Contents

Part I

Introduction

Chapter 1

Law and Economic Integration in the European Union

1.1 Introducing this Book

This is a book aimed at those who have already studied, or have at least a basic knowledge of, the law of the constitution and institutions of the European Union (EU). This includes understanding the effects of EU law, especially in relation to national law, and also the great variety of conditions and structures under which EU law is made. It assumes also a basic degree of familiarity on the part of the reader with the underlying history of the EU up to the present day. This is an increasingly complex narrative, but familiarity with the history is in any event a considerable aid to the study of the law of the EU, including the substantive social and economic law presented in this book. Important phases of the history of the EC/EU include:

- the launch of early economic 'Communities' of the 1950s, and the establishment of the European Economic Community (EEC) under the Treaty of Rome signed in 1957;
- the stagnation of the 1960s and 1970s, as the European integration project made little headway against a backdrop of an economic downturn in the Member States;
- the relaunch of the Community through the initiative from the mid-1980s onwards to complete the single market by the end of 1992, after the adoption of the Single European Act in 1986;
- the formal establishment of the European Union through the Treaty of Maastricht with its additional political concerns of foreign, security and defence policy and justice and home affairs policy;
- the creation of the single currency (the euro) in 1999, and its usage as a common currency in 'Euroland' from 2002;
- the solidification of political integration under the Treaty of Amsterdam in the late 1990s, and the additional progress contained in the Treaty of Nice which entered into force in 2003, both of which Treaties were intended to set the conditions for enlargement in the first decade of the twenty-first century;
- the important phases of Cold War enlargement, in particular with the accession of eight central and eastern European states among ten to join the Union in 2004, along with two more in 2007;
- the 'post-Nice' phase of discussions about how the European Union should develop in the future.

These latter discussions were still ongoing at the time of writing, as the Constitutional Treaty (OJ 2004 C310) which was signed in October 2004 has not thus far been ratified by the Member States (see 1.3)

This book describes and analyses the key features of what we shall generally term 'the economic and social law of the European Union'. The focus is on the internal and external dimensions of the law governing the operation of the single market, the creation and regulation of the single currency as an essential complement to the single market, the law

governing the status of citizens and non-citizens in the EU in the context of the creation of an Area of Freedom, Security and Justice, and the law governing the EU's social dimension and other flanking policies such as environmental policy and policy on regional development. It is, therefore, a broad conception of economic and social law, and includes also citizenship-related matters under the heading of the Area of Freedom, Security and Justice, which fall within the scope of EU justice and home affairs law.

Studying the economic and social law of the EU involves examining the real business of the European Union: that is to say, to the extent that there do exist powers at the EU level in any particular area to make laws or regulations, we shall be looking at the choices made by the relevant policy-makers about the conditions under which citizens and other residents of the EU live their lives (learning, caring, working, doing business, travelling, pursuing leisure activities, using services and purchasing goods, etc.) and the circumstances in which those choices can be and are made. Underlying these policy-making activities are the EU Treaties themselves – the sources of legal competence in a limited powers system – which set the basic legal and constitutional principles, establish the institutions and the conditions under which they operate, and determine the rules on what the EU and its institutions can and cannot do. In addition, the most important principles of economic and social law such as the foundations of the internal market, economic and monetary union, the Area of Freedom, Security and Justice and the social dimension of the EU themselves appear in the Treaties. In many cases, these Treaty provisions, along with secondary legislation, have been interpreted and applied by the Court of Justice and national courts. The study of the economic and social law of the EU in this book will combine the following elements:

- the study and interpretation of treaty texts, and of the role of the Court of Justice and national courts in interpreting the treaties;
- the study of the acts of the institutions adopted to implement the Treaties, including the application and interpretation of these measures by the Court of Justice and other actors; and
- (to a more limited extent) the study of the ways in which these policies have been applied, including at the national level.

An important stepping-off point is the classic argument about what the EU is 'for' or intended to 'achieve'. The original European Communities of the 1950s had, according to Weiler (1999a: 239–44), a vocation to secure three goals by building on the wreckage of post-war Europe: peace, prosperity and supranationalism. By the last is meant a departure from the limiting confines of a destructive nationalism which caused so much damage in the first half of the twentieth century in Europe. The first can be seen in the placing of some of the principal tools of war, such as the coal and steel industries, in common hands under the European Coal and Steel Community (ECSC) established by the Treaty of Paris in 1951, and in the common sense adage that countries which are intimately linked through economic and social relations are unlikely to go to war against each other.

However, in some ways, it is the middle goal, that of prosperity, which has been the key instrument for achieving the other goals. It is the enhancement of prosperity which could be striven for directly from the very beginning through the establishment of the legal structures of three 'Communities' aimed at the creation of a common market and a customs union, and at the creation of a number of key common policies, for example the

stabilisation of agricultural markets. In that sense, the business of what is now the European Union has come to be intimately linked to the implementation of this (socio-economic) goal of achieving greater prosperity, which in turn leads to the achievement of other (political and strategic) goals. This has come through successively in the project to complete the single market, the programme to create a single currency (the euro) and, more recently, the so-called 'Lisbon' agenda to make the European Union 'the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion'. However, what defines prosperity has changed in a variety of ways in the more than fifty years since the first Community was established, and policy-making at the EU and national levels has changed to reflect this. In common with other advanced economies, Western European societies have become simultaneously both more 'consumerist' and also more 'environmentalist' in orientation. Economic and social globalisation has accelerated in recent years, posing new challenges to the Member States. Furthermore, the original Community was conceived for a Western Europe caught in the middle of a Cold War between superpowers to the East and the West; since 1989, however, it has faced very different demands in relation to problems of economic and political transition and modernisation, and indeed maintaining peace on the European continent. We are now looking at a European Union stretching not only from the Arctic Circle to the Mediterranean and from the Atlantic Ocean to the Carpathian Mountains (achieved as of May 2004 with the fifth Enlargement of the Union), but even as far as the Black Sea in South Eastern Europe with the accession of Romania and Bulgaria on 1 January 2007. In this context, it becomes even more important to recognise that economic integration is not an end in itself, but part of a continuing process in which political goals are paramount, even though the political goals themselves have changed.

Accordingly, the original Treaties have evolved dramatically since they were first put in place to include ever more explicit political goals, especially since the adoption of the Treaty of Maastricht. We have seen the creation of a Common Foreign and Security Policy (CFSP) and the first steps towards a European Security and Defence Policy (ESDP), as well as the establishment of a framework for cooperation in the field of Justice and Home Affairs (JHA), covering internal security, police and criminal justice cooperation, immigration, asylum and the free movement of persons, and judicial cooperation in the civil justice field. These latter policies are now gathered together under the heading of the 'Area of Freedom, Security and Justice' (AFSJ), inaugurated by the Treaty of Amsterdam. Political integration is the primary business of the two non-Community pillars of the European Union, although it is also an inescapable dimension of the Community's first pillar itself. In the area of political integration, the current Treaty framework bears no resemblance to the original treaties.

If we focus upon the Community pillar, we will see in the paragraphs and chapters which follow that the basic Treaty framework concerned with the integration of markets and the creation of a common trading area with a single external economic identity has largely survived the passage of time. The most significant additions have been the provisions on Economic and Monetary Union (EMU) inserted by the Treaty of Maastricht and the further elaboration of policy goals and activities in relation to the free movement of persons. A number of key socio-economic goals have been added which are not wholly market-oriented, such as those in the arenas of environmental policy and labour market policy. 'Sustainable growth' was introduced as an objective of the European Community

by the Treaty of Maastricht, and is complemented by an insistence on 'a high level of protection and improvement of the quality of the environment' (Article 2 EC). There has been a gradual, but inexorable, development of a stronger social dimension to the European Union and of the flanking policies both of a regulatory nature (e.g. environmental policy) and of a redistributive nature (e.g. regional policy, policy on economic and social cohesion). The social goals of the EU have been anchored increasingly firmly within the Treaty framework over the years, with statements on equality, social protection and the combating of social exclusion proliferating in the 'Principles' of Part One of the EC Treaty, and in the greatly strengthened Title XI on 'Social Policy, Education, Vocational Training and Youth'. In addition, Title VIII deals specifically with employment policy. It has long been a point of contention in studies of the EU whether it is the liberal market goals or the social goals concerned with quality of life which take priority. As we shall see, when we begin to study EU economic and social law by considering first the prism of a system of regional economic integration, it is hard to escape the conclusion that the economic still somehow precedes the social, in the sense that processes of market integration represent the dominant paradigm. At the same time, the Community pillar itself has become more political, especially in the wake of the Treaty of Amsterdam, as Title IV on 'Visas, Asylum, Immigration and Other Policies Related to Free Movement of Persons' was added which has both economic and political dimensions. This complements rather than detracts from the economic goals of the original Treaties.

1.2 The Approach Taken in this Book

The fields of EU economic and social law and policy covered in this book have been mentioned in outline in the previous section. The approach which we take is to sketch the general framework for each field of law, focusing on key principles and broad lines of legal and policy development. Attention is given to the basic EC Treaty framework, key secondary legislation and policy documentation, sketching lines of policy-making for the past, present and future, and relevant case law. Both the 'hard' and 'soft' dimensions of law are reviewed, with account taken where necessary of measures which are not strictly or fully binding on the Member States.

No claim is made that the book is offering comprehensive coverage of EU socio-economic law and policy in this text. Obvious omissions include transport policy, industrial policy, education policy other than as a by-product of citizens' rights to free movement, energy policy, fisheries policy, data protection and the regulation of intellectual property. There are other areas of recent intensive legislative action in the EU which are not covered in the book, even though they are of profound significance for the work of companies and enterprises in the EU, such as the regulation of chemical substances (European Parliament and Council Regulation 1907/2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) and establishing a European Chemicals Agency, OJ 2006 L396/1). However, many of these fields are mentioned in passing in the chapters, highlighting how they link to the material which has been covered. Furthermore, within a single volume on the substantive law of the EU, it is possible to provide only a basic understanding of even the limited fields chosen for review, and to suggest case law, legislative and policy documents, secondary literature and other commentaries which can offer more detailed insights. Many of the subjects covered in the chapters of this book are analysed in larger volumes written by

other scholars, and many of these are referred to in the 'Further Reading' sections at the end of each chapter. Specific references in the chapters are detailed in the Bibliography and References at the end of the book.

We work self-consciously in this book with the multiple objectives of the EU, and its complex legal and political status as a novel type of 'non-state polity', with semi-autonomous institutions, while acknowledging throughout the important underlying foundation of the EU in international treaties signed by sovereign states. These treaties confer only limited powers on the EU and its institutions. Our approach is informed also by our attempt to place EU economic and social law in its wider economic and political context, as well as to illuminate the complicated legal framework within its proper historical context in order to remind readers never to assume that the development of EU law has merely 'just happened'. A sense of EU law as a dynamic, evolving and contested framework is a core dimension of the approach taken here. For those who wish to understand more, the evolutionary approach is fully amplified in an edited volume on *The Evolution of EU Law* (Craig and de Búrca, 1999). Of course, the process of evolution of EC economic and social law has not been smooth. It is much like the process of integration itself which 'has always been characterized by fits and starts, by bursts of activity which have often been followed by crisis and relative inaction' (Tsoukalis, 1997: 1–2). We view it as important, therefore, to provide an insight within each chapter as to how the law and policy in the relevant field has evolved.

Developing this sense of EU law as a narrative and a process is not only the task for this first part of the book, comprising this introductory chapter, followed by a chapter on what we term 'socio-economic governance' amplified in its specific EU context; but it is also an approach which suffuses each individual chapter sketching the different fields of law. Reference is made where appropriate to non-legal literatures on the topics covered, in an effort to help bring a broader perspective. The first part of the book aims to set out also the core constitutional and legal principles derived from the treaties and the case law of the Court of Justice which govern law and policy-making in the EU and to show the great variety of techniques of socio-economic governance which apply across the different fields of law and policy-making with which the EU is currently engaged.

Overall, it is hoped that the reader will gain a sense of the operation of the legal order within a framework informed by the historical development of European Union integration processes and by the ever-changing preoccupations of the broader issues and the most important factors which have brought about such changes. Where once the discussion centred on the creation of the single market, and then on the launching of the single currency, the focus is now above all on the challenge of making a Union of twenty-seven Member States work. In matters of policy, the focus has turned to the challenges inherent in building the Area of Freedom, Security and Justice, and the issue of competitiveness within labour markets. These reflect the EU's twin themes of internal and external security in an ever more challenging world, and of economic reform to promote prosperity and sustainable development. In terms of external affairs, both the longstanding attempts to create a global free trade system within the General Agreement on Tariffs and Trade (GATT 1948) and the World Trade Organisation (WTO 1994), as well as the more recent US-led 'war on terrorism' which has significantly changed the state of affairs surrounding internal and external security matters, continue to shape the development of internal EU law and policy. Against these swiftly changing backgrounds, some aspects of the legal core of the EU can offer a haven of stability! As we shall see, the

fact that the spotlight may shift away from a field of policy-making does not mean that the development of the law will actually stop. On the contrary, away from the full glare of attention, it may actually accelerate. In many fields of policy-making, it is apparent that a process of legislative renewal has been occurring under the management of recent Commissions headed by President Romano Prodi and President José-Manuel Barroso, reflecting often a principle of regulatory reform that encourages the EU to do more, but with fewer legislative instruments.

1.3 Terminology, Treaty Articles and Reform Processes

Wherever possible, reference is made throughout this book to the work, activities and institutions of the EU or the Union, although in strictly legal terms it is often correct in fact to refer to the European Community (EC) or simply the Community. Indeed, the Court of Justice commonly refers to 'Community law', and the term 'Union law' or 'EU law' is only just coming into usage in some legal documents of the EU and in the context of the emerging case law concerned with 'third pillar law'. Examples of documents which refer to Union law include the Charter of Fundamental Rights of the European Union of December 2000 (OJ 2004 C364/1) and the 2004 Constitutional Treaty (OJ 2004 C310/1), but the former is a declaratory instrument at present, while the latter has yet to be ratified and to enter into force, and seems unlikely to do so. In this book, we use the terms 'EU law' and the 'legal order of the EU' as general descriptors covering all legal aspects relating to the European Community and the European Union. Only when specifically delineating precise questions on the scope of Community competence under the EC Treaty will the terms 'EC' and 'Community' be used, in order to highlight the continuing legal distinction between the 'Community' and 'Union' pillars of the EU. In the latter context, reference will be made to the 'powers of the Union', in order to differentiate these from 'Community competence'.

In 1999, a significant renumbering exercise of Treaty provisions was brought into effect by the Treaty of Amsterdam. Throughout this work, provisions of the EC Treaty (e.g. Article 1 EC) and the Treaty on European Union (e.g. Article 1 EU) are referred to by their new post-Amsterdam numbers. Occasionally, for the avoidance of confusion, reference will be made to the earlier pre-Amsterdam numbering scheme. Thus, in quotations from cases or literatures where the old numbers are used, these are sometimes preserved if the sense requires this. Particular attention to the whole question of renumbering is paid wherever the periodic revisions which the treaties have undergone have resulted in the amendment, substitution or deletion of the original provisions. Tables of equivalences with the old and the new numbers are provided in all collections of primary materials on the EU, and readers are advised to consult them to resolve any confusion on the matter.

Since the early 2000s, the European Union has been going through a very significant reform process (Shaw, 2005). At the European Council meeting in Nice in December 2000, which finalised the text of the Treaty of Nice after an exceptionally difficult negotiation process, the leaders of the then fifteen Member States appended a Declaration on the Future of the Union to the Treaty. The Declaration committed the Member States to reflection upon some of the key issues which were felt to undermine the legitimacy of the EU. They raised issues such as the status of the Charter of Fundamental Rights of the EU, which had recently been drafted by a Convention established for that purpose during 2000, the division of powers between the EU and the Member States, and the role of

national parliaments. However, even earlier in May 2000, German Foreign Minister Joschka Fischer had given a visionary speech in Berlin on the so-called 'finality' of European integration. Where might the EU finally end up? He suggested that the model of a federation of nation states might be useful.

There were therefore some very big ideas already on the table when the Member States came to consider these questions during the course of 2001, to which they had committed themselves. There were also still some 'nuts and bolts' institutional questions which had not been properly addressed in the Treaty of Nice or earlier Treaty amendments, relating to making the EU work better after enlargement. These included the size and composition of the European Commission, and the legislative process and system of qualified majority voting in the Council of Ministers. The idea would be to make the Commission smaller and more effective, and to change the system of qualified majority voting to make it easier to reach majority decisions after enlargement, at the same time as extending the list of areas where majority decision-making rather than unanimous voting would apply. Both the big ideas and the nitty-gritty challenges lay behind the adoption by the Member States of the Laeken Declaration in December 2001. This text provided an analysis of the challenges facing the EU, both in terms of its own internal workings and the environment in which it operates, and envisaged a set of responses to these challenges.

The first response was the establishment in February 2002 of the Convention on the Future of the Union, with ex-French President Valéry Giscard d'Estaing as its President. This was a body comprising representatives from a variety of constituencies, such as the national governments, the national parliaments, the European Parliament and the European Commission, and observers from a number of bodies such as the Committee of the Regions and the Economic and Social Committee. It included also representatives from the then thirteen candidate states, namely the ten which acceded in May 2004, plus Bulgaria, Romania and Turkey. The Convention worked steadily until mid-2003, through phases of listening, reflection and drafting, and eventually produced a report in the form of a draft Treaty establishing a Constitution for Europe. This draft Treaty was in turn sent to an Intergovernmental Conference (IGC) which was convened in October 2003 by the Italian Presidency.

An IGC is the conventional mechanism for Treaty amendment in the European Union under Article 48 EU, and involves just the representatives of the governments of the Member States as the decision-makers, with limited input from the Commission which must give an Opinion, and the European Parliament which only has observers present. Here the ten accession states were involved as full participants, although the IGC began before they actually acceded (1 May 2004), and the three other states were granted only observer status. Italy failed to achieve agreement among all the Member States on a single text by the end of December 2003. Particular difficulties arose among France, Germany, Poland and Spain over the definition of qualified majority voting. The Irish Presidency in the first half of 2004 worked steadily on resolving differences between the Member States, however, and agreement was reached in June 2004. The result was the Treaty establishing a Constitution for Europe ('Constitutional Treaty'), which is based in substantial measure upon the text elaborated by the Convention, with some additional changes introduced particularly to take into account the sensitivities of Member States. A good example of this concerns qualified majority voting in the area of harmonisation of national criminal laws and criminal procedure, where the Member States can apply an 'emergency brake' if they believe that proposed harmonisation measures in the EU compromise the integrity of their

national legal systems. This means that if a Member State is unhappy about a proposal which could, in principle, be adopted by a qualified majority vote against their wishes, it can ask that the matter be referred to the European Council. This effectively means the dropping of the proposal.

Even though the Constitutional Treaty is not in force in the EU, some of its major proposals regarding changes to the EU's substantive laws and policies are referred to in the chapters which follow. In any event, it is worth noting that the text of the Constitutional Treaty contains important ideas for improving the effectiveness and coherence of the underlying legal structure of the EU which will influence any future reforms. However, it is important to emphasise that for the most part the Constitutional Treaty covers institutional and constitutional questions, and not issues of substantive policy-making. It does not affect, for example, the way in which the EU's single market continues to operate (see Chapter 3). On the other hand, it does suggest changes to some aspects of how the single currency is governed, and proposes substantial changes to the structure of policy-making in the area of justice and home affairs, in a way which would strengthen the input of the EU institutions into law-making, especially the European Parliament. Also, some of the institutional issues, such as the proposed simplification of the system of legal instruments which the EU institutions may adopt, are important for all fields of law and policy-making and are given brief coverage in this book as necessary. The basic institutional structure of the EU, with the European Parliament, the European Commission, the Council of Ministers and the Court of Justice, remains untouched.

The Constitutional Treaty is divided into four parts which are designated by Roman numerals:

- Part I is the general part of the Constitution, establishing Union objectives, values and competences. It includes provisions on institutions and instruments.
- Part II incorporates 'The Charter of Fundamental Rights of the Union' as a legally binding set of guarantees.
- Part III sets out 'The Policies and Functioning of the Union', and includes details on how the institutions as well as the policies actually work.
- Part IV contains 'General and Final Provisions'.

Overall, the Constitutional Treaty comprises 448 articles. Each article is designated with an Arabic and a Roman numeral. Thus, Article I-60 is the last provision in Part I, Article II-61 is the first provision of the next part, Article III-115 is the first provision of Part III, and Article IV-437 is the first provision of the final part. This notation is used in the chapters which follow whenever the text involves a discussion of the provisions of the Constitutional Treaty. Where there is no discussion of the Constitutional Treaty, it is because the Constitutional Treaty will not make any significant difference to the provisions which are being discussed. In such instances, the Constitutional Treaty is merely a renumbering exercise. A good example of this is the definition of the internal market contained in Article 14 EC and discussed in the next section. The definition is adopted in identical terms in Article III-130 of the Constitutional Treaty.

If it comes into force, the Constitutional Treaty will supersede the EC Treaty (as amended through to the Treaty of Nice) and the Treaty on European Union (likewise, as amended). However, at the time of writing, it could not be assumed that the Constitutional Treaty *will* in fact ever come into force, at least not in the form in which it

was originally agreed in June 2004, and signed by the Member States in October 2004. Although by May 2005, the Constitutional Treaty had been ratified by nine of the 25 Member States, representing nearly a majority of the population, it failed its first test on 29 May 2005, when it was decisively rejected in a referendum in France by a majority of 55 to 45 per cent. This was followed by a negative referendum in the Netherlands on 1 June 2005, where nearly 62 per cent of those voting (on the basis of a 63 per cent turnout) voted 'no'. Despite this setback, ratification still continued in some Member States although the majority terminated their endeavours to achieve ratification, and by the beginning of 2007 eighteen Member States had approved the Treaty (including the incomers Bulgaria and Romania), representing more than a majority of the population of the Union. Given that ratification is required by all Member States before the Constitutional Treaty can come into force, the EU remained in a curious limbo throughout the rest of 2005 and through 2006, a time officially termed a 'reflection period' during which the Commission tried hard both to engender increased debate about the need for democracy and communication, and to focus the attention of both citizens and policy-makers on the delivery of policy initiatives in preference to the institutional changes which are the primary focus of the Constitutional Treaty.

Serious efforts to reignite the process of institutional reform, with something like a 'mini' Treaty reforming the existing EU and EC Treaties, were relaunched by the German Presidency in the first six months of 2007, and the Berlin Declaration, agreed by the Member States and the EU institutions on the occasion of the fiftieth anniversary of the signature of the Treaty of Rome in March 2007, referred rather vaguely to a hope for an institutional renewal of the Union before the date of the next European Parliament elections in 2009. This will be a much more modest affair than the Constitutional Treaty. It certainly seems very doubtful that the Member States will try to press ahead on the basis of the existing Constitutional Treaty, and attempt to reverse the negative referendum votes and persuade some rather eurosceptic Member States, such as the UK, Sweden, Denmark, Poland and the Czech Republic, to seek a positive ratification outcome. Indeed, it may be that even a modest reforming treaty will encounter ratification difficulties in some Member States. Meanwhile, the legal framework of the EU will continue unchanged as before, on the basis of the EC Treaty and the Treaty on European Union, as amended.

1.4 Regional Systems of Economic Integration and Different Levels of Economic Integration

The European Union is based upon a framework for regional economic integration, embodied primarily in the three Community treaties (EEC – now EC, ECSC and Euratom), as subsequently amended, and as supplemented by the Treaty on European Union, also as amended. This has to be the starting point for presenting the narrative and themes of EU social and economic law. To a certain extent the system of integration which the treaties provide for follows, in a recognisable way, theories of regional economic integration outlined by economists, although tailored to the specific requirements of the original Communities and now the EU.

The EU today is based on what the treaties call an 'internal market', that is, an area without internal frontiers where goods, services, persons and capital can move without hindrance (Article 14 EC), but with a common external frontier. In other words, it is also a 'customs union', with a single external tariff for imports, and it has, to a large extent, a

common trading identity *vis-à-vis* the outside world. Since 1993 and the Treaty of Maastricht, it has been evolving towards an 'economic and monetary union', that is, an area with a common economic and monetary policy including a single currency, a single bank and controls over national economic policies. In broad terms, the form of integration chosen is that of market integration: a larger trading unit in which market forces operate freely and is created out of smaller diverse units. The EU is also a regulatory system, as the removal of trading borders between the Member States and the creation of a common trading area have often necessitated the replacement of diverse national regulations to protect interests such as the consumer, the worker and the environment, with common or harmonised EU-level regulations.

As a result of such processes of integration, economies are expected to specialise as they become increasingly interconnected, and to purchase imports from within the regional trading bloc rather than from outside. Thus, systems of regional economic integration are discriminatory *vis-à-vis* the rest of the world, and not automatically compatible with a system which aims at global free trade such as that based around the World Trade Organisation (WTO) which is now the principal international forum for trade negotiations and dispute settlement and comprises the old General Agreement on Tariffs and Trade from 1949 as amended (GATT), as well as newer agreements on trade in services (GATS) and intellectual property (TRIPS). The world trading environment of the post-Uruguay Round WTO and the increasing interconnectedness of the global economy have raised important challenges to the EU as a trading partner and as a regulatory system.

Economic integration can take different forms, depending essentially upon the degree of openness established towards the partner economies. The terms used here are not precise or static economic definitions, but rather descriptions of the types of features typically found in an evolutionary process of integration. A *free trade area* involves the removal of customs duties between the participating states, but does not involve the erection of a common external barrier. Participating states remain free to fix their own tariff levels in international trade. A free trade area will not lead to the removal of internal borders, as frontier controls will need to remain for the purposes of checking the origin of goods. The additional element of uniform external protection is added in a *customs union*, where the participating states agree upon the establishment of a common external tariff, and embark upon the task of creating a common external trade policy, for example, setting quotas and duty-free preferences. The EU is based on a customs union, but extends further in the sense that it is a *common market* in which there are to be no restrictions at all on the movement of commodities such as goods and services, or on the free flow of the factors of production such as labour, enterprise and capital.

The final stage of economic integration, in the sense that hitherto it was thought likely to be achieved only by groups of states which have become for all practical purposes a single political entity, is *economic and monetary union*. It was this stage of integration, involving the convergence of national economic policies and a gradual assumption of centralised responsibility for economic and monetary policy, leading to the creation of a single currency area within single monetary institutions and policies, which was envisaged by the Treaty of Maastricht. Many concrete steps towards its attainment have been taken, with the introduction of single banking institutions managing monetary policy, the locking of national exchange rates and the introduction of the euro as a single currency for 12 Member States from 1999, the phasing out of national currencies for 'Euroland' from 2002, and the introduction of greater centralised controls over national

economic policies of the participating states from the mid-1990s onwards. The 'political identity' of the EU remains, however, a very uncertain issue (see 1.8). Another way of putting this matter is that these economic terms tell us nothing about how political entities such as nation states, international organisations such as the WTO, or intermediate bodies such as the EU, are supposed to achieve the changes necessary to move from one stage to another in the evolutionary process of economic integration.

1.5 Key Terms in European Economic Integration

When economic integration is discussed in the EU context, confusion often arises as to how some terms are used in the EU Treaties and literature on the EU, with terms used sometimes interchangeably. The best example is provided by the terms: *common*, *internal* and *single market*. In one sense, this is not a problem, given the somewhat fluid nature of all the different levels of economic integration, which are subject to influence from external factors such as current political ideologies or the state of the world economy. Not too much should be read into the shift from the term 'common market' used in the original EEC Treaty, to the term 'internal market', used in the EC Treaty from the Single European Act onwards, and 'single market', used in much political discourse throughout the 1980s. There was no stepping back in ambition between the original EEC Treaty and the Single European Act. The new terminology represented a break with the somewhat jaded concept of a common market, which had lost some of its political credibility as a realistic objective since it should have been established by 1970, but in fact never was established because of political stagnation and economic difficulties. Armstrong calls the single market merely 'a new spin on the idea of a common market' (Armstrong, 1999: 747).

The apparently confusing terminology can best be summed up in these terms:

- 'common market' is the term associated in the economic literature with a particular level of economic integration;
- the 'single market' has been a political project associated with the relaunch of European economic integration in the 1980s (the '1992 programme'); and
- 'internal market' is the term found most often in legal literatures, including the EC Treaty, documentation emanating from the European Commission including its White Paper which underpinned the '1992 programme', and much secondary legislation. According to Article 14 EC, the internal market is an area 'without internal frontiers', and much endeavour has been directed since the end of the period set aside for the completion of the programme, i.e. 31 December 1992, towards removing these frontiers, particularly for persons.

In sum, the differences are not based on the scope of what is meant (e.g. does the particular term include EMU and/or the flanking policies such as the environment, as well as commodity and factor of production mobility?) but rather the context in which the term is used, and the economic and political rather than the legal meanings of what is conveyed. As it is the term most closely associated with legal literatures, 'internal market' will be used throughout this book, except from time to time when specifically referring to the 1992 or single market programme where it is appropriate to use that term. However, and perhaps a little confusingly for our purposes, the Court of Justice generally refers to the 'common market' since this remains the term used in the EC Treaty in its original 1957 version, from which the Court derives most of its terminology.

A distinction is commonly drawn between *negative* and *positive* integration. Negative integration refers to the removal of existing impediments to trade and exchange, and less complex forms of economic integration consist almost entirely of negative dispositions. Typically, these obstacles to trade between states stem from measures adopted by states, such as product standards or provisions discriminating against non-national goods or services. Positive integration relates to:

> 'the modification of existing instruments and institutions and, more importantly, to the creation of new ones so as to enable the market of the integrated area to function properly and effectively and also to promote other broader policy aims of the [integration] scheme' (El-Agraa, 2004: 2).

Increased commitment to positive integration is necessitated by the move towards more complex levels of integration. There are numerous examples of the phenomenon identified by El-Agraa to be found in the EU. For example, it is arguable that there is a need, within the single market, to create EU-wide basic product standards to which all products put on the market should conform in the interests of consumer and environmental protection. This can be achieved by means of the harmonisation of national laws. Particular obstacles to the free movement of persons *within* the single market are evident which can only be removed by positive measures especially at the external borders, to create common standards on the admission of third country nationals. This allows the removal of internal frontier controls, as has occurred among the 'Schengen' states. A further example is the creation of new centralised policy instruments (Articles 81–86 EC) which enable the EU to restrain or punish undertakings or groups of undertakings which seek to recreate, through private behaviour, the same market segmentation which Member States are prohibited from retaining by the EU's guarantees of free movement (competition policy).

Two key difficulties exist with positive integration at the level of policy and decision-making, and at the level of implementation. Throughout this book we will revisit, through practical examples, the details of the rigidities and complexities of the EU's decision-making process. It was only after the adoption of the Single European Act in 1986 that there was a marked acceleration in the legislative activity of the EU. In practice, as we shall see, many of the achievements of the EU in the field of economic and social law, and especially in the domain of rights for individual economic actors or market participants, are a result of creative interpretations of the outer limits of negative integration by the Court of Justice. Often these have led to altered conceptions about the types of positive harmonising measures which are both expedient and necessary for the completion of the single market. In other words, the work of the Court has changed the conventional understanding of the difference between positive and negative integration.

The second difficulty is even more impervious to proactive changes brought about by the EU institutions. One often overlooked truth about the EU is that while the EU institutions may make decisions and thereby seek to exert control over the marketplace, they have little capacity to put their decisions into effect. In relation to most aspects of *implementation*, the EU institutions are in the hands of the national political, legal and administrative structures and actors. The EU institutions are limited to powers of *enforcement* which are often ineffective to deal with infringements, or are dependent upon the complaints or claims brought by aggrieved individual companies, traders or consumers.

Reference should finally be made to *sectoral integration*. Closer integration in particular

sectors of the economy may be achievable only by interventionist policy-making which creates uniform regulatory mechanisms. The principal example in the EU, aside from the specific sectoral treaties, is the agricultural sector, where the various national mechanisms existing to subsidise agricultural activities and the earnings of farmers have, since the early 1960s, been replaced by a unified system of price support and intervention, buying whenever the market price falls below a specified guide price. This is not an example of the free market in operation. Recent steps towards reforming the agricultural policy have involved more structural action, for example encouraging changes in rural land use, supporting farmers to take care of the environment, or indeed leading to the re-nationalisation of certain policy choices in relation to agriculture. In none of these cases, however, is a free and unregulated market for agricultural activities and products proposed.

1.6 The Economic Benefits of Integration

Economists are greatly divided on the nature and degree of the economic advantages to be derived from integration. Models of customs unions developed within the classical theories of international trade would appear to show that there should be gains in terms of trade creation, but losses in terms of trade diversion. Trade creation occurs where the source of a particular good is switched to the most efficient source of production within the single trading bloc when customs duties which artificially increase prices are removed; trade diversion arises because the most efficient world producer may be excluded from that trading bloc, and its products may be rendered more expensive than those of the most efficient internal producer because of the effects of the customs duties at the external frontier. However, this theory relies upon a model of a static customs union which ignores factors such as the monopoly power of multinational undertakings, economies of scale, costs of transport and non-tariff barriers to trade erected by nation states. Consequently, the theory is based upon an unrealistic set of assumptions as to why systems of integration are formed. For example, the illustration of trade creation and trade diversion used here is an argument for global free trade, and against regional systems of integration. Global free trade would be the best way of maximising economic welfare, but in practice it remains unattainable. It follows, therefore, and is indeed undoubtedly true, that states have other reasons for embarking upon integration processes.

Regional integration offers other, dynamic benefits. These include the economies of scale and increased levels of competition which benefit both undertakings and consumers in a larger market, all of which may lead to accelerated restructuring and specialisation of economies. The integrated economic entity may also enjoy increased bargaining power in international trade, enabling better terms of trade to be negotiated with third countries. Integration involves openness of an economy towards the outside, and thus enhances transparency of the underlying regulatory framework. Overall, membership in a larger economic entity may make a state a more attractive location for inward investment from strong economies. Enhanced economic integration also leads onto other benefits, including increased political interdependence and increased influence upon global political events.

These dynamic benefits were emphasised particularly strongly in relation to the so-called 1992, or single market programme. For example, the Commission in its official papers pointed to the possible emergence of a 'virtuous circle of innovation and

competition – competition stimulating innovation which in turn would increase competition' as a result of the lowering of the barriers. Certainly, one of the political successes of the programme was the harnessing of business commitment to the project with companies being successfully convinced that they needed to respond – in some way – to the changes being brought about.

However, although it may be possible to identify the economic factors which should, in theory, lead to growth resulting from customs unions and other forms of more intense economic integration, in practice these gains are very difficult to quantify. It is almost impossible to separate any additional economic growth which may have occurred in the Member States as a consequence of the existence of the EU from the growth in GNP which would in any case have occurred. This is especially true because of radical changes in the global economy since the inception of the European Community, the altered arrangements for the regulation of international trade especially since the creation of the WTO, and factors such as the internationalisation of capital movements and financial markets which have led to much greater global economic interdependency.

Undoubtedly it can be demonstrated that trade within the EU has increased greatly at the expense of trade between the EU and the outside world. This is often given as a reason why the UK, which has a particular tradition of trading outside Europe resulting from its history as a colonial power, may not have benefited as much from membership in the EU as other countries, since it has lost both the sources of many of its cheap raw materials and the destinations of many of its exports. Furthermore, trade within the EU is dominated by Germany which accounts for over 35 per cent of all exports of manufactured goods within the EU. Germany also runs a large trade surplus with the rest of the EU, since it accounts for only 25 per cent of all imports.

There is certainly a case for treating the original figures associated with anticipated growth from the completion of the single market with a certain scepticism, especially in the light of emerging evidence some years after the 1992 deadline. The possibility of increasing GDP by up to 5 per cent as a result of eliminating the 'costs of non-Europe' (i.e. the costs resulting from the failure to complete the single market) was naturally beguiling for both politicians and industrialists, not to mention ordinary consumers who would expect to see their spending power increase. This optimistic prognosis was propounded most famously in the Commission's own sponsored study in 'The Economics of 1992' (*Cecchini Report*) (Cecchini, 1988) and has been termed 'Christmas Tree' economics. In practice, however, many of the calculations put forward did not take into account the costs associated with industrial restructuring, shifts in patterns of employment and other regional effects of the creation of a larger market.

Jovanovic (1997: 199) cautioned that the single market programme is part of the long-range process in which it is difficult to disaggregate the precise effects of the changes introduced, and suggested in 1997 that it was still too early to conclude on the long-term benefits. Tsoukalis has warned against the temptation of producing numerical estimates of the macro-economic effects of the single market programme, while accepting that these are highly attractive to politicians. In 1997, he summarised the available evidence in cautious terms:

> 'Whichever way it is calculated, the macroeconomic impact of the internal market seems to have been rather small; and certainly smaller than expected. According to estimates released by the Commission, the impact of the internal market on GDP has been between 1.1 and 1.5 per cent, with the impact on investment being close to 3 per cent. Between 300,000 and 900,000 jobs have been

directly attributed to the internal market, and approximately 1 per cent reduction in prices' (Tsoukalis, 1997: 77).

He attributed the difference between the *ex ante* estimates and *ex post* calculations of the macro-economic impact to the fact that expectations were deliberately inflated, and that the implementation of the single market programme has occurred in quite a hostile economic environment. The tenth anniversary of the completion of the single market, i.e. of the passing of the 1992 deadline, led to further attempts to estimate the effects of the single market programme, and the Commission concluded that EU GDP in 2002 is 1.8 percentage points or €164.5 billion higher thanks to the single market, and that about 2.5 million jobs have been created in the EU since 1992 that would not have been created without the opening up of frontiers.

Whatever the doubts about the figures, it cannot be denied that membership in the EU continues to be viewed as an attractive proposition. Evidence can be found not just in the 2004 enlargement, but also beyond, with Bulgaria and Romania having signed accession treaties in 2005, subsequently acceeding on 1 January 2007. In addition, in what is termed the EU's 'new neighbourhood' comprising countries such as Ukraine which continue the transition to full market economy status as well as to democracy, as well as those countries of South Eastern Europe which continue to cope with the fall-out from the break-up of Yugoslavia which undermines economic as well as political stability, membership in the EU is regarded as an important goal. It must be assumed therefore that all these countries, including the ten new Member States, envisage deriving economic gains from membership or, perhaps, avoiding losses which might result from non-membership. In addition, as many economists themselves note (e.g. El-Agraa, 2004), European integration involves many political choices as well as economic calculations.

1.7 Economic Integration and the Social Dimension

As Part IV of the book will show in detail, the EU has become gradually, but increasingly, involved in law and policy-making in many fields of social policy in the widest sense. In this book, for example, the discussion covers not only conventional redistributive social policies, but also environmental policy. Only belatedly are the Member States taking up the ringing declaration which they made in October 1972, at the Summit Meeting in Paris, just as the Community engaged with its first enlargement from six to nine members. The government leaders declared that 'they attribute the same importance to energetic proceedings in the field of social policy as to the realisation of the economic and financial union'. This suggests a grand principled rationale for the development of EU social policy. In practice, the reasons are more pragmatic.

According to Leibfried and Pierson, 'the economic and institutional dynamics of creating a single market have made it increasingly difficult to exclude social issues from the EU's agenda' (Leibfried and Pierson, 2000: 268). In developmental terms, EU social policy is widely understood to be the result of what are termed, in the language of integration theory, 'spill-overs' from one sector into another. The steps towards economic integration inherent in the concepts of the internal market and indeed economic and monetary union are not hermetically sealed with economic effects only. No one sector of the economy or society is isolated from all of the others.

The integration of markets, for example, can have a dramatic effect upon national welfare states. This is partly a result of labour migration which may change patterns of

demand, but it is also a consequence of the increased marketisation and commoditisation of public services such as health care and social care. The level of resources put into national welfare systems through fiscal policy may remain essentially a matter for the Member States, but in many respects outputs are now constrained by the impact of principles such as non-discrimination, under which national welfare regimes must treat all EU citizens equally. This has led to the adaptation of national welfare state institutions as a consequence of the indirect pressures of integration as well as changes in the rules governing benefit allocation as a consequence of direct pressures to make them compatible with the rules of 'negative' market integration. Similarly, Economic and Monetary Union – in common with other dimensions of economic integration – has an effect on labour markets, demanding, for example, substantial restructuring efforts which will be more effective if coordinated across the Member States and the Commission itself. But most obviously, there have been growing pressures for positive integration, i.e. some measure of harmonisation in some fields of social policy, especially in relation to the social standards imposed on employers such as health and safety provisions, protection against employment risks such as redundancy, and the prohibition of discriminatory practices.

1.8 The Links between Socio-economic Integration and Political Integration in a Globalising Economy

Observing the EU at the outset of the twenty-first century, Laffan *et al* (2000: 101) commented that the central problem confronting the EU was the question, 'how is deep economic integration achieved and governed in the absence of centralised political authority?'

Systems of economic integration are rather unstable, and the theory of functionalism has been used to describe the 'spill-over effect' whereby the attainment of one level of economic integration tends to lead onto the next. For example, for many years there was considerable pressure from within business communities in the EU for the establishment of a single currency, which would both eradicate many of the uncertainties of floating, or even partially fixed, exchange rates, and reduce the transaction costs associated with dealing in more than one currency. Thus, the prospect of a larger accessible market sharpened awareness of the potential benefits of EMU and helped structure the processes which led to the Treaty of Maastricht and its implementation through the 1990s and into the 2000s. Moreover, in the types of mixed economy to be found in the Member States of the EU, the activities of the state are not restricted to erecting border controls, charging customs duties, imposing taxes and the management of macro-economic policy, but include numerous interventions in the economy through both regulatory activity and, in some areas such as the utility industries where these remain in public hands, commercial activity (Tsoukalis, 1997: 61–2). Tsoukalis concludes:

> 'In the context of such economies, a complete customs union or a common market can be nothing short of total economic integration; and this has become increasingly apparent in the case of the EU.'

It was an awareness of this which constituted the driving force behind the political movement in the EU, from the mid-1980s onwards, to complete the internal market in accordance with the timetable established in the Single European Act and the 'shopping

list' of national obstacles to free trade identified in the Commission's White Paper of 1985. The primary barrier to full achievement of these objectives was the economic downturn experienced in the economies of the Member States in the early 1990s which significantly undermined, but did not eventually prevent progress towards EMU. All of this suggests both that the autonomy of the nation states within the legal framework provided by the EU Treaties has generally remained strong and that economic theory can sometimes underestimate the degree of political integration needed for the successful completion of a common market (Laffan *et al*, 2000: 103). In fact, it is generally accepted that the greater fetters upon the autonomy of the Member States have come from international market forces and that in fact states have ceded more power to the new economic orthodoxy of the free market and the global trading system than they have so far to the European institutions. Tsoukalis and Rhodes (1997: 19) suggested that:

> 'The main constraint in terms of national economy autonomy was for long the result of increased international capital mobility, and for many years regional integration had very little effect on it.'

Only as political realities have adjusted gradually to 'the growing Europeanisation (and internationalisation) of economic forces' (Tsoukalis and Rhodes, 1997: 29) have the European (Union) institutions slowly acquired more power at the expense of the national political institutions. This has occurred under the single market programme and, most recently, in relation to the development of EMU which involved the granting of significant powers to the European Central Bank (ECB). The initial reluctance of the Member States to concede the need for a parallel Intergovernmental Conference on Political Union to accompany the one on EMU which led to the Treaty of Maastricht and hence to the single currency and the establishment of the ECB is an important reminder of the obstacles to the balanced development of functional economic and political authority in the EU.

Political authority and hence political integration in the twenty-first century EU stands at a crossroads. On the one hand, as we shall see in the following section, political and socio-economic goals and policy-making instruments are now rather closely integrated together in the complex framework of Treaties which constitutes the present-day EU. In principle, the framework for a system of multi-level governance of the economies and societies involved in the EU is in place. As states and societies become more interdependent as a result of globalisation, as well as the process of European integration in fields as diverse as crime, immigration and the environment, policies have started to develop at the EU level, in close partnership with national policies. On the other hand, the nature of that governance system remains highly contested, as the EU appears to lose more and more popular support among the populations of the Member States and, moreover, it rarely appears to function particularly effectively or efficiently in response to growing technological and ethical challenges such as genetics or the need for sustainable energies. Public ignorance about and dissatisfaction with the EU are very high right across the EU, including in the new Member States of Central and Eastern Europe as public opinion surveys show. The campaign in France for a 'no vote' in the referendum on the ratification of the Constitutional Treaty reflected strongly felt and widespread public fears about globalisation and the preservation of national social systems and social models. Traditionally, the EU has offered protection against the harsh winds of globalisation. Some now fear that the EU itself is increasingly fostering the promotion of neo-liberal economic policies which push down labour market standards and force the privatisation of public services. The EU and its Member States have become increasingly

obsessed with how to achieve growth and competitiveness at levels matching the United States (Sapir *et al*, 2004).

This book will not attempt to show how this legitimacy challenge could or should be faced, or to engage in details with the EU's current debate on governance or the 'Future of the Union', except insofar as these impinge directly upon the topics under discussion, such as the division of competences and the techniques of governance which the EU has at its disposal. It stands, however, for the more modest proposition that a better understanding of the legal framework of policy-making is a necessary prerequisite to making judgments about the desirability of the past, the present and the future of the European integration project.

1.9 The Objectives of the European Union and the Legal Framework for Policy-Making in the Socio-economic Domain

The legal framework underpinning the fields of policy-making analysed in this book cuts right across the three pillar structure of the EU, as established by the Treaty of Maastricht in 1993. This is shown schematically on p. 21. In this section, we sketch out that framework by reference to the foundational principles to be found in the Treaties. The Preambles to the EU and the EC Treaties set the stage, linking the vocation of the EU in terms of economic and social objectives to wider political goals related to liberty, democracy and respect for fundamental rights. The Preambles to both Treaties make general references strengthening economic and social progress, and to the unity and the convergence of the economies of the states. More specifically, Article 2 EU provides in its first paragraph that it is an objective of the EU:

> 'to promote economic and social progress and a high level of employment and to achieve balanced and sustainable development, in particular through the creation of an area without internal frontiers, through the strengthening of economic and social cohesion and through the establishment of economic and monetary union, ultimately including a single currency . . .'

This is the core socio-economic objective of the EU, strongly echoed in the EC Treaty, and indeed in key non-Treaty statements about the objectives of the EU, such as the Lisbon competitiveness agenda (see 1.1). Turning to the combined political and social objectives of the Union which are relevant to the development of policies covered in this book, we find also that the Treaty aims:

> 'to strengthen the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union;'
>
> and
>
> 'to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.'

Part One of the EC Treaty which sets out 'Principles' appears to be simpler and indeed narrower, with Article 2 EC proclaiming the sole objective of the 'European Community' to be the following:

> 'The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing the common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality

PREAMBLE AND COMMON PROVISIONS OF THE EU TREATY [ARTS. 1–7 EU]

- objectives and tasks of EU;
- common principles, e.g. subsidiarity;
- common values, e.g. fundamental rights, liberty, rule of law, democracy;
- single institutional structure;
- respect for national identities.

THE THREE-PILLAR STRUCTURE OF THE UNION

Pillar Two | ***Pillar One*** | ***Pillar Three***

COMMON FOREIGN AND SECURITY POLICY (CFSP) TITLE V EU
ARTICLES 11–28 TEU
'Intergovernmental'

Area of shared activity or cross-pillar structures, e.g. Schengen Acquis incorporated after Amsterdam; Title IV Part II EC Treaty as linked to PJC – **Area of freedom, security and justice**

TWO (formerly three) COMMUNITIES HELD TOGETHER BY BOND OF 'SUPRANATIONALISM'

EUROPEAN COMMUNITY (EC) (subsumes since 23 July 2002 also the activities of the former Coal and Steel Community (ECSC)) **Covers** single market, customs union, EMU, social policy, etc.

EURATOM or EUROPEAN ATOMIC ENERGY COMMUNITY

POLICE AND JUDICIAL COOPERATION IN CRIMINAL MATTERS (PJC) TITLE VI EU ARTICLES 29–42 EU
'Intergovernmental' – but linked to first pillar . . .

TITLE VII EU (ARTICLES 43–45 EU)
GENERAL CONDITIONS OF CLOSER COOPERATION

- special rules for pillar one (Art. 11–11a EC), pillar two (Art. 27a–e EU), pillar three (Art. 40–40b TEU).

TITLE VI EU (ARTICLES 46–53 EU) FINAL PROVISIONS

- jurisdiction of Court of Justice;
- arrangements for accession of new Member States;
- amendments to treaties;
- entry into force.

PROTOCOLS APPENDED TO EU AND/OR EC TREATIES, e.g.

- jurisdiction of Court of Justice;
- incorporation of Schengen Acquis;
- opt-outs for UK, Denmark, Ireland;
- subsidiarity and proportionality;
- European enlargement;
- Declaration on the Future of the Union.

DECLARATIONS APPENDED TO TEU AND EC TREATY
(not formally part of Treaty)

CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

The Architecture of the European Union

between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.'

However, as Article 2 EC indicates, a fuller guide to the legal framework for economic and social law in the EU is to be found in Articles 3 and 4 EC. Article 3 EC, which has been amended and broadened on the occasion of each new Treaty, sets out the activities of the European Community and includes:

'(a) the prohibition, as between Member States, of customs duties and quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect;
(b) a common commercial policy;
(c) an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital;
(d) measures concerning the entry and movement of persons as provided for in Title IV;
(e) a common policy in the sphere of agriculture and fisheries;
(f) a common policy in the sphere of transport;
(g) a system ensuring that competition in the internal market is not distorted;
(h) the approximation of the laws of Member States to the extent required for the functioning of the common market;
(i) the promotion of coordination between employment policies of the Member States with a view of enhancing their effectiveness by developing a coordinated strategy for employment;
[. . .]
(k) the strengthening of economic and social cohesion;
(l) a policy in the sphere of the environment; [and
(m) to (u) which provide contributions to policies on competitiveness, research and technological development, the development of trans-European networks, health protection, education, training and culture, development cooperation, association of third countries, consumer protection, energy, civil protection and tourism.]'

Even then, the scope of the Community's activities as articulated seems a little narrow. Other than the reference to the free movement of persons in paragraph (c) of Article 3 EC, there is no reference in either Articles 2 or 3 EC to the citizenship objective articulated in the EU Treaty. This is a little anomalous, as the EC Treaty does indeed go on to create and regulate a 'citizenship of the Union' (Part Two of the EC Treaty, Articles 17–22 EC). These types of anomalies arise because the provisions of the EC Treaty on aims, objectives and activities have been constructed piecemeal since the original Treaty of Rome, via numerous amendments. Often, the final products do not make complete sense.

Article 4 EC, introduced by the Treaty of Maastricht, concentrates upon EMU. If doubt should remain after Article 3 EC, it firmly commits the EU to be a free market system, such that the activities of the EU now include:

'the adoption of an economic policy which is based on the close coordination of Member States' economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition.'

Article 4(2) EC introduces the objectives of:

'the irrevocable fixing of exchange rates leading to the introduction of a single currency . . . and the definition and conduct of a single monetary policy and exchange rate policy the primary objective of both of which shall be to maintain price stability and, without prejudice to this objective, to support the general economic policies in the Community, in accordance with the principle of an open market economy with free competition.'

All of these provisions which set out objectives need to be read in the context of the overall EC Treaty structure and contents and other principles articulated in Part One of the EC Treaty, as well as Article 6(1) of the Treaty on European Union which reminds us that:

> 'The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.'

The EU Treaty also commits the Union to respect fundamental rights (Articles 6(2) and 7 EU).

Turning to more specific principles contained in the EC Treaty, Article 3(2) EC 'mainstreams' gender equality, by requiring the Community to aim to eliminate inequalities and promote equality between men and women in all its activities. Environmental protection requirements are integrated into the definition and implementation of all policies by Article 6 EC, with a particular view to promoting sustainable development. Article 12 EC states the important principle of non-discrimination on grounds of nationality within the sphere of Community competence. Article 13 EC introduces not a principle of non-discrimination on a number of enumerated grounds, but a competence on the part of the Community to enact measures 'to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'. Article 14 EC, already noted in 1.5, defines the internal market, adding an additional element which does not appear in Article 3(c), namely the elimination of internal frontiers. Although it ostensibly introduced an obligation to complete the internal market by the end of 1992 – an obligation with which the EU institutions and the Member States self-evidently failed to comply given all the areas of economic integration where the internal market project remains incomplete – nonetheless Article 14 EC does not entail many specific legal consequences. The Member States were aware of the risk that it might, and added a Declaration on Article 14 EC to the Final Act of the Single European Act expressing its political will to complete the internal market, but indicating that the date of 31 December 1992 does not 'create an automatic legal effect'. In Case C-378/97 *Wijsenbeek* ([1999] ECR I-6207), the Court held that Article 14 EC:

> 'cannot be interpreted as meaning that, in the absence of measures adopted by the Council before 31 December 1992 . . . the Member States [are required] to abolish controls of persons at the internal frontiers of the Community . . . [S]uch an obligation presupposes harmonisation of the laws of the Member States governing the crossing of the external borders of the Community, immigration, the grant of visas, asylum and the exchange of information on those questions' (para. 40).

Questions of competence are addressed in Article 5 EC, which elaborates the basic principle of the European Community as a body with limited powers, with the exercise of shared competences to be subject to the principles of subsidiarity and proportionality. There is further discussion of the general and constitutional principles structuring policy-making in the socio-economic sphere in Chapter 2, including principles which are not found explicitly stated in the treaties, but are in other instruments such as the Charter of Fundamental Rights of the Union adopted in 2000, or which are implicit in the case law of the Court of Justice. Part One of the EC Treaty also establishes the basic institutional framework.

The Constitutional Treaty in large measure replicates this system of aims, objectives and principles, as set out in the EC and EU Treaties. However, there is, of course, one single

set of provisions, as the Constitutional Treaty sweeps away the 'pillar system' inaugurated by the Treaty of Maastricht, which separates out areas such as core economic and social policy-making activities, the common foreign and security policy, and cooperation in the areas of crime and policing. In comparison to the existing Treaties, the provisions of the Constitutional Treaty emphasise a little more clearly the EU's adherence to values such as fundamental rights, the diversity of its Member States and their cultures, and indeed the social rights and principles which underpin the so-called 'European social model'. In addition, Article I-7 of the Constitutional Treaty would give a single 'legal personality' to the EU, allowing it to make international treaties on its own behalf. Hitherto, only the separate European Communities have had international legal personality, allowing them each to conclude treaties. The EU as such, as established in 1993, had no formal legal personality, although in practice it has had the power to conclude some international agreements since the Treaty of Nice, by virtue of Article 24 EU. This has stunted in some ways the growth of the external dimension of the EU, although more in the political realm of common foreign and security policy, which lies beyond the scope of this book, rather than in the area of trade relations with third countries and with international organisations which is covered under the EC Treaty.

The Constitutional Treaty also deals with questions of competence in a manner different than before. It creates three explicit categories of competence: those which are *exclusive* to the EU, those which are *shared* between the EU and the Member States, and a category covering areas where the EU only has competence to support, coordinate or supplement the actions of the Member States. This is sometimes called *complementary* competence (Article I-12). Chapter 2 elaborates further on these categories, both by reference to the Constitutional Treaty, and also by reference to the existing Treaties, where they can already provide a useful way of categorising the different types of approaches to policy-making which the EU takes. The Constitutional Treaty also adopts unchanged the principles of subsidiarity and proportionality which are important in governing the exercise of competences, as well as the principle of limited powers, whereby the EU can only exercise powers which have been conferred upon it (Article I-11).

Part Three of the EC Treaty elaborates in greater detail many of the principal 'Community' activities identified in Article 3 EC, dealing separately with the mechanisms for establishing and maintaining the customs union, the removal of non-tariff barriers to trade in goods, and the elimination of restrictions on the free movement of services, the free movement of workers, enterprise and capital. Since the Treaty of Amsterdam, the EC Treaty has also included special provisions relating to 'Visas, Asylum, Immigration and other policies related to the Free Movement of Persons' (Title IV). These address directly the politically sensitive project of completing the internal market in relation to the free movement of people, creating a common external frontier and removing internal borders, while ensuring the necessary security measures are in place. In many cases, these policies are complemented by those on Police and Judicial Cooperation in Criminal Matters (the 'Third Pillar') governed by Title VI of the Treaty on European Union. Part Three also contains the basic framework for the harmonisation of national laws in pursuit of the single market objective, including the principal general law-making powers of Articles 94 and 95 EC. Separate Titles and Chapters within Part Three detail policies in other fields such as agriculture, transport and trans-European networks, competition, taxation, economic and monetary affairs, employment, external trade and customs cooperation, social policy, education, training and youth, culture, health, consumer protection,

industry, economic and social cohesion (regional policy), research and technological development, environmental protection and development cooperation. Separate chapters are devoted in this book to the majority of these policy areas, and where appropriate they also detail those sections of Part III of the Constitutional Treaty which introduce important changes to EU policy-making.

Law is the principal mechanism available for turning the political and economic aspirations articulated in the Treaties into reality. The legal instruments of economic integration within the framework of the European Union are based on Treaties, that is, it is *prima facie* international law, and on the secondary legislation passed by institutions set up by the Treaties – where a variety of different regulatory techniques including both hard and soft law are used to require and to persuade the Member States to participate fully in the pursuit of the integration objectives. The case law of the Court of Justice is also a distinctive and important source of law in relation to economic integration and socio-economic regulation. The system of law set up under the Treaties displays special characteristics which enhance its effectiveness *vis-à-vis* the national legal systems, in particular where the focus is placed upon the 'Community' pillar where supranational decision-making methods involving the different institutions are the norm and where the Court of Justice has an authoritative role in relation to the interpretation and enforcement of legal provisions, under the rule of law. Article 10 EC binds the Member States to:

> 'take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.'

The legal order of the EU is therefore generally termed supranational rather than international, even though there are strong international elements – notably under the second and third pillars – in relation to both decision-making structures which are intergovernmental and the effects of measures adopted. In many fields, however, the key economic and social law provisions of the EU have an impact within the Member States akin to constitutional provisions. Membership in the EU involves a loss of sovereignty, and the substitution of common political institutions for national political institutions. Indeed, in Case 294/83 *Parti écologiste 'Les Verts'* v. *European Parliament* ([1986] ECR 1339 at p.1365), the Court of Justice stated that the EC Treaty has the nature of a 'constitutional charter'. It is widely accepted that it is appropriate to analyse the EU's legal and institutional order as it evolves in constitutional terms, although it is accepted that the EU is not and will not become a 'conventional' state. This trend of analysis would, of course, enjoy a substantial boost in the event that the Constitutional Treaty is ratified and enters into force. In substance, the Constitutional Treaty is best understood as an incremental development of the existing Treaties and thus continues the emphasis on the international law origins of European integration combined with the strongly federal and supranational elements which have entered the legal order of the EU, both through the case law of the Court of Justice, and because of the extraordinary success in some fields at least of the EU in constructing a system of economic integration based on law. The use of the word 'constitution' in relation to the EU and its legal basis has fostered inevitably, however, a great deal of controversy, both during the drafting process and, most particularly, the ratification process where it has scratched at some of the evident sensibilities of the Member States and their citizens regarding national sovereignty.

Key provisions of economic and social law, such as those guaranteeing free movement, are justiciable before national courts (direct effect) and take precedence over national laws (supremacy). This is a case law principle under the system of EU law at present, but is explicitly enshrined in Article I-6 of the Constitutional Treaty. Those national courts faced with issues of EU law can and in some cases must refer questions on the interpretation and application of EU law to the Court of Justice, under the Article 234 EC preliminary reference procedure. Where the Community has fully exercised an exclusive competence to regulate in the economic domain, in particular in the field of agriculture, the existence of Community legislation will be regarded as precluding national legislation (the pre-emptive effect of Community law). In addition, the Community as a legal order exercising powers in the economic domain claims the legitimacy of adherence to the rule of law. The regulatory activities of the Community are therefore subject to tests of constitutionality and legality under the control of the Court of Justice.

1.10 Overview of the Structure and Contents of this Book

This book is divided into an Introduction and three substantive parts. Following this initial chapter, a further introductory chapter will set out the key principles, themes and approaches visible in the economic and social law of the EU. Part II then examines the law of the internal market and Economic and Monetary Union, covering both the general rules governing free movement and the harmonisation of national measures to facilitate the achievement and management of the internal market, and a number of special sectors and policies, such as agriculture, intellectual property and competition law. Both the internal and the external aspects of the regulation of the market are covered.

Because of the special circumstances which surround the case of persons, a separate part of the book is devoted to examining the legal situation of citizens and non-citizens of the Union, bearing in mind the general objective of creating an Area of Freedom, Security and Justice within the EU (Part III). Some dimensions of policy in relation to the creation of the Area of FSJ which are less directly related to socio-economic concerns are not discussed in detail, such as police and civil justice cooperation, and policies on criminal justice cooperation and organised crime and terrorism.

Finally, Part IV examines the social dimension of the EU, in its widest sense. It includes the 'flanking policies' such as policy on the environment and regional policy, which are closely related to the completion of the internal market.

Many of the subjects and policies considered here are not subjects which students of the law would necessarily study in the domestic context (e.g. regional development, development aid or the regulation of customs duties and imports/exports of goods). Moreover if they are studied they would often be the subject of many separate courses – for example on agricultural law, competition law, law and regulation, employment or labour law, discrimination law, social welfare law, environmental law, taxation, or immigration law, rather than being part of public law or regulation courses. One of the biggest challenges in studying EU social and economic law – with a dash of justice and home affairs law thrown in as well – is that of assimilating so many different fields of policy-making, and accomplishing this in a manner which is sensitive to the particular tensions of law and policy-making in a multi-level governance system where power and authority are distributed across a number of authorities, including the EU itself and the Member States. The reader will be constantly reminded of the many instabilities of the EU,

both in terms of its policy-making systems and structures, but also most pertinently in the early twenty-first century, in terms of the extension of its geographical and geopolitical frontiers through enlargement towards the East.

Summary

1. This chapter introduces the study of the social and economic law of the European Union. The objective of the chapter is to present the essential background to understanding law and economic integration.
2. This book assumes that the reader has a basic background knowledge of the EU's legal and political framework, including its historical evolution from the 1950s onwards. Only the most recent developments, such as the elaboration of the Treaty establishing a Constitution for Europe, are covered in more detail.
3. The key material reviewed includes the economic and social objectives of the EC Treaty and the Treaty on European Union, and a sketch of the way in which the Treaties approach the construction of a framework within which the institutions can develop policies. Law plays a key role in the economic integration system created by the Treaties, and the outlines of the policies can be identified looking at the provisions of the Treaties concerned with objectives and activities.
4. This chapter introduces the reader to key terminology in the study of regional systems of economic integration such as the EU, and the different levels of economic integration which can be achieved. It emphasises that the EU is a system of regional economic integration based on a customs union and a common market, with a system of economic and monetary union which extends to some of its Member States, which is still in development. It provides a short evaluation of the economic benefits of integration, highlighting that this issue is highly controversial. However, membership remains a very attractive proposition for outsiders.
5. The question of the social dimension of economic integration is also introduced briefly.
6. This chapter presents the basic structure of the rest of the book to the reader.

Exercises

1. Distinguish between a free trade area, a customs union, a common market and an economic and monetary union. Why has the EU gradually developed through the stages to become a more closely integrated trading system?
2. What are the principal economic benefits of integration? Why do commentators disagree about the issue of the benefits of integration?
3. How and why does globalisation present both economic and political challenges to the EU as a system of regional economic integration?

Further Reading

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Thompson, G. (2001) 'Governing the European Economy: A Framework for Analysis', and Lintner, V. (2001) 'The Development of the EU and the European Economy', in Thompson, G. (ed.), *Governing the European Economy*, London: Sage.

Tsoukalis, L. (2005) *What Kind of Europe?*, Oxford: Oxford University Press.

Key Websites

The Europa server, the essential starting point providing access to materials on the institutions, policies, and documents of the European Union, is available at:
http://europa.eu/index_en.htm

On the Treaty Establishing a Constitution for Europe, see:
http://www.europa.eu/constitution/index_en.htm
which includes up-to-date information about the ratification of the Constitutional Treaty.

The 'Future of the European Union – Debate' or Futurum site, is a reference site on the process of debate accompanying the Constitutional Convention and the Intergovernmental Conference, and is available at:
http://europa.eu/constitution/futurum/index.htm

Stay up to date with news about the EU and European politics and economics by visiting, and signing up for updates from, a number of websites including –

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Euractiv, a source for EU news and policy positions:
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Excellent blogs on European politics include:
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http://fistfulofeuros.net/
http://centreforeuropeanreform.blogspot.com/index.html
http://blogs.ft.com/brusselsblog/

Blogs on EU law and specifically on the Court of Justice include:
http://courtofjustice.blogspot.com/index.html
http://eulaw.typepad.com/eulawblog/

Index