European Constitutional Law

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NOVA UNIVERZA


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Title: European Constitutional Law

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Kataložni zapis o publikaciji (CIP) pripravili v Narodni in univerzitetni knjižnici v Ljubljani
COBISS.SI-ID **135672579**
ISBN 978-961-95520-4-9 (Nova univerza, PDF)

Publisher:
New University Press
Delpinova ulica 18b, 5000 Nova Gorica, Slovenija
tel. +386 1 251 44 85
https://press.nova-uni.si, press@nova-uni.si

Co-Publisher:
New University, Faculty of Government and European Studies
Žanova ulica 3, 4000 Kranj
tel +386 4 260 18 50
https://fds.nova-uni.si, info@fds.nova-uni.si

First published in 2022 by
New University Press
Delpinova ulica 18b, 5000 Nova Gorica, Slovenija

For Publisher:
Olga Jambrek, M.Sc., director

For co-publisher:
assist. prof. Gorazd Justinek, Ph.D., dean

Press Editor:
Boštjan Miha Jambrek, M.Sc.

Price: Free copy

https://doi.org/10.31601/2022.B002 ISBN 978-961-95520-4-9 (Nova univerza, PDF)

Available online at https://press.nova-uni.si.

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Abstract The reading material for the course »The European Constitutional Law« addresses a core content that forms the basis of the understanding of the European constitutional area, within which the constitutional orders of the Council of Europe, the EU, and Member States (in our case Slovenia) coexist and – to a certain extent – intertwine. It defines the concept of European constitutional Law. It does not overlook the broader political context in which both organizations were formed and are still developing. It focuses on their constitutional orders. The reading material also touches upon the interaction and intertwining of three levels of human rights and fundamental freedoms protection: the Slovenian constitutional level, the EU level and the level of the ECHR. To this end, the reading material mentions the relevant case law of the Slovenian Constitutional Court, the ECtHR, and the CJEU. The reading material provides a basis for an understanding, critical evaluation and questioning of how the Council of Europe and the EU function, and the role of Slovenia in these organizations.

Keywords: • European Constitutional Law • Human Rights and Fundamental Freedoms • European Union • Council of Europe • Convention for the Protection of Human Rights and Fundamental Freedoms • Charter of Fundamental Rights of the European Union • case law

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https://doi.org/10.31601/2022.B002 ISBN 978-961-95520-4-9 (Nova univerza, PDF)

Available online at https://press.nova-uni.si.

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Introduction

What role do regional international organizations play in contemporary international relations? How and why were the Council of Europe and the former European Economic Community established? What does it mean that the European Union (EU) constitutional order is an integral part of the constitutional orders of its Member States, including that of Slovenia? What are the effects of the adopted EU law on individuals? How does the Council of Europe work and when can a case be brought before the European Court of Human Rights (ECtHR)? When does the EU Charter of Fundamental Rights apply? What legal remedies are available when alleging breaches of EU law?

The European Constitutional Law, in the framework of which we discuss these issues, is a compulsory course of the undergraduate study Public Administration programme at the Faculty of Government and European Studies of the New University. It is conceptualised on a pluralistic understanding of the contemporary European environment, within which the constitutional orders of Slovenia, the Council of Europe, and the EU (co)exist. We study them in an interdisciplinary manner. In addition to the constitutional system, we are also interested in the broader political context in which the Council of Europe and the EU were formed, and in our work within these organizations.

Due to the dynamics of the Council of Europe and the EU, which should not be overlooked, this reading material addresses a core content that forms the basis of the understanding of the European constitutional area. In the lectures, we tie this core content with lively responses to the social reality and with the changing contemporary European environment, while we also elaborate on the recent case law of the Slovenian Constitutional Court and the case law of the ECtHR and the Court of Justice of the EU (CJEU). The reading material should therefore be understood as a static foundation, which must be linked to its dynamic upgrade and applied content, which we discuss in the lectures.

The reading material is addressed in particular to the students of the undergraduate study programme Public Administration of our faculty, with a sincere desire to help you study the required content and to direct you to the relevant literature and legal sources, and with the necessary warning that it does not cover details of this course's content, it is not a textbook, and it is not a substitute for the required literature listed in the syllabus.

Understanding the coexisting and sometimes intertwined constitutional orders will provide a sufficient basis for a critical evaluation and questioning of how the Council of Europe and the EU function, as well as of the role of Member States and individuals in these organizations.

The concept of European constitutional law and the constitutional dimension

As part of your studies, you have already encountered constitutional law, which is one of the traditional and indeed fundamental branches of law. European constitutional law is a newer branch of science that distinguishes itself from constitutional law in terms of content and scope of study. Within the European Constitutional Law course we study legal norms of constitutional nature and constitutional orders in a regionally limited, i.e. European, area. The course comprises the constitutional orders of three autonomous actors in this area, i.e. Member States (Slovenia), the EU, and the Council of Europe. We therefore study and explain the structure, organization, and functioning of the state and both regional organizations in the European area, and the interaction and intertwining of these constitutional orders and their effects on individuals.

In a brief historical overview, we mention that the notion of constitution derives from the Latin word *constitutio*. We also acquaint ourselves with the doctrine of constitutionalism, which primarily refers to limiting the power and preventing arbitration. After the historical events of the 18th century, there was a need for written rules that regulate the organization and functioning of state power, and provide citizens with certain fundamental human rights that this power must respect and protect. The power is no longer absolute; in fact, it is limited in its functioning. The first modern constitutions were adopted in the late 18th century (e.g. in the United States and in France). The theory identifies several classifications of constitutions, such as written and unwritten; codified and uncodified; flexible and rigid; according to the form of government (monarchical and republican); the form of state power (parliamentary and presidential); the form of state regulation (unitary and federal states); and the form of political system (autocratic and democratic).

The Constitution of the Republic of Slovenia was adopted on 23 December 1991. We draw attention to some important milestones related to Slovenia's independence and the adoption of the Constitution (e.g. the plebiscite, the adoption of the XIX amendment, the Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia, and the Declaration of Independence). The Slovenian Constitution contains a typical *materia constitutionis*. It contains basic rules governing state and social regulations as well as human rights and fundamental freedoms. Considering the already mentioned possible classifications of constitutions, we conclude that the Slovenian Constitution is a written act, a codified constitution, which derives from the principle of

people's sovereignty, and it is therefore a people's constitution. It is a rigid constitution because it regulates more stringent conditions for its amending. Slovenia is a territorially unified and indivisible state, a republic with a parliamentary form of state power and a democratic form of a political system; it is a constitutional democracy, as the conduct of power is limited by constitutional principles and by human rights and fundamental freedoms. The Slovenian Constitution is based on the principle of the division of power into legislative, executive and judicial.

The procedure for amending the Constitution is a uniform procedure, regardless of the scope and nature of the constitutional amendments. It is regulated by constitutional Articles 168 through 171. The competence to adopt changes of the Slovenian Constitution lies in the hands of the National Assembly. Citizens can also take part in the process by means of popular initiative or referendum. An amendment of the Constitution comprises two mandatory phases (the proposal to initiate a procedure for amending the Constitution and the decision regarding the proposal; the adoption of the constitutional amendment) and one optional phase of confirming of the constitutional amendment in a referendum. The amendment to the Constitution enters into force upon promulgation in the National Assembly. The Constitution does not regulate a specific technique for amending its provisions. In practice, however, the technique of change through amendments has been used. The adopted constitutional acts have the same legal force as the Constitution and directly affect the original text of the Constitution and amend, supplement, or abrogate its provisions. The Slovenian Constitution has been amended several times, most recently in June 2021 when a new provision of Article 62a (sign language and tactile sign language) was inserted.

The constituent instrument of an international organization, which enjoys a certain degree of autonomy, is also the constitutional foundation of this organization. This constituent instrument is, by its legal nature, an international treaty, based on the agreement of the Contracting States and interpreted by the Vienna Convention on the Law of Treaties. As Monaco explains (1974, p. 154), such an act takes the form of a treaty, pact or statute, but its content is comparable to the substance of the constitution, it is therefore »a fundamental act of the organization, to which it is bound throughout its existence«, which arose »to create lasting and stable legal entities«. Monaco explains that the constitutional foundation outlines the boundaries of functioning of an international organization and sets out the rules that apply to the bodies of that organization and to the Contracting States, and consequently have an impact on citizens. Over time, the constitutional legal foundation of an international organization goes beyond its origins and framework. This foundation covers the substance of national constitutions, i.e. the organization, competences, and functioning of the international organization and its bodies, as well as human rights and fundamental freedoms. This also applies to the Council of Europe (Statute of the Council of Europe and the ECHR) and the EU (primary law of the EU).
We discuss the concepts of intergovernmental and supranational organizations. On a theoretical level, the difference was sharpened by Schermers and Blokker. The

characteristics of supranational organizations are for example the power of the organization to take decisions binding on the Member States and their inhabitants; the adoption of binding decisions by majority vote, which means that the Member States can be bound against their will; the power of the organization to enforce its decisions and enforcement should be possible even without the cooperation of the Member States; and some financial autonomy of the organization.

The Council of Europe is an international organization of a regional character dedicated to the promotion and strengthening of democracy, the rule of law and the protection of human rights and fundamental freedoms. Slovenia became a member on 14 May 1993. It ratified the ECHR on 28 June 1994. Accession to the Council of Europe was particularly important because Slovenia demonstrated its commitment to the Convention's standards of protection of human rights and fundamental freedoms. All EU Member States are also members of the Council of Europe.

Attention is paid to the understanding of the position the ECHR has in the Slovenian legal order. Cardoso Da Costa identifies three types of situations that exist regarding the status of this Convention in national legal orders of the Contracting States: the constitutional status (as soon as the ECHR enters into force, it becomes part of that state's constitution); the quasi-constitutional status (it does not formally qualify as constitutional law, but in practice it has such a status, as it serves as a criterion for assessing national law); and the sub-constitutional status. With the ratification of the ECHR, Slovenia has committed itself under international law to observe the standards of the Convention for the protection of human rights and fundamental freedoms. This is also a legal obligation under national law that stems from national constitutional law. All state authorities, especially courts, regularly consider and observe the ECHR and the case law of the ECtHR when deciding on the rights and obligations of individuals. We refer to the principle of the highest protection of rights: »No human right or fundamental freedom regulated by legal acts in force in Slovenia may be restricted on the ground that this Constitution does not recognise that right or freedom or recognises it to a lesser extent« (the fifth paragraph of Article 15 of the Constitution). It means that a treaty can have priority even over the Slovenian Constitution if it guarantees a higher level of protection of a human right. In such a case, the constitutionality of the challenged law is assessed directly from the viewpoint of the ECHR and in constitutional complaint proceedings the Constitutional Court directly establishes the violations of rights, determined by the ECHR (see, e.g., Decision No. Up-518/03; compare with Decision No. U-I-40/12). The Slovenian Constitutional Court considers the ECHR to have the legal force of a constitution.

Article 3a was added to the Slovenian Constitution in 2003. The purpose of this constitutional provision was, *inter alia*, to provide a constitutional basis for Slovenia's accession to the EU. In designing the so-called European article an abstract approach was followed, which does not explicitly mention any international organization, however it sets out the procedural and substantive conditions for accession. Already in 1996,

Slovenia signed the Association Agreement with the EU, which entered into force in 1999, making Slovenia an Associate Member of the EU. Based on this agreement, Slovenia started a legally demanding and extensive harmonization of its law with the EU law. In December 2003, it concluded accession negotiations, which enabled it to accede to the EU on May 2004. Article 3a of the Constitution establishes the internal legal basis for Slovenia's activities within the EU. After accession, the relationship between Slovenian law and EU law also became important. The third paragraph of Article 3a of the Constitution stipulates that »legal acts and decision adopted within international organizations to which Slovenia has transferred the exercise of part of its sovereign rights shall be applied in Slovenia in accordance with the legal regulation of these organisations«. Today, the EU has twenty-seven Member States and over 400 million inhabitants.

The important consequences of EU membership are the changed position of the Parliament and the Government. In the Slovenian legal order, the holder of the legislative function is the National Assembly, which at certain extent and within the limits of delegated powers lost its legislative role when Slovenia acceded to the EU. Legislative decisions in the EU are generally taken by the European Parliament (which is directly elected) and the Council of the EU (where decisions are taken by representatives of the government of the Member States, i.e. the executive branch). In matters dealing with the EU, the Government asserts Slovenia's positions in the Council. The fourth paragraph of Article 3a of the Constitution obliges the Government to promptly inform the National Assembly of proposals for such acts and decisions, as well as of its own activities. The National Assembly may adopt positions, which the Government must take into consideration in its activities, to which it is legally and politically obliged. This cooperation is regulated in detail by the Cooperation between the National Assembly and the Government in EU Affairs Act.

The *hierarchical structure* of the *legal order* stipulates that a lower act has to comply with a higher one. In this regard, the provisions of Articles 8 and 153 of the Slovenian Constitution are important. The Constitution occupies the highest place in the hierarchy of legal acts in the Slovenian legal order. Below are presented the generally accepted principles of international law and treaties, which are ratified by the National Assembly and applied directly. These are followed by laws. The treaties ratified by the Government must be in conformity with laws. Individual acts and actions of state authorities, local community authorities, and bearers of public authority must be based on a law or regulation adopted pursuant to law. The hierarchy of legal acts in Slovenia is affected by EU law.

Revision questions

- Define the *materia constitutionis*.
- Is the Slovenian Constitution rigid or flexible? What does that mean?
- Explain the procedure for amending the Constitution and list its stages.
- What is a constitutional act?
- What constitutes the constitutional foundation of an international organization?
- List several characteristics of supranational organizations.
- Argue why Slovenia's accession to the Council of Europe was important.
- What is the position of the ECHR in the Slovenian legal order?
- Explain the constitutional principle of the highest protection of rights.
- What does Article 3a of the Constitution regulate?
- How does the EU law affect the Slovenian legal order?
- Highlight some key elements of the relationship between the Government and the National Assembly in EU affairs.
- What position in the hierarchy of legal acts does the Constitution confer to international treaties?

The origin and the constitutional order of the Council of Europe

The Council of Europe is a regional organization. It was founded to protect the values of democracy, the rule of law and human rights and fundamental freedoms. Its origin is linked to the post-war ideas of a united, connected, and inclusive Europe. Today it comprises forty-seven Member States, with a population of approximately 820 million.

1 The constitutional foundation of the Council of Europe

A brief historical overview is necessary to understand, why the Council of Europe was set up and how it works. A debate about the future of Europe took place at the end of the Second World War. A belief that a strong international organization could effectively prevent war prevailed. The British Prime Minister Winston Churchill called for the »United States of Europe« to establish peace and prevent a new war, the first step of which was to establish the Council of Europe. The idea was further developed at the Hague Congress in 1948. In the debates on the establishment of the Council of Europe, different visions emerged: intergovernmental, advocated by the United Kingdom, and supranational (federal), supported by France and Italy. This resulted in a compromise text of the Statute of the Council of Europe, which gave a decision-making role to the intergovernmental Committee of Ministers, while the Consultative Assembly (now the Parliamentary Assembly) became a consultative forum.

The Statute of the Council of Europe, which is an international treaty by its legal nature, was adopted in London on 5 May 1949. The constitutional foundation of the Council of Europe is formed by the Statute and subsequently adopted statutory texts. This organization has international legal personality and its own bodies, the administrative apparatus and its own budget.

Two amendment procedures are regulated in Article 41 of the Statute. The procedure, in which more extensive changes could be adopted, is subject to stricter rules. The Committee of Ministers acting on its own proposal or on the proposal by the Parliamentary Assembly recommends amendments, which it considers to be desirable. These changes are contained in a Protocol, which comes into force when two-thirds of the Member States have signed and ratified it. The Statute has never undergone a radical review with extensive changes of the statutory constitutive text. In the past, a simplified amendment procedure has been used. Under this procedure only specific statutory provisions are amended, namely Articles 23 to 35 (internal workings of the Parliamentary

Assembly), and Articles 38 and 39 (funding of the Council of Europe). Ratification in all Member States is not required for the amendments to take effect. They come into force when the Secretary General certify in writing that the amendments have the approval of the Committee of Ministers and the Parliamentary Assembly. The most frequently amended provision is Article 26 of the Statute, which determines the number of Member States' representatives in the Parliamentary Assembly and the wording of which must be adapted in accordance with any change in membership.

The Statute of the Council of Europe can also be changed by adopting statutory resolutions. As explained by the Council's Legal Advice Department these resolutions »are concerned with statutory matters and contain provisions which are not incompatible with the present Statute, i.e. which are added to the Statute and supplement it without changing the wording of the existing provisions […]«. The Committee of Ministers adopted the first statutory resolution in May 1951.

Wassenberg divided the development of this organization into three main periods: 1) from the beginning of 1949 until 1969, when Greece withdrew from the Council of Europe during the military dictatorship; 2) the search for its new identity in the two decades leading to the fall of the Berlin Wall in 1989; 3) from 1989 until 2009, when it became a pan-European organization and opened its doors to the countries of Central and Eastern Europe and Russia. Period 4) can be added: in today's stage of development, the Council of Europe deals with new challenges and threats of globalization, for example with social tensions leading to migration.

In general, the development of the constitutional order of the Council of Europe can be looked into though two parallel paradigms: widening (i. e. quantitative increase of membership) and deepening (i. e. qualitative consolidation and upgrading of cooperation).

2 The widening of the Council of Europe

The members of the Council of Europe are the parties to the Statute, which regulates membership in Chapter II (Articles 2–9). The membership of this organization has gradually increased from ten founding members to today's forty-seven. Enlargements have strengthened the role of this organization in promoting, upholding and facilitating the values of democracy, the rule of law and human rights and fundamental freedoms.

The Council of Europe is considered a closed organization, because membership is possible only under the invitation of the Committee of Ministers after consulting the Parliamentary Assembly. However, the procedure cannot be carried out if the state does not meet certain criteria. The value criterion signifies that a state is deemed to be able and willing to fulfil the already mentioned values on which the Council of Europe is based. The geographical criterion that a state is »European« in practice means that its national territory lies wholly or partly in Europe. The subsequently established political criterion

requires the state to demonstrate its commitment to the protection of human rights and fundamental freedoms by ratifying the ECHR and carrying out the necessary reforms. An invited state, which meets these criteria, shall become a member on the deposit with the Secretary General of an instrument of accession to the present Statute. The last step is to amend Article 26 of the Statute to update the list of Member States and determine the number of their representatives in the Parliamentary Assembly.

The Council of Europe also covers two ways of suspending or terminating membership: voluntary withdrawal (the decision shall be notified to the Secretary General) and enforced withdrawal. Any member of the Council of Europe, which has seriously violated the values on which the Council of Europe is founded, may be suspended from its rights of representation. The Committee of Ministers requests this state to withdraw. If such a member does not comply with the request, the Committee may decide that this State has ceased to be a member of the Council. The right of representation on the bodies of the Council of Europe may be suspended also when a member has failed to fulfil its financial obligation. This procedure is not directly related to a possible withdrawal of a Member State; however, a Member State that persistently or for a long time fails to fulfil its financial obligations could be called upon to withdraw.

2 The deepening of the Council of Europe

Under the auspices of the Council of Europe over two hundred instruments (e.g. conventions, framework convention, agreements) that promote the protection of human rights and fundamental freedoms, democracy and the rule of law have been adopted. By such instruments, the Council of Europe pursues its statutory aim of achieving a greater unity between its members for the purpose of safeguarding and realising the ideals and principles, which are common heritage, and facilitating their economic and social progress. This aim shall be pursued thought its bodies by discussion of questions of common concern and by agreements and common action in economic, social, cultural, scientific, legal and administrative matters and in the maintenance and further realisation of human rights and fundamental freedoms.

The areas of activity of the Council of Europe are extensive, as it deals with all important issues of European society, except the defence. Matters relating to national defence do not fall within the scope of the Council of Europe. Its functioning is limited also in some other areas (e.g. the economic cooperation) because these activities are covered by other international organizations (e.g. the EU). By deepening of its work though the adopted instruments the Council of Europe seeks to strengthen cooperation between the Member States and to promote the harmonization of legal orders and the development of (at least minimum) legal standards.

3 The institutional framework of the Council of Europe

The institutional set-up of the Council of Europe expresses a compromise between two visions leading to the establishment of the Council of Europe: supranational mode and intergovernmental cooperation. The statutory bodies of the Council of Europe are the Committee of Ministers and the Parliamentary Assembly. Whereas the former is the intergovernmental and decision-making body with limited powers (in particular, it adopts recommendations that are not legally binding and conventions and agreements that become binding only upon the ratification by the Member States), the latter has merely a consultative role.

4 The Committee of Ministers

The Committee is an intergovernmental statutory body that represents the interests of the Member States of the Council of Europe and acts on behalf of this organization. Each Member State is represented by the Minister for Foreign Affairs who shall be entitled to one vote. More frequently, the Committee meets at deputy level, deputies being the permanent representatives of Member States to the Council. Through discussions, it seeks to achieve constructive cooperation, greater unity and common action of Member States. Each Member State chairs the Committee for a six-month period (change-over months are May and November) on a rotating basis.

The Committee of Ministers has, *inter alia*, the following powers: as a collective decision-making body it conducts dialogue and discusses issues of common political interests of Member States that are within the competences of the Council of Europe; provides the necessary political impetus to the activities of the Council of Europe; considers the measures needed to achieve the statutory aim, which includes the adoption of conventions and agreements and common governmental policies on a particular issue; it is – together with the Parliamentary Assembly – the guardian of the Council's values; it invites a European country to become a member of the Council of Europe; it adopts the budget; it decides with binding effect all matters relating to the internal organization and arrangements of the Council of Europe (other than those within the powers of the Parliamentary Assembly) and for this purpose the Committee adopts such financial and administrative arrangements as may be necessary; it supervises the execution of ECtHR judgments.

5 The Parliamentary Assembly

The Parliamentary Assembly is a statutory body of the Council of Europe. From the outset, it was conceived to be a consultative body. This remains its fundamental function. Due to the persistent lobbying of its representatives and the justification of the need for change, it has gained more autonomy over time and it has strengthened its influence.

Initially, this body was named the Consultative Assembly. Despite the fact that it was subsequently renamed the Parliamentary Assembly, the statutory text has never been amended to include the new name. The procedure for appointment of national delegations was determined separately by the government of each Member State. The agenda of this body had to be approved by the Committee of Ministers. It is therefore not surprised that its representatives proposed changes very early, at the first meeting in August 1949.

The Parliamentary Assembly consists of representatives of each member, elected by its parliament from among the members thereof, or appointed from among the members of that parliament in a manner determined by each parliament itself. The only rule is that delegations must reflect with reasonable accuracy the balance of political parties or groups in their national parliaments and gender-balanced representation. This has strengthened its democratic legitimacy. It also draws up its own agenda and debate matters or political issues within the aim and scope of the Council of Europe. The increase of membership has contributed to the representativeness of this forum. In the Parliamentary Assembly, the number of representatives is determined by the size of the country. The biggest number is eighteen, the smallest two. The total number of members of the Assembly is therefore 324 representatives and 324 substitutes. The Slovenian delegation has three representatives and three substitutes. The representatives sit in alphabetical order, not in national delegations or political groups. The Parliamentary Assembly members are entirely free to join the political group of their choice. This statutory body elects from members its president, who controls the proceedings but does not take part in the debate or vote.

The Parliamentary Assembly retains its original power of a consultative body with no legislative powers. It acts as a forum that discusses issues within the Council's remit. It adopts resolutions with recommendations addressed to the Committee of Ministers. It has several elective functions. The Parliamentary Assembly elects the Secretary General and the Deputy Secretary General of the Council of Europe, the Commissioner for Human Rights and judges to the ECtHR.

6 Secretary General and the Secretariat of the Council of Europe

The Statute of the Council of Europe in its Article 10 mentions the Secretariat as a body that serves to both statutory bodies. It consists of a Secretary General, his Deputy and such other staff as may be required. The Secretary General and his Deputy are appointed by the Parliamentary Assembly on the recommendation of the Committee of Ministers. The remaining staff of the Secretariat is appointed by the Secretary General. His key responsibilities include coordinating the Council's work, preparing the Council's budget, preparing the Committee of Ministers' activity reports to the Parliamentary Assembly, and drawing up the annual intergovernmental programme of activities. He is also the depositary of the conventions of the Council of Europe. The Secretary General is responsible to the Committee of Ministers for the work of the Secretariat.

7 Wider institutional framework

In addition to statutory bodies, the wider institutional framework of the Council of Europe consists of other specialised institutions or bodies (ECtHR, Congress of Local and Regional Authorities, Commissioner for Human Rights) and some bodies based on partial or enlarged partial agreements (e.g. European Commission for Democracy through Law (i.e. Venice Commission), the Council of Europe Development Bank and the Group of States against Corruption).

8 Revision questions

- Explain the circumstances in which the Council of Europe was established.
- What values does the Council of Europe stand for?
- Define the constitutional foundation of the Council of Europe.
- How can the Statute of the Council of Europe be amended?
- Define a statutory resolution.
- Explain why the Council of Europe is a closed organization.
- Name the procedural and substantive criteria that a state must meet in order to become a Member State of the Council of Europe.
- How can a state terminate its membership in the Council of Europe?
- Explain the deepening of the Council of Europe.
- Define the statutory aim of the Council of Europe.
- Name the statutory bodies and explain their composition and powers.

The Convention for the Protection of Human Rights and Fundamental Freedoms

We have already mentioned that the Member States of the Council of Europe are also the Contracting Parties to the ECHR, on the basis of which the ECtHR was established with powers related to the protection of human rights and fundamental freedoms. Membership of the Council of Europe and ratification of the ECHR are inseparable, as any Contracting Party that ceases to be a Member of the Council of Europe also ceases to be a Party to this Convention. As stipulated in Article 1 of the ECHR, the Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in the Convention. Although the Statute forms the constitutional foundation of the Council of Europe and places human rights and fundamental freedoms, which are developed through the ECHR, among the fundamental values, the Convention is a treaty that is not legally bound by the statutory text. The Convention and the Statute are linked institutionally, as the judges of the ECtHR are elected by the Parliamentary Assembly and the Committee of Ministers supervises the execution of ECtHR judgments.

Though its extensive case law and binding decisions, the ECtHR has a significant impact on the respect, protection and exercise of human rights and fundamental freedoms in the Contracting Parties. The ECtHR follows the dynamic interpretation of the ECHR and it refers to the Convention as a »constitutional instrument of European public order« (*Loizidou v. Turkey*, No. 15318/89, 23 March 1995).

The text of the ECHR is amended by the adoption and ratification of the protocols. To date, 16 protocols and an interim Protocol No. 14bis have been adopted. Under the Vienna Convention on the Law of Treaties, these protocols have the same legal force as the ECHR. Adopted protocols can be divided into (at least) two groups. In the first group, there are optional protocols that add additional human rights and fundamental freedoms or introduce new powers of the ECtHR (e.g. Protocol No. 12 provides for a general prohibition of discrimination and Protocol No. 16 introduces a new advisory opinion procedure). These Protocols are without prejudice to the existing text of the ECHR and therefore do not require ratification procedures to be carried out in all Contracting Parties. Only a certain number of ratifications is sufficient for their enforcement. The second group includes amendment protocols that introduce changes or amendments to the supervisory mechanism of the ECHR (e.g. Protocol No. 15, *inter alia*, shortens the period within which individuals can lodge an application before the ECtHR). These Protocols

amend or supplement the existing text of the ECHR, and ratification by all Contracting Parties is therefore required for them to enter into force.

1 The supervisory mechanism of the ECHR

The supervisory mechanism of the ECHR consists of the ECtHR, which as a judicial body ensures the observance, protection, and exercise of the rights and freedoms guaranteed by the Convention, and the Committee of Ministers, which is the statutory body with the power to supervise the execution of ECtHR judgments.

2 European Court of Human Rights

The ECtHR is a permanent judicial body for ensuring and reviewing compliance with the provisions of the Convention and its Protocols. It is the only body empowered to find violations of the Convention. Due to the existence of the ECHR and the case law of the ECtHR, the protection of human rights and fundamental freedoms has been strengthened at national level. The manner of the ECtHR's functioning is regulated in particular in Section II of the ECHR. We highlight its composition and powers.

The composition of the ECtHR follows the rule, under which a number of judges equals to that of the Contracting Parties. The Court has forty-seven judges. The judges sit on the Court in their individual capacity and are independent and impartial. To perform this function, the judges must meet some of the criteria prescribed in the ECHR (Article 21). In addition to moral qualities (»high moral character«) and the criteria of professional qualification (they »must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence«), there is also an age criterion, under which candidates »shall be less than 65 years of age at the date by which the list of three candidates has been requested by the Parliamentary Assembly«. The intention of this criterion is to ensure that the judges complete the entire nine-year term for which they were elected. Their re-election is not allowed. In addition to the mentioned criteria, the Parliamentary Assembly developed further conditions: lists of candidates must be gender balanced; candidates must be proficient in one official language of the Council of Europe; they must submit their CV's in standard form; and they are interviewed by the Sub-Committee. The election process consists of two stages. In the national selection process the government of the Contracting Party identifies three qualified candidates. The election process in the Council of Europe is carried out by the Parliamentary Assembly that elects a judge of the ECtHR by a majority of votes cast from a list of three candidates (Article 22 of the ECHR).

The most widely used power of the ECtHR is to decide on individual applications. The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by a Contracting Party of the rights in the Convention or the Protocols (Article 34 of the ECHR). We focus on selected case

law of the ECtHR, namely the cases where the applications have been lodged against the Republic of Slovenia (e.g. concerning the right to a trial without undue delay see *Lukenda v. Slovenia*, No. 23032/02, 6 October 2005, or the right to respect for private life see *Benedik v. Slovenia*, No. 62357/14, 24 April 2018).

Understanding the subsidiary role of the mechanism for the protection of human rights and fundamental freedoms is crucial. The ECtHR cannot replace a national judge, as it is the latter who is generally in a better position than the ECtHR to review the violations of human rights and fundamental freedoms in a concrete case, because he knows best the facts and the legal framework of the dispute. It is thus understandable that the Contracting Parties have the primary responsibility to secure the rights and freedoms of the Convention. This means that they must secure these rights and freedoms to everyone within their jurisdiction and that they must guarantee an effective remedy before domestic bodies if these rights and freedoms were violated. The ECtHR may only deal with the matter after all domestic remedies have been exhausted and within the period of four months from the date on which the final decision was taken. The role of the ECtHR is supervisory as it reviews in the procedure with individual application whether the decisions of national bodies are in accordance with the Convention and the Protocols, taking into account the margin of appreciation that each Contracting Party enjoys.

Also important is a pilot-judgment procedure. Rule 61 of the Rules of Court stipulates: »The Court may initiate a pilot-judgment procedure and adopt a pilot judgment where the facts of an application reveal in the Contracting Party concerned the existence of a structural or systemic problem or other similar dysfunction which has given rise or may give rise to similar applications«. A pilot-judgment procedure may be initiated by the Court on its own motion or at the request of one or both parties. Let us mention the pilot-judgment procedure in cases *Kurić and others v. Slovenia*, No. 26828/06, 12 March 2014, and *Ališić and others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia*, No. 60642/08, 16 July 2014.

Besides individual applications the ECtHR decides in inter-state cases (Article 33 of the ECHR; see also *Slovenia v. Croatia*, No. 54155/16, 18 November 2020). At the request of the Committee of Ministers, it gives advisory opinions on legal questions concerning the interpretation of the Convention and the Protocols (Article 47 of the ECHR). The Court also gives advisory opinions at the request of highest courts and tribunals of a Contracting Party on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the Protocols (Protocol No. 16; see *Request no. P16-2018-001*, 10 April 2019).

3 The Committee of Ministers

A failure to execute the ECtHR judgment constitutes disrespect for the judgment, the ECHR and the Court, violates the international and national obligations of the state, threatens the authority of the ECtHR and undermines the importance, established standard and effectiveness of the mechanism for the protection of human rights and fundamental freedoms. The obligations of a Contracting Party to execute the ECtHR judgment entail just satisfaction, individual measures and general measures (e.g. legislative changes).

The judgments of the ECtHR are final and binding. They need to be executed. The Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties. The final judgment are transmitted to the Committee of Ministers, which supervises its execution. In this supervisory process, the Committee of Ministers takes decisions in the form of resolutions (interim and final). If the Committee of Ministers considers that the supervision of the execution of a final judgment is hampered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation (Article 46 of the ECHR). The Committee of Ministers may also refer to the ECtHR the question whether the Contracting Party has failed to fulfil its obligation if it considers that this Contracting Party refuses to abide by the final judgment.

However, as already mentioned, the rights and freedoms included in the ECHR and the case law of the ECtHR are binding even outside the context of a concrete dispute, as by means of interpretation the ECtHR sets the standards of protection of these rights and freedoms that are binding for the Contracting Parties.

4 Revision questions

- Explain the procedure for amending the ECHR.
- Explain the composition of the ECtHR.
- Explain the procedure for electing a judge of the ECtHR.
- What are the powers of the ECtHR?
- Define the subsidiary role of the ECHR's mechanism for the protection of human rights and fundamental freedoms.
- Explain when an individual can lodge an application before the ECtHR.
- Define the pilot-judgment procedure.
- Explain the supervision of execution of judgments of the ECtHR.

The origin and the constitutional order of the European Union

The EU is an international organization limited to the European continent and with specificities that differ in large part from other international organizations.

Similarly to the Council of Europe, the European Economic Community was founded after the Second World War. The idea of cooperation and integration between European countries was developed out of the need for peace and lasting coexistence. After the end of the Second World War, the focus was on overcoming disagreements on the European continent, creating economic conditions conducive to growth and development, rebuilding a destroyed Europe, ensuring stable democratic institutions, and asserting the identity of Europe on the international scene.

On 9 May 1950, the French Foreign Minister Robert Schuman, one of the founding fathers of European integration, called for a cooperation between European states. He stated in his declaration: »World peace cannot be safeguarded without the making of creative efforts proportionate to the dangers which threaten it. […] Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a *de facto* solidarity. The coming together of the nations of Europe requires the elimination of the age-old opposition of France and Germany. Any action taken must in the first place concern these two countries.« Key words were gradual creation of conditions, solidarity, unification, elimination of conflicts, laying a true foundation, raising living standards, promoting peaceful achievement. The mistrust that was present among European states had to be overcome through coexistence, cooperation, and, above all, interdependence. Schuman proposed the establishment of the first European Community, i.e. the European Coal and Steel Community. The Member States of this Community, which signed the Treaty of Paris in 1951, were Germany, France, Italy, the Netherlands, Belgium and Luxembourg. As the Treaty of Paris expired in 2002, the European Coal and Steel Community no longer exists. The same countries established two other European Communities in 1957: The European Economic Community and the European Atomic Energy Community.

The objectives of the European Economic Community were in particular to establish a common market and gradually align the Member States' economic policies, to reduce the economic and social differences and ensure balanced trade and fair competition, and to increase stability. However, the European Economic Community does not exist anymore.

It was replaced and succeeded by the EU. In these years of gradual progress, the EU has extensively surpassed its initial economic cooperation and developed into a political entity. It is still often referred to as an international organisation *sui generis*. Its speciality is best reflected in various divisions: between international and national manner of functioning, between intergovernmental and supranational (communitarian) methods, between the interests of Member States, the interests of citizens of the Union, and the general interest of the Union. The EU has more supranational elements than any other international organization. It is founded on the principle of conferral that govern the limits to EU competences. This principle has its international legal basis in Article 1 of the Treaty on the EU (TEU): »By this Treaty, the High Contracting Parties establish among themselves a European Union […], on which the Member States confer competences to attain objectives they have in common«. Its legal basis in the Slovenian legal order can be found in Article 3a of the Constitution: »Slovenia may transfer the exercise of part of its sovereign rights« to the EU, therefore »legal acts and decisions adopted within the EU are »applied in Slovenia in accordance with the legal regulation« of the EU.

1 The constitutional foundation of the European Union

The constitutional foundation of the EU consists of three normative texts: the TEU, which contains in particular the basic principles, objectives, and key institutional and organizational provisions; a more comprehensive Treaty on the Functioning of the EU (TFEU), which sets out, *inter alia*, categories and areas of Union competence and Union policies and internal actions; and the Charter of Fundamental Rights of the EU. Whereas the TEU could be described as a fundamental treaty with a substance of a constitution, and the Charter as a catalogue of rights, freedoms, and principles, the content of the TFEU differs and seems more of a detailed list of policies where the EU exercises its competences. Nonetheless, all three instruments have the same legal value; they all entail the primary law of the EU.

Many years have passed since the founding Treaty of Rome and the original European Economic Community. Member States have concluded various treaties that have changed, upgraded, and deepened the original Community. This progress can be addressed though two paradigms, that are interconnected and parallel: widening (the quantitative change of membership) and deepening (a qualitative development of the EU). The development has primarily been driven by the interests and benefits recognized by the Member States in the European integration, but also by purely pragmatic reasons. The dynamics brought by each enlargement have also led to the necessary adjustment of the constitutional foundation of the EU to new circumstances and new memberships.

2 The widening of the European Union

The process of the establishment of the European Economic Community with six founding members to the Union of twenty-seven has been gradual. Slovenia joined the EU on 1 May 2004.

TEU in Article 49 regulates the accession procedure. A State wishing to accede must meet certain criteria. The first criterion is geographical. Only a European State can apply for membership. The second criterion involves the respect of the values on which the EU is founded and a commitment to promote them. These values are respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. In addition to the criteria set out in the TEU, a state must meet other conditions of eligibility agreed upon by the European Council. The European Council in Copenhagen in 1993 defined the Copenhagen criteria as essential conditions all candidate countries must satisfy to become a member state. These are: stable institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities; a functioning market economy and the capacity to cope with competition and market forces; and the ability to take on and effectively implement the obligations of membership, including adherence to the aims of political, economic and monetary union. In December 1995, the European Council added the criterion of adapting administrative structures to be able to function in the EU. More than a decade later, the European Council adopted an enlargement strategy that is aimed not only on the applicant state and its meeting the prescribed conditions, but also takes into account the capacity of the EU to absorb new members and to function effectively even after the enlargement.

The applicant State addresses its application to the Council. The European Parliament and national parliaments shall be notified of this application. Negotiations are generally lengthy due to extensive EU legislation. The Council shall act unanimously after consulting the European Commission and after receiving the consent of the European Parliament. The agreement between the Member States and the applicant State, i.e. the accession treaty, shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements.

The withdrawal procedure is provided in Article 50 of the TEU. This procedure was followed in the case of the United Kingdom, which left the EU on 31 January 2020.

3 The deepening of the European Union

As has been pointed out, the founding treaties are the Treaty of Rome (now the TFEU), which established the European Economic Community, and the Maastricht Treaty (TEU), which established the EU. Today's consolidated versions of both treaties differ from the original treaty text, because the EU has deepened throughout its existence. Deepening takes place though treaties concluded, signed and ratified by all EU Member States. Among the most important ones are the Single European Act (1987), the Treaty of Amsterdam (1999), the Treaty of Nice (2003) and the last ratified treaty, i.e. the Lisbon treaty (2009), which has extensively amended the founding treaties. These treaties amended, supplemented, and upgraded the content of the founding treaties. We address the primary law of the EU in the module on the constitutional order of the EU: Primary law.

The development of the EU is not over yet. In fact, we do not know when and how it will end, because one of the characteristic features of the EU is its constant evolvement. With each treaty, Member States confer new and more extensive competences to the EU to attain common objectives. The Conference on the Future of Europe is underway, with conclusions expected to be reached by spring 2022.

4 Revision questions

- Explain the establishment and the development of the European Economic Community.
- Indicate the treaties on which the EU is founded.
- Justify why enlargement processes have taken place within the EU.
- Explain the criteria that must be fulfilled by a state wishing to accede to the EU.
- Explain the concept of deepening the EU constitutional foundation

The institutional framework of the European Union

The EU works through its institutions. TEU distinguishes between the Union's institutions (the European parliament, the European Council, the Council of the EU, the European Commission, the CJEU, the European Central Bank and the Court of Auditors), the advisory bodies (the Economic and Social Committee and the Committee of the Regions) and other bodies that form an institutional framework of the EU. Its aim is to promote Union's values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions (the first paragraph of Article 13 of the TEU).

The principles of institutional balance and loyal cooperation apply in particular to the functioning of the Union's institutions. The principle of institutional balance has its political and legal dimensions. It explains the relative strength of an institution in the constitutional order of the EU. At the same time, this principle replaces the principle of separation of powers into legislative, executive, and judicial as many duties and powers in the EU are shared between institutions (e.g. the legislative function is shared between the European Parliament and the Council, the latter composed of governmental representatives, i.e. the executive). Each institution acts within the limits of the powers conferred on it by the TEU and the TFEU, and in conformity with the procedures, conditions and objectives, determined by the treaties. The mutual sincere cooperation and trust that the institutions will not go beyond their competences is crucial for the successful and efficient functioning of the EU.

1 The European Parliament

The European Parliament is the institution representing the Union's citizens with a seat in Strasbourg. When the Treaty of Rome entered into force in 1958, this institution was called the Assembly with 142 people's representatives who were not directly elected but instead served a double term. Namely, they were members of the national parliament and simultaneously working in the Assembly. The powers of the Assembly were extremely limited as the real decision-making and legislative institution was the Council of the EU. With deepening of the EU, the Assembly gained importance. It was renamed the European Parliament and expended its powers. Since 1979, its representatives are directly elected.

The European Parliament is composed of members that are elected by the Union's citizens for a term of five years by direct universal suffrage in a free and secret ballot. In the past, there have been debates whether members of the European Parliament should be elected by uniform electoral rules and procedures in all Member States. There are currently no unified position on this, so each Member State still conducts elections on the basis of its electoral legislation.

The number of Members of the European Parliament shall not exceed seven hundred and fifty, plus the President. Representation of citizens shall be digressively proportional, with a minimum threshold of six members per Member State (e.g. Malta) and maximum threshold of ninety-six seats (e.g. Germany). Eight members are directly elected from Slovenia. The members of the European Parliament are not organised by nationality, instead they follow their political beliefs and sit in transnational political groups.

The European Parliament shall, jointly with the Council, exercise legislative and budgetary functions. It shall exercise functions of political control and consultation (e.g. vote on a motion of censure of the European Commission). It elects the President of the European Commission and the European Ombudsman.

2 The European Council

The European Council is a political institution composed of the Heads of State or Government of the Member States, the President of the European Council and the President of the European Commission. The High Representative of the Union for Foreign Affairs and Security Policy takes part in its work. The Treaty of Rome did not provide for such an institution. The idea of such high-level meetings appeared in 1974. The provisions on the composition, competences, and decision-making in the European Council reflect the importance of this Union institution.

The European Council provides the Union with the necessary impetus for its development and defines the Union's general political directions and priorities. It does not exercise legislative functions. It also has important electoral functions. It elects its President and appoints the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy.

3 The Council of the European Union

The Council of the EU is a decision-making institution designed to protect the interests of the Member States. It is composed of a representative of each Member State at ministerial level, who may commit the government of the Member State in question and cast its vote.

It meets in different configurations, two of which are explicitly mentioned in the TEU: the General Affairs Council and the Foreign Affairs Council. Whereas the General Affairs

Council has acquired the role of coordinator, ensuring consistency in the work of the different Council configurations, preparing and ensuring the follow-up to meetings of the European Council, the Foreign Affairs Council elaborates the Union's external action on the basis of strategic guidelines adopted by the European Council and ensures that the Union's action is consistent. The specificity is that the High Representative presides over the Foreign Affairs Council. The other configurations of the Council are subject to the presidency held by Member State representatives in the Council on the basis of equal rotation. Member States holding the presidency work together closely in groups of three in order to prepare a common agenda that will be addressed by the Council over an 18-month period. On the basis of this, each Member State presides for a 6-month period. This system enables the agenda continuity and achieves coherence in the functioning of the Council. Slovenia has presided over the Council twice; in the first half of 2008 and in the second half of 2021. The Council shall, jointly with the European Parliament, exercise legislative and budgetary functions. It shall carry out policy-making (e.g. formulation of the common foreign and security policy and taking decisions necessary for defining and implementing this policy) and coordinating functions (e.g. coordination of Member States' economic policies).

4 The European Commission

From the outset, the European Commission has indeed played a central role in developing and deepening of European integration. It was a driving force behind the most important projects in the history of the EU, such as the creation of the single market and the establishment of the Economic and Monetary Union. The European Commission promotes the general interest of the Union.

The question of the European Commission's composition has long been torn between its effectiveness, on one hand, and its legitimacy and representativeness, on the other. The rule remains that the Commission consists of one national of each Member State. The current European Commission, whose five-year term ends in 2024, thus have twenty-seven members. The members are chosen on the ground of their general competence and European commitment from persons whose independence is beyond doubt. It is important to note that the European Commission is completely independent in carrying out its responsibilities. It works under the guidance of its President, who also ensures the European Commission acts consistently, efficiently and as a collegiate body. The European Commission exercises coordinating, executive and management functions. It is often described as the guardian of the Treaties, ensuring and overseeing the application of Union law. In doing so, it may bring a legal action against Member States for failing to comply with their obligations under EU law. The role it plays in the legislative process is also important. The European Commission, as a rule, has the sole right to propose legislative acts. By that, it determines the direction and the development of the EU. It prepares the draft budget and it executes the adopted budget. It initiates the Union's annual and multiannual programming.

5 The Court of Justice of the European Union

The CJEU is the judicial body. It ensures the observance of the EU law in the interpretation and application of the TEU and the TFEU. It consists of the Court of Justice, the General Court and specialised courts. The Civil Service Tribunal used to be a specialised court within the CJEU. The Civil Service Tribunal had jurisdiction to hear and determine at first instance European civil service disputes. However, it ceased to exist in 2018, when its jurisdiction were transferred to the General Court. The seat of the CJEU is in Luxembourg.

We highlight in particular the process of appointment of judges to the CJEU and the jurisdiction of this institution. While the Court of Justice consists of one judge from each Member State, the General Court has at least one judge per Member State. After the last judicial reform the General Court has fifty-four judges as there are two judges from each Member State. The Court of Justice is assisted by eleven Advocates-General. The Advocates-General produce a writing opinion for the Court in the cases assigned to them. Their opinions do not bind the Court. However, the opinions are influential, they are considered to be an independent and impartial account of the law and they are thus often followed by the Court.

The Judges and the Advocates-General of the Court of Justice and the Judges of the General Court are chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognised competence. The judges of the General Court must possess (besides their independence) the ability required for being appointed to a high judicial office. The judges of the CJEU and the Advocates-General are appointed by common accord of the governments of the Member States for a term of six years, after consultation of the panel provided for in Article 255 of the TFEU (with a possibility to be reappointed).

This panel has an important task to deliver an opinion on candidates' suitability to perform the duties of Judge or Advocate-General. It is therefore understandable that the panel is set up of highly qualified people: seven persons chosen from among former members of the Court of Justice and the General Court, members of national supreme courts and lawyers of recognised competence, one of whom is proposed by the European Parliament. The panel conducts an interview with a candidate, which allows it to assess, *inter alia*, the candidate’s professional experience, language skills and ability to adapt to a multilingual environment in which there are several legal traditions. The Council of the EU follows the panel's opinion on candidates' suitability.

An important jurisdiction of the CJEU is to give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the EU institutions. In this procedure, the Court ensures a uniform interpretation and application of EU law through its territory. Furthermore, the CJEU

rules on actions brought by a Member State, an institution or a natural or legal person (e.g. action for annulment). The Court of Justice also gives opinions on the compatibility of an agreement between the Union and third countries or international organisations with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.

6 Other bodies, organs and agencies

The broader institutional framework of the EU consist of the already mentioned Court of Auditors and the European Central Bank and several other bodies or positions. These include the Economic and Social Committee and a Committee of the Regions acting in an advisory capacity, European Investment Bank, European Ombudsman, European Data Protection Supervisor, and the European Public Prosecutor's Office. There is also a diversified network of decentralized and executive agencies in the EU, supporting EU action in a specific field by carrying out technical, scientific, research, or organizational tasks. These agencies are based in different Member States. Examples include the Agency for the Cooperation of Energy Regulators, based in Ljubljana, the EU Intellectual Property Office based in Alicante, the European Maritime Safety Agency based in Lisbon and the EU Agency for Fundamental Rights based in Vienna.

7 Revision questions

- Define the principle of institutional balance in the EU.
- Explain the difference between the Council of Europe, the European Council, and the Council of the EU.
- Name the Union’s institutions and explain their composition and essential powers.
- Explain the meaning and functioning of the panel provided for in Article 255 of the TFEU.
- Explain which Union’s institutions are involved in the legislative process and describe their roles.
- Explain the role of the agencies and their tasks.

The constitutional order of the European Union: Primary law

In modules 6 and 7, we examine the Union's constitutional order in more detail. We are interested in the identification of the legal sources of EU law, their placement in the hierarchy of EU legal acts, and, importantly, how this hierarchy affects the Slovenian order. The constitutional order of the EU is an integral part of the constitutional orders of the Member States and is binding upon their institutions, including the courts.

1 Primary law of the European Union

Primary law or primary legislation of the EU is the original source of law, the binding rules that are considered the highest in the hierarchy of norms in the EU. The main source of the primary law are the founding treaties and their protocols and annexes, amending treaties, the Charter of Fundamental Rights of the EU, and treaties on accession.

The founding treaties and their revisions: We have noted that from the very beginning the EU has developed by treaties concluded between Member States. The Union's founding treaties are the TEU and the TFEU with attached protocols and annexes that form their integral part. The founding treaties have been on many occasions amended (e.g. the Lisbon treaty is the last of the revisions of the founding treaties). These treaties are, by their legal nature, international treaties that have amended or supplemented the original treaties' wording.

These treaties as the primary legislation are always the result of direct negotiations at the conference of representatives of the governments of the Member States and subject to ratification by all Member States. If one of the Member States does not ratify a treaty, it does not enter into force in any Member State (e.g. the Treaty establishing a Constitution for Europe). As ratifications by all the Member States are carried out in accordance with their respective constitutional requirements, in some states, ratification in the parliament is sufficient, and in some states, a referendum must be held before ratification. Due to the arduous negotiations that can take a long time to complete and as a rule lead to compromises, as well as the need for ratification in all Member States, the process of enforcing a treaty is often a lengthy process.

The founding treaties may be amended in accordance with an ordinary revision procedure or simplified revision procedures (Article 48 of the TEU). In the event of the ordinary revision, the amendments enter into force after being ratified by all the Member States in

accordance with their respective constitutional requirements. More flexible procedures for amending the constitutional foundation of the EU are therefore desirable. The TEU regulates two types of simplified revision procedures. The first is aimed at revising all or part of the provisions of Part Three of the TFEU relating to the internal policies and action of the Union. In this case, the European Council adopts a decision on the amendment by unanimity (after consulting the European Parliament and the European Commission), but this decision does not enter into force until it is approved by the Member States in accordance with their respective constitutional requirements. This, in turn, means that the enforcement of the amendment may be delayed. Following this procedure, an amendment of Article 136 of the TFEU with regard to a stability mechanism for Member States whose currency is the euro entered into force in 2013. The second type of simplified revision procedure is that contained in the seventh paragraph of Article 48 of the TEU and provides for two general *passarelle* clauses. These clauses offer a way to shift from unanimity to qualified majority voting in the Council and to move from a special legislative procedure to the ordinary legislative procedure. However, for the adoption of the general *passarelle* clauses a unanimous decision by the European Council (after obtaining the consent of the European Parliament) is needed.

The Charter of Fundamental Rights of the EU contains a preamble, provisions on dignity, freedoms, equality, solidarity, citizens' rights, justice, as well as the general provisions governing the interpretation and application of the Charter. The Charter was solemnly proclaimed in December 2000, but at that time, there was insufficient support to incorporate its text into the Treaty of Nice. The Charter therefore remained »merely« a modern catalogue of civil, political, social, and economic rights and freedoms with a symbolic meaning and with the role of a political declaration. A milestone in its development is the entry into force of the Lisbon Treaty, when the Charter acquired the same legal value as the TEU and the TFEU, thus becoming part of the EU primary legislation. It is binding on institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity. It binds also the Member States but only when they are implementing Union law. The exercise of Charter rights and freedoms involves an understanding of the wider environment where human rights protection at the constitutional and conventional level have already been entrenched.

The accession treaties are also among the primary law of the Union. We have already noted that these are treaties concluded between the Member States of the EU, on the one hand, and the accessing state, on the other.

Besides (the founding, amending and accession) treaties and the Charter, the case law of the CJEU and the general principles of EU law, largely developed by the CJEU, are also one of the primary sources of EU law.

The general principles of EU law play an important role in the Union's constitutional order. They were primarily used to fill gaps in EU law and applied by the CJEU when interpreting a particular Treaty provision. We divide them in (1) those principles that by

addressing the relationship between the individual and the EU express the quality of the Union's constitutional order, and (2) those principles that govern the relationship between EU law and national law.

As part of the firstly mentioned group of general principles of EU law we highlight the principles of equality and non-discrimination (Article 2 of the TEU, Articles 18 and 19 of the TFEU), the principle of the rule of law (Article 2 of the TEU and Article 7 of the TEU on breaches of the Union values), the principle of respect for fundamental rights (Articles 2 and 6 of the TEU), and the democratic principles (Article 2 and Title II of the TEU). These principles were largely fashioned by the CJEU, first drawing on national constitutional traditions. Today, these principles are enshrined in the TEU and the TDEU. We look at these principles though the selected case law of the CJEU.

In the context of democratic principles, we draw particular attention to the concept of citizenship of the Union, introduced by the Maastricht Treaty. Every person holding the nationality of a Member State is the citizen of the Union. Citizenship of the Union therefore does not replace national citizenship. Citizens of the Union enjoy the rights and are subject to the duties provided for in the Treaties. They shall have, *inter alia*: (1) the right to move and reside freely within the territory of the Member States; (2) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State; (3) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State; (4) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language; (5) the possibility of submitting the European citizens' initiative; (6) and the right of access to documents of the institutions, bodies, offices and agencies of the Union.

As part of the general principles of EU law, which lay out the foundations of the Union constitutional order, we examine in detail and through the relevant case law of the CJEU the following principles.

The principle of conferral means that the Union acts only within the limits of the competences conferred upon it by the Member States to attain the objectives set out in the TEU and the TFEU (the second paragraph of Article 5 of the TEU). This principle governs the limits to EU competences. Its constitutional legal basis is Article 3a (of the Slovenian Constitution). Let us mention some categories and areas of Union competences (Articles 2–6 of the TFEU). When the Treaties confer on the Union exclusive competence (e.g. customs union, monetary policy for the Member States whose currency is the euro), only the Union may legislate and adopt legally binding acts. The Member States are able to do so themselves only if they are empowered by the Union or for the implementation of Union acts. When the Treaties confer on the Union a competence shared with the

Member States (e.g. internal market, consumer protection, and transport), the Union and the Member States may legislate and adopt legally binding acts in that area. However, the Member States exercise their competence to the extent that the Union has not exercised its competence. The Member States again exercise their competence to the extent that the Union has decided to cease exercising its competence. In certain areas (e.g. protection and improvement of human health; culture, tourism), the Union has competence to carry out actions to support, coordinate or supplement the actions of the Member States, without superseding their competence or requiring harmonisation of national laws.

The principle of subsidiarity and *the principle of proportionality* govern the exercise of the Union's competences. The principle of subsidiarity means that the EU can act in areas which do not fall within its exclusive competence, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level (the third paragraph of Article 5 of the TEU). The principle of proportionality signifies that the content and form of Union action do not exceed what is necessary to achieve the objectives of the Treaties (the fourth paragraph of Article 5 of the TEU).

The principle of the autonomy of the EU legal order was developed by the CJEU. It means that the EU legal order is an autonomous legal order, developing independently from national legal orders. The autonomy is the result of the transfer of the exercise of part of its sovereign rights from the Member States to the EU. In this context we mention several cases of the CJEU, namely *Van Gend en Loos*, 26/62, 5 February 1963, and *Costa v. E.N.E.L.*, 6/64, 15 July 1964. In its judgment in the case *Les Verts v. European Parliament*, 294/83, 23 April 1986, the Court described the Treaty establishing the European Economic Community as »the basic constitutional charter«. Or, as the Court explained in paragraph 21 of its Opinion 1/91, 14 December 1991, this Treaty, »albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on the rule of law«. The Court continued that the Treaty »established a new legal order for the benefit of which the States have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only Member States but also their nationals […] The essential characteristics of the Community legal order which has thus been established are in particular its primacy over the law of the Member States and the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves«.

The principle of primacy of EU law is inextricably linked to the specific constitutional nature of the EU. Where a conflict arises between a norm of EU law and a provision of national law, any norm of EU law will prevail (regardless of the rank of national provisions and regardless of the time of its adoption or enforcement). National courts have the power to give immediate effect to EU law and to set aside any non-compliant national law. The principle of primacy of EU law is essential for the uniform application of Union law and for efficient functioning of the EU; in fact, it is crucial for its existence.

The primacy is based on the principle of conferral, as it was the sovereign decision by the Member States to confer competences in certain areas on the EU. If this were not to be the case, the Member States could simply allow their national laws to take precedence over EU law. Although the principle was developed by the CJEU in *Costa v. E.N.E.L.* in 1964, it still has no formal basis in the TEU or the TFEU. It can only be found in the Declaration (no. 17) concerning primacy annexed to the Final Act of the Intergovernmental Conference in 2007, which states »that, in accordance with well settled case law of the CJEU, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law«. Let us clarify that we understand the Union legal order and the national legal orders, including Slovenian, as heterarchical, they thus coexist in a heterarchical relationship, except when there is a conflict between them, in which case, in accordance with the principle of primacy, any norm of EU law takes precedence.

The principle of direct applicability of EU law means that certain legal acts of EU law (treaties, regulations, decisions) are directly applicable in all the Member States, i.e. they automatically and immediately (i.e. without transposition) become part of national law.
The principle of direct effect of EU law refers to the quality of a provision of EU law to confer rights on individuals that they can invoke before national courts. This is another principle that has been developed by the CJEU in its case law. The CJEU recognized the direct effect of the provisions of EU law, if they meet a certain quality, because the objectives of the Treaties could not be achieved if individuals could not invoke their rights directly before national courts. According to the Advocate General in *Banks*, C-128/92, »[t]he clarity, precision, unconditional nature, completeness or perfection of the rule and its lack of dependence on discretionary implementing measures are in that respect merely aspects of one and the same characteristic feature which that rule must exhibit, namely it must be capable of being applied by a court to a specific case«; such a provision thus has direct effect. The CJEU in *Van Gend en Loos* established the criteria for a Treaty provision to have direct effect: it should be clear, negative, unconditional, containing no reservation on the part of the Member States, and not dependent on any national implementing measure. The criteria have been loosened over years. As Lenaerts and Corthaut (2006, p. 311) explained: »[T]he classic criteria that the norm must be intended to confer rights on individuals and must, to that effect, be sufficiently clear, precise and unconditional […] apply irrespective of the legal instrument in which the right sought can be found.« If such a provision of a direct applicable act meets these criteria, then it has both vertical (i.e. it can be raised against the state) and horizontal (i.e. it can impose obligations on a private party) effect. The question whether a directive – not being directly applicable – has direct effect is addressed in the next module.

2 International agreements

The legal sources of EU law also include international agreements, namely those concluded by the EU with one or more third countries or international organisations (these agreements fall within the exclusive competence of the EU) and mixed agreements. The latter are concluded jointly by the EU and the Member States of the one hand, and third countries or international organizations, of the other. In this case, ratification by the Member States is also required.

As the CJEU has already held, these agreements are an integral part of EU law. In the hierarchy of the EU law international agreements need to comply with primary law of the EU, however, they are situated above the secondary law. We have already mentioned that the CJEU has jurisdiction to assess – before their enforcement – the compatibility of these agreements with the Treaties.

3 Revision questions

- Explain the concept of EU primary law or primary legislation.
- Indicate how the text of the TEU and the TFEU can be amended.
- Explain the principle of conferral and name its legal basis.
- Explain the difference between the principles of subsidiarity and proportionality.
- Explain why it is important that the Union's legal order is autonomous.
- Indicate what arguments the CJEU used to establish the principle of primacy of EU law.
- Explain the difference between the principles of direct application and direct effect of EU law.
- Explain which international agreements are included among the legal sources of EU law and why.

The constitutional order of the European Union: Secondary law

Secondary law or secondary legislation consists of legal acts adopted by the institutions and other bodies of the EU in order to exercise the Union's competences to attain objectives of the Treaties. They are based on EU primary legislation. Types of secondary legislation include: binding regulations, directives and decisions and non-binding recommendations and opinions (Article 288 of the TFEU).

1 Regulations

A regulation is a legal act defined by Article 288 of the TFEU. It has general application and is binding upon everyone, i.e. the individuals, legal persons, the Member States, and the EU institutions. It is binding in entirety and directly applicable in all Member States. This means that a regulation from the date of its entry into force (a date that it sets or, failing that, 20 days after its publication in the EU Official Journal) applies without needing to be transposed into national law. It therefore imposes an obligation to act. As an act of unification it aims to ensure the uniform application of EU law in all EU Member States. In accordance with the principle of primacy, in the event of collision between a regulation and national law, a regulation always takes precedence. A regulation has direct effect if it meets the criteria, established by the CJEU (confer rights on individuals, sufficiently clear, precise and unconditional), which means that an individual can invoke its provision directly before courts in both vertical (e.g. *Leonesio*, 93/71, 17 May 1972) and horizontal situations (e.g. *Antonio Muñoz y Cia SA and Superior Fruiticola SA,* C-253/00, 17 September 2002).

2 Directives

A directive is a legal act defined in Article 288 of the TFEU. It is binding only upon each Member State to which it is addressed (e.g. one, several or, mostly, all). Moreover, it is binding as to the result to be achieved, but leaves to the national authorities the choice of form and methods. A directive thus allows discretion to EU Member States, as it always requires national transposition measures. A directive from the date of its entry into force (the date that it sets or, failing that, 20 days after its publication in the EU Official Journal) imposes an obligation of result and is an act of harmonization. Upon adoption, a directive does not automatically become part of national law, but must be transposed into national law by the deadline set in the directive. In accordance with the principle of primacy, in

the event of collision between a directive and national law, a directive always takes precedence.

Precisely because a directive is not directly applicable, but requires a correct and timely transposition into national law, the questions arises as to whether an individual can invoke the directive's provisions before national courts. The CJEU held that its provisions in principle could have vertical direct effect but not horizontal one. As explained in the case law of the CJEU, a directive is capable of having vertical direct effect if its provision fulfils certain criteria (confer rights on individuals, sufficiently clear, precise and unconditional) and the deadline for its transposition expired (e.g. *Ratti*, 148/78, 5 April 1979). The CJEU gave three reasons to justify the direct effect of the directives. In paragraph 12 of its judgment in *Van Duyn v. Home Office*, 41/74, 4 December 1974, the Court stated two rationales. It held, first: »In particular, where the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts […]«. Second, as national courts are empowered to refer to the Court questions concerning the validity and interpretation (also) of directives, this implies furthermore that directives may be invoked by individuals in the national courts. In *Ratti* (148/78, paragraph 22), the Court added, third, »a Member State which has not adopted the implementing measures required by the directive in the prescribed periods may not rely, as against individuals, on its own failure to perform the obligations which the directive entails«.

In practice, Member States frequently fail to transpose directives into national law. If a directive is not transposed into national legal order or this transposition is incorrect or delayed, legal consequences arise. The European Commission can bring an action against a Member State for non-compliance with EU law before the CJEU. Also an individual can bring an action for damages against a Member State for breaches of EU law before national courts.

The CJEU established in its case law the principle of state liability to pay damages for breaches of EU law. An individual may bring a state liability action against a Member State before national courts if, for example, this Member State has not transposed the directive within the prescribed period (*Francovich, Bonifaci, and others*, C-6/90 and C-9/90, 19 November 1991) or a national legislature committed acts and omissions contrary to EU law (*Brasserie du Pêcheur and The Queen v. Secretary of State for Transport, ex parte: Factortame and others*, C-46/93 and C-48/93, 5 March 1996) or a violation of EU law resulted from a decision of a national court of last instance (*Köbler*, C-224/01, 30 September 2003).

In addition to the established principles of direct effect and state liability for breaches of EU law, another possibility developed by the CJEU is mentioned. This is the principle of consistent harmonious interpretation which requires national courts »to interpret their

national law in the light of the wording and the purpose of the directive« (*von Colson in Kamann*, 14/83, 10 April 1984, paragraph 26)**.**

3 Decisions

Decisions are defined in Article 288 of the TFEU as binding in their entirety. A decision, which specifies those to whom it is addressed, is binding only on them.

4 Non-binding acts: recommendations and opinions

Recommendations and opinions are non-legislative acts having no legally binding force, which excludes their direct effect. These acts are soft law instruments that can produce legal and practical effects.

5 Hierarchy of secondary law of the European Union

Regulations, directives and decisions can be adopted in three categories: as (1) legislative acts; (2) delegate acts (adopted under Article 290 of the TFEU); or (3) implementing acts (adopted under Article 291 of the TFEU). Legislative acts are legal acts adopted by (ordinary or special) legislative procedure (Article 289 of the TFEU). The ordinary legislative procedure begins with a proposal from the European Commission. It is therefore understandable if Member States through their representatives in EU institutions, EU institutions themselves, and the civil society wish to influence the European Commission at an early stage of drafting a legislative proposal or even persuade it to start working on a draft legislative act. The Council may request the European Commission to undertake any studies the Council considers desirable for the attainment of the common objectives, and to submit to it any appropriate proposals (Article 241 of the TFEU). The European Parliament may request the European Commission to submit any appropriate proposal on matters on which it considers that a Union act is required for the purpose of implementing the TEU and the TFEU (Article 225 of the TFEU). In both situations, the decision, whether to draw up a concrete proposal, remains in the hands of the European Commission. However, the European Commission has the duty to provide reasons if it does not submit a proposal. There is also a possibility to invite the European Commission to submit a proposal within the framework of its powers though the mechanism called the European Citizens' Initiative (at least one million citizens who are nationals of a significant number of Member States; the fourth paragraph of Article 11 of the TEU). This initiative is the expression of participatory democracy in the EU with an aim to strengthen the public debate on European matters.

The ordinary legislative procedure as the main legislative procedure gives the same weight to the European Parliament and the Council. If a legislative proposal is rejected at any stage of the procedure or the European Parliament and the Council are unable to reach a compromise, the proposal is not adopted and the procedure is ended. The procedure is explained in more detail in Article 294 of the TFEU. In the specific cases provided for by

the Treaties, regulations, directives or decisions are adopted by a special legislative procedure, either by the European Parliament with the participation of the Council, or more often by the latter with the participation of the European Parliament.

6 Revision questions

- Define the secondary law of the EU.
- Explain the difference between regulations and directives.
- Explain whether and when a regulation has direct effect.
- Explain whether and when a directive has direct effect.
- Justify the importance of EU Member State liability for breaches of EU law.
- What are soft law instruments?
- Explain the hierarchy of EU secondary acts.
- Highlight the characteristics of the ordinary legislative procedure in the EU.

The mechanisms of judicial protection in the European Union

1 The preliminary ruling procedure

This procedure reflects an area of judicial cooperation between national courts and the CJEU, which is of extreme importance for several reasons. It is through this procedure that the Court has established and developed essential concepts of EU law, such as the principles of primacy, direct effect and state liability for breaches of EU law. This mechanism continues to serve for the further development of EU law. Moreover, it ensures protection of rights of individuals provided by EU law. It enables individuals and legal persons to access the Court through the requests made by national courts. This procedure constitute the bulk of the work of the Court. In this procedure, the Court interprets EU law and decides on the validity of secondary law of the EU, its decisions are binding on everyone (not just the national court making a request for a preliminary ruling) and have an *erga omnes* effect. The mentioned procedure thus ensures that in all circumstances the EU law is the same throughout the EU; it is interpreted and applied uniformly. In an early preliminary ruling case *Bosch* (13/61, 6 April 1962), the Advocate General in its opinion stated: »Applied judiciously — one is tempted to say loyally — the provisions of Article 177 [now Article 267 of the TFEU] must lead to a real and fruitful collaboration between the municipal courts and the Court of Justice of the Communities with mutual regard for their respective jurisdictions.«

The preliminary ruling procedure is therefore not an appeal system. The national (i.e. referring) court stays the procedure, when a question is raised regarding the interpretation of EU law or validity of secondary law of the EU. It therefore refers the request for a preliminary ruling to the Court. The Court rules on the issues referred to it. The referring court then continues and ends the proceedings at the national level, taking into account the Court's decision in its deliberations. The preliminary ruling procedure should not be understood as a procedure establishing a hierarchical (vertical) relationship between the national (referring) court and the CJEU. This relationship is and should be of cooperative nature. For this to be the case, both involved courts should be aware of their limits and should act only within the limits of their competences. The interpretation of EU law and the decision on the validity of secondary law of the EU rests in hands of the CJEU, while the national court applies EU law to the facts of a particular case and enforces it accordingly. The CJEU has no jurisdiction to decide on the validity of national law or interpret national law nor can it end ongoing proceedings at the national level. It is for the

national court to make the decision to refer. Parties to the main proceedings cannot compel the national court to make a request for a preliminary ruling.

The TFEU in Article 267 distinguishes between courts with a discretion to refer (optional referral) and courts that have an obligation to refer (mandatory referral) a question for a preliminary ruling to the CJEU. An obligation to refer has »a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law« (i.e. a court of last instance). Which court is the last instance court is not entirely a matter of automatism. The highest court in Slovenia is the Supreme Court, but this is not the court of last instance in all proceedings. The Constitutional Court is the highest body of the judicial power for the protection of constitutionality, legality, human rights and fundamental freedoms; however, one has to distinguish between the procedure for a review of constitutionality and the constitutional complaint procedure. The constitutional complaint as a special legal remedy for the protection of human rights is not a legal remedy in the sense of the third paragraph of Article 267 of the TFEU. The assessment of whether a certain court is one against whose decision there is no judicial remedy under national law is therefore concrete.

The conditions under which national courts must submit a case to the CJEU are determined by the third paragraph of Article 267 of the TFEU. There is a distinction between the interpretation of EU law and the validity of secondary law of the EU. The CJEU has no jurisdiction to rule on the validity of primary law of the EU.

In accordance with the case law of the CJEU, whenever the question of the interpretation of EU law arises, last instance courts must fulfil their duty to submit such question to the Court, except if it is established (1) that the question is not relevant; (2) that the point of EU law in question has already been a subject of interpretation by the CJEU, even though the question at issue is not strictly identical (i.e. *acte éclairé* doctrine; see *Da Costa en Shaake N.V. and others*, 28/62, 29/62 and 30/62, 27 March 1963); and (3) that the correct application of EU law is so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved (i.e. *acte clair* doctrine). National courts must assess this possibility, *inter alia*, in the light of the characteristics of EU law, its linguistic diversity, special problems that the interpretation of EU law brings, the respect for the special terminology of EU law, and the particular difficulties to which its interpretation gives rise (*CILFIT*, 283/81, 6 October 1982).

When the validity of a legal act of the EU (i.e. secondary legislation) is at issue, it follows from the case law of the CJEU that national courts cannot avoid submitting the case to the CJEU because national courts do not have jurisdiction to establish that secondary legislation of the EU is invalid. The doctrine of *acte clair* cannot be extended to questions about the validity of secondary legislation. As the CJEU has explained: »[E]ven in cases which at first sight are similar, careful examination may show that a provision whose validity is in question is not comparable to a provision which has already been declared invalid because, for instance, it has a different legal or factual context, as the case may

be.« (*Gaston Schul Douane-expediteur*, C-461/03, 6 December 2005, paragraph 20; see also *Foto-Frost*, 314/85, 22 October 1987).

2 An action for failure to fulfil obligations under European Union law

An action for failure to fulfil obligations (i.e. infringement proceedings; Article 258 of the TFEU) is a tool to control and ensure the compliance of EU law by Member States. In such a case, an action against a Member State is usually brought before the CJEU by the European Commission, which is understandable given its role as »the guardian of the Treaties« and its promotion of the general interest of the Union. In addition to the European Commission, a Member State may also bring an action in these proceedings, but these cases are politically sensitive and therefore rare (Article 259 of the TFEU; see e.g. *Austria v. Germany*, C-591/17, 18 June 2019; and *Slovenia v. Croatia*, C-457/18, 31 January 2020). These proceedings are roughly divided into two stages. The pre-litigation stage consists of investigations, informal inquiries, and contacts, which then turn into a formal procedure when the European Commission sends a letter of formal notice to the Member State and, later, issues a reasoned opinion. The litigation stage of the procedure begins with an action before the CJEU and ends with either a declaratory judgment when the CJEU finds that the Member State has failed to fulfil its obligations under EU law or a dismissal of the infringement action (in whole or in part). In the event of a Member State failing to comply with the obligation to notify the European Commission of measures necessary to transpose a directive, the CJEU may, on a proposal by the European Commission, impose a lump sum or penalty payment on the Member States concerned (the third paragraph of Article 260 of the TFEU; *European Commission v. Belgium*, C-543/17, 8 July 2019).

3 An action for failure to comply with the judgment of the Court of Justice

If the European Commission considers that a Member State has not taken the necessary measures to comply with the judgment of the Court of Justice, it may bring the case before this Court (Article 260 of the TFEU). It is important to note that if the Court finds that the Member State has not complied with its judgment, it may impose a lump sum or penalty payment on it. These financial penalties may be imposed cumulatively (see *European Commission v. France*, C-304/02, 12 July 2005).

4 An action for annulment

The purpose of an action for annulment is to review the legality of EU acts (Article 263 of the TFEU). This action may be brought by a Member State, the European Parliament, the Council or the European Commission; by the Court of Auditors, the European Central Bank and the Committee of the Regions; and by any natural or legal person. The natural and legal persons institute proceedings before the General Court. The proceedings must be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of

the latter, as the case may be. If the action for annulment is well founded, the CJEU may annul the contested act.

5 Revision questions

- Explain the importance of the preliminary ruling procedure.
- Explain the difference between interpretation and application of EU law.
- Explain the difference between optional and mandatory referral.
- Explain the exceptions to the obligation of national courts of last instance to refer a case to the CJEU for a preliminary ruling.
- Define the doctrine of *acte clair* in the preliminary ruling procedure.
- Explain the difference between interpretation of EU law and the validity of secondary law of the EU.
- Highlight the key differences between a preliminary ruling procedure and an action for failure to fulfil obligations under EU law.
- Explain the main elements of an action for failure to fulfil obligations under EU law.
- When can the CJEU impose financial penalties on an EU Member State?
- Highlight the key differences between a preliminary ruling procedure and an action for annulment.

Interaction and interweaving of three levels: the national, the ECHR level, and the EU level as regards the protection of human rights and fundamental freedoms

In the last module, we focus on the protection of human rights and fundamental freedoms through the interaction and intertwining of three levels: the Slovenian, the ECHR level, and the EU level. To this end, we examine the relevant case law of the Slovenian Constitutional Court, the ECtHR, and the CJEU.

As part of the intertwining of Slovenian and EU law, at least the following decisions of the Constitutional Court are worth mentioning: Decision No. Up-1056/11, 21 November 2013; Decision No. U-I-65/13, 3 July 2014 in connection with the judgment of the CJEU in the joint cases *Digital Rights Ireland and Seitlinger and others*, C-293/12 and C-594/12, 8 April 2014; Decision No. Up-561/15, 16 November 2017; and Decision No. U-I-59/17, 18 September 2019.

To understand the intertwining of Slovenian law and the ECHR, we list at least the following decisions: *Gaspari v. Slovenia*, No. 21055/03, 21 July 2009, and Order No. U-I-223/09, Up-140/02, 14 April 2011; *Benedik v. Slovenia*, No. 62357/14, 24. April 2018, and Decision No. Up-540/11, 13 February 2014; *Čeferin v. Slovenia*, No. 40975/08, 16 January 2018, and Decision No. Up-309/05, 15 May 2008.

As part of the intertwining of EU law and the ECHR, we draw attention to the doctrine of equivalent protection of human rights and we look at some relevant judgments: *Matthews v. United Kingdom*, No. 24833/94, 18 February 1999; *Spain v. United Kingdom*, C-145/04, 12 September 2006; *M. S. S. v. Belgium and Greece*, No. 30696/09, 21 January 2011; and *N. S. and others*, C-411/10 and C-493/10, 21 December 2011.

Under EU law, fundamental rights are protected as general principles of EU law (based on two foundations, namely the constitutional traditions common to the Member States and the ECHR) and by the Charter of Fundamental Rights of the EU. In accordance with the case law of the CJEU, the Charter serves as a criterion for assessing the validity or legality of EU acts (e.g. *Digital Rights Ireland and Seitlinger and others*, C-293/12 and C-594/12, 8 April 2014; *Stefano Melloni*, C-399/11, 26 February 2013) and as a tool (or reference point) for the interpretation of EU law (e.g. *Detiček*, C-403/09 PPU, 23 December 2009; *Bauer and Brossonn*, C-569/16 and C-570/16, 6 November 2018). The

CJEU also interprets the rights and freedoms included in the Charter (e.g. *DEB*, C-279/09, 22 December 2010; *Åkerberg Fransson*, C-617/10, 26 February 2013).

It is easier to understand the coexisting constitutional orders (national, the ECHR, and the EU) when examining legal consequences of a breach of the duty to make a reference to the CJEU for a preliminary ruling, caused by a court against decision of which there is no judicial remedy under national law. Legal consequences of such a breach can be identified at all three levels: the national, that of the Convention, and that of the Union. At the EU level, the European Commission may bring an action against Member States for failing to fulfil obligations under EU law (e.g. *European Commission v. France*, C-416/17, 4 October 2018). These procedures can conclude with a declaratory judgment of the CJEU. An individual may sue a Member State for damages due to the loss caused by a decision of the national court of last instance (e.g. *Ferreira da Silva e Brito and others*, C-160/14, 9 September 2015). When the national court of last instance violates its duty to refer a case to the CJEU, this also entails a violation of the right to have a decision made by a court constituted by law determined by the first paragraph of Article 23 of the Slovenian Constitution (Decision No. Up-1056/11, 21 November 2013) or of the right to equal protection of rights determined by Article 22 in conjunction with the first paragraph of Article 23 of the Slovenian Constitution (Decision No. Up-384/15, 18 July 2016). An individual may also bring a complaint to the ECtHR, because the national court of last instance did not refer the matter to the CJEU for a preliminary ruling. The ECtHR has already taken the view that national courts are required to state the reasons for any decision refusing to refer a case for a preliminary ruling, otherwise they violate the first paragraph of Article 6 of the ECHR (*Dhahbi v. Italy*, No. 17120/09, 8 April 2014, and *Schipani and others v. Italy*, No. 38369/09, 21 July 2015).

1 Revision questions

- Explain, based on case law, how the CJEU applies the Charter of Fundamental Rights of the EU.
- Identify the legal consequences of a breach of the duty to make a reference to the CJEU for a preliminary ruling.

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Constitution of the Republic of Slovenia. Official Gazette of the Republic of Slovenia, Nos. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, 47/13, 75/16 and 92/21.
Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols Nos. 11, 14 and 15, supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13, and 16. ETS No. 005 et seq.
Cooperation between the National Assembly and the Government in EU Affairs Act. Official Gazette of the Republic of Slovenia, Nos. 34/04, 43/10, 107/10 and 30/15.
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Treaty on European Union (TEU). Consolidated version. UL C 202, 7. 6. 2016.
Treaty on the Functioning of the European Union (TFEU). Consolidated version. UL C 202, 7. 6. 2016.

NEW UNIVERSITY

Undergraduate research topics

- EU accession to the ECHR.
- Interaction between the ECtHR and national courts under the Protocol No. 16 to the ECHR.
- European Health Union.
- The future development of the EU.
- Recent case law of the Court of Justice of the EU.
- Recent case law of the ECtHR.
- Recent case law of the Slovenian Constitutional Court.

Potential projects and research activities

- Participating in the Conference on the Future of Europe. See https://futureu.europa.eu/.
- Research Project ARRS »Integral Theory of the Future of the European Union«. See https://eufuture.nova-uni.si/o-projektu/.
- Publishing scientific articles in the Slovenian or foreign journals, e.g. in Dignitas