Concentrate Questions and Answers EU Law: Law Q&A Revision and Study Guide (3rd edn)

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2. The Origins, Institutions, and Development of the Union and the Legislative Processes

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Abstract

The Concentrate Questions and Answers series offer the best preparation for tackling exam questions. Each book includes typical questions, bullet-pointed answer plans and suggested answers, author commentary and illustrative diagrams and flowcharts. This chapter presents sample exam questions along with examiner's tips, answer plans, and suggested answers about the origins, institutions, and development of the European Union and its legislative processes. Key debates noted are the questions raised by the changes brought about by the Lisbon Treaty, and concerns raised by Member States about the EU assuming too many competences. Sample exam questions cover topics such as the concept of European integration and the motivations behind it, reform of the EU, the powers of the Court of Justice of the European Union and its impact, and analysis of the 2007 Lisbon Treaty and the abandoned Constitutional Treaty which it effectively replaced.

Keywords: European Union, EU law, legislative processes, institutions, development

Are You Ready?

In order to attempt questions in this chapter, you must have covered all of these topics in both your work over the year and in revision:

- The history and development of the Communities and how it has developed into the Union; direct questions on this would be rare but not ruled out.

● The principal institutions of the Council, the European Commission, and the European Parliament, and in particular the inter-relationship of these institutions in the legislative and other processes of the Union.

● The role and legality of the delegated legislation procedures under **Arts 290 and 291 TFEU**, the legislative procedures contained in **Arts 288 and 289 TFEU**, or the budget procedures in **Arts 310–19 TFEU** may be questioned in further detail or questions may focus on the powers and rights of the European Parliament (EP), the Council, or the Commission separately.

Key Debates

Debate: Lisbon changes

Following the considerable institutional reform brought about by the **Lisbon Treaty**, many questions have been raised focusing on the changes brought about by the Lisbon Treaty and whether they represent further progress on the path to integration or a brake on that progress.

Debate: The division and change to EU competences

Concerns raised by the Member States about the EU assuming too many competences has also been a hot topic, as have the challenges made by Member States to halt the so-called 'competence creep'.

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Question 1

'European integration is initially a wholly political concept whose implementation proceeds by the formulation of economic policies and decisions.'

Comment on this statement by the European Commission from the 1960s.

Caution!

■ Try to achieve a balance of coverage of the various elements in your answer and do not over-concentrate on one particular aspect such as the historical beginnings or present-day changes.

■ Do not be sidetracked by the fact this is a quote from the 1960s; it is as relevant today as it was then but does need to be addressed both historically and currently.

Diagram Answer Plan

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Suggested Answer

Reasons for establishing the Communities[1]

[1] This title and first part of the answer addresses the questions of why the Communities, and now Union, were set up and how they were designed to achieve their aims.

The term 'European integration' is taken to refer to the European Communities which were set up in the 1950s. We can ask, then, what were the reasons for setting up these Communities by treaties between nation states?[2] The Communities were a political response to the Second World War and the massive destruction that had taken place in Europe as a consequence. They represented both an attempt to ensure that such a war could not occur in Europe again and to provide a better and hopefully more stable means by which the reconstruction of Europe could take place. They aimed to remove the rivalries between nation states by legally binding them together in economic communities. So, the reason for setting up the Communities was the result of entirely political motives to eliminate war and provide a new basis for economic reconstruction of Europe. Thus, the primary motivations were political but economic tools were employed to achieve that integration.

[2] Commence with a review of reasons, which must be addressed in contrast to suggesting that the reasons were based purely or merely on economic grounds, although it is difficult to distinguish the two terms completely.

How was integration to be achieved?

What was the political concept of European integration? At the time the Communities were being contemplated and even after the establishment of the Treaties, different views were adopted on the form and extent of integration.[3] These ranged from the view that a European Federal State was envisaged to the view that the Member States were only participating in the erection of a common market concerned only with economic cooperation. It was, however, originally widely considered that because there was success in certain policies this would automatically lead to a spillover from one area to another to lead to increasing integration and that the whole process of integration was a dynamic and not a static process. This process is termed functional integration. In fact, it was considered that in order for the original policies to work properly there must be continuing integration. Thus, sector-by-sector integration and the process of European integration were regarded as inexorable. For example, common tariffs and the establishment of the Common Market would lead to exchange rates being stabilised to ensure that production factors and costs in the Member States were broadly equal. This in turn requires monetary union to be established to ensure exchange rates do not drift apart, and this requires full economic union to be achieved so that the value of different components of the common currency is not changed by different policies in different countries. This economic integration would also mean that the political integration would eventually follow. Whilst the above is a rather simplistic account of the theories of ↵ integration, it also helps understand the suggestion that any decision on the part of the Community, and now Union, to go no further in terms of integration would in fact not maintain a stable position but would ultimately be regressive as it would start to undermine or undo the previous successes and integration achieved.

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[3] Consider the process by which the implementation of the political concept was to be achieved, including considerations of the theories of European integration of federalism and functional integration.

Federalism or some form of federal state may therefore be the argued goal of the Communities, and now Union, if the aims are not limited to the distinct policies thus far agreed. In order to make the goal of the Communities and Union more acceptable the term 'a closer union' has been used in both the old **EC and EU Treaties**. The **post-Lisbon TEU** expresses this again as the Member States being 'Resolved to continue the process of creating an ever closer union'. Its exact meaning is unclear as to whether it refers to federalism or something short of that. The UK's view on this during the negotiations for the **Treaty of European Union** was that it falls somewhat short and whilst the EU does operate on the supra-national level, at that time the UK maintained that it does not signify an inevitable move to federalism, a view now expressed by countries such as Denmark, Poland, and the Czech Republic.

The economic activities of the EU[4]

[4] Look at how the implementation was to be achieved by considering the overall objectives of the original **EEC Treaty** and the way in which further laws and decisions could be reached to assist integration.

The way in which these fundamental political objectives were to be converted into economic and social ones was initially by the agreement to establish a treaty providing the legal basis for economic and further integration. The aims and objectives of the Community were clearly set out in the **EC Treaty**. The **Preamble** and **Arts 2 and 3 EC** (now **Arts 2** and **3 TEU**) set out in general terms the type and range of policies the Community was to pursue to achieve the general objective of European integration.

Article 2 EC, for example, set the general goals as the establishment of a common market and an economic and monetary union. This was to be achieved by the implementation of the common policies or activities referred to in **Arts 3 and 4 EC**. **Article 3 EC** notably included policies on customs duties, a common commercial policy, free movement of goods, persons, services, and capital, agriculture and fisheries, transport, and competition. Newer developments include[5] activities and policies in the social sphere, economic and social cohesion, the environment, research and technological development, trans-European networks, health protection, education and training, culture, development cooperation, overseas policies, consumer protection and energy, civil protection, and tourism.

[5] Since the quotation arises from the 1960s you will be aware it predates the various treaty revisions but don't limit your answer to an intention as viewed in the 1950s and 1960s.

Those objectives and policies were expanded upon in specific parts of the Treaty, for example, free movement of workers in now **45 TFEU** and competition law in **now 101–02 TFEU**. The Treaty Articles were not to be the only source of legal provisions formulating the economic policies and decisions. The Community institutions, ↵ notably the Council, Commission, and, at first to a very limited extent, the European Parliament, were also empowered by the Member States with their own law-making powers to establish further laws to achieve European integration and the objectives of the Treaties. These powers are summarised in **now 293–94 TFEU**. Furthermore, a European Court of Justice (CJEU) was established for the Community to adjudicate on Community law and provide rulings binding on the Member States. These further help to implement the concept of European integration.

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Concluding remarks[6]

[6] You could consider the further question of whether the arguable eventual goal of the Communities, and now Union, of political union to be achieved by progressive economic integration will ever be reached.

Thus, whilst it would be true to agree that the original concept was a political one, which has and is being implemented by economic policies, the debate continues and it is clear from the intense discussions surrounding the **Single European Act** (**SEA**), the **Treaty on European Union**, and the further changes in the 1990s to date that the eventual goal of the Union is far from clearly or definitively determined. European integration is still dependent on further political impulses. Implementation of European integration can only proceed by further political policy and not just by economic decisions. Indeed, it can be observed from the very modest scope of social policy in the original **EEC Treaty, Art 119 (now 157 TFEU)** that considerable advances or inroads have been made into other non-purely political or economic areas of the Member States' economies. The underlying political nature of the EU was clearly seen during the negotiations at the Nice 2000 IGC and in gaining the ratification of all twenty-eight Member States for the **Lisbon Treaty**, where only after very hard political bargaining was sufficient agreement reached to provide for continued European expansion and integration. The political impetus for new policies to assist integration and indeed the wide-ranging political debate as to the future of the EU continues. These events show quite clearly that European integration is indeed a wholly political concept because without the political agreement, there will be no further economic integration. It remains to be seen how Brexit will impact on the integration process.[7]

[7] Due to the continuing uncertainty about the final result of the Brexit process, whatever you might say here must be short, along the lines of stating that there is a debate about whether Brexit will be a catalyst for disintegration or encourage the remaining twenty-seven Member States to pull together in greater integration.

Looking for Extra Marks?

■ You could point to the various and numerous changes brought about by the institutional reform of the Lisbon Treaty as an example of political change.

■ Just to give one example here: the formalising of the European Council with a European President as a main institution as political head which gives further impetus to economic integration.

■ A brief mention of Brexit and its possible consequences could be included, as outlined under point 7 above.

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Question 2

'As far as its legislative procedures are concerned, the EU is neither efficient nor democratic.'

a Discuss this statement in the light of the powers and the decision-making procedures of the Council, Commission, and European Parliament.

b What reforms would you advocate which would overcome these criticisms?

Caution!

■ This question is quite complex because it is in three parts. The first sentence can be broken down to determine what issues must be considered.

■ This final section is probably the hardest to prepare for in that it really requires you to have read particular advocated reforms during your course on top of those already put into effect following the entry into force of the **2007 Lisbon Treaty.**

■ Although good original suggestions will pick up a few extra marks it is not the major part of the answer. If you have not considered possible reforms, it is not worth spending an excessive amount of time trying to think up reforms; it would probably be better to find another question to answer.

Diagram Answer Plan

Suggested Answer

Introduction to the legislative procedures[1]

[1] The legislative procedures must be described as concisely as possible because specific features of these procedures should be considered further in the answer.

At present all the legislative procedures commence with a proposal from the Commission although following the entry into force of the **Lisbon Treaty**, suggestions and recommendations for legislative acts ↲ may also come from the EP, the European Council, the Member States, the ECB, the CJEU, the EIB, and EU citizens. Following the **Lisbon Treaty** there are now effectively just three procedures: the ordinary legislative procedure, the special legislative procedure, and the consent procedure. In addition, the Commission and the Council have limited delegated or go-it-alone powers.

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Under the EP's initial advisory role[2] a limited number of **EEC Treaty Articles** (17) provided that the Council was required to consult the EP as to its opinion before coming to a decision on Community secondary law; see e.g. **old Arts 54 or 56 EC**. The ***Isoglucose (Roquette Frères) cases* (Cases 138–9/79)** confirmed that the EP had to be consulted. However, on receipt of that opinion the Council could proceed to ignore it and override any view given by the EP. In two cases, ***EP v Council (C-65/91)*** and ***Parliament v Council (C-392/95)***, the Court annulled two Regulations which had been substantially amended by the Council without a further consultation of Parliament taking place when the Council had amended its draft legislation. This still exists within the special legislative procedure but only in limited instances as will be considered.

[2] Set out the original position.

The ordinary legislative procedure[3]

[3] Outline the ordinary legislative procedure and changes made to it by Treaty amendment.

Article 289 TFEU has been amended over the years to provide that the EP act more extensively with the Council and Commission in the legislative process, notably by the introduction of the co-decision procedure and its renaming as the ordinary legislative procedure, detailed in **Art 294 TFEU**. It provides for the enhanced participation of the EP to the extent that ultimately, the EP can reject a legislative proposal at a second reading. The EP cannot impose its own will on the content of a legislative proposal, and equally the Council cannot force unwanted legislation on the EP. Note that in the procedure, the Council votes mainly by QMV but at times, according to some Treaty Articles and parts of the procedure itself, it must vote unanimously. The following description takes into account the amendments made to the procedure by the **Treaties of Amsterdam and Lisbon**.

The ordinary legislative procedure provides a process by which both the Council and EP may consider and approve a legislative proposal or amend it, in which case, the other institution must further consider the proposal. Ultimately, the institutions must either agree on the proposal or either the Council or the EP or both reject it.

Special legislative procedures[4]

[4] Then, briefly set out the two remaining procedures, the special legislative procedure followed by the consent procedure.

This second category is really a bundle of procedures that may be referred to in the Treaties variously as 'the' or 'a' special legislative procedure, and essentially groups together a number of procedures that differ in one or more elements from the ordinary legislative procedure. Instead of QMV, the Council may vote by unanimity or the EP may just be consulted or asked for its consent rather than co-deciding. Other ↵ bodies, such as the EESC, CoR, or ECB, may also be included in the process. It incorporates the original consultation procedure. Under this procedure, the Commission proposes legislation that it deems necessary to fulfil a Union aim; the EP is then consulted and it offers its opinion; and the Council decides on the matter, sometimes by QMV, but usually unanimously. However, on receipt of the opinion of the EP, the Council could proceed to ignore it and override any view given by the EP.

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The consent procedure

The consent (previously referred to as 'assent') procedure was introduced by the **SEA** and extended under the **TEU** and **Lisbon Treaty**, so that the EP's consent is required by the Council in respect of membership and withdrawal applications to the EU, the Union's membership of international agreements and organisations, and association agreements with third countries (**Arts 49 and 50 TEU**, and **218 and 217 TFEU**): in total, in fifteen instances. In the event of disagreement, the EP has effectively a right of veto, but there are no formal mechanisms built in by which a dialogue between the two institutions can be initiated in the event of a disagreement on any aspect or an entire Agreement. In reality, though, any such dispute would have been subject to debate and discussion behind the scenes. Consent may also be employed to confirm serious and persistent breaches by a Member State (**Art 7 TEU**) and in establishing a procedure for the revision of the Treaties (**Art 48 TEU**). The procedure has not been made subject to time limits.

Evaluation of the procedures[5]

[5] Address the issues in the second sentence of the question that the EU is neither efficient nor democratic in respect of the powers and activities of the three political institutions.

The efficiency and democracy of these procedures must be considered in the light of powers of the institutions which support or contradict the view expressed in the question.

The powers of the Council are basically set out in **Arts 16 TEU** and **238 TFEU**. The Council disposes of EU legislation which must be initiated by the Commission. The power of the EP is set out in **Art 14 TEU** which provides that the EP shall exercise legislative functions which are detailed in **Arts 289 and 294 TFEU** and by giving consent (previously known as assent).

The Commission's powers are to initiate the legislative procedure by making proposals and to act under powers delegated to it by the Council. The Commission's right to act under delegated powers is extremely restricted by the revised management committee structure by which the Council retains overall much of its original powers.

A feature that that supports the first statement was the limited role played by the EP in the legislative procedure, although that has changed considerably over the years and the EP has now effectively an equal say with the Council. It might be argued that the main ordinary legislative procedure is quite convoluted and slow although the reality is that most EU legislation is now passed at an early stage of the procedure, ↵ thus relatively efficiently. Finally, the most fundamental feature is that even with the ordinary legislative procedure, the Council and EP's ultimate power is only that of a negative veto but again to temper that consensus and agreement is reached in the vast majority of cases.

Addressing the criticism concerning the lack of efficiency, the delays that were often and still are experienced in the legislative procedure can be cited, and also that there are still a number of different procedures according to the Treaty. The procedures became more complex and, as evidence, the stagnation of the legislative process in the 1970s and 1980s could be highlighted. Further evidence is that the Council could not cope with the amount of work necessary and has had to devise ways in which decision-making power could be delegated but control could nevertheless be retained by setting up a number of complex management committees. The Council by its nature acts in the interests of the Member States and not the Union, hence compromises must be reached, which has delayed some legislation by very many years. The **Lisbon Treaty reforms**, though, have reduced the number of procedures and appear to allow law-making to be more efficient. Reports show that the Council decides on legislation by finding an acceptable consensus rather than pushing each time for a vote, thus making law-making easier to achieve.

The question of democracy is easier to address and clearly points to the role of the EP as the only directly elected body and originally only having a lesser role in the legislative process, and the question of delegation to Committees controlled by the Council and not the EP. This whole argument is described as the democratic deficit in the EU, i.e. because the EP is the only directly democratically elected element, in order to maintain the democratic right or justification of EU laws, the legislative process must be more in the hands of elected bodies. If this democratic deficit is real then something needs to be done.

The Reforms[6]

[6] Review the reforms already put into effect under the **Maastricht, Amsterdam, Nice,** and **Lisbon Treaties** to determine whether these have answered the criticisms before suggestions for further reform are made.

The criticisms of the Maastricht Treaty and subsequent reforms are that the power of co-decision could be argued to give the EP a negative power of veto and that **Art 294 TFEU** is not comprehensive and still only applies to limited specific areas, although this has been expanded significantly by the Treaties, especially the **Lisbon Treaty**, to some forty more Treaty Articles. The ability under **Art 225 TFEU** to request the Commission to make legislative proposals in areas of EU policy is also unclear as to whether it can insist that a proposal is made. Whilst the amendments by the **Nice and Lisbon Treaties** were more limited in scope than hoped and planned for, particularly in view of the changes proposed originally for the Constitution for Europe, which originally would have provided for one single legislative procedure featuring the co-decision process, they have considerably improved matters. However, the cooperation procedure, which was used less and less, ↵ was scrapped in favour of the co-decision procedure, which became the 'ordinary' procedure under **Arts 289 and 294 TFEU**. This procedure was extended again into new areas, although certain areas such as tax and social security retained the use of unanimous voting, as have, indeed, over fifty other legal bases. Whether this addresses the concerns about democracy and efficiency will only be measurable after the passage of time. The **Lisbon Treaty** also introduced a role for the National Parliaments in the legislative process, which is now referred to in **Art 12 of the amended EU Treaty** and is contained in a **Protocol** on the role of National Parliaments. This requires that draft legislative acts of the Union are forwarded to National Parliaments for their opinion. Whilst this could be argued to increase democracy, it might be at the expense of efficiency, as another body (or collection of bodies) is introduced into the law-making process and, apart from the in-built extra time required, may simply slow or prevent the Council from reaching a consensus on a particular issue if hindered by unfavourable national Parliaments' opinions. In relation to this change the 2008 article by Barratt[7] on the involvement of national Parliaments is instructive.

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[7] Cited in the 'Taking Things Further' section at the end of the Chapter.

Any reforms have to try to increase democracy, which could be achieved by giving the EP a completely equal role to the Council's and/or increasing the participation of the national parliaments. The former would not be at the expense of efficiency, whereas the latter probably would.[8] However, any increase in the powers of the EP is to be at the expense of some other organisation, not the National Parliaments but the Councils of Ministers and/or the Commission. Imposing time limits on the legislative process might help efficiency but may undermine democracy if participants are not given adequate time to consider and comment on proposals.

[8] Reforms you suggest depend on your views as to whether the Union is inefficient or undemocratic, or whether previous reforms have improved the situation. State how they are to be achieved and the consequences for the other institutions.

Looking for Extra Marks?

■ Make a longer comparison with the past procedures to show that the principal procedure today, the ordinary legislative procedure, is in fact far more democratic and indeed efficient.

■ Some University courses will have considered statistics of law-making to show that a clear majority of laws are enacted at first reading by the Council and the EP, so providing these would be very profitable.

■ If you had time and space, a consideration of why the procedures changed would be very positive (facilitating further integration, taking account of more Member States, the democratic deficit).

Question 3

In the light of the roles of the Advocates General and the Court of Justice of the European Union and with reference to the jurisprudence of the Court, consider whether the Court of Justice possesses law-making powers in the EU legal order.

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Caution!

■ This appears to be a relatively straightforward question dealing with the CJEU and the Advocates General and their impact in the EU legal order, but you need to make sure you answer the actual question and not just provide a general answer.

■ The amount of detail you include for the first part of the answer will depend on the coverage in your course and whether, for example, you have considered in detail the Protocol on the Statute of the Court of Justice **or** the Rules of the Court of Justice. If not, then supply as much detail as you can.

Diagram Answer Plan

Suggested Answer

Introduction[1]

[1] The question can be broken into easier sections, starting with a general description of the Court, judges, and Advocates General. Brexit will, of course, reduce the number of judges but not necessarily the number of Advocates General.

The CJEU presently consists of twenty-seven judges and eleven Advocates General, nominated and appointed by unanimous agreement by the governments of the Member States. They must be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial office in their own countries (**Arts 251–53 TFEU**).

The position of the Advocates General[2] is established under **Art 252 TFEU**. The role of an AG is to assist the Court by giving an opinion, in complete independence and impartiality, on the issues of a case. In doing so the AG will examine the legal issues in depth and critically review the jurisprudence of the Court on the subject. The reasoned submissions of the Advocates General are to be made in open court. It is a general ↵ requirement that the opinion of the AG be heard before judgment is given unless the case raises no new point of law (**Art 20 of the Statute of the Court of Justice**). The AG

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can therefore take the public view of things and consider the submissions of all the parties but cannot be bound to present or represent any particular view. Additionally, the opinion of the AG is not binding on the Court but it acts like a sort of persuasive precedent. Alternatively, it can be considered that the opinion of the AG acts like a first instance decision subject to an automatic and instant appeal. The AG plays no part in the actual decision of the Court and once the AG has delivered an opinion it brings to an end his or her role in the case.

[2] You need to outline the position and function of the Advocate General (AG) and how that may play in answering the question.

Whilst not having the direct formal impact on EU law that the Court has, the Advocates General have nevertheless also helped in the development of EU law. This arises indirectly from their detailed research for cases often involving comparative research of the laws of Member States. At times this has led to a distinct influence by the introduction of national legal principles into the EU legal order, e.g. in the case of ***Transocean Marine Paint Association v Commission* (17/74)**, the principle of *audi* et *alterem partem* (the right of the other party to be heard) was introduced by the AG and adopted later by the Court. An opinion of an AG may be referred to in later cases as a sort of persuasive precedent, as in the case of ***Prodifarma v Commission (T-3/90)*** when the AG's opinion in a previous case was taken up by the Court of First Instance (CFI) (now called the General Court following the **Lisbon Treaty**).

The duties of the Court of Justice[3]

[3] Then you must turn to the role and powers of the CJEU. The place to start for both of these is with the Treaty.

Article 19 TEU outlines the general function of the CJEU. It states: 'It (the Court of Justice) shall ensure that in the interpretation and application of the Treaties the law is observed.' Originally it had exclusive jurisdiction over EU law but was joined by the Court of First Instance and judicial panels (now the General and Specialised Courts under **Arts 256–57 TFEU**). The Court has been divided into chambers to help expedite the business of the Court. The jurisdiction and tasks of the Court are laid down in **Arts 258–81 TFEU**.

As a result of the fact that the European Treaties and some of the secondary legislation are framework measures, they often require considerable amplification and interpretation. This, coupled with the style of interpretation which has been adopted by the Court to give effect to the aims of the Treaties, has given a wide scope to the CJEU to engage in judicial activism.[4]

[4] Decide whether the role played by the CJEU in the decisions it reaches constitute a law-making power and, thus, whether it adds to the body of EU law, or whether it merely interprets and applies existing EU law.

A primary form of interpretation is described as teleological in that the Court tries to determine in the light of the aims and objective of the Treaties and legislation what was intended and what result would assist those goals. These methods are applied in addition to the usual array of methods of interpretation found in the Member States' legal systems. The Court often refers to the spirit of the Treaty and Community (now Union) to come to a particular conclusion. ↵ See in particular the leading case[5] of ***Van Gend en Loos* (26/62)** at para 71 and the case of ***CILFIT Srl v Ministro della Sanita* (283/81)**, concerned with the necessity of national courts to refer a question under **Art 234 EC (now 267 TFEU)**. This form of interpretation allows the Court to be more adventurous in its decision-making than could be assumed from a literal reading of the legal provisions. For example, in certain circumstances it has been held that persons who are unemployed or studying can be classified as workers under EU law; see the case of ***Lair v Universität Hannover* (39/86)**.

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[5] The reference to the jurisprudence of the CJEU is simply asking you to refer to the case law of the CJEU where necessary to support your arguments and answer.

Precedent in the EU legal order?

Past decisions are often cited in Court, however, they are only persuasive rather than having any formal authority. For example, the ***Da Costa* case (28/62)** can also be observed to give rise to a form of precedent in that the CJEU stated that it was possible for national courts to refer to previous judgments of the CJEU in identical cases to achieve a solution without the need for reference to the CJEU. However, it must be stated that there is no formal system of precedent but the Court, as do courts in civil law jurisdictions, tries to maintain consistency in its judgments. An example of a reversal of the Court's decisions is in the case of ***EP v Council*** in the ***Comitology* case (302/87)**, in which the EC was denied the right to take action under **Art 230 EC** (now **263 TFEU**), but it was later allowed in the case of ***EP v Council* (C-70/88),** concerned with a Euratom decision Treaty base by Council to protect Parliament's prerogatives.

One aspect which may hinder a law-making role is the requirement to give a single judgment of the Court. This is because a single judgment is at times difficult to interpret later, because it does not reveal whether the decision was reached on a unanimous or majority verdict. Hence it can be confusing and terse and thus difficult to apply in future cases as 'established' law.

The establishment of EU principles of law[6]

[6] This demonstrates just how judicially inventive the Court has been in establishing leading principles of EU law.

It can be observed that the Court has played a crucial role in the establishment and development of the EU legal order by the establishment and development of leading principles of EU law. Notable judgments are those concerned with what are now fundamental decisions of the Court including direct effects (***Van Gend en Loos* case (26/62)**) and supremacy (***Costa v ENEL* case (6/64)**) and case rulings in actions concerning the rights of the EU institutions, notably the EP. In the case of ***Les Verts v EP* (294/83)**, an action against the EP under **Art 230 EC (**now **263 TFEU)** was admitted despite the lack of any mention in the Article that the EP could be a defendant and in ***EP v Council* (C-295/90)**, concerned with the Treaty base, the extension of the rights of the EP to take action under **Art 230 EC** (now **263 TFEU**) was confirmed despite not being given the right under the provision of the Article itself.

p. 20 ↵ A number of cases could then be cited to provide evidence that the CJEU enjoys some form of law-making role but it would be best to rely on leading cases in which the CJEU has established the fundamental principles of EU law of direct effects and supremacy of EU law: ***Van Gend en Loos* (26/62)** and ***Costa v ENEL* (6/64)**. Quotations from these cases could be employed to great effect.

In ***Van Gend en Loos*** the CJEU held:

> the Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit in limited fields, and the subjects of which comprise not only Member States but also their nationals.

From ***Da Costa*** it was held:

> By contrast with ordinary international treaties the **EEC Treaty** has created its own legal system which became an integral part of the legal systems of the Member States and which their courts are bound to apply. By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and more particularly real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the Community the Member States have limited their sovereign rights and have created a body of law to bind their nationals and themselves.

Also:

> It follows ... that the law stemming from the treaty, an independent source of law, could not because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.

These cases demonstrate more than the simple interpretation and application of law as there is nothing in the Treaty to expressly establish these two fundamental principles of EU law. Furthermore, the introduction of new principles to the EU legal order also establishes new principles and rules of EU law. The question that remains is whether this is law-making.[7] During the Intergovernmental Conference (IGC) of 1996–97, some Member States had expressed their dissatisfaction with the high degree of judicial activism exercised by the CJEU in cases such as ***Barber* (C-262/88)**, which defined pension payments, in certain circumstances, as pay. No changes resulted from this but it may be regarded as evidence that the Member States consider the CJEU to be doing more than just interpreting law.

[7] Reaching a conclusion depends on how 'law-making' is defined. It is at least arguable that it would not be incorrect to describe it as having law-making powers.

Looking for Extra Marks?

- Take a more detailed look at the reasoning behind such cases as ***Van Gend en Loos*** and ***Von Colson***.
- A lot more case law could be used as examples of how the court has been judicially active to the point of describing it as law-making. Such case law would include: ***Defrenne, Marshall, Mangold,*** amongst others.

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Question 4

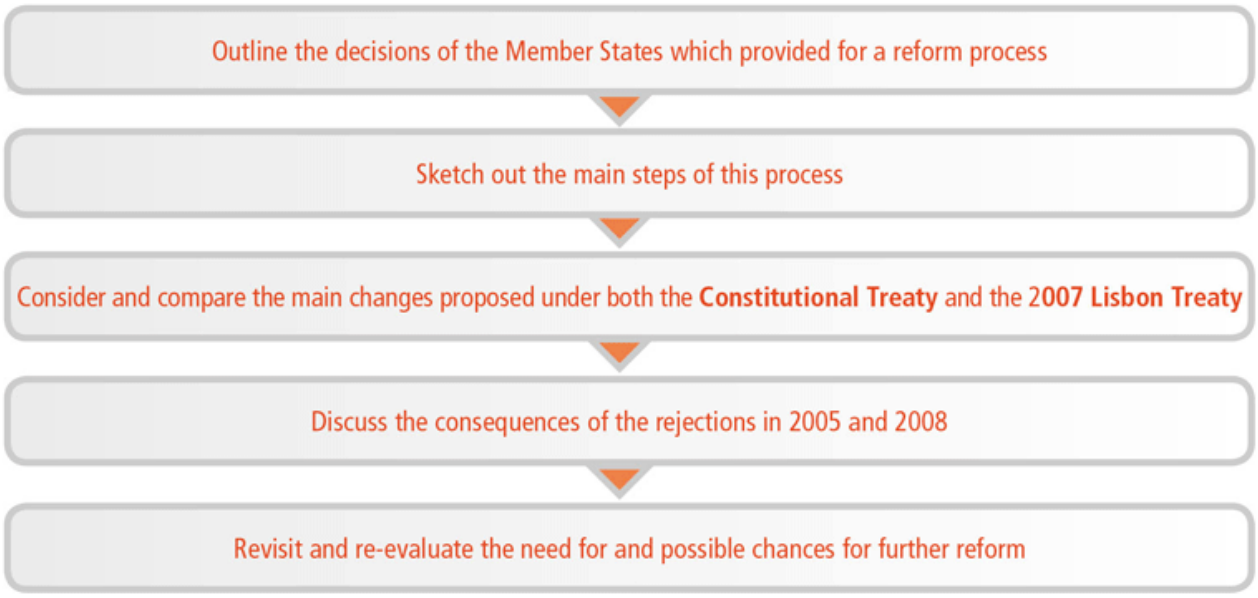
The **2007 Lisbon Treaty**, having eventually being ratified by all of the Member States, was a much poorer substitute for the **2004 Constitutional Treaty** whilst essentially making the same institutional and other changes to the EU.

Discuss.

Caution!

- Avoid a simple description of events.
- Equally avoid a purely descriptive answer on what the **Lisbon Treaty** and/or **Constitutional Treaties** contained.

Diagram Answer Plan



Suggested Answer

The background to reform[1]

[1] This question is one which is designed to highlight not only the changes which were proposed but also the difficulties the Member States have experienced in trying to reform the EU.

In preparation for the planned future expansion of the EU, in 1999,[2] the then fifteen Member States convened an intergovernmental conference to discuss institutional change which concluded with the signing and eventual ratification of the **Nice Treaty**. The Nice Council Summit saw the agreement of the Member States as to how to move on to the next stage of Treaty amendment and further integration. It was further agreed to do this in a different way to make Treaty reform more inclusive and transparent. The Nice Council Summit provided a 'Declaration on the Future of the Union' which was to address a number of issues for ↵ the next IGC, planned for 2003. The details were finalised at a later summit of the Member States in Laeken in December 2001, which saw the start of an ultimately unsuccessful attempt to put the EU on a new constitutional footing. The Laeken Summit formally set up and prepared the agenda for a 'Convention on the Future of Europe' which was headed by a Praesidium of twelve members, led by Valéry Giscard d'Estaing, a former French President. It further consisted of representatives of the heads of state and government of the fifteen Member States and the thirteen candidate countries, thirty representatives of the National Parliaments and twenty-six from the candidate countries, sixteen members of the EP and two members from the Commission. It laid out in a declaration the goals for making the EU more democratic, transparent, and efficient. In particular, attention would be paid to the governance of the Union, institutional preparations for the forthcoming expansion, the division of competences, and democratic participation in decision-making processes of the Union. The Convention worked until June 2003, when it wrote up its report, and a draft **Constitutional Treaty (CT)** was finalised and presented to the European Council in Greece on 18 July 2003. This was subsequently considered by the IGC which commenced in October 2003 and the draft **CT** was presented to the Heads of State and Government Summit in Rome in December 2003.

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[2] Consider why significant changes were proposed in both the **CT** and the **2007 Lisbon Treaty**. Go back to the previous decisions of the Member States which launched the Union on the reform path.

What the CT contained[3]

[3] Make a comparison of what the **2004 Constitutional Treaty (CT)** and its substitute, the **2007 Lisbon Treaty**, contain. You must outline why these Treaties were considered desirable or necessary in the first place.

After some very hard bargaining on voting numbers in Council and the number of Commissioners in 2003–04, the **CT** was put to the Member States and was signed in October 2004 by all the Member States in Rome and handed over to each of the Member States to ratify it by parliamentary approval or referendum or both according to the constitutional or legal requirements of each state. However, in

referenda, the **CT** was rejected by the electorates of France and the Netherlands in 2005. After an agreed period of reflection during which some states continued the ratification process, taking the total to eighteen, in June 2007 a further summit was held to see if the **CT** could be rescued or replaced. The German Presidency had the task of either making the **CT** more palatable or coming up with something in its place which nevertheless addressed the institutional challenges of enlargement. However, after another late night of Summit discussions, it was agreed to abandon the **CT** entirely and replace it. Even though the **CT** was abandoned, it is worthwhile listing the agreements[4] reached in that Treaty because most of these matters ended up in the **Lisbon Treaty** although in slightly altered or different form:

1. the transfer of a number of Article bases from unanimity to qualified majority
2. making the **Charter of Fundamental Rights** a legally binding part of the **Treaty**
3. providing the EU with the status of a legal person

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4. establishment of the European Council as a main institution and the appointment of a President for the European Council (with a two-and-a-half-year term of office)
5. a smaller Commission comprising two-thirds of the number of Member States
6. creation of a common EU foreign minister to lead a joint foreign ministry with ambassadors
7. an express statement that Union law shall have primacy over national law
8. procedures for adopting and reviewing the Constitution, some without the need for another IGC
9. an exit clause for Member States.[5]

[4] Lists may not be preferred by your law school but sometimes they are easier to use where there is quite a long list of points to be made.

[5] You could mention that the exit clause in Article 50 TEU has now been triggered for the first time by the UK after the 2016 Brexit referendum.

The Lisbon Treaty

The **2007 Lisbon Treaty**, which did not replace the existing Treaties but amended them, has retained the following features of the **CT**. The Union did get its legal personality; the proposed Union Minister for Foreign Affairs is instead called the High Representative of the Union for Foreign Affairs and Security Policy (the High

Representative). The European Council with President was established as envisaged by the **CT**. The Commission size was also to be reduced as planned, but this was revised again as a part of the deal to get Ireland to hold a second referendum on the **Lisbon Treaty**. The names and types of secondary law —'Regulations', 'Directives', and 'Decisions'—will be kept.

The **Charter on Fundamental Rights**[6] will become legally binding but only through a Declaration attached to the Treaties and with an opt-out for the UK and Poland and later the Czech Republic. Primacy of Union law was removed as an express statement in the Treaty and instead placed in a declaration which merely affirmed the settled case law establishing primacy. The transfer of a number of Articles to QMV and the co-decision procedure proceeded largely as planned.

[6] Noting the changing status of the EU **Charter on Fundamental Rights** is particularly important.

The aspects of the **CT** which were not retained in the **Lisbon Treaty** were those more of a symbolic nature which were perceived by the Member States to be a large part of the reason for the rejection by the French and Dutch electorates, although studies have failed to establish this with any authority. The items completely abandoned were the references to a European flag, an anthem, and a motto, and reference to a Europe day celebration, which were argued to suggest too strongly of statehood. Note, though, that sixteen Member States agreed Declaration 52 attached to the treaties that the flag, anthem, motto, euro, and Europe Day would continue as symbols to express the community of the people in the EU and their allegiance to it.

The **Lisbon Treaty** was supposed, by stripping away the offensive parts of the **CT** and retaining most of the institutional changes, to make ↵ the changes more palatable to the Member States and their electorates. However, as the question suggests, the end result is less than satisfying despite making most of the changes considered necessary to allow the Union to operate effectively in the future. This is because of the way the changes were made. Rather than containing them in a single document, as with the **CT**, the **Lisbon Treaty** does this by complicated and extensive amendments to the **EC and EU Treaties**. The **TEU** was turned more into an overview Treaty, with the **EC Treaty** being converted into a treaty dealing with substantive issues, called the **Treaty on the Functioning of the European Union**, and the term 'Community' has been replaced throughout by 'Union'. Both Treaties, however, concern the institutions and a number of Articles in both Treaties are concerned with the same subject matter. In addition, rather than tidying up and reducing the protocols and declarations attached to the Treaties, more have been added. Useful articles on the changes are Craig, P, 'The Lisbon Treaty: Process, Architecture and Substance' (2008) and Dougan, M, 'The Treaty of Lisbon 2007: Winning Minds, Not Hearts' (2008).[7]

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[7] Cited in 'Taking Things Further' at the end of the Chapter.

At this stage[8] it is clear that the **Union Treaty** architecture remains complicated but, having been ratified by all Member States, it is progress. As the question suggests, it is arguable that this could have been done better, perhaps in a single document, and still have removed those elements considered offensive and which did not contain the word 'Constitutional' or similar, by just calling it, for example, the 'Consolidated EU and EC Treaty'.

[8] State a view at this stage of whether you think **Lisbon** represents progress.

It is to be noted that not only was the **CT** rejected by the electorates in two Member States, but its supposed much more palatable replacement, the **Lisbon Treaty**, was rejected by the Irish electorate in June 2008.[9] Indeed, all but one state considered that the changes were insignificant enough not to have to subject the Treaty to a referendum at that time. It was generally assumed it would be ratified with less difficulty than the **CT**. Following a period of consideration and negotiation after the Irish rejection, in exchange for the agreement by Ireland to hold a second Referendum, EU leaders agreed to provide legal guarantees respecting Ireland's taxation policies, its military neutrality, and ethical issues. More controversially, they also agreed that each state should maintain one Commissioner each, contrary to the Treaty itself. Constitutional challenges in other states such as Germany, the Czech Republic, and Poland were resolved and the deliberate delay by the Czech President in completing the Constitutional ratification process was withdrawn. The Treaty was finally ratified by all twenty-seven states in November 2009 and entered into force on 1 December 2009.

[9] You need to address the fact that both attempts to reform the EU have been undermined by rejection in one or more states at some stage.

In conclusion, I would suggest that with only, for the most part, the symbolic aspects having been removed and because most substantive changes remained, the **Lisbon Treaty** is a poorer substitute, especially because of the way that the changes have been made.

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Looking for Extra Marks?

■ Try to sum up the latest position on the consequences of these developments for the future of the reform of the EU.

■ You could link the changes to the competences division to a discussion about the control on future integration by the Member States.

Taking Things Further

■ Barratt, G, 'The King is Dead, Long Live the King: The Recasting by the Treaty of Lisbon of the Provisions of the Constitutional Treaty concerning National Parliaments' (2008) 33 EL Rev 66.

This article is good in looking at the changes brought about by the Lisbon Treaty in the involvement of national parliaments in the scrutiny and enactment of EU secondary law.

■ Craig, P, 'The Lisbon Treaty: Process, Architecture and Substance' (2008) 33 EL Rev 137.

A general article on the changes brought about by the Lisbon Treaty.

■ Dougan, M, 'The Treaty of Lisbon 2007: Winning Minds, not Hearts' (2008) 45 (3) CML Rev 609.

Another view on the changes introduced by the Lisbon Treaty.

■ Horsley, T, 'Subsidiarity and the European Court of Justice: Missing Pieces in the Subsidiarity Puzzle' (2012) 50 JCMS 267.

A closer look at how the CJEU viewed the attempt by Member States to challenge EU law on the grounds of a breach of subsidiarity.

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