



Unlocking the potential of the EU Treaties

An article-by-
article analysis
of the scope for
action

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Unlocking the potential of the EU Treaties

An article-by-article analysis of the scope for action

The latest Eurobarometer surveys indicate that there is consistent support for more EU action in various policy areas, including preventing climate change, tackling irregular migration, designing a common foreign and security policy and preventing terrorism. Assuming that the Treaty of Lisbon will be the framework for EU action for the foreseeable future, this paper explores possibilities for broadening the scope of EU action in order to respond to these repeated calls from EU citizens. With a view to reappraising the legal framework of the EU, it aims at identifying those legal bases in the Treaties that remain either under-used (in terms of the purposes they could be used to achieve) or completely unused. It analyses possible ways of delivering on EU policies, including in the development of common rules, providing enhanced executive capacity, better implementation of existing measures, targeted financing and increased efficiency. An overview table sets out possible initiatives, which are then explored in greater detail in 50 fiches, organised according to broad policy clusters reflecting the priorities of the von der Leyen Commission. Possible measures are mentioned in each fiche, along with the legal bases in the current Treaties on which action could potentially be based.

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Executive summary

The Treaty of Lisbon is the current legal foundation for the work of the European Union and its institutions. Although there has recently been no general debate within the EU institutions on the revision of the Treaties, some suggest this as a means of facilitating the recovery from the coronavirus pandemic, while others see the crisis as a reason not to discuss Treaty changes. Nonetheless, senior EU politicians have in recent months hinted at the possibility of expanding Parliament's powers. That said, given that the ordinary procedure for revision of the Treaties is cumbersome and lengthy, and that the simplified procedure cannot be used to widen EU competences, it makes sense to explore possibilities for unlocking the full potential of the Treaties as they stand.

Characteristically, European citizens are less concerned about how precisely the EU institutions operate, than whether the Union is capable of delivering on specific policy issues of importance to them, such as consumer protection, free movement of citizens, irregular migration and combatting transnational crime and terrorism, and now of course health too. Even in matters which lie at the heart of state sovereignty as traditionally conceived – such as the broad domain of the Area of Freedom, Security and Justice – large proportions of EU citizens would like to see more EU action. The expectations of the European public therefore represent an important guideline for the European institutions, and delivering upon such expectations, within the Treaty framework, contributes to enhancing the EU's democratic legitimacy. In this vein, the present study explores the possibilities for unlocking the full potential of the legal bases already available to the Union, with a view to better delivering on citizens' expectations.

The European Union is a community of law, and therefore any action or measure undertaken by the Union institutions – whether legislative or non-legislative – no matter how much it is needed or how much citizens demand it, must have an appropriate legal basis in the Treaties. This is in line with the well-established principle of legality, which is a key component of the 'rule of law' principle. In the EU context of multilevel governance, the principle of legality is connected with the principle of conferral, meaning that the EU enjoys only such competences as have been explicitly conferred upon it by the Member States in the Treaties. Therefore, the EU co-legislators – the European Parliament and the Council of the EU – are bound by the will of the Member States, expressed in the Treaties, laying down the precise fields of potential EU legislative activity. Such rules are referred to, especially when it comes to enacting EU legislation, as legal bases. For the purposes of this paper, EPRS policy analysts have identified and analysed those legal bases which can be described as either unused or under-used. However, it must be remembered that the Treaties should not be read independent of their changing context. A 'static interpretation', sticking to the 'original' intent of the drafters, would quickly find itself out of touch with the changed context, both within the EU and in the wider world. The Treaties, including the legal bases for EU action, should therefore be interpreted dynamically, in order for the EU to be able to address new challenges.

The study is based on legal analysis of the relevant Treaty articles and on policy analysis focused on current challenges, and how they could be addressed through more EU action. Obviously, it is up to policy-makers to decide which legal basis should be used to further action and what kind of EU action is needed. Our intention has been to demonstrate that there are still unused or under-used possibilities for the EU institutions to deliver even more in terms of citizens' expectations and meeting current challenges. The outcome of the project, in the form of a systematic overview of the 50 under-used, or even unused, legal bases should be seen as a kind of toolbox for political decision-makers. The possible forms of EU action that have been identified might take not only the most obvious one of legislation (i.e. adoption of directives or regulations), but also improving procedural mechanisms (e.g. moving beyond unanimity and unlocking the ordinary legislative procedure through the use of *passerelle* clauses), enforcing delivery of legislation which already exists but the potential of which remains to be fully tapped, enhancing complementary administrative capacity at EU level (e.g. a European Anti-Fraud Corps), and finally, increasing financing in a given policy area.

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Introduction

The Treaties – The legal framework for EU action

The [Treaty of Lisbon](#), which entered into force on 1 December 2009, is the current legal foundation for the work of the European Union and its institutions. The European Union is a [community of law](#), as Walter Hallstein famously put it,ⁱ and therefore any action or measure undertaken by the Union institutions, be it legislative or non-legislative, must have a proper legal basis in the Treaties. This is in line with the well-established **principle of legality**, which is a key component of the **rule of law** (*Rechtsstaat, état de droit*) principle.ⁱⁱ In the EU context of multi-level governance, the principle of legality is connected with the **principle of conferral** (enshrined in Article 5(2) of the Treaty on European Union – TEU), meaning that the EU enjoys only such competences as have been explicitly conferred upon it by the Member States in the Treaties. Therefore, the EU co-legislators are bound by the will of the Member States, expressed in the Treaties, laying down the precise fields of potential EU legislative activity. Such rules are referred to, especially when it comes to enacting EU legislation, as **legal bases**. Within the framework of this research project, EPRS policy analysts have identified and analysed those legal bases that can be described as **unused** or **under-used**.

Although there has in recent times been no general debate within the EU institutions on the revision of the Treaties, top EU politicians have recently hinted at the possibility of expanding Parliament's powers. The President of the European Parliament, David Sassoli, speaking on 17 October 2019 to the European Council explicitly [said that](#) 'the European Parliament intends to **assert its role** as one of the main actors in the European decision-making process' and that 'it will ... stand up for itself and its prerogatives'. In her [pre-election speech](#) at the European Parliament, Ursula von der Leyen, now President of the European Commission, affirmed that she supports 'a **right of initiative** for the European Parliament', and made an explicit pledge: 'When this House, acting by majority of its Members, adopts resolutions requesting the Commission to submit legislative proposals, **I commit to responding with a legislative act** in full respect of the proportionality, subsidiarity, and better law-making principles'. President Sassoli also recently [addressed](#) the question of Council unanimity in certain procedures, referring to it as the '**right of veto**', commenting that a democracy cannot function with a right of veto, something that should be 'addressed once and for all' in the EU. This echoes an earlier statement by the German Chancellor, Angela Merkel, who, speaking before the European Parliament on 13 November 2018, [indicated](#) that 'We must ... be ready to rethink our decision-making processes, also by **lifting the unanimity requirement wherever possible**', although she immediately added that this should be done 'in areas where this is permitted by the Treaties'.

The coronavirus pandemic and the resultant economic crisis have generated debate on how the EU and its Member States can act to support and facilitate the recovery. While for some the issue of Treaty change should very much be on the table, notably in the context of the Conference on the Future of Europe (see box below), for others the current circumstances are a reason not to open the issue.

Given that the ordinary procedure for the revision of the Treaties is cumbersome and lengthy, and that the simplified procedure cannot be used to broaden EU competences, there is a need, for the time being at least, to focus on unlocking the existing potential of the Treaties as they stand now.

The Conference on the Future of Europe

A possible opening for Treaty change and a venue for reflection on EU policies after the peak of the coronavirus pandemic

In her [political guidelines](#) for the next Commission, Ursula von der Leyen indicated she wanted 'citizens to have their say at a Conference on the Future of Europe, to start in 2020 and run for two years'. With the onset of the coronavirus pandemic, this date has been postponed until after the public health situation in Europe has fully stabilised. On 13 April 2020, Commission Vice-President Dubravka Šuica [indicated](#) that it could start in September 2020 at the earliest. In a [statement](#) to mark the 70th anniversary of the 9 May 1950 Declaration by Robert Schuman, Parliament's Conference of Presidents stated that 'The Conference needs to be convened as soon as possible and has to result in clear proposals by engaging directly and meaningfully with citizens...'

The conference would bring together 'citizens, ... civil society and European institutions as equal partners'. The Commission President has said that she is 'ready to follow up on what is agreed, including by legislative action if appropriate', being '**also open to Treaty change**'.

According to a '[Franco-German non-paper on key questions and guidelines](#)' for the conference, circulated among the Member States in late 2019, the conference 'should ... identify ... the main reforms to implement as a matter of priority, setting out the types of changes to be made ... incl. **possible treaty change**'.

The main idea of the conference, according to the non-paper, is to 'address all issues at stake to guide the future of Europe with a view to making the EU more united and sovereign', including such areas as EU foreign and neighbourhood policy, defence and security policy, digitalisation, climate change, migration, the fight against inequalities, the social market economy, the rule of law and European values.

Potential to be unlocked

The post-Lisbon Treaties are not, however, simply another revision of the founding Treaties, since they incorporate most of the output of the [European Convention](#) and the legacy of the [Treaty establishing a Constitution for Europe](#), although the latter never entered into force. In this context, it should be underlined that the European Parliament was a staunch promoter of the Convention and an [active participant](#). This can be taken as evidence that the Lisbon Treaty is, to a certain extent at least, 'the Parliament's Treaty'.

Bearing this in mind, it is useful to embark on a careful re-reading of the currently binding Treaties, with a view to unlocking the potential enshrined in the wording and purpose of its articles. All too often, a backward-looking interpretation, focused more on what a given article originally meant in the Treaty of Amsterdam, Treaty of Maastricht or even the founding Treaties, has limited understanding of the current Treaty set-up. In line with the established case law of the Court of Justice of the EU (CJEU), the articles of the Treaties should be interpreted not so much in accordance with their historical meaning (known as the 'originalist' interpretation), but rather in accordance with three factors, considered jointly: their wording, their context and – most importantly – their purpose, seen in light of the general *telos* of European integration.ⁱⁱⁱ Such an interpretation should not be 'static' – namely sticking to the state of affairs at the time of drafting or upon adoption of the Treaties – but must rather be 'dynamic'^{iv} – adapting to the challenges currently faced by the Union, in light of the dynamically changing economic, social and international political situation. It should not be forgotten that both Europe and the world are very different places now from how they were more than a decade ago when the Treaty of Lisbon was drafted, and that the Union has, since that time, faced a variety of new challenges. Nevertheless, the Treaty provides for greater scope and flexibility than the previous Treaties, in particular through having introduced the *passerelle* clauses (see next section). There can also be no doubt that the coronavirus pandemic has brought fresh and unforeseen challenges for the Union and its Member States that could be addressed, in part, by stepping up the EU's coordinating function (see 'Complementary administrative capacity' below).

The present paper, in reappraising the EU's legal framework, aims at identifying those legal bases in the Treaties that remain either under-used (compared with the purposes they could be used to achieve) or completely unused^v (see 'Under-used and unused legal bases in the Treaties' below).

The *passerelle* clauses: Making rules for law-making more efficient without changing the Treaty

The general *passerelle* clause

The Lisbon Treaty introduced a general *passerelle*^{vi} clause i.e. a flexibility mechanism; it is now contained in Article 48(7) TEU and is designed to improve the efficiency of the decision-making process. This provision provides for two types of general *passerelle* clause:

- it enables the European Council to authorise Council, on the basis of a unanimous decision, to shift from unanimity to qualified majority voting (QMV), and
- entitles the European Council to authorise Council to shift from a special legislative procedure to the ordinary legislative procedure in cases or areas where, according to the Treaty on the Functioning of the European Union (TFEU), legislative acts must be adopted under a special legislative procedure.

This initiative of the European Council to avail itself of the general *passerelle* clause must be notified to national parliaments, which may manifest their veto within six months, in which case the general *passerelle* is not adopted. The European Parliament's consent is also needed (a majority of constituent members). The general *passerelle* clause can be applied to all areas and cases for which unanimity or a special legislative procedure currently applies. It can also be applied in the field of common foreign and security policy, but decisions with military or defence implications are excluded.

Specific *passerelle* clauses

The Treaty on the Functioning of the European Union (TFEU) and the Treaty on the European Union (TEU) also contain six specific *passerelle* clauses that apply in the following policy areas:

- common foreign and security policy (Article 31(3) TEU),
- family law with cross-border implications (Article 81(3) TFEU),
- social policy (Article 153(2) TFEU),
- environmental policy (Article 192(2) TFEU),
- the multiannual financial framework – MFF (Article 312(2) TFEU), and
- the enhanced cooperation mechanism (Article 333 TFEU).

A common feature of the special *passerelle* clauses is that they put in place a less burdensome procedure for their approval and can be adopted with less stringent conditions compared with the general *passerelle* clause (Article 48(7) TEU). As a result, however, some of the safeguards granted by the general *passerelle* clause (Article 48(7) TEU) are absent. One example of this is the involvement of national parliaments, with the exception of the special *passerelle* on family law with cross-border implications where national parliaments may still block a decision to put in place a *passerelle*.

Some of the special *passerelle* clauses (those relating to common foreign and security policy, the MFF, and enhanced cooperation) affect the decision-making process only by shifting from unanimity to QMV; while other special *passerelles* affect the legislative procedure by shifting from the special to the ordinary legislative procedure – OLP (namely those relating to social policy, family law with cross-border implications and environmental policy). While for some of the special *passerelles* (those relating to family law with cross border implications, social policy, environmental

policy and enhanced cooperation) the institution authorising the shift either to QMV or to OLP is the Council, in the others (common foreign and security policy and the MFF) the authorising institution remains the European Council. In some of the special *passerelles* (those relating to family law with cross border implications, social policy and environmental policy) the role of Parliament in a consultative role remains unaffected, while in the remaining cases (common foreign and security policy, the MFF and enhanced cooperation) the consultative role of Parliament is absent.

A crucial aspect of the *passerelle* clauses is that they are intended either to make Council's decision-making more efficient (QMV) or to modify it (OLP). They are not meant to alter or simplify the decision-making of other institutions. In this vein, it is only when the Council must decide by unanimity or using a special legislative procedure that *passerelles* come into play. Situations where it is Parliament that acts following a special legislative procedure remain beyond the scope of the (general) *passerelles* (e.g. Article 228(4) on regulations governing the performance of the Ombudsman, and Article 226(3) on rules governing the exercise of the right of inquiry). Likewise, other areas that remain beyond the scope of the (general) *passerelle* are changes to voting majorities within Parliament. In addition, (general) *passerelle* clauses apply to legislative acts that are to be adopted by Council alone, without the involvement of Parliament.

Passerelle clauses are not meant to increase or alter the division of powers between Member States and the EU, nor are they meant to increase the competencies of the EU. The decision to activate them is entirely in the hands of Member States, as it is either the European Council or the Council that has the initiative.

Notwithstanding their potential benefits for decision-making in terms of efficiency, increased speed and transparency, the *passerelle* clauses have never been activated. In recent years, however, the institutional players' interest in them has been growing steadily. In her [political guidelines](#), the President of the European Commission, Ursula von der Leyen, supported a move to co-decision and qualified majority voting (QMV) in the area of taxation, and also in the area of external policies. In his State of the Union speech of [12 September 2018](#), former Commission President Jean-Claude Juncker suggested the use of *passerelle* clauses in the field of taxation and specific areas of external relations. In the [Commission work programme for 2019](#), it was also suggested that the efficiency of decision-making could be improved by a shift to QMV in certain areas of external relations and climate policy. In 2018 or 2019, the European Commission recommended a move to QMV or the ordinary legislative procedure in the following four areas:

- in [common foreign and security policy](#), by using a specific *passerelle* clause (Article 31(3) TEU), in particular for human rights issues in multilateral fora, sanctions policy and civilian common foreign and security policy missions;
- in the [field of taxation](#) by applying the general *passerelle* clause in three steps: first for measures without a direct impact on Member States' taxing rights (e.g. measures to combat fraud, tax evasion and avoidance, and address tax compliance), then for measures that support other policy goals (e.g. climate change), and finally in fields of taxation that are already harmonised;
- for EU [environment](#) and energy policy measures that are primarily of a fiscal nature (general *passerelle* clause) and to explore a specific *passerelle* clause (192(2) TFEU) in the environmental field;
- in the field of [social policy](#) (general *passerelle* clause) particularly in areas of non-discrimination and adoption of recommendations on social security and the social protection of workers.

Following the inquiry into money laundering, tax avoidance and tax evasion (2016/3044(RSP)), on 13 December 2017, the European Parliament [recommended](#) that Council and the Commission support QMV in the tax field.

Parliament has advocated the use of *passerelle* clauses on several occasions. In its [resolution](#) of 16 February 2017 on improving the functioning of the EU by building on the potential of the Lisbon Treaty, Parliament called for use of the general and specific *passerelle* clauses. In a [resolution](#) of 16 February 2017 on possible evolutions of and adjustments to the current institutional set-up of the EU, Parliament called for a reduction in the number of unanimity decisions in Council and a shift to QMV, in particular in foreign and defence matters, fiscal affairs and social policy. In a resolution of 13 February 2019 [on the state of the debate on the future of Europe](#), Parliament reiterated its invitation to use *passerelle* clauses.

Delivering on the expectations of EU citizens

Citizens' expectations

Today, European citizens are less interested in an institutional debate concerning the European project than in whether the Union is capable of delivering on matters of concern to them, within specific policy areas, such as combating climate change and enhancing environmental policies, strengthening consumer protection, fostering the free movement of citizens, tackling irregular immigration or combating transnational crime.^{vii} Opinion polls show that even in matters that lie at the heart of traditionally conceived state sovereignty – such as home affairs and foreign policy – large proportions of EU citizens want more action by European institutions. For instance, according to the latest [Standard Eurobarometer 91](#) (June 2019), 74 % of EU citizens approve of a common defence and security policy in the Union. The expectations of the European public are an important reference point for the European institutions, and delivering upon such expectations, within the current Treaty framework, helps to enhance the EU's democratic legitimacy. This paper therefore explores the possibility of exploiting the unused potential of the legal bases available to the Union with a view to delivering on citizens' expectations more effectively. Obviously, it is up to the political level – the policy-makers – to decide which legal basis should be used to further what kind of EU action. The aim here is to show that there are still a number of unused or under-used possibilities for the EU institutions to deliver more in terms of satisfying citizens' expectations and rising to current challenges.

The table later in this paper offers an overview of the available legal bases that remain unused (marked in red) or under-used (marked in yellow), and can therefore be seen as a kind of toolbox for political decision-makers.

Some examples of recent delivery on citizens' expectations

Enhanced protection of personal data

EU citizens have repeatedly voiced concerns about the protection of their personal data, especially in the context of the digital economy. Before the adoption of the General Data Protection Regulation ([GDPR](#)), only a minority of respondents (15 %) felt they had complete control over the information they provided online, while a third (31 %) considered they had no control over it at all ([Special Eurobarometer 2015](#)). Furthermore, the **vast majority (67 %) of EU citizens indicated they were concerned about not having complete control over the information they provided online**. The EU legislature sought to address these issues by adopting the GDPR in 2016; it entered into force on 25 May 2018. The new rules include provisions on the 'right to be forgotten', the need for the person concerned by the processing of private data to give 'clear and affirmative consent', the right to data portability, the right to know when personal data has been hacked, and the right to object to profiling. This is backed up by stronger enforcement, with the possibility to fine non-compliant firm – with penalties of up to 4 % of their annual turnover. According to the latest [Special](#)

[Eurobarometer on data protection](#) (March 2019), the majority (67 %) of Europeans have heard of the GDPR, and almost three quarters (73 %) have heard of at least one right guaranteed by the regulation.

Cutting red tape for citizens moving across the Union

Although the free movement of citizens is among the fundamental freedoms set out in the EU Treaties, a number of administrative burdens still make the lives of EU citizens living abroad or changing Member States more difficult than if they stayed in their native country. The **support rate for the policy of free movement of citizens is very high among EU citizens** (81 % in favour, and only 14 % against) according to the latest [Standard Eurobarometer 91](#) (June 2019). At the same time, according to a study commissioned by Parliament, excessive red tape constitutes one of the barriers to the effective exercise by EU citizens of their right to free movement.^{viii} To this end, the EU recently adopted rules effectively cutting red tape with regard to the recognition of official documents from another Member State. The [new rules](#), adopted in June 2016 and applicable since February 2019, have simplified requirements for cross-border use and acceptance of certain public documents in the Union, thereby not only promoting the free movement of citizens and contributing to a smoothly functioning single market for EU businesses, but also significantly reducing the financial and bureaucratic burden, and legal obstacles, for citizens and firms.

Enhancing security and combating terrorism

According to the latest [Standard Eurobarometer 91](#) (June 2019), **74 % of EU citizens approve of a common defence and security policy** (CDSP) in the Union and only 18 % are against it. It is worth underlining that since 2004, support for the CDSP has remained at a stable high level. The fight against terrorism was the top priority issue for 49 % of EU citizens in the 2019 European Parliament elections.^{ix} The problem of terrorism remains one of the key issues for Europeans, with 18 % of respondents mentioning it as a reason for concern. The EU legislature has been continually addressing these issues, in particular by enacting new rules limiting [access to weapons](#), strengthening the rules on [money laundering](#) and reviewing the [framework decision on terrorism](#). Parliament has [called upon](#) the Commission to make proposals on eliminating the obstacles to tackling cybercrime. A set of proposals were presented in spring 2018 with regard to [electronic evidence](#) and the [appointment of representatives](#) by service providers to help law-enforcement authorities access this evidence.

Tackling the migration issue

The latest [Standard Eurobarometer 91](#) (June 2019) indicates that **67 % of European are in favour of a common European migration policy** (and 24 % are opposed to it). Immigration remains the most important issue for EU citizens, and is cited as a cause for concern by 34 % of respondents, ahead of climate change (22 %), which ranks second. The EU has already addressed some of these issues, and recent developments in the area include the [transformation](#), in 2016, of the former Frontex agency into the European Border and Coast Guard, bringing together the EU agency and national authorities responsible for border management. The new agency has an enhanced mandate and will provide Member States with further support in the field of border management, including border control, return operations, and search and rescue operations, the aim being to fight cross-border crime, manage the crossing of external borders efficiently and ensure internal security. Furthermore, in 2016, the EU established a [uniform European travel document for the return](#) of illegally staying nationals of non-EU countries, in order to facilitate returns; in 2017, it established a system providing for the electronic registration of both entry and exit of non-EU nationals admitted into the EU ([Entry/Exist System – EES](#)); and, in 2018, it established a system for determining the eligibility of all visa-exempt non-EU citizens to travel to the Schengen Area ([ETIAS](#)).

In her pre-election [speech](#) before the European Parliament on 16 July 2019, the President of the European Commission, Ursula von der Leyen, indicated that the EU 'needs humane borders. We must save, but saving alone is not enough. We must reduce irregular migration ... we must preserve the right to asylum and improve the situation of refugees'. She also promised to propose a **new pact on migration and asylum**, including the relaunch of the [Dublin reform](#).

Preventing climate change and protecting the environment

According to the latest [Special Eurobarometer on climate change](#) (April 2019), **93 % of Europeans think climate change is a serious problem**, and 79 % consider it to be a very serious problem (an increase of five percentage points since 2017). Concerning the question of who should tackle climate change, 49 % of respondents point to the EU as the principal actor. At the same time, 70 % of Europeans agree that adapting to the adverse impacts of climate change can have positive outcomes for EU citizens, and 92 % support the goal of making the EU economy climate-neutral by 2050. Furthermore, according to the [Special Eurobarometer on air quality](#) (September 2019), **50 % of EU citizens think that air quality problems should be tackled at Union level**. Moreover, [Standard Eurobarometer 91](#) (June 2019) indicates that climate change now ranks second among the issues facing the European Union, as concerns over the issue are rising rapidly, with significant growth since spring 2018 (+11 percentage points). Indeed, public concern about climate change is currently at its highest level since first being measured back in 2010.

In response to these expectations, the EU legislature has recently adopted a new [directive on waste](#) and amended the [rules on greenhouse gas emissions](#), providing for a higher annual rate of emissions reduction. In her [political guidelines](#), Ursula von der Leyen promised to work towards making Europe the first climate neutral continent in the world, and to make legal commitments towards attaining this goal by 2050. She mentioned explicitly broadening the scope of the emissions trading system to cover the maritime sector and cut privileges for the aviation sector, as well as introducing a carbon border tax to reduce carbon leakage. The new Commission put forward its **European Green Deal** in December 2019, and is planning to launch a **European Climate Pact** towards the end of 2020.

Successful launch of permanent structured cooperation (PESCO)

As new challenges have emerged for peace and security in Europe, EU citizens' support for the enhancement of the EU's military and defence policy has solidified.^x The latest [Standard Eurobarometer 91](#) (June 2019), confirms that there is remarkably stable and very high support for the EU's common defence and security policy. Comparative Eurobarometer surveys on citizens' perceptions and expectations conducted for the European Parliament in [2016](#) and [2018](#) showed that the share of EU citizens who would like the EU to intervene more in the field of security and defence policy grew from 66 % in 2016 to 68 % in 2018, with relatively small variations across the Union and with support for more EU intervention exceeding (or equal to) 50 % in all Member States. However, until December 2017, the relevant legal basis in the Treaties – [Article 46](#) TEU and [Protocol 10](#) on permanent structured cooperation (PESCO) established by [Article 42\(6\)](#) TEU – remained what was known as the '[sleeping beauty](#)' of EU defence given that it had failed to materialise following the entry into force of the Lisbon Treaty. The European Parliament has repeatedly [called](#) for the implementation of the Lisbon Treaty provisions on common foreign and security policy, including PESCO.

Following the announcement of the [Global Strategy](#) in July 2016, the subsequent intensification of efforts to make progress on EU defence policy and the resulting [implementation plan on security and defence](#), launched in November 2016, the European Council [agreed](#) in June 2017 on the need to launch PESCO without delay. In November 2017, the Council and the HR/VP received a [joint](#)

[notification](#) signed by 23 EU Member States (all except Denmark, Ireland, Malta, Portugal and the United Kingdom) of their intention to participate in PESCO. Any other Member State wishing to participate in PESCO may still notify its intention to the Council and to the HR/VP at a later stage. On 11 December 2017, the Council adopted a [decision](#) formally creating PESCO and approved a first [list of projects](#) to be placed under the PESCO umbrella. These include a European Medical Command, action to secure radio frequencies, the creation of a European Logistics Hub, simplification and standardisation of [cross-border military transport](#) procedures, the establishment of a Centre of Excellence for EU Training Missions, and upgrading of the Maritime Surveillance System, as well as an information-sharing platform on responses to cybernetic attacks and threats, and mutual assistance for cyber-security and cyber rapid response teams. A second wave of PESCO projects was adopted in November 2018, leading to a total of 17 while a third call for proposals was launched in May 2019. PESCO Member States have also made commitments concerning increasing their defence spending to agreed benchmarks. PESCO aims to contribute to the progressive framing of a common defence policy, as envisioned by the Treaty of Lisbon, alongside other initiatives such as the European Defence Fund (part of the next MFF) and military mobility.

Under-used and unused legal bases in the Treaties

Unused legal bases

It may seem surprising that, a decade after its entry into force, the Treaty of Lisbon still contains a number of legal bases – allowing the EU to act – that have **never been used**. They are referred to here as 'unused legal bases'. No legislative act or non-legislative measure has been adopted on the basis of these articles of the Treaty. For the sake of precision, the focus here is on specific paragraphs of individual articles in the TEU and TFEU. It should be noted that in the preambles to EU legislative acts, often only the entire article is mentioned as the legal basis although, in other situations, an article and specific paragraph are indicated. Whereas this practice may be justified for pragmatic reasons (e.g. future judicial review of the measure in question), it falls to analysts and commentators to identify which part of the article (down to the individual sub-paragraph, indent or letter) was the actual basis for the EU action in question. This analysis goes down to the level of subparagraphs and indents, as shown in the table and in the individual sections devoted to specific legal bases. Therefore, while one paragraph of a given Treaty article may have been used frequently, another may still be dormant – waiting to become the basis for much needed EU action.

Under-used legal bases

The second category of legal bases analysed are those that appear to be 'under-used'. In contrast to the absolute category of 'unused', the notion of an 'under-used' legal basis presumes a certain goal-related value judgement. This is because in order to describe a given article of the Treaties as 'under-used' it is first necessary to identify the goals for which it could be used (including, but not limited to those specifically mentioned in that article) and, second, to evaluate the existing *acquis* based on that article as insufficient. In the individual fiches devoted to each under-used legal basis of the Treaties, the conclusion about the under-used nature of the basis is the result of a comparison of the current challenges and possible scope for more EU action on the one hand, and EU legislative and non-legislative measures adopted to date.

Furthermore, realisation of the under-used nature of certain legal bases may also arise from a new, broader understanding of the articles concerned, going beyond the 'original' meaning presumably attributed to them by the drafters, in the light of the changed political and economic context in which the Treaties are now applied and the goals that the Union is striving to achieve in these

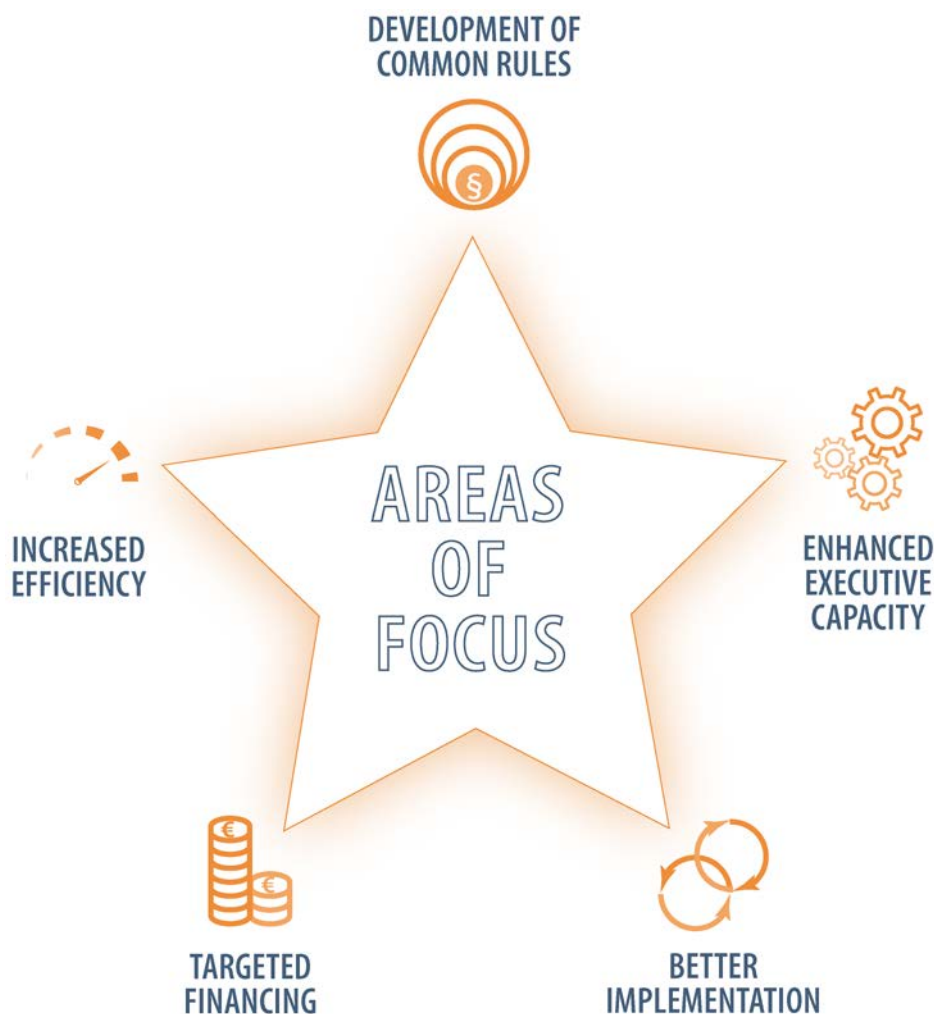
challenging times. Accordingly, this analysis aims to draw attention to the dormant potential of the Treaties, awaiting discovery by the EU institutions, and in particular by the co-legislators.

Examples of under-used legal bases include Article 114 TFEU, which has been used dozens of times as legal basis for directives harmonising law concerning the internal market, and Article 81 TFEU, which has been the basis of numerous regulations on European civil justice. The **notion of being 'under-used' is not a quantitative one, but a qualitative one.** Despite the adoption of dozens of legislative acts, key European regulations or directives may still be waiting to be adopted or even formally proposed by the Commission, as is evident not least from the Parliament's own-initiative legislative resolutions.

Different possible forms of EU action – Not only legislation

The present study attempts to indicate the main focus of the action envisaged. Most actions are legal acts, and the vast majority are aimed at creating rules. However, it is important to flag up the fact that the focus of EU action can also be to enforce delivery, to create an executive capacity that complements that of the Member States.

Figure 1 – Categorisation of the possible forms of EU action, as used in the overview table and individual fiches in this paper



Legislative measures (or rule-making)

Directives and regulations

The most obvious form of EU action, based on a given Treaty article, is legislative action, namely the adoption of a piece of secondary legislation: a regulation, a directive or a (legislative) decision. A regulation is a directly applicable piece of EU legislation that serves to unify the law on a given issue in all Member States. This is because exactly the same rules, set out in the regulation, are applied by courts and administrative bodies across the EU without any difference in form or content. By contrast, a directive is a piece of legislation that, in principle, is directed not so much at citizens and businesses directly, but rather at the legislative powers of the Member States that need to enact national legislation aimed at achieving the goals set out in the directive. Therefore, directives are sometimes referred to as 'two-stage legislation', because – in contrast to regulations – they are addressed to the Member States and not to private parties, and only in the second stage, when Member States transpose the directive into their national laws, are the rules (the national implementing measures) addressed to all legal subjects (citizens, companies, etc.).^{xi}

Specific limitations of the legal basis

Some legal bases prescribe the type of legislation that can be pursued, for example, specifying that only directives or decisions may be adopted. In other situations, the legal basis explicitly excludes any harmonisation measures, meaning that national law may not be affected.

For example, in the area of criminal law, Article 83 TFEU paragraph 1 provides explicitly for directives of Parliament and Council, and its paragraph 2 provides for decisions of the Council adopted unanimously, with Parliament's consent.

Furthermore, sometimes the legal basis explicitly limits the scope of application of EU legislation, stating that it can apply to matters of a cross-border nature only.

For example, in the area of civil procedure, Article 81 TFEU allows the EU to enact legislation concerning civil proceedings having a cross-border element only. By contrast, the EU may not regulate purely domestic civil proceedings using this specific legal basis.

However important the enactment of new legislation, it is important not to succumb to 'normative optimism' and believe that adopting a directive or regulation will be sufficient to solve existing problems. For this reason, the paper also draws attention to three further, equally important, ways of using the Treaties' legal bases, namely enforcing delivery, providing for complementary administrative capacity and increasing financing.

In some cases, small modifications of existing legislation could enable much greater efficiency, as for instance in the case of Eurojust (established on the basis of Article 85 TFEU). An amendment to the recently adopted Eurojust Regulation could allow this body to initiate investigations and request that national law enforcement authorities conduct them on its behalf.

Enforcing delivery

Even the best legal regulation, if it remains on paper, will not address the challenges faced by the Union. Therefore, in addition to proposing new legislation and enacting it, it is sometimes crucial to ensure that the existing rules are implemented and applied effectively. Here, the role of the Commission as 'guardian of the Treaties' is crucial, and an **action for failure to fulfil obligations against a non-compliant Member State (Article 258 TFEU) remains the ultimate option**. Recent cases brought by the European Commission over questions of judicial independence^{xii} demonstrate

the importance of this mechanism in the fundamental area of protecting the rule of law.^{xiii} Concerning this area, more infringement actions from the Commission can be expected, as the President of the European Commission, Ursula von der Leyen, [speaking](#) in July before the Parliament, clearly said: 'there can be **no compromise when it comes to respecting the rule of law**' and, 'I will ensure that we use our full and comprehensive toolbox at European level'.

Another important area where the Commission is working to ensure that the law is enforced is in international trade agreements. In December 2019, the second instance of the WTO Dispute Settlement Body (DSB), the Appellate Body, [ceased](#) to function, as it no longer had enough members to review cases (the situation resulted from the United States [blocking](#) the nomination of new judges since 2016). In order to remedy the enforcement gap, the Commission [published a legislative proposal](#) in December 2019 that would allow the EU to introduce economic counter-measures such as customs duties, quantitative restrictions and measures in the area of public procurement so as to secure enforcement of international trade rules in the absence of a functioning WTO Appellate Body.

Complementary administrative capacity

Closely linked to enforcing delivery is the provision of complementary administrative capacity by the Union. It is unlikely that the European Union will develop a fully fledged administration of the kind present in large federal States. However the Union level could act as an 'enabler' or support capacity that can help national and/or regional administrations to perform their obligations. Such capacity at the central level should remain agile and responsive. It is likely to be developed notably in domains where disruptions occur – i.e. crisis management and new technologies.

For instance, in the fight against fraud, Article 325 TFEU would be used much more effectively if national administrations could count on the assistance of EU bodies such as OLAF or EPPO in their activities. Similarly, in the area of customs, Article 33 TFEU could serve to create a European customs force that would provide for uniform application of the EU customs code across the Union.

In technically complex areas such as customs, taxation, and economic and monetary union, a European administrative capacity such as a task force of EU officials and seconded national experts (SNEs) could complement national and/or regional administrations and solve problems on the ground, helping Member States to apply existing EU rules effectively. A good example is the European Border and Coast Guard Agency, which has the task of increasing cooperation between Member States in order to build integrated border management. Mention should also be made of Europol, which has played a major role in fostering cooperation between national law-enforcement agencies, including the sharing of best practices and creation of new synergies between national authorities. The EU could also establish a climate emergency office (fiche 13) to supplement national bodies and create additional executive capacity at EU level. The challenge posed by the coronavirus pandemic could be addressed by the Union precisely by offering the Member States complementary administrative capacity (see 'Stepping up EU health policy' below, fiche 1), in line with the need for a coordinated response to the pandemic, as highlighted by President [David Sassoli](#) and President [Ursula von der Leyen](#) during the Parliament's plenary session on 16 April 2020. The European health response mechanism proposed by Parliament in its [resolution of 17 April 2020](#) would be a perfect example of a truly coordinated, EU response to the pandemic.

Seeking efficiency

EU action is sometimes perceived as intrusive or excessive. The whole debate about better law-making has highlighted the need to act at EU level only when necessary, and with genuine stakeholder consultations and impact assessments. However, even when legislation is adopted, it

should not automatically create another layer of rules and complexity; on the contrary. Harmonisation of rules at EU level has the immediate effect of simplification in a space of free movement. Examples include the possibility of adopting a European business code (fiche 24) to simplify the contract-law rulebook for businesses, or a uniform European identity card, (fiche 48) to replace the often divergent national documents and make it easier for citizens to enjoy their fundamental right to free movement across the Union.

Increasing targeted financing

EU citizens want more action at European level to address certain issues, particularly those with a wider cross-border dimension that cannot be tackled by individual Member States alone, e.g. migration and climate change, the two most significant reasons for concern according to the last Eurobarometer. Sometimes the proper legislative framework exists and is even used extensively, with sufficient administrative capacity, but despite this, the EU does not manage to accomplish its goals due to limited funds earmarked for the given policy area. This is because even the best legislative and regulatory framework will struggle to achieve its goals in a situation of budgetary constraints. Financing should be increased to supply the resources needed to tackle the challenges faced by the Union.

The [own resources](#) and [multiannual financial framework](#) (MFF) structures are quite rigid, making it sometimes difficult to react quickly and with sufficient resources to significant, urgent challenges. The Union has provided itself with the means to react more flexibly with the creation of new instruments funded from a variety of sources sitting alongside the EU budget, such as [trust funds](#). The rules for such instruments are set out in the [Financial Regulation](#). These rules could be used to create more such instruments if necessary. There are, however, issues of transparency and accountability in the (increasing) use of such instruments that must be borne in mind.

Article 311 TFEU requires the Union to provide itself with the means necessary to attain its objectives and carry through its policies. The multiannual financial framework (MFF) mentioned in Article 312 TFEU describes how expenditure should develop within the limit of own resources. Both the own resources and MFF ceilings could be raised to provide the increased financing necessary. This increase in financing would also allow better use of existing legal bases in certain areas. For instance, in the field of cultural policy the first indent of Article 167(2) TFEU could be used effectively as a tool for promoting the EU narrative and identity in third countries, if the budget for [Euronews](#) were increased. Likewise, in the area of education policy Article 166 TFEU remains under-used, despite the efficient legal framework concerning [Erasmus+](#), because the means to finance all the deserving projects submitted are insufficient. In addition, the financial rules described in Article 322(1)(a) TFEU could be used to allow the creation of new off-budget instruments with mixed financing to allow for a rapid and sufficient response to urgent needs. The financial rules should also be modified to allow greater resources for [pilot projects and preparatory actions](#), which should be made available outside the MFF ceilings.

Spending from the EU budget can be authorised only if backed up by both the necessary appropriations in the budget and a suitable legal basis. Pilot projects and preparatory actions (PP-PAs) provide such a legal basis and give Parliament the means to implement its right of initiative. Use of such instruments has led to some remarkable successes, e.g. the [Erasmus programme](#). However, the sums available are very limited. Even the small amount of resources available cannot be used in certain circumstances, as these must be found within the margins of the relevant MFF headings. Furthermore, given the very constrained structure of the MFF, there is often no margin left within the headings. The sums available for individual projects can therefore sometimes be so small that an otherwise good project is not actually viable. The financial rules could also be modified to provide greater resources for PP-PAs.^{xiv}

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NOTES

- i W. Hallstein, *Europäische Reden* (1979), pp. 343-344, translation after: T. von Danwitz, 'The Rule of Law in the Recent Jurisprudence of the ECJ', *Fordham International Law Journal*, Vol. 37(5), 2014 pp. 1312-1313.
- ii On the rule of law see EPRS briefing, [Protecting the rule of law in the EU Existing mechanisms and possible improvements](#), (2019).
- iii See the historic [Van Gend en Loos judgment](#) (1963). See also M. Poiars Maduro, '[Interpreting European Law: Judicial Adjudication in the Context of Constitutional Pluralism](#)', *European Journal of Legal Studies*, Vol. 1, 2007; K. Lenaerts, J.A. Gutiérrez-Fons, [To say what the law of the EU is: methods of interpretation and the European Court of Justice](#), EUI Academy of European Law Distinguished Lectures, 2013/09.
- iv The expression is used by the President of the European Court of Justice – see: K. Lenaerts, 'Discovering the Law of the EU: European Court of Justice and the Comparative Method' in T. Perišin and S. Rodin (eds.), *The Transformation or Reconstitution of Europe: The Critical Legal Studies Perspective on the Role of Courts in the European Union*, Oxford, Hart Publishing, 2018, p. 86.
- v See also, for a more detailed overview, EPRS study, [Unlocking the potential of the EU Treaties: An article-by-article analysis of the scope for action](#), 2019.
- vi From the French word meaning 'bridge'.
- vii For an overview of citizens' expectations concerning various policy areas see the briefings in the '**EU policies – Delivering for citizens**' series, published in June 2019, ahead of the last European elections: [Human rights](#), [The fight against unemployment](#), [Environmental protection](#), [Health and social security](#), [Protecting European consumers](#), [Promoting equality between women and men](#), [Youth empowerment](#), [Agriculture](#), [Fisheries](#), [Industrial policy](#), [Digital transformation](#), [Energy supply and security](#), [Future financing of EU policies](#), [The fight against tax fraud](#), [Promoting European culture](#), [Regional policy](#), [Foreign policy](#), [EU support for democracy and peace in the world](#), [The migration issue](#), [International trade and globalisation](#), [Security and defence](#), [The fight against terrorism](#).
- viii EP Policy Department for Citizens' Rights and Constitutional Affairs, [Obstacles to the right of free movement of EU citizens and their families](#), 2016, pp. 62-63.
- ix [Eurobarometer Survey 89.2 of the European Parliament](#), 2018.
- x [Special Eurobarometer 461](#) – Designing Europe's future: Security and defence, April 2017.
- xi B. Kurcz, 'Harmonisation by means of Directives', *European Business Law Review*, Vol. 11, 12/2001, p. 290.
- xii See e.g. [Case C-192/18 Commission v Poland \(Early Retirement of Judges\)](#); [Case C-619/18 Commission v Poland \(Early Retirement of Supreme Court Judges\)](#); [Case C-791/19 Commission v Poland \(Disciplinary Regime for Judges\)](#) (pending).
- xiii The Court of Justice has also given guidance on the rule of law, and specifically judicial independence, in a number of recent judgments rendered in the preliminary reference procedure (Article 267 TFEU), see e.g. [Case C-64/16 Associação Sindical dos Juízes Portugueses](#); [Case C-216/18 PPU Minister for Justice and Equality](#); [Joined Cases C-585/18, C-624/18 and C-625/18 Krajowa Rada Sądownictwa](#).
- xiv Given their short-term nature, it could be argued that it does not make sense to include PP-PAs in the MFF, which is a medium-term financial planning tool. The financial rules could thus also be amended to specify that PP-PAs are funded outside the MFF within the limit of the own resources ceiling.




Overview of measures the EU could take, making use of unused or under-used legal bases





(red = unused; yellow = under-used)











POLICY CLUSTER	SUBJECT MATTER		LEGAL BASIS	ACTORS RESPONSIBLE	POSSIBLE EU MEASURES	
I Health and security of citizens; migration	1	Stepping up EU health policy	Article 168 TFEU	Commission Parliament Council	<ul style="list-style-type: none"> Boosting EU-wide common health preparedness Facilitating common procurement of medical equipment Addressing shortages of medicines Promoting vaccination Supporting cancer prevention 	
	2	Emergency measures on migration	Article 78(3) TFEU	Council Commission Parliament	<ul style="list-style-type: none"> Increasing efficiency and targeting financing to ensure solidarity with Member States facing increased migrant inflows Increasing role of European Asylum Support Office and Frontex 	
	3	Irregular immigration	Article 79(2)(c) TFEU	Commission Parliament Council	<ul style="list-style-type: none"> Increasing cooperation between Member States and third countries to develop common returns policies Decriminalising illegal immigration 	







Health and security of citizens; migration (continued)					<ul style="list-style-type: none"> Setting clearer rules in relation to respect for human rights in return decisions and interventions, especially when third countries are involved Possibly also granting executive powers to the EU in relation to the adoption or execution of return decisions 	
	4	Solidarity on borders, migration and asylum	Article 80 TFEU	Commission Parliament Council	<ul style="list-style-type: none"> Using secondary legislation to identify variables by which to measure the common responsibility to be shared and its distribution between Member States in these policy areas, providing for mechanisms that allocate assistance whenever a Member State is assessed to be facing a disproportionate responsibility under the agreed parameters 	
	5	Extension of areas of EU criminal law	Article 83(1) TFEU, third subparagraph	Council	<ul style="list-style-type: none"> Adopting a Council decision laying down common definitions of crimes against humanity and war crimes 	
	6	Terrorism prevention	Article 84 TFEU	Commission Parliament Council	<ul style="list-style-type: none"> Creating a pan-European system for the surveillance of potential terrorists and other dangerous criminals 	
	7	Stronger powers for Eurojust	Article 85(1)(a) TFEU	Commission Parliament Council	<ul style="list-style-type: none"> Amending the Eurojust Regulation with a regulation to allow Eurojust to initiate criminal investigations to be 	




Health and security of citizens; migration (continued)					conducted by national law enforcement bodies	
	8	Common investigation techniques	Article 87(2)(c) TFEU	Commission Parliament Council	<ul style="list-style-type: none"> Creating a legal framework for the existing informal networks of Council experts 	
	9	Cross-border criminal justice and police operations	Article 89 TFEU	Commission Parliament Council	<ul style="list-style-type: none"> Broadening the scope of cross-border hot pursuit by police, to include hot pursuit on water and in the air and to simplify the procedures Harmonising police communication standards across the EU (common frequency) Harmonising legal police equipment to make cross-border operations easier Enacting rules allowing the prosecution and criminal justice services to operate easily in a cross-border setting 	
	10	Freezing of terrorist assets under AFSJ	Article 75 TFEU	Commission Parliament Council	<ul style="list-style-type: none"> Creating a comprehensive anti-terrorist administrative legal framework, including such areas as policing, immigration and asylum 	
	11	Administrative cooperation in AFSJ	Article 74 TFEU	Commission Parliament Council	<ul style="list-style-type: none"> Laying down rules on administrative cooperation in the AFSJ which can include single transmission of information, databases, mutual information mechanisms or alert systems, mutual 	





					<p>administrative assistance, joint administrative teams and joint operations</p> <ul style="list-style-type: none"> • Creation of a peer review mechanism in the AFSJ, based on administrative cooperation between Member States, which would facilitate the exchange of good practice, enable mutual learning, foster policy dialogue and improve consistency 	
<p>II Green Deal</p>	12	European Green Deal	Article 192 TFEU	<p>Commission Parliament Council</p>	<ul style="list-style-type: none"> • Introducing a package allowing Europe to attain the goal of becoming the first climate-neutral continent • Establishing a green EU single market to boost demand for sustainable products, with transparent and harmonised product information and labelling • Promoting the circular economy for climate neutrality 	
	13	European climate emergency office	Article 192 TFEU	<p>Commission Parliament Council</p>	<ul style="list-style-type: none"> • Establishing a European climate emergency office as an organisational structure to support and coordinate the activities of the various actors, monitor progress and facilitate the sharing of best practice thus providing complementary executive capacity at EU level 	
	14	Promotion of sustainable finance	Article 114 TFEU	<p>Commission Parliament</p>	<ul style="list-style-type: none"> • Establishing a unified classification system for sustainable activities and 	






Green Deal (continued)				Council	<p>standards for sustainable financial products</p> <ul style="list-style-type: none"> • Making efforts to foster investment in sustainable projects, through consideration of sustainability in financial advice, establishing sustainability benchmarks, requiring sustainability in market research and credit ratings 	
	15	Action to address carbon leakage	Articles 113, 115 and 192 TFEU	Commission Parliament Council	<ul style="list-style-type: none"> • Introducing a 'carbon border adjustment' to ensure that carbon emissions for products sold in the EU are subject to the same carbon pricing, be they produced in the EU or imported, thus securing a level playing field 	
	16	A stronger EU energy policy	Article 194(1)(b) and (2) TFEU	Commission Parliament Council	Fully integrating the EU energy market	
III Economy for people	17	New own resources	Article 311 TFEU	Commission Council	<ul style="list-style-type: none"> • Establishing a common consolidated corporate tax base • Providing for an emissions trading system-based own resource • Creating a plastic packaging waste-based own resource • Possibly introducing a financial transaction tax at EU level as an own resource 	

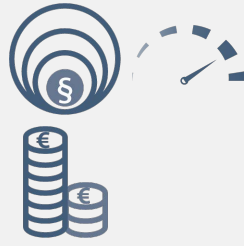



Economy for people (continued)	18	Social Europe	Article 158 TFEU	Commission Parliament Council	<ul style="list-style-type: none"> Enacting rules to protect citizens employed in the platform economy Creating a European unemployment fund and an EU-wide unemployment benefit fund Strengthening the social dimension of the multiannual financial framework, especially regarding social investments 	
	19	Qualified majority voting on the MFF	Article 312(2) TFEU	Commission Parliament Council	<ul style="list-style-type: none"> Triggering the special passerelle clause in Article 312(2) TFEU to enable qualified majority voting in decisions on the multiannual financial framework 	
	20	School-business cooperation	Article 166(4) and (2) fourth indent TFEU	Commission Parliament Council	<ul style="list-style-type: none"> Providing for broader and deeper cooperation between educational establishments (e.g. universities) and companies Ensuring better funding for Erasmus+ Creating more exchange opportunities for trainees 	
	21	Customs cooperation	Article 33 TFEU	Commission Parliament Council	<ul style="list-style-type: none"> Establishing a European customs force 	





Economy for people (continued)	22	Fight against fraud	Article 325(4) TFEU	Commission, Parliament, Council	<ul style="list-style-type: none"> Creating a task force of EU civil servants and seconded national experts to support national administrations in the fight against fraud (a 'European corps') 	
	23	Structural and investment funds	Article 177 TFEU	Commission, Parliament, Council	<ul style="list-style-type: none"> Reorienting distributive policies by establishing a clear link between additional funding and successful achievement of policy objectives 	
	24	European business code	Articles 50 and 114 TFEU	Commission Parliament Council	<ul style="list-style-type: none"> Enacting a European business code to eliminate law-related barriers in the single market and create a level-playing field, especially for SMEs 	
	25	Third-party effects of assignment of claims	Article 81(2) TFEU	Commission Parliament Council	<ul style="list-style-type: none"> Bringing more legal certainty concerning the third-party effects of assignment of claims to foster cross-border investment in the EU and, thereby, facilitate access to finance for firms, including SMEs, and consumers 	
	26	Harmonisation of bank insolvency law	Articles 81 and 114 TFEU	Commission Parliament Council	<ul style="list-style-type: none"> Laying down common rules on bank insolvency in the EU in order to provide more legal certainty and ensure a level playing field 	
	27	Civil justice	Article 81(2)(f) TFEU	Commission Parliament Council	<ul style="list-style-type: none"> Eliminating linguistic barriers for cross-border civil proceedings Promoting arbitration proceedings more broadly as 	

Economy for people (continued)					<ul style="list-style-type: none"> an alternative to traditional courts Establishing a European expedited civil procedure for business litigation Setting up a European commercial court 	
	28	Euro-area multilateral economic surveillance	Article 121(6) TFEU	Commission Parliament Council	<ul style="list-style-type: none"> Introducing a rule requiring country-specific recommendations (CSR) to be public unless justified for legitimate reasons Issuing ex-ante impact assessments of CSR on rights covered by the Charter of Fundamental rights, in order to ensure that emergency measures remain proportional 	
	29	Common positions for the euro area	Article 138(1) TFEU	Commission Parliament Council	<ul style="list-style-type: none"> Creating new ad hoc working groups to strengthen Eurogroup coordination on external aspects (e.g. IMF representation) Coordinating EU-wide common positions on matters of interest for the whole Union between Eurogroup and non-euro-area Member States within the Economic and Financial Committee 	
	30	Stronger euro-area representation in the IMF	Article 138(2) TFEU	Commission Council European Central Bank	<ul style="list-style-type: none"> Providing for single external representation of the euro area in the IMF (single euro constituency at IMF) Ensuring full membership of the EU in international 	

					economic and financial institutions (requiring modification of IMF rules)	
	31	Balance of payments assistance	Article 143(2) TFEU	Council	<ul style="list-style-type: none"> Establishing enhanced balance of payments assistance to non-euro-area Member States in the form of a precautionary conditioned credit line (PCCL) or an enhanced conditions credit line (ECCL) 	
IV Digital agenda	32	European digital sovereignty	Articles 114 and 171 TFEU	Commission Parliament Council	<ul style="list-style-type: none"> Creating an EU system of internet governance Ensuring that EU critical IT infrastructure is resilient Creating an EU technological base 	
	33	EU intellectual property rights	Article 262 TFEU	Commission Parliament Council	<ul style="list-style-type: none"> Adopting a regulation conferring on the Court of Justice of the EU jurisdiction over litigations in the field of intellectual property 	
	34	Digital social innovation	Articles 50 and 114 TFEU and sectoral legal bases	Commission Parliament Council	<ul style="list-style-type: none"> Making social innovation more attractive by linking it to technological innovation Making EU citizens participate in innovation, e.g. through digital platforms designed to solve social problems Introducing a social economy label Increasing funding for programmes promoting digital social innovation 	

<p>V</p> <p>Europe in the world</p>	35	Member State support for EU external action	Article 24(3) TEU, third subparagraph	Council Member States	<ul style="list-style-type: none"> Increasing the CFSP budget Introducing more impact assessments in CFSP 	
	36	More efficient decision-making in CFSP	Article 31(3) TEU	European Council, Member States	<ul style="list-style-type: none"> Activating the <i>passerelle</i> clause (European Council acting unanimously) thereby allowing QMV to be used in Council on common foreign and security policy decisions without formal Treaty changes 	
	37	European Parliament and CFSP	Article 36(2) TEU	Parliament	<ul style="list-style-type: none"> Creating a mechanism to monitor implementation of Parliament's recommendations on CFSP 	
	38	Data protection in CFSP	Article 39 TEU	Council	<ul style="list-style-type: none"> Adopting a Council decision regulating the use of personal data by EU missions and operations in third countries Adopting new data sharing agreements in the field of the fight against terrorism and cyber attacks 	
	39	European army	Article 42(2) TEU	European Council	<ul style="list-style-type: none"> Gradually moving towards the creation of an EU army Building on the PESCO initiative to move towards creating a 'common defence', involving common financing and procurement of capabilities supported by the EU budget, sharing of expensive military assets and technological innovation aimed at reducing defence costs 	

Europe in the world (continued)	40	Financing of civilian EU missions	Article 41(3) TEU, first subparagraph	Council	<ul style="list-style-type: none"> Establishing a special procedure, by means of a Council decision, allowing rapid access to appropriations in the Union budget, for the urgent financing of initiatives in the framework of CSFP, in the context of civilian missions 	
	41	Financing of EU military operations	Article 41(3) TEU, second subparagraph	Council, High Representative of the Union for Foreign Affairs and Security Policy	<ul style="list-style-type: none"> Setting up a start-up fund made up of Member State contributions, by means of an intergovernmental agreement, to allow for the financing of the preparation of EU military operations not covered by the EU budget 	
	42	Enforcing international trade rules	Article 207 TFEU	Commission	<ul style="list-style-type: none"> Introducing economic countermeasures such as customs duties, quantitative restrictions and measures in the area of public procurement in order to secure enforcement of international trade rules despite the lack of a functioning WTO Appellate Body Creating complementary executive capacity at EU level to ensure the proper application of trade agreements to which the EU is party 	
	43	Factual information on the EU in third countries	Article 167(5) first indent, (2) first indent	Commission Parliament	<ul style="list-style-type: none"> Granting a specific mandate to promote the EU identity and narrative to the EU Network of National Institutes of Culture 	

				Council	<p>(EUNIC) and to the EU delegations in third countries</p> <ul style="list-style-type: none"> Strengthening Euronews financially and structurally enable EU narratives to be promoted in third countries 	
<p>VI Values, democracy and transparency</p>	44	Judicial independence of national judges	<p>Articles 2 and 19 TEU Article 47 CFR</p>	<p>Commission</p> <p>Parliament</p> <p>Council</p>	<ul style="list-style-type: none"> Creating an EU mechanism on democracy, the rule of law and fundamental rights in the form of an interinstitutional agreement cutting EU funds to Member States systematically violating the rule of law Creating an annual rule of law review cycle analysing the situation in all Member States 	
	45	Conditionality and the rule of law	Article 121 TFEU	<p>Commission</p> <p>Parliament</p> <p>Council</p>	<ul style="list-style-type: none"> Laying down explicit rule of law conditionalities in secondary legislation governing the structural and investment funds Laying down procedural rules for assessing the fulfilment of <i>ex ante</i> conditionalities 	
	46	Uniform European Parliament electoral procedure	Article 223(1) TFEU	<p>Commission</p> <p>Parliament</p> <p>Council</p>	<ul style="list-style-type: none"> Adopting a regulation to provide for a truly uniform procedure for election to the European Parliament, with the same rules on constituencies, calculation of votes, voting age, etc., across the whole Union 	
	47	Fundamental rights in criminal procedure	Article 82(2)(b) TFEU	<p>Commission</p> <p>Parliament</p>	<p>Adopting minimum rules concerning:</p> <ul style="list-style-type: none"> pre-trial detention and detention conditions 	

<p>Values, democracy and transparency (continued)</p>				<p>Council</p>	<ul style="list-style-type: none"> • offenders considered vulnerable adults • the right to an appeal in criminal matters • double jeopardy (<i>ne bis in idem</i>) • the right to be tried without undue delay 	
	48	European ID card	Articles 20(2)(a) and 77(3) TFEU	<p>Commission Parliament Council</p>	<ul style="list-style-type: none"> • Creating a uniform, EU-wide ID card for European citizens to strengthen the feeling of European identity, facilitate the free movement of EU citizens, enhance democratic participation and help combat the counterfeiting of documents 	
	49	External borders	Article 77(2)(d) TFEU	<p>Commission Parliament Council</p>	<ul style="list-style-type: none"> • Increasing information exchange and operational cooperation between EU agencies and Member States • Developing cooperation with third countries' authorities • Fostering technological modernisation of border management • Strengthening the EU's capacities in search and rescue operations • Further involving the European Asylum Support Office in the European Border and Coast Guard activities, possibly by merging both agencies and creating a unique European border and asylum agency 	

Values, democracy and transparency (continued)	50	More efficient EU decision-making	Article 48(7) TEU	European Council Parliament Council	<ul style="list-style-type: none">• Activating the general passerelle clause	
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1. Stepping up EU health policy



While responsibility for health lies primarily with the governments of the individual EU Member States, the EU complements national policies, especially those with a cross-border dimension. EU health policy action has gained particular relevance in the unfolding coronavirus crisis, as underlined by Parliament in a recent resolution.

Current challenges and policy debates

The coronavirus pandemic is dominating health policy debates and has led to stringent emergency public health measures. In March 2020, EU leaders [agreed on](#), and then [reaffirmed](#), their commitment to a solidarity-based approach. Within the limits of its powers, the EU [acted quickly](#) to help limit the spread of the virus, secure the [provision of medical equipment](#) and boost research into a vaccine, among other measures. The European Commission set up a [coronavirus response team](#) to coordinate and communicate a common European response to the crisis, in terms of both [public health](#) and the wider [socio-economic fallout](#). In an April 2020 [resolution](#) on coordinated EU action to combat the pandemic, the European Parliament called for the creation of a European health response mechanism, to improve the preparation and coordination of the response to health crises. It also suggested that a post-crisis strategy could include greater powers for the EU to act to counter cross-border health threats, with new and strengthened instruments for EU-level coordination. EU health policy has been characterised by a 'gap' between public expectations and actual EU engagement. In a [Eurobarometer survey](#) for the European Parliament, over two-thirds of respondents expressed support for increased [EU action on health and social security](#), while support for greater EU involvement in the area grew from 63 % in 2016 to 69 % in 2018. A Parliament study, [Mapping the Cost of Non-Europe 2019-2024](#), argues that, although the EU only has supporting competence in health, access to cross-border healthcare and better coordination and promotion of best practice between Member States can bring considerable benefits. According to a European Observatory on Health Systems and Policies [publication on EU health policy](#), there is 'legal space and a range of creative political possibilities' for more health-focused EU policies, for instance, through direct, visible EU action.

Scope for more EU action

Serious cross-border threats to health

The need for [common health preparedness](#) has been reiterated in the current crisis. Parliament has called for the European Centre for Disease Prevention and Control (ECDC) and the European Medicines Agency (EMA) to be strengthened. The EU has also contributed to [global efforts](#) to address antimicrobial resistance, by adopting a [European 'One Health' action plan](#) in 2017. Health and Food Safety Commissioner Stella Kyriakides has been tasked with its full implementation. In 2018, Parliament adopted a [resolution](#) recommending measures to reduce antibiotic use, such as restrictions on their sale by health professionals. Stakeholders have also called on the EU to [act on](#) (and promote [research](#) into) antimicrobial resistance.

Medicines shortages

In its [2020 work programme](#), the Commission announced the launch of a pharmaceutical strategy for Europe, to ensure the quality and safety of medicines and consolidate the sector's global competitiveness, making sure that patients can benefit from innovation while resisting the pressure of the increasing cost of medicines. This strategy could be shaped so as to address broader concerns, such as [medicines shortages](#), and the EU-wide [procurement](#) of medical equipment, both of which have recently come to the fore.

Cancer

The Commission also announced its intention to launch the 'Europe's Beating Cancer' plan to support Member States in their efforts to improve cancer prevention and care. The plan would focus on [several areas](#), from prevention and treatment, to survivorship and palliative care. This '[ambitious but realistic plan](#)' could become a major opportunity for EU action.

Vaccine hesitancy

In her [mission letter](#), Commission President Ursula von der Leyen asked (then) Commissioner-designate Kyriakides to prioritise communication on vaccination. Parliament's April 2018 [resolution](#) on vaccine

hesitancy called on EU governments and the Commission to reinforce the legal basis for immunisation coverage, and facilitate a better aligned schedule for vaccination across the EU. Thanks to a December 2018 [Council recommendation](#), and in line with Parliament's demands, coordinated approaches could be strengthened, including, for instance, the possibility of establishing a European vaccine information sharing system with a view to developing guidelines on an EU vaccination schedule.

Global health issues

According to a [publication on EU health policy](#) by the European Observatory on Health Systems and Policies, there is 'abundant space for the EU to shape global health', in part by replacing an ever more withdrawn United States in many areas of standard-setting, reproductive health aid and surveillance. The Council's working party on public health at senior level referred in September 2019 to a [planned multiannual project](#) on how the EU could achieve better results in global health cooperation. As a 2019 [study](#) for Parliament's Environment Committee indicates, the development of an EU post-sustainable development goals global health agenda could be considered. The [German Institute for International and Security Affairs](#) (SWP) notes in a March 2020 [comment](#) that the German Council Presidency (second half of 2020) should strengthen the EU's role in global health, arguing that having so far centred primarily on disease prevention and control – as in response to the coronavirus pandemic – the EU should now focus more on overall health systems. This would require an intersectoral and preventive approach at EU level.

The legal basis

[Article 168 TFEU](#)

1. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.

Union action, which shall complement national policies, shall be directed towards improving public health, preventing physical and mental illness and diseases, and obviating sources of danger to physical and mental health. [...]

2. The Union shall encourage cooperation between the Member States in the areas referred to in this Article and, if necessary, lend support to their action. [...]

While Article 168 TFEU itself provides a limited legal basis to adopt binding public health measures, there are several other legal bases the EU can use to achieve its public health objectives. These include [Article 153 TFEU](#) (social policy) and [Article 114 TFEU](#) (approximation of laws), the latter being the most frequently invoked. One major [ongoing legislative file](#) in the area of health – the [proposal for a regulation on health technology assessment](#) – is based on Article 114 TFEU. As explained in the aforementioned EP study, Article 168 TFEU defines the scope of EU public health competences. While it explicitly provides that Member States retain the responsibility to organise their health systems, it allows the EU to engage in supportive and coordination actions to improve public health, and in particular to prevent physical and mental ill health, and combat threats to health. It also calls on the EU to act on global health issues.

Use of legal basis to date

Article 168 TFEU was used as a legal basis for [Regulation \(EU\) 282/2014](#) on the establishment of the third programme for the Union's action in the field of health (2014-2020). The EU health programme [aims to improve health](#) in Europe by fostering cooperation between EU countries to improve the health policies that benefit their citizens, encouraging the pooling of resources where economies of scale can provide optimal solutions. Article 168(5) TFEU was used as a legal basis for the Cross-border Health Threats Decision ([No 1082/2013/EU](#)), which aims to improve preparedness and strengthen capacity for a coordinated EU response to health emergencies. Moreover, Article 168 TFEU was invoked, alongside Article 114 TFEU, as a legal basis for the Falsified Medicines Directive ([2011/62/EU](#)) and the Clinical Trials Regulation ([EU No 536/2014](#)), which aims to ensure a greater level of harmonisation of the rules of conducting clinical trials throughout the EU. It is worth noting that Article 35 of the [Charter of Fundamental Rights of the EU](#) is based on Article 168 TFEU.

FURTHER READING

EPRS, [Cross-border threats to health: EU action on preparedness and response](#), 2020.

EPRS, [What can the EU do to alleviate the impact of the coronavirus crisis?](#), 2020.

2. Emergency measures on migration



Although the record-high migratory flows to the EU witnessed in 2015 and 2016 have subsided, the situation remains fragile. On 1 March 2020, following events on its Turkish border, Greece called for emergency measures based on Article 78(3) of the Treaty on the Functioning of the European Union to secure full EU support in the event of a sudden influx of third-country nationals. The article, first used in 2015 in the context of peak migrant arrivals, could be used in various ways to help Member States confronted by an emergency migratory situation.

Current challenges and policy debates

The unprecedented [migratory flows](#) into the EU seen during 2015 and 2016 have since [eased off](#), but the situation, especially in the Eastern Mediterranean, remains [difficult](#). Approximately [3.6 million refugees](#) have entered Turkey since the beginning of the Syrian civil war in 2011, the highest number in the region. Despite on-going international and EU financial and humanitarian support, this ever-growing refugee presence has heightened social tensions in Turkey. Turkish military operations in Syria, the Turkish incursion into Libya, and other geostrategic issues, such as gas drilling disputes with Cyprus, have tested relations between the EU and Turkey. Furthermore, the Turkish authorities' decision in February 2020 to stop implementing the [EU-Turkey agreement](#) has resulted in a significant increase in migrant arrivals along the Greek-Turkish border and rising tensions. On 1 March 2020, in the light of events on its Turkish border, Greece announced it was '[invoking](#)' Article 78(3) of the Treaty on the Functioning of the European Union (TFEU) to ensure 'full European support' in the face of a sudden influx of third-country nationals into the EU.

As pointed out in one [expert's opinion](#), Member States must be able to rely at all times on the solidarity (see fiche 4) of other Member States in order to neutralise the negative effects of unbalanced distribution of migrants, including in cases of sudden inflows. The [Commission President](#), Ursula von der Leyen, has also made it clear that all Member States must make 'meaningful contributions to support those countries under the most pressure'. Given the instability in neighbouring regions as well as the [cyclical nature of migration](#), the situation remains volatile and Europe could witness another influx in the coming years.

Scope for more EU action

In its April 2016 [resolution](#) on the need for a holistic EU approach to migration, the European Parliament listed several forms of solidarity, some of which could also apply in the context of provisional measures to help Member States confronted by an emergency migratory situation. These measures included fair-sharing of responsibility for those seeking or already benefiting from international protection and provision of operational support through EU agencies. In practical terms, the Parliament recommended increasing financial and technical support for frontline Member States, strengthening the role of EU agencies active in these policy areas, such as the European Asylum Support Office ([EASO](#)) and the European Border and Coast Guard ([Frontex](#)), and providing appropriate equipment and resources in connection with both the processing of applications and the protection of the external border.

Increased efficiency and targeted financing to ensure solidarity with countries affected by increasing migrant arrivals are also discussed by researchers Rebecca Dowd and Jane McAdam, in a [paper](#) based on the [outcome](#) of the June 2011 UNHCR expert meeting on international cooperation to share burdens and responsibilities. The ideas set out there could also be applied in the European context. According to the authors, cooperation 'can be manifested in many forms, including material, technical or financial assistance, as well as physical relocation of asylum-seekers and refugees'. The authors further suggest that financial assistance for refugee-hosting countries is considered the 'most convenient and common' and 'the easiest form of sharing'. Furthermore, the nature of responsibility-sharing also depends on the circumstances. In the case of sea rescue, for example, it may include financial, material, technical or other capacity-building help: such as non-disembarking states assuming responsibility for examining applications, providing international protection or ensuring long-lasting solutions for displacement.

When discussing the triggering of emergency measures, the [European Council on Refugees and Exiles](#) (ECRE) refers to the collective emergency response as providing humanitarian assistance, decent reception conditions and access to asylum for people arriving.

The legal basis

Article 78(3) TFEU

In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament.

Article 78(3) TFEU provides for the adoption of provisional measures in emergency migratory situations at the EU's external borders. Read together with [Article 80 TFEU](#), it offers a specific legal basis for measures implementing the principle of solidarity in the area of international protection. On the basis of a proposal made by the Commission, the Council takes decisions by qualified majority; it does not apply the ordinary legislative procedure common for decisions in the area of border checks, asylum and immigration. While Denmark opts out of measures adopted pursuant to Article 78(3) TFEU ([Protocol No 22](#)), Ireland (and previously the UK) may opt in ([Protocol No 21](#)). Associated states (Iceland, Liechtenstein, Norway and Switzerland) have no obligation to take part but may voluntarily decide to participate.

As stated in 2017 by the Court of Justice of the EU in [Joined Cases C-643/15 and C-647/15 Slovakia and Hungary v Council](#), Article 78(3) can be used only in exceptional circumstances, namely in the event of a sudden inflow of nationals of third countries, inasmuch as it makes the normal functioning of the EU common asylum system impossible. As regards the scope of the provision, the Court confirmed in the same ruling the possibility for the Council to derogate, on the basis of Article 78(3), from secondary law (EU regulations, directives, decisions); however, according to [Steve Peers](#), Article 78(3) decisions should still be in compliance with primary EU law and public international law and cannot amend it, meaning that general rules on EU asylum law, including the respect of *non-refoulement*, the [Geneva Convention](#) and other relevant [human rights instruments](#) continue to apply during emergency measures.

Similar views were expressed by the [ECRE](#) and the [United Nations High Commissioner for Refugees](#) who have warned that Article 78(3) TFEU, if invoked, should lead to provisions in compliance with EU primary law, including the Charter of Fundamental Rights. The article 'cannot ... provide a legal basis for the suspension of the right to asylum' or for expulsions against the principle of *non-refoulement*. As the European Parliament has to be consulted it must be 'prepared to promote positive alternatives when this happens'. Furthermore, [experts](#) note the EU institutions have a certain discretion as regards the length of time during which the provisional measures should temporarily apply. There is also discretion regarding the definition of an 'emergency situation' justifying the use of Article 78(3) TFEU, as well as a margin of appreciation when deciding upon the substance of support measures.

Use of legal basis to date

The European Union has already applied provisions under this article in 2015, when both Italy and Greece were exposed to increased migratory pressure. To alleviate [migratory pressure](#) on both frontline Member States, which had borne the brunt of the influx of refugees, the Council adopted two decisions for a duration of two years: [Decision 2015/1523](#) to relocate a total of 40 000 people seeking international protection and [Decision 2015/1601](#) to relocate a further 120 000 people seeking international protection.

Despite most Member States' willingness to [relocate](#) asylum-seekers based on the two emergency relocation schemes, Slovakia and Hungary objected and challenged Council Decision 2015/1601, which had been adopted by qualified majority. The CJEU rejected their case in a [judgment](#) of September 2017 (see above). According to [experts](#), the judgment takes an innovative approach in that it reaffirms solidarity between the Member States as a binding principle and the distribution of applicants for international protection as mandatory. Similar views were expressed by [Henri Labayle](#), who stated that the CJEU judgment clearly confirms the binding nature of the principle of solidarity in EU migration policy.

FURTHER READING

EPRS, [Emergency measures on migration: Article 78\(3\) TFEU](#), EPRS, European Parliament, 2020.

3. Doing more to tackle irregular migration



The vast majority of Europeans would like to see more EU action in the area of migration policy. The Union has the power to adopt measures relating to irregular immigration and unauthorised residence, including removal and repatriation. EU action can range from legislation to operational instruments, including executive and financial measures. So far, the most prominent use of the legal basis has been the adoption of the Returns Directive and the creation of the European Border and Coast Guard (EBCG), but further action is possible.

Current challenges and policy debates

Europeans are clearly in favour (72%) of more EU action in the area of migration. However, the way in which Europe should deal with that challenge is often subject to debate. The number of [irregular arrivals](#) in the EU and the discrepancy between the number of third-country nationals [ordered to leave](#) and those who [actually leave](#) EU territory have prioritised two issues linked to irregular immigration. On the one hand, the need to improve the EU's return rates and secure the EU's external borders to prevent irregular entries and fight smuggling has become a matter of major concern for those who see these policies as effective tools to prevent and combat irregular immigration. On the other hand, some authors [question](#) the effectiveness of such policies when it comes to preventing and combating irregular migration and claim that the EU should [focus](#) on providing legal and safe channels for migration and addressing the root causes of irregular immigration. In both cases, the debate on the need to ensure solidarity and shared responsibility among all Member States is a recurrent one, as stressed by Commission President von der Leyen in her [political guidelines](#). Finally, the compliance of border control and return activities with EU and international standards of human rights and the principle of *non-refoulement* is a major [concern](#), especially where vulnerable groups are affected. Much attention is being paid to the need to reduce the number of deaths of migrants trying to reach European shores, the effects that continued calls to speed up returns may have in relation to migrants' human rights, and the recurrent use of criminal law to combat irregular immigration – '[crimmigration](#)'.

Scope for action

Preventing and combating irregular immigration

[Parliament](#) has frequently linked the prevention and fight against irregular immigration with the need to secure the EU's external borders, combat smuggling and human trafficking, provide legal and safe channels for migration and mobility, and address the root causes of irregular immigration through partnership with countries of origin. Some of these policies cannot be developed under the legal basis analysed here, but EU activities relating to border management, returns and the fight against smuggling fall under Article 79(2)(c) TFEU. There is still room for more EU action in this area, in addition to measures that could be taken in the area of border management (see [under-used legal basis No 12](#)). On returns, future developments could include: further harmonising national rules in relation to standards and procedures for adopting return decisions, boosting [Member States' cooperation with each other and with third countries](#) to improve the management of returns, or further [promoting voluntary returns](#), for instance by establishing common rules to incentivise it. On the fight against smuggling, future action could include: [improving the existing EU legal framework](#) in order to align it with international standards; doing further work to identify, capture and dispose of [vessels](#) used by smugglers; enhancing cooperation between Member States, EU agencies and third countries to tackle smuggling; enhancing the implementation of sanctions for the employment of irregular migrants; or modifying the existing legislation to oblige Member States to issue residence permits for migrants cooperating with competent authorities.

Ensuring full compliance with human rights obligations

Parliament has asked consistently for a human-rights-based common European migration policy. In this vein, further developments could focus on ensuring adequate protection for victims of smuggling, strengthening the EU's capacities in search and rescue operations, as suggested by Commission President Ursula von der Leyen in her [political guidelines](#); establishing clear rules [forbidding Member States from](#)

[penalising](#) those providing migrants with humanitarian help; or ensuring that migrants' [human rights and the principle of non-refoulement](#) are fully upheld in border control and return operations. [Parliament](#) has also consistently condemned the growing criminalisation of irregular migration, an issue that could be tackled through measures attempting to diminish the use of detention in the immigration context or to decriminalise the irregular crossing of a border.

The legal basis

Article 79(2)(c) TFEU

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures in the following areas:

[...] (c) illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation; [...]

Article 79(2)(c) TFEU adopts a similar wording to [former Article 63\(3\)\(b\) of the Treaty establishing the European Community \(TEC\)](#), differing only in the introduction of an express reference to 'removal' of unauthorised third-country nationals. EU measures follow the ordinary legislative procedure. The type of legal act is not determined by the Treaties. As this is an area of shared competence, subsidiarity and proportionality principles apply. Denmark opts in on a case-by-case basis only in relation to measures building upon the Schengen acquis ([Protocol No 22](#)) and Ireland (and previously the UK) opt in on a case-by-case basis in relation to any measure adopted under this legal basis ([Protocol No 21](#)).

Use of legal basis to date

Legislative acts adopted

Article 79 (2) (c) TFEU has been used to create the [EBCG](#) and an [immigration liaison officers network](#). It has also been used to establish common standards and procedures for [returning illegally staying third-country nationals](#), to provide for the [mutual recognition of return decisions](#) and for the [compensation of the financial imbalances](#) resulting from that recognition, to establish a [uniform European travel document for return](#) and to establish rules on the [organisation of joint flights for removals](#) as well as on mutual assistance between Member States [in cases of transit for the purposes of removal by air](#). It has been used to establish minimum standards on [sanctions and measures against employers](#) of illegally staying third-country nationals and against those [helping them to enter, transit or reside](#) within the territory of a Member State. In a complementary approach, it was used to determine the circumstances in which victims of trafficking should be granted a [residence permit](#) within the EU. It was used to adhere to the [Protocol against the Smuggling of Migrants by Land, Sea and Air](#) and to the [Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women And Children](#), both supplementing the United Nations Convention Against Transnational Organised Crime. It was also used to legislate on the [obligation of carriers to communicate passenger data](#) and to impose on them certain [obligations](#) when transporting third-country nationals to Member States. It was used to establish the [Schengen information system II, to allow the use of that system for the return of illegally staying third country nationals and for border check purposes](#) and to provide for a framework of [interoperability](#) between EU information systems for police and judicial cooperation, asylum and migration. The legal basis has also been used to create [eu-LISA](#) and provide for the participation of [Norway, Iceland, Sweden and Liechtenstein](#) in eu-LISA activities. Finally, it was used to adopt a considerable number of readmission agreements (including for [Albania](#), [Ukraine](#), [Montenegro](#), [Russia](#) and [Bosnia and Herzegovina](#)) and to provide [financial support](#) for certain return activities.

Legislative proposals under discussion

The Commission has used this legal basis to propose to recast the [Return Directive](#) and the [Eurodac Regulation](#). It has also presented a proposal aiming to upgrade the existing [visa information system](#). Finally, the Commission has presented a proposal to continue [providing financial support](#) for Member States activities in the area of return.

FURTHER READING

EPRS, [The proposed Return Directive \(recast\)](#), Substitute impact assessment, 2019.

EPRS, [Recasting the Return Directive](#), Legislative briefing, 2019

EPRS, [EU asylum, borders and external cooperation on migration](#), 2018.



4. Boosting solidarity and responsibility-sharing on borders, asylum and migration

The principle of solidarity and the fair sharing of responsibility in the policy areas of borders, asylum and migration is enshrined in the Treaty of Lisbon. Ideas proposed by institutions, academics and stakeholders to facilitate its implementation include doing more to pool relevant tasks and resources at EU level, and compensating frontline Member States financially.

Current challenges and policy debates

The removal of internal border controls within the Schengen Area has led to the gradual development of EU policies on external borders, asylum and migration. According to Article 80 of the Treaty on the Functioning of the European Union (TFEU), these common policies are to be governed by the principle of solidarity and the fair sharing of responsibility, financial implications included, among Member States. The [Schengen](#) and [Dublin](#) systems are the focus here, dealing respectively with borders and asylum, and both relevant to migration. However, a series of events have gradually revealed some weaknesses and asymmetries. The systems are often [deemed](#) to assign a disproportionate responsibility to certain Member States, owing to factors such as their geographical position (e.g. owing to the rule assigning the processing of asylum claims mainly to the first country of entry into the EU). This [debate](#) gathered momentum in the wake of the 2015 to 2016 surge in asylum-seeker arrivals, which EU institutions and Member States have sought to address through [various sets of measures](#), in some cases exposing widely differing positions. Financially, the EU institutions [have used](#) the flexibility tools available under the 2014 to 2020 multiannual financial framework (MFF) to the maximum to enhance EU agency and funding programme resources for borders, asylum and migration. These, however, represent only a limited share of the EU budget. An [analysis](#) of citizens' expectations has shown that more than 70% support increased EU involvement in these policy areas. The refugee crisis has led to the temporary re-introduction of internal border controls in some Member States, undermining the functioning of the Schengen Area.

Scope for action

A 2017 [study](#) on the cost of non-Europe deems the return to a [fully functioning](#) Schengen Area to require enhanced EU action, including reforms to foster solidarity and a fair distribution of responsibility between Member States. Since the Treaty does not provide a detailed definition of the responsibility to be shared, scholars such as [E. Küçük](#) have argued that secondary legislation adopted by the EU in relevant policy areas and its interpretation by the Court of Justice of the European Union (CJEU) could facilitate implementation of the principle. A step in this direction would be an agreement on a definition of the responsibility to be shared and the inclusion of related measures to ensure its fair distribution whenever necessary in the legal acts adopted under Articles [77](#) (borders), [78](#) (asylum) and [79](#) (migration). Moreover, new actions could be taken in the area of border management and irregular migration (see fiches 3 and 49).

Focusing on the common European asylum system (CEAS), [E. Tsourdi](#) concludes that its current design provides for emergency-driven and rather limited solidarity. Her suggestions for fairer, structural sharing of responsibility are either greater integration between the EU and national administrations, which poses a number of challenges, or a compensatory mechanism that finances relevant expenditure through the EU budget. Examples of areas of responsibility that can be shared are: financial resources (the only example explicitly mentioned in Article 80 TFEU); in-kind contributions such as technical equipment and staff deployment; the processing of asylum applications; and provision of refugee protection. [A. D'Alfonso](#) examines possible developments that could strengthen the contribution of the EU budget to the application of the principle of solidarity in the fields of borders, asylum and migration. The [2018 MEDAM Report](#) on asylum and migration policies in Europe notes that any progress requires a common understanding of the challenges to be tackled jointly and of possible ways to contribute. The report recommends increasing the pooling of tasks and resources at EU level, while supporting the concept of flexible solidarity on the basis of which Member States less exposed to migration flows would contribute proportionally more in other ways (e.g. financially). Already before the peak of the refugee crisis, the European Council on Refugees and Exiles ([ECRE](#)) made recommendations to improve the functioning of the

CEAS by means of enhanced intra-EU solidarity tools. The ECRE favoured solutions that promote more effective sharing of financial resources and expertise. Several recommendations related to strengthening the role and resources of the European Asylum Support Office (EASO), which was identified as a key actor in enhancing responsibility sharing. In 2019, a collaborative thinking exercise on the occasion of the 20th anniversary of the Tampere European Council resulted in a [publication](#) that includes various ideas to reinforce responsibility sharing.

[Parliament](#) has called repeatedly for a holistic approach to asylum, migration and borders that must be informed by the principle of solidarity and fair sharing of responsibility in line with Article 80 TFEU. It has recommended [increases](#) in financial and technical support for frontline Member States, a [strengthened role](#) for EU agencies active in these policy areas and the [provision](#) of appropriate equipment and resources. Linking the concepts of internal and external solidarity, Parliament has [identified](#) tools to promote them such as: relocation, mutual recognition of asylum decisions, operational support measures, a pro-active interpretation of the [current Dublin Regulation](#) and the [Temporary Protection Directive](#), resettlement, humanitarian admission, search and rescue at sea, and the civil protection mechanism.

According to the [Committee of the Regions](#), implementation of the principle of solidarity and fair sharing of responsibility would require the establishment of mechanisms that take into account the disparities between individual Member States concerning the number of arrivals of third-country nationals as well as the financial, technical and other resources available for managing migratory flows.

The [European Commission](#) has proposed to boost the resources of the relevant EU funding programmes and agencies from €12.7 billion in the 2014 to 2020 programming period to €30.8 billion in the next (in constant 2018 prices), which would represent 2.7 % of the 2021 to 2027 MFF. More specifically, the increase would finance further strengthening of the [European Border and Coast Guard](#). A proposal to reinforce EASO and transform it into the [European Union Agency for Asylum](#) is also being considered.

The legal basis

Article 80 TFEU

The policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle.

Article 80 TFEU is a peculiar kind of legal basis since it has to be used in conjunction with another article (77, 78 or 79 TFEU), which would determine the legislative procedure to be followed. Its inclusion in the Treaty originates from a recommendation of the [European Convention](#).

Use of legal basis to date

Article 80 TFEU has not been used as a legal basis to date although enhancing solidarity and responsibility-sharing is one objective of the current EU funding instruments for asylum, migration and borders. The [European Commission](#) proposed to use it as a joint legal basis for funds dealing with asylum and migration, but the Council of the European Union rejected the proposal. [Parliament](#) has repeatedly taken the view that Article 80 TFEU provides a joint legal basis in the areas of asylum, migration and borders along with Articles 77 to 79 TFEU. In its first reading position on the Asylum and Migration Fund proposed for the 2021-2027 period, [Parliament](#) introduced various amendments relating to solidarity, including one to have Article 80 TFEU as a joint legal basis for the new funding instrument. Likewise, the [Committee of the Regions](#) deems it a valid legal basis to promote solidarity and fair sharing of responsibility. In line with the concept of a joint legal basis, the [Advocate General of the Court of Justice of the European Union](#) has stated that another Treaty provision on asylum, Article 78(3), constitutes a specific legal basis for measures to implement the principle of solidarity, when read in conjunction with Article 80 TFEU.

FURTHER READING

EPRS, [Migration and border management: Heading 4 of the 2021-2027 MFF](#), 2020.

EPRS, [The Cost of Non-Europe in Asylum Policy](#), 2019.

EPRS, [EU asylum, borders and external cooperation on migration](#), 2018.

EPRS, [The Cost of Non-Schengen: Civil Liberties, Justice and Home Affairs aspects](#), 2016.



5. Extending the list of crimes addressed by EU criminal law policies

The Treaty on the Functioning of the European Union (TFEU) allows for cooperation on criminal law in the EU by establishing the principle of minimum rules on the definition of criminal offences. The directives proposed under Article 83 TFEU are adopted through the ordinary legislative procedure. However, according to the provisions of Article 83(1)(3), the extension of the list of areas of crime for which minimum rules can be adopted requires unanimity in Council and remains challenging in both legal and policy-making terms.

Current challenges and policy debates

In the 2018 Eurobarometer [Survey 89.2 of the European Parliament](#), 49% of Europeans considered the fight against terrorism as the top priority topic for the 2019 European elections campaign, ahead of combating youth employment, immigration, economy and growth. According to the [Spring 2019 Standard Eurobarometer](#), terrorism is still among Europeans' top five concerns, sharing third place with the economic situation, but behind immigration and climate change. Terrorism, organised crime and cybercrime were cited as key challenges to the EU's internal security by the vast majority of respondents to a [2017 survey on security](#), while the [2019 survey on cybersecurity](#) shows that 76% of Europeans feel increasingly exposed to cybercrime risks. The types of cross-border crime covered by the provisions of Article 83(1) TFEU are tackled by national authorities and by Europol as a coordinating EU agency. Europol targets mobile organised crime groups ([MOCGs](#)) active in areas such as drug-trafficking, robberies, burglaries, organised shoplifting and cash machine attacks. Of course, terrorism, human trafficking, cybercrime, corruption and money-laundering remain at the top of the list of cross-border crimes. Article 83(1) TFEU is key in this context, as it creates minimum rules and sanctions on areas of crime at EU level and allows for the list to be extended.

Scope for action

European Parliament opinions on areas of crime

Most Parliament resolutions on this topic refer to existing areas of crime and call for extension of current legislation based on Article 83(1)(2) TFEU. For instance, in a 2016 [resolution](#) on the fight against corruption, the Parliament calls for specific rules on crimes not listed in Article 83(1)(2), such as wildlife and forest crime, and the trafficking and export of radioactive materials and hazardous waste, but refers to them in relation to organised crime, which is already covered by the article. However, in [2014](#), and in several subsequent resolutions on [combating violence against women](#), most recently on [28 November 2019](#), Parliament has called for violence against women and girls (and other forms of gender-based violence) to be added to the crimes listed in Article 83(1) TFEU.

Violence against women as a new area of crime?

Echoing Parliament's calls, Commission President, Ursula Von der Leyen, stated in her [political guidelines](#) that the EU 'should do all it can to prevent domestic violence, protect victims and punish offenders', mentioning a possible extension of the list of EU-recognised crimes to include violence against women. In its [Gender Equality Strategy](#) issued in March 2020, the European Commission announced its intention to introduce, in 2021, a proposal to add 'specific forms of gender-based violence' to the areas of crimes under Article 83(1) TFEU, should [EU accession](#) to the Council of Europe Convention on preventing and combating violence against women and girls ([Istanbul Convention](#)) remain blocked in the Council.

Other possible future action?

Even if there is as yet no formal [definition](#) of the notion of serious crime at the EU level, the legislator could nevertheless decide to extend the list of areas of crime, thanks to Article 83(1)(3) TFEU, for instance by using the lists of crimes defined in the [Europol](#) and [EAW](#) legislation. But, as Article 83(1)(3) requires unanimity from the Council, the question is whether it is worth taking the risk of having a Member State reject the proposal. The use of Article 83(1)(3) will therefore suppose from Member States a strong collective involvement, stating that the related area of crime would be better fought on a cross-border level. However, it could be possible to take into account the distinction given by the European Commission in 2006: the EU may intervene when a crime is not sanctioned in one or several Member States and needs to be tackled.

Another solution would be to add universally sanctioned crimes, such as crimes against humanity and war crimes, covered today by the 8 May 2003 Council Decision ([2003/335/JHA](#)) on the investigation and prosecution of genocide, crimes against humanity and war crimes. These crimes could be added to the list provided in Article 83(1)(2) on the grounds of EU values, of the [support](#) given by the EU to the International Criminal Court, and of their serious, universal and cross-border nature, allowing for future modifications to be made to Decision 2003/335/JHA under the ordinary legislative procedure.

The legal basis

[Article 83\(1\) TFEU](#)

The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.

These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.

On the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the consent of the European Parliament.

[Article 83\(1\)](#), notably its sub-paragraph 3, opens the possibility to extend the areas of crime by a Council decision adopted unanimously after obtaining the consent of Parliament. The use of this possibility remains very challenging, however, due to lack of definitions in the scope covered by Article 83(1). [Article 72](#) TFEU provides that law and order and security issues remain a Member State competence. In his 3 May 2018 opinion on the *Ministerio fiscal* case ([C-207/16](#)), Advocate General Saugmandsgaard Øe considers that 'the power to determine what constitutes "serious crime" belongs, in principle, to the competent authorities of the Member States' and that the concept of serious crime is not an autonomous concept of EU law according to the Court's case law (notably the [Digital Rights](#) and [Tele2](#) cases). In his 10 September 2013 opinion on the case on cross-border exchange of information on road safety related traffic offences ([C-43/12](#), *Commission v Parliament and Council*), Advocate General Bot recalls that 'the definition of criminal offence must then be a formal one, with no risk of heterogeneity between the Member States since they are obliged to give the same classification to a given offence'. The definition of the 'cross-border dimension resulting from the nature or impact of such offences' is not an easy one. It might refer to the [definition](#) given by [Article 3.2](#) of the United Nations Convention against transnational organised crime (the '[Palermo Convention](#)'). The May 2016 Europol [Regulation](#) also provides definitions, stating in its Article 3(1) that 'Europol shall support and strengthen action by the competent authorities of the Member States and their mutual cooperation in preventing and combating serious crime affecting two or more Member States, terrorism and forms of crime which affect a common interest covered by a Union policy'. It also [provides](#) a list of crimes of 'EU interest' in its [Annex I](#). The 2002 Council [Framework Decision](#) on the EAW, in its Article 2(2), also gives an exhaustive list.

Use of legal basis to date

Until now, the current provisions of Article 83(1)(2) have allowed for the extension of the minimum rules concerning the definition of criminal offences [in at least three cases](#): the 5 April 2011 Directive ([2011/36/EU](#)) on trafficking of human beings – which extends the definition of 'exploitation'; the 13 December 2011 Directive ([2011/92/EU](#)) on sexual abuse of children; and the 12 August 2013 Directive ([2013/40/EU](#)) on attacks against information systems. However, Article 83(1)(3) has not been used in the EU legislative framework since the entry into force of the Lisbon Treaty.

FURTHER READING

EPRS, [The fight against terrorism](#): Cost of Non-Europe Report, 2018

EPRS, [Cyber-attacks: not just a phantom menace](#), 2018

EPRS, [Organised crime and corruption](#): Cost of Non-Europe Report, ([annex 1](#)) ([annex 2](#)) ([annex 3](#)), 2017.

6. Strengthening cooperation on terrorism



Since the entry into force of the Lisbon Treaty and the introduction of Article 84 of the Treaty on the Functioning of the European Union (TFEU), crime prevention has been an important aspect of law enforcement cooperation at EU level. With terrorism being one of the most important concerns of European citizens, the use of Article 84 in helping its prevention is a potentially valuable tool.

Current challenges and policy debates

According to the [Spring 2018](#) standard Eurobarometer, terrorism is among Europeans' [top concerns](#) and in the 2018 Eurobarometer [Survey 89.2](#) of the European Parliament, 77 % of respondents said that they wanted the European Union to intervene more in the fight against terrorism.

There are already various national systems in place for collecting information on suspected criminals, such as the French *fichier des personnes recherchées* (FPR), which includes the 'fiches S' or the *fichier des signalements pour la prévention de la radicalisation à caractère terroriste* (FSPRT), and these have to [comply](#) with data protection rules and fundamental rights. One subject of debate is the possible creation, at EU level, of a dedicated surveillance system to identify persons suspected of ties with terrorist organisations. Indeed, already in 2017, [Professor Peter Neumann](#), former director and senior fellow of the King's College International Centre for the Study of Radicalisation (ICSR) and former-[OSCE special representative on radicalisation](#), [called](#) for the creation of an EU preventive database related to terrorism. However, the creation of EU-level crime prevention databases of this type has been criticised in certain Member States in the past. In Germany, for instance, in 2008, the CSU political party had expressed its [preference](#) for an EU passenger name record (PNR) system inspired by the German *Gefährderdatei* rather than the system ultimately proposed by the European Commission for the subsequent directive, even though it considered such a database useful in principle.

Today, cultural, political and legal differences among Member States still pose two major challenges to an EU-level anti-terrorist surveillance system. The first is both political and technical: the creation of such a database would require the organisation of a counter-terrorist administrative police system amongst all Member States. The second results from the lack of a definition of what is meant by 'crime prevention'. Article 84 explicitly excludes any kind of harmonisation of national laws and regulations. Preventive policing must therefore be considered as a [strictly Member State competence](#) and has to be limited to a cooperation tool.

In addition, on the specific issue of counter-terrorism, Member States consider it to be a matter of national prerogative, as it very often involves a mix of classical police investigation techniques and surveillance with intelligence, and sometimes counter-insurgency methods, depending on the country. Due to their particular nature, preventive information exchanges are made on a voluntary basis, bilaterally or through Europol's counter-terrorism centre ([ECTC](#)). Alternatively, they may take place at a different level, in intelligence-related structures such as the counter-terrorism group ([CTG](#)). Preventive data can also be collected through the European criminal records information exchange system ([ECRIS](#)) or through the Schengen information system ([SIS](#)).

Scope for action

Position of the European Parliament on terrorism prevention

In its 11 February 2015 resolution on anti-terrorism measures ([2015/2530\(RSP\)](#)), the European Parliament, having regard notably to Article 84 TFEU, underlined the need to exchange information between Member States and EU agencies, focusing on [Europol](#) and [Eurojust](#), but also on the [SIS](#), the [PNR](#) and the advanced passenger information system ([APIS](#)). However, the Parliament also insisted on the necessity to respect a person's fundamental rights, notably in terms of data protection. In general, the European Parliament, for example in its resolution of 3 October 2017 on cybercrime ([2017/2068\(INI\)](#) para. P), follows the 2015 [Schrems](#) judgment of the Court of Justice, which considers that mass surveillance is a violation of fundamental rights.

Possible actions?

Creating a terrorism prevention database at EU level should be feasible in principle, as the current structures allow it on a voluntary basis and through its agencies. However, adopting a specific piece of legislation would require adaptation to specific data protection cultures and to national legal frameworks. Data

exchange on terrorism prevention has so far been possible through Europol's secure information exchange network application ([SIENA](#)), the IT-platform allowing Member States and associated countries to share data on criminal issues. The efficiency of SIENA and of Europol's support to crime prevention was confirmed by the French-Belgian [Task-force Fraternité](#), after the November 2015 Paris attacks. In order to go further, and given the political and legal issues related to databases at national level, and the Article 84 restrictions on harmonisation, one solution could be to organise a database on terrorism prevention on a voluntary basis in cooperation, and not in competition, with Europol.

The legal basis

Article 84 TFEU

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish measures to promote and support the action of Member States in the field of crime prevention, excluding any harmonisation of the laws and regulations of the Member States.

[Article 84 TFEU](#), for the first time since the creation of the area of freedom, security and justice, provides an EU competence in the field of crime prevention, in accordance with the ordinary legislative procedure. Before the entry into force of the Lisbon Treaty, crime prevention measures were adopted as part of funding programmes, such as the European Crime Prevention Network ([EUCPN](#)), originally established by the Council Decision ([2001/427/JHA](#)) of 28 May 2001. The conclusions of the European Council in [Tampere](#) of 15 and 16 October 1999 (paragraph 41) launched the idea of a crime prevention framework at EU level. Article III-272 of the Treaty establishing a Constitution for Europe (TEC) was the first attempt to integrate this principle in the Treaties, with wording which is very close to that of Article 84 TFEU. More generally, the source of Article 84 TFEU might be found in [Article 3\(2\) of the Treaty on European Union \(TEU\)](#), which explicitly refers to 'prevention and combating of crime'. [Article 67\(3\) TFEU](#) provides that 'the Union shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia.'

Use of legal basis to date

Article 84 TFEU has been (and continues to be) used as a legal basis for several EU laws, programmes and ongoing legislative proposals. It has allowed for the adoption of [several programmes and pieces of legislation](#), resulting in reinforced police cooperation through crime prevention at EU level. Funding instruments such as the [Internal Security Fund \(ISF\) Borders and Visas](#), [ISF Police](#), the Asylum, Migration and Integration Fund ([AMIF](#)) or the [Justice Programme 2014-2020](#) have been organised thanks to Article 84. The new ISF will be also [re-organised](#) on the same basis. The European Parliament has adopted several resolutions on crime prevention-related issues, such as the fight against cybercrime [[2017/2068\(INI\)](#)], the fight against corruption [[2015/2110\(INI\)](#)], anti-terrorism measures [[2015/2530\(RSP\)](#)], and the renewal of the EU internal security strategy [[2014/2918\(RSP\)](#)]. In the case of the [EUCPN](#), the original legislation was repealed under Article 84 provisions, by Council Decision [2009/902/JHA](#) of 30 November 2009.

FURTHER READING

EPRS, [The fight against terrorism](#): Cost of Non-Europe Report, 2018.

EPRS, [Organised crime and corruption](#): Cost of Non-Europe Report, ([annex 1](#)) ([annex 2](#)) ([annex 3](#)), 2017.



7. Strengthening the powers of Eurojust

The EU body for judicial cooperation, Eurojust, plays a key role in facilitating and coordinating investigations and prosecutions conducted by Member States in relation to serious cross-border crimes such as terrorism or cybercrime. However, there is still scope for more EU action. The Lisbon Treaty makes it possible to empower Eurojust to initiate criminal investigations and propose the initiation of prosecutions by national authorities.

Current challenges and policy debates

A European Union without borders offers multiple opportunities, but also comes with a number of challenges. One such challenge is to protect European citizens from various forms of serious crime spreading across borders. Security is a growing concern for [Europeans](#), who see terrorism and organised crime as the main threats to the EU. Citizens are increasingly [worried](#) about cybercrime, which accounts for more than [half of all crimes](#) in some Member States. Moreover, organised crime groups control illicit markets generating around €110 billion annually (1 % of EU gross domestic product – GDP), according to [estimates](#). Organised crime is closely linked to corruption, which [costs](#) the European economy another €120 billion every year. In this context, cooperation among national police and judicial authorities is of the utmost importance. However, successfully investigating and prosecuting cross-border crimes involving several Member States can be challenging, as Member States have different legal cultures and judicial systems. In 2002, the EU set up a specific body – Eurojust – to overcome the difficulties that can arise in cross-border cases and to resolve possible conflicts of jurisdiction. Since then, Eurojust has gained the trust of national judicial authorities and positioned itself as a key player in EU criminal justice cooperation: between 2002 and 2017, the number of cases brought to it annually [increased](#) from 202 to 2 550. In 2018, the increase was 19% compared with 2017, with Eurojust involved in more than 6 500 new and ongoing cases including investigations of serious organised cross-border crime. Eurojust also contributes to protecting the EU's financial interests – an area where it could play a reinforced role, alongside the newly established [European Public Prosecutor's Office](#) (EPPO).

Scope for action

Protecting the financial interests of the European Union

In a number of [resolutions](#), the European Parliament has reiterated the need to do more to protect EU financial interests against fraud and corruption. Until now, the cases of fraud affecting the EU budget have been investigated by the European Anti-Fraud Office (OLAF) – an administrative body relying on Member States to initiate prosecutions, resulting in a very low conviction rate. After the adoption of the Lisbon Treaty, two options were [considered](#) to ensure that cases are brought to court: extending the mandate of Eurojust to the initiation of investigations, and creating a new, independent body with investigatory and prosecutorial powers – EPPO. The creation of EPPO was finally [agreed](#) in 2017, under enhanced cooperation involving 22 Member States. EPPO will have exclusive competence for crimes against EU financial interests ('[PIF crimes](#)'), but Eurojust could play an important [complementary role](#). As Eurojust will remain competent with respect to PIF crimes in cases involving Member States not participating in the EPPO, it could be granted a binding power to initiate investigations in those cases.

Reinforced mandate in counter-terrorism and other areas of serious cross-border crime

Even though the European Parliament has [called](#) for an assessment of the need to extend the powers of EPPO to organised crime, and the European Commission has [proposed](#) to grant EPPO a counter-terrorism competence, its current mandate is limited to 'PIF crimes'. Meanwhile, Eurojust has a broad mandate covering thirty serious crimes [listed](#) in its new regulation (identical to those covered by Europol). It can therefore be [argued](#) that granting Eurojust a binding power to initiate investigations in all these areas could help the global EU objective of combating serious cross-border crime and ensuring security. Moreover, such a power [would allow](#) Eurojust to work in a more proactive and strategic way, contributing to the development of an EU criminal justice agenda.

A single agency for police and judicial cooperation?

In a 2017 [resolution](#), the European Parliament considered that, to upgrade EU capacities to combat terrorism and international organised crime, 'Europol and Eurojust should receive genuine investigation

and prosecution competences and capabilities, possibly by a transformation into a true European Bureau of Investigation and Counter-Terrorism, with due parliamentary scrutiny'. Back in 2011, some [academics](#) raised the idea of merging Europol and Eurojust into a single 'criminal justice cooperation' body, considering that the separation made at EU level between police and judicial authorities is artificial, if not counter-productive.

Better use of existing tools

As noted in a 2018 [Cost of non-Europereport](#) on counter-terrorism, some European added value could also lie in increased and more effective use of existing tools, without the creation of new powers. In this regard, the Parliament has [called](#) for greater use of [joint investigative teams](#) under the auspices of Eurojust. Another way forward could be the creation of technical centres of excellence, offering expertise and technical capacity to national authorities. There is already one example: the [European Judicial Cybercrime Network](#) supported by Eurojust and helping prosecutors and judges dealing with cybercrime investigations.

The legal basis

[Article 85\(1\)\(a\) TFEU](#)

1. Eurojust's mission shall be 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 bases [...]

[...] the European Parliament and the Council, by means of regulations adopted in accordance with the ordinary legislative procedure, shall determine Eurojust's structure, operation, field of action and tasks. These tasks may include: (a) the initiation of criminal investigations, as well as proposing the initiation of prosecutions conducted by competent national authorities, particularly those relating to offences against the financial interests of the Union; [...]

The first legal basis for Eurojust was introduced in the Nice Treaty with [Article 31\(2\) TEU](#). The [novelty](#) of Article 85 TFEU is the possibility under paragraph (1)(a) to grant Eurojust the mandate to initiate criminal investigations and to propose the initiation of prosecutions conducted by Member State authorities, in particular (but not only) for 'offences against the financial interests of the Union'. There is a clear distinction between investigations and prosecutions: for the latter, Eurojust can only propose their initiation. Moreover, paragraph (2) clarifies that for prosecutions, 'acts of judicial procedure shall be carried out by the competent national officials'. The true potential thus lies in the power to initiate investigations, binding upon Member States. While some [authors](#) have considered that Eurojust could only be granted a (binding) power to request that national authorities launch investigations, other [commentators](#) have suggested a maximalist interpretation, meaning that Eurojust could be empowered to initiate investigations itself.

Use of legal basis to date

Eurojust was [set up](#) by Council Decision 2002/187/JHA, updated in 2008 (providing it with a more 'proactive' role). Following a 2013 [proposal](#), based on Article 85 TFEU, a new [regulation](#) was agreed in 2018, modernising Eurojust's rules and streamlining its functioning and structure. However, it is not granted any binding powers. In relation to 'PIF crimes', the Commission [has estimated](#) that even the most far-reaching reform of Eurojust, making maximum use of Article 85(1)(a), could not address the present shortcomings in the prosecution of Union fraud. The creation of EPPO was deemed a more efficient solution as it will have full powers to investigate and prosecute. As [called](#) for by the European Parliament, the new Eurojust regulation envisages a close relationship between Eurojust and EPPO (Article 50). The regulation enables Eurojust to exercise its tasks at the request of Member States or EPPO, but also 'on its own initiative'.

FURTHER READING

EPRS, [EU Agency for Criminal Justice Cooperation \(Eurojust\)](#), 2018.

Policy Department for Citizens' Rights and Constitutional Affairs, [The inter-agency cooperation and future architecture of the EU criminal justice and law enforcement area](#), 2014.

Policy Department for Citizens' Rights and Constitutional Affairs, [The future of Eurojust](#), 2012.



8. Fostering common investigative techniques

Although some 18 expert groups share common investigation techniques at present, the EU legislature could still use the mandate of the Lisbon Treaty to a greater extent and adopt common rules in the area of police cooperation. The provisions of Article 87(2)(c) TFEU in particular specifically address the issue of common investigative techniques, an area that remains challenging, even in a less intergovernmental context.

Current challenges and policy debates

EU-level cooperation on police cooperation can be traced back to the establishment, in 1976, of the [TREV](#) group (an acronym from the French words *terrorisme, radicalisme, extrémisme et violence internationale*). Indeed, the origins of police cooperation at EU level are to be found in the fight against terrorism, an issue that according to the spring 2018 standard [Eurobarometer](#) is still a major concern for European citizens (29%), whereas crime per se is of major concern to only 10%. Member States, however, come up against internal issues relating to the territorial scope of investigative teams and the actual powers of the law enforcement authorities. [Investigative techniques](#) are not only a political and legal issue – they also vary depending on national societal and cultural trends. The challenge is therefore to arrive at an approximation of those investigative techniques and to frame common policies in this area. However, the principle of organising networks or expert groups on investigative techniques in the area of serious forms of organised crime is long established.

Existing networks and expert groups

There are currently [18 networks](#) and expert groups sharing common investigative techniques at EU level, on either formal or informal bases. Eight of these were set up on a formal basis and established under the pre-Lisbon framework, through Council decisions. These include the [ATLAS](#) network on cooperation between special intervention units; the [CARPOL](#) network on cross-border vehicle crime; the European network for the protection of public figures ([ENPPE](#)), established in [2002](#); the group of experts for major sport events ([MSE](#)), initially based on a [2002](#) Council decision; the Liaison officers management services, established in [2003](#) to facilitate the action of police liaison officers posted abroad and their contacts with the host country or organisation; and the European crime prevention network ([EUCPN](#)). Judicial cooperation in criminal matters has been secured by the [European arrest warrant](#), [Joint investigation teams](#), and the [European investigation order](#). Police cooperation is organised through [Europol](#), and [special investigation techniques](#) are addressed via the [Council of Europe](#) and the [United Nations](#).

Scope for action

Lack of definitions

Establishing common investigative techniques at EU level could be key to deepening and strengthening police cooperation and thus addressing the challenges posed by serious organised crime. There are not yet any official definitions of common investigation techniques at EU level. The Council has expressed an interest in improving or changing established networks and systems and has encouraged the European Commission to propose new provisions, for instance on [ATLAS](#), explicitly calling for an agreement and not amended or new legislation through Article 87(2)(c) TFEU. The Commission has tried to extend the common investigation issue to the question of 'hot pursuit' in a Schengen [context](#), based on Article 40 of the [Schengen Convention](#), on [Article 25](#) of the [Prüm](#) Convention and on [Article 89 TFEU](#), which refers to [Articles 82](#) and 87 TFEU.

Position of the European Parliament

The European Parliament has called on the European Commission in several resolutions, to draft proposals on common investigation techniques. For instance, in its 20 October 2011 [resolution](#) on organised crime in the European Union, Parliament called on the Commission to draft a study on investigative practices, such as telephone interception, environmental interception, search procedures, delayed arrest, delayed seizure, undercover operations and controlled and supervised delivery operations employed by the Member States to fight organised crime, and to submit a proposal for a directive based on Article 87(2)(c) by the end of

2014. The Commission did not follow up on the resolution. In its 23 October 2013 [resolution](#) on organised crime, corruption and money laundering, Parliament called again on the Commission to submit a proposal for a directive on common investigative techniques based on Article 87(2)(c) by the end of 2014, likewise, this was not followed up by the Commission. In its 25 October 2016 [resolution](#) on the fight against corruption, Parliament called on the Commission to prepare a study on Member States' investigative techniques best practices, in order to develop 'European legislation which is effective and pioneering'.

Outlook

The only way that the provisions of Article 87(2)(c) would actually be used would be in a situation where national tools were insufficient. Given the Member States' reluctance, the establishment of common investigative techniques will result from exceptional circumstances that could not be addressed at a cross-border level with the current national tools or existing cooperation networks.

The legal basis

Article 87(2) TFEU

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish measures concerning:

(a) the collection, storage, processing, analysis and exchange of relevant information;

(b) support for the training of staff, and cooperation on the exchange of staff, on equipment and on research into crime-detection;

(c) common investigative techniques in relation to the detection of serious forms of organised crime.

[Article 87 TFEU](#) is the core basis on EU [police cooperation](#), 'involving all the Member States' competent authorities, including police, customs and other specialised law enforcement services in relation with the prevention, detection and investigation of criminal offences', under the provisions of its paragraph 1. Two types of police cooperation are made possible by Article 87 TFEU.

Operational police cooperation is organised under the provisions of Article 87(3): measures are adopted unanimously by the Council, under a special legislative procedure, after consulting the European Parliament. Non-operational police cooperation is based on the provisions of Article 87(2): these measures are adopted under the ordinary legislative procedure, notably establishing provisions on data and information-sharing [Article 87(2)(a)], on staff training and exchange [Article 87(2)(b)] and on common investigative techniques in relation to the detection of serious forms of organised crime [Article 87(2)(c)]. Before the Lisbon Treaty, police cooperation was organised under the provisions of [Article 30 TEU](#), the type of measures being defined in [Article 34 TEU](#). Article 87(2) is a brand new process in terms of EU criminal law, as it allows the ordinary legislative procedure to be used for the adoption of most police cooperation measures. However, while Articles 87(2)(a) and (b) are used quite often, Article 87(2)(c) is challenged by the fact that cooperation on investigative techniques can be carried out through [Europol](#), without necessitating any kind of harmonisation or approximation of laws or through formal or informal networks, without needing to legislate in the Lisbon framework.

Use of legal basis to date

Article 87(2)(c) has never been used.

FURTHER READING

Policy Department for Citizens' Rights and Constitutional Affairs, [Criminal procedural laws across the European Union – A comparative analysis of selected main differences and the impact they have over the development of EU legislation](#), 2018.

9. Boosting cross-border criminal justice and police work



The free movement of persons and abolition of border checks within the European Union can be exploited by criminals – hence the need to allow national criminal justice bodies and police to pursue cross-border operations. Although limited possibilities exist under the Schengen Agreement, the fully fledged legal basis provided under Article 89 of the Treaty on the Functioning of the European Union (TFEU) has still to be explored in full.

Current challenges and policy debates

Since the mid-1990s, border controls between EU Member States have been progressively abolished by the [Schengen Agreement](#), allowing for free movement of persons and goods. Unfortunately this also involves free movement of crime, and to compensate for this, the agreement allows national police forces to cross the borders of neighbouring Member States in order to pursue fleeing criminals. This is particularly relevant for the Benelux (Belgium, Netherlands and Luxembourg), French-German and Polish-German borders. In the latter area, cross-border 'hot pursuit' has become a [routine operation](#) since Poland's accession to Schengen (rising from 8 cases in 2008 to 55 cases in 2015). The Schengen Agreement also allows national police forces to carry out cross-border surveillance in another Member State of suspects in extraditable criminal offences. However, [in practice](#), this possibility is subject to substantial limitations due to different national laws: criminals can only be pursued if caught in the act, and then only for a limited list of offences, which may be interpreted differently in various Member States. The Member State on whose territory a pursuit takes place must be informed no later than when police officers cross the border, but the lack of a common radio communication network makes this task difficult. Furthermore, cross-border 'hot pursuit' also faces other limits such as a ban on entry into private homes and on the use of force for apprehending a suspect, as well as limitations on police officers' powers to make an arrest on foreign soil. Finally, the Schengen rules cover only 'hot pursuit' on land, and not in the air or on water.

Scope for action

Broadening the scope of 'hot pursuit'

One possible [option](#) could extend 'hot pursuit' to include not only criminals caught in the act, but also suspects sought for an already committed crime which can lead to extradition. This is already [provided for](#) and is [extended](#) even further in the Benelux countries, as well as in the [German-Dutch Treaty](#). A wider scope could [further include](#) air and water borders for pursuit over difficult terrain and territorial waters (at present the Schengen Agreement rules limit these to land borders). A wider territorial scope could also cover areas beyond the immediate border zone, as in the [German-Polish Treaty](#), which sets no territorial limit for 'hot pursuits' and includes air and water, and in the [Benelux countries](#).

Harmonising communication standards

An [attempt](#) could be considered to create a genuine common technical standard replacing the two existing emergency service digital radio systems standards used in different Member States (TETRA-norm and TETRAPOL) to enable direct communication, along with existing police and customs cooperation centres currently dealing with cross-border communication between police forces. In July 2018, the Council radio communications experts group [suggested](#) incorporating both radio systems after the end of their life cycles within an integrated system.

Harmonising police equipment standards

Varying definitions of standard basic police equipment and the service weapons officers may carry when pursuing criminals over borders could also be further [harmonised](#). At present, some countries limit the weapons they accept on their territory, allowing only categories of weapons carried by their own police officers, and requiring foreign police officers to leave prohibited service weapons in their vehicle and not use them. Also, Schengen Agreement rules on 'hot pursuit' only allow the use of service weapons on foreign soil in cases of self-defence.

Improving existing networks

The cross-border cooperation activities of existing networks could be improved, e.g. the ATLAS special intervention units network (EU Member States plus Norway, Iceland and Switzerland), set up in 2001 after

the September 11 attacks. In 2017, the [Council](#) asked the Commission to provide financial and human resources for a permanent ATLAS support office (ASO) by 2019, while not interfering in Europol's activities, and to explore further initiatives for better cooperation within ATLAS in crisis situations. In 2018, Council [discussions](#) suggested pooling and sharing specialised equipment and specific capabilities and setting up common training facilities on the model of the Benelux countries, while also mapping specific Member State capabilities at EU level.

Strengthening Europol's mandate

The Commission's January 2020 [draft work programme](#) envisaged a regulation to strengthen Europol's mandate during the fourth quarter of 2020. According to the [Commission](#), this would 'improve EU police cooperation and information exchange by modernising the law enforcement cooperation framework and simplify the operational cooperation among Member States'.

Cross-border gathering of evidence

There have been [suggestions](#) to improve cross-border evidence-gathering by allowing Member State criminal justice investigation authorities (police, customs and prosecuting authorities) to actively gather evidence in other Member States, while respecting the legislation of the host country and complying with agreed EU minimum procedural guarantees. However, practitioners at EU level have not reached consensus on the [definition of evidence](#) relating to money in bank accounts and there is [no agreement](#) on whether illegally obtained evidence in another State can be used as intelligence to start an investigation.

The legal basis

Article 89 TFEU

The Council, acting in accordance with a special legislative procedure, shall lay down the conditions and limitations under which the competent authorities of the Member States referred to in Articles 82 and 87 may operate in the territory of another Member State in liaison and in agreement with the authorities of that State. The Council shall act unanimously after consulting the European Parliament.

The current Article 89 TFEU replaced the pre-Lisbon [Article 32 TEU](#), introducing the involvement of the European Parliament to the adoption of EU acts in this area. Although Article 89 allows the adoption of rules for law enforcement operations across borders by police and judicial authorities, it remains based on the premise of Member States' territorial integrity, which is seen as a basic principle. Actions by foreign authorities in another Member State are subject to the host Member State's consent in each case, with the possibility for its courts to rule on the legality of such actions. Foreign police officers must abide by the laws of both their Member State of origin and the host Member State, and are criminally responsible in the host country. EU-level acts in this field are adopted under a [special legislative procedure](#) in which the Council decides unanimously and the European Parliament is only consulted. However, a [passerelle clause](#) allows for the potential use of the ordinary legislative procedure. Ireland (and previously the UK) can in some cases opt in or opt out under [Protocols No 21 and No 22](#), while Denmark has a permanent opt-out.

Use of legal basis to date

Article 32 TEU was the basis for two Council decisions: [one](#) converting into EU law the Prüm Treaty on sharing certain forms of data by law enforcement, and a [second](#) aimed at improving cooperation between Member States' special intervention units in crisis situations. Article 32 was also the basis for an earlier 2005 Commission [proposal](#) to amend the Schengen Agreement through better police cooperation between Member States, removing the land border limitation for 'hot pursuit', addressing cross-border deployment of non-compatible equipment, creating the obligation to establish permanent cooperation structures in border regions, and sharing data. This proposal overlapped with the Prüm Treaty decision and became [obsolete](#), although the possibility for widening cross-border pursuit was [not](#) included in the Prüm Treaty decision. Article 89 TFEU is [one](#) of the legal bases for a 2011 Council Decision on a Protocol on Liechtenstein's accession to the Swiss-EU agreement on the Schengen Agreement provisions on judicial cooperation in criminal matters and police cooperation.

FURTHER READING

EPRS, [Schengen area: Update and state of play](#), 2016.

EPRS, [Challenges to the Schengen area](#), 2016.

10. Freezing terrorist assets under AFSJ



Most Europeans believe terrorism is an important security challenge for the EU. The Lisbon Treaty conferred explicit competence on the EU to adopt – preventively – restrictive measures against individuals and entities suspected of terrorism. However, interinstitutional litigation and confusion have ensued, as not one but two Treaty legal bases in different fields (foreign policy and internal security) are applicable to such sanctions. The EU is yet to adopt the asset-freezing framework provided for by Article 75 TFEU in the internal security field.

Current challenges and policy debates

A large majority of EU citizens consider terrorism a [key challenge](#) for the EU. Some [estimates](#) reveal that, between 2000 and 2016, 544 EU nationals and about 107 non-EU nationals were killed in terrorist attacks in the EU; and another 1 573 EU citizens lost their lives in terror attacks outside the EU. Jihadi terrorism is responsible for the great majority of victims in the EU and globally; far-left and far-right attacks have caused a lot fewer victims. It is estimated that terrorism has [cost the EU](#) about €185 billion in lost GDP between 2004 and 2018. While Member States have primary responsibility for counter-terrorism, the Lisbon Treaty integrated it in EU foreign policy (CFSP) and in its internal security actions (area of freedom, security and justice, AFSJ). The EU [contributes](#) in many ways to combatting terrorism, including through measures against terrorist financing. The EU [implements](#) the main United Nations Security Council (UNSC) anti-terrorist [sanctions](#) regimes consisting of arms embargos, travel bans and asset freezes against suspected individuals and legal persons, groups or non-state actors. Whereas fast and effective [asset-freezing measures](#) seem necessary to prevent terrorists from raising and moving funds, critics argue these infringe key fundamental rights, such as the targeted person's due process rights, although legal challenges have led to procedures improving and EU sanctions can undergo full judicial review by the EU Court of Justice (CJEU). The administrative (preventive) nature of sanctions is also contested, as they may last for years, with far-reaching human rights restrictions.

Scope for action

In a 2009 [resolution](#), the European Parliament stated that 'a legal framework should be established under Article 75 TFEU for measures with regard to capital movements and payments, such as the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities, including ... for restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban'. For Parliament, the distinction between external and internal terrorist threats was difficult to justify, especially when sanctions could infringe the rights of EU citizens and residents. Moreover, unlike the CFSP-based measures used until then, Article 75 TFEU 'would allow a proper level of democratic accountability' as Parliament is co-legislator.

In 2015, the Commission stated it would explore the need for [additional measures](#) in the area of terrorism financing, including freezing of terrorist assets under Article 75 TFEU, which could provide the basis for a new EU regime for freezing assets of EU 'internal' terrorists (persons/entities suspected of terrorist intent against the EU or a Member State, and not linked to international terrorism). In its 2016 [action plan](#) on terrorist financing, the Commission promised to [assess](#) the [need](#) for a supplementary administrative system for freezing the assets of EU internal terrorists, based on Article 75 TFEU, to complete the 'effective asset freezing arrangements in line with the UN system as concerns persons with links to international terrorism'. Such an EU regime would fill important gaps, as not all Member States have established asset-freezing regimes, and existing national regimes differ in many ways. The system would set common standards on the assets to be frozen, as well as the remedies and safeguards applicable. However, in December 2016, the Commission [concluded](#) that no further [action](#) was required, due to the limited added value of a new Article 75-based regime: as the biggest threat to EU security remains jihadi terrorism, existing EU sanctions regimes under CFSP already fulfil the objective. Also, for EU internal terrorist groups, [EU criminal law](#) offers increased possibilities for the freezing of terrorist assets, providing 'more options to block funds linked to terrorism than in the past, with more safeguards than administrative asset-freezing while still enabling quick and effective action.' The Commission pledged to review regularly the need for measures based on Article 75.

The legal basis

Article 75 TFEU

Where necessary to achieve the objectives set out in Article 67, as regards preventing and combating terrorism and related activities, 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 of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities.

The Council, on a proposal from the Commission, shall adopt measures to implement the framework referred to in the first paragraph.

The acts referred to in this Article shall include necessary provisions on legal safeguards.

Article 75 TFEU provides for the adoption of a 'framework for administrative measures with regard to capital movements and payments' where needed to achieve the AFSJ objectives as regards preventing and combating terrorism. Compared to former [Article 60 TEC](#) covering restrictions on capital movements and payments in respect of third countries, Article 75 refers to natural or legal persons, groups or non-State entities. It arguably establishes an EU competence, lacking prior to the Lisbon Treaty, to adopt financial sanctions against suspected EU internal terrorists. The Council and Parliament adopt the framework by means of regulations under the ordinary legislative procedure; then the Council, on the Commission's proposal, takes implementing decisions. Article 75 TFEU is a shared competence, excluding Member State action once the EU acts. The AFSJ opt-out of [Denmark](#) (but not [Ireland](#)) applies (while the [UK](#) previously had an opt-out, it had declared its [intention](#) to opt into any proposal under Article 75 TFEU). Experts have emphasised the overlap with [Article 215\(2\) TFEU](#) (also introduced by the Lisbon Treaty to allow for sanctions against individuals or groups, in implementation of a CFSP decision), insofar as the measures refer to a restriction of financial resources to serve anti-terrorism purposes. Post-Lisbon, the EU has based terrorist asset freezes against individuals/entities on Article 215(2) TFEU. Parliament took the Council to court for using Article 215(2) instead of 75 TFEU as legal basis for [amending](#) a Council Regulation instituting asset freezes against Al-Qaeda. The [CJEU](#) decided that Article 215 TFEU was the correct legal basis to implement sanctions based on a CFSP decision, but it did not clarify when Article 75 may be used. Some academics claim this judgment provides [stability](#) in the EU legal order, while others [emphasise](#) a 'decrease in democratic accountability'.

The EU gives effect to the main UNSC sanctions regimes by means of CFSP instruments. **Firstly**, [common position 2002/402/CFSP](#) implemented the UNSC [1267](#) sanctions regime (Al-Qaeda) until its repeal in 2016 by [Council Decision \(CFSP\) 2016/1693](#), which extends sanctions to ISIL/Da'esh (mandated by the [UNSC](#)) but also introduces the option of 'autonomous' EU sanctions against persons/entities associated with ISIL/Da'esh and Al-Qaeda, besides those on the UN list; **EU nationals** are covered, if they have a link to international terrorism (e.g. foreign fighters). As asset freezes against external actors are an EU competence, the CFSP decision is implemented by: [Council Regulation \(EC\) No 881/2002](#) instituting asset freezes against those listed by the UNSC and [Council Regulation \(EU\) 2016/1686](#) applying to those designated by the EU only. Both regulations are now based on Article 215(2) TFEU, whereas pre-Lisbon, such asset freezes required the combination of Articles [60](#), [301](#) and [308](#) TEC. **Secondly**, [common position 2001/931/CFSP](#) (in force) gives effect to UNSCR [1373](#) by creating an autonomous EU sanctions regime against persons/entities linked to international terrorism (e.g. Hezbollah's military wing) but also those active in the EU (e.g. in Northern Ireland). [Council Regulation \(EC\) 2580/2001](#) implements the common position as regards asset freezes of external terrorists. As for EU [internal](#) terrorists, the EU had no competence to freeze their assets (provided now arguably by Article 75 TFEU), so Member States resorted to police and judicial cooperation; this is why the common position has a 'Third Pillar' legal base (ex [Article 34](#) TEU) and a CFSP one (ex [Article 15](#) TEU).

Use of legal basis to date

Article 75 TFEU has not been used so far.

FURTHER READING

EPRS, [The fight against terrorism](#), 2018.

EPRS, [Counter-terrorist sanctions regimes: Legal framework and challenges at UN and EU levels](#), 2016.



11. Improving administrative cooperation in the area of freedom, security and justice

The Lisbon Treaty gave the European Union (EU) the power to adopt measures to ensure administrative cooperation in the area of freedom, security and justice. The EU *acquis* in the area has grown considerably in recent years, in volume and as regards the cross-border dimension. Efficient administrative cooperation between Member States and the EU to implement and enforce that body of law is indispensable.

Current challenges and policy debates

The 1997 Treaty of Amsterdam established an [area of freedom, security and justice](#) that secures the free movement of people, providing for appropriate measures as regards border checks, asylum and immigration, as well as the prevention of and fight against crime. Two decades later, however, the European Union (EU) and its Member States are still facing major challenges in delivering this objective. Problems have been identified in upholding the rule of law and fundamental rights, fighting organised crime, terrorism and fraud, protecting external borders, and developing a common asylum policy.

Despite the growing cross-border dimension of areas covered by Title V of the Treaty on the Functioning of the European Union (TFEU), such as organised crime, terrorism and irregular migration, Member States' competence for dealing with these issues stops at their national boundaries. Furthermore, the legal framework, based on directives in the area of immigration and asylum, is characterised by a low level of harmonisation, causing non-uniform implementation. This limits progress on establishing a common European asylum system and efficient legal migration channels. In addition, decisions adopted by one Member State impact on all the others. This has been evident in the case of the [temporary reintroduction](#) of border controls by some Member States owing to threats to their public policy and internal security. Efficient implementation of EU legislation in these fields requires cooperation in terms of access to and the exchange of information and staff between the relevant departments of Member States and the EU. Furthermore, before the Commission took office in December 2019, its President-elect Ursula von der Leyen in [political guidelines](#) for the 2019-2024 European Commission stressed the need to improve cross-border cooperation to tackle gaps in the fight against serious crime and terrorism in Europe and to return to a fully functioning Schengen Area of free movement.

Scope for action

Exchange of information and administrative assistance

In May 2017, after the temporary reintroduction of internal border controls in some Schengen states, the Commission [recommended](#) a more coherent approach to managing temporary limits on free movement. It proposed that Member States develop and implement 'cross-border information exchanges with their neighbouring Member States to support joint actions to address threats to public policy or internal security in shared internal border areas'. In the field of the internal market in services, meanwhile, [experts](#) analysing administrative cooperation and the implementation of EU law have concluded that Member States need 'clear, legally binding obligations ... to cooperate effectively to make that market function properly'. This cooperation can include the transmission of information, databases, mutual information mechanisms or alert systems, mutual administrative assistance, joint administrative teams and joint operations. There are therefore parallels with the functioning of the Schengen area and the need to avoid limiting free movement with internal border controls. EPRS has produced two reports on the cost of non-Schengen, analysing the impact both on the [single market](#) and in the [area of justice and home affairs](#).

Peer review

As stated in the [European agenda on migration](#), as regards regular migration, the Commission will 'support Member States in promoting a permanent dialogue and peer evaluation at European level on issues such as labour market gaps, regularisation and integration – issues where decisions by one Member State have an impact on others'. Similar mechanisms could also be established in the area of EU asylum policy. Implementation and enforcement of the current *acquis* in the area of [legal migration](#) and [asylum law](#) could be improved through a peer review mechanism based on administrative cooperation between Member

States. Peer review can facilitate the exchange of best practice, enable mutual learning, foster policy dialogue and improve consistency.

Other possible areas

Some [academics](#) have suggested that Article 74 could be used as a legal basis for funding programmes when they are intended primarily to finance cooperation between administrations. Furthermore, in its [feasibility study](#) of September 2017, the Commission acknowledged that some categories of third-country nationals are not covered by any information system: those residing in the EU (residence-permit and residence-card holders), staying for longer than 90 days in any 180-day period (long-stay visa holders) or regularly crossing the external borders (local border-traffic permit holders). While the first two categories are now covered by the new proposal on the Visa Information System (VIS), the proposal does not include provisions on establishing a repository for local border-traffic permit holders.

The legal basis

Article 74 TFEU

The Council shall adopt measures to ensure administrative cooperation between the relevant departments of the Member States in the areas covered by this Title, as well as between those departments and the Commission. It shall act on a Commission proposal, subject to Article 76, and after consulting the European Parliament.

Based on former Article [66](#) of the Treaty establishing the European Community (TEC), Article 74 allows the Council to take decisions on administrative cooperation by qualified majority. It does not apply the ordinary legislative procedure, as the Parliament is just consulted. The reference to Article 76 means that a proposal can, in some circumstances, also be submitted by a quarter of Member States. The Treaties do not determine the type of legal act. The EU competence is shared with the Member States, with the subsidiarity and proportionality principles being applicable to any EU initiative. Denmark opts in on a case-by-case basis only in relation to measures building on the Schengen *acquis* (Article 4 of [Protocol No 22](#)) and Ireland (and previously the UK) opt in on a case-by-case basis for any measures adopted under this legal basis ([Protocol No 21](#)).

Use of legal basis to date

Legislative acts adopted

Article 74 TFEU has already been used in several fields in the area of freedom, security and justice. In 2004, an immigration liaison officers ([ILO](#)) network was established. ILOs are Member State representatives posted in a third country to facilitate measures taken by the EU to combat irregular immigration. In 2011, the European Asylum Support Office ([EASO](#)) was set up to enhance practical cooperation among Member States on asylum-related matters and to assist Member States in implementing their obligations under the common European asylum system. The mandate of the EU Agency for the Operational Management of large-scale IT Systems, [eu-LISA](#), which began operations in 2012, was [revised](#) in 2018. It supports Member States' efforts to achieve internal security in the EU through technology and is entrusted with the operational management of the second generation Schengen Information System ([SIS II](#)), [VIS](#) and [Eurodac](#), essential instruments in the implementation of the EU's asylum, border management and migration policies. Article 74 was also used as a legal basis for the establishment of SIS II and VIS and for establishing interoperability between EU information systems on [borders and visas](#) and in the area of [police and judicial cooperation, asylum and migration](#). The aim is to make more intelligent and targeted use of the information available in existing and future systems, by allowing national authorities to make the best possible use of existing data, detect multiple identities and counter identity fraud, and carry out rapid and effective checks.

FURTHER READING

EPRS, [Area of freedom, security and justice: Cost of Non-Europe](#), 2019.

EPRS, [Area of freedom, security and justice: Untapped potential](#), 2017.

EPRS, [The cost of non-Schengen: Civil liberties, justice and home affairs aspects](#), 2016.

12. European Green Deal



The European Green Deal, a programme proposed by the von der Leyen Commission and supported by the European Parliament, aims to make the EU a sustainable, fair and prosperous climate-neutral society by 2050 and address the climate and environment emergency.

Current challenges and policy debates

The [European Green Deal](#) is a strategic priority first outlined in the [political guidelines](#) of the Commission President, Ursula von der Leyen. It aims to make Europe the first climate-neutral continent by 2050, while boosting the competitiveness of European industry and ensuring a just transition for the regions and workers affected. Preserving Europe's natural environment and biodiversity, a 'farm-to-fork' strategy for sustainable food, and a new circular economy action plan are other key elements.

Key policy issues include intermediate emission reduction targets for 2030 and 2040, carbon pricing for additional economic sectors, a carbon border adjustment mechanism to prevent carbon leakage, financing of transition towards a climate-neutral, circular economy, and action to ensure a socially just transition.

The majority (52%) of respondents to the Eurobarometer survey [Parlemeter 2019](#) consider climate change to be the most important environmental issue today, followed by air pollution, marine pollution, deforestation and the growing amount of waste. Nearly six out of ten EU citizens believe that youth-led climate protests have had a direct policy impact both at EU level (59%) and in Member State politics (58%).

Scope for more EU action

The European Parliament [resolution of 15 January 2020 on the European Green Deal](#) advocates for a fundamental right to a safe, clean, healthy and sustainable environment and to a stable climate for all people living in Europe. It makes far-reaching proposals that can be achieved by revising existing EU legislation. As an example of a new initiative, Parliament calls for a green EU single market to boost demand for sustainable products, with transparent and harmonised product information and labelling to help consumers make healthy and sustainable choices.

The European Council's [strategic agenda 2019-2024](#), adopted in June 2019, sets out a vision for a climate-neutral, green, fair and social Europe. Key missions entrusted to the EU include further improvements to the urban and rural environment; enhancing the quality of air and water; promoting sustainable agriculture; and leading efforts to fight biodiversity loss and preserve environmental systems. The agenda stresses the need for a deep transformation of the EU economy and society to achieve climate neutrality, conducted in a way that is socially just and accommodates national circumstances.

A number of analysts consider the European Green Deal to be the new defining mission of the EU, comparable in significance to the EU single market. A [Bruegel](#) opinion piece considers that the European Green Deal can only be successful if the transition to a sustainable economy delivers growth, jobs and prosperity, and that a failure to deliver could severely damage the EU's legitimacy. It notes that the success of the European Green Deal ultimately depends on Member States' ownership and implementation of the common targets. [Notre Europe](#) considers the European Green Deal to be a radical transformation of society that needs a broad coalition, a narrative and flagships to succeed and overcome opposition, structured around three [complementary policy priorities](#): climate ambition to set the overall direction, innovation-based competitiveness to help EU industry develop world-leading clean energy solutions, and social justice to ensure that all Europeans can benefit from an inclusive transition. As regards flagship projects, it makes the case for a programme to renovate one million buildings to help people out of energy poverty and at the same time provide for economies of scale that can allow companies to innovate and cut costs.

The think-tank Bruegel identifies four [critical success factors](#) for the European Green Deal: a meaningful carbon price for all sectors; a sustainable investment strategy; support for disruptive green innovation; and compensation for any adverse social consequences of the transition that cannot be avoided. The Centre for European Policy Studies sets out recommendations regarding a [circular economy for climate neutrality](#), arguing that these two policies are mutually reinforcing. It calls for technology push and market pull policies and new methods of regulation adapted to the new and often as yet unknown business models required

for both the circular economy and low-carbon economy. The Centre on Regulation in Europe calls for deeper analysis of [distributional effects](#) of the green transition and policy measures to address them.

Another key issue is [financing](#) the transition to a sustainable, carbon-neutral, circular and just economy through the effective use of public funds (including the EU budget) in combination with a framework for promoting large-scale private investment in climate-friendly and circular products and technologies. The ongoing negotiations about the EU's 2021-2027 multiannual financial framework provide an opportunity to align the EU budget with the priorities of the European Green Deal. Bruegel points out that most of the public investment will need to be made at national level and proposes the inclusion of a [green investment clause](#) in the EU fiscal rules to facilitate deficit-financed green investment during the transition.

In a global economy, critical factors in the success of the European Green Deal include safeguarding the competitiveness of EU industry and promoting climate action on the part of the EU's trading partners. The effective design, in line with multilateral trade rules, of a carbon border adjustment mechanism to level the playing field between economies with different carbon prices is the subject of [political debate](#) and [legal analysis](#). A recent *Financial Times* article advocates consolidation and streamlining of the EU's development finance and climate activities outside Europe, in order to achieve global leadership on decarbonisation.

The legal basis

Article 192 TFEU

1. *The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, shall decide what action is to be taken by the Union in order to achieve the objectives referred to in Article 191.*

Articles 191 to 193 TFEU form the legal basis for EU policy on the environment and climate change. Article 191 sets out the objectives and general principles of EU environment policy (precaution, prevention, rectification at source, and polluter pays). Article 192(1) is the legal basis for the adoption of EU legislation in the field of environment under the ordinary legislative procedure (OLP). However, Article 192(2) lists a number of areas that are exempt from the OLP and require unanimity in the Council. It contains a *passerelle* clause that makes it possible to move future decision-making from this special legislative procedure to the ordinary legislative procedure. Article 192(3) provides for the adoption of action programmes through the OLP. Article 192(4) gives Member States responsibility for financing and implementation. Article 192(5) seeks to avoid disproportionate costs to Member States by providing for temporary derogations or financial support from the Cohesion Fund. Finally, Article 193 allows Member States to take environmental protection measures that go beyond standard EU environmental policy.

Use of legal basis to date

Article 192(1) has been used as the legal basis of most of EU environmental and climate policy, notably the EU 2030 climate and energy framework. Key legislative acts adopted under this article include EU legislation on [emission trading](#), [effort sharing](#), emissions from [land use and forestry](#), [governance of the energy union](#), CO₂ emissions of vehicles ([cars and vans](#) and [heavy-duty vehicles](#)), [plastics](#), [waste](#) and [air quality](#). The special legislative procedure of Article 192(2)(c) has not been used so far, and the *passerelle* clause it contains has never been activated. Article 192(3) was used as the legal basis for the [seventh EU environment action programme](#). Article 192(5) has yet to be used.

FURTHER READING

EPRS, [The von der Leyen Commission's priorities for 2019-2024](#), briefing, January 2020.

EPRS, [Just transition in EU regions](#), At-a-glance note, January 2020.

DG IPOL, [EU Environment and Climate Change Policies: State of play, current and future challenges](#), study, 2019.

DG IPOL, [European policies on climate and energy towards 2020, 2030 and 2050](#), briefing, 2019.

EPRS: [EU policies – Delivering for citizens: Environmental protection](#), briefing, 2019.

13. European climate emergency office



In November 2019, the European Parliament declared a climate and environmental emergency, calling for urgent action to fight and contain the threat, better alignment of EU legislative and budgetary proposals with the targets of the Paris Agreement and a thorough reform of relevant EU policies.

Current challenges and policy debates

Recent scientific publications, notably the [IPCC](#) special report on global warming of 1.5 °C, have highlighted the dangers of a rapidly warming world and the expected consequences for agriculture, food supply, water, [human health](#), ecosystems, economics, poverty and migration ([climate refugees](#)).

Even if countries meet their nationally determined targets under the Paris Agreement, a [temperature rise](#) of more than 3 °C is forecast by 2100. Global emissions of greenhouse gases are still rising, [investment](#) in energy efficiency and renewable energy sources has recently stalled, and [forests](#) are being lost at an increasing rate. In 2019, the [global temperature rise](#) reached 1.1 °C above pre-industrial levels. Reaching the Paris Agreement target to keep global warming to well below 2 °C is looking increasingly difficult, and it will be extremely challenging to meet the 1.5 °C target. [Unprecedented cuts](#) in emissions are now required to keep global warming under control: 2.7 % per year from 2020 for the 2 °C goal and 7.6 % per year on average for the 1.5 °C goal. Even steeper reductions will be required if decisive action is further delayed.

Progress on international climate action is stalling. The [US](#) decided to leave the Paris Agreement, and at the [UN climate summit](#), major emitters did not commit to raising their climate ambitions. The [COP25](#) climate conference in December 2019 failed to finalise the rulebook for the Paris Agreement. UN Secretary-General [António Guterres](#) expressed his disappointment and spoke of a lost opportunity. Global [climate finance](#) for developing countries is likely to fall short of the US\$100 billion target by 2020. International action to reduce greenhouse gas emissions in [aviation](#) and [maritime shipping](#) is progressing slowly and lacks ambition.

The EU [reduced](#) its carbon emissions by 23 % between 1990 and 2018 and adopted a [2030 climate and energy framework](#) in line with its commitment under the Paris Agreement to achieve a 40 % emission reduction by 2030.

The European Parliament has repeatedly called for a more ambitious EU climate policy and a mid-century decarbonisation strategy, to which the Juncker Commission responded with the [clean planet strategy](#), followed by President von der Leyen's strategy for a [European Green Deal](#) to achieve a climate-neutral EU economy by 2050.

The majority (52 %) of respondents to the Eurobarometer survey [Parlemeter 2019](#) consider climate change to be the most important environmental issue today, followed by air pollution, marine pollution, deforestation and the growing amount of waste. Nearly six out of ten EU citizens believe that youth-led climate protests have had a direct policy impact both at EU level (59 %) and in Member State politics (58 %).

Scope for more EU action

The 2019 [cost of non-Europe study](#) highlights the potential benefits of ambitious climate action and puts the cost of missing the 2 °C target at €160 billion per year in the EU, with strong regional disparities.

The European Parliament [resolution of 15 January 2020 on the European Green Deal](#) advocates a fundamental right to a safe, clean, healthy and sustainable environment and to a stable climate for all people living in Europe. It supports a legally binding European climate law with a carbon-neutrality target for 2050 and intermediate EU targets for 2030 and 2040, a strong governance framework and an adaptation component. It calls for the revision of EU climate and energy legislation and for ways to be explored of using the potential of other EU legislation to contribute to climate action. Parliament's [resolution of 28 November 2019 on the climate and environment emergency](#) urges the Commission to assess in full the climate and environmental impact of legislative and budgetary proposals and align them with the objectives of limiting global warming to under 1.5 °C and halting biodiversity loss. It calls for a thorough reform of EU agricultural, trade, transport, energy and infrastructure investment policies, in order to ensure their consistency with climate and environment targets.

The failure of the COP25 climate conference to agree on rules for [international carbon markets](#) leaves a gap that can be filled by voluntary carbon trading and linking of carbon markets. Such linkages exist already

between California and Quebec, and since 1 January 2020 between the [EU and Switzerland](#). While preparing for a new round of negotiations on carbon markets at COP26 in Glasgow (initially scheduled for autumn 2020, but postponed until the following year in the wake of the coronavirus crisis), willing countries may already develop their own rules for [international linkages](#) that ensure proper accounting and environmental integrity. The January 2020 [Council conclusions on climate diplomacy](#) acknowledge the importance of bilateral agreements to complement international action under the Paris Agreement.

A European climate pact, part of the European Green Deal, should bring together regional and local authorities, civil society, industry and schools to agree on commitments to change behaviour. To ensure the climate pact is effective in tackling the climate emergency, it may take an organisational structure to support and coordinate the activities of the various actors, monitor progress and facilitate the sharing of best practices. This could follow the model of the [Covenant of Mayors](#), which coordinates climate action across various European cities. This European climate emergency office could be established on the basis of the EU Treaties, possibly as an EU agency.

The legal basis

Article 192 TFEU

1. *The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, shall decide what action is to be taken by the Union in order to achieve the objectives referred to in Article 191.*

Articles 191 to 193 TFEU form the legal basis for EU policy on the environment and climate change. Article 191 sets out the objectives and general principles of EU environment policy (precaution, prevention, rectification at source, and polluter pays). Article 192(1) is the legal basis for the adoption of EU legislation in the field of environment under the ordinary legislative procedure (OLP). However, Article 192(2) lists a number of areas that are exempt from the OLP and require unanimity in the Council. It contains a *passerelle* clause that makes it possible to move from this special legislative procedure to the ordinary legislative procedure. Article 192(3) provides for the adoption of action programmes through the OLP. Article 192(4) gives Member States responsibility for financing and implementation. Article 192(5) seeks to avoid disproportionate costs to Member States by providing for temporary derogations or financial support from the Cohesion Fund. Finally, Article 193 allows Member States to take environmental protection measures that go beyond EU environmental policy.

Use of legal basis to date

Article 192(1) is the legal basis for most EU environmental and climate policy measures, notably the EU 2030 climate and energy framework. Key legislative acts adopted under this article include the EU's [Emission Trading System Directive](#), the [Effort Sharing Regulation](#), the [LULUCF Regulation](#) (land use and forestry emissions), the [regulation on the governance of the energy union](#), and [CO₂ emissions standards for cars and vans](#) and for [heavy-duty vehicles](#). The special legislative procedure of Article 192(2)(c) has not yet been used, and the *passerelle* clause it contains has never been activated. Article 192(3) was used as the legal basis for the [seventh EU environment action programme](#). Article 192(5) has not yet been used.

FURTHER READING

EPRS, [Europe's two trillion euro dividend: Mapping the Cost of Non-Europe, 2019-24](#), 2019.

EPRS, [Mainstreaming of climate action in the EU budget: Impact of a political objective](#), 2019.

DG IPOL, [EU Environment and Climate Change Policies: State of play, current and future challenges](#), 2019.

DG IPOL, [European policies on climate and energy towards 2020, 2030 and 2050](#), 2019.

EPRS: [EU policies – Delivering for citizens: Environmental protection](#), 2019.



14. Promoting sustainable finance

Sustainable finance generally refers to the process of taking due account of environmental, social and governance considerations in investment decision making. Major sums of money will be needed in order to achieve the sustainability goals and sustainable finance can contribute. The EU can help to remodel the financial system by encouraging sustainable investment, and rethink the European financial regulatory framework in a comprehensive way. The EU could lead the way on sustainable finance, thus securing a competitive advantage.

Current challenges and policy debates

According to a Eurobarometer survey commissioned by Parliament and conducted in October 2019, [combating climate change should be Parliament's top priority](#). The European Green Deal is the European Commission's top priority; in her [political guidelines](#), Commission President Ursula von der Leyen announced plans for a strategy for green financing. The transition to a sustainable economy will require large investments. As Commission Vice-President Dombrovskis [stated](#), 'to meet our Paris targets, Europe needs between €175 and €290 billion in additional yearly investment in the next decades'. The Commission [estimates](#) that financing on such a scale is beyond the capacity of the public sector alone.

In their publication '[Financing Climate Futures: rethinking Infrastructure](#)', the OECD, the World Bank and UN Environment suggest that the financial system can facilitate the match between these investment needs and private capital allocation. They also highlight the need to strengthen financial stability by building environmental, social and governance (ESG) risk factors into investment decision-making. The European Political Strategy Centre points out that [China](#) has moved quickly to embrace sustainable finance and leads the green bond market. According to the High-Level Expert Group (HLEG) on Sustainable Finance, [Europe has been in the vanguard of sustainable finance](#), and it is in its strategic interest to maintain its leadership position.

The current [policy debate](#) is about how the banking system should facilitate green investments and loans, while keeping prudential considerations in mind. Some stakeholders are in favour of lowering the capital requirements for green loans; other stakeholders are in favour of increasing the capital requirements for loans to brown activities. There is currently no clear standard international framework for sustainable finance, even though a number of market initiatives have emerged. The existing lack of clarity could be [exacerbated](#) if Member States attempt to take action individually, without coordination. That would increase market fragmentation and raise competition problems, making it more difficult and costly for investors and citizens to have access to and exchange sustainable finance products.

Scope for more EU action

Commission action plan on sustainable finance

On 8 March 2018, the Commission published its [action plan on financing sustainable growth](#), to be followed up by [a renewed strategy for sustainable finance](#), scheduled for publication later in 2020. The main objective of the action plan was to promote a consistent approach to factoring ESG into investment decision making. Three main areas for action were identified: reorienting capital flows towards sustainable investment, mainstreaming sustainability into risk management, and fostering transparency and long-termism. These cover 10 measures: a unified classification system for sustainable activities; standards for sustainable financial products; efforts to foster investment in sustainable projects; consideration of sustainability in financial advice; sustainability benchmarks; sustainability in market research and credit ratings; institutional investors' and asset managers' sustainability duties; prudential requirements; disclosure and accounting; and corporate governance and undue capital market short-termism.

European Parliament resolution on the action plan

On 29 May 2018, the European Parliament adopted a [resolution](#) in response to the action plan, noting that, frequently, ESG benefits and risks are not built into financial products adequately. Sustainability indicators already exist, but the current voluntary reporting frameworks lack harmonisation. Parliament calls for sustainable finance criteria to be incorporated in all new and revised legislation relating to the financial sector. In the context of the [Non-financial Reporting Directive](#) (NFRD), there is a need to develop further ESG reporting requirements. The ESG risks and factors could also be built more effectively into ratings

produced by credit-rating agencies. In the same context, the [European supervisory authorities](#) (ESAs) could have a mandate to monitor ESG risks and factors in their activities.

Stakeholders' contributions to the debate

[Capital requirements rules](#) for banks in relation to sustainable finance is one of the domains in which the EU intends to intervene. This means incorporating climate risks into banks' risk management policies, in order to favour a robust financial sector with strong capital buffers that are properly aligned with the risks that banks have to deal with. Some stakeholders, such as the [European Banking Federation](#), are in favour of introducing a 'green supporting factor', where banks commit less capital for loans that effectively contribute to accelerating the transition to a sustainable, climate-neutral economy. Other stakeholders, including [Finance Watch](#) and [Positive Money](#) propose a 'brown penalising factor', to discourage lending for activities that have a negative climate, environmental or social impact.

Academia and think tanks

In one policy paper, the Grantham Research Institute on Climate Change and the Environment (London School of Economics) advocates for '[blue finance](#)' in order to respond to the urgency of ocean risks. In another policy paper, a researcher from the same institute analyses and indicates the [future priorities for building a sustainable financial system](#), arguing that there is a need to align the global financial system with climate security and sustainable development. The action of central banks and supervisors should include climate change and wider sustainability issues. It will also be necessary to incorporate sustainability factors into core international regulatory regimes (such as the Basel framework for banking). David Pitt-Watson, executive fellow at London Business School, published an [opinion piece](#) in the *Financial Times*, explaining that finance degree programmes need to include society's issues. Academia should create innovative courses linked with the needs of the economy and society. The [Institute for European Environmental Policies](#) meanwhile points to the need for data and high-quality information, noting that this could be achieved by adopting the recommendations of the [Taskforce on Climate-related Financial Disclosures](#).

The legal basis

Article 114 TFEU

1. [...] *The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.*

Article 114 TFEU is the key legal basis for harmonising internal market rules. The ordinary legislative procedure applies.

Use of legal basis to date

Article 114 TFEU has been already used as legal basis for two regulations relating to sustainable finance: [Regulation \(EU\) 2019/2088](#) on sustainability-related disclosures in the financial services sector, and [Regulation \(EU\) 2019/2089](#) regarding EU Climate Transition Benchmarks, EU Paris-aligned Benchmarks and sustainability-related disclosures for benchmarks. Article 114 TFEU is also the legal basis for the future regulation on the [establishment of a framework to facilitate sustainable investment](#) (also known as a 'taxonomy'), on which the European Parliament and Council have reached an agreement.

FURTHER READING

EPRS, [Disclosures relating to sustainable investments and sustainability risks](#), Legislative train schedule, 2020.

EPRS, [Low carbon benchmarks and positive carbon impact benchmarks](#), Legislative train schedule, 2020.

EPRS, [An EU framework to facilitate investments in environmentally sustainable economic activities](#), initial appraisal of the Commission Impact Assessment accompanying the sustainable finance legislative package, 2019.



15. Addressing carbon leakage

There is now greater awareness and more of a consensus on the need to do more to mitigate the climate change resulting from greenhouse gases (GHG), especially in terms of pricing. While carbon emissions resulting from production have decreased, emissions corresponding to final demand within a given area have generally not decreased but rather increased, because production and thereby carbon emissions have leaked to other parts of the world. The issue is addressed by the Green Deal, and carbon leakage is at the top of the EU's agenda.

Current challenges and policy debates

Climate change affects the economy, trade, health and biodiversity on a global scale and the [danger](#) of not addressing it properly is now widely [acknowledged](#). GHG (carbon-equivalent) emission pricing is one of a number of actions and policies aimed at mitigating climate change. Carbon pricing is embedded in the work of the United Nations Framework Convention on Climate Change ([UNFCCC](#)) to stabilise atmospheric GHG concentrations at a level that would prevent 'dangerous interference with the climate system' (1992 Kyoto Protocol and 2015 [Paris Agreement](#)). The design of actions and policies aimed at mitigating climate change is a work in progress. This is also the case for carbon emission reduction, including by means of carbon pricing (in other words internalising externalities). Such measures exist in several countries around the globe, with varying scope (upstream, downstream), coverage (sector exclusions) and frontiers (subnational or national areas). They fall into two categories: emission trading systems (cap and trade) and carbon taxes. [Carbon pricing](#) is being adapted and updated to provide answers on a scale commensurate with the global nature of climate change.

The pricing of carbon emissions upstream raises concerns about competitiveness and trade and about efficiency in reducing emissions globally. When measures are applied at production level, there is a risk that competitors that are not priced for emissions generated will enjoy a competitive advantage. One consequence of this can be a shift of production (or part of it) to countries not pricing carbon emissions, a process referred to as [carbon leakage](#). The result is some competitors within the single market not being priced for their carbon emissions. The carbon leakage risk has been addressed with regard to competitiveness through the free allocation of allowances. Furthermore, as regards carbon emission reduction and the climate change mitigation objective – the *raison d'être* of carbon pricing – the outcome of carbon leakage is that pricing carbon emissions in one area might not necessarily result in reduced emissions globally.

Scope for more EU action

Carbon leakage results from differences between different countries' climate objectives and policies. In the EU, it can result in (a) a shift of production outside the EU to countries where emissions are not paid for and (b) an increase in consumption in the EU of non-regulated and therefore cheaper products from abroad. Comparisons of EU countries' carbon inventories with their carbon footprints show noticeable reductions in the production of carbon emissions and increases in consumption-based carbon emissions (this is also the case in a number of other developed countries). The carbon footprint calculates the quantities of GHG generated by the final demand of the country. It incorporates emissions associated with the manufacture of imported products sold locally in another country (referred to as 'stowaways from international trade' or grey emissions). In order for the climate change resulting from global GHG emissions be mitigated, this leakage must be addressed.

General acknowledgement of the need to strengthen both climate change mitigation and environmental protection is central to the [Green Deal](#) and underpins action to boost emission reduction measures and address the risk of carbon leakage. One measure yet to be designed, referred to as a 'carbon border adjustment', is included in the political guidelines of Commission President Ursula von der Leyen and is among the tasks entrusted to the Commissioner in charge of tax matters. The idea is to ensure that carbon emissions for products sold in the EU are subject to the same carbon pricing, whether they are produced in the EU or imported, thus securing a level playing field. This would send a price-signal for reducing carbon emissions by pricing carbon at the point of entry into the single market. Another effect would be to incentivise trading partners to adopt robust carbon pricing mechanisms. The fundamental reason for such a measure is to mitigate climate change and contribute to environmental protection. Competitiveness and trade-related aspects are to be addressed at the design stage.

In its [resolution of 14 March 2019 on climate change](#), the European Parliament 'called on the Commission to explore policy options as soon as possible, including on environmental taxation, in order to encourage behavioural change'.

The extensive literature on carbon leakage and carbon border adjustment dates back to the 1990s. It offers an overview of objectives and challenges, some of which have changed over the period due to international discussions and changes in national positions on the reduction of GHG emissions. Nevertheless, it is generally reckoned that there are still [no conclusive answers](#) regarding optimal design.

The legal basis

Article 113 TFEU

The Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, adopt provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition.

Article 115 TFEU

Without prejudice to Article 114, the Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market.

Article 192(2) TFEU

By way of derogation from the decision-making procedure provided for in paragraph 1 and without prejudice to Article 114, the Council acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions, shall adopt: (a) provisions primarily of a fiscal nature.

In the 'Tax provisions' chapter of the TFEU (Articles 110 to 113), Article 113 on indirect taxes also provides competence for the necessary harmonisation of indirect taxes. In the 'Approximation of laws' chapter of the TFEU (Articles 114 to 118), Article 115 TFEU applies for the harmonisation of other taxes, under the same special legislative procedure. Article 116 TFEU provides for a mechanism to overcome distortions in conditions for competition in the internal market when consultation of the Member States does not result in an agreement eliminating the distortion in question.

EU environmental policy is enshrined in Articles 191-193 TFEU. Article 191 states that environmental policy aims at providing a high level of protection based on four principles (precaution, preventive action, rectification of damages at source, and 'the polluter pays'). As a rule, the EU can act in environmental policy in accordance with the ordinary legislative procedure, with some exceptions covering in particular 'provisions primarily of a fiscal nature'.

Use of legal bases to date

Measures for addressing carbon leakage have complementary objectives, starting with the initial purpose of providing an effective means to contribute to climate change mitigation through emission reduction policies. The central reason for these measures remains climate change mitigation, though some outcomes need to be addressed in terms of design, including in particular competitiveness and trade concerns. In the December 2019 Commission [communication on the European Green Deal](#), the proposal for a carbon border adjustment mechanism for selected sectors is scheduled for 2021. Preparation by Commission services is ongoing with an inception impact assessment and an on-line public consultation.

FURTHER READING

EPRS, [Understanding environmental taxation](#), briefing, 2020.

EPRS, [Carbon emissions pricing: Some points of reference](#), briefing, 2020

EPRS, [Carbon border adjustment mechanism as part of the European green deal](#), Legislative Train Schedule, 2020



16. Developing a stronger EU energy policy

Urgent EU action is necessary to meet the goals of the Paris Climate Change Agreement and to decarbonise Europe's economy by 2050. Article 194 of the Treaty on the Functioning of the European Union (TFEU) provides a legal basis to adopt EU energy policies under the ordinary legislative procedure. However, crucial aspects such as energy taxation, the energy mix and structure of energy supply, require unanimity in the Council.

Current challenges and policy debates

According to a series of Eurobarometer surveys carried out for the European Parliament, 65 % of EU citizens would like to see [greater EU involvement in energy policy](#). The [energy union strategy](#) adopted by the Juncker Commission in 2015 outlined five broad areas for EU action in the energy field that are still very relevant today: security of energy supplies; a fully integrated internal market; energy efficiency; climate actions to decarbonise the economy; and research and innovation on low-carbon and clean energy technologies. The [communication](#) on a European Green Deal, adopted by the von der Leyen Commission in December 2019, aims for a complete transformation of EU energy markets by phasing out use of fossil fuels and deploying renewable and low-carbon energy sources on a massive scale, in order to meet the EU goal of net zero greenhouse gas (GHG) emissions by 2050. This ambitious initiative may well require the EU to develop new legislation in areas of energy policy that are typically the preserve of its Member States.

Scope for action

Energy mix

In its wide-ranging own-initiative resolutions on [European energy union](#) (15 December 2015) and [energy market design](#) (13 September 2016), the European Parliament pushed for greater EU ambition on energy efficiency, promotion of renewables, design of electricity markets, and security of supply. Parliament positions in negotiations over the [clean energy package](#) have included higher EU-wide targets on renewables and energy efficiency, to be delivered via binding national targets and a greater oversight role for the EU. However, some countries still consider that binding national targets undermine the right of Member States to determine their energy mix and structure of energy supply, as guaranteed under EU law. New legislation sets collectively binding EU targets on [energy efficiency](#) (32.5 % improvements) and [promotion of renewables](#) (32 % share of consumption) to be delivered by 2030, with indicative national contributions that are coordinated by the EU Institutions through a [new system of governance](#). If in the longer run this approach does not succeed in delivering on EU energy and climate goals, the EU may demand a greater oversight role, including the capacity to set and enforce more binding national targets.

Energy taxation

Existing EU action on energy taxation is limited to an outdated Energy Taxation Directive (ETD) that was adopted in 2003. Yet greater harmonisation of energy taxes could help the functioning of the internal market, incentivise the use of renewable and low-carbon energy sources, and discourage the use of high polluting fossil fuels. The introduction of an EU-wide form of 'carbon tax' could discourage the use of energy sources with high greenhouse gas emissions. More generally, meeting global objectives in the climate field may require stronger EU intervention in national energy policies, including the adoption of EU decisions that affect the choice of energy sources ('energy mix') and the structure of energy supply across Member States. The communication on a Green Deal proposes a major revision of the ETD that would incentivise the promotion of renewables, greater energy efficiency, and reduced GHG emissions.

Integrated energy market

A 2017 EPRS study, [Mapping the cost of non-Europe](#), estimates that over €250 billion of economic benefits could be achieved by 2030 with a more integrated energy market and energy efficiency in the EU. The bulk of these savings (€200 billion) would come from full implementation of the EU's energy efficiency measures, the remainder largely from better coordination of renewable investments (€23.5 billion) and full integration of the energy market (€12.5 billion).

The legal basis

Article 194 TFEU

1. In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to:

- (a) ensure the functioning of the energy market;
- (b) ensure security of energy supply in the Union;
- (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and
- (d) promote the interconnection of energy networks.

2. Without prejudice to the application of other provisions of the Treaties, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish the measures necessary to achieve the objectives in paragraph 1. Such measures shall be adopted after consultation of the Economic and Social Committee and the Committee of the Regions.

Such measures shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, without prejudice to Article 192(2)(c).

3. By way of derogation from paragraph 2, the Council, acting in accordance with a special legislative procedure, shall unanimously and after consulting the European Parliament, establish the measures referred to therein when they are primarily of a fiscal nature.

Since the Lisbon Treaty, Article 194 TFEU has been the preferred legal basis for EU legislation in the energy field, where necessary in conjunction with other legal bases (e.g. Articles 191 and 192 on environment). Article 194 was the main legal basis for all energy-related legislation adopted as part of the energy union package during the previous legislative term (2014-2019).

Article 194 lists the broad areas for EU action in the energy field, as well as the three main policy areas where Member States have the 'right' to fully determine their own energy policies (see above). Article 194(2) makes an explicit link to Article 192(2)(c), which provides for a special legislative procedure allowing the adoption of 'measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply' (i.e. two of the three Member State 'rights' under Article 194). This special procedure requires a unanimous decision by Council and needs to be justified on environmental grounds (the basis of Article 192). Article 192(2)(c) also includes a *passerelle* clause allowing the Council (through an initial decision by unanimity) to make the ordinary legislative procedure applicable to energy policy areas where unanimity is formally required under the Treaties.

Article 194(3) introduces specific requirements for energy policies that are 'primarily of a fiscal nature' (i.e. energy taxation), involving a special legislative procedure requiring unanimity in Council after consultation of Parliament. In April 2019, the Commission adopted a communication that proposed to use the *passerelle* clause in Article 192(2)(c) to enact changes to energy and climate decision-making, in particular by making it possible to use qualified majority voting in decision making in the field of energy taxation.

Use of legal basis to date

The special legislative procedure of Article 192(2)(c) has never been used, and the *passerelle* clause it contains has never been activated. The special legislative procedure in Article 194(3) for energy taxation was used once in an attempt to revise the 2003 [Energy Taxation Directive](#) (ETD). The ETD sets minimum levels of taxation on energy products and electricity, but has since become outdated and rather counter-productive to EU goals in the energy and climate field, because it sets low tax rates on highly polluting fuels such as coal, and higher tax rates on cleaner energy sources. Yet this concerted effort to [revise the ETD](#) ultimately failed because it was not possible to reach unanimity in the Council despite four years of negotiation. The European Green Deal envisages a major reform of the ETD to align it with EU energy and climate goals, an idea that in principle is strongly supported by both Parliament and Council.

FURTHER READING

EPRS, [Mapping the Cost of Non-Europe, 2014-19 – Fourth edition](#), 2017.

EPRS, [Promoting renewable energy sources in the EU after 2020](#), 2018.

EPRS, [Revised Energy Efficiency Directive](#), 2018.

17. New own resources



The EU is legally required to finance its budget with own resources. Article 311 of the Treaty on the Functioning of the EU explicitly enables the Council to create new or abolish existing categories of own resources. In practice, however, genuine own resources are not at the core of the EU budget and changes to its revenue side were last made in 1988. The barriers to using Article 311 are considerable, but it provides the basis for greater financial autonomy for the EU, and for unlocking the economic potential of its budget.

Current challenges and policy debates

[EU's system of own resources](#) (OR) dates back to 1970 when it was [first conceived](#) as an alternative to direct national contributions. Initially, own resources included customs and agricultural levies, since 1979 they have included a VAT resource, and this was [supplemented](#) in 1988 by a gross national income-based (GNI) own resource to cover the deficit. This, as well as the 1984 introduction of a [UK 'rebate'](#) (followed by other [correction mechanisms](#)) are the only major changes to the OR system made in the last fifty years, and they still shape the debate today. The rebates were designed to [offset the difference](#) between what Member States pay to the EU budget and what they get from it. The rebates and the growing share of GNI-based OR in the revenue mix have been criticised as the trigger for the issue of '*juste retour*', encouraging Member States to focus mainly on their national interest rather than more strategically on how to best finance EU public goods. As a result, the perception that national contributions are a mere cost factor with no benefits has been [perpetuated](#) and the simplicity and transparency of the financing system compromised.

In the current [system of 'own resources'](#) the bulk of financing (around 80%) comes from *the GNI-based own resource* and the *VAT-based own resource*, largely seen as national contributions. The third component, *traditional own resources* (around [16%](#) in 2018), is considered the only genuine own resource. The remainder comes from *other revenue*. Estimating and collecting EU revenue in the current system has proven complex and opaque and has bred dissatisfaction. However, change requires unanimity in Council, giving each Member State a de facto veto power. This has impeded several major reform attempts since the 1990s. In 2013, Parliament used its consent power while negotiating the multiannual financial framework (MFF), to insist on creating an [interinstitutional high-level group on own resources](#) (HLGOR) to review the OR system. Its [first report](#) pointed out the system's main flaws: complexity; lack of transparency and reliance on national contributions rather than genuine OR, which fuels discord between net payers and net contributors. Despite all the criticism, however, the report also acknowledged the system's merits – it had been a reliable and sufficient supply of easily collected finance, which had eased the urge to reform.

Scope for more EU action

As the HLGOR chair said in [2016](#), the debate on OR system reform is relevant, because it is 'very far from the spirit of the Treaty' as embodied in Article 311. The case for reform is made stronger with the UK leaving the EU, and many see in this an opportunity to streamline the budget by abolishing rebates, and adopting a new OR decision (although the one in force has [no expiry date](#)). Other factors such as economic, social and environmental developments in the EU and globally that need to be addressed further [justify reform](#).

Over the years, calls for new own resources have increased and many ideas have been put forward. However, as the HLGOR's final report highlighted, when selecting new own resources, Member States should seek not only sources of revenue, but ones that are more clearly linked with specific EU priorities such as the single market, energy union or environmental and climate policy. Moreover, features such as transparency, simplicity, stability, impact on competitiveness and sustainable growth, and a fair breakdown among Member States should be kept in mind. The HLGOR stressed that national parliaments, which ultimately ratify the OR decision, should be more involved in the debate, and communication needs to be improved as it is key to shifting perceptions of the EU budget as a cost rather than a useful tool creating EU added value. The challenge when shaping a balanced solution lies in ensuring budgetary efficiency, shared benefits and public support, and taking into account both Member States' and common EU interests.

The **Commission** took up the HLGOR's ideas in its 2017 [Reflection paper on the future of EU finances](#) and recommended introducing new categories of OR linked to EU policies and discontinuing correction mechanisms. It did not see the status quo as an option for the EU or its budget after 2020. Alongside the MFF proposal, in May 2018, the Commission published a legislative [package on own resources](#) for the post-

2020 period, based on a mix of existing and innovative revenue streams. In brief, it proposed keeping the GNI-based resource and customs duties with lower collection costs and simplifying the VAT-based OR, as well as introducing a [basket of new own resources](#) that could account for 12 % of EU revenue. They include a common consolidated corporate tax base; an emissions trading system-based OR; and a plastic packaging waste-based OR. It also proposed to phase out corrections over five years and increase the ceiling for OR from 1.20 % of EU GNI to 1.29 %. The Commission [argues](#) that new own resources would link the budget to key EU policies, reflecting their added value; provide fresh money, and make the system more resilient.

Parliament has fewer powers than the Council and Member States to shape own resources, but has been critical of the current configuration and has favoured its redesign. Parliament has expressed its views [in a series of resolutions](#) (March, May, November 2018) calling for an in-depth reform that results in a more transparent, simpler and fairer OR system. It supports the introduction of new genuine own resources linked to EU policies and objectives; elimination of all rebates; and creation of a reserve for unexpected needs filled in by other revenue. Parliament has put forward numerous potential bases for new own resources for consideration, including a modified VAT own resource; share of corporate income tax; a financial transaction tax at EU level; seigniorage (central bank revenue); digital and environmental taxes. It has also proposed gradually introducing each additional new OR on a fixed timetable. For Parliament, new own resources should serve a dual purpose: largely reduce the share of GNI-based resource, and enable the financing of a higher level of EU spending under the next MFF, including covering the gap left by the UK's withdrawal. Parliament insists that revenue and expenditure should be treated as one package in the MFF negotiations and has made it clear that its consent depends on parallel progress on new own resources.

Think-tanks such as [Bruegel](#) and the [European Policy Centre](#) (EPC) welcome the proposed phasing out of rebates and introduction of new genuine OR. The EPC favours further exploration and more in-depth scrutiny of the idea of creating new own resources. The [Jacques Delors Institute](#) sees the proposed basket of new OR as lacking ambition. [CEPS](#) regards the proposed new OR as a means to prevent a further rise in national contributions as the UK leaves, and deems most of them unlikely to materialise in the near future.

The legal basis

[Article 311 TFEU](#)

- (1) *The Union shall provide itself with the means necessary to attain its objectives and carry through its policies.*
- (2) *Without prejudice to other revenue, the budget shall be financed wholly from own resources.*
- (3) *The Council, acting in accordance with a special legislative procedure, shall unanimously and after consulting the European Parliament adopt a decision laying down the provisions relating to the system of own resources of the Union. In this context it may establish new categories of own resources or abolish an existing category. [...]*

Article 311 TFEU [sets out the key principles](#) behind EU financing and is the legal basis for the decision on own resources, adopted in a special legislative procedure, requiring unanimity in Council, after consulting Parliament, and ratification by all Member States. In a different procedure for adopting the implementing rules, Parliament has power of consent. The Lisbon Treaty's novelties relate to both the way the EU budget is financed and the budgetary procedure. Article 353 TFEU exempts Article 311 from the *passerelle* clause.

Use of legal basis to date

[Council Decision 2014/335/EU](#) is the OR Decision in force. Article 311 has proven a '[high procedural hurdle to overcome](#)' to introduce substantial qualitative changes in the OR system. No new categories of own resources have been created since 1988.

FURTHER READING

EPRS, [Legislative train schedule on the system of own resources after 2020](#), December 2019.

EPRS, [Own resources of the European Union: Reforming the EU's financing system](#), briefing, 2018.

18. Strengthening social Europe



There is an increasing gap between citizens' expectations and the delivery of European Union (EU) social policies: close to three quarters of Europeans expect more EU action, with only one third finding it adequate and over half considering it insufficient. Future decisions and actions relating to the implementation of the social pillar, the EU's economic governance mechanism and the EU budget will greatly influence the extent to which social policies can be further strengthened and developed to meet citizens' expectations.

Current challenges and policy debates

EU policies influence core redistributive areas through social regulation (mainly setting minimum standards), hard coordination ([economic governance](#) and [fiscal rules](#)), soft coordination (the [open method of coordination](#)) and re-distribution (through programmes and funds). Social Europe is an inherent part of European integration. [Analyses](#) reveal the many obstacles in the way of the relevant European policies, including the need for unanimity in the Council, the insistence on national identity and sovereignty, which makes regulation and redistribution at European level difficult, and the strong focus on market exchange. Globalisation, demographic challenges, digital transformation and climate change have put labour markets and the welfare state under enormous pressure. From 2004 onwards the explosion of centre-periphery conflicts in the wake of the sovereign debts crisis and the appearance of new East-West conflicts have amplified the challenges. In response, the Juncker Commission declared Europe's ambition to be to earn a '[social triple A](#)', by achieving fair and balanced growth, decent jobs and social protection. The jointly proclaimed [European Pillar of Social Rights](#) (social pillar) in November 2017 has the [potential](#) to open a new chapter in European social and employment policies. Following this [path](#), the von der Leyen Commission is setting great store by ensuring a [just and fair transition for all](#) to a green and sustainable economy in the digital age, including further [implementation](#) of the social pillar.

Scope for further EU action

Simplifying the decision-making procedure and strengthening social governance

Two parallel trends can be observed in social policy decision-making procedures since the 1980s: a tendency towards the gradual reduction of unanimity by consultation, cooperation, co-decision and now the ordinary legislative procedure (OLP); and the growing ability of the European Parliament to block legislation, and thereby increase the number of veto-players. In its [April 2019 communication](#) the Commission called for further debate on moving from unanimity voting in the Council to qualified majority (QMV), or from the special to the ordinary legislative procedure in some social policy areas, especially recommendations on social security and protection (excluding cross-border situations) and non-discrimination. This would be possible through the 'general *passerelle* clause' (Article [48\(7\) of the Treaty on European Union \(TEU\)](#)). This means that the European Council would have to decide by unanimity to make these procedural changes, with no national parliaments objecting, and with the European Parliament's consent. So the final decision would be still under the control of the national legislatures of the Member States.

To further strengthen the social aspects of economic governance, from 2020 onwards, the [United Nation's sustainable development goals](#) are to be built into [European Semester](#) analyses. This will ensure that more emphasis is placed on the analysis of social progress. In addition, in a 2017 [resolution](#) Parliament called for greater consideration of its views within the European Semester before Council takes decisions, and for its Employment and Social Affairs Committee to be put on an equal footing with its Economic and Monetary Affairs Committee in that context. It also reiterated the idea of introducing a [social imbalances procedure](#) when designing the country-specific recommendations.

Further implementing the social pillar

The social pillar aims to support EU Member States in adjusting their [social protection systems](#) to the new realities of work and everyday life. It ultimately paves the way for bringing [non-standard workers](#) into existing social protection schemes, for making further efforts to individualise social protection and ultimately move towards universal social protection, where this would be removed from the employment relationship, and for strengthened European social citizenship. In this vein, an October 2017 Parliament [resolution](#) urged all Member States to set up minimum income schemes (point 14 of the social pillar) or

update their existing schemes to ensure that they also reach the most vulnerable. However, the idea of moving beyond that to a harmonised (or) homogenous European minimum income scheme, as promoted by some, still raises [questions](#) about the potential impact on the different welfare regimes.

Promoting fairness through funding

In its 2017 [resolution](#) on the social pillar, the European Parliament called for sufficient financial capacity for social investment partly through the existing funds but also through additional financial instruments for the euro area. The new [multiannual financial framework](#) proposal addresses many of these areas. The June 2018 [Meseberg Declaration](#) advocated a euro-area budget, but whose stabilisation function would be carried out mainly through a yet to be explored European unemployment stabilisation fund. The idea reappears in Ursula von der Leyen's [political guidelines](#) where she proposes to design a European unemployment benefit reinsurance scheme that will protect citizens and reduce the pressure on public finances during external shocks. Several [challenges](#) arise in relation to the design of this scheme: the risk that its resources would flow permanently from certain countries with low unemployment rates; uncertainty concerning its fiscal rules; the role of social partners; the legal basis.

The legal basis

Article 153 TFEU

1. With a view to achieving the objectives of Article 151, the Union shall support and complement the activities of the Member States in the following fields: (a) improvement in particular of the working environment to protect workers' health and safety; (b) working conditions; (c) social security and social protection of workers; (d) protection of workers where their employment contract is terminated; (e) the information and consultation of workers; (f) representation and collective defence of the interests of workers and employers, including co-determination, subject to paragraph 5; (g) conditions of employment for third-country nationals legally residing in Union territory; (h) the integration of persons excluded from the labour market, without prejudice to Article 166; (i) equality between men and women with regard to labour market opportunities and treatment at work; [...]

2. To this end, the European Parliament and the Council: [...] (b) may adopt, in the fields referred to in paragraph 1(a) to (i), by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States. Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings. The European Parliament and the Council shall act in accordance with the ordinary legislative procedure after consulting the Economic and Social Committee and the Committee of the Regions. In the fields referred to in paragraph 1(c), (d), (f) and (g), the Council shall act unanimously, in accordance with a special legislative procedure, after consulting the European Parliament and the said Committees. [EESC, CoR] The Council, acting unanimously on a proposal from the Commission, after consulting the European Parliament, may decide to render the ordinary legislative procedure applicable to paragraph 1(d), (f) and (g).

[The aim](#) of Article 153 TFEU is *not* uniform conditions of social protection, but merely [approximation](#) – not harmonisation – of national rules. A special *passerelle* clause in Article 153(2) TFEU allows the Council to extend the OLP to Article 153 (1d, f, g) areas covered by unanimity and decided according to a special legislative procedure. This special *passerelle* clause is however excluded for legislation on social security and social protection of workers (Article 153(2) third subparagraph TFEU). Therefore, in this latter field, the general *passerelle* clause of Article 48(7) TEU could be activated by the European Council, which could decide (unanimously) to authorise the Council to act by QMV and no longer by unanimity. This shift to QMV in the area of social security and social protection of workers would also allow the Council to adopt recommendations in the same field by QMV (Article 292 TFEU).

Use of legal basis to date

Legislative acts adopted on the basis of Article 153 TFEU include directives on a [European Works Council](#), [temporary work](#), [employee protection in case of insolvency](#), [working time](#), as well as a number of detailed directives on safety in the workplace (e.g. concerning [electromagnetic fields](#), [asbestos](#) or [optical radiation](#)).

FURTHER READING

EPRS, [Social governance in the European Union: Governing complex systems](#), 2017



19. Long-term budget under qualified majority?

According to the Treaties (Article 312 TFEU), the long-term budget is adopted by the Council acting unanimously after receiving the Parliament's consent. A *passerelle* clause in that article provides for the possibility to take the decision by qualified majority voting (QMV), if the European Council so decides unanimously.

Current challenges and policy debates

The requirement to have a unanimous decision in Council on the regulation establishing the multiannual financial framework (MFF) enables each Member State to use a veto if all its requests are not fulfilled. Reaching an agreement on the EU's long-term budget, given the different positions of the Member States, is difficult and time consuming. For the Commission's [proposal](#) for the 2021-2027 MFF, Member States are struggling to reach a common position on the overall volume of EU's budget and its distribution among the priorities.

Since the first financial framework back in 1988, the [duration of the negotiations](#) has increased steadily from 16 to 30 months. The negotiations on the 2014-2020 MFF took 30 months overall. The agreement was finally adopted on 2 December 2013, just one month before the start of the new financial period, causing serious delays in the implementation of the new programmes. This also resulted in an increased payment [backlog](#) at the end of 2014, reaching €26 billion.

The current process of negotiating the 2021-2027 MFF seems to be following a similar timeline. Council's difficulty in reaching a common position may once again cause a serious delay in the implementation of the programmes. It could increase [economic uncertainty](#), diminish the EU's political credibility, create interinstitutional tension, damage EU's image and unity and have serious [consequences](#) for beneficiaries and EU citizens. All projects are likely to see their timelines delayed. The EU needs a budget in time to deliver on its political priorities. Several of these goals are of an urgent nature, such as tackling climate change and developing digital technologies.

Furthermore, sufficient time must also be allowed for Parliament's consent procedure and its legislative prerogatives as a co-legislator for the individual funding instruments. In line with Article 312(5), Parliament has [called](#) on a number of occasions for a constructive dialogue during the negotiating process on the MFF. In its recent resolution on the 2021-2027 MFF it [stated](#) clearly that it will not 'rubber-stamp a *fait accompli* from the European Council' and that it intends to exert its 'legislative prerogatives under both the consent and ordinary legislative procedures'.

In the event of failure to agree on a new MFF, Article 312(4) TFEU provides for the [extension](#) of the ceilings and other provisions corresponding to the last year of the latest MFF, until the new MFF regulation is adopted. This implies the same financing volume and structure, and therefore, would not allow the start of any new programme or priority. The Parliament, concerned by Council's delay in reaching a common position is [asking](#) for a contingency plan, with concrete operational provisions, in order to protect beneficiaries and secure continuity of funding.

Scope for more EU action

More efficient decision-making on the MFF

The [2021-2027 MFF negotiations](#) are the second to be taking place under the Lisbon [Treaty](#), which established a unanimous decision by the Council and Parliament's consent as compulsory for the MFF's [adoption](#) (Article 312(2)). Currently, the problem lies within the requirement for unanimity in the Council. Similarly, any [revision](#) of the long-term budget meets the same difficulty.

Concrete discussions with Parliament on the next MFF are 'on hold' because the Council [does not yet](#) have a common position. The lack of a timely decision contradicts the very first objective for which the multiannual financial framework was [set up back in 1988](#): the need to enhance [budgetary discipline](#) and provide for stability and predictability in investments.

The intention of the Treaty provisions to facilitate the negotiating process and an agreement on the MFF is evident in several articles. It explicitly imposes upon the institutions an obligation to carry out negotiations and reconcile their positions in order to find agreement on a text to which Parliament can give its consent (Articles 312(5) and [324](#) TFEU). Practice to date does not however reflect the goals of the Treaty and its provisions are not fully exploited. While, the decision-making process within the Council is dominated by [national considerations](#) and [lacks transparency](#).

To enable a more [efficient](#) exercise of Union competences in areas where unanimity is maintained, the Treaty provides for a special *passerelle* clause for the MFF (Article 312(2)). This offers an opportunity to overcome a stalemate in the Council's decision-making and to avoid the negative consequences of a delay in the start of the long-term budget. However, this provision is subject to a [double intergovernmental check](#): if the European Council agrees to apply it, each national parliament can veto the proposal within six months ([Article 48\(7\)](#) TEU).

Given the serious potential consequences and the issues at stake if adoption of the MFF is delayed, an analysis of the Treaty provisions requiring a unanimous decision from the Council on the MFF and the opportunity to shift towards qualified majority through the *passerelle* clause is advisable. Thought should be given to how best to facilitate activation of this provision.

The legal basis

[Article 312, paragraph 2 TFEU](#)

The Council, acting in accordance with a special legislative procedure, shall adopt a regulation laying down the multiannual financial framework. The Council shall act unanimously after obtaining the consent of the European Parliament, which shall be given by a majority of its component members.

The European Council may, unanimously, adopt a decision authorising the Council to act by a qualified majority when adopting the regulation referred to in the first subparagraph.

Article 312(2) contains a specific *passerelle* clause for the MFF, empowering the European Council, acting unanimously, to enable the Council to take a decision on the regulation on the MFF by qualified majority voting. This provision therefore allows for QMV without a formal change in the Treaty.

Already in [April 2014](#), Parliament, [called](#) on the European Council to use both the general *passerelle* clause (Article 48(7) TEU) and the specific MFF *passerelle* (Article 312(2) TFEU). Furthermore, in November 2018, in its resolution on the 2021-2027 MFF, it [underlined](#) that the 'unanimity requirement for the adoption and revision of the MFF Regulation represents a true impediment to the process' and called on the European Council to activate the *passerelle* clause provided for under Article 312(2), to allow the Council to adopt the MFF regulation by qualified majority.

Use of legal basis to date

Article 312(2) has not been used as a legal basis to date. The decision to use this provision depends on a decision of the European Council alone. It requires a decision by unanimity, which makes it very unlikely. The two-stage process then allows any single national parliament to [veto](#) the move to qualified majority within a period of six months.

FURTHER READING

Parliament resolution on the [Multiannual Financial Framework 2021-2027 - Parliament's position with a view to an agreement](#), 2018.

Parliament resolution on the [MFF negotiations 2014-2020: lessons to be learned and the way forward](#), 2014.

EPRS, [Ten issues to watch in 2020](#), 2020.

EPRS, ['Ideas Paper' for the EP Administration's Innovation Day – Adequate financing for EU public goods](#), 2020.

EPRS, [Multiannual financial framework for the years 2021 to 2027](#), 2019.

EPRS, [Future financing of EU policies, EU policies - Delivering for citizens](#), 2019.

20. Encouraging cooperation between schools and business



The EU is active in building cooperation between schools and firms, but the full potential of the available legal bases remains untapped due to the general policy-making approach and insufficient funding. School-business cooperation is still needed to solidify democratic values and social cohesion, and also to boost skills acquisition.

Current challenges and policy debates

Ninety-seven percent of [Europeans](#) think that it is useful for students to work on innovative projects with researchers and companies from different countries. The EU runs a number of actions that align with this view by developing cooperation between education and training establishments and firms. One strand of action is based on intergovernmental agreements that are not based explicitly on the EU treaties, although they contribute to furthering their objectives. The process began with the [Copenhagen Declaration](#), which led to the emergence of an EU policy on vocational education and training (VET) that includes cooperation between education, training and firms. The latest round, the [Riga conclusions](#), made work-based learning a top priority. Following in this direction are: the [blueprint for sectorial cooperation on skills](#) under the [new skills agenda](#); collaboration between the European Commission and the European Business Network for Corporate Social Responsibility (CSR Europe) on [the European pact for youth](#); the [European alliance for apprenticeships](#); and [European vocational skills week](#), an awareness raising effort. However, as these initiatives do not refer explicitly to Article 166(4) of the Treaty on Functioning of the European Union (TFEU), the European Parliament is excluded from the decision-making process. Another difficulty lies in the red tape associated with applying for funds from Erasmus+, an EU programme that uses Article 166 as one of its legal bases. The Commission is addressing this obstacle, but project rejection rates remain high, owing mainly to limited funding. Finally, school-firm cooperation is clearly seen as a way to hone skills that will be needed in future workplaces. Moreover, it can also be an opportunity to develop students' critical thinking, if they reflect in class on their work experiences, in order to study the extent to which workplaces are integral to creating inclusive, [sustainable](#) and democratic societies.

Scope for action

The [Education Council](#) of 22 to 23 May 2018 echoed a number of points made in Parliament's resolution of 17 May 2018 on the [modernisation of education](#). This resolution repeats messages that the Parliament reiterated throughout its eighth legislature. It points out that the chances of achieving the EU's economic and social objectives, and competitive and sustainable growth, would be improved by high quality education and training systems that promote [democratic values](#), human rights, social cohesion, inclusion and individual success. Civil society organisations have called for a renewed focus in education and training on [inclusive growth](#). Cooperation with firms can support this [perspective](#) in the following ways.

Cooperation with social enterprises

A focus on the social dimension of [business education](#) is key to a more social, inclusive and sustainable economy. This would be introduced through subjects such as fair trade, social enterprise, corporate social responsibility, and alternative business models, such as cooperatives. Placements in [firms](#) with a social dimension would offer hands-on experience.

Inclusive placements

The May 2018 resolution points out that education and [training](#) should develop proactive and [responsible citizens](#) who are engaged in developing their key competences throughout their lives so as to be able to live and [work](#) in technologically advanced and globalised societies. Hence the importance of [everyone](#), especially the most vulnerable, people with [disabilities](#) and special needs and [disadvantaged](#) groups, having equal opportunities to [access](#) and complete education and training and acquire skills at all levels.

Tackling the gender gap

Cooperation between education, training and firms could also be more attentive to [gender inequality in education](#), which hinders personal development and employment. In 2015, women accounted for 57.6% of all graduates in higher education while the gender employment gap still stood at 11.6%.

Improving the Erasmus+ programme and providing for flexible learning paths

In concrete terms, the resolution called for qualitative [improvements](#) and increased financial support, to expand [student](#) and staff [mobility](#) under Erasmus+, so that this action becomes more inclusive and accessible. This also refers to mobility for traineeships and apprenticeships, which receive less funding than mobility in higher education. The European Parliament also believes that higher education systems can be more flexible and open. For instance, universities and further education institutes too could offer dual education paths, involving apprenticeships for instance. There is also the potential for greater cooperation between higher education, VET and businesses to offer [opportunities](#) via career guidance, apprenticeships, internships and reality-based teaching, built into curricula. The resolution warns, however, that [apprenticeships](#) and traineeships should not be used as a form of cheap labour.

The legal basis

Article 166 TFEU

1. *The Union shall implement a vocational training policy which shall support and supplement the action of the Member States, while fully respecting the responsibility of the Member States for the content and organisation of vocational training.*
2. *Union action shall aim to: [...] stimulate cooperation on training between educational or training establishments and firms [...]*
4. *The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, shall adopt measures to contribute to the achievement of the objectives referred to in this Article, excluding any harmonisation of the laws and regulations of the Member States, and the Council, on a proposal from the Commission, shall adopt recommendations.*

On the basis of Article [166 TFEU](#) (ex [Article 150](#) of the Treaty on the establishment of the European Community) the Union supports and supplements Member States' efforts to modernise their VET systems. The TFEU creates a legal basis for adopting measures and recommendations to stimulate cooperation on training between educational or training establishments and firms with, as a substantive novelty, the inclusion of the European Parliament in the ordinary legislative procedure and the empowerment of Council to adopt recommendations on a proposal from the Commission. The Union may not legislate to harmonise the content or organisation of vocational education and training in Member States.

Use of legal basis to date

Many EU actions are based on Article 166 TFEU. These include the creation of the European Centre for the Development of Vocational Training ([Cedefop](#)) and its projects: the [skills panorama](#), and [skills and jobs monitoring](#). The [Council recommendation](#) of March 2018 on a European framework for quality and effective apprenticeships and the Erasmus+ vocational education and training [mobility charter](#) together set out standards for mobility for work-based learning. The European credit system for vocational education and training ([ECVET](#)) allows learners to accumulate and transfer learning. This is possible as European quality assurance in vocational education and training framework ([EQAVET](#)) builds transparency and trust. The [Erasmus+](#) funding programme allows VET students to do apprenticeships or traineeships abroad. Staff working in a VET institution can also go to an enterprise abroad for job shadowing or a work placement. Staff from firms can, meanwhile, provide training in VET institutions in another Member State. Alongside learning mobility, Erasmus+ also develops [strategic partnerships](#), [sector skills alliances](#), [knowledge alliances](#), [joint qualifications in VET](#) with strong work-based learning and mobility components and the development of transnational cooperation platforms for [centres of vocational excellence](#).

FURTHER READING

EPRS, [Education policy in the Europe 2020 Strategy](#), 2015.

EPRS, [Lifelong learning in the EU](#), 2018.

EPRS, [Erasmus+](#), 2016.



21. Facilitating customs cooperation

While the customs union is an exclusive competence of the Union, its implementation and the application of customs sanctions are the responsibility of the Member States. Difficulties in coordinating between national and EU levels, however, often result in distortions of the single market. The EU Treaties do nevertheless provide for the possibility of enhanced cooperation in customs matters, for instance by means of the harmonisation of non-criminal sanctions, better customs control equipment or a standardised customs information technology (IT) system.

Current challenges and policy debates

The European Union's customs legislation is harmonised. The [Union Customs Code \(UCC\)](#) has provided the legal framework for customs since 2016. The major goals of the UCC are the end of paper-based procedures and the digitalisation of customs procedures, as well as reinforced risk management with a view to advancing cargo information. While customs legislation is adopted at EU level, its implementation is the responsibility of each EU country via their national customs administrations. The European Commission supports the Member States in the implementation of the legislation in different ways, *inter alia*, through the [customs 2020 programme](#).

However, there are currently several shortcomings in the proper functioning of the customs union in terms of risk management and IT systems. Enforcement, supervision and control are matters for the Member States, but it is difficult for them to deliver effectively on these aspects due to the cross-border nature of customs transactions and operations, and the different jurisdictions involved. According to some [experts](#), the wide variety of sanctions applied by the individual Member States is also problematic. These shortcomings undermine the work of customs, lead to distortions in the single market and impede the effective protection of the Union's external borders.

Furthermore, before the European Commission took office in December 2019, its President-elect Ursula von der Leyen stressed in her [political guidelines](#) the need 'to take the Customs Union to the next level, equipping it with a stronger framework' so as to protect EU citizens and the single market more effectively. She announced her intention to propose 'a bold package for an integrated European approach to reinforce customs risk management and support effective controls by the Member States'.

Scope for action

The European Parliament, in its first reading [position](#) of 15 April 2014 on the proposed regulation on mutual assistance to ensure the correct application of the law on customs, endorsed, among other things, the speeding up of customs investigations, more legal certainty on the recognition of evidence, and a better exchange of data regarding customs infringements.

In this context, broader use of the legal basis offered by Article 33 of the Treaty on the Functioning of the European Union (TFEU) could introduce some improvements for the customs union – a number of which are currently on the political agenda, as outlined below.

Common risk management

Some related ideas are discussed in the European Commission's 2014 [EU action plan for customs risk management](#). These [include](#) the homogeneous implementation of customs enforcement of intellectual property rights across the EU. Another proposal is the stationing of Member States' experts in a permanent location. As a response to new threats, it is suggested that there should be a closer exchange of data with and between national law enforcement authorities, Europol (the European Union's law enforcement agency), or the European Border and Coast Guard Agency (Frontex), and on chemical, biological, radiological and nuclear (CBRN) security.

Shared IT supplier

In addition, further capacity building in information technology (IT) is needed since 98 % of customs declarations are filed [electronically](#). The use of collaborative methods, such as the deliverance of IT systems under the current UCC work programme, or the development and operation of efficient customs IT systems (under alternative delivery models), could be interesting options in this regard. According to the 2018 European Commission [report](#) on the IT strategy for customs, a further option could be a shared IT supplier through a specific entity/agency or other methods of collaboration. Given the inherent complexity of

customs operations, together with their cross-border character, a 'blended solution' might be better in response to threats than a single overarching one.

Harmonised sanctions

The existing Treaty provisions could also offer legal grounds for approximating legislation on sanctions. Approximation of legislation could take the form of common administrative non-criminal sanctions (as criminal law falls under the jurisdiction of the Member States) to be levied for a range of violations. This, however, would presume a common understanding and system for dealing with customs infringements. In this regard, shared best practices on how to deal with customs infringements, as well as common rules on supervision and investigation, could be useful.

More control equipment and human networking

More customs control equipment and capacity building actions around human networking and competency acquirement may be needed in order to address security challenges and criminal activities more effectively, and to enhance multi-agency cooperation.

Unified EU customs force and EU criminal law

On a larger scale, a further idea would be the creation of a unified EU customs force. Such an authority, acting on behalf of the Union, could curb and prevent acts regarding customs wrongdoings and be responsible for the enforcement, supervision and control of the common customs rules. A set of common EU criminal law rules concerning customs violations could be introduced (replacing the existing Member State rules).

The legal basis

Article 33 TFEU

Within the scope of application of the Treaties, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall take measures in order to strengthen customs cooperation between Member States and between the latter and the Commission.

Article 33 TFEU provides, in principle, for a non-defined range of measures in order to strengthen cooperation in customs matters between Member States and within the Union. These measures can include both legal acts (e.g. regulations, directives) and non-legislative measures. In the framework of the ordinary legislative procedure, the European Parliament acts as a co-legislator. Unlike its predecessor ([ex-Article 116 TEU](#)), Article 33 TFEU does not exclude the application of criminal law or the national administration of justice.

Use of legal basis to date

Article 33 TFEU has been used as a legal basis on several occasions: in 2013, for instance, with [Regulation \(EU\) No 952/2013](#), which lays down the Union Customs Code, and [Regulation \(EU\) No 1294/2013](#) establishing the Customs 2020 action programme for the period 2014-2020. In 2015, [Regulation \(EU\) 2015/1525](#) was adopted amending [Council Regulation \(EC\) No 515/97](#), which deals with mutual assistance between Member States and with the European Commission in customs matters. The 2013 Commission [proposal](#) for a directive on customs infringements and sanctions and the 2018 [proposal](#) for a regulation establishing the 'customs' programme, which would replace the current customs 2020 programme and cover the next multiannual financial framework for the 2021-2027 period, are also based on Article 33 TFEU. The legislative procedure for both proposals is ongoing.

FURTHER READING

EPRS, [MFF – Proposal for a regulation of the European Parliament and of the Council establishing the 'Customs' programme for cooperation in the field of customs](#), Legislative Train Schedule, 2018.

EPRS, [Union Customs Code – State of play](#): European Implementation Assessment, 2018.

EPRS, [Understanding the EU customs union](#), 2017.

Policy Department for Economic and Scientific Policy, [Implementation of the Modernised Customs Code](#), 2014.



22. Stepping up the fight against fraud

Three quarters of EU citizens would like the EU to do more to combat tax fraud, and two thirds think that it is not currently doing enough. Article 325(4) TFEU gives the EU a broad mandate to introduce measures to combat fraud affecting EU financial interests, including customs duties and value added tax (VAT), which are among EU budget's sources of income. This legal basis has been used for [Regulation 883/2013](#) concerning investigations conducted by the European Anti-Fraud Office (OLAF) and more recently for [Directive 2019/1937](#) on the protection of people who report breaches of Union law, but there is still room for much wider use, not least with regard to laying down a substantive anti-fraud policy and providing for EU supervision over national customs and taxation authorities.

Current challenges and policy debates

According to a 2016 Eurobarometer survey on [citizens' perceptions and expectations](#), 75 % of EU citizens surveyed would like the EU to play a more active part in the fight against tax fraud, one of the areas with the strongest support for more EU involvement. At the same time, two thirds of EU citizens consider the EU's current contribution to the fight against fraud to be insufficient. Another side of fraud is corruption, especially in the context of public procurement. In a [2017](#) Eurobarometer survey on business attitudes towards corruption in the EU, 31 % of respondents indicated that they think corruption has prevented them from winning a public tender. Protection of EU financial interests is a [crucial item](#) on the Union's agenda because transparent, regular and sound financial management is important both for citizens, aiming at strengthening their confidence in the EU institutions, for businesses, and for NGOs, offering them a level playing field regarding access to EU funding. According to the Commission's 2018 fight against fraud [report](#), a total of 11 638 fraudulent and non-fraudulent irregularities were reported to the Commission in 2018, 25 % fewer than in 2017. They involved approximately €2.5 billion, stable in comparison with the previous year. Overall, 1 152 irregularities (+0.4%) were reported as fraudulent (i.e. about 10 % of all irregularities detected and reported), involving about €1 197.2 million (+183 %) covering both expenditure and revenue irregularities. The reasons for the sharp increase in 2018 relate to cohesion policy. According to the European Commission this increase is due, to a large extent, to two fraudulent irregularities detected by Slovakia involving very high sums. In general, [cohesion policy and regional development policy](#) are considered to be most affected by fraudulent behaviour. It is also worth noting, however, that over 80 % of the EU budget is managed at national level, making the Member States primarily responsible for fighting fraud. In 2018, OLAF opened 219 investigations and concluded 167, recommending financial recoveries worth €371 million. At the end of the year, 414 investigations were ongoing.

Scope for action

European Parliament's position

Parliament has called repeatedly for an integrated approach to fraud, tax avoidance and corruption, as well as for action to strengthen multidimensional cooperation and coordination between the Member States and the EU institutions. Examples of this include its resolutions on [OLAF](#) (2008), on [organised crime, corruption and money laundering](#) (2013) and on the [Annual Tax Report](#) (2015).

Strengthening tax authorities: a European tax corps

One factor in the 2008 crisis was the weakness of some national tax administrations in the collection of tax revenues. The creation of a 'European tax corps' or 'European facilitator' of tax agents, composed of EU civil servants and seconded national officials who could support national tax administrations in the fulfilment of their duties might be one way to address this issue. Parliament and Council, acting upon a Commission proposal, could adopt a legislative act, possibly a regulation, establishing such a European Tax Corps, which could also have supervisory powers in relation to national customs and tax authorities.

Creating a European customs service

Given that customs duties are an exclusive EU competence (Articles 28-29 TFEU), as well as an own resource of the EU budget, another possibility might be the creation of a European customs service, to either assist national customs authorities or even replace them in the long term.

Substantive anti-fraud policy

On the basis of Article 325 TFEU, Parliament and Council, upon a Commission proposal, could adopt a directive or regulation providing for a substantive EU anti-fraud policy. This could include, more specifically, standards and definitions for application and redress. Such a directive or regulation would supplement the current institutional framework of OLAF and the European Public Prosecutor's Office.

Legal basis

Article 325(4) TFEU

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, after consulting the Court of Auditors, shall adopt the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Union with a view to affording effective and equivalent protection in the Member States and in all the Union's institutions, bodies, offices and agencies.

Article 325(4) TFEU gives a very generous delimitation of the scope of EU competence. The ordinary legislative procedure is applicable, and the Court of Auditors must be consulted. The measures that may be adopted are qualified only as 'necessary', and include all types of legislative acts (directives, regulations) as well as any non-legislative action required. The measures can serve not only to combat actual fraud, but also to prevent fraud, and should be considered with regard to fraud affecting the financial interests of the Union. This encompasses not only money directly owing to the EU budget, but also money collected by the Member States which is then partly paid into the EU budget. Value added tax (VAT) is a case in point. As the Court of Justice of the EU explains in [Case C-105/14 Taricco](#): 'offences in relation to VAT and VAT evasion amounting to several million euros ... constitute cases of serious fraud affecting the European Union's financial interests'. In the context of Article 325, mention should also be made of [Article 87 TFEU](#), which provides that: 'the Union shall establish police cooperation involving all the Member States' competent authorities, including police, customs and other specialised law enforcement services in relation to the prevention, detection and investigation of criminal offences'. Furthermore, [Article 83 TFEU](#) allows the EU to establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime having a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis. In fact, the 2017 [Directive on the fight against fraud to the Union's financial interests by means of criminal law](#) is based on Article 83 TFEU.

Use of legal basis to date

Article 325 TFEU (and its predecessor, [Article 280 TEC](#)) have been the legal basis for several legal acts, including the following, currently in force: Regulation 250/2014 establishing a programme to promote activities in the field of the protection of the financial interests of the EU ([Hercule III](#) programme); [Regulation 883/2013](#) concerning investigations conducted by OLAF; [Regulation 2016/2030](#) concerning the secretariat of the OLAF Supervisory Committee; [Regulations 2015/1525](#) and [766/2008](#), both amending Council Regulation (EC) No 515/97 to ensure the correct application of the law on customs and agricultural matters and more recently [Directive 2019/1937](#) on the protection of persons who report breaches of Union law. A number of decisions, no longer in force, were also based on this article, including the one [setting up](#) a committee of inquiry to investigate alleged contraventions and maladministration in the application of Union law in relation to money laundering, tax avoidance and tax evasion, and those establishing the [Hercule](#) and [Hercule II](#) programmes. Legislative proposals recently submitted on the basis of Article 325 include a proposed regulation [establishing](#) the EU anti-fraud programme, [amending](#) the 2013 OLAF Regulation mentioned above.

FURTHER READING

EPRS, [The institutional architecture of EU anti-fraud measures](#), 2018.

EPRS, [2016 report on protection of the EU's financial interests: Fight against fraud](#), 2018.

EPRS, [Definitive VAT system and fighting VAT fraud](#): Implementation appraisal, 2017.

EPRS, [Fight against tax fraud](#): Public expectations and EU policies, 2016.

23. Making better use of conditionality in European structural and investment funds



The European structural and investment (ESI) funds are financial tools set up to implement the cohesion, rural and fisheries policies of the European Union. Under current rules, Member States must meet a set of conditions to use the funds, such as regulatory frameworks and administrative capacity. Better enforcement, scope adjustment and procedural simplification of these 'conditionalities' could contribute to more efficient implementation of the funds and compliance with EU law.

Current challenges and policy debates

In the period 2014-2020, [€454 billion](#) of EU funding is being channelled through the five European structural and investment (ESI) funds. These include the [European Regional Development Fund](#), the [European Social Fund](#), the [Cohesion Fund](#) (the three funds that make up cohesion policy), as well as the [European Agricultural Fund for Rural Development](#) and the [European Maritime and Fisheries Fund](#). According to the rules governing the use of ESI funds, EU Member States must respect a set of ex-ante conditionalities (ExAC). These pre-conditions are meant to ensure that Member States' legal, strategic and administrative frameworks are fully prepared to implement the funds effectively and comply with EU policy standards, subject to suspension of interim payments in case of non-fulfilment. The existing 48 ex-ante conditionalities include: 7 general conditionalities linked to the horizontal aspects of programme implementation (e.g. anti-discrimination, public procurement and state aid); 29 thematic conditionalities, which set out sector-specific conditions applicable under cohesion policy (e.g. transport, employment, institutional capacity and social inclusion); 8 thematic conditionalities applicable to agricultural policy; and 4 thematic conditionalities applicable to fisheries. Member States provide the assessment of applicability and fulfilment of the ExACs in the [partnership agreements](#) outlining the use of ESI Funds. If ExACs are not fulfilled, the necessary actions, the bodies responsible and the timetable for their implementation must be indicated. Ex-ante conditionalities are not to be confused with 'macroeconomic conditionality', which makes regional funding dependent on respecting the European economic governance rules.

The evaluation of the impact of ex-ante conditionalities has been mixed. According to a 2017 European Commission [report](#), ExACs ensure a direct link between ESI funds investments and EU-level policies, contribute to the implementation of EU legislation, help tackle barriers to investment and trigger policy reforms and structural changes. In 2017, the [European Court of Auditors](#) found that the ex-ante conditionalities provide a consistent framework for assessing Member State's readiness to use EU funds at the start of the programme period. However, the Court pointed out that the Member States' assessment of applicability of ex-ante conditionalities was a lengthy and time-consuming process, while the level of involvement of civil society organisations in the assessment was low. Moreover, the applicability assessment was inconsistent and fulfilment effort varied case by case. In spite of this, the Commission did not suspend any payments. A 2018 [study](#) on conditionalities produced for the European Parliament's Regional Development Committee, highlighted that while ExACs trigger reforms, their impact and sustainability is uncertain due to lack of enforcement and monitoring.

Scope for action

Simplification of administrative procedures

National and regional authorities struggle to interpret and meet the specified criteria for fulfilment of ex-ante conditionalities. A simplified regulatory framework could help Member States to fulfil the applicability assessment of conditionalities. In a June 2017 resolution, the European Parliament [highlighted](#) the need to simplify cohesion policy's overall management system. The 2018 Parliament [study](#) suggests that in the future the conditionalities should remain simple, clear, precise, meaningfully linked to spending and focused on measurable results. The high administrative burden, especially for the less developed regions, could be addressed through prior technical assistance and dedicated support during implementation. Moreover, the applicability of the principle of partnership could be extended to conditionalities.

Adjusting the scope of conditionalities

A second area for improvement concerns the scope and use of conditionalities of various kinds. According to [some Member States](#), there are too many, which might even compromise the proportionality principle. In order to prevent 'over-regulation', conditionalities could be ordered by priority and Member States asked to focus on the priority ones. The European Court of Auditors [recommends](#) to re-assess the relevance and usefulness of each of the ex-ante conditionalities to eliminate overlaps and keep those with the highest impact on the effective achievement of policy objectives. Additional conditionalities could be considered to ensure EU financial resources are used to achieve EU political objectives and promote respect of its values.

Improved enforcement and monitoring

A last area for improvement is procedural. There are currently no procedures for monitoring application of the conditionalities. Ultimately, their application relies entirely on the ownership of Member States. There are several available options to counterbalance this. A first, broader option consists of enhanced supervisory power for the European Commission. In its 2017 report '[The Value Added of ex ante Conditionalities in the European Structural and Investment Funds](#)', the Commission pointed out that a stable link between investments and policy objectives expressed in the conditionalities must be ensured, and that the durability of results achieved via their fulfilment needs to be strengthened. To complement this, an administrative code governing EU funds, including a system of checks and balances for the application of conditionalities, together with a well-balanced system of sanctions and incentives, could help to overcome such procedural issues. The Court of Auditors recommends a requirement to fulfil and apply ExACs throughout the whole programming period. The 2018 European Parliament [study](#) also highlights the possibility of automatic suspension of payments due to unfulfilled conditionalities.

The legal basis

Article 177 TFEU

Without prejudice to Article 178, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure and consulting the Economic and Social Committee and the Committee of the Regions, shall define the tasks, priority objectives and the organisation of the Structural Funds, which may involve grouping the Funds. The general rules applicable to them and the provisions necessary to ensure their effectiveness and the coordination of the Funds with one another and with the other existing Financial Instruments shall also be defined by the same procedure. A cohesion fund set up in accordance with the same procedure shall provide a financial contribution to projects in the fields of environment and trans-European networks in the area of transport infrastructure.

Use of legal basis to date

Article 177 TFEU is the basis for [Regulation \(EU\) No 1303/2013](#) of the European Parliament and the Council of 17 December 2013, which provides the legal background for ExACs. In the new [common provisions](#) regulation proposed for the post-2020 period, also on the basis of Article 177 TFEU, the ex-ante conditionalities are called 'enabling conditions' and their number is reduced to 20 (4 horizontal and 16 thematic). The monitoring mechanisms have been strengthened to include continued ex-post monitoring of fulfilment. Other novelties include the automatic applicability of conditions and the automatic ineligibility of payments in case of non-compliance. Moreover, a [new conditionality](#) relating to the rule of law is added and an infringement conditionality relating to breach of EU law is re-introduced. The legislative framework has also been simplified. The new [amended](#) regulation proposal covers eight funds (called 'Union Funds'), including the Just Transition Fund.

FURTHER READING

Policy Department for Structural and Cohesion Policies, [Conditionalities in cohesion policy](#), 2018.

EPRS, [Challenges for EU cohesion policy: Issues in the forthcoming post-2020 reform](#), 2018

EPRS, [How the EU budget is spent: European Structural and Investment Funds](#), 2015.

Policy Department for Structural and Cohesion Policies, [Ex Ante Conditionality in ESI Funds: State of Play and their potential impact on the Financial Implementation of the Funds](#), 2018



24. Introducing a European Business Code

The diversity of the legal environment for businesses makes economic activity in Europe difficult, especially for small and medium-sized enterprises. The elimination of legal obstacles through the enactment of a European Business Code could contribute to the creation of a level playing field for businesses and the achievement of a genuinely single market.

Current challenges and policy debates

Debate on the unification of European private law

Whilst directives, regulations and Court of Justice of the European Union (CJEU) case law create isolated 'islands' of unified EU private law within the broad realm of national private laws, since the 1970s scholars have advocated a horizontal approach through the adoption of a 'European Civil Code'. The European Parliament explicitly backed the idea as early as [1989](#) and [1994](#). The European Commission took it on board in a 2001 communication on [European contract law](#), only to drop it three years later in a subsequent [communication](#). Nevertheless, the Commission did keep the idea of drafting a Common Frame of Reference, conceived as a 'toolbox' for the EU legislature in the field of private law, as well as the adoption of an 'optional instrument' (a code applicable only if the parties to the transaction so wish). The Parliament gave its support to the idea of an optional code in [2011](#). Whether the EU needs a civil code to regulate private law uniformly across the Member States has been the subject of much debate. Supporters [argue](#) that it would increase market efficiency by removing legal barriers for businesses and consumers. [Critics](#), on the other hand, claim that a uniform code would have a negative impact upon national legal cultures and legal communities, and question its actual efficiency, pointing to the value of regulatory [competition](#) between national legal orders.

The draft Common Frame of Reference

With a grant from the Commission, two expert groups composed of academics prepared a [draft Common Frame of Reference](#) (DCFR), published in its final version in 2009. The DCFR consists of ten books, covering both the law of obligations (contracts and non-contractual liability), as well as certain aspects of property law, such as transfer of ownership of goods, security rights in movable property, and trusts.

The abandoned idea of an 'optional instrument'

With its 2010 [green paper](#) on policy options for progress towards a European contract law for consumers and businesses, the Commission re-consulted the public on possible policy options. These included an 'optional instrument', understood as being an EU law applicable on an opt-in basis (i.e. only if the parties to a contract want to apply it to their transaction). The European Parliament backed the idea of such an instrument in a 2011 [resolution](#). In the meantime, in 2010, the Commission [set up](#) an expert group, composed of distinguished academics, which in 2011 drew up a 'feasibility study' including a draft instrument on sales law, mainly inspired by the DCFR. This became the basis for the Commission's proposal for a [common European sales law](#), tabled in October 2011. In 2014, Parliament [backed](#) the proposal, but it remained blocked in the Council and the Juncker Commission decided not to proceed with it.

Cross-border only regulation?

Some scholars have argued in favour of a cross-border only regulation of European private law, meaning a directly applicable EU regulation but which would apply only to cross-border transactions, rather than to domestic ones. They consider that the logic that a single market should be governed by a single set of rules makes sense with regard to a *genuinely single* market in a socio-economic sense. However, they argue that whilst there is a single market for cross-border, and especially online, transactions, there are, in parallel, purely domestic markets, which should not be affected by the unified legislation.

Scope for further EU action

A European Business Code...

A European Business Code in the form of a regulation could create a comprehensive legal environment, in the areas of broadly conceived private law, for business activity in Europe. Such a code could, first of all, codify all the existing *acquis* in the field of company law, transforming the existing directives (which require

national implementation) into a directly applicable piece of EU law (a regulation). Furthermore, the European Business Code could also regulate the most frequently concluded types of business contracts, such as franchise, agency, distribution, but also business-to-business sales and lease of property. A European Business Code would create a level playing field for European businesses, eliminating barriers to trade caused by the divergence of national legal systems. The text of the code could be based, in particular, on the comprehensive draft Common Frame of Reference.

On 20 November 2018, the idea of a European Business Code was [presented](#) to the European Parliament's Committee on Legal Affairs (JURI) by members of the [Henri Capitant Association](#). The Association has already started working on a draft.

...complemented by a European Consumer Code

The envisaged European Business Code could be complemented by a European Consumer Code, codifying and systematising the existing *acquis* in the field of consumer contract law. Today, this is scattered across a dozen directives, most of them based on the principle of minimum harmonisation. Taking into account that many Member States wish to grant consumers a higher level of protection than the European 'average', a realistic option for a Consumer Code would be in the form of a minimum harmonisation directive, allowing national legislatures to step up consumer protection if they so wished. Nonetheless, bringing the consumer *acquis* into one legal act and filling the existing gaps in EU legislation on consumer contract law would make the legal environment more predictable, transparent and accessible, for both consumers and traders.

The legal basis

[Article 50\(1\) TFEU](#)

In order to attain freedom of establishment as regards a particular activity, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall act by means of directives.

[Article 114\(1\) TFEU](#)

[...] The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.

Article 50 TFEU is the legal basis for the harmonisation of certain aspects of company law, including for any rule that protects company shareholders or third parties and serves the realisation of any of the fundamental freedoms (not only freedom of establishment). Article 114 TFEU is currently the most important legal basis for the harmonisation of substantive rules of private law. It was added (as Article 100a EEC) by the Single European Act in 1986 in order to enable the EU legislature to complete the internal market using the procedure of qualified majority voting in the Council (the ordinary legislative procedure now applies). Article 114 TFEU confers upon the EU the competence to harmonise national rules regarding the establishment and functioning of the internal market. As with Article 50 TFEU, measures based on Article 114 TFEU are adopted under the ordinary legislative procedure, and the European Economic and Social Committee must be consulted.

Use of legal basis to date

Article 114 TFEU is the legal basis for an entire body of EU contract law, including directives on [package travel](#), [unfair contract terms](#), [late payments](#), and [consumer sales](#). Discussions on the proposed new directives on [consumer sales](#) and on [supply of digital content and digital services](#) are on-going in the Parliament. Article 50 TFEU and its predecessors have, in turn, provided the legal basis for the creation of a whole body of [EU company law](#). Parliament is currently working on two new proposals for company law directives, one on the [digitalisation of company law](#), and another on [cross-border mobility](#) for companies.

FURTHER READING

EPRS, [EU competence in private law](#), 2015.

EPRS, [Contract law and the digital single market](#), 2016.



25. Third-party effects of assignments of claims

The assignment of claims, whether simple or more elaborate, is used extensively in the European Union by small and medium-sized enterprises (SMEs) – factoring – and banks – securitisation – to obtain much-needed liquidity. Currently, the EU market in factoring has a volume of €1.73 trillion yearly, and the market in securitisation, €269.7 billion. However, the lack of common rules, first, on the third-party effects of assignment of claims and, second, specifying which national law is applicable, mean that cross-border transactions of this kind carry a great deal of legal risk. The Commission has proposed rules that would specify which legal system applies to the third-party effects of such transactions.

Current challenges and policy debates

The [assignment of a claim](#) is a legal mechanism where a creditor transfers the right to claim a debt to another person in exchange for a payment. Elaborate mechanisms for assigning claims include factoring and [securitisation](#) (the pooling of homogeneous assets and their sale to a special third party to issue securities). [Factoring](#) in the EU – the largest market worldwide, with a [volume](#) of €1 727 billion in 2018 – is used mostly by SMEs (87% of total users) and is crucial way for them to obtain funds quickly, using the amounts owed to them for goods or services delivered (receivables). However, the mechanism is still mostly used within Member States and not across borders. The market volumes for securitisation in the EU are also significant ([issuance in 2018](#) totalled €269.7 billion).

The question of the third-party effects of assignments of claims – i.e. which national law applies when determining who owns a claim, after it has been assigned in a cross-border case – was already identified in the [first Giovannini report](#) in 2001. It was raised explicitly when the [Rome Convention](#) was being transformed into the [Rome I Regulation](#). However, action was not envisaged until 2015, when the matter was included in the [action plan](#) on building a capital markets union.

In the absence of EU conflict of laws rules, the applicable law is determined by national conflict of laws rules. Currently, [Member States' conflict of laws rules](#) can be inconsistent as they are based on different connecting factors to determine the applicable law: by way of [example](#), conflict rules in Spain and Poland are based on the law of the assigned claim, whereas conflict rules in Belgium and France are based on the law of the assignor's habitual residence. This inconsistency across the EU means that Member States may designate the law of different countries as the law that should govern the third-party effects of the assignment of claims. This lack of legal certainty in turn creates a [legal risk in cross-border assignments](#), which does not exist in domestic assignments. The legal risk in cross-border transactions implies loss of earnings, potential losses and significantly higher costs (the cost of a cross-border transaction might double). These elements may further contribute to financial stability risks and to reduced market integration.

Scope for more EU action

Following a [public consultation](#) in 2017 and the setting up of an [expert group](#) on conflict of laws regarding securities and claims, on 12 March 2018 the [Commission proposed](#) common conflict of laws rules on the third-party effects of assignments of claims. The proposal takes a mixed approach, under which the law of the country where the assignor has its habitual residence will govern the third-party effects of the assignment of claims and the law of the country of the assigned claim will only apply as an exception.

In its [opinion](#), the European Central Bank (ECB) notes that Article 14 of the [Rome I Regulation](#) refers, for certain aspects, to the law of the assignment agreement and, for others, to the law of the assigned claim. The general rule under the proposed regulation refers to a third jurisdiction, that of the assignor. If credit claims are used as financial collateral, the reference to the law of a third jurisdiction increases the legal due diligence burden on collateral takers where bank loans (credit claims), are mobilised as collateral on a cross-border basis. Therefore, the ECB invites the Council to clarify in the proposed regulation that the law applicable to the claim would also govern the third-party effects of assignments of credit claims.

The proposal has received [further criticism](#) in that it leads to increased complexity. In the interest of legal certainty and protection of the debtor, it has been proposed that the law of the assigned claim should be chosen as a rule and not as an exception.

The legal basis

Article 81(2) TFEU

For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring:

[...]

(c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction;

[...].

The legal basis for the proposal is Article 81(2)(c) TFEU which, in the area of judicial cooperation in civil matters having cross-border implications, specifically empowers Parliament and Council to adopt measures aimed at ensuring 'the compatibility of the rules applicable in the Member States concerning conflict of laws ...'. The ordinary legislative procedure applies, unless the measure would have implications for family law, which is not the case for the third-party effects of assignment of claims.

By reason of [Protocol No 22](#), legal measures adopted in the area of freedom, security and justice, such as rules on conflict of laws, do not bind or apply in Denmark. By reason of [Protocol No 21](#), Ireland (and previously the UK) are not bound by such measures either. However, once a proposal has been presented in this area, these Member States can notify their wish to take part in the adoption and application of the measure and, once the measure has been adopted, they can notify their wish to accept that measure by [qualified majority voting](#). Neither has made use of this possibility.

Use of the legal basis to date

Article 81(2) TFEU gives the EU power to promote [judicial cooperation in civil matters](#) having cross-border implications. In this context, it has been used as the basis to adopt a whole body of EU legislation on private international law and [cross-border civil procedure](#). The article was used recently for the adoption of the [Brussels Regulation](#) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, for [Regulation \(EU\) No 606/2013](#) on mutual recognition of protection measures in civil matters and for [Regulation \(EU\) No 655/2014](#) establishing a European account preservation order procedure to facilitate cross-border debt recovery in civil and commercial matters. Parliament has also called for the use of this article: to adopt [common minimum standards](#) of civil procedure in the European Union, to defined rules on the [protection of vulnerable adults](#), and to create a new type of civil procedure for business-to-business litigation – the [European expedited civil procedure](#), which could be complemented by the creation of a European commercial court, as a forum specialised in cross-border business litigation.

FURTHER READING

EPRS, [Law applicable to the third-party effects of assignments of claims](#), briefing, 2018.

EPRS, [Fostering cross-border investment](#) – Law applicable to the third-party effects of assignments of claims, impact assessment, 2018.



26. Harmonising EU bank insolvency law

The current EU regime for banks failing or likely to fail is split between a common resolution procedure at EU level for banks of systemic importance, on the one hand, and Member State insolvency law for smaller banks, on the other. The fact that currently national insolvency regimes vary substantially between Member States, has economic implications for the industry and prevents the banking union from reaching its full potential. In this context, there have been calls for further harmonisation of bank insolvency law. The Treaty could potentially provide two legal bases for moving forward in this area.

Current challenges and policy debates

A country's financial system transfers funds from savers to borrowers. The two [main ways](#) to do this are through [\(i\) financial markets and \(ii\) banks](#). While financial markets play the leading role in channelling funds in the United States, the European Union financial system is [predominantly bank-based](#). Because of the critical role of banks in the EU, it is of primary importance that their financial difficulties be resolved in such a way as to minimise their impact on the wider financial system.

For most banks, this can be achieved through national insolvency proceedings. Some banks, however, are [too important and/or interconnected](#) to allow for their liquidation through a normal insolvency process. That is why, following the crisis, a common resolution regime was adopted for such banks in the context of the banking union. The regime involves the [Single Resolution Board](#) (SRB), which applies the [Bank Resolution and Recovery Directive](#) (BRRD) and manages the [Single Resolution Fund](#). Under this regime, when a bank needs public financial support to preserve its liquidity or solvency, the resolution authority may conclude that there is a public interest (e.g. safeguarding financial stability, or protecting depositors) in putting it under resolution. If not, the bank is liquidated under national insolvency law.

Within the EU, these national insolvency regimes [vary substantially](#) across jurisdictions (although limited elements of harmonisation were introduced with the BRRD and the directive on the [ranking of unsecured debt instruments](#) in insolvency hierarchy). This divergence relates to legal form, as in some Member States bank-specific regimes are in place, while in others, insolvency takes place in the context of ordinary corporate insolvency regimes. It also has to do with [specific aspects](#) of insolvency (e.g. the triggers of insolvency procedures, the hierarchy of claims, or the tools available to manage a bank's failure).

Such a divergence in regimes can give rise to conflicting decisions in the case of a banking group with legal entities in several Member States (e.g. [ABLV](#) with liquidation in Latvia and resolution in Luxembourg), complicating resolution planning and creating uncertainty for the industry and investors. It can also result in different outcomes for bank creditors depending on the insolvency law applying to a particular bank, and therefore create an [uneven playing field across](#) the banking union in terms of banks' funding costs.

When it comes to the Banking Union initiative, the fact that national bank insolvency proceedings are the rule and resolution is the [exception](#), coupled with the fact that Member States might opt to provide state aid to save the bank, contrasts with the post-crisis efforts to resolve potential banking crises without using taxpayers' money. Similarly, the current regime helps to perpetuate large implicit national guarantees on domestic banking sectors, and as a result, to the sovereign-bank nexus, which the banking union was designed to break. As such, it has been criticised as a '[major obstacle](#) towards a fully fledged Banking Union'.

Scope for more EU action

To deal with the aforementioned challenges, proposals have been made to [further harmonise](#) national insolvency laws. This harmonisation can be full (new EU regime) or partial, including by [broadening the scope](#) of the BRRD and the Single Resolution Mechanism Regulation to establish administrative procedures also for banks not meeting the public interest test that would, in some concrete aspects, bind the national insolvency regimes.

Already in 2010, the European Commission noted in its communication on an [EU framework for crisis management in the financial sector](#), that it would examine 'the need for further harmonisation of bank insolvency regimes, with the possible aim of resolving and liquidating banks under the same procedural and substantive insolvency rules'.

In a September 2018 article, the chair of the SRB advocated for bank insolvency procedures to be subject to common standards and practices at EU level and noted that 'The ideal solution would be EU-wide rules on insolvency proceedings for the banking sector'.

In 2018 and 2019, the Economic Governance Unit of the European Parliament published various analyses addressing the topic both [directly](#) and [indirectly](#).

Lastly, in November 2019, the Commission published a [study](#) on the differences between bank insolvency laws and on their potential harmonisation.

The legal basis

[Article 81 TFEU](#)

1. *The Union shall develop judicial cooperation in civil matters having cross-border implications.*
2. *For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market.*

[Article 114 TFEU](#)

1. [...] *The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure ..., adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.*

It has been [noted](#) that Articles 81 and 114 TFEU can constitute legal bases that can help to harmonise insolvency laws in the EU and, more specifically, in the euro area. Article 81 TFEU offers a legal basis for judicial cooperation. Article 81(2) TFEU gives the EU power to promote [judicial cooperation in civil matters](#) having cross-border implications and has been used as the basis for adoption of a growing number of regulations in the field of private international law and (harmonisation of) [cross-border civil procedure](#). Article 114 TFEU [seems](#) to be particularly fit for further harmonising insolvency laws, as measures to increase predictability in a cross-border transaction are a pre-condition for the creation of a genuine single market for capital.

Use of legal basis to date

Article 81 TFEU has been used as a legal basis in numerous occasions, most recently to adopt the [Brussels IIa](#) Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, a [regulation](#) establishing a European Account Preservation Order and a [regulation](#) on insolvency proceedings. Article 114 TFEU was recently used as a legal basis for a [regulation](#) on the prudential requirements of investment firms, a [regulation](#) on facilitating cross-border distribution of collective investment undertakings and a [directive](#) on preventive restructuring frameworks.

FURTHER READING

EPRS, [Cross-border insolvency law in the EU](#), briefing, 2013

EPRS, [Reform of the EU Insolvency Regulation](#), briefing, 2014

EPRS, [Finalising reform of cross-border insolvency rules](#), plenary at a glance, 2015

EPRS, [Ranking of bank creditors in insolvency](#), briefing, 2017

EPRS, [New EU insolvency rules give troubled businesses a chance to start anew](#), briefing, 2018

27. Introducing new tools to facilitate civil justice



The number of cross-border civil cases in Europe may range from 83 000 to as many as 116 000 per year, and the total overall cost of such litigation is estimated at €7.7 billion annually. However, national civil procedures remain incompatible and often protracted. The Treaties allow the European Union to remedy this by creating optional civil procedures, promoting fair and transparent arbitration, or tackling linguistic barriers.

Current challenges and policy debates

Thanks to the internal market and the Schengen area, the number of cross-border legal relationships in the EU is steadily increasing. Citizens and businesses often enter into contracts with sellers or service providers outside their Member State of residence. The number of international couples in Europe is also increasing, and many EU citizens live permanently outside their country of origin. Cross-border legal relationships sometimes lead to cross-border litigation – to enforce a late payment, to seek damages under a contract, to divorce and decide on child maintenance, or to divide an inheritance. According to various [estimates](#), the number of cross-border civil cases in Europe may range from 83 000 to as many as 116 000 per year. The total overall cost of cross-border civil litigation is [estimated](#) to be as much as €7.7 billion annually. The divergence of civil procedure rules in the Member States not only generates elevated costs, but also leads to difficulties concerning linguistic regimes, incompatibility between national laws and cross-border enforcement. For citizens, such additional hurdles only add to the inconvenience of litigating a dispute, and for businesses, they constitute a real cost, increasing the overall costs of cross-border economic activity. From a [political perspective](#), the broader policy context of harmonising civil justice rules across the EU is seen as encouraging not only cross-border trade, but also greater [mutual trust](#) between national judiciaries, as well as a general feeling of justice across the EU and the legitimacy of civil justice systems acting in cross-border situations. The Court of Justice of the EU (CJEU) has been [identifying](#), on a case-by-case basis, fundamental principles of civil procedure that can be viewed as minimum standards.

Scope for action

Common minimum standards of civil procedure

On 4 July 2017, Parliament adopted a [resolution](#) calling upon the Commission to table a proposal on common minimum standards of civil procedure. The resolution includes an annex containing a ready-to-use text of a draft directive. Parliament would like the directive to apply to civil proceedings having cross-border implications. Minimum standards would be set *inter alia* for the following areas: the fair conduct of proceedings; use of appropriate distance communication technology; provisional and protective measures; rights of the defence; right to an effective remedy and a fair trial; the principle of an adversarial process; the obligation for the courts to provide reasoned decisions within a reasonable time; active management of cases by judges; legal aid; service of documents, as well as the right to a lawyer. According to the 2017 EPRS [Cost of Non-Europe Report](#), the adoption of common minimum standards of civil procedure could bring savings of up to €773 million per year.

Mutual recognition of adoption orders

On 2 February 2017, Parliament adopted a [resolution](#) calling upon the Commission to table a proposal for a regulation on the mutual recognition of adoption orders between the Member States. Currently, there is no mechanism for an automatic recognition of adoptions, meaning that a child who is legally adopted in one EU country could be treated as a complete stranger to his adoptive parents in another EU country. The resolution also contains a ready-to-use legislative draft which the Commission could table as a proposal.

Expedited procedure in business-to-business litigation

On 20 November 2018, the JURI committee unanimously adopted, under [Rule 46](#), a [report](#) with recommendations to the Commission on expedited settlement of commercial disputes. The report invites the latter to table a proposal to create a new EU optional civil procedure – the European expedited civil procedure (EECP) for cross-border litigation between businesses. This could allow cutting costs and to speed up the resolution of business-to-business disputes, thanks, *inter alia*, to tight, pre-determined

deadlines, no separate appeal on procedural questions, and the limited possibility of raising new circumstances once the procedure kicks off. The procedure would be voluntary and would require agreement from both parties to the dispute, in contrast to existing ones which are triggered at the claimant's initiative, but in line with arbitration procedures which also require both parties' consent.

Establishment of a European Commercial Court

The JURI [report](#) on commercial litigation also suggests the creation of a European Commercial Court, to supplement the courts of Member States and offer litigants an additional, international forum specialised in settlement of commercial disputes.

Other possible areas

Additional areas of potential development of European civil procedure could include e-evidence (recently [proposed](#) in criminal procedure), promotion of the use of [arbitration proceedings](#) by businesses, or removing linguistic barriers and promoting [multilingualism](#) of civil proceedings, for instance by making it obligatory for courts to accept submissions in at least one language of another Member State.

The legal basis

Article 81 TFEU

1. The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring: [...] (f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States [...].

The legal basis, first introduced in 1999, currently provides for the ordinary legislative procedure to be followed. Denmark does not participate, and Ireland (and previously the UK) opt in on a case-by-case basis. Legislation concerning family matters is adopted through a special legislative procedure, with the Parliament only consulted. A *passerelle* clause in Article 81(3) TFEU allows to switch to the ordinary legislative procedure also for family law, something Parliament has expressly called for in its [resolution](#) of 16 February 2017.

Use of legal basis to date

Legislative adopted

Up to now, Article 81(2) TFEU has been used to create a number of optional cross-border civil procedures (which do not replace national ones, but can be used upon the initiative of the litigants), including the [European Small Claims Procedure](#), [European Order for Payment Procedure](#), [European Enforcement Order](#) and the [European Account Preservation Order](#). Apart from enacting directly applicable regulations, the EU legislature has also made some first steps to harmonise national civil procedure in selected areas, including [mediation](#) and [legal aid](#). A non-binding recommendation on [collective redress](#) was adopted in 2013. Furthermore, the EU has enacted a number of regulations providing for the recognition and enforcement of judgments from other EU Member States, including the [Brussels Ia Regulation](#), as well as specific regulations on [matrimonial matters and parental responsibility](#), [cross-border divorces](#) (under enhanced cooperation), [cross-border successions](#), and [insolvency proceedings](#). Parliament is currently working on two legislative proposals amending the rules on [service of documents](#) and [taking of evidence](#).

FURTHER READING

EPRS, [Common minimum standards of civil procedure](#): Legislative Train Schedule, 2018.

EPRS, [Mapping the Cost of Non-Europe, 2014-19 – Fourth edition](#), 2017.

Policy Department for Citizens' Rights and Constitutional Affairs, [The European Law Institute/UNIDROIT Civil Procedure Projects as a Soft Law Tool to Resolve Conflicts of Law](#), 2017.

EPRS, [Common minimum standards of civil procedure](#): European Added Value Assessment, 2016.

EPRS, [Europeanisation of civil procedure: Towards common minimum standards?](#), 2015.

28. Improving euro-area multilateral surveillance



The European sovereign debt crisis sparked a process to reform economic and monetary union (EMU), a process that resulted in the establishment of a multilateral surveillance framework. The measures adopted stretched the use of the Treaties' legal bases to their maximum limits and had to be supplemented with intergovernmental treaties outside the European Union (EU)'s legal order.

Current challenges and policy debates

The sovereign debt crisis that started in 2009-2010 and affected four euro-area Member States showed that the economic governance framework was not up to its task, as its proper functioning should have prevented the occurrence of such events. This led to the [reform](#) of the framework in order to improve economic and monetary stability, avoid negative spill-over effects, and improve the sustainability of pensions. In particular, by establishing the [European Semester](#), the EU adopted a series of regulations to strengthen the [Stability and Growth Pact](#) (SGP) and introduced a procedure to monitor and correct [macroeconomic imbalances](#) (MIP). The latter serves to identify possible problems within a Member State at an early stage in order to allow for timely correction, if necessary by applying the [excessive imbalance procedure](#). As EMU-related legal bases were stretched to the maximum, some of these reforms were concluded in intergovernmental agreements (such as the [Fiscal Compact](#) and the [Euro Plus Pact](#)). In addition, to avoid a deepening of the crisis, a series of [financial assistance programmes](#) designed to support Member States that had lost access to the capital markets were set up. That financial support is subject to strict conditionality, necessitating structural reforms and achievement of sustainable public finances. In the absence of a suitable EU legal basis, most support instruments, such as the [European Stability Mechanism](#) (ESM) have been based on intergovernmental agreements.

Despite improvements in European economic governance, progress on implementing country-specific recommendations (CSRs) has been [rather slow](#). Some of the measures agreed in connection with the financial support have been challenged by individuals in courts, including in the Court of Justice of the EU (CJEU). In its [Pringle judgment](#), the CJEU confirmed the legality of the intergovernmental support mechanisms, as well as the need to apply conditionality when these extend loans to distressed governments. The court also confirmed the legitimacy of the amendment to [Article 136 TFEU](#), adding a third paragraph to make the creation of the intergovernmental ESM possible, while implicitly allowing EU institutions a supporting role, but without conferring decision-making powers upon them. However, concerns over the impact of measures intended to improve the sustainability of public finance on the protection of fundamental rights and their potentially negative socio-economic impact have been raised by [academics](#) and by the European Parliament. The latter has also drawn attention to the reluctance to enforce the MIP, with the result that it fails to correct imbalances effectively.

Scope for action

The European Parliament has adopted several resolutions (for example those of [26 October 2017](#), [16 February 2017](#) and [13 March 2014](#)) on the need for further reform of EMU and its multilateral surveillance. The current rules are deemed complicated, difficult to enforce properly and lacking transparency. Parliament has placed the emphasis on ensuring implementation of the CSRs by means of increased national ownership, respect for human rights, accountability, consistency with structural reforms and EU spending, promotion of growth-enhancing measures, and measures to enhance its own powers of scrutiny.

Improving input legitimacy

When it comes to EMU executive tasks the Treaties envisage only a minimal role for the European Parliament, which in most cases has the right to be informed at best. Therefore, input legitimacy (i.e. ensuring that decisions are responsive to citizens' concerns and made by, and subject to, control by a democratic process) could be improved by enhancing the role of parliaments at national level. Improving national ownership of policies would also help to improve input legitimacy.

Improving output legitimacy

On the output legitimacy side (i.e. achieving beneficial policy outcomes), an ex-ante assessment of the impact of adjustment programmes on rights covered by the [Charter of Fundamental Rights](#) (CFR), could help to ensure that emergency measures remain proportional. Reforms and measures destined to restore fiscal sustainability can impact on diverse rights, as shown in a Council of Europe [study](#). The European Parliament has called for socio and economic impact assessments to be carried out on the measures taken under the various assistance programmes. Finally, the reliability of the statistics used could be enhanced. In 2013, the European Commission issued a [proposal](#) to improve statistics in the MIP. This dossier is currently [on hold](#) in Council over the choice of legal basis ([Article 338 TFEU](#)).

The legal basis

[Article 121\(6\) TFEU](#)

The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, may adopt detailed rules for the multilateral surveillance procedure referred to in paragraphs 3 and 4.

[Article 136\(1\) TFEU](#)

In order to ensure the proper functioning of economic and monetary union, and in accordance with the relevant provisions of the Treaties, the Council shall, in accordance with the relevant procedure from among those referred to in Articles 121 and 126, with the exception of the procedure set out in Article 126(14), adopt measures specific to those Member States whose currency is the euro: (a) to strengthen the coordination and surveillance of their budgetary discipline; (b) to set out economic policy guidelines for them, while ensuring that they are compatible with those adopted for the whole of the Union and are kept under surveillance.

Article 121 TFEU sets out the framework for multilateral surveillance in EMU for all Member States. It establishes the procedures and instruments for economic coordination, such as the definition of broad economic policy guidelines (BEPG), monitoring of national economic developments and consistency of national policies with the BEPG (Article 121(3) TFEU), and the issuing of CSRs if national policies are inconsistent with the BEPG (Article 121(4) TFEU). Article 121(6) TFEU allows Parliament and Council to adopt detailed procedural rules under paragraphs 3 and 4 of Article 121 TFEU. Article 136(1) TFEU allows the Council to adopt measures specific to euro-area Member States to strengthen coordination and surveillance of budgetary discipline and to set out economic policy guidelines and monitor their implementation. Measures must be adopted in accordance with the relevant procedures under Articles 121 and 126 TFEU ([excessive deficit procedures](#)), with the exception of Article 126(14). Article 136(1) TFEU can therefore be used in conjunction with Article 121 TFEU (as a joint legal basis). The main debate among [academics](#) centres on whether the use of this joint legal basis must be limited to instruments provided under Article 121 TFEU (as an enhanced cooperation provision) or whether it can be used for measures going beyond that framework (similar to a flexibility clause). Experts currently tend towards the first interpretation.

Use of legal basis to date

In the wake of the European sovereign debt crisis, the joint legal basis was used extensively to strengthen the coordination of economic policies and the enforcement of budgetary discipline for the euro area. The MIP and its [excessive imbalance procedure](#), the latter being restricted to the euro area, are based on it. The legal bases for EMU have been stretched to their limits (e.g. introduction of sanctions for the preventive part of the SGP in relation to recommendations that were originally non-binding, or the changes in the majority voting rule with the introduction of reverse majority). Furthermore, in addition to the above-mentioned intergovernmental treaties (Fiscal Compact, Euro Plus Pact), a number of intergovernmental mechanisms were created, such as the [European financial stabilisation mechanism](#) (EFSM), the ESM, and the [European Financial Stability Facility](#) (EFSF).

FURTHER READING

EPRS, [Understanding the macroeconomic imbalance procedure: Origin, rationale and aims](#), 2017.

EPRS, [Vicious circles: The interplay between Europe's financial and sovereign debt crises](#), 2016.

29. Presenting common euro-area positions in international forums



Euro-area Member States have conferred monetary policy competence to the Union, but external representation of the euro area within international financial institutions and at conferences remains fragmented. The Treaty obligation to issue common euro-area positions on matters concerning EMU is essential for unified representation, but so far informal coordination has been preferred, with rather poor results.

Current challenges and policy debates

Fragmentation of euro-area external representation in international financial institutions and at conferences is due partly to the uneven distribution of competences and powers within economic and monetary union (EMU). Monetary policy for the euro area is an exclusive EU competence, while certain aspects of economic and fiscal policies are coordinated to various degrees within the European Semester, including those of non-euro area Member States. Moreover, external representation is divided between Member States and EU institutions. The division of powers between EU institutions, mainly the Council and the European Central Bank (ECB), which performs most of that representation, must also be respected. Therefore, even when the euro area is represented, the task is often performed by more than one institutional actor. Moreover, under the current rules of some international financial institutions, such as the [International Monetary Fund](#) (IMF), full membership is for individual countries only. The [obligation](#) to issue common positions under Article 138(1) TFEU was enshrined in the Treaties to ensure that whenever necessary the euro area could speak with one voice in the external arena. However, formal coordination has rarely been used, with most coordination being done in informal groups. Nevertheless, some [academics](#) report that the euro area has often been unable to speak with a single voice, sometimes issuing contradictory statements. Governance frameworks in certain international organisations also hinder coordination. For example, the IMF [executive board](#) is comprised of [executive directors](#) elected from single members (e.g. France or Germany) and from 'constituencies' (groups of countries). Euro-area countries are dispersed between different 'constituencies', sometimes including countries from far away continents, and the constituency's executive director must reflect the mix of interests when voting.

Scope for action

Common positions under Article 138(1) TFEU could be used in a variety of situations, including [G7](#), [G20](#) and IMF meetings. As underlined by [experts](#), the 'unified representation' of the euro area envisaged by Article 138 TFEU is based on those common positions. However, these common positions are difficult to reach for a number of reasons explained below, and action is required to achieve improvements.

Use of Article 138(2) TFEU to facilitate adoption of positions under Article 138(1) TFEU

With regard to the difficulty to reach common positions within the IMF executive board, experts have [suggested](#) that Member States should make a commitment not to vote in the executive board if they cannot reach a common position. Such a proposal is however not in line with [IMF law](#); by which executive directors have to vote in accordance with their constituency. Article 138(2) TFEU could be used to improve external representation and facilitate adoption of positions under Article 138(1) TFEU in the context of the IMF. Proposals under Article 138(2) TFEU could include the negotiation of observer status for the euro area, or the creation of euro-area constituencies (see fiche 30).

Improving coordination networks

The complexity and informality of the current form of coordination may also make it difficult to reach a euro-area position. For example, in the framework of the IMF, coordination takes place in two EU-wide groups. The Council's sub-committee on IMF matters ([SCIMF](#)) meets eight to ten times a year in Brussels and deals with horizontal issues, drafts the speech for the Council Presidency for the six-monthly meetings of the Interim Monetary and Financial Committee ([IMFC](#)), and writes the euro-area review in the context of [consultations](#), and the 'common understanding' on key subjects of IMF activities. The [EURIME](#) is an informal body, composed of EU Member States' representatives to the IMF, the ECB observer and an official from the EU Delegation to the US. It meets three times a week in Washington to deal with day-to-day coordination

of activities in the IMF. The Eurogroup working group ([EWG](#)), assists the Eurogroup in preparing euro-area common positions. Some [academics](#) have highlighted the need for stronger coordination between the EWG and SCIMF. In addition, they have suggested a euro-area SCIMF, as a subcommittee to the EWG focused on IMF matters. The [European Parliament](#) has also suggested enhancing coordination, with a greater role for the Eurogroup, and new ad hoc working groups for coordination on external aspects. Improvement of the coordination network would also mean strengthening the political identity of the euro area and defining common objectives for the euro in the international arena. Indeed, national preferences have been extremely [heterogeneous](#) to date and a major impediment to reaching common positions.

The advantages of EU-wide positions and coordination at the euro-area level

While the presidents of the ECB and the [Eurogroup](#) participate in the G7, in the G20 the ECB participates alongside the Commission and the rotating Council Presidency. The question remains whether the euro area's particularities justify a separate position as opposed to the EU-wide common position, expressed by the rotating Council presidency. If an issue touches upon Europe-wide interests, it may be useful that a common EU-wide position is established. This seems also to be the position of the Commission; in its [2015 proposal](#), it recommends coordination with non-euro Member States within the [Economic and Financial Committee](#) (EFC) to reach EU-wide common positions on matters of interest for the whole Union. Still, the need for an EU-wide common position does not preclude the possibility to coordinate first within the Eurogroup working group and then within the EFC before achieving a Union-wide position that still respects euro-area specificities.

The legal basis

Article 138(1) TFEU

In order to secure the euro's place in the international monetary system, the Council, on a proposal from the Commission, shall adopt a decision establishing common positions on matters of particular interest for economic and monetary union within the competent international financial institutions and conferences. The Council shall act after consulting the European Central Bank.

[Article 138 TFEU](#) deals solely with the external representation of the euro area. Article 138(1) imposes an obligation ('shall') on the Council to adopt decisions on common positions on matters of particular interest for EMU in order to secure the euro's place in the international monetary system. These decisions require qualified majority (QMV). However, Article 138(1) TFEU prescribes the establishment of common positions on matters of particular interest for EMU only, as opposed to those relating to individual Member States. This heavily limits the scope of that legal basis: typical IMF decisions such as those regarding financial support for non-EU countries, e.g. Venezuela, are generally not of immediate concern for EMU. This means that it remains within the remit of each country to take a decision on whether or not to engage its national budgetary means, or provide guarantees, for such a support operation. However, it would be different should a euro area country request IMF financial support or the IMF attempt to impose concrete measures on the euro area, such as requiring manipulation of the euro exchange rate as part of a Member State's programme. This would constitute a matter of particular interest for the whole euro area that would demand a common position. In addition to affecting other euro-area countries, the IMF request would also impede on the Eurosystem's independence in setting monetary policy.

Use of legal basis to date

The Commission issued a proposal in [2015](#) based on Article 138 TFEU aimed at strengthening the external representation of EMU, including stronger coordination, and replacing a [1998](#) proposal. The 2015 proposal was ignored by the Council.

FURTHER READING

EPRS, [Towards unified representation for the euro area within the IMF](#), 2019.

Policy Department for Economic and Scientific Policy, [The EU's role in International Economic Fora: the IMF](#), 2015.

Policy Department for Economic and Scientific Policy, [External Representation of the Euro Area](#), 2012.



30. Strengthening euro-area representation in the IMF

The external representation of the euro area is fragmented, contributing to its inability to speak with one voice. The extent of the lack of global influence of the euro area is particularly acute in the [International Monetary Fund \(IMF\)](#). Article 138 TFEU requires the Council to adopt decisions establishing common positions on matters of particular interest for EMU and to adopt measures in order to secure unified representation of the euro area.

Current challenges and policy debates

The euro area's external representation is fragmented and it has not been able to speak with [one voice](#). The problem is particularly acute within the IMF, where Member States are the trustees of EU interest. The European Central Bank (ECB) has [observer status](#) on the IMF [executive board](#) and therefore can be invited to attend meetings relating to its competences. Twice a year, the European Commission and the ECB attend the meetings of the Interim Monetary and Financial Committee ([IMFC](#)). Yet, euro-area influence has remained limited due to its inability to reach common positions (see fiche 29). This also results from the structure of the IMF Executive Board. The [executive directors](#) are elected either from single IMF members (e.g. France or Germany) or from constituencies, i.e. groups of countries. The euro-area Member States are scattered over different constituencies that can comprise countries from different continents. This dispersion hinders attempts to defend a single euro-area position, as a constituency can only vote as a unit. However, Article 138(1) TFEU prescribes the establishment of common positions on matters of particular interest for EMU, as opposed to individual Member States. This limits the scope of that legal basis: typical IMF decisions such as those on financial support to non-EU countries, e.g. Venezuela, are generally not immediately relevant to EMU. It is up to each country to decide on whether or not to support such operations. However, were a euro area country to request IMF financial support and should the IMF attempt to impose concrete measures on the euro area, such as requesting a manipulation of the euro exchange rate as part of that Member State's programme, that would constitute a matter of particular interest for the whole euro area and would require a common position. As well as affecting other euro area countries, the IMF request would also impede on the Eurosystem's independence in setting monetary policy. The 2015 [Five Presidents' Report](#) called for more unified euro-area external representation.

Scope for action

Observer status, single seat, or negotiating an intermediate status

One suggestion by academics (taken up by the Commission in its legislative proposal, see below) has been to negotiate observer status for the euro area with a representative on the Board of Governors and IMFC. However, that may not be acceptable for the IMF, as contrary to the EU, the euro area does not have [legal personality](#). In addition, observer status is limited in many ways, often allowing intervention on invitation only and not providing for voting rights. In 2010, a European Parliament [resolution](#) recommended an agreement on a euro-area/EU representation in the IMF and other relevant financial institutions. Parliament also [called](#), in 2014, for a single external representation of the euro area and, in [2015](#), for full membership for the EU in international economic and financial institutions. Currently, full IMF membership is not legally possible for either the EU or the euro area, as under [Article II of the IMF Agreement](#) only countries can enjoy full membership. A further obstacle to the single seat is the diversity of competences in the economic and monetary union (EMU). Whereas monetary policy is an exclusive EU competence, it is limited to the euro area, while certain aspects of economic and fiscal policies are coordinated to various degrees. Nevertheless, the EU could try to negotiate a novel arrangement, such as membership without voting rights (these remaining with the Member States), but allowing EU institutions to intervene more systematically every time a matter falls under their competence and to take responsibility for Union-level policies. Alternatively the EU could start by negotiating an enhanced observer status similar to that enjoyed by the EU at the United Nations [General Assembly](#).

The potential advantages of euro-area only constituencies on the IMF Executive Board

The main difficulty in reaching common positions lies in the current [distribution](#) of euro-area Member States amongst the Executive Board constituencies. The way countries are grouped together undermines the capacity of euro-area members to vote as a single entity within the IMF Executive Board as they have to account for the interests of EU Member States not using the euro and/or of countries outside the EU. Although a single euro-area constituency [could strengthen](#) the power of the EMU and [entry into force](#) of the 2010 IMF reform allows for the creation of a single euro constituency, that option has been [blocked](#) by some EU Member States. Nonetheless, as [trustees](#) of the EU in the IMF, Member States [are still bound](#) by a [duty of loyal cooperation](#). If common positions on matters of particular interest for EMU, which should have been adopted under Article 138(1) TFEU, cannot be reached as a result of euro-area dispersion in constituencies with non-euro countries, then a reshuffle of the constituencies in the IMF Executive Board might be required to allow euro-area countries to comply with their obligations. This objective could be reached either through a single euro area constituency, or through several constituencies each solely comprising euro-area countries.

The legal basis

Article 138 TFEU

1. *In order to secure the euro's place in the international monetary system, the Council, on a proposal from the Commission, shall adopt a decision establishing common positions on matters of particular interest for economic and monetary union within the competent international financial institutions and conferences. The Council shall act after consulting the European Central Bank.*
2. *The Council, on a proposal from the Commission, may adopt appropriate measures to ensure unified representation within the international financial institutions and conferences. The Council shall act after consulting the European Central Bank.*
3. *For the measures referred to in paragraphs 1 and 2, only members of the Council representing Member States whose currency is the euro shall take part in the vote.*

A qualified majority of the said members shall be defined in accordance with Article 238(3)(a).

There is no legal basis for a unified representation of the EU as a whole, as [Article 138 TFEU](#) concerns the euro area only. Article 138(2) TFEU allows, but does not prescribe, the adoption by the Council of appropriate measures to ensure unified representation. Moreover, use of Article 138(2) TFEU must respect the division of competences as enshrined in the Treaties and the external competences given by the Treaty to the ECB and to the National Central Banks (Articles 6, 23, 30 and 31 of [Protocol No 4](#)). The TFEU refers only to 'unified representation', not necessarily implying a single Union seat. Article 138(2) TFEU could therefore be viewed either as a further step towards integration beyond the obligation of issuing common positions, or as instrumental in achieving the obligation to reach common positions.

Use of legal basis to date

The Commission's 2012 [communication](#) 'A blueprint for a deep and genuine EMU' calls for action to strengthen the euro area's external representation, leading ultimately to the creation of a single seat in the IMF bodies. The plan is the basis of the [2015 Commission proposal](#) for establishing unified representation of the euro area in the IMF. It proposes that by 2025 the President of the Eurogroup (which the Commission [considers](#) should best be a Commissioner) should present euro-area views to the Board of Governors, and represent the euro area in the IMFC. It also envisages direct representation of the euro area on the IMF Executive Board, following the creation of one or several euro-area constituencies. The ECB issued its [opinion](#) in 2016, highlighting the need to respect central bank competences and protect its independence when designing the mechanism for common representation.

FURTHER READING

EPRS, [Towards unified representation for the euro area within the IMF](#), EPRS, European Parliament, July 2019.

EPRS, [External Representation of the EMU](#), Legislative Train Schedule, 2018.

Policy Department for Economic and Scientific Policy, [The European Union's role in International Economic Fora: the IMF](#), 2015

Policy Department for Economic and Scientific Policy, [External Representation of the euro area](#), 2012.



31. Facilitating balance of payments assistance

The EU Treaties provide for the possibility of financial assistance for non-euro-area Member States that are facing balance of payments difficulties. This assistance is conditional and usually combines medium-term loans with changes in the economic policy of the applicant country, such as consolidation of public finances or structural reforms. However, non-euro-area countries do not have access to the same range of financial instruments as euro-area Member States.

Current challenges and policy debates

Countries with balance of payments (BoP) difficulties often face capital drain and stress on the financial markets. To restore investor confidence and alleviate financial turbulence, the ability to respond quickly to emergency situations and streamlined decision procedures is key.

When it comes to the EU and the non-euro area Member States, the BoP assistance rules are based on a complex mechanism that is outlined in [Council Regulation \(EC\) No 332/2002](#). The BoP facility has become a permanent instrument and is managed directly by the European Commission. The facility is backed by EU own resources and borrows on the financial markets.

A country applying for BoP assistance must [submit a request](#) to the European Commission and the Council explaining how it intends to address its balance of payments problems. Before funds are released, the applicant country must provide information detailing the economic policies outlined in the adjustment programme endorsed by the Council. According to [one research paper](#), the conditions usually relate to fiscal consolidation (e.g. reduction of government deficits); structural reforms (e.g. labour market); reform of the public administration; and safeguard clauses against fraud. In terms of type of financial assistance, the BoP facility can provide loans or lines of credit. The first assessment of whether to grant BoP assistance is made by the European Commission's [Economic and Financial Committee](#) (EFC). Then, acting by [qualified majority](#), the Council must approve the assistance.

However, the current legislation for non-euro-area Member States does have shortcomings, such as the absence of sovereign bailout loans, bank recapitalisation programmes or [precautionary conditioned credit lines](#). In this context, it does not take into account the new coordination tools and instruments created in the context of the financial crises such as the [European Stability Mechanism \(ESM\)](#).

In addition, enhanced BoP assistance is needed in the context of the coherence of the European [banking union](#), which is backed up by a [single rulebook](#) for all financial actors in all Member States.

Scope for action

Since financial crises can also affect non-euro area countries by contagion, it might be useful to make decision-making within this mechanism more efficient and grant non-euro-area countries access to precautionary and conditional loans under similar conditions. In this context, broader use of existing Treaty provisions and reform of existing legislation could enhance the integrity of the single market, including the banking union, and speed up the creation of the capital markets union. In June 2012, the Commission issued a [legislative proposal](#) on financial assistance for Member States whose currency is not the euro. This proposal would have repealed Council Regulation (EC) No 332/2002, but has not yet been adopted.

Enhanced BoP assistance for non-euro area Member States could strengthen economic governance and economic and budgetary coordination. The credit line could take the form [of a precautionary conditioned credit line \(PCCL\)](#), which is a credit line based on eligibility conditions, or an [enhanced conditions credit line \(ECCL\)](#), based on the combination of eligibility conditions and new policy measures. Currently, both instruments are used in the ESM and are applicable to euro-area Member States.

In addition, banking union demands fair and equal treatment of all participating Member States. Non-euro Member States that opt into the [single supervision mechanism \(SSM\)](#) would need to adopt an appropriate set of rights and duties in terms of supervision, consultation and decision-making. Currently, the SSM provides for 'close cooperation' with the European Central Bank (ECB) without decision-making rights for

non-euro-area countries. This raises the question of whether BoP assistance should remain separate from the ESM or become one of its arms.

The legal basis

Article 143 TFEU

1. Where a Member State with a derogation is in difficulties or is seriously threatened with difficulties as regards its balance of payments either as a result of an overall disequilibrium in its balance of payments, or as a result of the type of currency at its disposal, and where such difficulties are liable in particular to jeopardise the functioning of the internal market or the implementation of the common commercial policy, the Commission shall immediately investigate the position of the State in question [...]. The Commission shall state what measures it recommends the State concerned to take.

If the action taken by a Member State with a derogation and the measures suggested by the Commission do not prove sufficient to overcome the difficulties which have arisen or which threaten, the Commission shall [...] recommend to the Council the granting of mutual assistance and appropriate methods therefor.

2. The Council shall grant such mutual assistance [...], which may take such forms as:

(a) a concerted approach to or within any other international organisations to which Member States with a derogation may have recourse;

(b) measures needed to avoid deflection of trade where the Member State with a derogation which is in difficulties maintains or reintroduces quantitative restrictions against third countries;

(c) the granting of limited credits by other Member States, subject to their agreement.

This legal basis, within a broader understanding, offers the possibility to grant 'mutual assistance' to non-euro area Member States experiencing difficulties with their balance of payments and/or external financing constraints. Since Article 143 TFEU alone does not provide the necessary legal basis to apply existing specific instruments such as BoP assistance to non-euro-area Member States, the European Commission also applies [Article 352 TFEU](#) (known as the '[flexibility clause](#)') to provide 'mutual assistance'.

Use of legal basis to date

In 1971, the Council adopted a mutual assistance mechanism in the form of bilateral loans for crisis situations concerning balance of payments by means of [Decision 71/142/EEC](#), based on what were then Articles 108 and 235 of the Treaty establishing the European Economic Community (EEC).

In 1988, the Council opted to merge the mutual assistance facility created in 1971 with the Community loan system set up in 1975 through the adoption of [Regulation \(EEC\) No 1969/88](#) establishing a single facility providing medium-term financial assistance for Member States' balances of payments. With a budget of up to ECU16 billion, the Council was able to provide Member States with balance of payments loans.

The maximum sum of outstanding loans granted under this facility was in principle limited to [€12 billion](#) per country. This amount was then raised to €25 billion in 2008 and €50 billion in 2009. Technically, BoP assistance provides loans granted solely by the EU. Nonetheless the loans are generally granted in conjunction with financing from the International Monetary Fund (IMF), the European Investment Bank (EIB), and other multilateral lenders.

The Council has so far decided to grant mutual assistance within the meaning of Article 143 TFEU to Latvia ([Council Decision 2009/289](#)), Romania ([Council Decisions 2009/458](#) and [2011/289](#)) and Hungary ([Council Decision 2009/103](#)).

FURTHER READING

Economic Governance Support Unit, [Macro-Financial Assistance to EU Member States – State of Play](#), 2019.

Factsheets on the European Union, [Financial Assistance to EU Member State](#), 2019.

Policy Department for Budgetary Affairs, [The Instruments Providing Financial Support to EU Member States](#), 2017.

32. Digital sovereignty



The idea of ensuring 'digital sovereignty' is gaining traction in the EU. Political leaders and industry players have strongly voiced their support for a new policy approach to maintain Europe's ability to act independently in the digital world and tackle new challenges such as the fight against cyber threats and the development of artificial intelligence (AI). This approach will require the EU to adapt a number of its current legal and regulatory frameworks. Potential areas to explore include setting up an EU legal framework for data, harmonising rules for AI and cybersecurity and stepping up the EU's standardisation efforts in the field of smart devices and the internet of things (IoT).

Current challenges and policy debates

The notion of [digital sovereignty](#) refers to the situation of dependency regarding digital technology, which the EU is increasingly facing, and to the need to enhance Europe's digital leadership and strategic autonomy in the digital field.

There are concerns over the economic and social influence of non-EU tech companies in different areas. The fact that EU citizens are losing control of their personal data in an online environment that is now largely dominated by non-EU tech companies has been [stressed](#). There is also growing concern that EU industry and the economy are becoming dependent on technology developed elsewhere, as the EU is increasingly [importing](#) information and communications technology (ICT) products and services. One important symptom of the loss of leadership is that there are fewer and fewer EU companies among the [top](#) digital companies worldwide. Another is the fact that non-EU suppliers almost exclusively dominate today's [cloud and data storage market](#).

As a result, Member States' sovereignty is at stake for instance in the area of cybersecurity, where the security risks associated with [5G Chinese telecom suppliers](#) have sparked a political debate. EU governments and industry players have also become [concerned](#) about using non-EU data services, which has potentially detrimental implications for security and EU citizens' rights. The EU's ability as a bloc to remain a major actor in the worldwide digital environment has also been called into question in the area of [artificial intelligence](#) (AI) where studies [show](#) that the US is currently leading the race, with China rapidly catching up, and the European Union lagging behind. Similarly, the EU is currently [falling](#) behind other regions of the world when it comes to developing new frontier technologies such as in [blockchain](#), [the internet of things](#) (IoT) and [quantum-computing](#) technologies.

Scope for EU action

Against this backdrop, political leaders and industry players have voiced strong support for a new policy approach, to secure 'digital sovereignty' and enhance the EU's ability to set global standards in the digital field. New EU actions could be taken in areas such as personal and non-personal data collection, cybersecurity and artificial intelligence.

EU legal framework for data

To start with, there are [calls](#) to build a European cloud and data infrastructure to strengthen Europe's digital sovereignty and data sovereignty. The European cloud initiative [Gaia-X project](#) was announced jointly by Germany and France and proposes to establish, as of 2020, a federated data infrastructure at European level. Further [action](#) at EU level could be necessary to foster the implementation of an EU-wide cloud infrastructure and ensure a secure environment for the data of citizens, businesses and governments. Furthermore, measures could also be put in place at EU level to secure access for innovators to data – especially industry datasets – since these are the engine of the new data economy. For instance, granting [open access to government data](#) in certain strategic sectors, such as transportation or in healthcare, allowing companies to have access to privacy-preserving data marketplaces and incentivising the [sharing of data](#) would be useful to further develop AI products and services.

EU legal framework for AI

In recent years, the EU has carved out a '[human-centric](#)' approach to AI that is respectful of European values and principles. In the global race to AI, the EU intends to become a standard setter in ethical AI. To implement such an approach the EU has so far [recommended](#) that AI software and hardware systems be developed, deployed and used in the EU in adherence with a number of key ethical requirements. However, there are calls to go further and [harmonise](#) rules on algorithmic decision-making systems in the EU, including in the fields of [health](#) and [facial recognition](#). Adopting a common legal framework for AI would support the EU's ambition to be a world standard-setter in AI.

Connectivity and cybersecurity

The EU's standardisation efforts in the field of technology could also be stepped up. The [definition](#) of common mandatory EU standards and certification schemes for 5G networks would assist in the response to cybersecurity threats. Furthermore, the EU could jointly define standards in the field of smart devices and the internet of things (IoT), for which there are not yet any cybersecurity [standards](#).

The legal basis

Article 114 TFEU

[...] The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market [...].

Article 171 TFEU

[T]he Union:

- shall establish a series of guidelines covering the objectives, priorities and broad lines of measures envisaged in the sphere of trans-European networks; these guidelines shall identify projects of common interest,
- shall implement any measures that may prove necessary to ensure the interoperability of the networks, in particular in the field of technical standardisation,
- may support projects of common interest supported by Member States, which are identified in the framework of the guidelines [...]

[Article 114 TFEU](#) is extensively used in the field of digital policy to approximate national laws because of the absence of specific provisions for ICTs in the Treaties. In addition, a set of measures and guidelines could be adopted pursuant to [Article 171 TFEU](#) in conjunction with [Article 170 TFEU](#) and [Article 172 TFEU](#) to foster the establishment and development of trans-European networks and the interconnection and interoperability of networks in the areas of transport, telecommunications and energy infrastructures. Such measures and guidelines must be adopted by the European Parliament and the Council, acting in accordance with the ordinary legislative procedure. Furthermore, guidelines and projects of common interest that relate to the territory of a Member State require the approval of the Member State concerned.

Use of legal basis to date

During the 2014-2019 European parliamentary term, a number of legislative acts were adopted on the basis of Article 114 TFEU to foster coordination of digital policies in the EU. For instance, the 2016 [Network and Information Security Directive](#) (NIS) and the 2018 [European Cybersecurity Act](#) were passed to improve Member States' cybersecurity capabilities and cooperation. Furthermore, a number of texts have been adopted in the digital field on the basis of Articles 170 to 172 TFEU: [Regulation \(EU\) No 283/2014](#) lays down guidelines for trans-European networks in the area of telecommunications infrastructure and [Regulation \(EU\) 13016/2013](#) establishes the Connecting Europe Facility, a financial instrument designed, inter alia, to support investment in cross-border connections.

FURTHER READING

EPRS, '[Ideas Paper](#)' for the EP Administration's Innovation Day – Digital sovereignty, February 2020.



33. Facilitating intellectual property rights in the EU

National laws protecting intellectual property rights (IPRs) have been largely harmonised in the European Union. However, EU policymakers have not yet given full consideration to the case for granting the Court of Justice of the European Union jurisdiction to hear disputes over EU IPRs, despite the existence of an explicit legal basis to that effect in the Treaties. Possible areas for further EU action include creating EU-wide IPRs, granting the EU Court jurisdiction over related disputes and setting up specialised courts for IPRs.

Current challenges and policy debates

[Intellectual property rights](#) (IPRs) protect industrial property (i.e. patents, trademarks, designs, etc.) and copyright on artistic and literary works. IPR protection is a key component of the European Union's internal market as [IPR-intensive industries](#) – such as audiovisual and high technology – currently account for around 42 % of EU gross domestic product (worth some €5.7 trillion annually). These industries generate 38 % of all jobs and contribute to as much as 90 % of EU exports. IPR enforcement is necessary in order to foster innovation, creation and investment in new works and industries (music, television programmes, robotics, etc.) throughout the Union. EU studies have [shown](#) that support for IPR enforcement is high among EU citizens.

EU policy makers have been very active in harmonising national IP laws in recent decades. The EU has developed a [legal framework](#) to avoid national fragmentation and harmonise national laws including for copyright, trademarks, patents, designs and geographical indications. Recently, new initiatives have been launched to further harmonise national IP laws in the field of [copyright](#) and to improve the [enforcement of IPRs](#). There is also increasing discussion of the need to harmonise IPRs in new areas such as [artificial intelligence](#) and [three-dimensional printing](#). Furthermore, over time, separate European IPR titles such as [Community plant variety rights](#) and [Community design rights](#) have been created at Community level – in parallel to national rights – to protect specific IP rights across the jurisdictions of all Member States.

The Court of Justice of the European Union (CJEU) is becoming increasingly active with respect to IPR disputes. According to the CJEU's [2017 annual report](#), IP cases form the bulk of litigation before the General Court, with 378 cases pending (especially trademarks and design) at the end of 2017 and 60 requests for a preliminary ruling concerning intellectual and industrial property matters. Nevertheless, EU policymakers have yet to fully exploit the possibility for creating new EU-wide IPRs or wholly assess the possibility for granting the CJEU jurisdiction to hear disputes over such EU-wide IPRs.

Scope for action

Creating EU-wide IPRs and granting the EU Court jurisdiction over EU IPR disputes

The Lisbon Treaty strengthened the competences of the Union in the field of IPRs significantly. The EU was granted explicit power to create [European IPRs](#), valid across all the Member States' jurisdictions. On this basis, a [European Union trademark](#) protection system and a [unitary patent](#) protection system have already been established. However, the [unification of copyright law](#) has yet to be achieved in the EU despite discussions on the introduction of a [European unitary copyright](#) title. The European Parliament called on the Commission to study the impact of introducing a single European copyright title into EU law in a 2015 [resolution](#). While the recent reform of copyright law falls short of addressing this issue, it would be useful to assess the potential for unification of copyright in the EU and the potential for CJEU jurisdiction over disputes arising in this respect.

Specialised courts for IPRs

[Academics](#) warn that the CJEU is failing to develop coherent jurisprudence, owing to its lack of judicial expertise in the technical and complex area of copyright law, and call for the introduction of specialised chambers or individual professionals into the European Court system in order to increase domain competence and predictability in the area of IPRs. Against this backdrop, one proposal is to create [specialised courts](#) to deal with the new intellectual property litigation that is expected to grow in the coming decades. In the context of the reform of the EU patents framework, a European Parliament

[resolution](#) supports the creation of a European chamber for intellectual property to hear appeals from national bodies in patent litigation.

The legal basis

Article 262 TFEU

Without prejudice to the other provisions of the Treaties, the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament, may adopt provisions to confer jurisdiction, to the extent that it shall determine, on the Court of Justice of the European Union in disputes relating to the application of acts adopted on the basis of the Treaties which create European intellectual property rights. These provisions shall enter into force after their approval by the Member States in accordance with their respective constitutional requirements.

[Article 262 TFEU](#) as last amended by Lisbon Treaty (previously [Article 229a of the Treaty establishing the European Community \(TEC\)](#)) potentially extends the powers of the CJEU to [disputes relating to IPRs](#). The provision allows the Union legislator to confer upon the CJEU jurisdiction to hear disputes relating to all types of EU intellectual property rights (copyright law, patent law, designs, etc.). A decision of this kind, implying an extension of the competences of the CJEU, nonetheless presents the inherent difficulty of requiring unanimity in the Council and approval by the Member States pursuant to their respective constitutional requirements. Article 262 TFEU could be used in conjunction with [Article 118 TFEU](#) which provides that in the context of the establishment and functioning of the internal market, Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish measures for the creation of European IPRs in order to provide uniform protection for such rights throughout the Union. Furthermore, in conjunction with [Article 257 TFEU](#), jurisdictional competence could be conferred upon a specialised court to hear cases relating to IPRs.

Use of legal basis to date

Article 262 TFEU has not yet been used. Its predecessor, Article 229a TEC, was however discussed with a view to granting the Court of Justice jurisdiction over EU patent litigation in the context of long-standing efforts to establish a [Europe-wide legal regime for patent law](#). Unification of the patent system has been a goal of the European Union for decades in response to fragmentation of the current patent litigation system in Europe and issues such as inconsistency in decision making across jurisdictions and the costs of parallel litigation. In this context, in 2003, the Commission proposed the establishment of a Community patent court, a judicial panel within the Court of Justice that would have jurisdiction at the first instance over disputes relating to the Community patent. The Commission's [proposal](#) suggested conferring upon the Court of Justice formal [jurisdiction](#) in disputes relating *inter alia* to the infringement or the validity of Community patents based on Article 229a TEC. This proposal was however withdrawn after the CJEU held in its 2011 Opinion 1/09 that the proposal was incompatible with the EU Treaties. Eventually, the EU adopted a legal package comprising an international agreement (the [Agreement on a Unified Patent Court](#) (UPC) signed in 2013 but not yet in force) and two regulations adopted under the enhanced cooperation procedure (namely the [Patent Regulation](#) and a [Regulation concerning patent translation arrangements](#)). It is worth noting that the CJEU indicated in its Opinion 1/09 that transferring patent jurisdiction to the Court of Justice of the European Union could have been an acceptable option. However, the Commission [discarded](#) this option on grounds that it would not have met the political requirements of the Member States and the interests of users of the patent system. Instead the Commission proposed the establishment of a special international court by means of an international agreement.

FURTHER READING

EPRS, [An EU intellectual property policy to boost innovation](#), 2018.

EPRS, [EU copyright reform: Revisiting the principle of territoriality](#), 2015.

34. (Digital) social innovation



(Digital) social innovation differs from other kinds of (digital) innovation in terms of its social purpose and the emphasis on changes in social practices. It can help to mobilise and empower many actors in collective problem solving, and thus contribute to a just transition to a green and sustainable economy. To that end, strengthening its main actors through better regulation and funding mechanisms is key.

Current challenges and policy debates

[Social innovation](#) (SI) refers to new ideas (products, services and models) that simultaneously meet social needs (more effectively than alternatives) and create new social relationships or forms of collaboration, including grassroots initiatives, co-design and sharing. [Digital social innovation](#) (DSI) offers digital solutions for social or societal problems. SI is often a way to overcome the classic division between the public and private sectors as it involves actors from the public and third sector, voluntary, community and social economy organisations. The social economy, for example, [employed](#) the equivalent of approximately 6.3% of the working population of the EU-28, and generated 4% of the Union's GDP in 2015. It has huge potential for SI and DSI activity. In addition, its [interaction](#) with classical economy players provides a fertile ground for the birth of new business models, including [digital solutions](#). Each innovation (business, technology) is at the same time an [SI process](#). The digital element allows the participation of a larger number of people at a deeper level.

SI [featured highly](#) in policy debates in the [immediate aftermath](#) of the 2008 economic and financial crisis, and was present in the funding programmes under the Juncker Commission (2014-2019). The von der Leyen Commission however offers new opportunities to strengthen both SI and DSI activity and policy across the EU. One of the core [policy priorities](#) of the new Commission is a just transition for all to a green and sustainable economy in the digital age. The [transformations](#) needed to achieve this goal across the EU require a shared framework to mobilise governments, business and civil society around targeted problem solving. SI and DSI have a major role to play in this process, to help to address the core issue of the current systemic change: the relationship between knowledge, technology, society and policy-making.

Scope for more EU action

Develop a European cross-sectoral policy strategy on (digital) social innovation

SI can happen in many sectors ranging from the welfare state to urban planning, from local development to social entrepreneurship. Explicit [fostering of SI](#) at European level has been a rather scattered endeavour across the different sectors, whereas [DSI](#) is only in its nascent phase. The SI policy field has been defined at European level in the areas of the [internal market](#), [social and employment policies](#) and [research and innovation](#). However, many other sectors have actively supported SI actions through EU programmes, including in the fight against climate change, the transition to a low-carbon economy, the urban agenda, agriculture, etc. With a common core, meeting social needs, all these sectors have defined the SI concept in slightly different ways. Since 2011 the European Parliament has called repeatedly for more SI in different contexts, ranging from [improving funding programmes](#) to [fighting unemployment](#). A European cross-sectoral policy strategy could provide a common definition and framework for SI and DSI for all sectors and lay out ways in which they could help to address the necessary transformations across the board. This would also be very timely as the age of artificial intelligence takes off, the next chapter in the digital revolution, and the European Commission is in the process of [designing](#) its human-centric artificial intelligence strategy. Based on this cross-sectoral strategic document the EU could move towards systematically helping the development of an [ecosystem for subsidised experimentation](#) at EU, national, regional and local levels.

Explore and reach a consensus on the usefulness of EU legislation to empower social economy actors

The social economy unites a large and rich variety of organisational forms shaped by diverse national and welfare contexts but with shared values, characteristics and goals. It combines sustainable economic activities with positive social impact, while matching goods and services to needs. Their diverse legal forms mean that social economy actors often struggle with regulatory obstacles, access to funding and visibility, both in national and cross-national contexts. The EU has been considering the usefulness of a common

European regulation to overcome these obstacles. Currently there is only one piece of legislation in force, the [Statute for a European Cooperative Society](#). Debates on the usefulness of legislation on [associations](#) are also ongoing. In 2018 the European Parliament proposed the introduction of a [social economy label](#) based Article 50 TFEU. This would be applied to all social and solidarity-based enterprises regardless of the legal form they decided to adopt in accordance with national legislation. The European Commission [stressed](#) that the results of existing national labelling systems are mixed. Therefore, the opportunity and feasibility of creating a Europe-wide label should be further examined and discussed with stakeholders. The planned new [action plan for the social economy](#) might provide a particularly good window of opportunity to explore and reach consensus on the content and form of possible European legislation in the field.

Continue to mainstream disruptive and breakthrough innovation across funding programmes

There is a lot of [complementarity](#) in the various European Union funding schemes when it comes to innovation. However, projects supported by the European [research programmes](#) tend to be more of a [breakthrough or disruptive](#) nature while those supported by other programmes, such as the [European structural and investment funds](#) or the [European Programme for Employment and Social Innovation](#), are more incremental, and adopt novelty, within the same system. At the same time, projects from the [research programme](#) have difficulties scaling up. The proposed new [ESF+](#) regulation, for example, addresses some of these issues in theory, including obliging Member States to allocate some funding for bottom-up innovative approaches based on partnerships, and to scale up innovative approaches developed in the future research programme, [Horizon Europe](#). However, for this to happen in practice, [specific mechanisms](#) would need to be in place. These could include a more [impact-oriented approach](#) to funding and innovation with a pre-defined intervention logic, and expected results, and an assessment of whether these were reached. Alternatively, selection process rules could award extra points to projects that mainstream and scale up innovations supported by [Horizon Europe](#) or by the above-mentioned cross-sectoral SI and DSI strategy.

The legal basis

Article 50 TFEU

1. *In order to attain freedom of establishment as regards a particular activity, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall act by means of directives. [...]*

Article 114 TFEU

1. [...] *The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure ..., adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.*

Digital social innovation is a cross-cutting issue in relation to which, depending on the particular aspect concerned, various legal bases could be used. However, whenever promotion of the freedom of establishment is at stake, as in the case of the European cooperative society, Article 50 TFEU could be the appropriate legal basis, and whenever the harmonisation of internal market legislation is at stake, Article 114 TFEU gives the EU the competence to adopt legislative measures. Other possible legal bases could include Article 153 TFEU on European social policy (as discussed in fiche 18).

Use of legal basis to date

Both legal bases mentioned above have been used extensively. Article 50 TFEU, in particular, has been the basis of an entire body of EU company law, and Article 114 TFEU has been used to establish European consumer law, as well as to harmonise various technical and other standards in the internal market.

FURTHER READING

EPRS, [Fostering social innovation in the European Union](#), briefing, 2017.

EPRS, [Cooperatives: characteristics, activities, status and challenges](#), briefing, 2019.

EPRS, [Mapping the cost of non-Europe, 2019-24](#), study, 2019.

35. Boosting national support for EU external action



Ever since the Treaty of Maastricht, the European Union has been building its common foreign and security policy (CFSP), increasingly aiming to be a global actor speaking with a single voice on international affairs. This goal enjoys widespread support among EU citizens. Article 24(3) of the Treaty on European Union (TEU) embodies the principle of loyalty within the CFSP, stipulating that Member States will act to support and comply with EU external action, thus ensuring the coherence and increasing the gravitas of CFSP actions.

Current challenges and policy debates

According to the latest [surveys](#), a significant majority of EU citizens want the EU to speak and act as one in international affairs, such as when dealing with Russia, China and the United States (US), and 66 % [support](#) a common foreign policy for the EU. While seven in ten EU citizens [agree](#) that the EU's voice currently counts in the world, the EU average in this category has decreased for the first time since autumn 2015. In order to achieve a coherent, unified and common foreign policy, EU Member States must comply with the [principles and objectives](#) that guide the EU's [common foreign and security policy](#) (CFSP). These are enshrined in the founding Treaties and include safeguarding the common values, fundamental interests, independence and integrity of the Union in conformity with the principles of the United Nations Charter; strengthening the security of the Union in all ways; preserving peace and strengthening international security; promoting international cooperation, developing and consolidating democracy and the rule of law, and respect for human rights and fundamental freedoms. At the same time, decision-making in CFSP differs from most other policy areas, in that decisions are [taken](#) by unanimity by the Council on the basis of guidelines set by the European Council, with no co-decision powers for the European Parliament. This intergovernmental method allows Member States to use their veto power, in some cases blocking or weakening the EU's ability to act as a unitary actor – a global power – in international relations. Since acts adopted in the framework of CFSP are – for the most part – [non-legislative](#), and are often positions or strategies, the EU also relies heavily on its Member States to transform them into action. Yet, their individual economic and geopolitical interests often come into play, affecting their support for strategies and plans proposed by the European External Action Service or the European Commission. The role of the Council and the High Representative for EU Foreign and Security Policy (HR/VP) is to ensure that EU Member States are brought on board in CFSP initiatives that serve the Union's interests as a whole in a spirit of loyalty and mutual solidarity.

Scope for action

As it represents 500 million citizens, the EU has [more leverage](#) in international affairs than any individual Member State; it is a stronger negotiator and can influence international standards on the basis of its foreign policy principles. In addition, [studies](#) have shown that in certain fields of foreign policy, such as [common security and defence policy](#) (CSDP), there are substantial gains to be made – not least financial, with the cost of non-Europe estimated at €26.4 billion annually – if the EU acts more coherently.

More funding for common foreign and security policy

Ensuring that Member States support EU external action is a fundamental to achieving a truly common foreign policy with global impact. As noted in the 2018 [report](#) on CFSP implementation by Parliament's Foreign Affairs Committee, Member States often tend to prioritise their national interests, regardless of the consequences at EU level. The report notes that Parliament has called for more financial resources for the EU's external action under the next multiannual financial framework. The Commission has [proposed](#) to increase EU spending on external action by 30 % in the next multiannual financial framework (MFF), increasing the total to €120 billion. This suggests that there will be greater incentives for Member States to comply with EU-level external action, but that this should also come with a greater responsibility to do so. In the field of security and defence, [PESCO](#) (permanent structured cooperation) and the [European Defence Fund](#) are examples of this. The hard geopolitical questions raised by power shifts in the international environment require unified EU responses to questions such as relations with [China](#), [Russia](#) and the [US](#); EU action in Syria and Libya; climate policy; and the EU approach towards the state of [human rights and democracy](#) in the world. All these fields require more coordination and consistency by the Member States if tangible results are to be achieved through EU action.

Impact assessment in common foreign and security policy

The European Parliament can help ensure that the HR/VP and the Council perform the role assigned to them by Article 24(3), namely that of ensuring Member States' compliance with the principles enshrined in the Treaty. This task compensates for the fact that the Court of Justice of the EU has no jurisdiction in foreign and security policy. The role gives the HR/VP the task of leading Member States to a position that is commonly agreed and consistent with the principles of EU external action. As chair of the Foreign Affairs Council (Article 27(1) TEU), the HR/VP is in a privileged position to do so; while the Commission oversees the process of streamlining the CFSP. In the 'geopolitical' [von der Leyen](#) Commission, external policy will be discussed and decided upon systematically by the College, and coordinated by the HR/VP. A specific group for external coordination (EXCO) has been created to prepare the external aspects of College meetings on a weekly basis and to enhance coordination between the Commission and the EEAS. Increased compliance of Member States could come from ex-ante impact assessments of foreign policy strategies, in spite of their non-legislative nature, and more added value reports, given directly to the permanent representations. The [proposal](#) to [reduce](#) unanimity in foreign affairs, endorsed by Commission President Ursula von der Leyen in her [political guidelines](#), and to replace consultation by co-decision between Parliament and Council, if supported by Member States, would be a clear indication of support for the EU's CFSP and would enable the Council and the HR/VP to ensure EU Member States' compliance with the principles of loyalty and mutual solidarity more effectively. Parliament had already [called](#) for this move.

The legal basis

Article 24(3) TEU

The Member States shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity and shall comply with the Union's action in this area.

The Member States shall work together to enhance and develop their mutual political solidarity. They shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations.

The Council and the High Representative shall ensure compliance with these principles.

Article 24(3) TEU (previously Article 11 TEU), which aims to ensure that Member States respect their CFSP obligations, is often referred to as the 'loyalty' principle, drawing comparisons between this provision and Article 4(3) TEU (which applies that principle across the range of EU policies). While Article 24(3) TEU serves as a basis for coherence and synergies between Member States' foreign policies and EU foreign policy, it also goes [beyond](#) that, by setting red lines for national foreign policies. It stipulates that Member States should refrain from actions contrary to the interests of the Union or likely to impair its effectiveness. Thus, apart from coherence, it also calls for consistency. This is true both for individual states' foreign policies, as well as for coalitions. According to some analyses, this also ensures that the CFSP as a whole can profit from the variable geometry included in the Treaties, e.g. PESCO. The EU's visibility and effectiveness on the global scene is thus safeguarded. Most importantly, the Council and the HR/VP are tasked with ensuring this compliance (and thus also avoiding actions contradictory to EU interests).

Use of legal basis to date

Article 24 TEU as a whole is cited in two 2009 Council decisions (agreements with [Iceland and Norway](#) on cross-border cooperation and with [Russia](#) on the protection of classified information).

Article 24(3) TEU has been invoked by the European Parliament in several resolutions, in the process of exercising its power to make recommendations on CFSP. Most notably, it was used in a 2016 [resolution](#) on the Global Strategy on foreign and security policy. Previously it was cited in resolutions urging compliance with the EU external action approach, and in a 2014 [resolution](#) calling for sanctions against Uganda and Nigeria for human rights violations. It also appears in CSDP-related [resolutions](#) dating back to 2013-2015, supporting calls for closer cooperation, coordination and coherence in the area of security and defence.

FURTHER READING

EPRS, [Mapping the Cost of Non-Europe, 2014-19 – Fourth edition](#), 2017.

EPRS, [Peace and Security in 2019: Overview of EU action and outlook for the future](#), 2019.



36. Ensuring efficient decision-making in foreign policy

According to European Commission President [Ursula von der Leyen](#), 'To be a global leader, the EU needs to be able to act fast'. Former Commission President Jean-Claude Juncker meanwhile argued that Europe should be more [weltpolitikfähig](#), i.e. *more capable to act in world politics*. In his 2018 State of the Union address to Parliament, President Juncker called for use to be made of the 'lost treasure' of the Lisbon Treaty – Article 31(3) of the Treaty on European Union (TEU). This, it is argued, would improve its ability to speak with one voice and take faster decisions in the area of common foreign and security policy (CFSP).

Current challenges and policy debates

[Currently](#), decisions on the EU's external relations and [foreign affairs](#) are taken by Council acting by unanimity, on the basis of European Council guidelines, with Parliament having no co-decision power. This consensus-based method is time-consuming and can paralyse CFSP decision-making; each Member State has a veto. Foreign policy is still widely seen as a classical executive power and a symbol of sovereignty. In the contested [geopolitical environment](#) surrounding the EU, including borderless threats, technological disruptions and the insecurity stemming from great power politics, more efficient decision-making in foreign affairs is necessary for the EU to be able to speak with one voice on the world stage. Faced with a more volatile and unpredictable security climate, political momentum has grown to boost [Member States' cooperation in defence](#) through initiatives such as the [European Defence Fund](#) and [permanent structured cooperation](#). According to a June 2019 [Eurobarometer](#) survey, 74% of citizens support the principle of a common defence and security policy for the EU. The [passerelle](#) clause for CFSP in Article 31(3) TEU is a Treaty-based opportunity to move decision-making from unanimity to [qualified-majority voting](#) (QMV), following unanimous agreement by EU leaders.

Debates surrounding the use of Article 31(3) TEU tend to revolve around the advantages potentially gained by larger Member States should QMV be introduced, and the disadvantages for smaller Member States, which currently enjoy the power to veto any proposal, regardless of their size. The current political momentum could make previously unsuccessful French and German [proposals](#) for a move to QMV in CFSP a reality – at least in some areas. The Commission has [proposed](#) questions of human rights in international fora, sanctions regimes, and [civilian missions](#) as areas in which QMV could be applied. In his [mission letter](#), High Representative for Foreign Affairs and Security Policy/ Vice-President of the Commission (HR/VP) Josep Borrell was instructed to use the Treaty clauses that allow certain CFSP decisions to be taken by QMV.

Scope for action

How common a foreign and security policy for the EU?

It is widely [acknowledged](#) that the key precondition for a robust EU foreign policy is a [common strategic culture](#), resting upon a shared threat perception among EU countries. This is where difficulties in finding unanimity stem from, since Member States do not always share the same vision. [Academics](#) have argued that unanimity is unlikely to be achieved on delicate questions regarding the use of force or interference in third countries' domestic affairs, as the examples of [Iraq](#) in 2003 and [Syria](#) in 2013 demonstrate. There is also the risk that QMV might result in a [democratic deficit](#) and in turn weaken the EU's legitimacy domestically by raising issues of sovereignty, confidentiality and dominance of larger Member States. So far, the progressive involvement of Parliament in CFSP has helped increase the policy's democratic accountability. One cure for a potential democratic deficit could be more European Parliament involvement, which, in its role as the directly elected representative of EU citizens, increases legitimacy. Although Parliament's [formal powers](#) in CFSP are limited to oversight and scrutiny, it nonetheless has [increasing influence](#) as a 'norm entrepreneur' in human rights, in its closer relation with the HR/VP and as a diplomatic actor through its [44 delegations](#).

The European Parliament has [characterised](#) the current decision-making process for CFSP as 'the main obstacle to effective and timely external EU action', signalling the need to react more swiftly to crises, and explicitly [calling for](#) the use of Article 31(3) TEU. It has done so most recently in its January 2020 resolutions on [CFSP](#) and on common security and defence policy ([CSDP](#)), in the latter calling on the European Council to make this 'a political priority'. There is scope for Parliament to make more use of its discursive power and

political influence. For instance, it could table a resolution explicitly calling for the HR/VP to raise the extension of QMV to CFSP at the European Council, and to address it more strongly in plenary and committee debates. In another [resolution](#), Parliament makes a further call to reduce unanimity in foreign affairs and to fully replace 'the consultation procedure by co-decision between Parliament and Council'. Such changes would bring the CFSP in to line with other major policy areas in which the EU has established itself as a global actor and Parliament is fully involved, such as [trade](#). Another means to increase Parliament's influence and scrutiny in CFSP would be by converting its Subcommittee on Security and Defence (SEDE) into a fully-fledged committee, as one [Parliament resolution](#) suggests. This move, the resolution argues, would offer greater accountability over the foreign affairs portfolio, and wider scrutiny responsibilities for CFSP-related legal acts. Parliament could also author a report recommending the Council, the Commission and the HR/VP use Article 31(3) TEU. Increased citizen consultations to take the pulse on this matter could be explored, not least in the upcoming [Conference on the Future of Europe](#).

Limits and opportunities

Article 31(3) TEU is limited by Article 31(4) TEU, which excludes decisions with military or defence implications. However, the TEU does not define 'military and defence implications' or the difference between them. On [civilian missions](#), for example, there are convincing arguments both for and against their military/defence implications. When excluding decisions with military/defence implications, Article 31(4) TEU does not refer specifically to CSDP. This could [imply](#) that (non-CSDP) CFSP decisions such as humanitarian assistance would also require unanimity.

This imprecision may allow for flexibility. Given the favourable political climate, Parliament can play a key role in informing the debate. If QMV is introduced for CFSP, [academics](#) argue, Parliament should exert stronger oversight to 'secure the legitimacy of the CSDP' and CFSP. Greater ex-post evaluation prerogatives and closer relations with the HR/VP can also serve this purpose. The negative implications of a situation in which Member States are publicly outvoted on sensitive policy issues such as Russia, the US or China are also pointed out as possibly weakening the EU's external credibility. Member States such as France and Germany have previously argued in favour of using this *passerelle* clause. In their June 2018 [Meseberg Declaration](#), they proposed the creation of an EU security council and called for the extension of QMV to CFSP, as measures to increase the effectiveness of EU decision-making in the face of existential challenges such as migration, the digital revolution, climate change and the evolving [security environment](#).

The legal basis

Article 31(3) TEU

The European Council may unanimously adopt a decision stipulating that the Council shall act by a qualified majority in cases other than those referred to in paragraph 2.

Commonly known as the *passerelle* clause in CFSP, Article 31(3) TEU empowers the European Council to act unanimously to enable the Council to take decisions in some areas of CFSP by QMV. This allows QMV to be used without formal Treaty changes. Article 31(2) TEU already endows the Council with QMV decision-making in certain pre-defined cases. While Article 31(3) TEU provides a *passerelle* clause for faster CFSP decision-making, Article 31(4) TEU excludes 'decisions having military or defence implications'.

Use of legal basis to date

The *passerelle* clause of Article 31(3) TEU has not been used so far. [Literature](#) recounts that previous attempts to make use of it, notably by France and Germany, were ultimately vetoed. In addition, in some Member States such as [Germany](#) and [Denmark](#), use of the clause [would require](#) prior parliamentary consent. EU leaders were [invited](#) to expand the scope of QMV via the *passerelle* clause at the Sibiu summit on 9 May 2019 but unsuccessfully. Exactly one year later, on 9 May 2020, the Conference on the Future of Europe is expected to be launched. The [Parliament](#) and [Commission](#) positions on the thematic aspects of the conference converge, as both wish to discuss democratic and institutional aspects of the EU as well as strengthening the EU's voice in the world, among other matters. At least in these two clusters, it is likely that the topic of QMV will be on the agenda.

FURTHER READING

EPRS, [Peace and Security in 2019: Overview of EU action and outlook for the future](#), 2019.

EPRS, [The European Council and the 2017 State of the Union proposals](#), 2017.

37. Strengthening Parliament's role in CFSP



The EU's common foreign and security policy (CFSP) has gradually evolved since the Treaty of Maastricht and today enjoys broad support among EU citizens. Yet, in spite of progress made following the Treaty of Lisbon, the role of the European Parliament in the CFSP is more limited than in other areas. Article 36(2) of the Treaty on European Union (TEU) stipulates that the European Parliament should be consulted on the main CFSP choices and envisages parliamentary debates on its implementation. A stronger role for the Parliament would secure a greater level of democracy in foreign affairs policy.

Current challenges and policy debates

Common foreign and security policy is an area supported by two thirds of EU citizens (66 %). Seven in ten EU citizens [agree](#) that the EU's voice currently counts in the world, and a clear [majority](#) want the EU to speak with one voice and act together when dealing with third countries.

While public support for CFSP is high, the parliamentary dimension of CFSP is relatively limited. Although the European Parliament enjoys legislative co-decision powers in the areas of EU trade and aid policy, as well as budgetary powers in relation to various aspects of foreign policy instruments and to the budget of the European External Action Service (EEAS) itself, decision-making on CFSP remains intergovernmental. Decisions are [taken](#) by unanimity in Council on the basis of guidelines set by the European Council, with no co-decision powers for the European Parliament. By increasing the Parliament's influence in EU foreign policy through both formal and informal means, albeit gradually, the Lisbon Treaty established that the European Parliament is part of the democratic accountability link to CFSP. On the basis of Article 36 TEU, which provides for Parliament's views to be taken into consideration in foreign policy choices, in conjunction with its budgetary power, Parliament played a significant role in setting up the EEAS. By agreeing to the 2010 [Declaration on Political Accountability](#) to define the relationship with the European Parliament, the High Representative/Vice President (HR/VP) affirmed the importance that should be attributed to Parliament in CFSP matters. As things stand, the Parliament votes on the annual resolution on the main aspects of and basic choices relating to foreign and security policy and negotiates the adoption of the EU's external financial instruments. The further 'parliamentarisation' of the EU's foreign policy within the scope of the Lisbon Treaty was on the [agenda](#) of the European Parliament for the past term and will most likely continue to be in the future. According to its political guidelines and its 2020 [work programme](#) the new Commission 'is strongly committed to building a special relationship with the European Parliament and, as part of that, supports a right of initiative for the Parliament'. It remains to be seen to what extent this will be relevant in the area of external action.

Scope for action

As CFSP and common security and defence policy (CSDP), which is part of it, evolve towards the goal of the EU speaking with one voice in international affairs, the need for more democratic accountability in the CFSP will become more pronounced. Although steps have been made towards engaging the European Parliament more, by consulting it more frequently and taking its views on board, there is still space for [more interaction](#) between the European Parliament and the EU's foreign policy-making institutions – the Council, the HR/VP and the EEAS. While consultation between the HR/VP and the European Parliament has increased in frequency, Parliament needs to ensure commitments undertaken by the HR/VP continue to be implemented and oversee the further development of CFSP and the implementation of EU external action instruments.

Security and defence

Specific fields of EU external action offer illustrative examples of how Article 36(2) TEU could be further utilised to ensure that recommendations made by the European Parliament are taken on board. One such field is that of security and defence, which has seen significant progress in recent years, following the release of the [EU Global Strategy](#). It is also a field where the European Parliament has made forward-looking recommendations for further action. For example, in a 2017 resolution Parliament [called for](#) its Subcommittee on Security and Defence to be upgraded into a full committee. This would increase the possible number of simultaneous own-initiative reports in the defence and security area. In the same resolution Parliament called on the HR/VP to launch an EU security and defence white paper, to be based

on the EU's Global Strategy. Parliament also called for evaluation, 'in close coordination with the HR/VP, of the opportunity to establish a Directorate-General for Defence within the Commission'. It can be seen as a positive sign, in that context, that a [Directorate-General for Defence Industry and Space](#) has been established under the new Commission. The creation of the new [European Defence Fund](#) has also opened up a debate regarding the role of the Parliament in security and defence.

A mechanism to monitor consideration of European Parliament positions

Currently, the European Parliament is informed by the HR/VP or a representative before some meetings of the Foreign Affairs Council. On the basis of the [Declaration on Political Accountability](#) it is also fully informed at all stages of negotiating international agreements; in addition, access to classified information is [granted](#) to some Members of Parliament. The European Parliament exchanges views with diplomats nominated for high-level EEAS positions, Heads of Delegation and EU Special Representatives before they take up their posts. Yet, there is no formalised mechanism to monitor the extent to which 'the views of the European Parliament are duly taken into consideration'. A mechanism of this kind, whether devised by the European Parliament's general secretariat, or through an agreement between the Parliament and EEAS secretariats, could contribute to a more substantial implementation of the Lisbon Treaty's vision for the European Parliament's role in CFSP. It would also enhance the democratic nature of foreign policy decisions.

The legal basis

[Article 36\(2\) TEU](#)

The High Representative of the Union for Foreign Affairs and Security Policy shall regularly consult the European Parliament on the main aspects and the basic choices of the Common Foreign and Security Policy and the Common Security and Defence Policy and inform it of how those policies evolve. He shall ensure that the views of the European Parliament are duly taken into consideration. Special representatives may be involved in briefing the European Parliament. The European Parliament may address questions or make recommendations to the Council or the High Representative. Twice a year it shall hold a debate on progress in implementing the Common Foreign and Security Policy, including the Common Security and Defence Policy.

Article 36(2) TEU sets out the role of the European Parliament in CFSP. This includes its right to be consulted biannually on policy choices in this area, and the requirement to ensure that its opinion is taken into consideration. Since the [substantive legal bases](#) of the CFSP do not involve the European Parliament, these continue to take precedence. Yet Article 36(2) TEU provides an important route via which Parliament can exert limited influence in an area where it lacks the right to legislate. In Parliament's rules of procedure, Article 36(2) TEU is embodied in [Rule 113a](#) on consultation of, and provision of information to, Parliament within the framework of common foreign and security policy. Among other things, this rule states that 'when Parliament is consulted pursuant to Article 36 TEU, the matter shall be referred to the committee responsible, which may draw up draft recommendations', in most cases the Committee on Foreign Affairs (AFET). The rule also provides that the HR/VP shall be invited to every plenary debate that involves either foreign, security or defence policy. On her side, in the Declaration on Political Accountability, the HR/VP commits to seeking 'the views of the European Parliament on the main aspects and basic choices of this policy in conformity with Article 36 TEU'.

Use of legal basis to date

On the basis of Article 36(2) TEU, the European Parliament has held annual debates on the implementation of CFSP and CSDP accompanied by votes, including on the financial implications for the Union budget. The same legal basis has been used by Parliament to make recommendations to the Council regarding the sessions of the [United Nations General Assembly](#), the promotion of [human rights](#) in the EU's external action, [sanctions](#), [terrorism](#), [CSDP missions](#) and the [Eastern Partnership](#), as well as for recommendations regarding the [functioning of the EEAS](#), beyond the budgetary aspects on which the European Parliament co-legislates.

FURTHER READING

EPRS, [Peace and Security in 2019: Overview of EU action and outlook for the future](#), 2019.

EPRS, [Mapping the Cost of Non-Europe, 2014-19 – Fourth edition](#), 2017.

EPRS, [Parliament and High Representative: a new partnership?](#), 2015.



38. Improving data protection in foreign affairs

Growing volumes of personal data are processed in the context of the EU's Common Foreign and Security Policy, for activities relating to EU missions or anti-terrorism targeted sanctions for instance. While the EU Treaties recognise data protection as a fundamental right to be secured through legislative acts, they also lay down special rules for data processing in this specific area, rules that have yet to be adopted.

Current challenges and policy debates

The EU legal framework recognises data protection as the [fundamental right of every individual](#). Any limitations, such as for national security reasons, [are strictly regulated](#). While a comprehensive legal framework on data processing exists in the area of freedom, security and justice (AFSJ) (including the [General Data Protection Regulation](#) (GDPR) and the [Directive](#) on data processing for law enforcement purposes), rules are lacking as regards data processing in the area of Common Foreign and Security Policy (CFSP). EU measures seeking to balance fundamental rights protection and internal or global security needs (such as the [EU-US data protection agreements](#)) have been adopted as part of the [external dimension of the EU's internal security](#), under the AFSJ, to which the [ordinary legislative procedure](#) applies.

The line between the AFSJ and CFSP, however, is not clear-cut and there is growing acknowledgment of the [internal-external security](#) nexus, something that is also emphasised by the [EU's global strategy](#). When carrying out activities relating to external security issues (to counter global terrorism threats for instance), Member States may also need to exchange personal data. In addition, data could be collected during civilian and military missions under the EU's Common Security and Defence Policy (CSDP), for subsequent use for internal security purposes by [EU or Member State agencies](#). An EU instrument in this field would, inter alia, clarify the rules on information gathered during EU security and defence missions and exchanged with national intelligence services for instance.

Restrictive counter-terrorism measures under CFSP, such as [watch-lists, asset freezing](#) and [targeted sanctions](#), can also raise data protection issues and clear data protection rules are needed to address the legal gap in that area. As the Court of Justice of the EU (CJEU) has stated, [fundamental rights](#) are among the constitutional principles underpinning the EU legal order. Minimum safeguards are necessary in this area too, to avoid any abuse of data, while allowing their sharing and an oversight system. This would be in line with the Treaties (Article 6 TEU), the EU Charter of Fundamental Rights, the [European Convention on Human Rights](#), [Council of Europe Convention No 108/1981](#), and the positions of the [CJEU](#) and the [European Court of Human Rights](#).

Scope for action

In view of the abolition of the pillar system but also of the specific procedures required for CFSP, new rules could fill the current gap on data protection in CFSP and also help to clarify the [blurred boundaries](#) between the different areas (AFSJ/CFSP) in which data can be processed (e.g. for counter-terrorism purposes). Within the limits of its (increased) [power within CFSP](#), and in line with other [initiatives](#), the European Parliament could advocate for the adoption of specific rules on data protection in this area, including through [resolutions](#), annual reports and interparliamentary conferences. In addition, Members of the European Parliament could also table written or oral [questions](#) to the Council or the Commission asking them to initiate new policies.

Data protection rules for CFSP-related actions

Although in 2018 specific rules have been adopted for [EU institutions processing personal data](#), also applicable to data processing by Union bodies involved in AFSJ activities, such as the framing of border check policies, the new regulation explicitly excludes from its application CSDP-related missions. Before this reform, only a [code of conduct](#) was available. In order to further regulate data processing in this field, Article 39 TEU could be used as the basis for a Council decision on data protection rules for [CSDP](#) missions and operations. [CSDP missions](#) aim inter alia to prevent conflict, maintain peace and respond to crises outside the Union. One [example](#) in relation to data protection is the EU's counter-piracy military mission ([EUNAVFOR Somalia](#)), which involves data collection and sharing. Under a future Council decision, these

activities could be based on Article 39 TEU. [Information](#) gathering and processing by the EU Intelligence and Situation Centre ([IntCen](#)) are also activities that could give rise to the use of Article 39 TEU, at least as regards external EU security measures.

Data-sharing agreements and counter-terrorism measures

[Future data-sharing agreements](#) with third countries for counter-terrorism purposes could also be based on Article 39 TEU. Recent EU [passenger name record agreements](#) were however adopted under the AFSJ. Although the [role of the European Parliament](#) is limited in the CFSP, it is [evolving](#) (e.g. in terms of consultation and scrutiny). Under [Article 218\(11\) of the Treaty on the Functioning of the European Union](#) (TFEU) Parliament has the power to seek the opinion of the CJEU on the compatibility of an agreement with the Treaties, a power already exerted in one [case](#) regarding data protection. Article 39 TEU could also be used as legal basis to clarify rules on the adoption of specific CFSP-related measures on counter-terrorism, including asset-freezing measures and watch-lists. The [European Data Protection Supervisor](#) (EDPS) has called on the EU legislator to address data protection issues relating to restrictive measures in a consistent way, by enhancing rights protection and legal certainty.

Cybersecurity

An increasingly challenging and borderless threat for the EU in [the area of CFSP](#) is [cyber-threats](#). Enhanced measures and [coordinated responses](#) at EU and Member State level to counter cyber-attacks are in definite [demand](#). These will involve data processing and require adequate rules, possibly based on Article 39 TEU. Finally, the specific rules on data protection to be adopted under CFSP should also specify which independent authority (EDPS or other) should oversee compliance with those rules.

The legal basis

Article 39 TEU

In accordance with Article 16 of the Treaty on the Functioning of the European Union and by way of derogation from paragraph 2 thereof, the Council shall adopt a decision laying down the rules relating to the protection of individuals with regard to the processing of personal data by the Member States when carrying out activities which fall within the scope of this Chapter, and the rules relating to the free movement of such data. Compliance with these rules shall be subject to the control of independent authorities.

Article 39 TEU was introduced by the Lisbon Treaty and allows for the adoption of specific rules on the protection and free movement of personal data processed by Member States in the area of CFSP. The EU's competence in this field covers all areas of foreign policy and the Union's security, including the progressive framing of a common defence policy. Article 39 TEU should be read in conjunction with [Article 16 TFEU](#), in particular with the principle that everyone has the right to personal data protection. However, Article 39 TEU introduces a derogation from the general ordinary legislative procedure rule contained in Article 16 TFEU when it comes to data protection: the role of Parliament in CFSP is in fact far more limited. Parliament should nevertheless be consulted on the main aspects and basic choices made in relation to CFSP, its view should be taken into consideration, and it can make recommendations ([Article 36 TEU](#)).

Use of legal basis to date

Article 39 TEU has not been used since its introduction by the Lisbon Treaty: the Council has not yet adopted a decision on data protection in the CFSP. As for Parliament, while its direct involvement is not allowed, it could use resolutions (similar to [others](#) adopted in the past) to suggest possible directions and options.

FURTHER READING

EPRS, [The civilian CSDP compact. A stronger EU footprint in a connected, complex, contested world](#), 2018.

EPRS, [The privacy shield: Update on the state of play of the EU-US data transfer rules](#), 2018.

EPRS, [Rules for EU institutions' processing of personal data](#), 2018

EPRS, [Cybersecurity in the EU Common Security and Defence Policy](#), 2017.

EPRS, [New model of governance and accountability of data protection by Union institutions and bodies](#): Ex-ante impact assessment, 2017.



39. Potential establishment of an EU army

The Treaty of Lisbon provides for a common EU defence policy, potentially leading to common EU defence. In the face of a changing geopolitical environment and emergent new threats, and given the public expectation that Europe should protect, several of the Treaty's defence-related provisions have been implemented in recent years. More remains to be done however if the prospect of truly common defence is to become a reality.

Current challenges and policy debates

In recent years, security and defence have ranked remarkably high in public support for EU policies, with approximately 74% of citizens in favour of common security and defence according to a spring 2019 [Eurobarometer](#) survey. These high figures undoubtedly reflect growing instability and uncertainty in the global and regional environment. The crises in the Middle East, the growing terrorist threats within and beyond EU territory, Russian aggression in the EU's eastern border region and resurgent nuclear antagonism are some of the security risks that have become a daily part of the debate on EU security and defence. In addition, [strategic forecasting agencies](#) and national strategies around the world point out that these multiple threats are here to stay for the near – and perhaps distant – future. Illustrating the high level of insecurity and fear for the state of peace, global defence spending [reached](#) US\$1.774 trillion in 2018, the highest level since the end of the Cold War.

Within this scenario, in recent years, the EU has engaged consistently in building up its common security and defence policy (CSDP), an integral part of common foreign and security policy (CFSP). From as early as 2013, [calls](#) from both the Council of the EU and the European Parliament to implement the full potential of the Lisbon Treaty in the area of security and defence have increased in frequency and substance. While, as part of CFSP, CSDP remains in the intergovernmental sphere, an increasing number of initiatives aimed at strengthening EU cooperation in security and defence, and progressively leading to a common defence policy and – potentially – an EU defence union, have come to fruition since the launch of the [EU Global Strategy](#) (EUGS) in June 2016 by the High Representative of the Union for Foreign Affairs and Security Policy and Vice-President of the Commission (HR/VP). Since then, the EU counts among its achievements in the area of defence: the activation of [permanent structured cooperation](#) (PESCO), the establishment of the [military planning and conduct capability](#) (MPCC), the [coordinated annual review on defence](#) (CARD), the [preparatory action for defence research](#), the [European defence industrial development programme](#) (EDIDP), the new compact for civilian CSDP and ongoing plans for [military mobility](#), and a dedicated [European Defence Fund](#) in the next [multiannual financial framework](#). It has also strengthened its cooperation with NATO through two joint declarations in 2016 and 2018 and an extensive list of areas for cooperation. In the light of all these developments, one of the most significant debates in the field of EU defence is determining the *finalité* – the end objective of an EU defence union.

While the idea of an EU army gained traction in November 2018, due to the support it received from the French President, Emmanuel Macron, and subsequently the German Chancellor, Angela Merkel, in her address to the [European Parliament](#), the eventual creation of an EU army had already been explicitly mentioned by the European Commission President, Jean-Claude Juncker, in an [interview](#) he gave back in 2015. Subsequently, strong EU defence was a key objective of the former Commission President's annual State of the Union speeches, up to and including the last ([2018 speech](#)), embodied in the ninth [priority](#) of the last Commission's work programme – 'EU as a stronger global actor'. The complexity of the concept of an EU army has led to widespread debate about what it means, including in the context of EU-NATO relations and the attainment of EU strategic autonomy as embodied in the EUGS. In her previous capacity as German Defence Minister, Commission President [Ursula von der Leyen](#) clarified the complementary nature of the two. In her [political guidelines](#), the Commission President has committed to 'taking bolder steps towards a European Defence Union' in the next five years, while emphasising that NATO will continue to be the cornerstone of Europe's collective defence.

Scope for further EU action

It is hard to determine a timeline towards the establishment of an EU defence union or EU army in some form. However, scope for further EU action based on the Treaty abounds. In a 2017 resolution the European Parliament [called for](#) its Subcommittee on Security and Defence (SEDE) to be upgraded to a full committee,

thus increasing the potential number of own-initiative reports in the defence and security area, and allowing the committee to recommend report topics and rapporteurs directly to the Conference of Presidents, to adopt reports, and submit them direct to plenary. It also called on the HR/VP to launch an EU security and defence white paper based on the EUGS and suggested exploring the creation of a directorate-general (DG) for defence within the Commission. Under the von der Leyen Commission, the creation of a [DG for Defence Industry and Space](#) will play an important role in the coordination of the capability development and industrial aspects of defence. The European Parliament has [highlighted](#) the need to establish a European intervention force endowed with sufficiently effective defence capabilities to engage in peacekeeping and conflict prevention. It [maintains](#) that 'Europe's defence is based largely on the Union's capacity and on the political willingness of Member States to intervene militarily, in a credible manner, in external theatres of operations' and stresses the need to develop strategic autonomy on the path towards a European defence union.

Commission reflection paper on European defence

The Commission's 2017 [reflection paper on the future of European defence](#) offers one interpretation of the ultimate vision for the EU defence union. Looking forward to 2025, the paper presents three visions of EU defence, the most ambitious being common defence and security, entailing common financing and procurement of capabilities supported by the EU budget, sharing of expensive military assets and technological innovation aimed at reducing defence costs, and demanding executive EU-led operations, all in complementarity with NATO. Other aspects that come up in the debate include common ownership of military assets and a common EU [strategic culture](#). The latter was also mentioned by President Macron in his 2017 [Sorbonne speech](#), in which he introduced the idea of a European intervention initiative and called for a common intervention force, a common defence budget, and a common doctrine for action.

The legal basis

[Article 42\(2\) TEU](#)

The Common Security and Defence Policy shall include the progressive framing of a common Union defence policy. This will lead to a common defence, when the European Council, acting unanimously, so decides. It shall in that case recommend to the Member States the adoption of such a decision in accordance with their respective constitutional requirements.

The policy of the Union in accordance with this Section shall not prejudice the specific character of the security and defence policy of certain Member States and shall respect the obligations of certain Member States, which see their common defence realised in the North Atlantic Treaty Organisation (NATO), under the North Atlantic Treaty and be compatible with the Common Security and Defence Policy established within that framework.

The current formulation of Article 42(2) TEU is based on the pre-Lisbon Article 17(1) TEU, but as commentators [underline](#), the finality of the EU defence policy as leading to a common defence is now more strongly pronounced. Nonetheless, the second sub-paragraph introduces an important limitation on EU defence policy, establishing, in precise legal terms, the priority of national defence policy, including NATO membership or neutrality, over EU defence policy (sometimes referred to as the '[Irish clause](#)'). In particular, the military neutrality of Ireland, Cyprus, Malta, Austria, Finland and Sweden must be respected. The decision to move towards common defence is in the hands of the European Council, requiring unanimity. No role is included in the procedure for the Parliament. Article 42 TEU, as all Treaty rules, is subject to the principle of subsidiary, which, according to some [commentators](#), 'supports the allocation of defence policy to the EU level, including the establishment of European military structures'.

Use of the legal basis to date

Article 42 TEU has been used as legal basis for the adoption of 139 Council decisions, establishing a number of EU police, security and military missions in various parts of the world, as well as the [creation](#), in 2005, of the European Security and Defence College (its current legal basis is [Council Decision \(CFSP\) 2016/2382](#)).

FURTHER READING

EPRS, [Peace and Security in 2019: Overview of EU action and outlook for the future](#), 2019.

EPRS, [EU Defence Policy: The sleeping giant](#): European Added Value in action, 2016.

40. Clearer process for financing civilian EU missions



Promoting global peace and security is a fundamental goal and central pillar of the EU's external action. However, when carrying out crisis-management operations within the framework of the EU's common security and defence policy (CSDP), the complexity of financing rules has in the past had a negative impact on the EU's ability to respond rapidly to crises. For civilian missions, this problem has been solved through the creation of a specific budget line for 'preparatory measures' in the realm of common foreign and security policy (CFSP).

Current challenges and policy debates

European citizens [would like to see](#) more EU involvement in the realm of [peace and security](#), with an increasing preference for more EU-level external action. The CSDP is part of the EU's common foreign and security policy (CFSP) and provides the Union with an operational capacity drawing on civilian and military assets. The CSDP covers military and civilian crisis-management tasks performed outside the EU territory for peace keeping, conflict prevention, and the strengthening of international security, in accordance with the principles of the United Nations Charter (Article [42\(1\)](#) of the Treaty on European Union (TEU)). The aim of the overall crisis management system is to identify risks and take preventive measures to avoid conflict and preserve lives. It includes involvement in all phases of the crisis cycle from preventive strategies to post-crisis rehabilitation and reconstruction.

As far as EU civilian crisis management missions are concerned, the EU currently deploys 10 [civilian](#) missions and operations in Europe, Africa and Asia. Altogether, 22 have been deployed since the launch of operational CSDP in 2003. Rapid deployment of missions can be key to their success. According to a [commentary](#) on Article 41 TEU, the EU has often struggled with the challenge of rapid deployment because of a lack of rapid financing for preparatory measures, among other obstacles. In this context, difficulties associated with financing special envoys, as a preparatory measure for the deployment of a CSDP mission, have been mentioned. The problem was first addressed by the Constitutional Convention and the Treaty establishing a Constitution for Europe (which was signed in 2004 but [never entered into force](#)). It was the first EU Treaty to contain provisions that would have made it easier to finance preparatory measures for CSDP missions. However, in the meantime, procedures that are not based on the EU Treaties have been created and early financing for rapid deployment has been available in recent years.

Civilian CSDP missions can be funded exclusively from the EU budget, in contrast to operations having military or defence implications, which are financed by the Member States. The CFSP budget specifically makes funds available to cover 'the financing of preparatory measures to establish the conditions for EU action in the field of CFSP'. Funds may cover evaluation and analysis measures, including ex-ante evaluation of means, specific studies, organisation of meetings, and fact-finding on the ground. Funds may also serve to assess the operational requirements for a planned action, provide for rapid initial deployment of personnel and resources, take the necessary measures on the ground to prepare for the launch of the operation, or pay for technical experts or for security training for staff to be deployed to the mission.

The legal basis for this budget lies in Article 54(2) of the [Financial Regulation](#), not in TEU's Chapter II on CFSP (Article 41(3)). Appropriations for CFSP preparatory measures can be implemented without a basic act. Moreover, Article 54(3) of the Financial Regulation empowers the Commission to adopt delegated acts concerning detailed rules on the preparatory measures set out in Financial Regulation Article 54(2). Consequently, there seems to be little scope to add further 'specific procedures' on the basis of a Council decision, as envisaged by Article 41(3) TEU.

Payments from budget line 19 03 01 06 amounted to €2.37 million in 2013, €263 077 in 2014, €283 529 in 2015, €149 537 in 2016, €323 322 in 2017, and €180 070 in 2018. The percentage of actual payments as against commitment appropriations was as low as 6.58 % over the 2014 to 2016 period, and did not exceed 27 % over the 2015 to 2017 period at any point after 2014, indicating that the budget put aside for preparatory measures was in fact under used. It was only in 2018-2020 that the percentage of actual payments as against commitment appropriations reached 51 %.

Scope for action

The process was launched in 2016 with the publication of the [European Union Global Strategy](#) and the [Implementation Plan on Security and Defence](#). The latter called on Member States to review structures and capabilities for the planning and conduct of CSDP missions. In April 2018, the Council presented a concept paper on strengthening the civilian strand of the CSDP. This was followed by guidance from the [Council](#) in May 2018 and from the [European Council](#) in June 2018, and the adoption of a civilian capability development plan in September 2018, identifying gaps to which Member States were invited to commit resources. The process led to the adoption, on 19 November 2018, of a civilian CSDP compact that provides a new EU framework for civilian crisis management and CSDP missions, with new commitments at EU and national levels. The aim of the civilian CSDP compact is also to make civilian CSDP faster, more flexible and more effective, inter alia by improving the professionalisation of civilian personnel staffing those missions and ensuring effective employment on the ground. On 9 December 2019, the Council adopted [conclusions](#) on the implementation of the Civilian CSDP Compact, which commended the positive overall progress in implementing the Civilian CSDP Compact over the course of its first year.

A [paper](#) published by the European Union Institute for Security Studies (EUISS) in October 2018 notes that the civilian dimension of CSDP could be more successful if it were supported by 'adequate financial incentives coming from the CFSP budget and other funding schemes', which the next multiannual financial framework (MFF) 2021-2027 could provide. The EUISS report proposes 'new funding schemes for civilian personnel to be employed in civilian CSDP missions [...] to promote the deployment of seconded personnel'. A paper published by the Deutsche Gesellschaft für Auswärtige Politik ([DGAPkompakt](#)) in October 2018 calls for better resourcing for civilian CSDP, especially as compared to military CSDP. The paper calls on Member States to allocate more resources to develop the necessary capabilities, i.e. larger quantities of trained personnel, and for detailed long-term commitments in terms of financial and staffing resources.

The legal basis

[Article 41\(3\), first subparagraph, TEU](#)

The Council shall adopt a decision establishing the specific procedures for guaranteeing rapid access to appropriations in the Union budget for urgent financing of initiatives in the framework of the Common Foreign and Security Policy, and in particular for preparatory activities for the tasks referred to in Article 42(1) and Article 43. It shall act after consulting the European Parliament.

Article 41 TEU outlines the rules governing the financing of the CFSP, including CSDP missions and operations (which are defined in Articles 42(1) and 43 TEU). Under Article 41(1) TEU, administrative expenditure arising in the context of missions and operations is automatically charged to the EU budget. Article 41(2) TEU states that operating expenditure is also charged to the EU budget, provided it does not arise from operations having military or defence implications, or as long as the Council does not unanimously decide otherwise. As a result, civilian missions are financed from the CFSP budget, while military operations are financed by contributions from Member States. Article 41(3), first subparagraph, TEU provides the legal basis for the adoption, by the Council, of measures to ensure rapid access to financing for the EU's civilian missions under the CFSP and CSDP, in particular preparatory measures for such missions.

Use of legal basis to date

Article 41(3) TEU has not been used as a legal basis to date. Parliament may wish to examine whether it has been made redundant by measures to finance the CSFP adopted on a different legal basis, or whether Article 41(3) TEU can still serve as a useful basis for future legislation.

FURTHER READING

EPRS, [Peace and Security in 2019](#), 2019

EPRS, [EU efforts on counter-terrorism – Capacity building in third countries](#), 2017.

EPRS, [The EU's new approach to funding peace and security](#), November 2017.

EPRS, [Financing of CSDP missions and operations](#), 2016.

EPRS, [Common Foreign and Security Policy](#), 2016.

EPRS, [Security and Defence Policy](#), 2016.

41. Simplifying the funding of EU military operations



The complexity of rules governing the financing of crisis-management operations carried out within the framework of the EU's common security and defence policy (CSDP) has in the past had a negative impact on the EU's ability to respond rapidly to crises. For military operations, the problem was solved through the introduction of the Athena mechanism in 2004. However, it has been suggested that a start-up fund to finance preparatory activities, based on Article 41(3) of the Treaty on European Union, could further help to ensure immediate access to financing to allow the EU to respond to emerging crises.

Current challenges and policy debates

European citizens [would like to see](#) more EU involvement in the realm of [peace and security](#), with an increasing preference for more EU-level external action. The EU deals with these issues through the common security and defence policy, which is part of the EU's common foreign and security policy (CFSP) and provides the Union with an operational capacity drawing on civilian and military assets. The CSDP covers crisis-management tasks (military and civilian) performed outside the EU territory for peace keeping, conflict prevention, and the strengthening of international security, in accordance with the principles of the United Nations Charter (Article [42](#)(1) of the Treaty on European Union (TEU)), with the aim of identifying risks and taking preventive measures to avoid devastation and preserve lives.

EU military operations are a key element of this approach. The EU currently deploys six [military](#) missions and operations in Europe, Africa and Asia. Rapid deployment of missions and operations can be key to their success. According to a [commentary](#) on Article 41 TEU, the EU has often struggled with the challenge of rapid deployment in part because of a lack of rapid financing for preparatory measures. In recent years, these problems have been successfully addressed through the introduction of the Athena mechanism. The TEU does not make provisions for the financing of operations having military or defence implications from the EU budget. A large percentage of the costs associated with CSDP military operations (i.e. expenditure for troops, arms, equipment and deployment) is borne by Member States (and third countries) participating in an operation, in accordance with the principle that 'costs lie where they fall'.

In 2004, EU Member States decided to share some of the costs of military operations by setting up the [Athena financing mechanism](#), on the basis of Article [41](#)(2) TEU. Athena also covers common costs relating to the preparatory phase of a specific operation, including costs arising in the context of exploratory missions and preparations, in particular fact-finding missions and reconnaissance (Annex II of [Council Decision \(CFSP\) 2015/528](#)). Athena also specifically includes early or pre-financing arrangements for military rapid-response operations (Article 26 of Decision 2015/528).

Scope for action

The 'start-up fund' envisaged by Article 41(3) (second subparagraph) TEU may offer certain additional advantages. This Treaty provision does not define preparatory activities. Hence, it could be argued that the definition of 'preparatory' could be broader and comprise operational activities that are not covered by the Athena mechanism or the proposed European peace facility (EPF). By financing a greater variety of costs arising in the context of CSDP operations, the start-up fund would increase burden-sharing among (participating) Member States. It should be noted that the EPF also envisages broadening the definition of 'common costs' to be shared by Member States. Moreover, the start-up fund, once established, would exist on a permanent basis and the Council could authorise the High Representative of the Union for Foreign Affairs and Security Policy/Vice-President of the European Commission (HR/VP) to use funds already prior to the approval of a specific military operation. By contrast, under the Athena mechanism, payments are conditional on the existence of a specific Union military rapid response operation. The Council would still have to adopt a decision to authorise the use of start-up funds in each instance (Article 41(3) fourth subparagraph).

The establishment of the start-up fund is subject to qualified majority voting. It has been [argued](#) that this would allow for more rapid deployment, since no single Member State would be able to veto the setting up of the fund. However, Member States would still be able to oppose the deployment of a mission on the

basis of Article 42(4) TEU, which requires unanimity for all decisions relating to the CSDP, and accordingly still prevent any funds from being disbursed.

In a resolution on [Financing the CSDP](#) adopted in May 2015, the European Parliament called on the Council 'to initiate [...] the setting-up of the start-up fund (envisaged by Article 41(3) TEU) for the urgent financing of the initial phases of military operations'. Parliament noted that 'the efficiency of military missions will remain structurally hindered as long as this possibility is not used'. Two further resolutions, both adopted in the first semester of 2015 on the [annual report from the HR/VP](#) and the [implementation of the CSDP](#), also called for the setting up of a start-up fund under Article 41(3), second subparagraph, TEU. Parliament is currently preparing a [recommendation](#) for a Council decision establishing a European peace facility, in accordance with Rule 133 of the Rules of Procedure.

The legal basis

Article 41(3), second subparagraph TEU

Preparatory activities for the tasks referred to in Article 42(1) and Article 43 which are not charged to the Union budget shall be financed by a start-up fund made up of Member States' contributions.

Article 41 TEU outlines the rules governing the financing of the CFSP, including CSDP missions and operations (which are defined in Articles 42(1) and 43 TEU). Under Article 41(1) TEU, administrative expenditure arising in the context of missions and operations is automatically charged to the EU budget. Article 41(2) TEU states that operating expenditure is also charged to the EU budget, provided it does not arise from operations having military or defence implications, or as long as the Council does not unanimously decide otherwise. As a result, civilian missions are financed from the CFSP budget, while military operations are financed by contributions from Member States. Article 41(3) second paragraph TEU provides the legal basis for the creation of a start-up fund made up of Member States' contributions, to finance preparatory activities for military operations. The decision to establish the start-up fund is subject to qualified majority voting.

Use of legal basis to date

Article 41(3) second paragraph TEU has not been used as a legal basis to date. Parliament may wish to examine whether it has been made redundant by measures to finance military operations under the CSFP adopted on a different legal basis, or whether it can still serve as a useful basis for future legislation.

On 13 June 2018, the HR/VP, Federica Mogherini, presented a [proposal](#) for a European peace facility (EPF). The EPF is designed to allow financing of all CFSP external action with military and defence implications from 2021 onwards, on the basis of Articles 28(1), 42(2), 42(4) and 30(1) TEU. It would be an off-budget fund financed by yearly contributions from EU Member States, and would replace the Athena mechanism. Even though it would be outside the EU budget, the EPF would run alongside the multiannual financial framework (MFF) for the 2021 to 2027 period. The EPF would make EU funding available on a permanent basis, which would allow for more rapid deployment, and improve both flexibility and predictability. Its annex on the common costs relating to the preparatory phase of an operation is identical to Athena's similar annex (Annex III).

FURTHER READING

EPRS, [Peace and Security in 2018](#), 2018.

EPRS, [EU efforts on counter-terrorism: Capacity-building in third countries](#), 2017.

EPRS, [The EU's new approach to funding peace and security](#), 2017.

EPRS, [Financing of CSDP missions and operations](#), 2016.

EPRS, [Common Foreign and Security Policy](#), 2016.

EPRS, [Security and Defence Policy](#), 2016.

42. Enforcing international trade rules



Under its President, Ursula Von der Leyen, the new 'geopolitical' European Commission has vowed to level the playing field and take a stronger stance against unfair trading practices. It will also address the blockage of the Appellate Body of the World Trade Organisation (WTO). To bridge the legal void and defend its rights under the WTO, the EU proposes to expand the scope of its 2014 Enforcement Regulation adopted under Article 207 TFEU. There is scope for better enforcement of the EU's trade remedies and the trade and sustainable development (TSD) chapters of trade agreements. The Commission will appoint a chief trade enforcement officer vested with a complementary executive capacity to improve compliance with and enforcement of trade agreements.

Current challenges and policy debates

The EU and other countries are facing a WTO dispute settlement crisis. On 11 December 2019, the second instance of the WTO Dispute Settlement Body (DSB), the Appellate Body, [ceased](#) to function, as it no longer had the [quorum](#) of three members necessary to review cases. This situation has resulted from the US [blocking](#) the nomination of new judges since 2016. In the [absence](#) of agreements on alternative dispute resolution under [Article 25](#) of the WTO Dispute Settlement Understanding (DSU), future appeals by defendant WTO members against panel reports decided in favour of complainant WTO members will be caught in a legal void. As WTO members depend on the completion of dispute settlement procedures to proceed to enforcement action, they will effectively be deprived of their enforcement (retaliation) rights.

Attempting to remedy this situation, on 24 January 2020, 17 of the 164 WTO members [announced](#) the creation of a multi-party interim appeal arrangement, open to all WTO members. Certain major litigating parties at the WTO, including India, Russia and the US, have not joined the group, however, and are not therefore covered by the alternative appeal arrangements that would enable the EU to enforce its rights.

Moreover, blockage of dispute settlement bodies could also arise in the context of EU bilateral or regional trade agreements, leading to similar situations where EU enforcement action could be compromised.

In addition, against the backdrop of rising protectionism and nationalism, EU companies are facing asymmetric [market access barriers](#) in third countries and unfair trade practices, such as dumping and the subsidising of exports from third countries. Better implementation and enforcement of the EU's trade agreements are vital to keep markets open and ensure a level playing field for EU business. Industry representatives [have called](#) on the EU to secure more robust enforcement of the recently reformed EU trade defence instruments (TDIs) and to leverage access for the internal market to open procurement markets of non-members of the WTO [Agreement on Government Procurement](#).

The EU is also committed to promoting its values-based agenda and climate action, including via free trade agreements. [Academics](#) and [civil society](#) have however criticised the EU's enforcement of the trade and sustainable development (TSD) chapters of EU trade agreements for its [lack](#) of effectiveness. Currently, the TSD chapters are outside the agreements' general dispute settlement mechanism and cannot be enforced through sanctions in the event of non-compliance. The EU's [cooperative approach](#) largely depends on each trading partner's political will and responsiveness to reputational risks and pressure from civil society.

Current challenges and policy debates

Extending the scope of the 2014 Enforcement Regulation to defend the EU's rights under WTO law

In December 2019, to fill the legal enforcement gap left by the deadlock over the WTO Appellate Body, the European Commission [published](#) a [legislative proposal](#) under Article 207 TFEU aimed at amending [Regulation \(EU\) No 654/2014](#) concerning the exercise of the EU's rights regarding the application and enforcement of international trade rules. The proposed amendment would extend the scope of the Enforcement Regulation adopted in 2014 to two situations where an EU trading partner adopts illegal measures and also either i) blocks WTO dispute settlement procedures and prevents WTO litigation from being completed with a binding ruling required under WTO law for EU enforcement action or ii) blocks dispute settlement arrangements included in EU bilateral or regional trade agreements, preventing dispute settlement under EU bilateral or regional trade agreements from taking place. The Enforcement Regulation

thus amended would allow the EU to introduce economic countermeasures such as customs duties, quantitative restrictions and measures in the area of public procurement in the two situations.

Making more forceful use of the EU's reformed trade defence instruments (TDIs)

The Commission could initiate anti-dumping investigations more often without a complaint from EU industry (Article 5(6) of the EU [Anti-dumping Regulation](#)). This would support small and medium-sized enterprises (SMEs) that may not have the resources to submit such complaints. It could act more on proof of a 'threat of material injury' (Article 3 of the EU Anti-dumping Regulation) rather than on proof of 'material injury'. [EU industry](#) has moreover suggested tightening up the EU [Anti-subsidy Regulation, creating a new instrument to prevent dumping of services](#) and paying greater attention to TDI circumvention.

Seeking mutual access to international procurement markets

The 2014 Commission [proposal](#), as amended in 2016, for an international procurement instrument (IPI) has been [gridlocked](#) in the Council due to diverging interests of EU Member States. The IPI's adoption could open up closed international procurement markets and level the playing field for EU business.

Strengthening the enforcement of trade agreements, notably their TSD chapters

The Commission's [focus](#) on the implementation and enforcement of trade rules and the [creation](#) of the new post of EU [Chief Trade Enforcement Officer](#) as a Deputy Director-General of DG Trade vested with a complementary executive capacity to monitor and improve compliance with and enforcement of trade agreements is an opportunity to reopen the debate on the enforcement of TSD chapters. The Commission has [not](#) adopted the US and Canadian [sanctions-based](#) approach to enforce the TSD chapters but has retained an [approach](#) based on dialogue and consultation with a crucial role for civil society. Some commentators have advocated [combining](#) the two approaches by including [pre-ratification conditionality](#) and financial sanctions in the EU approach. Others have recommended [strengthening](#) monitoring and capacity building, [introducing](#) a formal complaint mechanism or [adding](#) the option of suspending tariff preferences. The European Parliament has called for sanctions as a last resort to enforce TSD chapters in [several](#) of [its resolutions](#). As stakeholders' [calls](#) on the EU to leverage trade policy for broader policy objectives become louder, the Commissioner for Trade, Phil Hogan, [has announced](#) that the Commission will propose to include trade partners' commitments to the Paris Agreement for Climate Change in the essential elements of future trade agreements that can lead to suspension in the event of non-compliance. Currently, this is limited to violations of the human rights and nuclear non-proliferation clause.

The legal basis

Article 207 TFEU.

1. The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.

2. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the measures defining the framework for implementing the common commercial policy. [...]

Article 207 TFEU, a core provision of the EU's exclusive trade competence, lays down the essential rules governing the EU's common commercial policy (CCP). Since the entry into force of the Lisbon Treaty in 2009, the European Parliament has shaped the CCP's legislative framework as a co-legislator on an equal footing with the Council and has gained the power of consent to international trade agreements.

Use of legal basis to date

Article 207 TFEU has been widely used as a legal basis, inter alia for the recent [two-pronged](#) reform of the EU trade and defence instruments and the [EU framework for foreign direct investment screening](#).

FURTHER READING

EPRS, ['Ideas Paper' for the EP Administration's Innovation Day – Free and Fair Trade](#), February 2020.

43. Making it easier to find factual information on the EU in non-EU countries



Even though the Treaties provide for the improvement of knowledge and dissemination of information about the European Union (EU), EU competence to act in this field is limited to encouraging cooperation between EU countries, and supporting and supplementing their efforts. That notwithstanding, the relevant legal bases could be further exploited to improve coordination, pool resources and strengthen the (financial) support offered to existing structures involved in upholding the EU's image abroad and countering third-country propaganda.

Current challenges and policy debates

The EU's approach to [strategic communication](#) is undergoing a profound change. It is no longer perceived as a mere public relations exercise, but instead is being used as a tool for promoting the EU's identity and values. With this in mind, the importance of strategic communication rests on the understanding that public opinion does not simply result from people's access to (reliable and trustworthy) information, but is also formed through skilful [disinformation](#).

Large proportions of EU citizens believe they have been exposed to disinformation, as witnessed by the results of a recent [Eurobarometer poll](#) (2018), showing that 85 % of Europeans believe fake news is a problem in their country, with almost as many – 83 % – viewing false information as a problem for democracy. Indeed, disinformation has rapidly risen to be one of the most pressing challenges facing the EU, since it erodes trust in institutions and the media, and harms democracy by hampering citizens' ability to take informed decisions. However, the efficient countering of such phenomena cannot be done in isolation, and needs to go hand in hand with the strengthening of the European narrative and identity. In this respect, cultural relations have substantial potential for enhancing the EU's image and impact in the rest of the world, including through filling value gaps and rectifying misconceptions, based on factual information.

Scope for action

Given that EU competence in this field is formally limited to enhancing cooperation between EU countries and adopting incentive measures excluding harmonisation, broader use of the corresponding legal bases could contribute to bolstering the existing structures responsible for the dissemination of positive narratives on EU identity, and at the same time, to strengthening the human and financial resources necessary to counter disinformation.

Upholding the European narrative and identity

The 139 EU [delegations](#) around the world, together with the 156 [offices](#) of the EU network of national institutes for culture ([EUNICs](#)), are particularly well placed to get the appropriate message across and provide foreign audiences with the necessary clarification. In the absence of a thorough evaluation, the creation of additional overlapping structures at this point seems superfluous. However, the lack of sufficient resources in both [EUNICs](#) and the [EU delegations](#), as well as the need to build up a common vision, has been apparent for some time. In order to allow both entities to operate smoothly and efficiently, the European Parliament and Council will need to ensure that they are endowed with appropriate human and financial resources. In addition, the inclusion in the EUNICs' statutes or mission statements of a specific mandate to carry out EU-focused activities would be necessary to encourage them to disseminate the relevant EU narratives, as well as to set up a small but strong coordination mechanism to this end (for instance between EUNICs and the directorates-general for communication of the European Commission and Parliament). Such a mandate is currently [lacking](#), thus reducing EUNICs to national organisations whose main mission is to represent and promote their national interests.

The EU's broadcasting media are yet another singular channel for projecting EU identity. The upholding and dissemination of EU narratives in non-EU countries could therefore benefit greatly from expanded use of common communication tools through genuinely European media, such as [Arte](#), [Euronews](#) and [Euranet](#). Unlike the two others, Euronews depends on the EU for over a third of its [broadcasting budget](#).

Nevertheless, over time, private investors from non-EU countries have increased their share at the expense of EU public broadcasters, the former currently representing 85 % of shareholders. A 2019 [rapid case review](#) by the Court of Auditors concluded that Euronews could not maintain its geographic and linguistic coverage without support from the EU. However, the auditors also identified shortcomings in the way the European Commission monitors the performance of Euronews against agreed objectives and commitments made. At this point, a political decision backed by Parliament and Council is needed on the degree of ambition the EU has for the future of Euronews. This decision will have an impact on the presence of Euronews in the media landscape, including in various non-EU languages such as Arabic and Farsi.

Countering propaganda from third countries

Russia's persistent disinformation campaigns were the main reason for the creation of the [East StratCom Task Force](#) in 2015, with the aim of exposing and countering myths and wrong statements on the EU, its history, and present-day functioning. Since its creation, the task force has debunked over [6 500 cases of disinformation](#) on a wide range of topics via [euvdisinfo.eu](#) and the [@EUmythbuster](#) account on Twitter. In 2017, the structure was joined by two new units – the Task Force for the Western Balkans and Task Force South for the countries in the Middle East, Northern Africa and the Gulf region – with the aim of promoting fact-based narratives about the EU. In the light of the growing scale and importance of disinformation activities in these regions and the need to raise awareness of damaging fake news, the mandate of the East StratCom Task Force should be maintained and the mandate of the other two StratCom Task Forces (Western Balkans and South) should be reviewed. Proper staffing and adequate budgetary resources will be critical to ensuring continuity in upholding the EU's image abroad. Repeated calls in this direction have been voiced by [Parliament and by EU leaders](#).

The legal basis

Article 167(2) TFEU, first indent

2.[...] Action by the Union shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in the following areas:

[...]

– improvement of the knowledge and dissemination of the culture and history of the European peoples [...].

Article 167(5) TFEU, first indent

5. [...] In order to contribute to the achievement of the objectives referred to in this Article:

– the European Parliament and the Council acting in accordance with the ordinary legislative procedure and after consulting the Committee of the Regions, shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States [...]

[Article 167 TFEU](#) frames EU cultural policy in respect of national and regional diversity, and emphasises the EU's common cultural heritage. However, the powers of the EU legislator are strictly limited to the adoption of incentive measures, through the ordinary legislative procedure, excluding any harmonisation at EU level. The EU's role is reduced to coordination, support and supplementing of measures adopted at national level in this field, inter alia, by enhancing the knowledge and dissemination of EU culture and history.

Use of legal basis to date

Up until now, the ordinary legislative procedure, provided for in [Article 167\(5\) TFEU](#), has been used as a legal basis only once, in conjunction with [Article 167\(2\) TFEU](#) – but in that case indent 4 rather than indent 1 – in the framework of the proposal for the [MEDIA Plus programme](#) for the 2001-2005 period. In two other instances – a decision establishing the [European Capitals of Culture for the years 2020 to 2033](#), and a decision providing for a [European Heritage Label](#) (2011) – the texts of the above-mentioned articles can be found in the recitals, even though the articles are not explicitly referred to as a legal basis.

FURTHER READING

EPRS, [Online disinformation and the EU's response](#), 2018.

EPRS, [EU strategy for international cultural relations](#), (podcast), 2017.

Policy Department for Structural and Cohesion Policies, [European Cultural Institutes abroad](#), 2016.

44. Promoting judicial independence and the rule of law



Judicial independence is the cornerstone of the rule of law. In Article 19 TEU and Article 47 of the Charter of Fundamental Rights of the European Union (CFR) EU law guarantees EU citizens and businesses the right to access to an independent judiciary that will uphold the rule of European law and protect their fundamental rights. If Europe is to remain an area of freedom, security and justice where mutual trust between national judiciaries is the foundation of the free movement of judgments across the Union, judicial independence must be protected and promoted. However, the currently existing mechanisms are not necessarily fully efficient, and need to be better adjusted to fulfil their purposes.

Current challenges and policy debates

As the Commission points out in its [communication](#) of April 2019 on further strengthening the rule of law within the Union, 'under the rule of law, all public powers always act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts. The rule of law includes, among others, ... effective judicial protection by independent and impartial courts ...'. In her [Political guidelines for the next European Commission 2019-2024](#), Commission President Ursula von der Leyen underlined that the EU 'is a Community of Law', adding that 'Threats to the rule of law challenge the legal, political and economic basis of how our Union works'. The European Council's [New Strategic Agenda 2019-2024](#) also underlines that that 'rule of law, with its crucial role in all our democracies, is a key guarantor that [EU] values are well protected', adding that 'it must be fully respected by all Member States and the EU'.

Despite the importance of the rule of law, its key component – judicial independence – has found itself under pressure, leading first to the activation of the Commission's [rule of law framework](#) (recommendations: [2016/1374](#), [2016/146](#), [2017/1520](#), [2018/103](#)), and more recently to the triggering of the [breach of values procedure](#), envisaged in Article 7 TEU, in two cases (procedures: [2017/0360\(NLE\)](#) and [2017/2131\(INL\)](#)). Rule of law issues are also being addressed through the existing legal avenues – the infringement procedure (e.g. cases [C-286/12](#), [C-619/18](#), [C-192/18](#), [C-791/19](#)), as well as preliminary references triggered by national courts concerned with their independence (e.g. [Joined Cases C-585/18](#), [C-624/18](#) and [C-625/18](#)). Questions of the rule of law and judicial independence have also been addressed, since December 2014, in the form of Council's annual peer-to-peer [dialogues](#) on the rule of law.

Scope for more EU action

EU mechanism on democracy, rule of law and fundamental rights

In an October 2016 [resolution](#), Parliament [called upon](#) the Commission to create an EU mechanism on democracy, rule of law and fundamental rights. Parliament wanted the Commission to submit, by September 2017, a proposal based on Article 295 TFEU that would entail the conclusion of a Union pact for democracy, the rule of law and fundamental rights, in the form of an interinstitutional agreement laying down arrangements facilitating cooperation between the EU institutions and the Member States in the framework of Article 7 TEU. The Commission [replied](#) to Parliament's proposal on 17 February 2017, questioning the need for and feasibility of an annual report and a specific policy cycle prepared by a committee of experts, or the need for and added value of an interinstitutional agreement in this area. On 14 November 2018, Parliament adopted a new [resolution](#) calling on the Commission to propose the adoption of an interinstitutional agreement on an EU pact and to consider linking it with the proposal for a regulation on protecting the EU budget in case of rule of law deficiencies in the Member States.

Cutting funding to countries accused of breaching the rule of law

In May 2018, the Commission put forward a [proposal](#) for a regulation on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States, based on Article 322(1)(a) TFEU. The proposal defines generalised deficiencies as regards the rule of law as including, in particular, endangering judicial independence, failing to prevent, correct and impose sanctions for arbitrary or unlawful public authority decisions, and limiting the availability and effectiveness of legal

remedies. If the Commission finds generalised deficiencies in one of the Member States as regards the rule of law as described above, it may resort to protective measures, including the suspension or reduction of payments from the EU budget and a prohibition on entering into new legal commitments. The Council would be able to veto the Commission's ruling by a qualified majority, but Parliament would have no say in the matter. In April 2019, the Parliament adopted its [first-reading legislative resolution](#) on the proposal, putting forward a number of significant modifications, in particular aimed at giving Parliament an equal footing in the procedure and safeguarding the interests of beneficiaries of EU funding. The Council has not yet taken a position on the proposal.

The Commission's rule of law review cycle

In its July 2019 [rule of law communication](#), the Commission put forward the idea of a 'rule of law review cycle'. It proposed to promote a 'rule of law culture' within the EU through various measures, and to prevent rule of law backsliding in Member States by deepening its monitoring of Member States' compliance with the rule of law through a 'rule of law review cycle'. This would cover all Member States and culminate in the adoption of an annual rule of law report that would summarise the rule of law situation in Member States.

Academic proposals

In 2012, Armin von Bogdandy put forward a '[reverse-Solange doctrine](#)' for the European Court of Justice (ECJ), under which the Member States would retain their exclusive competence to protect fundamental rights only 'as long as' they were not systematically violating their 'essence'. In 2013, Iris Conor proposed a '[horizontal Solange](#)' concept, under which it would be for other Member States to sanction peers that violated the rule of law or other EU values. Jan-Werner Müller proposed the creation of a new EU body, which he referred to as the '[Copenhagen Commission](#)'. The aim of this body would be to subject the current EU Member States to a monitoring process similar to that applied to candidate countries (hence the reference to the '[Copenhagen criteria](#)').

The legal basis

[Article 2 TEU](#)

The Union is founded on the values of respect for ... the rule of law... These values are common to the Member States...

[Article 19\(1\) TEU, second paragraph](#)

Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.

[Article 47 CFR](#)

Everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal previously established by law. [...]

The three above articles form the main legal basis for rule of law in the EU. The ECJ has held that Article 19 TEU 'gives concrete expression to the value of the rule of law' enshrined in Article 2 TEU and places direct obligations on Member States ([C-64/16](#)). The Court has also ruled that 'although ... the organisation of justice in the Member States falls within the competence of [the] Member States, ... when exercising that competence, the Member States are required to comply with their obligations deriving from EU law' ([C-619/18](#)). Member States must ensure that national courts operating within areas covered by EU law meet the requirements of effective judicial protection and judicial independence required by Article 47 CFR ([C-64/16](#)). EU action to protect the rule of law has been based on Article 7 TEU (breach of values procedure), Article 258 TFEU (infringement proceedings) and Article 267 TFEU (preliminary ruling procedure).

Use of legal basis to date

Article 19 TEU and Article 47 CFR have been resorted to in the case law of the Court of Justice, discussed above, in order to flesh out common minimum standards on judicial independence and the rule of law.

FURTHER READING

EPRS, [Protecting the rule of law in the EU: Existing mechanisms and possible improvements](#), 2019.

EPRS, [Protecting the EU budget against generalised rule of law deficiencies](#), 2018.

EPRS, [The EU as a community of law: Overview of the role of law in the Union](#), 2017.

EPRS, [Understanding the EU Rule of Law mechanisms](#), 2016.

EPRS, [An EU mechanism on democracy, the rule of law and fundamental rights](#), 2016.

45. Linking funding conditionality to the rule of law



The long-term challenges facing the EU include the need to reinforce the EU's role on the international stage, reduce greenhouse gas emissions and bolster European democracy, including respect for the rule of law by Member States. The reinforcement and improvement of the conditionality of EU budget spending in the event of generalised deficiencies as regards the rule of law in a Member State may offer a viable response to these challenges, especially when it comes to respect for the rule of law.

Current challenges and policy debates

About 94 % of the EU budget – set at [€168.7 billion](#) in 2020 figures – is intended to fund projects and activities on the ground, contributing substantially to [public investment](#). The principle of conditionality – the set of rules aimed at ensuring that recipients of EU funds uphold EU values, respect the [rule of law](#) and adopt EU economic recommendations – could be considered the main political leverage in the EU budget. Already in 2003, the [Sapir report](#) stressed that the key principle of conditionality should be strengthened. Since 2007 the EU budget has embraced the [concept of solidarity](#), built on the idea that all Member States and the Union are confronted with the same challenges and risks. The Commission stressed the importance of the contribution of conditionality to the implementation of EU legislation, and to the triggering of policy reforms and structural changes, in a 2017 [report](#) on the added value of ex ante conditionalities in the European structural and investment funds and again in a 2018 [communication](#) concerning the Union's 2021-2027 multiannual financial framework. The [mission letter](#) to Commissioner designate for Budget and Administration, Johannes Hahn, asked him to focus on the application and enforcement of EU law and 'ensure that rule of law is an integral part of the next long-term budget'. In the following [hearing](#) before the European Parliament, explicit mention was made of the need for final beneficiaries of EU funds to be protected by binding the EU funds to the rule of law in EU countries. The need for a guarantee that the upcoming rule of law assessment mechanism would be applied equally to all EU countries was also discussed.

The EU has already introduced certain levels of conditionality aimed at reinforcing EU values and respect for the rule of law through EU spending, with the European structural and investment funds (ESI) a case in point (see fiche 23). Furthermore, the [EU justice scoreboard](#), monitoring the functioning of national judiciaries, has been integrated into the [European Semester](#). The current rules on conditionality, however, are mostly voluntary, often relate to national characteristics (rather than EU objectives), and are based on 'soft' mechanisms – i.e. non-obligatory guidelines. The ESI funds provide a significant example. Until the [2007-2013 multiannual financial framework \(MFF\)](#), these funds were subject to macroeconomic conditionality, and allocation was linked to compliance with the Maastricht criteria – the [Stability and Growth Pact](#). Not all conditions (adopted by the Council) were legally binding for beneficiary countries, and the main enforcement mechanism was voluntary.

Scope for action

The EU lacks a clear strategy on how budget support could be used to promote EU values and objectives. Where they exist, the criteria for determining policy conditionality and assessing its impact on EU Member States remain ambiguous. Three elements may constitute a sound basis upon which to develop further reasoning on the application of conditionality to respect for the rule of law: the protection of the European Union's financial interests, respect for human rights, and failure to act on economic recommendations.

Under several EU regulations, the European Commission is granted the power to take appropriate measures to protect the Union's financial interests. If breaches to the rule of law are considered to threaten the financial interests of the EU, the Commission could suspend funding. During previous legislative term, a proposed [regulation](#) explicitly allowing for that was [discussed](#) by the co-legislators (see 'Use of legal basis to date' below).

The second conditionality clause concerns respect for human rights. The challenge is to broaden the definition of the existing conditionality to an extent that could address respect for the rule of law. References to human rights are contained in the 2013 regulation on the [European Social Fund](#) and EU regulations mentioning [gender equality](#), the [fight against discrimination](#) and [fundamental rights](#).

Finally, in the case of failure to act on economic recommendations, it could be argued that an independent and professional judiciary and a politically neutral prosecution service, are a necessary precondition for the fight against fraud and prosecution of crimes relating to EU fraud, and therefore could be considered a conditionality to avoid negative economic consequences for the EU budget. The European Parliament has [stressed](#) the absence of mechanisms to suspend financial assistance where a beneficiary country fails to observe the basic principles enunciated in the respective instrument and notably the principles of democracy, the rule of law and respect for human rights.

The legal basis

Article 121 TFEU

1. Member States shall regard their economic policies as a matter of common concern and shall coordinate them within the Council, in accordance with the provisions of Article 120. [...]

2. In order to ensure closer coordination of economic policies and sustained convergence of the economic performances of the Member States, the Council shall, on the basis of reports submitted by the Commission, monitor economic developments in each of the Member States and in the Union as well as the consistency of economic policies with the broad guidelines referred to in paragraph 2, and regularly carry out an overall assessment. [...]

4. Where it is established, under the procedure referred to in paragraph 3, that the economic policies of a Member State are not consistent with the broad guidelines referred to in paragraph 2 or that they risk jeopardising the proper functioning of economic and monetary union, the Commission may address a warning to the Member State concerned. The Council, on a recommendation from the Commission, may address the necessary recommendations to the Member State concerned. The Council may, on a proposal from the Commission, decide to make its recommendations public. [...]

Article 322(1) TFEU

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, and after consulting the Court of Auditors, shall adopt by means of regulations:

(a) the financial rules which determine in particular the procedure to be adopted for establishing and implementing the budget and for presenting and auditing accounts [...]

According to Article 121 TFEU (ex Article 99 TEC), Member States have an obligation to regard their economic policies as a matter of common concern and to coordinate them within the Council. According to the procedure established in Article 121, the power to adopt sanctions is attributed to the Council, while the Commission is tasked with surveillance. The role of the European Parliament is meanwhile that of checking on the decision adopted by the Council. Article 322(1) TFEU (ex Article 279 TEC) is the general legal basis for enacting EU financial rules in the form of regulations under the ordinary legislative procedure, with the Court of Auditors being consulted.

Use of legal basis to date

Article 322 TFEU has been used as the legal basis for the [Financial Regulation](#), the [regulation](#) on own resources, and also the [regulation](#) on methods and procedures for making available the traditional, VAT and GNI-based own resources.

MFF proposal on protecting the EU budget in the event of generalised rule of law deficiencies

On 2 May 2018, as part of the MFF package, the Commission put forward a [proposal](#) for a regulation on the protection of the Union's budget in the event of generalised deficiencies as regards the rule of law in a Member State. In a 2019 [communication](#) to Parliament and the Council, the Commission set out a blueprint for action on strengthening the rule of law within the Union. Deficiencies as regards respect for the rule of law in one Member State, explained the Commission, impact other Member States and the EU as a whole, and the Union has a shared stake in resolving rule of law issues wherever they appear. The proposed actions include knowledge-building, cooperation at national level and reinforcement at EU level (when national mechanisms falter).

FURTHER READING

EPRS, [Protecting the EU budget against generalised rule of law deficiencies](#), 2018.

46. Putting in place a uniform electoral procedure for the European Parliament



Although the Treaties provide for the possibility of a uniform electoral procedure, elections to the European Parliament are mainly determined by national electoral rules, which differ considerably from one Member State to another. At the moment, the EU rules only set out 'common principles' to be followed by Member States. A further approximation of laws would help to reinforce the European dimension of the elections to the European Parliament.

Current challenges and policy debates

Differences between [national rules](#) are among the [reasons](#) for 'disaffection' among EU citizens when it comes to voting for the European Parliament, as evidenced by the average [turnout](#) at the 2014 elections (42 %) although the 2019 elections saw an improvement in the [trend](#) (50 %). Some deficiencies of the current system encroach upon the principle of equality of EU citizens, the notion of European citizenship and the democratic character of the elections. This is because disparities in national rules may mean that different rights are attributed to citizens coming from different Member States as regards, for example, [disenfranchisement](#), i.e. the loss of the right to vote due to prolonged residence in another country, the possibility to vote from a third country (by post or online), the minimum age for active voting, or compulsory/non-compulsory voting. In addition, some further deficiencies weaken the European character of the elections, such as insufficient visibility of European political parties, a risk of cross-influencing the results in other Member States due to the absence of a common election day, and the lack of common rules concerning electoral campaigns and detailed technical rules on calculating votes cast.

Scope for action

A broader use of the existing Treaty provisions could bring about an extension of the areas where EU law regulates European elections, or even the establishment of a uniform set of EU rules, with a view to creating a truly *European* electoral procedure. This could be achieved by introducing, on the basis of Article 223 of the Treaty on the Functioning of the European Union (TFEU), EU rules to regulate areas that are now either left to the choice of Member States or are fully governed by national rules. In its [resolution](#) of 11 November 2015, Parliament proposed amendments to the currently applicable [Electoral Act](#) of 1976 seeking to go in this direction; however, the text ultimately adopted by the [Council](#) reduced the scope of the Parliament's original proposal.

Ensuring equal treatment among EU citizens

It is particularly important to ensure equal treatment of EU citizens coming from different Member States in their capacity as voters for the European Parliament. A higher degree of alignment or convergence of rules on the eligibility to vote or to be elected, the establishment of the minimum age for active voting, conditions of [disenfranchisement](#), and the possibility to vote from a third country, could serve this purpose. EU citizens would then perceive themselves as being part of a pan-EU process where, as voters for the European Parliament, all citizens enjoy the same rights and have the same obligations. In this respect, fuller use of Article 223 TFEU could eliminate the current disparities in treatment of EU citizens, which are simply the result of the current situation allowing the application of divergent national laws.

Strengthening the European dimension of European elections

From the perspective of bringing Members of the European Parliament closer to voters, enhancing the European dimension of elections and adding transparency, Article 223 TFEU could be further exploited to achieve greater convergence, if not harmonisation, of rules for the nomination of candidates or even for the establishment of a pan-EU constituency. Further steps could be taken to strengthen, through EU legislation, the obligation to display the logos of European political parties throughout the whole electoral campaign in Member States, or the establishment of a common day on which to hold the elections.

The legal basis

[Article 223 TFEU](#)

The European Parliament shall draw up a proposal to lay down the provisions necessary for the election of its Members by direct universal suffrage in accordance with a uniform procedure in all Member States or in accordance with principles common to all Member States.

The Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, which shall act by a majority of its component Members, shall lay down the necessary provisions. These provisions shall enter into force following their approval by the Member States in accordance with their respective constitutional requirements. [...]

The above article gives Parliament the power to submit legislative proposals aimed at establishing the rules for the election of Members of the European Parliament in the Member States. It envisages the possibility to propose common rules or to establish common principles governing the electoral procedure in Member States. The legislative procedure according to which such common rules or principles may be finally adopted is rather complex. It first requires a proposal from the European Parliament, which the Council then needs to adopt by unanimity subject to the consent of the absolute majority of Parliament Members. However, a further condition is required for the legislative act to enter into force, which is the final approval, often in the form of 'ratification' of the EU act (e.g. a Council decision), by each and every Member State according to national constitutional requirements. This enhanced legislative procedure takes account of the fact that electoral rules touch upon constitutional and fundamental principles of Member States. Article 223 TFEU seems to leave a certain margin of discretion as to the choice of form of the legislative act (decision, directive or regulation).

Use of legal basis to date

EU legislation has so far been based on Article 223 TFEU or other provisions contained in previously applicable treaties, similar in function and wording to this one.

The 1976 Electoral Act (based on Article 138(3) of the EEC Treaty) provided the first fundamental common rules for the first direct elections to the European Parliament. This act introduced [direct universal suffrage](#), established the number of MEPs per country, determined the five-year term of office, laid down several incompatibilities between the mandate and other national or European offices, prohibited the double vote (i.e. casting a vote in two Member States), determined the electoral period and fixed the date of the first elections.

The 1976 Electoral Act was amended by [Council Decision 2002/772](#), based on Article 190(4) of the EC Treaty. This decision introduced proportional representation using the list system or the single transferable vote, confirmed the principle of freedom and secrecy of elections, introduced the possibility to set a national minimum threshold not exceeding 5 % of votes cast, and identified a set of offices incompatible with that of Member of the European Parliament (e.g. member of a national parliament).

Recently, on 13 July 2018, the Council adopted [Decision](#) 2018/994. Based on a proposal of the European Parliament, this made a number of further amendments to electoral rules by introducing an obligatory minimum threshold of between 2 % and 5 % for constituencies (including single-constituency Member States) with more than 35 seats, to be implemented by the 2024 EU elections at the latest. In addition, it allows Member States to use different voting methods (postal, electronic, internet); requires the protection of personal data; establishes that 'double voting' should be penalised and sets a deadline of three weeks before the election day for the submission of lists. Decision 2018/994 has not entered into force as three Member States have not yet completed the approval procedure according to their constitutional requirements ('ratification').

FURTHER READING

EPRS, [Reform of the electoral law of the EU](#): Legislative Train Schedule, 2018.

EPRS, [Reform of the electoral law of the EU](#), 2018.

EPRS, [The Reform of the Electoral Law of the European Union](#): European Added Value Assessment, 2015.

EPRS, [Ten issues to watch in 2018](#), 2018.



47. Strengthening fundamental rights in criminal procedure

Freedom of movement benefits not only EU citizens but also criminal networks. Judicial and police cooperation is therefore essential to guarantee internal security. This cooperation requires mutual trust between national authorities and upholding the rights of individuals in criminal proceedings is necessary to build that trust in the judicial domain. Since the Lisbon Treaty the EU has a clear competence to establish minimum rules concerning those rights. Article 82(2)(b) TFEU has been used to legislate on specific procedural rights, but it could also be used to fully guarantee the right to a fair trial in criminal proceedings and to improve detention conditions.

Current challenges and policy debates

The development of the internal market and the Schengen area have led to the dismantling of the Schengen area's internal border controls and made freedom of movement within the EU a reality. However, it is not only [EU citizens](#) living in another EU country who benefit from freedom of movement, but also [criminal networks](#), making judicial and police cooperation among Member States a vital to ensure internal security. Since the 1999 [Tampere European Council](#), EU institutions have identified mutual recognition of judicial decisions as the cornerstone of judicial cooperation. Mutual recognition of judicial decisions [requires](#) mutual trust among Member State judiciaries. Its achievement is very much linked to the progressive development of a common set of procedural rights that should be fully respected within democratic legal orders attached to the rule of law. A rule of law and a human rights perspective is essential when articulating judicial cooperation instruments, such as the [European Arrest Warrant](#) or the [Framework Decision 2008/909](#) providing for the transfer of sentenced persons between Member States. This is not only because the lack of such a perspective might hinder the implementation of those instruments, as the Court of Justice of the European Union has already acknowledged ([C-404/15 and C-659/15 PPU](#)), but also because the EU is a democratic organisation based on the rule of law and respect for human rights ([Article 2 TEU](#)), as the Court of Justice has consistently pointed out ([C-619/18](#)). Therefore, if EU citizens exercise their freedom of movement and become involved in criminal proceedings in a Member State other than their own, the EU needs to ensure that their rights will be fully respected, independently of where proceedings against them take place. Finally, from an economic point of view, a 2017 Cost of Non-Europe report [suggests](#) that establishing clear common rules in relation to some procedural rights might be cost-saving. For example, if all EU Member States were to reduce pre-trial detention to the EU average, it estimates the potential savings to be up to €707 million per year.

Scope for action

Pre-trial detention and detention conditions

The European Parliament has repeatedly [called](#) for the establishment of common European standards fully respectful of international standards on human rights in relation to pre-trial detention, administrative detention and the detention of children, although some minimum rules on the latter have already been incorporated in a 2016 [EU directive](#). In a similar vein, [Parliament](#) has also highlighted important shortcomings in some Member States' prison systems, especially in relation to the material conditions of detention. While [some authors](#) question the EU's competence to act in this area, highlighting that it relates partially to post-trial detention conditions and not to trial or pre-trial guarantees, Parliament has [called](#) for the adoption of common European standards for detention to ensure that the fundamental rights of prisoners, and particularly of vulnerable individuals, children, mentally ill persons, disabled people and women are upheld, and to secure the mutual recognition of judicial decisions.

Protecting vulnerable adults in criminal proceedings

The specific needs of vulnerable adults in criminal proceedings have so far been dealt with at EU level only through a non-legislative instrument, namely the [2013 European Commission recommendation](#) on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings. Further EU action could transform this non-legislative act into a [binding legal instrument](#).

A second 'package of procedural guarantees in criminal cases'

Following the [2009 roadmap](#) on procedural rights of suspected or accused persons, several EU directives were adopted to regulate procedural guarantees. In addition to the [modification](#) of existing EU law to extend its scope or align it with international human rights standards, a second package of procedural rights could be adopted. In the trial phase, a new EU law could focus on [defence rights](#), such as, for example, the right to access the complete file of the case, to make a defence statement, or to question witnesses directly. In addition, common rules regarding the right to an impartial and independent judge, the right to access legal remedies, the right of appeal, the right not to be tried or punished twice in criminal proceedings, the [right to compensation for unjustified detention](#), or the right to be tried without undue delay, all in the EU Charter of Fundamental Rights ([Articles 47-50](#)) or in international human rights instruments ([Article 6 of the European Convention on Human Rights \(ECHR\) and Articles 2-4 of its Protocol 7](#)), could also be envisaged.

The legal basis

[Article 82\(2\)\(b\) TFEU](#)

2. To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States.

They shall concern: [...] (b) the rights of individuals in criminal procedure; [...]

Adoption of the minimum rules referred to in this paragraph shall not prevent Member States from maintaining or introducing a higher level of protection for individuals.

Introduced by the Lisbon Treaty, this legal basis enables the EU to establish minimum rules relating to the rights of individuals in criminal procedure. It succeeds the previous [Article 31\(1\)\(c\) TEU](#), introduced by the [Treaty of Amsterdam](#) and used by the Commission in 2004 to present a [proposal](#) on procedural rights that was never adopted. Under Article 82(2)(b) TFEU, the EU can only act as far as is necessary to facilitate recognition of judicial decisions and police and judicial cooperation in criminal matters with a cross-border dimension. EU legislative acts must take into account the differences among Member States' legal systems and cannot prevent Member States from providing individuals with a higher level of protection (minimum harmonisation). EU acts can only take the form of directives, adopted by Parliament and Council following the ordinary legislative procedure. Nevertheless, if a Member State considers that a proposal would affect fundamental aspects of its criminal justice system, [Article 82\(3\) TFEU](#) can be invoked, with the proposal being referred to the European Council and the ordinary procedure being suspended for a maximum period of four months ('[brake clause](#)'). In that case, if there is no consensus, a group of at least nine Member States may establish enhanced cooperation without having to ask for the authorisation required in [Articles 20\(2\) TEU](#) and [329\(1\) TFEU](#) ('[accelerator clause](#)'). EU acts can be adopted either on a proposal of the Commission or on the initiative of a quarter of Member States, according to [Article 76 TFEU](#). Denmark does not participate ([Protocol No 22](#)) and Ireland (and previously the UK) may opt in on a case-by-case basis ([Protocol No 21](#)).

Use of legal basis to date

Legislative acts adopted

Following the [2009 roadmap](#) on procedural rights of suspected or accused persons, the legal basis has been used to establish common minimum rules concerning the [right to legal aid](#); the [presumption of innocence and the right to be present at trial](#); the [right of access to a lawyer](#), and the right to have a third party informed upon deprivation of liberty and to communicate with third parties and consular authorities while deprived of liberty; the [right to information](#) of suspects or accused persons; and the [right to interpretation and translation](#). It has also been used to establish rules concerning certain [rights of children](#) in criminal and European arrest warrant proceedings, and on the [freezing and confiscation](#) of instruments and proceeds of crime.

FURTHER READING

Policy Department for Citizens' Rights and Constitutional Affairs, [Criminal procedural laws across the EU](#), 2018.

EPRS, [Procedural rights and detention conditions](#): Cost of Non-Europe Report, 2017.

48. Creation of a European ID card



EU citizens have important rights, commonly referred to as EU citizenship rights, that include moving and residing freely within the EU. This free movement relies on identity (ID) cards that can be used by EU citizens as travel documents and to establish their identity when exercising their right to live in another country. A common European ID card could be used to facilitate the exercise of those EU citizenship rights and would help develop a sense of European identity, enhancing EU citizens' feeling of belonging to the EU.

Current challenges and policy debates

Every person holding the nationality of a Member State is automatically a European Union (EU) citizen. EU citizens are granted important rights, commonly referred to as [EU citizenship rights](#); these include moving and residing freely within the EU. Currently, more than [15 million](#) EU citizens reside in another EU country and more than 11 million work in another Member State. Every year over a billion people travel within the EU or cross its external borders. The free movement of EU citizens relies on ID cards, which can be used by EU citizens as travel documents and to establish their identity when exercising their right to live in another country. There are over 250 different types of ID card and residence document in valid circulation in the EU. Twenty-six EU Member States issue identity cards to their nationals; identity card ownership is compulsory in 15 of them.

In 2018 the European Commission prepared an [impact assessment](#) on the security of ID cards and residence documents issued to Union citizens and their families. It identified several [problems](#), including insufficient acceptance of ID and residence documents in other Member States, document fraud and lack of authentication of ID and residence documents, and complexity of issuance and administration of ID and residence documents. The Commission also pointed out that Member States do not apply a common format, minimum standard information or minimum production standards for ID cards. Furthermore, not all Member States currently offer their citizens the opportunity to request ID cards outside the country. Therefore, citizens need to travel back to their home country to request an ID card, incurring higher costs.

Scope for more EU action

In May 2016, the European Parliament published a [study](#), 'The legal and political context for setting up a European identity document'. The study assessed the added value of introducing a European identity card in order to facilitate the exercise of EU citizenship rights. The study focused mainly on the exercise of EU political rights, assessing the role a European ID card might play in enhancing EU citizens' participation in decision-making processes at EU level. It suggested that the adoption of a European ID card could help resolve the issue of EU citizens not being able to make full use of their democratic participation rights, especially when moving around in Europe.

The study also argued that a common EU ID card would not only enhance democratic participation rights at EU level but also facilitate free movement. Furthermore, it analysed the legal and political feasibility of and challenges inherent in setting up an operable European ID card given the current legislative and political context. It also put forward recommendations regarding the legal and technical components required to establish an operable European ID card.

In its response to the [EU citizenship report 2017](#), the [European Parliament](#) welcomed the idea of introducing a European ID card in addition to existing cards.

In April 2019, the Trans-European Policy Studies Association ([TEPSA](#)), a research network working in the field of European affairs, published a [manifesto](#) focusing, in part, on the European identity and, specifically, on raising the profile of the EU, which in the mind of many citizens is an abstract entity, perceived as a source of problems or a convenient scapegoat. TEPSA proposed a common European layout for national ID cards in order to make citizens fully aware of the benefits and rights of being a European and to help them identify as European citizens.

[AEDE France](#), a non-profit organisation promoting European literacy and citizenship education in Europe, adopted a [resolution](#) in 2017 advocating the establishment of a European identity card to replace national ones. This would help European citizens realise that they are the fortunate inhabitants of the EU and that they have a responsibility to ensure that this common good, the Union, can prosper and flourish.

Furthermore, a European identity card would enhance EU citizens' sense of belonging to the EU and help them realise that they live in a common territory, that they, themselves, can contribute to its development, and that they enjoy its benefits every day.

The legal basis

[Article 20\(2\)\(a\) of the Treaty on the Functioning of the European Union \(TFEU\)](#)

[...]

2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:

(a) the right to move and reside freely within the territory of the Member States;

[...]

[Article 77\(3\) TFEU](#)

[...]

3. If action by the Union should prove necessary to facilitate the exercise of the right referred to in Article 20(2)(a), and if the Treaties have not provided the necessary powers, the Council, acting in accordance with a special legislative procedure, may adopt provisions concerning passports, identity cards, residence permits or any other such document. The Council shall act unanimously after consulting the European Parliament.

[...]

The power to legislate in connection with ID cards is set out in Article 77(3) TFEU, which is based on the former [Article 17](#) of the Treaty establishing the European Community (TEC). This provision applies only with respect to the facilitation of the right of Union citizens to move and reside freely within the territory of the Member States (Article 20(2)(a) TFEU). The powers under Article 77(3) are residual, as they apply only where the Treaties have not provided the necessary powers. The Council must act unanimously under a special legislative procedure after consulting the European Parliament. The Treaties do not determine the type of legal act.

Use of legal basis to date

Article 20 TFEU as a whole has been invoked by the European Parliament in several resolutions addressing EU citizenship and EU citizens' rights. In 2017, it was for example used in a [resolution](#) on strengthening citizens' rights in a Union of democratic change, a [resolution](#) on obstacles to EU citizens' freedom to move and work in the internal market, and in a [resolution](#) on the potential and challenges of e-democracy in the EU. Furthermore, Article 20 has been cited in resolutions expressing concern at the sale of EU citizenship to third-country nationals, such as in a 2014 [resolution](#) on the sale of EU citizenship and also in the 2017 [resolution](#) on the rule of law in Malta.

Article 77(3) TFEU yet to be used. According to [experts](#), Article 77(3) TFEU has a limited scope and its special legislative procedure, which requires unanimity among Member States, ensures that it will not be activated extensively. Other [academics](#) point out that the use to which new Article 77(3) can be put is not clear. They further note that the fact that the article provides for unanimity following mere consultation with the European Parliament makes it 'probably one of the most outrageous provisions in the new Treaty'.

FURTHER READING

Policy Department for Citizens' Rights and Constitutional Affairs, [The legal and political context for setting up a European identity document](#), 2016.

49. Better management of external borders



Since the entry into force of the Lisbon Treaty, the EU has had the competence to gradually introduce an integrated management system for its external borders. This allows the EU to adopt 'any measure necessary' to develop such a system, including legislative harmonisation, support for transnational cooperation, coordination of public procurement or financial support. Until now, the most prominent use of the legal basis has been the creation of the European Border and Coast Guard (EBCG), but its scope would allow for further action.

Current challenges and policy debates

The dismantling of internal border controls within the Schengen area and the development of the internal market have made it necessary to manage external borders efficiently. As border Member States carry a major burden when it comes to the managing the EU's external borders, the core of the debate has focused on the need to ensure solidarity and shared responsibility. The threat posed by serious crime with a cross-border dimension and the need to tackle irregular immigration – even if irregular arrivals to the EU have decreased dramatically since 2016 – have also dominated the debate on securing the EU's external borders. However, these concerns go hand in hand with three others. First, the number of deaths of migrants trying to reach European shores has centred the debate on the need to enhance the EU's capacity to develop search and rescue operations, find a permanent arrangement to disembark those rescued at sea, refrain from penalising those who assist people in distress at sea, fight organised networks involved in the smuggling of people, and develop a long-term migration policy to address the root causes of irregular migration while providing legal and safe channels for migration and mobility. Cooperation with third countries is seen as essential here. Second, criticism of some national and European authorities in relation to the way border management and return operations have developed has focused the debate on the need to guarantee full respect for fundamental rights – especially those of vulnerable groups and minors – and the principle of non-refoulement. Finally, managing steadily increasing passenger flows and promoting mobility to and from the EU in an increasingly globalised world is also an important challenge.

Scope for action

More efficient management of the EU's external borders

The European Parliament has called for the introduction of a European integrated border management system (EIBM), based on high common standards applied by all Member States and effective exchange of information between them. The Schengen Borders Code already regulates checks at external borders, but border surveillance and operational management are left to Member States, with the increasing participation of the EBCG. Nonetheless, there is still room for more EU action, whether by centralising and transferring executive powers to the EU through the creation of a truly European border guard, or by increasing the EU's supervisory, regulatory and operational tools in the field. The first proposal raises serious concerns as regards the EU constitutional principle that attributes to Member States ultimate responsibility for their own internal security (Articles 4(2) TEU and 72 TFEU) and in relation to the possible transfer of executive powers to an EU agency, a decision that might disrespect the Court of Justice's case law (e.g. Case C-270/12). The second possibility seems less controversial, allowing for further developments in various areas, inter alia, increasing the EU's capacity to develop operational interventions and providing the EBCG with further powers to command and control border management activities, in line with the recently approved EBCG Regulation that will strengthen the EBCG Agency through the creation of a standing corps of 10 000 EU border guards and upgrading its mandate; working on information exchange and operational cooperation between EU agencies and Member States; promoting cooperation with third countries' authorities; and boosting the technological modernisation of border management, e.g. through the uniform automation of border checks, the use of space-based products and services for border management, or European integrated systems to control and detect illegal movements of certain products.

Ensuring full compliance with human rights obligations

The European Parliament has also highlighted the need to ensure that actions taken by the EU in relation to border management fully respect fundamental rights and international obligations. Thus efforts could be made to strengthen EU capacities in search and rescue operations, as suggested by Commission

President von der Leyen in her [political guidelines](#); to ensure that those rescued at sea are [disembarked](#) in the closest safe port; to promote further involvement of the European Asylum Support Office in EBCG activities, possibly by merging both agencies and creating a unique [European Border and Asylum Agency](#); to ensure that first screening of migrants and return operations, especially when third countries are involved, fully respect human rights obligations; and, finally, to ensure that the technological modernisation of border management fully respects data protection and privacy.

The legal basis

Article 77 TFEU

1. The Union shall develop a policy with a view to: [...]

(c) the gradual introduction of an integrated management system for external borders

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures concerning: [...]

(d) any measure necessary for the gradual establishment of an integrated management system for external borders; [...]

Introduced by the Lisbon Treaty, the legal basis complements prior EU competences, especially those relating to standards and procedures for border controls (current Article 77(2)(d) TFEU, [previously Article 62\(2\)\(a\) TEC](#)). EU measures are adopted by the European Parliament and the Council through the ordinary legislative procedure. The type of legal act to be adopted is not determined by the Treaties. As the EU competence is shared with Member States, subsidiarity and proportionality principles apply. Any EU measure must be governed by the principle of solidarity and fair sharing of responsibility pursuant to [Article 80 TFEU](#). Denmark opts in on a case-by-case basis only in relation to measures building upon the Schengen *acquis* ([Protocol No 22](#)), while Ireland (and previously the United Kingdom) opt in on a case-by-case basis in relation to any measure adopted under this legal basis ([Protocol No 21](#)).

Use of legal basis to date

Legislative acts adopted

Up to now, the main use of Article 77(2)(d) TFEU has been to create the [EBCG](#), building on [Frontex](#). It has also been used to establish the rules for the surveillance of the [EU's external sea borders](#) in operations coordinated by the EBCG Agency, and for signing status agreements with [Albania](#), [Macedonia](#), [Montenegro](#), [Serbia](#) and [Bosnia and Herzegovina](#) that would allow the EBCG Agency to deploy teams in those countries. With the exception of the Status Agreement with [Albania](#), the other status agreements have still to be concluded by the Council after obtaining Parliament's consent (Article 73 [EBCG Regulation](#) and [Article 218\(6\) TFEU](#)). The legal basis has also been used to establish a mechanism for information exchange and cooperation between national authorities responsible for border management and the EBCG Agency ([Eurosur](#)), a system providing for the electronic registration of the entry and exit of third-country nationals admitted into the EU ([Entry/Exit System](#)) and a system determining the eligibility of all visa-exempt third-country nationals to travel into the Schengen Area ([ETIAS](#)). It has also been used to extend the use of the [Schengen information system](#) in the field of border checks and to establish a framework for [interoperability](#) between EU information systems in the fields of borders and visas. Finally, it has also been used in order to provide [financial support](#) for national activities linked to the development of EIBM.

Legislative proposals under discussion

The Commission has proposed to upgrade the existing EU [visa information system](#) (VIS) and also issued a [proposal](#) to set out the technical amendments necessary to fully set up the ETIAS system and one to set up a new [EIBM Fund](#) providing financial support for the Member States securing the common external borders.

FURTHER READING

EPRS, [EU asylum, borders and external cooperation on migration](#), 2018.

Policy Department for Citizens' Rights and Constitutional Affairs, [European Travel Information and Authorisation System \(ETIAS\): Border management, fundamental rights and data protection](#), 2017.

50. More efficient EU decision-making avoiding Treaty change



Improving the efficiency and rapidity of EU decision-making has emerged as one of the few reforms that could be performed without Treaty change. The current Treaties allow for this by putting at the disposal of the European Council and the Council '*passerelle* clauses' that make it possible to introduce qualified majority voting in the Council or to apply the ordinary legislative procedure where the Treaties require unanimity and/or a special legislative procedure. This option, however, has never been used as it requires strong political will on the part of the Member States to agree to change the decision-making majorities and the type of legislative procedures used in Council.

Current challenges and policy debates

In the past decade, there has been an unprecedented need to find policy solutions to a wide range of issues within a very limited time. The speed of decision-making has not always been able to match the gravity and urgency required by the situation. Current rules in force since the Lisbon Treaty (2009) have enlarged the policy areas governed by [qualified majority voting](#) (QMV) and those where the [ordinary legislative procedure](#) (OLP) applies. However, a number of policy areas or sub-areas are still subject to unanimity in Council or to a special legislative procedure that involves both Council and Parliament but prevents them from acting in the open and equal way guaranteed by the ordinary legislative procedure.

When unanimity and a special legislative procedure are applied, decision-making can become not only more cumbersome but also less transparent. In addition, unanimity stiffens the decision-making process as Member States have little incentive to negotiate or find a compromise if their veto can always effectively block a decision. The mere possibility that a majority is needed encourages solution-oriented and constructive behaviour that is more likely to pave the way to compromise and help find common ground. The current Treaties provide flexibility mechanisms, known as *passerelle* clauses, that can shift decision-making in Council from unanimity to QMV and can also shift from a decision of Council under a special legislative procedure to the regular OLP. Activation of these *passerelle* clauses however remains in the hands of the Member States (European Council or Council) and, notwithstanding their potential added value, their use has never been implemented, only proposed.

Scope for more EU action

Parliament and the Commission have been very open in advocating the benefits of *passerelle* clauses in EU decision-making. In her [political guidelines](#), the President of the European Commission, Ursula von der Leyen, supported a move to co-decision and QMV in the area of taxation, as well as in the area of external policies. Prior to that, in his State of the Union speech of [12 September 2018](#), former Commission President Jean-Claude Juncker had suggested the use of *passerelle* clauses in the same fields. In the [Commission work programme for 2019](#), a suggestion was also made that the efficiency of decision-making could be improved by shifting to QMV in certain areas of external relations and climate policy. Between 2018 and 2019, the European Commission took the following four initiatives suggesting a move to QMV or the OLP:

- in [common foreign and security policy](#), by using a specific *passerelle* clause (Article 31(3) TEU), in particular for human rights issues in multilateral fora, sanctions policy and civilian common foreign and security policy missions;
- in the [field of taxation](#) by using the general *passerelle* clause in three steps: first for measures without a direct impact on Member States' taxing rights (e.g. measures to fight fraud, evasion and avoidance or to promote tax compliance), then for measures that support other policy goals (e.g. climate change), finally in fields of taxation that are already harmonised;
- for measures to improve the [environment](#) and for Union policy on energy that are primarily of a fiscal nature (general *passerelle* clause) and to explore a specific *passerelle* clause (Article 192(2) TFEU) in the environmental field;
- in the field of [social policy](#) (general *passerelle* clause), in particular in areas of non-discrimination and adoption of recommendations on social security and social protection of workers.

The European Parliament has advocated the use of *passerelle* clauses on several occasions. In its [resolution](#) of 16 February 2017 on improving the functioning of the European Union building on the potential of the Lisbon Treaty, Parliament called for use of the general and specific *passerelle* clauses. In a [resolution](#) of 16 February 2017 on possible evolutions of and adjustments to the current institutional set-up of the European Union, Parliament called for a reduction in the number of unanimity decisions in Council and a shift to QMV, in particular in foreign and defence matters, fiscal affairs and social policy. In a resolution of 13 February 2019 [on the state of the debate on the future of Europe](#), the European Parliament reiterated its invitation to use *passerelle* clauses.

The legal basis

General passerelle clause

[Article 48\(7\) TEU](#)

Where the Treaty on the Functioning of the European Union or Title V of this Treaty provides for the Council to act by unanimity in a given area or case, the European Council may adopt a decision authorising the Council to act by a qualified majority in that area or in that case. This subparagraph shall not apply to decisions with military implications or those in the area of defence.

Where the Treaty on the Functioning of the European Union provides for legislative acts to be adopted by the Council in accordance with a special legislative procedure, the European Council may adopt a decision allowing for the adoption of such acts in accordance with the ordinary legislative procedure.

Any initiative taken by the European Council on the basis of the first or the second subparagraph shall be notified to the national Parliaments. If a national Parliament makes known its opposition within six months of the date of such notification, the decision referred to in the first or the second subparagraph shall not be adopted. In the absence of opposition, the European Council may adopt the decision.

For the adoption of the decisions referred to in the first and second subparagraphs, the European Council shall act by unanimity after obtaining the consent of the European Parliament, which shall be given by a majority of its component members.

Special passerelle clauses

[Article 312\(2\) TFEU on the MFF](#); [Article 81\(3\) TFEU](#) on family law with cross-border implications; [Article 192\(2\) TFEU](#) on environmental policy; [Article 333 TFEU](#) in the framework of enhanced cooperation; [Article 153\(2\) TFEU third subparagraph](#) on social policy (see fiche 18); and [Article 31\(3\) TEU](#) on common foreign and security policy (see fiche 36).

Passerelle clauses are not supposed to expand EU competences or alter the division of powers between the EU and its Member States. The decision to activate them remains entirely in the hands of Member States, as the initiative and final decision rests with the European Council or the Council. It is only when the Council must decide by unanimity or according to a special legislative procedure that *passerelles* may be activated, with the exception of those cases where it is Parliament that acts following a special legislative procedure (e.g. Article 228(4) TFEU) or to change voting majorities within Parliament. Special *passerelle* clauses put in place a less burdensome procedure for approval and can be adopted with less stringent conditions compared to the general *passerelle* clause (48(7) TEU). As a result, however, some of the safeguards granted by the general *passerelle* clause (Article 48(7) TEU) are absent, for example the involvement of national parliaments, with the exception of the special *passerelle* on family law with cross-border implications.

Use of legal basis to date

Passerelle clauses have yet to be used in EU decision-making.

FURTHER READING

EPRS, [How EU Treaties are changed](#), 2019.

The latest Eurobarometer surveys indicate that there is consistent support for more EU action in various policy areas, including preventing climate change, tackling irregular migration, designing a common foreign and security policy and preventing terrorism.

Assuming that the Treaty of Lisbon will be the framework for EU action for the foreseeable future, this paper explores possibilities for broadening the scope of EU action in order to respond to these repeated calls from EU citizens. With a view to reappraising the legal framework of the EU, it aims at identifying those legal bases in the Treaties that remain either under-used (in terms of the purposes they could be used to achieve) or completely unused. It analyses possible ways of delivering on EU policies, including in the development of common rules, providing enhanced executive capacity, better implementation of existing measures, targeted financing and increased efficiency.

An overview table sets out possible initiatives, which are then explored in greater detail in 50 fiches, organised according to broad policy clusters reflecting the priorities of the von der Leyen Commission. Possible measures are mentioned in each fiche, along with the legal bases in the current Treaties on which action could potentially be based.

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