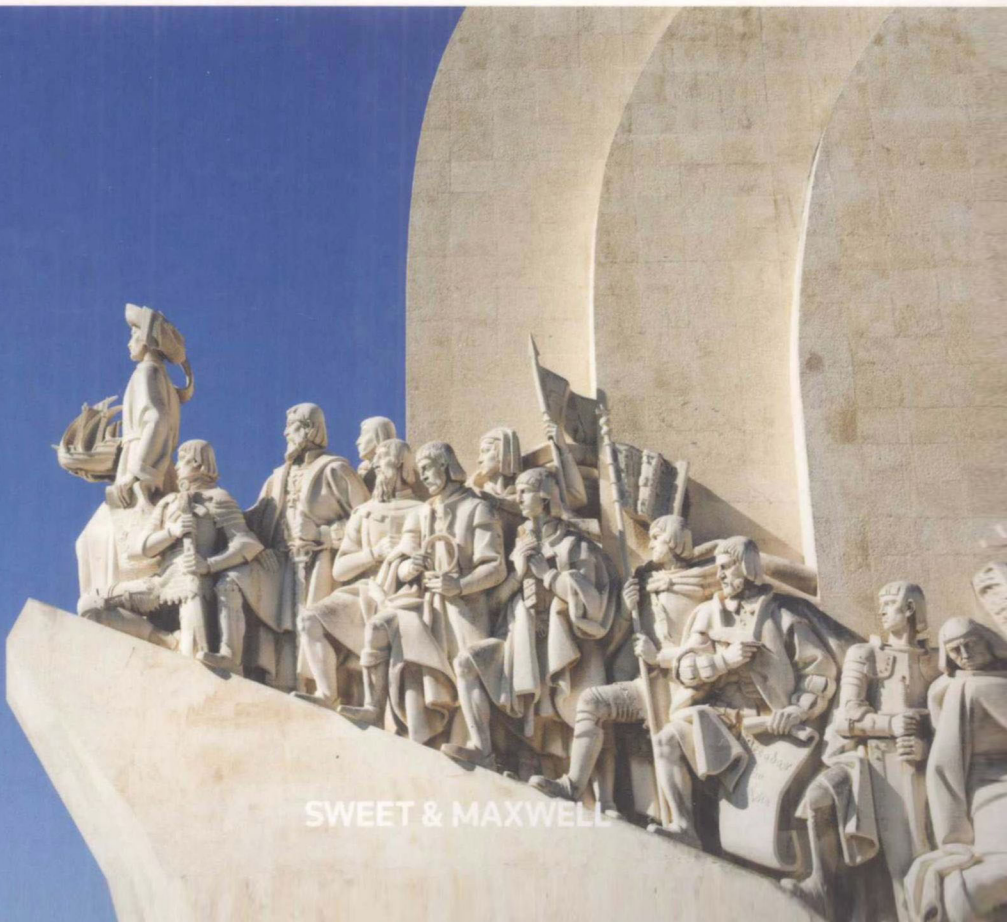


A Guide to European Union Law

as amended by the Treaty of Lisbon

Tenth Edition

Dr P S R F Mathijsen



SWEET & MAXWELL

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In memoriam

*Daphné
Olivier*

Acknowledgments

By starting, back in May 2008,¹ to update the 9th edition of this book, and including in it all the modifications provided for by the Treaty of Lisbon, I took quite a risk, and so did Sweet & Maxwell. As is well known, it was indeed not until November 2009, that this Treaty was finally ratified by all the Member States and could enter into force on December 1, 2009. I am therefore particularly grateful to the publisher and publishing editor (Nicola Thurlow) for having stood by me all that time. I also want to thank the editorial staff for their patience, understanding and indispensable help: they produced the many tables and the index, without which this book would be much less useful. For editing, correcting and improving the manuscript and proofs my thanks go to Michelle Afford.

Community activities have developed tremendously over the past years, more so probably than before. Some tasks also became more technical, more complicated. I realised I needed some outside help and was particularly lucky in finding the required experts ready to assist me. In the first place there is my university colleague, Prof. Tony Joris, who once again accepted to review the chapters concerning the institutions. Ms Katia Bodard helped me updating the chapter on Intellectual Property Rights (IPR) and, above all, Ms Bettina Bognár, my assistant at the law firm, who, for months, researched, rechecked and reread the many drafts!

I have freely made use of information published by the Union institutions on the Internet and elsewhere and have always made reference to the place where I found it. I remain particularly grateful to the Office for Official Publications of the European Union in Luxembourg and the Court of Justice for graciously supplying me with needed documents and publications.

For morale and physical support nothing equals, as always, my wife Beverly. She gracefully accepted the consequences of prolonged absences at the office during drafting, including weekends.

P. Mathijssen
February 2010

¹ The consolidated versions of the Treaty on European Union and the Treaty on the functioning of the European Union were published in the *Official Journal* on May 9, 2008 (CIIJ).

Introduction to the “After Lisbon” Edition

Readers who now approach “European law” for the first time are to be envied in a certain way since they start out with the new terminology, article numbering, concepts, treaty contents, etc. They will get to know “Europe” under its new “cloak”! However, they need to know what went on before the Treaty of Lisbon became applicable in order not to be utterly confused when confronted with former expressions, numbers, etc. One example will make this clear: “Community” was the term universally used to designate the enterprise to unify Europe, that started after World War II at the beginning of the 1950s, which is now referred to as “Union”. The term “Community” was used all over the world for more than 50 years but has now been discarded and replaced; it is, however, to be expected that the term “Community” won’t totally disappear from one day to the next as by magic; and, furthermore, the *acquis communautaire*¹ remains and must constantly be dealt with. The same applies to the many other changes; the European newcomer might, therefore, find it more than useful to have some knowledge about what went on before the Treaty of Lisbon.

It seems necessary to start by briefly mentioning some of the major technical and material modifications introduced by the Treaty of Lisbon, leaving the substantive changes for the chapters of this book dealing with the various structures and activities of the Union. The reader should not be surprised that modifications were introduced, after all this has happened over and over again in the past: the first modification was introduced back in 1952 and since then some 17 modifications have been introduced by treaty or act.

- At one point there existed four legal and institutional European “structures”: the 1951 Coal and Steel Community (ECSC); the 1957 European Economic Community (EEC), which became the European Community (EC); the 1957 European Atomic Energy Community (Euratom); and the 1993 European Union (EU).

The ECSC was established for 50 years only and has, therefore, now ceased to exist, but it should be remembered that it was during that time that the basis of the present European law was developed: the case law of those first years (1951–1958) is very important indeed. Euratom today plays a rather minor role (only some aspects are discussed in this book) and until the end of 2008 the emphasis lay mostly with the EC, while the EU acquired, over the years, more and more importance within the European structure and is now the major player on the world scene.

Although the three Treaties continue to exist,² politically speaking the accent now lies with the Treaty on European Union, which gives its name to the whole European endeavour. As indicated above, the term “Community” disappears from the European vocabulary and although the EU and TFEU Treaties have the same legal value,³ the EC Treaty was made into an instrument for accomplishing the tasks set out in the EU Treaty⁴ and is now referred to as the Treaty

¹ All the legal texts that have been adopted (acquired) by the European institution over the past 58 years and are still applicable.

² Contrary to the “Constitutional” draft treaty, which would have merged the three Treaties into one.

³ art.1, 3 EU.

⁴ It even lost its legal personality in favour of the European Union!

on the Functioning of the European Union (TFEU). Nonetheless, it still constitutes the basis for practically all the Union's activities.

- The EU Treaty lays down the objectives of the Union, the values and principles on which it is based (conferral of powers, subsidiarity, proportionality, democracy, etc.), the institutional structure and its main competences; it provides for enhanced co-operation, external action and common foreign and security policy, the creation of a permanent Council chairman and of a High Representative of the Union for Foreign Affairs and Security Policy, and a defence policy. The fact that the EU Treaty now contains all those basic provisions concerning the Union as a whole, makes it necessary to include the provisions of that Treaty in this book; the previous editions were more or less limited to the EC Treaty (now TFEU).
- As for the TFEU, it constitutes, as mentioned, the legal basis for practically all the Union's activities. It defines the Union's competences, which are either exclusive, shared with the Member States or the object of co-ordination, it establishes the "citizenship" of the Union, the internal market and, as mentioned, all the activities of the Union. It also contains the details of the institutional set up, the voting procedures, the maximum number of members, etc. All those subjects are discussed in the following chapters of this book.
- Another important technical change is the, already mentioned, new numbering of the provisions of the Treaties: in the EU Treaty not all numbers were modified, but in the TFEU the numbering of every single article has changed. The newcomer should be aware of the fact that this is the fourth time that article numbers have been modified, with most disturbing consequences for the study of, for instance, the case law of the European courts. A simple example will make this clear: the provisions concerning competition rules applying to undertakings were, in the ECSC Treaty (for cartels) art.65 and (for abuse of a dominant position) art.66; in the EEC Treaty they were respectively arts 85 and 86; in the EC Treaty they became arts 81 and 82; and, now, in the TFEU they are arts 100 and 101! In order to give some help to the reader, the numbers of the EC Treaty are, in this edition, indicated in brackets after each present article number and in the quoted texts, including the case law, they have simply been replaced by the new numbers, but in brackets.

Those changes mean that when consulting the European courts case law, for instance, attention must be paid to the year in which the case was initiated, although the courts have indicated in their judgments, but necessarily only since the first modification, the previous numbering. Supposedly the courts shall now in some cases have to mention the last two changes!

So, maybe, when writing that the "newcomer to European law is to be envied" because he is introduced right away to the new terminology and numbering—which certainly is an enormous advantage—special attention is required by them when studying older acts, whether emanating from the Council, the Commission, Parliament or the courts. Indeed, although the content of the Treaties' provisions remained, for the most part, unchanged, the references in those acts to Treaty articles will not correspond to the ones having that number in the new TFEU. Many European acts, although more than 55 years old, are still applicable today and are often the object of courts' interpretation; studying them without the above warning in mind could be most confusing.⁵

⁵ *The Official Journal* [2007] C306 contains tables of correspondence between the new and the old numbers.

- Some texts that were in one Treaty are now to be found in another: this is the case, for instance with "Judicial Co-operation in Criminal Matters", which used to be in the EU Treaty and is now in the TFEU. On the other hand, some provisions that were in the EC Treaty are now in the EU Treaty.
- The names of the Union acts have changed in so far that some names have disappeared and only the traditional Regulation, Directive and Decision are now used.
- The three so-called pillars (the European Treaties, Justice and Home Affairs and Foreign Affairs and Security) on which the Union was based⁶, were merged and incorporated into one of the two Treaties: EU or TFEU; undoubtedly this constitutes an important simplification.

Changes Introduced by the Treaty of Lisbon in the European Material Law

- Generally speaking, the material law (in other words the provisions concerning the activities of the Union, such as the internal market, competition, agriculture, environment, social policy, regional policy, consumer protection, etc.) is practically unchanged, except for the introduction of extended provisions on the "external action" of the Union.

Having learned, probably, from the traumatic consequences of the rejection of the "Constitution", the Treaty of Lisbon provides for a simplified Treaty revision procedure.

Changes Introduced by the Treaty of Lisbon in the European Institutional Law

- This is where most modifications were introduced, which is not surprising since the main purpose of modifying (once again) the Treaties was to make the Union institutions capable of functioning with 27 Member States, the existing institutional set-up was devised for six members!

Besides the, probably by now well known, creation of a Presidency (chairmanship) of the European Council (now one of the seven institutions and not to be confused with "the Council" [of Ministers]) for a duration of 2½ years, renewable once, and of a High Representative of the Union for Foreign Affairs and Security Policy, more fundamental changes were introduced.

They concern, in the first place, a new rule of double majority for decision-taking in the Council, to be introduced step-by-step until November 1, 2014; from that date on, all decisions will be taken by qualified majority based on the number of votes assigned to each Member State when accepted by 55 per cent of the members of the Council, and representing Member States comprising at least 65 per cent of the population of the Union. A blocking minority has to include at least four Member States.⁷ This will facilitate the creation of majorities and, therefore, decision-taking.

⁶ See the 1992 Maastricht or European Union Treaty.

⁷ However, in order to win over Poland, the so-called informal "Ioannina compromise" was maintained in the following manner: if one-third of the Member States or 25 per cent of the population are opposed to a decision without attaining the "blocking minority", all the Member States commit to seeking a solution to rally opponents, while reserving the option to vote at any time.

Secondly, practically all decisions are now taken by the European Parliament and the Council acting together; this so-called codecision procedure, now referred to as the "ordinary legislative procedure" was extended to many new areas.

Thirdly, the role of citizens and of national parliaments, in the decision-making process, is increased.

Fourthly, the competences of the institutions are more strictly defined as "exclusive competences", "competences shared with the Member States" and "actions to support, coordinate or supplement the actions of the Member States".

The modifications introduced by the Treaty of Lisbon are examined hereunder, in some detail, in the corresponding chapters.

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