



---

# Unlocking the potential of the EU Treaties

---

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

---

STUDY

---

EPRS | European Parliamentary Research Service

Author: Étienne Bassot  
Members' Research Service  
PE 630.353 – January 2019

EN



# Unlocking the potential of the EU Treaties

---

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

Public opinion often express the view that the European Union should do more to improve the lives of citizens in various policy areas, but a lack of convergence among Member States on the desired changes, not to mention likely hurdles in the ratification process, as well as other factors make any significant reform of the EU Treaties unlikely in the near term. This study identifies and analyses 34 policy areas where there may be the potential to do more under the existing legal bases provided by the Treaties without recourse to any amendment or updating of those texts. It looks at currently unused or under-used legal bases in the Treaties with a view to their contributing more effectively to the EU policy process.

## **AUTHOR(S)**

This paper has been drawn up by the Members' Research Service of the Directorate-General for Parliamentary Research Services (EPRS) of the Secretariat of the European Parliament. Its preparation has been coordinated by Rafał Mańko.

A number of policy analysts within the Members' Research Service have each drafted sections of this paper. They are: Nikolai Atanassov, Denise Chircop, Carmen-Cristina Cîrlig, Alessandro D'Alfonso, María Diaz Crego, Roderick Harte, Beatrix Immenkamp, Cemal Karakas, Ivana Katsarova, Silvia Kotanidis, Tania Lađici, Elena Lazarou, Tambiama Madiega, Rafał Mańko, Shara Monteleone, Laura Puccio, Anja Radjenović, Gianluca Sgueo, François Théron, Sofija Voronova, Agnieszka Widuto, and Alex Benjamin Wilson.

To contact the authors, please email: [eprs@ep.europa.eu](mailto:eprs@ep.europa.eu)

## **LINGUISTIC VERSIONS**

Original: EN

Translations: DE, FR

Manuscript completed in December 2018.

## **DISCLAIMER AND COPYRIGHT**

This document is prepared for, and addressed to, the Members and staff of the European Parliament as background material to assist them in their parliamentary work. The content of the document is the sole responsibility of its author(s) and any opinions expressed herein should not be taken to represent an official position of the Parliament.

Reproduction and translation for non-commercial purposes are authorised, provided the source is acknowledged and the European Parliament is given prior notice and sent a copy.

Brussels © European Union, 2018.

PE 630.353  
ISBN: 978-92-846-4404-9  
DOI:10.2861/45233  
QA-07-18-117-EN-N

[eprs@ep.europa.eu](mailto:eprs@ep.europa.eu)  
<http://www.eprs.ep.parl.union.eu> (intranet)  
<http://www.europarl.europa.eu/thinktank> (internet)  
<http://epthinktank.eu> (blog)

## Executive summary

The Treaty of Lisbon is the current legal foundation for the work of the European Union and its institutions. Although there is at present no general debate within the institutions on the revision of the Treaties, senior EU politicians have recently hinted at the possibility of expanding Parliament's powers. However, given that the ordinary procedure for revision of the Treaties is cumbersome and lengthy, and that the simplified procedure cannot be used to broaden EU competences, it makes sense to explore possibilities for unlocking the full potential of the existing Treaties as they stand now.

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

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

The study is based on both legal analysis of the relevant Treaty articles and on policy analysis focused on current challenges, and how they could be addressed through more EU action. Obviously, it is up to policy-makers to decide which legal basis should be used to further action and what kind of EU action is needed. Our intention has been to demonstrate that there are still unused or under-used possibilities for the EU institutions to deliver even more in terms of citizens' expectations and meeting current challenges. The outcome of the project, in the form of a systematic overview of the 34 under-used, or even unused, legal bases should be seen as a kind of toolbox for political decision-makers. The possible forms of EU action that have been identified might take, not only the most obvious one of legislation (i.e. adoption of directives or regulations), but also improving procedural mechanisms (e.g. moving beyond unanimity and unlocking the ordinary legislative procedure), enforcing delivery of legislation which already exists but the potential of which remains to be fully tapped, enhancing complementary administrative capacity at EU level (e.g. a European Anti-Fraud Corps), and finally, increasing financing in a given policy area.

## Table of contents

<b>Introduction</b>	<b>1</b>
The Treaties - The legal framework for EU activity	1
Potential to be unlocked	1
<b>Delivering on the expectations of EU citizens</b>	<b>2</b>
Citizens' expectations	2
Some examples of recent delivery on citizens' expectations	2
<b>Under-used and unused legal bases within the Treaties</b>	<b>5</b>
Unused legal bases	5
Under-used legal bases	5
<b>Different possible forms of EU action – Not only legislation</b>	<b>5</b>
Legislative measures	5
Enforcing delivery	6
Complementary administrative capacity	7
Increasing financing	7
<b>Overview table of measures the EU could take, making use of unused or under-used legal bases</b>	<b>9</b>
<b>Analysis of 34 specific unused or under-used legal bases</b>	<b>15</b>
1 Boosting national support for EU external action	16
2 Ensuring efficient decision-making in foreign policy	18
3 Strengthening the Parliament's role in CFSP	20
4 Improving data protection in foreign affairs	22
5 Establishing an EU army?	24
6 Clearer process for financing civilian EU missions	26
7 Simplifying the funding of EU military operations	28
8 Facilitating customs cooperation	30
9 Strengthening the fight against fraud	32

---

10	Making better use of conditionality in European structural and investment funds	34
11	Linking funding conditionality to the rule of law	36
12	Better management of external borders	38
13	Doing more to tackle irregular migration	40
14	Boosting solidarity and responsibility-sharing on borders, asylum and migration	42
15	Extending the list of crimes addressed by EU criminal law policies	44
16	Strengthening cooperation on terrorism	46
17	Strengthening the powers of Eurojust	48
18	Fostering common investigative techniques	50
19	Boosting cross-border criminal justice and police work	52
20	Freezing terrorist assets under AFSJ	54
21	Strengthening fundamental rights in criminal procedure	56
22	Improving administrative cooperation in the Area of Freedom, Security and Justice	58
23	Introducing a European Business Code	60
24	Introducing new tools to facilitate civil justice	62
25	Facilitating intellectual property rights in the EU	64
26	Improving euro-area multilateral surveillance	66
27	Facilitating finding common positions in the euro area	68
28	Strengthening euro-area representation in the IMF	70
29	Facilitating balance of payments assistance	72
30	Developing a stronger EU energy policy	74
31	Putting in place a uniform electoral procedure for the European Parliament	76
32	Strengthening Social Europe	78
33	Encouraging cooperation between schools and business	80
34	Making it easier to find factual information on Europe in third countries	82



## Introduction

### The Treaties - The legal framework for EU activity

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

Although there is at present no general debate within the EU institutions on the revision of the Treaties, top EU politicians have recently hinted at the possibility of expanding Parliament's powers. President of the European Parliament, Antonio Tajani [remarked](#) on 13 November 2018 that 'a crucial change to be made is to **give the European Parliament more power**', specifically mentioning the need to give the EP the power to table legislative proposals. German Chancellor, Angela Merkel, in turn, speaking before the Parliament on the same day, [indicated](#) that 'We must ... be ready to rethink our decision-making processes, also by **lifting the unanimity requirement wherever possible**', although she immediately added that this should be done 'in areas where this is permitted by the Treaties.' All this should be seen in the context of President Juncker's recent [call](#) – in his 2018 State of the Union address – to build a 'European sovereignty'.

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

### Potential to be unlocked

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

Bearing this in mind, it is useful to embark on a careful re-reading of the currently binding Treaties, with view to unlocking the potential enshrined in the wording of its articles. Too often, a backward-looking interpretation, focused more on what a given article meant in the Treaty of Amsterdam, Treaty of Maastricht or even the founding Treaties, has limited understanding of the current Treaty set-up. In line with the established case law of the Court of Justice of the EU (CJEU), the articles of the Treaties should be interpreted not so much in accordance with their historical meaning (known as 'originalist' interpretation), but rather in accordance with their wording, their context and their purpose, seen in light of the general *telos* of European integration.<sup>2</sup> Such an interpretation should

not be 'static' – namely sticking to the state of affairs at time of drafting or adoption of the Treaties – but must rather be 'dynamic' – adapting to the challenges currently faced by the Union, in light of the dynamically changing economic, social and international political situation. We must not forget that both Europe and the world world are very different from how they were more than a decade ago, when the Treaty of Lisbon was drafted, and the Union has, since that time, faced new and previously unknown challenges. The present study, aimed at reappraising the legal framework of the EU, aims precisely at identifying those legal bases in the Treaties which remain either under-used or completely unused.

## Delivering on the expectations of EU citizens

### Citizens' expectations

Today, European citizens are not much invested in the institutional debate concerning the European project in its political dimension, but rather focus on whether the Union is capable of delivering on matters of concern to them, within specific policy areas, such as consumer protection, free movement of citizens, irregular migration and combating transnational crime, including terrorism.<sup>3</sup> Even in matters which lie at the heart of the traditionally conceived state sovereignty – the broad domain of the Area of Freedom, Security and Justice – large proportions of EU citizens want more action on the part of the European institutions. Therefore, expectations of the European public are an important guideline for the European institutions, and delivering upon such expectations, within the Treaty framework, contributes to enhancing the EU's democratic legitimacy. Therefore, in this project, **we have explored the possibility of discovering the unused potential of the legal bases available to the Union with view to delivering on citizens' expectations.** The project was conceived as an exercise combining both **policy analysis** (current challenges, and how they can be addressed through more EU action), and **legal analysis** (legal basis and its use until now). Obviously, it is for the political level – the policy-makers – to decide which legal basis should be used to further what kind of EU action. Our intention has been to show that there are still a number of unused or under-used possibilities for the EU institutions to deliver even more in terms of citizens' expectations and meeting current challenges. The outcome of the project, in the form of a systematic overview of the available legal bases should therefore be seen as a kind of **toolbox for political decision-makers.**

### Some examples of recent delivery on citizens' expectations

#### Cutting red tape for citizens moving across the Union

Although the free movement of citizens is among the fundamental freedoms of the EU Treaties, a number of administrative burdens still make the lives of EU citizens living abroad or changing Member States more difficult than those who stay in their native Member State. The **support rate for the policy of free movement of citizens remains very high among EU citizens** (81 % in favour, and only 14 % against).<sup>4</sup> At the same time, however, according to a study commissioned by the European Parliament, excessive red tape constitutes one of the barriers to the effective exercise by EU citizens of their rights of free movement.<sup>5</sup> To this end, the EU has recently adopted rules effectively cutting red tape with regard to the recognition of official documents from another Member State. The [new rules](#), adopted in June 2016, will simplify the requirements for cross-border use and acceptance of certain public documents in the Union, thereby not only promoting the free movement of citizens and contributing to a well-functioning single market for EU businesses, but also significantly reducing the financial and bureaucratic burdens, as well as legal obstacles, for citizens and firms.

## Successful launch of permanent structured cooperation (PESCO)

The emergence of new challenges for peace and security in Europe has seen European citizens overwhelmingly support the enhancement of the EU's military and defence policy.<sup>6</sup> **Three quarters (75 %) of Europeans are in favour of a common defence and security policy among EU Member States and there is even a clear majority (55 %) in favour of the creation of an EU army.** However, until very recently the relevant legal basis in the Treaties – [Article 46](#) TEU and [Protocol 10](#) on permanent structured cooperation (PESCO) established by [Article 42\(6\)](#) TEU – remained what was known as the '[Sleeping Beauty](#)' of EU defence due to the lack of its materialisation following the entry into force of the Lisbon Treaty. The European Parliament has repeatedly [called](#) for the implementation of the Lisbon Treaty provisions on the Common Foreign and Security Policy, including PESCO.

Following the launch of the [Global Strategy](#) in July 2016, the subsequent intensification of efforts to make progress in EU defence policy and the resultant [Implementation Plan on Security and Defence](#), launched in November 2016, the European Council [agreed](#) in June 2017 on the need to launch PESCO without delay. In November 2017, the Council and the HR/VP received a [joint notification](#) signed by 23 EU Member States (all except Denmark, Ireland, Malta, Portugal and the United Kingdom) of their intention to participate in PESCO. Any other Member State which wishes to participate in PESCO may still notify its intention to the Council and to the HR/VP at a later stage. On 11 December 2017 the Council adopted a [decision](#) formally creating PESCO and approved a first [list of projects](#) to be placed under the PESCO umbrella. These include a European Medical Command, securitising radiofrequencies, creation of a European Logistics Hub, simplification and standardisation of cross-border military transport procedures, establishment of a Centre of Excellence for EU Training Missions, and upgrading of the Maritime Surveillance System, as well as an information-sharing platform on responses to cybernetic attacks and threats and mutual assistance for cyber-security and Cyber Rapid Response Teams. PESCO Member States have also made commitments concerning increasing their defence spending to agreed benchmarks.

## Tackling irregular migration

**Three quarters (74 %) of Europeans would like the EU to do more to tackle the issue of irregular migration.**<sup>7</sup> In response to this, the former Frontex agency was [transformed](#), in 2016, into the European Border and Coast Guard, bringing together the EU agency and national authorities responsible for border management. The new agency has an enhanced mandate and will provide further support to Member States in the field of border management, including border control, return operations, and search and rescue operations, with the aim to fight cross-border crime, manage the crossing of external borders efficiently and ensure internal security. Furthermore, in 2016, the EU established a [uniform European travel document for the return](#) of illegally staying nationals of non-EU countries, in order to facilitate returns; in 2017, it established a system providing for the electronic registration of both entry and exit of non-EU nationals admitted into the EU ([Entry/Exist System - EES](#)); and, in 2018, it established a system for determining the eligibility of all visa-exempt non-EU citizens to travel to the Schengen Area ([ETIAS](#)), to cite only some of the most recent decisions adopted.

## Better protection of the environment and preventing climate change

According to a 2017 Special Eurobarometer survey,<sup>8</sup> **two thirds of Europeans (67 %) think that environmental decisions should be taken jointly within the EU**, and only 29 % consider that this issue could be tackled at national level. Moreover, as much as 83 % of EU citizens agree that the EU should have the power to verify whether Member States are correctly applying environmental legislation. Clearly, citizens expect the Union to tackle environmental problems. In response to these

expectations, the EU legislature has recently adopted a new [directive on waste](#), as well as amended the [rules on greenhouse gas emissions](#), providing for a higher annual rate of emissions reduction.

## Enhanced protection of personal data

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

## Enhancing security and combating terrorism

According to recent surveys,<sup>9</sup> the fight against terrorism is the **top priority issue for 49 % of EU citizens in the May 2019 European Parliament elections**. In fact, terrorism is the second top concern of Europeans, just after irregular migration and the economic crisis.<sup>10</sup> The EU legislature has been continually addressing these issues, in particular by enacting new rules limiting [access to weapons](#), strengthening the rules on [money laundering](#), as well as reviewing the [framework decision on terrorism](#). The Parliament has [called upon](#) the Commission to make proposals on eliminating the obstacles to tackling cybercrime. A set of proposals were presented in spring 2018, concerned with [electronic evidence](#) and [appointment of representatives](#) by service-providers to help law-enforcement authorities access such evidence.

## Under-used and unused legal bases within the Treaties

### Unused legal bases

It may seem paradoxical that almost a decade after its entry into force, the Treaty of Lisbon still contains a number of legal bases – allowing for the EU to act – which have **never been used**. We have referred to them as 'unused legal bases'. No legislative act nor non-legislative measure has yet been adopted on the basis of such articles of the Treaty. For the sake of precision, we have focused on specific paragraphs of individual articles in the TEU and TFEU. It should be noted that in the preambles to EU legislative acts sometimes only the entire article as such is mentioned as the legal basis although, in other situations, an article and specific paragraph are indicated. Whereas this practice may well be justified by pragmatic reasons (e.g. future judicial review of the measure in question), it remains to analysts and commentators to identify which part of the article (down to the individual sub-paragraph, indent or letter) actually was the basis of the EU action in question. In our analysis, we have gone down to the level of subparagraphs and indents, as shown in the following table and in the individual sections devoted to specific legal bases. Therefore, while one paragraph of a given Treaty article may have been frequently used, another may still be dormant – waiting to become the basis of much needed EU action.

### Under-used legal bases

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

Furthermore, the under-used character of legal bases may also follow from a broader understanding of a given article, not only in its 'original' meaning, presumably attributed to it by its drafters, but also in the light of the changed political and economic context, in which the Treaties are now applied and the goals which the Union strives to achieve in these challenging times. This is in line with the aim of our research – to draw attention to the dormant potential of the Treaties, awaiting discovery by the EU institutions, and in particular by the co-legislators.

## Different possible forms of EU action – Not only legislation

### Legislative measures

#### Directives and regulations

The most obvious form of EU action, based on a given Treaty article, is legislative action, namely the adoption of a piece of secondary legislation: a regulation, a directive or a (legislative) decision. A **regulation** is a directly applicable piece of EU legislation, which serves to **unify** the law on a given issue in all Member States. This is because exactly the same rules, set out in the regulation, are applied by courts and administrative bodies across the EU without any difference in form or content.

However, regulations are often interconnected with national legislation, for instance the regulation on the European Small Claims Procedure cannot be applied on its own, since it presupposes the existence of a complex set of national rules on civil procedure regulating, for instance, the composition of courts, detailed rules on organising a hearing and the like. However, within the specific scope of a regulation it is the only source of law, uniform across the entire Union. A decision, addressed to the Member States and adopted under a legislative procedure is, for all practical purposes, similar to a regulation.

By contrast, a **directive** is a piece of legislation which, in principle, is directed not so much to citizens and businesses directly, but rather to the legislative powers of the Member States which need to enact national legislation aimed at achieving the goals set out in the directive. Therefore, directives are sometimes referred to as 'two-stage legislation', because – in contrast to regulations – they are addressed to the Member States and not to private parties and only in the second stage, when Member States transpose the directive into their national laws, are the rules (of the national implementing measures) addressed to all legal subjects (citizens, companies, etc.).<sup>11</sup>

### Specific limitations of the legal basis

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

For example, in the area of criminal law, Article 83 TFEU provides in paragraph 1 explicitly for directives of the Parliament and the Council, and in paragraph 2 for decisions of the Council adopted unanimously, with the Parliament's consent (see [fiche #15](#) below).

Furthermore, sometimes the legal basis explicitly limits the scope of application of the EU legislation, providing that it may apply only to matters of a **cross-border** character.

For example, in the area of civil procedure, Article 81 TFEU allows the EU to enact legislation only concerning civil proceedings having a cross-border element. By contrast, the EU may not regulate purely domestic civil proceedings using this specific legal basis (see [fiche #24](#) below).

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

In some cases, small modifications of existing legislation would enable much greater efficiency, as for instance in the case of Eurojust (established on the basis of Article 85 TFEU). An amendment to the recently adopted Eurojust Regulation could allow this body to **initiate investigations** and requesting national law enforcement authorities to conduct them on its behalf (see [fiche #17](#)).

### Enforcing delivery

Even the best legal regulation, if it remains on paper, will not address the challenges faced by the Union. Hence, apart from proposing new legislation and enacting it, it is sometimes crucial to ensure that existing rules are implemented and effectively applied. Here, the role of the Commission as 'guardian of the Treaties' is crucial, and an **action for failure to fulfil obligations** against a non-compliant Member State (Article 258 TFEU) remains the ultimate option.

## Complementary administrative capacity

Closely linked to enforcing delivery is the provision of complementary administrative capacity by the Union. Especially in technically complex areas, such as customs, taxation and economic and monetary union, a task force of EU officials and seconded national experts (SNEs) could solve problems on the ground, helping Member States to apply existing EU rules effectively. A good example is the European Border and Coast Guard Agency which has the task of increasing cooperation between Member States in order to build integrated border management. One should also mention Europol which has played a major role in fostering cooperation between national law-enforcement agencies, including the sharing of best practices and creating new synergies between national authorities.

For instance, in the area of the fight against fraud, Article 325 TFEU would be much more effectively used if national administrations could count on the assistance of the EU bodies, such as OLAF or EPPO, in their activity (see [fiche #9](#)). Similarly in the area of customs, Article 33 TFEU could serve to create a European Customs Force which would provide for a uniform application of the EU customs code across the Union (see [fiche #8](#)).

## Increasing financing

Sometimes the proper legislative framework exists and is even used extensively, with sufficient administrative capacity, but nonetheless the EU does not manage to accomplish its goals due to limited funds earmarked for the given policy area. This because even the best legislative and regulatory framework will struggle to achieve its goals in a situation of budgetary constraints.

For instance, in the field of cultural policy, [Article 167\(2\) first indent TFEU](#) could be used effectively as a tool for promoting the EU narrative and identity in third countries if the budget of Euronews were increased (see [fiche #34](#)). Likewise, in the area of education policy, Article 166 TFEU remains under-used, despite the efficient legal framework concerning Erasmus+, because there is not sufficient means to finance all the deserving projects which are submitted (see [fiche #33](#)).

Étienne Bassot

Director, Members' Research Service

## NOTES

- <sup>1</sup> W. Hallstein, *Europäische Reden* (1979), pp. 343-344, translation after: T. von Danwitz, 'The Rule of Law in the Recent Jurisprudence of the ECJ', *Fordham International Law Journal* 37.5 (2014): 1311-1377, p. 1312-1313.
- <sup>2</sup> See the historic [Van Gend en Loos judgment](#) (1963). Cfr. M. Poiares Maduro, '[Interpreting European Law: Judicial Adjudication in the Context of Constitutional Pluralism](#)', *European Journal of Legal Studies* 1/2007; K. Lenaerts, J.A. Gutiérrez-Fons, '[To say what the law of the EU is : methods of interpretation and the European Court of Justice](#)', EUI Academy of European Law Distinguished Lectures 2013/09.
- <sup>3</sup> For an overview of citizens' expectations towards the EU, see EPRS, [Public opinion and EU policies](#) (2016).
- <sup>4</sup> [Standard Eurobarometer 88: Europeans' opinion of the European Union's priorities](#) (2017), p. 7.
- <sup>5</sup> Policy Department for Citizens' Rights and Constitutional Affairs, [Obstacles to the right of free movement of EU citizens and their families](#) (2016), pp. 62-63.
- <sup>6</sup> [Special Eurobarometer 461](#) - Designing Europe's future: Security and defence (April 2017).
- <sup>7</sup> Eurobarometer 85.1. See also EPRS, [Public opinion and EU policies](#) (2016), p. 23-26.
- <sup>8</sup> Special Eurobarometer 468 – Attitudes of European citizens towards the environment (2017).
- <sup>9</sup> [Eurobarometer Survey 89.2 of the European Parliament](#) (2018).
- <sup>10</sup> [Standard Eurobarometer 89](#) (2018). See also EPRS, [Public opinion and EU policies](#) (2016), p. 11-14.
- <sup>11</sup> B. Kurcz, 'Harmonisation by means of Directives', *European Business Law Review* 11-12/2001, p. 290.

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

(red = unused; yellow = under-used)



POLICY AREA		SUBJECT MATTER	LEGAL BASIS	POSSIBLE EU MEASURES	
Common Foreign and Security Policy (CFSP), including Common Security and Defence Policy	1	Member State support for EU external action	Article 24(3) TEU, third subparagraph	<ul style="list-style-type: none"> <li>Increasing CFSP budget</li> <li>Introducing more impact assessments in CFSP</li> </ul>	
	2	More efficient decision-making in CFSP	Article 31(3) TEU	<ul style="list-style-type: none"> <li>Activating the <i>passerelle</i> clause by the European Council (acting unanimously) and thereby allowing for QMV to be used in Council on Common Foreign and Security Policy without formal Treaty changes</li> </ul>	
	3	The EP and CFSP	Article 36(2) TEU	Creation of a mechanism to monitor the implementation of Parliament's recommendations in the CFSP	
	4	Data protection in CFSP	Article 39 TEU	<ul style="list-style-type: none"> <li>Adoption of Council decision regulating the use of personal data by EU missions and operations in third countries</li> <li>Adoption of new data sharing agreements in the field of fight against terrorism and cyber attacks</li> </ul>	
	5	European army?	Article 42(2) TEU	Progressive move towards the creation of a truly European army. Building on the PESCO initiative, the EU could move towards creating its 'common defence'. As a first step one could envisage common financing and procurement of capabilities supported by the EU budget, sharing of expensive military assets and technological innovation aimed at reducing defence costs.	
	6	Financing of civilian EU missions	Article 43(3) TEU, first subparagraph	A Council decision establishing a special procedure allowing rapid access to appropriations in the Union budget, for the urgent financing of initiatives in the framework of the CSFP, in the context of civilian missions	

POLICY AREA	SUBJECT MATTER		LEGAL BASIS	POSSIBLE EU MEASURES	
	7	Financing of EU military operations	Article 43(3) TEU, second subparagraph	An intergovernmental agreement to set up a start-up fund, made up of Member State contributions, to allow for the financing of the preparation of EU military operations not covered by the EU budget	
Revenue and budget, including structural funds	8	Customs cooperation	Article 33 TFEU	Setting up of a European Customs Force	
	9	Fight against fraud	Article 325(4) TFEU	Creating a task force of EU civil servants and seconded national experts to support national administrations in the fight against fraud (a 'European corps')	
	10	Structural and investment funds	Article 177 TFEU	<ul style="list-style-type: none"> <li>Laying down explicit rule of law conditionalities in the secondary legislation governing structural and investment funds</li> <li>Laying down procedural rules for assessing the fulfilment of <i>ex ante</i> conditionalities</li> </ul>	
	11	Conditionality and the rule of law	Article 121 TFEU	<ul style="list-style-type: none"> <li>Reorientation of distributive policies by establishing a clear link between additional funding and successful achievement of policy objectives</li> </ul>	
Migration and asylum	12	External borders	Article 77(2)(d) TFEU	<p>Enactment of rules concerning:</p> <ul style="list-style-type: none"> <li>information exchange and operational cooperation between EU agencies and Member States</li> <li>cooperation with third countries' authorities;</li> <li>technological modernisation of border management;</li> <li>strengthening the EU's capacities in search and rescue operations;</li> <li>further involvement of the European Asylum Support Office in the European Border and Coast Guard activities, possibly by merging both agencies and creating a unique European Border and Asylum Agency.</li> </ul>	
	13	Irregular immigration	Article 79(2)(c) TFEU	<p>Establishment of common rules on:</p> <ul style="list-style-type: none"> <li>cooperation between Member States and third countries to develop common return interventions;</li> <li>criminalisation of illegal immigration;</li> </ul>	

POLICY AREA	SUBJECT MATTER		LEGAL BASIS	POSSIBLE EU MEASURES	
				<ul style="list-style-type: none"> <li>clearer rules in relation to the respect of human rights in return decisions and interventions, especially when third countries are involved.</li> </ul> <p>Possibly also to grant executive powers to the EU in relation to the adoption or the execution of return decisions.</p>	
	14	Solidarity on borders, migration and asylum	Article 80 TFEU	Secondary legislation could identify variables to measure the common responsibility to be shared and its distribution between Member States in these policy areas, providing for mechanisms that allocate assistance whenever a Member State is assessed to be facing a disproportionate responsibility on the basis of the agreed parameters.	
<b>Criminal law, criminal justice and fight against terrorism</b>	15	Extension of areas of EU criminal law	Article 83(1) TFEU, third subparagraph	Adoption by the Council of a decision laying down common definitions of crimes against humanity and war crimes	
	16	Terrorism prevention	Article 84 TFEU	Creating of a pan-European system for surveillance of potential terrorists and other dangerous criminals	
	17	Strengthening the powers of Eurojust	Article 85(1)(a) TFEU	Regulation amending Eurojust regulation to allow Eurojust to initiate criminal investigations to be conducted by national law enforcement bodies	
	18	Common investigation techniques	Article 87(2)(c) TFEU	Creating a legal framework for the existing informal networks of Council experts	
	19	Cross-border criminal justice and police operations	Article 89 TFEU	<ul style="list-style-type: none"> <li>Broadening the scope of cross-border hot pursuit by police, to include also hot pursuit on water and in the air and to simplify the procedures</li> <li>Harmonisation of police communication standards across the EU (common frequency)</li> <li>Harmonisation of legal police equipment to make cross-border operations easier</li> <li>Enactment of rules allowing prosecution service and criminal justice easily operate in a cross-border setting</li> </ul>	

POLICY AREA	SUBJECT MATTER		LEGAL BASIS	POSSIBLE EU MEASURES	
	20	Freezing of terrorist assets under AFSJ	Article 75 TFEU	<ul style="list-style-type: none"> <li>Creation of a comprehensive anti-terrorist administrative legal framework, including such areas as policing, immigration and asylum</li> </ul>	
	21	Fundamental rights in criminal procedure	Article 82(2)(b) TFEU	<p>Adoption of minimum rules concerning:</p> <ul style="list-style-type: none"> <li>the rights of detainee and preventive detention;</li> <li>mentally disordered offenders;</li> <li>the right to an appeal in criminal matters;</li> <li>double jeopardy (<i>ne bis in idem</i>);</li> <li>the right to be tried without undue delay</li> </ul>	
	22	Administrative cooperation in AFSJ	Article 74 TFEU	<ul style="list-style-type: none"> <li>Laying down rules on administrative cooperation in the AFSJ which can include single transmission of information, databases, mutual information mechanisms or alert systems, mutual administrative assistance, joint administrative teams and joint operations</li> <li>Creation of a peer review mechanism in the AFSJ, based on administrative cooperation between Member States, which would facilitate the exchange of good practice, enable mutual learning, foster policy dialogue and improve consistency</li> </ul>	
Civil law, company law	23	European Business Code	Articles 50 and 114 TFEU	<ul style="list-style-type: none"> <li>Enactment of a European Business Code to eliminate law-related barriers in the single market and create a level-playing field, especially for SMEs</li> </ul>	
	24	Civil justice	Article 81(2)(f) TFEU	<ul style="list-style-type: none"> <li>Elimination of linguistic barriers for cross-border civil proceedings</li> <li>Broader promotion of arbitration proceedings as an alternative to traditional courts</li> <li>Creation of European Expedited Civil Procedure for business litigation</li> <li>Establishment of European Commercial Court</li> </ul>	
	25	EU intellectual property rights	Article 262 TFEU	<ul style="list-style-type: none"> <li>Adoption of a regulation conferring on the Court of Justice of the EU jurisdiction over litigations in the field of intellectual property</li> </ul>	

POLICY AREA	SUBJECT MATTER		LEGAL BASIS	POSSIBLE EU MEASURES	
<b>Economic policies, Economic and Monetary Union</b>	26	Euro-area multilateral economic surveillance	Article 121(6) TFEU	<ul style="list-style-type: none"> <li>Introducing a rule requiring country-specific recommendations (CSR) to be public unless it is justified for legitimate reasons.</li> <li>Issue ex-ante impact assessments of CSR on rights covered by the Charter of Fundamental rights, in order to ensure that emergency measures remain proportional.</li> </ul>	
	27	Reaching common positions for the euro area	Article 138(1) TFEU	<ul style="list-style-type: none"> <li>Creation of new ad hoc working groups in order to strengthen the Eurogroup coordination on external aspects (e.g. IMF representation)</li> <li>Coordination of position between Eurogroup and non-euro-area Member States within the Economic and Financial Committee to coordinate EU-wide common position on matters of interest for the whole Union</li> </ul>	
	28	Stronger euro-area representation in the IMF	Article 138(2) TFEU	<ul style="list-style-type: none"> <li>Creating a single external representation of the euro area in the IMF (single euro constituency at IMF)</li> <li>Ensuring full membership of the EU in international economic and financial institutions (need to modify IMF rules)</li> </ul>	
	29	Balance of payments assistance	Article 143(2) TFEU	<ul style="list-style-type: none"> <li>Establishment of enhanced balance of payments assistance to non-euro-area Member States in the form of a precautionary conditioned credit line (PCCL) or an enhanced conditions credit line (ECCL)</li> </ul>	
	30	Energy policy	Article 194(1)(b) and (2) TFEU	<ul style="list-style-type: none"> <li>Adoption of common rules on the EU energy mix</li> <li>Creation of EU-wide energy tax to discourage the use of energy sources with high greenhouse gas emissions</li> <li>Full integration of EU energy market</li> </ul>	
<b>Institutional provisions</b>	31	Uniform EP electoral procedure	Article 223(1) TFEU	Adoption of a regulation providing for a truly uniform election procedure to the EP, with the same rules on constituencies, calculation of votes, age for voting, etc. across the whole Union	
<b>Social policy</b>	32	Social Europe	Article 158 TFEU	<ul style="list-style-type: none"> <li>Enacting rules protecting citizens employed in the platform economy,</li> <li>Creation of a European unemployment fund and an EU-wide unemployment benefit fund</li> </ul>	

POLICY AREA	SUBJECT MATTER		LEGAL BASIS	POSSIBLE EU MEASURES	
				<ul style="list-style-type: none"> <li>Strengthening the social dimension of the MFF, especially regarding social investments</li> </ul>	
<b>Culture and education</b>	33	School-business cooperation	Article 166(4) and (2) fourth indent TFEU	<ul style="list-style-type: none"> <li>Broader and deeper cooperation between education establishments (e.g. universities) and companies</li> <li>Ensuring better funding for Erasmus+</li> <li>Creating more exchange opportunities for trainees</li> </ul>	
	34	Factual information on Europe in third countries	Article 167(5) first indent, (2) first indent	<ul style="list-style-type: none"> <li>Granting a specific mandate to promote European identity and narrative to the EU Network of National Institutes of Culture (EUNIC) and to the EU delegations in third countries</li> <li>Strengthening Euronews financially and structurally to allow to promote EU narratives in third countries</li> </ul>	

## Analysis of 34 specific unused or under-used legal bases

# 1 Boosting national support for EU external action

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

## Current challenges and policy debates

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

## Scope for action

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

## More funding for Common Foreign and Security Policy

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

## Impact assessment in Common Foreign and Security Policy

The European Parliament can help ensure that the HR/VP and the Council perform the role assigned to them by Article 24(3), namely of ensuring Member States' compliance with the principles enshrined in the Treaty. This task compensates for the fact that the Court of Justice of the EU has no jurisdiction in foreign and security policy. The role gives the HR/VP the task of leading Member States to a position that is commonly agreed and consistent with the principles of EU external action. As chair of the Foreign Affairs Council (Article 27(1) TEU), the HR/VP is in a privileged position to do so; while the Commission oversees the process of streamlining the CFSP. This streamlining is a challenge as Member States [often](#) prioritise political over legal considerations, as in the case of the development of a common EU position in crises (Libya is an example). Increased compliance of Member States could come from ex-ante impact assessments of foreign policy strategies, in spite of their non-legislative nature, and more added value reports, given directly to the permanent representations.

The current [proposal](#) to [reduce](#) unanimity in foreign affairs and to replace consultation by co-decision between Parliament and Council, if supported by Member States, would be a clear indication of support for the EU's CFSP and would enable the Council and the HR/VP to ensure EU Member States' compliance with the principles of loyalty and mutual solidarity more effectively. Parliament had already [called](#) for this move.

## The legal basis

### Article 24(3) TEU

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

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

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

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

## Use of legal basis to date

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

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

## FURTHER READING

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

EPRS, [Peace and Security in 2018: Overview of EU action and outlook for the future](#), 2018.

## 2 Ensuring efficient decision-making in foreign policy

Being capable of world politics, or *Weltpolitikfähig*, is European Commission President Jean-Claude Juncker's [vision](#) for the European Union. In his 2018 State of the Union address to the European Parliament, he called to make use of the 'lost treasure' of the Lisbon Treaty – Article 31(3) of the Treaty on European Union (TEU). Should the EU do so, it could significantly improve its ability to speak with one voice and take faster decisions in the area of Common Foreign and Security Policy (CFSP).

### Current challenges and policy debates

As things stand [today](#), decisions regarding the EU's external relations and [foreign affairs](#) are taken by the Council of the EU (henceforth the Council) acting by unanimity, on the basis of guidelines set by the European Council, with the European Parliament having no co-decision powers. This consensus-based method requires a lot of time, and often paralyses decision-making in foreign affairs due to the veto available to any Member State. Additionally, foreign policy is still widely seen as a largely executive power and a symbol of sovereignty. In the current [geopolitical environment](#), with crises in the EU's neighbourhood, threats not bound to geographical borders, Brexit and a weakened transatlantic relationship, more efficient decision-making in foreign affairs is necessary for the EU to be able to speak with one voice on the world stage. Due to the aforementioned factors and the unpredictability of the security climate more broadly, political momentum has grown to boost [Member States' cooperation in defence](#) through initiatives such as the [European Defence Fund](#) and [Permanent Structured Cooperation](#). According to a March 2018 [Eurobarometer survey](#), 75 % of citizens support a common defence and security policy for the EU. The [passerelle](#) clause for CFSP in Article 31(3) TEU is an opportunity in the Treaty to move decision-making from unanimity to [qualified majority voting](#) (QMV), following unanimous agreement by EU leaders.

Debates surrounding the use of Article 31(3) TEU tend to revolve around the advantages potentially gained by larger Member States should QMV be introduced, and the disadvantages for smaller Member States, which currently have the power to veto any proposal. The current political momentum could make previously unsuccessful French and German [proposals](#) for a move to QMV in CFSP a reality – at least in some areas. The Commission has [proposed](#) questions of human rights in international fora, sanctions regimes and [civilian missions](#) as areas in which QMV could be applied.

### Scope for action

#### Challenging the *Common of the Foreign and Security Policy*

It is widely [acknowledged](#) that the key precondition for a robust EU foreign policy is a [common strategic culture](#) and shared threat perceptions. This is where difficulties in finding unanimity stem from, since Member States have different views on sensitive matters. [Academics](#) have argued that unanimity is unlikely to be achieved on delicate questions regarding the use of force or interference in third countries' domestic affairs, as the examples of [Iraq](#) in 2003 and [Syria](#) in 2013 demonstrate. However, there is a risk that QMV might result in a [democratic deficit](#) and weaken the EU's legitimacy domestically by raising issues of sovereignty, confidentiality and dominance of larger Member States. So far, the progressive involvement of the EP in CFSP has helped increase its democratic accountability. One cure for a potential democratic deficit could be to involve the EP even more closely and thus give a greater say to citizens' representatives. Although, the EP's [formal powers](#) in CFSP are limited, it nonetheless has an [increasing influence](#) as a 'norm entrepreneur' in human rights, in its close relation with the High Representative for Foreign Affairs and Security Policy / Vice-President of the Commission (HR/VP) and as a diplomatic actor through its [44 delegations](#). In its [resolutions](#), the European Parliament has characterised the current decision-making process for CFSP as 'the main obstacle to effective and timely external EU action', signalling the need for mechanisms to react more swiftly to crises, and explicitly [calling for](#) the use of Article 31(3) TEU. In this respect, Parliament could make increasing use of its discursive power and political influence through a resolution explicitly calling for the HR/VP to raise the extension of QMV to CFSP with the European Council, as well as to address it in a parliamentary plenary debate. In another [resolution](#), Parliament makes a further call to reduce unanimity in foreign affairs and to fully replace 'the consultation procedure by co-decision between Parliament and

Council'. Such changes would bring the CFSP into line with other major policy areas on which the EU has established itself as a global actor and the EP is fully involved, such as [trade](#). Another means to increase the influence and scrutiny of the EP in CFSP would be by converting its Sub-committee on Security and Defence (SEDE) into a fully fledged parliamentary committee, as an [EP resolution](#) suggests. The resolution argues that this move would offer greater accountability over the foreign affairs portfolio, and wider scrutiny responsibilities for legal acts related to CFSP. Moreover, Parliament could also author a report on a recommendation to the Council, the Commission and the HR/VP on using Article 31(3) TEU.

### Limits and opportunities

The scope of Article 31(3) TEU is further limited by Article 31(4) TEU, which excludes decisions with military or defence implications. Nevertheless, the TEU does not define what the terms military and defence implications encompass, nor what is the difference between them. With respect to [civilian CFSP missions](#), for example, convincing arguments could be made both in favour of and against their military/defence implications. Additionally, when excluding decisions with military/defence implications, Article 31(4) TEU does not refer specifically to the Common Security and Defence Policy (CSDP), the defence-focused part of CFSP. This could [imply](#) that (non-CSDP) CFSP decisions such as humanitarian assistance would also require unanimity.

This imprecision may provide flexibility in terms of what could fall under the exception. Given the favourable political climate, Parliament can play an important role in informing the debate of its preferences. Should QMV be introduced for CFSP, [academics](#) have argued that the EP should exert stronger control in order to 'secure the legitimacy of the CSDP' in the form of oversight over mandates and closer relations with the HR/VP. They also point out the negative implications of a situation in which Member States are publicly outvoted on sensitive policy issues such as Russia, the USA or China, which would in fact weaken the EU's external credibility as a global actor. Member States such as France and Germany have previously argued in favour of using this *passerelle* clause. Most recently, in their June 2018 [Meseberg Declaration](#), they proposed the creation of an EU Security Council and called for the extension of QMV to CFSP, as measures to increase the effectiveness of EU decision-making in the face of existential challenges such as migration, the digital revolution, climate change and the evolving [security environment](#).

## The legal basis

### Article 31(3) TEU

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

Most commonly known as the *passerelle* clause in CFSP, Article 31(3) TEU empowers the European Council to act unanimously to enable the Council to take decisions in some areas of CFSP by qualified majority voting. This provision allows for QMV to be used in CFSP without formal Treaty changes. The previous paragraph (Article 31(2) TEU), already endows the Council with QMV decision-making in certain pre-defined cases. While Article 31(3) TEU does provide a *passerelle* clause for faster decision-making in CFSP matters, it is limited by Article 31(4) TEU which excludes 'decisions having military or defence implications'. The EP has adopted three [resolutions](#) during its eighth term calling for use of the *passerelle* regarding foreign and defence matters.

### Use of legal basis to date

The *passerelle* clause of Article 31(3) TEU has not been used so far. [Literature](#) indicates previous attempts to make use of it, notably by France and Germany, which were ultimately vetoed. In addition, in some Member States such as [Germany](#) and [Denmark](#), the use of the clause [would require](#) prior parliamentary consent. The Commission has [invited](#) EU leaders to expand the scope of QMV via the *passerelle* clause at the summit on the future of Europe taking place on 9 May 2019 in Sibiu, Romania.

### FURTHER READING

EPRS, [Peace and Security in 2018: Overview of EU action and outlook for the future](#), 2018.

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

## 3 Strengthening the Parliament's role in CFSP

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

### Current challenges and policy debates

The Common Foreign and Security Policy is an area which receives significant public support. According to the latest [polls](#), a clear majority of European citizens want the EU to speak with one voice and act together when dealing with third countries. In addition, 73 % of EU citizens [would like](#) the EU to intervene more for the promotion of peace and democracy in the world, a key aim of the CFSP. While the increase in public support suggests that the CFSP is becoming more relevant for EU elections, the parliamentary dimension of the CFSP is relatively limited. Although the European Parliament enjoys legislative co-decision powers in the areas of EU trade and aid policy, as well as budgetary powers in relation to various aspects of foreign policy instruments and to the budget of the European External Action Service (EEAS) itself, decision-making on the CFSP remains intergovernmental. Decisions are [made](#) by unanimity by the Council on the basis of the guidelines set by the European Council, with no co-decision powers for the European Parliament. By increasing the Parliament's influence in EU foreign policy through both formal and informal means, albeit gradually, the Lisbon Treaty established that the European Parliament is part of the democratic accountability link to the CFSP. On the basis of Article 36 TEU, which provides for the Parliament's views to be taken into consideration in foreign policy choices, in conjunction with its budgetary power, Parliament played a significant role in setting up the EEAS. By agreeing to the 2010 '[Declaration on Political Accountability](#)' to define the relationship with the European Parliament, the High Representative/Vice President (HR/VP) affirmed the importance that should be attributed to Parliament in CFSP matters. As things stand, the Parliament votes on the annual resolution on the main aspects and basic choices of foreign and security policy and negotiates the adoption of the EU's external financial instruments. The further 'parliamentarisation' of the EU's foreign policy within the scope of the Lisbon Treaty has been on the [agenda](#) of the European Parliament for this past term and this will most likely continue to be the case in the future.

### Scope for action

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

### Security and defence

Specific fields of EU external action offer illustrative examples of how Article 36(2) TEU could be further utilised to ensure that recommendations made by the European Parliament are taken on board. One such field is that of security and defence which has seen significant progress in recent years, following the release of the [EU Global Strategy](#). It is also a field where the European Parliament has made forward-looking recommendations for further action. For example, Parliament has [called for](#) the upgrading of its Sub-Committee on Security and Defence into a full committee starting with the 2019-2024 legislature. This would increase the possible number of simultaneous own-initiative reports in the defence and security area, with the possibility to directly recommend report topics to the relevant authorities, to adopt reports and to have a direct access to the plenary. The European Parliament has also [called](#) on the HR/VP to launch an EU security and defence white paper, to be

based on the EU's Global Strategy. Going even further, it has [proposed](#) the evaluation, 'in close coordination with the VP/HR, of the opportunity to establish a Directorate-General for Defence within the Commission (DG Defence), which would drive the Union's actions to support, coordinate or supplement the actions of the Member States aimed at the progressive framing of a common defence policy'.

### **A mechanism to monitor the implementation of the European Parliament's views?**

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

## The legal basis

### **Article 36(2) TEU**

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

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

### Use of legal basis to date

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

### FURTHER READING

EPRS, [Peace and Security in 2018: Overview of EU action and outlook for the future](#), 2018

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

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

## 4 Improving data protection in foreign affairs

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

### Current challenges and policy debates

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

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

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

### Scope for action

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

### Data protection rules for CFSP-related actions

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

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

### Data-sharing agreements and counter-terrorism measures

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

### Cybersecurity

An increasingly challenging and borderless threat for the EU in [the area of CFSP](#) is [cybersecurity](#). Enhanced measures and [coordinated responses](#) at EU and Member State level to counter cyber-attacks are in definite [demand](#). These will involve data processing and require adequate rules, possibly based on Article 39 TEU.

Finally, the specific rules on data protection to be adopted under CFSP should also specify which independent authority (EDPS or other) should oversee compliance with those rules.

## The legal basis

### Article 39 TEU

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

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

### Use of legal basis to date

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

### FURTHER READING

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

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

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

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

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

## 5 Establishing an EU army?

The progressive framing of a common EU defence policy, potentially leading to common EU defence, is provided for by the Treaty of Lisbon. In the face of a transforming geopolitical environment and emergent new threats, together with the expectation that Europe should protect, several of the Treaty's defence-related provisions have been implemented in recent years, yet more remains to be done if the prospect of a truly common defence is to become reality.

### Current challenges and policy debates

In recent years, security and defence have ranked remarkably high in public support for EU policies, with approximately 75 % of citizens in favour of common security and defence according to a March 2018 [Eurobarometer](#) survey. These high figures are undoubtedly related to the growing instability and uncertainty in the global and regional environment. The crises in the Middle East, the growing terrorist threats within and beyond EU territory, Russian aggression in the EU's eastern border region and resurgent nuclear antagonism are some of the security risks that have become a daily part of the debate on EU security and defence. In addition, [strategic forecasting agencies](#) and national strategies around the world point out that these multiple threats are here to stay for the near – and perhaps distant – future. Illustrating the high level of insecurity and fear for the state of peace, [global defence spending](#) is forecast to reach US\$1.67 trillion by the end of 2018, the highest level since the end of the Cold War.

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

While the idea of an EU army gained traction in November 2018, due to the support it received from the French President, Emmanuel Macron, and subsequently the German Chancellor, Angela Merkel, in her address to the [European Parliament](#), the eventual creation of an EU army had already been explicitly mentioned by the European Commission President, Jean-Claude Juncker, in an [interview](#) he gave back in 2015. Since then, a strong EU defence has been a key objective of the Commission President's annual State of the Union speeches, up to and including the latest one ([2018 speech](#)), embodied in the ninth [priority](#) of the Commission work programme – 'EU as a stronger global actor'. The complexity of the concept of an EU army has led to widespread debate about what it means, including in the context of EU-NATO relations and the attainment of EU strategic autonomy as embodied in the EUGS. While alarmist voices perceive it as contradictory to NATO, many policy- and law-makers, such as [Arnaud Danjean](#) (EPP, France) and German Defence Minister [Ursula von der Leyen](#), have hurried to explain the complementary nature of the two.

## Scope for further EU action

It is hard to determine a timeline towards establishment of an EU defence union or EU army in some form. But scope for further EU action based on the Treaty abounds. The European Parliament has [called for](#) its Sub-Committee on Security and Defence (SEDE) to be upgraded to a full committee, thus increasing the potential number of own-initiative reports in the defence and security area, and allowing the committee to recommend report topics and rapporteurs directly to the Conference of Presidents, to adopt reports, and submit them direct to the plenary. It has also [called](#) on the HR/VP to launch an EU security and defence white paper based on the EUGS. Going even further, it has [proposed](#) evaluating the creation of a directorate-general (DG) for defence within the Commission. Parliament supports effective use of the existing CSDP tools, coordinating national actions and pooling resources more closely. It highlights the importance of resolving the longstanding operational problems related to the deployment of EU battlegroups, operational since 2007 yet never deployed.

### Commission reflection paper on European defence

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

## The legal basis

### Article 42(2) TEU

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

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

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

### Use of the legal basis to date

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

### FURTHER READING

EPRS, [Peace and Security in 2018: Overview of EU action and outlook for the future](#), 2018

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

## 6 Clearer process for financing civilian EU missions

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

### Current challenges and policy debates

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

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

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

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

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

## Scope for action

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

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

## The legal basis

### **Article 41(3), first subparagraph, TEU.**

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

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

## Use of legal basis to date

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

### FURTHER READING

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

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

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

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

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

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

## 7 Simplifying the funding of EU military operations

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

### Current challenges and policy debates

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

EU military operations are a key element of this approach. The EU currently deploys six [military](#) missions and operations in Europe, Africa and Asia. Rapid deployment of missions and operations can be key to their success. According to a [commentary](#) on Article 41 TEU, the EU has often struggled with the challenge of rapid deployment because of a lack of rapid financing for preparatory measures, among several other obstacles. In recent years, these problems have been successfully addressed through the introduction of the Athena mechanism. The TEU does not make provisions for the financing of operations having military or defence implications from the EU budget. A large percentage of the costs associated with CSDP military operations (i.e. expenditure for troops, arms, equipment and deployment) is borne by Member States (and third countries) participating in an operation, in accordance with the principle that 'costs lie where they fall'. In 2004, EU Member States decided to share some of the costs of military operations by setting up the [Athena financing mechanism](#), on the basis of Article [41\(2\)](#) TEU. Athena also covers common costs relating to the preparatory phase of a specific operation, including costs arising in the context of exploratory missions and preparations, in particular fact-finding missions and reconnaissance (Annex II of [Council Decision \(CFSP\) 2015/528](#)). Athena also specifically includes early or pre-financing arrangements for military rapid-response operations (Article 26 of Decision 2015/528).

### Scope for action

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

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

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

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

## The legal basis

### **[Article 41\(3\), second subparagraph TEU.](#)**

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

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

## Use of legal basis to date

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

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

## FURTHER READING

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

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

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

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

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

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

## 8 Facilitating customs cooperation

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

### Current challenges and policy debates

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

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

### Scope for action

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

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

### Common risk management

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

### Shared IT supplier

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

customs operations, together with their cross-border character, a 'blended solution' could better respond to threats than a single overarching one.

### Harmonised sanctions

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

### More control equipment and human networking

To better address security challenges and criminal activities, and to enhance multi-agency cooperation, more customs control equipment and capacity building actions around human networking and competency acquirement would be needed.

### Unified EU customs force and EU criminal law

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

## The legal basis

### Article 33 TFEU

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

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

### Use of legal basis to date

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

### FURTHER READING

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

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

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

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

## 9 Strengthening the fight against fraud

Three quarters of EU citizens would like the European Union (EU) to do more in the fight against tax fraud, and two thirds think that the Union is not doing enough. Article 325(4) TFEU gives the EU a broad mandate to introduce measures aimed at combating fraud which affects EU financial interests, including customs duties and Value Added Tax (VAT) which are among the sources of income to the EU budget. The legal basis has been used to create the European Anti-Fraud Office (OLAF) and the European Public Prosecutor's Office, but there is still room for much more generous use, especially with regard to laying down a substantive anti-fraud policy and providing for EU supervision over national customs and taxation authorities.

### Current challenges and policy debates

According to a 2016 Eurobarometer survey on [citizens' perceptions and expectations](#), 75 % of EU citizens surveyed would like the EU to intervene more in the fight against tax fraud, one of the areas with the strongest support for more EU involvement. At the same time, two thirds of EU citizens evaluate the current EU action in the fight against fraud as insufficient. Another side of fraud is corruption, especially in the context of public procurement. A [2013](#) Eurobarometer survey revealed that **32 %** of companies operating in an EU Member State, and that had participated in a public procurement procedure, thought that corruption prevented them from winning a contract. In a [2017](#) Eurobarometer survey on business attitudes towards corruption in the EU, the proportion of respondents who think corruption has prevented them from winning a public tender has remained the same: 31 %. Protection of EU financial interests is a [crucial element](#) of the Union's agenda because transparent, regular and sound financial management is important both for citizens, aiming at strengthening their confidence in the EU institutions, for businesses, and for NGOs, offering them a level playing field regarding access to EU funding. According to the Commission's 2017 fight against fraud [report](#), a total of 1 146 irregularities were reported as fraudulent (i.e. 7.5 % of all irregularities detected and reported), involving about €467 million (representing 18.1 % of all financial amounts affected by irregularities) and covering both expenditure and revenue irregularities. [Cohesion policy and regional development policy](#) are considered to be most affected by fraudulent behaviour. However, at the same time, we must remember that over 80 % of the EU budget is managed at national level, making the Member States primarily responsible for fighting fraud. In 2017, OLAF opened 215 investigations and concluded 197, recommending financial recoveries worth €3.1 billion, of which €2.7 billion related to revenue.

### Scope for action

#### European Parliament's position

The European Parliament has repeatedly called for an integrated approach towards fraud, tax avoidance and corruption, as well as for strengthening multidimensional cooperation and coordination between the Member States and the EU institutions. One can mention in this respect Parliament's resolutions on [OLAF](#) (2008), on [organised crime, corruption and money laundering](#) (2013) and on the [Annual Tax Report](#) (2015).

#### Strengthening tax authorities: a European Tax Corps

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

#### Creating a European Customs Service

Given that customs duties are an exclusive EU competence (Articles 28-29 TFEU), as well as an own resource of the EU budget, one could also envisage the creation of a European Customs Service, which could either assist the national customs authorities or even replace them in the long term.

## Substantive anti-fraud policy

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

## Legal basis

### Article 325(4) TFEU

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

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

## Use of legal basis to date

Article 325 TFEU (and its predecessor, [Article 280 EC](#)) have been the legal basis for 21 legal acts, consisting of 6 regulations and 15 decisions. These include the following regulations, currently in force: Regulation 250/2014 establishing a programme to promote activities in the field of the protection of the financial interests of the EU ([Hercule III](#) programme); [Regulation 883/2013](#) concerning investigations conducted by OLAF; [Regulation 2016/2030](#) concerning the secretariat of the OLAF Supervisory Committee; [Regulations 2015/1525](#) and [766/2008](#), both amending Council Regulation (EC) No 515/97 to ensure the correct application of the law on customs and agricultural matters. A number of decisions, no longer in force, were also based on this article, including the one [setting up](#) a committee of inquiry to investigate alleged contraventions and maladministration in the application of Union law in relation to money laundering, tax avoidance and tax evasion, and those establishing the [Hercule](#) and [Hercule II](#) programmes. Recently submitted legislative proposals based on Article 325 include a proposed regulation [establishing](#) the EU Anti-Fraud Programme, a proposed regulation [amending](#) the 2013 OLAF Regulation, and a proposed directive on [whistle-blower protection](#).

### FURTHER READING

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

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

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

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

## 10 Making better use of conditionality in European structural and investment funds

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

### Current challenges and policy debates

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

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

### Scope for action

#### **Simplification of administrative procedures**

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

## Adjusting the scope of conditionalities

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

## Improved enforcement and monitoring

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

## The legal basis

### Article 177 TFEU

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

## Use of legal basis to date

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

## FURTHER READING

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

EPRS, [Challenges for EU cohesion policy](#), 2017.

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

Policy Department for Structural and Cohesion Policies, [EU Member States' preparedness for cohesion policy 2014-2020](#), 2013.

Policy Department for Structural and Cohesion Policies, [Ex-Ante conditionalities in cohesion policy](#), 2012.

## 11 Linking funding conditionality to the rule of law

The long-term challenges facing the EU include the consolidation of European economic and social frameworks, the management of the refugee crisis, the reduction of greenhouse gas emissions and respect for the rule of law by Member States. The reinforcement and improvement of the conditionality of EU budget spending is one of the main tools in place to respond to these challenges, especially when it comes to respect for the rule of law.

### Current challenges and policy debates

About 94 % of the EU budget – set at [€160 billion](#) in 2018 figures – is intended to fund projects and activities on the ground, contributing substantially to [public investment](#). The principle of conditionality – the set of rules aimed at ensuring that recipients of EU funds uphold EU values, respect the [rule of law](#) and adopt EU economic recommendations – is considered the main political leverage in the EU budget. Already in 2003, the [Sapir report](#) had stressed that the key principle of conditionality should be strengthened. Since 2007 the EU budget has embraced the [concept of solidarity](#), built on the idea that all Member States and the Union are confronted with the same challenges and risks. In a [2017 report](#) on the added value of ex ante conditionalities in the European structural and investment funds, the Commission stressed the importance of the contribution of conditionality to the implementation of EU legislation, and to the triggering of policy reforms and structural changes. The EU has already introduced certain levels of conditionality aimed at reinforcing EU values and respect for the rule of law through EU spending, with the European structural and investment funds (ESI) a case in point (see [fiche #10](#)). Furthermore, the [EU justice scoreboard](#), monitoring the functioning of national judiciaries, has been integrated into the [European Semester](#). The current rules on conditionality, however, are mostly voluntary, often relate to national characteristics (rather than EU objectives), and are based on 'soft' mechanisms – i.e. non-obligatory guidelines. The ESI funds provide a significant example. Until the [2007-2013 multiannual financial framework \(MFF\)](#), these funds were subject to macroeconomic conditionality, and allocation was linked to compliance with the Maastricht criteria – the [Stability and Growth Pact](#). Not all conditions (adopted by the Council) were legally binding for beneficiary countries, and the main enforcement mechanism was voluntary.

### Scope for action

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

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

The second conditionality clause concerns respect for human rights. The challenge is to broaden the definition of the existing conditionality to an extent that could address respect for the rule of law. In the case of human rights, for instance, one example is the provision contained in the 2013 regulation on the [European Social Fund](#), according to which this fund should comply with Article 5(2) of the Charter of Fundamental Rights of the EU (which provides that no one shall be required to perform forced or compulsory labour). Other references to human rights are contained in EU regulations mentioning [gender equality](#), the [fight against discrimination](#) and [fundamental rights](#). In the case of failure to act on economic recommendations, it could be argued that an independent and professional judiciary and a politically neutral prosecution service, are a necessary precondition for the fight against fraud and prosecution of crimes relating to EU fraud, and therefore could be considered a conditionality to avoid negative economic consequences for the EU budget. The European Parliament has [stressed](#) the absence of mechanisms to suspend financial assistance where a beneficiary country fails to observe the basic principles enunciated in

the respective instrument and notably the principles of democracy, the rule of law and respect for human rights. In all these cases, possible actions for the EU should include the re-orientation of distributive policies, by emphasising a clear link between additional funds and policy objectives; the interlink of conditionality with spending policies, with specific goals to orientate country-specific recommendations; and a stronger role for the European Parliament in the exercise of its discretionary powers.

## The legal basis

### Article 121 TFEU

1. Member States shall regard their economic policies as a matter of common concern and shall coordinate them within the Council, in accordance with the provisions of Article 120. [...]
2. In order to ensure closer coordination of economic policies and sustained convergence of the economic performances of the Member States, the Council shall, on the basis of reports submitted by the Commission, monitor economic developments in each of the Member States and in the Union as well as the consistency of economic policies with the broad guidelines referred to in paragraph 2, and regularly carry out an overall assessment. [...]
4. Where it is established, under the procedure referred to in paragraph 3, that the economic policies of a Member State are not consistent with the broad guidelines referred to in paragraph 2 or that they risk jeopardising the proper functioning of economic and monetary union, the Commission may address a warning to the Member State concerned. The Council, on a recommendation from the Commission, may address the necessary recommendations to the Member State concerned. The Council may, on a proposal from the Commission, decide to make its recommendations public. [...]

### Article 322(1) TFEU

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

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

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

## Use of legal basis to date

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

### **MFF proposal on protection of EU budget in the event of generalised rule of law deficiencies**

On 3 May 2018, the Commission put forward, as part of the MFF package, a [proposal](#) for a regulation on the protection of the Union's budget in the event of generalised deficiencies as regards the rule of law in a Member State. The proposal addresses, from a budgetary perspective, generalised deficiencies as regards the rule of law, including threats to the independence of the judiciary, arbitrary or unlawful decisions by public authorities, limited availability and effectiveness of legal remedies, failure to implement judgments, or limitations on effective investigation, prosecution or sanctions for breaches of law. It provides for the possibility for the Commission to make proposals to the Council on sanctions measures with regard to EU funding, including suspension of payments, suspension, reduction or even termination of legal commitments (to pay), suspension of programmes, and the transfer of money to other programmes.

### FURTHER READING

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

## 12 Better management of external borders

Since the entry into force of the Lisbon Treaty, the European Union (EU) has had the competence to gradually introduce an integrated management system for the EU's external borders. This competence allows the EU to adopt 'any measure necessary' to develop such a system, including legislative harmonisation, support for transnational cooperation, coordination of public procurement or financial support. Until now, the most prominent use of the legal basis has been the creation of the European Border and Coast Guard (EBCG), but its scope would allow for further action.

### Current challenges and policy debates

The dismantling of internal border controls within the Schengen area and the development of the internal market have made it necessary to manage external borders efficiently. As border Member States have assumed a major burden in the managing of the EU's external borders, a great part of the [debate](#) has focused on the need to ensure solidarity and shared responsibility. The threat posed by serious crime with a cross-border dimension and the need to tackle irregular immigration – even if irregular arrivals to the EU have [dramatically decreased](#) since 2016 – have also dominated the [debate](#) on securing the EU's external borders. However, these concerns go hand in hand with three other debates. First, the figures related to the [number of migrant deaths](#) while trying to reach European shores have centred the [debate](#) on the need to enhance the EU's capacity to develop search and rescue operations, refrain from penalising those who assist people in distress at sea, fight organised networks involved in the smuggling of people, and develop a long-term migration policy that would address the root causes of irregular migration as well as provide legal and safe channels for migration and mobility. Cooperation with third countries is seen as an essential tool to achieve these goals. Second, [criticism](#) of some national and European authorities in relation to the way border management and return operations have developed has focused the [debate](#) on the need to guarantee full respect for fundamental rights – especially of vulnerable groups and minors – and the [principle of non refoulement](#) when planning and developing those activities. Finally, facilitating the [steadily increasing](#) passenger flows, and promoting mobility from and to the EU in an increasingly globalised world is also identified as an important challenge.

### Scope for action

#### More efficient management of the EU's external borders

The [European Parliament](#) has called for the introduction of a European Integrated Border Management system (EIBM), based on high common standards applied by all Member States and effective exchange of information between them. The [Schengen Borders Code](#) already regulates checks at external borders, but border surveillance and operational management are left to Member States, with the increasing participation of the [EBCG](#). Nonetheless, space is left for more EU action, whether in the form of centralisation and transfer of executive powers to the EU through the creation of a truly [European border guard](#), or in the form of increasing the EU's supervisory, regulatory and operational tools in the field. The first proposal raises serious [concerns](#) as regards the EU constitutional principle that attributes to Member States the ultimate responsibility for their own internal security (Articles 4(2) TEU and 72 TFEU) and in relation to the possible transfer of executive powers to an EU agency, a decision that might disrespect the Court of Justice's [case law](#) (e.g. [Case C-270/12](#)). The second possibility seems less controversial, allowing for further developments in various areas, inter alia, increasing the EU's [capacity](#) to develop operational interventions and providing the EBCG with further powers to command and control border management activities, in line with the September 2018 proposal presented by the [Commission](#); working on information exchange and operational cooperation between EU agencies and Member States; promoting [cooperation](#) with third countries' authorities; and boosting the technological modernisation of border management, e.g. through the uniform [automation of border checks](#), the use of [space-based products and services for border management](#), working further on the [interoperability](#) of IT systems for border management and on [European integrated systems](#) to control and detect illegal movements of certain products.

## Ensuring full compliance with human rights obligations

The [European Parliament](#) has also highlighted the need to ensure that actions taken by the EU in relation to border management fully respect fundamental rights and international obligations. Thus a great effort can be made in order to strengthen EU capacities in [search and rescue operations](#); to promote further involvement of the European Asylum Support Office in EBCG activities, even by merging both agencies and creating a unique [European Border and Asylum Agency](#); to ensure that first screening of migrants and return operations, especially when third countries are involved, fully respect human rights obligations; and, finally, to ensure that the technological modernisation of border management fully respects data protection and privacy.

## The legal basis

### Article 77 TFEU

1. The Union shall develop a policy with a view to: [...]

(c) the gradual introduction of an integrated management system for external borders

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

(d) any measure necessary for the gradual establishment of an integrated management system for external borders; [...]

Introduced by the Lisbon Treaty, the legal basis complements prior EU competences, especially those related to standards and procedures for border controls (current Article 77(2)(b) TFEU, [previously Article 62\(2\)\(a\) TEC](#)). EU measures are adopted by the European Parliament and the Council through the ordinary legislative procedure. The type of legal act to be adopted is not determined by the Treaties. As the EU competence is shared with Member States, subsidiarity and proportionality principles apply. Any EU measure must be governed by the principle of solidarity and fair sharing of responsibility pursuant to [Article 80 TFEU](#). Denmark opts in on a case-by-case basis only in relation to measures building upon the Schengen *acquis* ([Protocol No 22](#)), while the United Kingdom and Ireland opt in on a case-by case basis in relation to any measure adopted under this legal basis ([Protocol No 21](#)).

## Use of legal basis to date

### Legislative acts adopted

Up to now, the main use of Article 77(2)(d) TFEU has been in order to create the [EBCG](#), building on the existing [Frontex](#). It has also been used to establish the rules for the surveillance of the [EU's external sea borders](#) in operations coordinated by Frontex, and for a Status Agreement with [Albania](#) allowing Frontex to develop operations in that country. The legal basis has also been used in order to establish a mechanism for information exchange and cooperation between national authorities responsible for border management and Frontex ([Eurosur](#)), a system providing for the electronic registration of the entry and exit of third-country nationals admitted into the EU ([Entry/Exit System](#)) and a system determining the eligibility of all visa-exempt third-country nationals to travel into the Schengen Area ([ETIAS](#)). Finally, it has also been used in order to provide [financial support](#) to national activities linked to the development of EIBM.

### Legislative proposals under discussion

The Commission has recently proposed a [regulation](#) on the EBCG aiming to strengthen Frontex through the creation of a standing corps of 10 000 EU border guards and upgrading its mandate. A proposal to adopt a Status Agreement with the [former Yugoslav Republic of Macedonia](#) allowing Frontex to develop operations in that country is under discussion. The Commission has also adopted a proposal to upgrade the existing [EU Visa Information System](#) (VIS), a proposal on the use of the [Schengen Information System \(SIS\) in the field of border checks](#) and a proposal establishing a framework for [interoperability](#) between EU information systems for security, border and migration management. Finally, it has presented a proposal to set up a [new EIBM Fund](#) providing financial support to Member States securing the common external borders.

## FURTHER READING

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

Policy Department for Citizens' Rights and Constitutional Affairs, [European Travel Information and Authorisation System \(ETIAS\): Border management, fundamental rights and data protection](#), 2017.

## 13 Doing more to tackle irregular migration

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

### Current challenges and policy debates

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

### Scope for action

#### Preventing and combating irregular immigration

[Parliament](#) has frequently linked the prevention and fight against irregular immigration with the need to secure the EU's external borders, combat smuggling and human trafficking, provide legal and safe channels for migration and mobility, and address the root causes of irregular immigration through partnership with countries of origin. Some of these policies cannot be developed under the legal basis analysed here, but EU activities relating to border management, returns and the fight against smuggling fall under Article 79(2)(c) TFEU. There is still room for more EU action in this area, in addition to measures that could be taken in the area of border management (see [fiche #12](#)). On returns, future developments could include: further harmonising national rules in relation to standards and procedures for adopting return decisions, boosting [Member States' cooperation with each other and with third countries](#) to improve the management of returns, or further [promoting voluntary returns](#), for instance by establishing common rules to incentivise it. On the fight against smuggling, future action could include: [improving the existing EU legal framework](#) in order to align it with international standards; doing further work to identify, capture and dispose of [vessels](#) used by smugglers; enhancing cooperation between Member States, EU agencies and third countries to tackle smuggling; enhancing the implementation of sanctions for the employment of irregular migrants; or modifying the existing legislation to oblige Member States to issue residence permits for migrants cooperating with competent authorities.

#### Ensuring full compliance with human rights obligations

[Parliament](#) has asked consistently for a human-rights-based common European migration policy. In this vein, further developments could focus on ensuring adequate protection for victims of smuggling, strengthening the EU's capacities in [search and rescue operations](#), establishing clear rules [forbidding Member States from penalising](#) those providing migrants with humanitarian, or ensuring that migrants' [human rights and the principle of non-refoulement](#) are fully upheld in border control and return operations. [Parliament](#) has also consistently condemned the growing criminalisation of irregular migration, an issue

that could be tackled through measures attempting to diminish the use of detention in the immigration context or to decriminalise the irregular crossing of a border.

## The legal basis

### Article 79(2)(c) TFEU

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

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

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

## Use of legal basis to date

### Legislative acts adopted

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

### Legislative proposals under discussion

The Commission recently proposed a new [regulation](#) to boost the EBCG. Proposals to recast the [Regulation creating a network of immigration liaison officers](#) and the [Returns Directive](#) are also under discussion. The Commission has also presented proposals on: a new legal framework for [eu-LISA](#) activities, an upgrade of the existing [Visa Information System](#), a [recast of the Eurodac Regulation](#) including the possible use of the system for return activities, use of the Schengen Information System for [return](#) and [border check](#) purposes, and a framework for [interoperability](#) between EU information systems for police and judicial cooperation, asylum and migration. A proposal providing for the participation of [Norway, Iceland, Sweden and Liechtenstein in eu-LISA](#) activities is also under discussion. Finally, the Commission has presented a proposal to continue [providing financial support](#) for Member States activities in the area of return.

### FURTHER READING

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

Policy Department for Citizens' Rights and Constitutional Affairs, [Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants](#), study, 2016.

## 14 Boosting solidarity and responsibility-sharing on borders, asylum and migration

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

### Current challenges and policy debates

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

### Scope for action

According to a [study](#) on the cost of non-Europe, the return to a fully functioning Schengen Area would require enhanced EU action, including reforms to foster solidarity and a fair distribution of responsibility between Member States. Since the Treaty does not provide a detailed definition of the responsibility to be shared, scholars such as [E. Küçük](#) have argued that secondary legislation adopted by the EU in relevant policy areas and its interpretation by the Court of Justice of the European Union (CJEU) could facilitate implementation of the principle. A step in this direction would be an agreement on a definition of the responsibility to be shared and the inclusion of related measures to ensure its fair distribution whenever necessary in the legal acts adopted under Articles [77](#) (borders), [78](#) (asylum) and [79](#) (migration). Moreover, new actions could be taken in the area of border management and irregular migration (see [fiches 12](#) and [13](#)).

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

European Council on Refugees and Exiles ([ECRE](#)) made recommendations to improve the functioning of the CEAS by means of enhanced intra-EU solidarity tools. The ECRE favoured solutions that promote a more effective sharing of financial resources and expertise, coupling them with enhanced free movement rights for people who are granted international protection. Several recommendations related to strengthening the role and resources of the European Asylum Support Office (EASO), which was identified as a key actor in enhancing responsibility sharing.

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

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

The [European Commission](#) has proposed to boost the resources of the relevant EU funding programmes and agencies from €12.4 billion in the 2014 to 2020 programming period to €32.6 billion in the next, which would represent around 2.5 % of the 2021 to 2027 MFF. More specifically, the increase would finance further strengthening of the [European Border and Coast Guard](#). A proposal to reinforce EASO and transform it into the [European Union Agency for Asylum](#) is also being considered.

## The legal basis

### Article 80 TFEU

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

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

### Use of legal basis to date

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

### FURTHER READING

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

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

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

## 15 Extending the list of crimes addressed by EU criminal law policies

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

### Current challenges and policy debates

According to the recent Eurobarometer [Survey 89.2 of the European Parliament](#), 49 % of Europeans consider that the fight against terrorism is the top priority topic for the 2019 European elections campaign, ahead of combating youth employment, immigration, economy and growth. In the [Spring 2018 Standard Eurobarometer](#), terrorism came second in Europeans' top concerns, behind immigration and ahead of the economic situation. Cybercrime is also among Europeans' worries. A [2017 Eurostat survey](#) states that 86 % of Europeans feel increasingly exposed to cybercrime risks. The vast majority of respondents [consider](#) that terrorism, organised crime and cybercrime are key challenges to the internal security of the EU. The types of cross-border crime covered by the provisions of Article 83(1) TFEU are tackled by national authorities and by Europol as a coordinating EU agency. Europol targets mobile organised crime groups ([MOCGs](#)) active in areas such as drug-trafficking, robberies, burglaries, organised shoplifting and cash machine attacks. Of course, terrorism, human trafficking, cybercrime, corruption and money-laundering remain at the top of the list of cross-border crimes. Europol for instance initiated 66 113 new cases in 2017 through [SIENA](#), the crime information exchange IT network. Article 83(1) TFEU is key in this context, as it creates minimum rules and sanctions on areas of crime at EU level and allows for the list to be extended.

### Scope for action

#### European Parliament opinions on areas of crime

The European Parliament's resolutions on this topic refer to existing areas of crime and call for an extension of the current legislation based on Article 83(1)(2) TFEU, but not for the creation of new areas. For instance, in its resolution of 25 October 2016 on the fight against corruption and follow-up of the CRIM resolution ([2015/2110\(INI\)](#)), particularly in its paragraph 18, the Parliament calls on the Commission to draft specific rules on crimes that are not listed in Article 83(1)(2), such as wildlife and forest crime and the trafficking and export of radioactive materials and hazardous waste, but refers to them in relation to organised crime, which *is* already covered by that article.

#### Possible future actions?

Even if there is as yet no formal [definition](#) of the notion of serious crime at the EU level, the legislator could nevertheless decide to extend the list of areas of crime, thanks to Article 83(1)(3) TFEU, for instance by using the lists of crimes defined in the [Europol](#) and [EAW](#) legislation. But, as Article 83(1)(3) requires unanimity from the Council, the question is whether it is worth taking the risk of having a Member State reject the proposal. The use of Article 83(1)(3) will therefore suppose from Member States a strong collective involvement, stating that the related area of crime would be better fought on a cross-border level. However, it could be possible to take into account the distinction given by the European Commission in 2006: the EU may intervene when a crime is not sanctioned in one or several Member States and needs to be tackled. Another solution would be to add universally sanctioned crimes, such as crimes against humanity and war crimes, covered today by the 8 May 2003 Council Decision ([2003/335/JHA](#)) on the investigation and prosecution of genocide, crimes against humanity and war crimes. These crimes could be added to the list provided in Article 83(1)(2) on the grounds of EU values, of the [support](#) given by the EU to the International Criminal Court, and of their serious, universal and cross-border nature, allowing for future modifications to be made to Decision 2003/335/JHA under the ordinary legislative procedure.

## The legal basis

### Article 83(1) TFEU

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

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

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

Debate on the subject are not recent: as a consequence of the [Probo Koala disaster](#) in Abidjan in 2006, the then Environment Commissioner, [Stavros Dimas](#), said that such an incident would be [impossible](#) in the EU. His colleague [Franco Frattini](#), in charge of Justice, Freedom and Security at the time, noted that at least one Member State – Spain – had no legislation on environmental crimes. This was the basis for the creation of the notion of 'European crimes', i.e. basically those not sanctioned in the legislation of one or several Member States. In 2007, the Court of Justice ruled (Case [C-440/05](#)) that the Commission could only issue a list of crimes, but not define a set of sanctions. [Article 83\(1\)](#), notably its sub-paragraph 3, opens the possibility to extend the areas of crime by a Council decision adopted unanimously after obtaining the consent of Parliament. The use of this possibility remains very challenging, however, due to lack of definitions in the scope covered by Article 83(1). [Article 72](#) TFEU provides that law and order and security issues remain a Member State competence. In his 3 May 2018 opinion on the *Ministerio fiscal* case ([C-207/16](#)), Advocate General Saugmandsgaard Øe considers that 'the power to determine what constitutes "serious crime" belongs, in principle, to the competent authorities of the Member States' and that the concept of serious crime is not an autonomous concept of EU law according to the Court's case law (notably the [Digital Rights](#) and [Tele2](#) cases). In his 10 September 2013 opinion on the case on cross-border exchange of information on road safety related traffic offences ([C-43/12, Commission v Parliament and Council](#)), Advocate General Bot recalls that 'the definition of criminal offence must then be a formal one, with no risk of heterogeneity between the Member States since they are obliged to give the same classification to a given offence'. The definition of the 'cross-border dimension resulting from the nature or impact of such offences' is not an easy one. It might refer to the [definition](#) given by [Article 3.2](#) of the United Nations Convention against transnational organised crime (the '[Palermo Convention](#)'). The May 2016 Europol [Regulation](#) also provides definitions, stating in its Article 3(1) that 'Europol shall support and strengthen action by the competent authorities of the Member States and their mutual cooperation in preventing and combating serious crime affecting two or more Member States, terrorism and forms of crime which affect a common interest covered by a Union policy'. It also [provides](#) a list of crimes of 'EU interest' in its [Annex I](#). The 2002 Council [Framework Decision](#) on the EAW, in its Article 2(2), also gives an exhaustive list.

### Use of legal basis to date

Until now, the current provisions of Article 83(1)(2) have allowed for the extension of the minimum rules concerning the definition of criminal offences [in at least three cases](#): the 5 April 2011 Directive ([2011/36/EU](#)) on trafficking of human beings – which extends the definition of 'exploitation'; the 13 December 2011 Directive ([2011/92/EU](#)) on sexual abuse of children; and the 12 August 2013 Directive ([2013/40/EU](#)) on attacks against information systems. However, Article 83(1)(3) has not been used in the EU legislative framework since the entry into force of the Lisbon Treaty. Nor has there been any resolution to date from the European Parliament calling explicitly for an extension of the areas of crime listed in Article 83(1)(2).

### FURTHER READING

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

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

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

## 16 Strengthening cooperation on terrorism

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

### Current challenges and policy debates

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

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

Today, cultural, political and legal differences among Member States still pose two major challenges to an EU-level anti-terrorist surveillance system. The first is both political and technical: the creation of such a database would require the organisation of a counter-terrorist administrative police system amongst 28 Member States. The second results from the lack of a definition of what is meant by 'crime prevention'. Article 84 explicitly excludes any kind of harmonisation of national laws and regulations. Preventive policing must therefore be considered as a [strictly Member State competence](#) and has to be limited to a cooperation tool.

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

### Scope for action

#### Position of the European Parliament on terrorism prevention

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

## Possible actions?

Creating a terrorism prevention database at EU level should be feasible in principle, as the current structures allow it on a voluntary basis and through its agencies. However, adopting a specific piece of legislation would require adaptation to specific data protection cultures and to national legal frameworks. Data exchange on terrorism prevention has so far been possible through Europol's secure information exchange network application ([SIENA](#)), the IT-platform allowing Member States and associated countries to share data on criminal issues. The efficiency of SIENA and of Europol's support to crime prevention was confirmed by the French-Belgian [Task-force Fraternité](#), after the November 2015 Paris attacks. In order to go further, and given the political and legal issues related to databases at national level, and the Article 84 restrictions on harmonisation, one solution could be to organise a database on terrorism prevention on a voluntary basis in cooperation, and not in competition, with Europol.

## The legal basis

### Article 84 TFEU

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

[Article 84 TFEU](#), for the first time since the creation of the area of freedom, security and justice, provides an EU competence in the field of crime prevention, in accordance with the ordinary legislative procedure.

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

## Use of legal basis to date

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

## FURTHER READING

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

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

## 17 Strengthening the powers of Eurojust

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

### Current challenges and policy debates

Living in a European Union without borders offers multiple opportunities, but also involves a number of challenges. One such challenge is to protect European citizens from various forms of serious crime spreading across borders. Security is a growing concern for [Europeans](#), who see terrorism and organised crime as the main threats to the EU. Citizens are increasingly [worried](#) about cybercrime, which represents more than [half of all crimes](#) in some Member States. Moreover, organised crime groups control illicit markets generating around €110 billion annually (1 % of EU GDP), according to [estimates](#). Organised crime is closely linked to corruption, which [costs](#) the European economy another €120 billion every year. In this context, cooperation among national police and judicial authorities is of the utmost importance. However, successfully investigating and prosecuting cross-border crimes involving several Member States can be challenging, as Member States have different legal cultures and judicial orders. In 2002, the EU set up a specific body – Eurojust – to overcome the difficulties which can arise in cross-border cases and to resolve possible conflicts of jurisdiction. Since then, Eurojust has gained the trust of national judicial authorities and positioned itself as a key player in EU criminal justice cooperation: between 2002 and 2017, the number of cases it dealt with [increased](#) from 202 to 2 550 per year. In terms of results, in [ten high-level cases](#) assisted recently by Eurojust, national authorities were able to make 345 arrests, seize more than €30 million in assets, and collect vital evidence. Eurojust also contributes to protecting the EU's financial interests – an area where it could play a reinforced role, alongside the newly established [European Public Prosecutor's Office](#) (EPPO).

### Scope for action

#### Protecting the financial interests of the European Union

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

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

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

## A single agency for police and judicial cooperation?

In a 2017 [resolution](#), the European Parliament considered that, to upgrade EU capacities to combat terrorism and international organised crime, 'Europol and Eurojust should receive genuine investigation and prosecution competences and capabilities, possibly by a transformation into a true European Bureau of Investigation and Counter-Terrorism, with due parliamentary scrutiny'. Back in 2011, some [academics](#) raised the idea of merging Europol and Eurojust into a single 'criminal justice cooperation' body, considering that the separation made at EU level between police and judicial authorities is artificial, if not counter-productive.

### Better use of existing tools

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

## The legal basis

### Article 85(1)(a) TFEU

*1. Eurojust's mission shall be to support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States or requiring a prosecution on common bases [...]*

*[...] the European Parliament and the Council, by means of regulations adopted in accordance with the ordinary legislative procedure, shall determine Eurojust's structure, operation, field of action and tasks. These tasks may include:*

*(a) the initiation of criminal investigations, as well as proposing the initiation of prosecutions conducted by competent national authorities, particularly those relating to offences against the financial interests of the Union; [...]*

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

## Use of legal basis to date

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

### FURTHER READING

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

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

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

## 18 Fostering common investigative techniques

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

### Current challenges and policy debates

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

### Existing networks and expert groups

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

### Scope for action

#### Lack of definitions

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

#### Position of the European Parliament

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

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

### Outlook

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

## The legal basis

### Article 87(2) TFEU

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

- (a) the collection, storage, processing, analysis and exchange of relevant information;
- (b) support for the training of staff, and cooperation on the exchange of staff, on equipment and on research into crime-detection;
- (c) common investigative techniques in relation to the detection of serious forms of organised crime.

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

Operational police cooperation is organised under the provisions of Article 87(3): measures are adopted unanimously by the Council, under a special legislative procedure, after consulting the European Parliament. Non-operational police cooperation is based on the provisions of Article 87(2): these measures are adopted under the ordinary legislative procedure, notably establishing provisions on data and information-sharing [Article 87(2)(a)], on staff training and exchange [Article 87(2)(b)] and on common investigative techniques in relation to the detection of serious forms of organised crime [Article 87(2)(c)].

Before the Lisbon Treaty, police cooperation was organised under the provisions of [Article 30 TEU](#), the type of measures being defined in [Article 34 TEU](#). Article 87(2) is a brand new process in terms of EU criminal law, as it allows the ordinary legislative procedure to be used for the adoption of most police cooperation measures. However, while Articles 87(2)(a) and (b) are used quite often, Article 87(2)(c) is challenged by the fact that cooperation on investigative techniques can be carried out through [Europol](#), without necessitating any kind of harmonisation or approximation of laws or through formal or informal networks, without needing to legislate in the Lisbon framework.

## Use of legal basis to date

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

### FURTHER READING

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

## 19 Boosting cross-border criminal justice and police work

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

### Current challenges and policy debates

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

### Scope for action

#### **Broadening the scope of 'hot pursuit'**

One possible [option](#) could be to allow 'hot pursuit' not only in the case of criminals caught in the act, but also when a suspect is sought for a crime which has already been committed and can lead to extradition. This is already [provided for](#) and is [extended](#) even further in the Benelux countries, as well as in the [German-Dutch Treaty](#). There is also room to widen the scope of 'hot pursuit' over national borders: while Schengen Agreement rules limit foreign police intervention to land borders, police operations sometimes involve pursuits over difficult terrain and territorial waters. An important [improvement](#) could therefore be to extend the scope to include air and water borders. Also, the territorial scope could possibly be widened to include areas beyond the immediate border zone. A good example is the [German-Polish Treaty](#), which sets no territorial limit for 'hot pursuits' and includes air and water. The [Benelux countries](#) have similar provisions.

#### **Harmonising communication standards**

An [attempt](#) could be considered to create a genuine common technical standard to replace the two existing standards for the emergency service digital radio systems used in different Member States (TETRA-norm and TETRAPOL). This would allow direct communication, along with the existing Police & Customs Cooperation Centres which are currently in charge of cross-border communication between police forces. The Council radio communications experts group has recently [suggested](#) incorporating both radio systems after the end of their life cycle into an integrated solution.

#### **Harmonising police equipment standards**

Another useful step might be to further [harmonise](#) the varying definitions of standard basic police equipment and service weapons officers may carry when pursuing criminals over borders. At present, some countries have limited the weapons they accept on their territory, allowing only categories of weapons carried by their own police officers, and require foreign police officers to leave prohibited service weapons in their vehicle and not to use them. Also, Schengen Agreement rules on 'hot pursuit' only allow the use of service weapons on foreign soil in case of self-defence.

## Improving existing networks

There is also scope to improve the functioning of cross-border cooperation activities of existing networks, such as the ATLAS network of special intervention units (28 EU Member States plus Norway, Iceland and Switzerland), set up in 2001 after the September 11 attacks. In 2017, the [Council](#) asked the Commission to allocate financial and human resources for a permanent ATLAS support Office (ASO) by 2019, while not interfering in Europol's activities, and to explore further initiatives for better cooperation within ATLAS in crisis situations. In 2018, Council [discussions](#) have suggested pooling and sharing specialised equipment and specific capabilities and setting up common training facilities on the model of Benelux countries, while also mapping specific Member State capabilities at EU level.

## Cross-border gathering of evidence

There have been [suggestions](#) to improve cross-border evidence-gathering by allowing the Member State authorities involved in criminal justice investigations in a broader sense (police, customs, prosecuting authorities) to cross national borders to actively gather evidence in other Member States, while respecting the legislation of the host country and complying with agreed EU minimum procedural guarantees. However, it should be noted that there is no consensus among practitioners at EU level on the [definition of evidence](#) related to money in bank accounts and [no agreement](#) on whether illegally obtained evidence in another State can be used as intelligence to start an investigation.

## The legal basis

### Article 89 TFEU

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

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

## Use of legal basis to date

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

## FURTHER READING

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

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

## 20 Freezing terrorist assets under AFSJ

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

### Current challenges and policy debates

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

### Scope for action

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

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

## The legal basis

### Article 75 TFEU

*Where necessary to achieve the objectives set out in Article 67, as regards preventing and combating terrorism and related activities, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall define a framework for administrative measures with regard to capital movements and payments, such as the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities.*

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

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

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

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

## Use of legal basis to date

Article 75 TFEU has not been used so far.

### FURTHER READING

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

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

## 21 Strengthening fundamental rights in criminal procedure

Freedom of movement benefits not only citizens of the European Union (EU), but also criminal networks. Judicial and police cooperation is therefore essential in order to guarantee internal security. Such cooperation requires mutual trust among national authorities; ensuring the rights of individuals in criminal proceedings is necessary in order to build that trust in the judicial domain. Since the Lisbon Treaty, the EU has a clear competence to establish minimal rules concerning those rights. The legal basis provided there has been used to legislate on specific procedural rights, but it could also be used to fully guarantee the right to a fair trial in criminal proceedings and to improve detention conditions.

### Current challenges and policy debates

The development of the internal market and the Schengen area led to the dismantling of the European Union's (Schengen area) internal border controls and made freedom of movement within the EU a reality. However, not only [EU citizens](#) living in another EU country benefit from freedom of movement, but also [criminal networks](#), making judicial and police cooperation among Member States a vital instrument in order to ensure internal security. Since the 1999 [Tampere European Council](#), EU institutions have identified mutual recognition of judicial decisions as the cornerstone of judicial cooperation. Mutual recognition of judicial decisions [requires](#) mutual trust among Member State judiciaries. Its achievement is very much linked to the progressive development of a common set of procedural rights that should be fully respected within democratic legal orders attached to the rule of law. A rule of law and a human rights perspective is essential when articulating judicial cooperation instruments, for example the [European Arrest Warrant](#) or [Framework Decision 2008/909](#) providing for the transfer of sentenced persons between Member States. This is not only because the lack of such a perspective might hinder the implementation of those instruments, as the Court of Justice of the European Union has already acknowledged ([C-404/15 and C-659/15 PPU](#)), but also because the EU is a democratic organisation based on the rule of law and respect for human rights ([Article 2 TEU](#)). Therefore, if EU citizens exercise their freedom of movement and become involved in criminal proceedings in a Member State other than their own, the EU [needs to ensure](#) that their rights will be fully respected, independently of where proceedings against them take place. Finally, from an economic point of view, a 2017 Cost of Non-Europe report [suggests](#) that establishing clear common rules in relation to some procedural rights might be cost-saving. For example, if all EU Member States were to reduce pre-trial detention to the EU average, it estimates the potential savings to be up to €707 million per year.

### Scope for action

#### Pre-trial detention and detention conditions

[The European Parliament](#) has repeatedly called for the establishment of common European standards in relation to [pre-trial detention](#), [administrative detention](#) and the [detention of children](#), although some minimum rules on the latter have already been incorporated in a 2016 [EU directive](#). In a similar vein, [Parliament](#) has also highlighted important shortcomings in some Member States' prison systems, especially in relation to the material conditions of detention. While [some authors](#) question the EU's competence to act in this area, highlighting that it relates partially to post-trial detention conditions and not to trial or pre-trial guarantees, [Parliament](#) has called for the adoption of common European standards for detention to ensure the fundamental rights of prisoners, and particularly of vulnerable individuals, children, mentally ill persons, disabled persons and women, and the mutual recognition of judicial decisions.

#### Protecting vulnerable adults in criminal proceedings

The specific needs of vulnerable adults in criminal proceedings have only been dealt with at EU level so far through a non-legislative instrument, namely the [2013 European Commission Recommendation](#) on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings. Further EU action could transform this non-legislative act into a [binding legal instrument](#).

## A second 'package of procedural guarantees in criminal cases'

Following the [2009 roadmap](#) on procedural rights of suspected or accused persons, several EU directives were adopted to regulate procedural guarantees. Apart from [modification](#) of existing EU law to extend its scope or align it with international human rights standards, a second package of procedural rights could be adopted. In the trial phase, new EU law could focus on [defence rights](#), such as, for example, the right to access the complete file of the case, to make a defence statement, or to question witnesses directly. In addition, common rules regarding the [right to an impartial and independent judge](#), the [right to access legal remedies](#), the [right of appeal](#), the right [not to be tried or punished twice](#) in criminal proceedings, the [right to compensation for unjustified detention](#), or the right to be tried without undue delay, all in the EU Charter of Fundamental Rights ([Articles 47-50](#)) or in international human rights instruments ([Article 6 of the European Convention on Human Rights \(ECHR\) and Articles 2-4 of its Protocol 7](#)), could also be envisaged.

## The legal basis

### Article 82(2)(b) TFEU

*2. To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States.*

*They shall concern: [...] (b) the rights of individuals in criminal procedure; [...]*

*Adoption of the minimum rules referred to in this paragraph shall not prevent Member States from maintaining or introducing a higher level of protection for individuals.*

Introduced by the Lisbon Treaty, this legal basis enables the EU to establish minimum rules relating to the rights of individuals in criminal procedure. It succeeds the previous [Article 31\(1\)\(c\) TEU](#), introduced by the [Treaty of Amsterdam](#) and used by the Commission in 2004 to present a [proposal](#) on procedural rights that was never adopted. Under Article 82(2)(b) TFEU, the EU can only act as far as is necessary to facilitate recognition of judicial decisions and police and judicial cooperation in criminal matters with a cross-border dimension. EU legislative acts must take into account the differences among Member States' legal systems and cannot prevent Member States from providing a higher level of protection to individuals (minimum harmonisation). EU acts can only take the form of directives, adopted by Parliament and Council following the ordinary legislative procedure. Nevertheless, if a Member State considers that a proposal would affect fundamental aspects of its criminal justice system, [Article 82\(3\) TFEU](#) can be invoked, with the proposal being referred to the European Council and the ordinary procedure being suspended for a maximum period of four months ('[brake clause](#)'). In that case, if there is no consensus, a group of at least nine Member States may establish enhanced cooperation without having to ask for the authorisation required in [Articles 20\(2\) TEU](#) and [329\(1\) TFEU](#) ('[accelerator clause](#)'). EU acts can be adopted either on a proposal of the Commission or on the initiative of a quarter of Member States, according to [Article 76 TFEU](#). Denmark does not participate ([Protocol No 22](#)) and the UK and Ireland may opt in on a case-by case basis ([Protocol No 21](#)).

## Use of legal basis to date

### Legislative acts adopted

Following the [2009 roadmap](#) on procedural rights of suspected or accused persons, the legal basis has been used to establish common minimum rules concerning the [right to legal aid](#); the [presumption of innocence and the right to be present at trial](#); the [right of access to a lawyer](#), and the right to have a third party informed upon deprivation of liberty and to communicate with third parties and consular authorities while deprived of liberty; the [right to information](#) of suspects or accused persons; and the [right to interpretation and translation](#). It has also been used to establish rules concerning certain [rights of children](#) in criminal and European arrest warrant proceedings, and on the [freezing and confiscation](#) of instruments and proceeds of crime.

### FURTHER READING

Policy Department for Citizens' Rights and Constitutional Affairs, [Criminal procedural laws across the EU](#), 2018.

EPRS, [Procedural rights and detention conditions](#): Cost of Non-Europe Report, 2017

## 22 Improving administrative cooperation in the Area of Freedom, Security and Justice

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

### Current challenges and policy debates

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

Despite the growing cross-border dimension of areas covered by [Title V](#) of the Treaty on the Functioning of the European Union (TFEU), such as organised crime, terrorism and irregular migration, Member States' competence for dealing with these issues is limited to their national boundaries. Furthermore, the legal framework, based on directives in the area of immigration and asylum, is characterised by a [low level of harmonisation](#), causing non-uniform implementation. This limits progress on establishing a common European asylum system and efficient legal migration channels. In addition, decisions adopted by one Member State impact on all the others. This has been evident in the case of the [temporary reintroduction](#) of border controls by some Member States owing to threats to their public policy and internal security. Efficient implementation of EU legislation in these fields requires cooperation in terms of access to and the exchange of information and staff between the relevant departments of Member States and the EU.

### Scope for action

#### Exchange of information and administrative assistance

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

#### Peer review

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

## Other possible areas

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

## The legal basis

### Article 74 TFEU

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

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

## Use of legal basis to date

### Legislative acts adopted

Article 74 TFEU has already been used in several fields in the area of freedom, security and justice. In 2004, an immigration liaison officers ([ILO](#)) network was established. ILOs are Member State representatives posted in a third country to facilitate measures taken by the EU to combat irregular immigration. In 2011, the European Asylum Support Office ([EASO](#)) was set up to enhance practical cooperation among Member States on asylum-related matters and to assist Member States in implementing their obligations under the common European asylum system. The EU Agency for the Operational Management of large-scale IT Systems, [eu-LISA](#), began operations in 2012. It supports Member States' efforts to achieve internal security in the EU through technology and is entrusted with the operational management of the second generation Schengen Information System ([SIS II](#)), [VIS](#) and [Eurodac](#), essential instruments in the implementation of the EU's asylum, border management and migration policies. Article 74 was also used as a legal basis for the establishment of SIS II and VIS.

### Legislative proposals currently in Parliament

Parliament is currently working on two specific proposals on [interoperability](#): one between EU information systems on [borders and visas](#) and another in the area of [police and judicial cooperation, asylum and migration](#). The proposals are designed to make more intelligent and targeted use of the information available in existing and future systems, by allowing national authorities to make the best possible use of existing data, detect multiple identities and counter identity fraud, and carry out rapid and effective checks.

### FURTHER READING

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

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

## 23 Introducing a European Business Code

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

### Current challenges and policy debates

#### Debate on the unification of European private law

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

#### The draft Common Frame of Reference

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

#### The abandoned idea of an 'optional instrument'

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

#### Cross-border only regulation?

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

### Scope for further EU action

#### A European Business Code...

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

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

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

### **...complemented by a European Consumer Code**

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

## The legal basis

### **Article 50(1) TFEU**

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

### **Article 114(1) TFEU**

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

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

## Use of legal basis to date

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

### **FURTHER READING**

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

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

## 24 Introducing new tools to facilitate civil justice

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

### Current challenges and policy debates

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

### Scope for action

#### Common minimum standards of civil procedure

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

#### Mutual recognition of adoption orders

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

#### Expedited procedure in business-to-business litigation

On 20 November, the JURI committee unanimously adopted, under [Rule 46](#), a [report](#) with recommendations to the Commission on expedited settlement of commercial disputes. The report invites the latter to table a proposal to create a new EU optional civil procedure – the European expedited civil procedure (EECP) for cross-border litigation between businesses. This could allow cutting costs and to speed up the resolution of business-to-business disputes, thanks, *inter alia*, to tight, pre-determined deadlines, no separate appeal

on procedural questions, and the limited possibility of raising new circumstances once the procedure kicks off. The procedure would be voluntary and would require agreement from both parties to the dispute, in contrast to existing ones which are triggered at the claimant's initiative, but in line with arbitration procedures which also require both parties' consent.

### Establishment of a European Commercial Court

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

### Other possible areas

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

## The legal basis

### Article 81 TFEU

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

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

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

## Use of legal basis to date

### Legislative adopted

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

### FURTHER READING

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

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

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

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

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

## 25 Facilitating intellectual property rights in the EU

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

### Current challenges and policy debates

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

EU policy makers have been very active in harmonising national IP laws in recent decades. The EU has developed a [legal framework](#) to avoid national fragmentation and harmonise national laws including for copyright, trademarks, patents, designs and geographical indications. Recently, new initiatives have been launched to further harmonise national IP laws in the field of [copyright](#) and to improve the [enforcement of IPRs](#). There is also increasing discussion of the need to harmonise IPRs in new areas such as [artificial intelligence](#) and [three-dimensional printing](#). Furthermore, over time, separate European IPR titles such as [Community plant variety rights](#) and [Community design rights](#) have been created at Community level – in parallel to national rights – to protect specific IP rights across the jurisdictions of the 28 Member States.

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

### Scope for action

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

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

#### **Specialised courts for IPRs**

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

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

## The legal basis

### Article 262 TFEU

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

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

## Use of legal basis to date

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

It is worth noting that the CJEU indicated in its Opinion 1/09 that transferring patent jurisdiction to the Court of Justice of the European Union could have been an acceptable option. However, the Commission [discarded](#) this option on grounds that it would not have met the political requirements of the Member States and the interests of the users of the patent system. Instead the Commission proposed the establishment of a special international court by means of an international agreement.

### FURTHER READING

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

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

## 26 Improving euro-area multilateral surveillance

The sovereign debt crisis initiated a reform process of the Economic and Monetary Union (EMU), including its multilateral surveillance framework. The measures adopted stretched the use of the Treaties' legal bases to their maximum limits, leading to the need for intergovernmental treaties outside the European Union (EU) legal order. This reformed EMU revealed gaps in democratic legitimacy.

### Current challenges and policy debates

The sovereign debt and financial crisis that affected several euro-area Member States has led to the necessity to [reform the EMU](#) in order to ensure economic and monetary stability and contain spill-over effects. The EU has adopted a series of regulations to strengthen the [Stability and Growth Pact](#) (SGP) (imposing public finance obligations) and to introduce a procedure to monitor and correct [macroeconomic imbalances](#) (MIP), together with a series of [financial assistance programmes](#). Some of these reforms were concluded in intergovernmental agreements (such as the [European Stability Mechanism](#) and the '[Fiscal Compact](#)'). Multilateral surveillance has fundamentally changed, in particular for euro-area countries, with the introduction of sanctions under the [excessive imbalance procedure](#), as well as under the [preventive arm](#) of the SGP (its monitoring framework) for non-implementation of country-specific recommendations (CSR). Notwithstanding the introduction of sanctions, progress on following CSR has been [rather slow](#), although implementation by euro-area countries is higher than for non-euro ones. In addition, countries needing financial assistance due to serious difficulties have received funding under strict conditionality. Some of the measures imposed have been challenged by individuals in courts (including in the Court of Justice of the EU, CJEU). These challenges were mostly unsuccessful, either on grounds of [inadmissibility](#) or because the measures were justified for financial stability reasons ([Dowling](#), [Ledra Advertising](#), [Associação Sindical dos Juizes Portugueses](#)). [Regulation 472/2013](#) was adopted, inter alia, to ensure that conditions for financial assistance, now set in economic adjustment programmes, are subject to EU rules and CJEU review. Concerns over the impact of austerity measures on the protection of fundamental rights and their potential negative socio-economic impact have been raised by [academics](#) as well as by the European Parliament. The latter has also highlighted the reluctance to use the MIP and to effectively correct imbalances.

### Scope for action

The European Parliament has adopted several resolutions (for example, those of [26 October 2017](#), [16 February 2017](#) and [13 March 2014](#)) on the need to reform the EMU and its multilateral surveillance. Parliament has put the accent on ensuring implementation of CSR (via increasing national ownership with involvement of national parliaments), respect of human rights, accountability, consistency with structural reforms and EU spending, promoting growth-enhancing measures, and enhancing its own scrutiny powers.

#### Improving input legitimacy

Input legitimacy (i.e. ensuring that decisions are responsive to citizens' concerns and made by, and subject to, control by a democratic process) could be improved by enhancing the role of Parliament. Some actions of Parliament depend on CSR being public. Currently, the Council retains discretion on that. This could be changed through a rule requiring CSR to be public unless otherwise justified. The transparency of CSR is also important to enhance civil society involvement. Stakeholders could warn of negative social impacts of a recommendation and thus help to ensure that appropriate safety nets were put in place. Improving ownership of policies at national level would also improve the input legitimacy. This could be done by at least involving in the European Semester procedure the national parliament of the country subject to the recommendations. Finally, consideration could be given to extending the scope of the [inter-parliamentary conference](#) established under the Fiscal Compact, to cover all aspects of multilateral surveillance.

#### Improving output legitimacy

On the output legitimacy side (i.e. achieving policy outcomes beneficial for the people), an ex-ante assessment of the impact of CSR on rights covered by the [Charter of Fundamental Rights](#) (CFR), could help ensure that emergency measures remain proportional. Regulation 402/2013 currently refers only to Article 28 CFR on collective agreements and actions, but austerity measures can impact on other rights, as

shown in a Council of Europe [study](#) and in court challenges (see above). The European Parliament has called for socio and economic impact assessments to be carried out on the measures taken under the various assistance programmes. Finally, the reliability of statistics used could be enhanced. In 2013, the European Commission issued a [proposal](#) to improve statistics in the MIP. This is currently [on hold](#) in Council because of the legal basis chosen (Article 338 TFEU). One possibility might be to adopt it under Article 121(6) TFEU, as was suggested by [Parliament's rapporteur](#) during preparation of its first reading position on the proposal.

## The legal basis

### **Article 121(6) TFEU.**

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

### **Article 136(1) TFEU**

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

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

## Use of legal basis to date

After the 2010 crisis, the joint legal basis was used extensively to strengthen coordination and enforcement of [recommendations](#) with regard to budgetary discipline for the euro area, as well as for introducing the [excessive imbalance procedure](#) for this area. [Academics](#) have concluded that this legal basis has been used beyond its limits (e.g. introduction of sanctions for the preventive part of the SGP in relation to recommendations that were originally non-binding, or the changes in the majority voting rule with the introduction of reverse majority). It was also the basis for Regulations [1173/2011](#) and [473/2013](#), which complement the excessive deficit procedure rules. This was because Article 136(1) TFEU could not be used in conjunction with Article 126(14) TFEU. The joint legal basis was also used to introduce an [enhanced surveillance framework](#) for euro-area Member States experiencing or threatened with serious difficulties with respect to financial stability, or having requested or received financial assistance from Member States, third countries or another entity (e.g. the European Financial Stabilisation Mechanism, the European Stability Mechanism, the European Financial Stability Facility, or the International Monetary Fund).

### FURTHER READING

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

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

## 27 Facilitating finding common positions in the euro area

Euro-area Member States have transferred monetary policy competence to the Union, but external representation to international financial institutions and conferences remains fragmented. The obligation, enshrined in the Treaties, to issue common positions for the euro area is essential to achieve a unified representation. However, informal coordination has been preferred to date, with rather poor results.

### Current challenges and policy debates

Fragmentation of euro-area external representation in international financial institutions and conferences is due partly to the distribution of competences and powers in the Economic and Monetary Union (EMU). Monetary policy for the euro area is an exclusive EU competence, but economic policy is only coordinated and financial supervision is shared in many respects. Therefore, external representation is divided between Member States and EU institutions. Division of powers and competences between the Council and the European Central Bank (ECB) must also be respected. Thus, even when the euro area is represented, it is often represented by more than one institutional actor. Moreover, in some international financial institutions, only a country can have full membership (for example the [International Monetary Fund](#), IMF). The obligation to issue common positions under Article 138(1) TFEU was introduced to ensure that the EU could speak with one voice in the external arena, even when Member States (as members of the institution) act as the [trustees](#) of the EU-level interests. However, formal coordination has rarely been used, with most done in informal groups. Nevertheless, [scholars](#) report that the euro area has often been incapable of speaking with a single voice and sometimes contradictory statements are issued. The governance frameworks in certain international organisations also hinder coordination. For example, the IMF [executive board](#) is comprised of [executive directors](#) elected from single members (such as from France or Germany) or from 'constituencies' (groups of countries). With the exception of France and Germany, the dispersion of other euro-area countries in different 'constituencies' that include non-euro countries means that the vote of the executive director of 'constituencies' with euro-area members will have to reflect the mix of interests in that constituency, which may diverge from the euro-area interest.

### Scope for action

Common positions under Article 138(1) TFEU could be used in a variety of situations such as meetings of the [G7](#) finance ministers, [G20](#) and the IMF. As mentioned by [experts](#), the 'unified representation' of the euro area foreseen under Article 138 TFEU is based on those common positions. However, these common positions are difficult to reach for a number of reasons, which require action to achieve improvements.

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

With regard to the difficulty to reach common positions within the IMF executive board, academic experts have [reported](#) the suggestion that Member States should make a commitment not to vote in the executive board if they cannot reach a common position. Such a proposal is however not in line with [IMF law](#); executive directors have to vote in accordance with their constituency. Article 138(2) TFEU could be used to improve external representation and facilitate adoption of positions under Article 138(1) TFEU in the context of the IMF. Proposals under Article 138(2) TFEU could include the negotiation of observer status for the EU, or the creation of euro-area constituencies (see [fiche #28](#)).

#### **Improving the coordination networks**

How informal coordination is currently undertaken may also not be conducive to reaching a euro-area position. For example, in the framework of the IMF, coordination takes place in two EU-wide groups. The Council's sub-committee on IMF matters ([SCIMF](#)) meets eight to ten times a year in Brussels and deals with horizontal issues, drafts the speech for the Council Presidency for the six-monthly meetings of the Interim Monetary and Financial Committee ([IMFC](#)), and writes the euro-area review in the context of [consultations](#), and the 'common understanding' on key subjects of IMF activities. The [EURIMF](#) is an informal body, composed of EU Member States' representatives to the IMF, the ECB observer and an official from the EU Delegation to the US. It meets three times a week in Washington to deal with day-to-day coordination of activities in the IMF. The Eurogroup working group ([EWG](#)), assists the Eurogroup in preparing euro-area

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

### **The need for EU-wide positions and coordination at the euro-area level**

While the Presidents of the ECB and the [Eurogroup](#) participate in the G7, in the G20 the ECB participates alongside the Commission and the rotating Council Presidency. Some topics in the G20 (such as global imbalances) are also of particular interest for the euro area. The question remains whether the euro area's particularities justify a separate position as opposed to the EU-wide common position, expressed by the rotating Council Presidency. If the issue has Europe-wide interest, it is important that the common position is also EU-wide. This seems also to be the position of the Commission; in its [2015 proposal](#), it proposes coordination with non-euro countries within the [Economic and Financial Committee](#) to coordinate EU-wide common positions on matters of interest for the whole Union. Still, the need for an EU-wide common position does not preclude the possibility to first coordinate within the Eurogroup working group and then coordinate within the EFC before achieving a Union-wide position that still respects euro-area specificities.

## The legal basis

### **Article 138(1) TFEU**

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

[Article 138 TFEU](#) deals with the external representation of the euro area. Article 138(1) imposes an obligation ('shall') on the Council to adopt decisions on common positions on matters of particular interest for EMU in order to secure the euro's place in the international monetary system. The decision requires qualified majority (QMV) in accordance with Article 283(3)(a) TFEU, providing for QMV when only part of EU Member States vote (Article 138(3) TFEU). The TFEU brings some relevant [changes](#) to the text of the provision, to its context and to its position in the Treaty. As opposed to the Nice version (Article 111(4) TEC), Article 138(1) TFEU is no longer linked to exchange rate agreements now based on Article 219 TFEU. The article now falls under Chapter 4 of Title VIII of the TFEU specific to the euro-area Member States. The obligation of the Council to issue a common position concerns solely those matters 'of particular interest for EMU'. Such matters should probably be interpreted in line with the objective 'to secure the euro's place in the international monetary system'. The common position obligation could be viewed as a specific expression of the duty of loyal cooperation in the framework of the external representation of the euro area. The choice of formal coordination within the Council also reflects the importance of this duty.

## Use of legal basis to date

The Commission issued a proposal in [2015](#) based on Article 138 TFEU aimed at strengthening the external representation of EMU, including stronger coordination, and replacing a [1998](#) proposal. Notwithstanding the QMV voting rule (introduced by the Nice Treaty), the 2015 proposal was still not adopted by the Council. A European Economic and Social Committee [opinion](#) mentions the inadequacy of the current coordination framework and the need to strengthen the euro's presence beyond the IMF, in other frameworks.

### **FURTHER READING**

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

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

## 28 Strengthening euro-area representation in the IMF

The external representation of the euro area is fragmented, leading to its inability to speak with one voice. The problem of the under-influence of the euro area is particularly acute in the International Monetary Fund (IMF). Article 138(2) TFEU allows the Council to adopt measures in order to secure a unified representation of the euro area.

### Current challenges and policy debates

External representation of the euro area is currently fragmented and the EU has not been able to speak with [one voice](#). The problem has been particularly acute within the IMF, where Member States remain the [trustees](#) of the EU interest. The European Central Bank (ECB) has [observer status](#) on the [executive board](#) that deals with IMF day-to-day decision-making and therefore can be invited to attend meetings related to its competences. Twice a year, the European Commission and the ECB also attend the meetings of the Interim Monetary and Financial Committee ([IMFC](#)). Notwithstanding that and EU Member States' over-representation in the IMF, euro-area influence has remained limited due to its inability to reach common positions. That inability is mainly due to the structure of the IMF Executive Board. The [executive directors](#) who vote on the board are elected from single members (such as from France or Germany) or from 'constituencies' (groups of countries). The euro-area Member States belong to different constituencies jointly with non-euro countries. Such dispersion can prevent them from voting in line with a single euro-area position, as they [must vote as a unit](#) with the other countries' positions in their respective constituencies. Moreover, individual countries can be held responsible by the IMF for Union-level policies. Considering the role of the euro in the global economy and the role of the IMF in financial assistance to euro-countries, as highlighted by [various experts](#) the euro area has an interest in being duly represented within the IMF. The 2015 [Five Presidents' Report](#) therefore called for an increasingly unified external representation of the euro area.

### Scope for action

#### **Observer status, single seat, or negotiating an intermediate status**

A suggestion by scholars (and taken up by the Commission in a 2015 proposal, see below) has been to negotiate observer status for the euro area with a representative on the Board of Governors and IMFC. However, the euro area does not have legal personality. Under the current rules, it should be the EU which obtains observer status on behalf of the euro area so that the [Eurogroup](#) can intervene alongside the ECB in their respective areas of competences. Still, observer status is limited in many ways and it often allows intervention on invitation only. In 2010, a European Parliament [resolution](#) recommended agreement on a euro-area/EU representation in the IMF and other relevant financial institutions. Parliament also called, in [2014](#), for a single external representation of the euro area and, in [2015](#), for full membership of the EU in international economic and financial institutions. Currently, full membership is not possible for the EU as under [Article II of the IMF Agreement](#) only countries can enjoy full membership. [Article X of the IMF Agreement](#) allows the conclusion of cooperation arrangements with international organisations which may involve amendment of the Agreement. The EU could, therefore, try to negotiate full membership, but this could be [politically difficult](#) due to other IMF members' opposition. Moreover, a further obstacle to the single seat is the division of competences in the Economic and Monetary Union (EMU). Whereas monetary policy is an exclusive competence for the euro area, economic policy is coordinated and IMF obligations go beyond monetary competences, as pointed out in several [academic books](#) and [articles](#). Still, the EU could try to negotiate a novel arrangement, such as a membership without voting rights (these remaining with the Member States), but allowing EU institutions to intervene more systematically every time a matter falls under their competence and take responsibility for Union level policies, or start by negotiating an [enhanced observer status](#) similar to the one enjoyed by the EU at the United Nations [General Assembly](#).

#### **The need to have euro-area only constituencies on the IMF Executive Board**

The main difficulty in reaching common positions lies in the current [distribution](#) of euro-area Member States in the Executive Board constituencies. This undermines the capacity of euro-area members to vote as a single entity within the IMF Executive Board as they have to account for the interests of non-euro area members. This arrangement is due to the [political interest](#) of Member States trying to maximise their

chances to nominate either an executive director or an alternate executive director on the IMF board. Therefore, notwithstanding the fact that a single euro-area constituency [could strengthen](#) the power of the EMU and that the [entry into force](#) of the 2010 IMF reform would allow for the institution of a single euro constituency, that kind of move has been [blocked](#) by some EU Member States. Nonetheless, as [trustees](#) of the EU in the IMF, Member States [are still bound](#) by the [duty of loyal cooperation](#). If common positions on matters of particular interest for EMU, which should have been adopted under Article 138(1) TFEU, cannot be reached as a result of euro-area dispersion in constituencies with non-euro countries, then a reshuffle of the constituencies in the IMF Executive Board might be required to allow euro-area countries to comply with their obligations under Article 138(1) TFEU. A single euro-area constituency would not be needed to achieve this objective if the different constituencies were composed only of euro-area countries.

## The legal basis

### Article 138(2) TFEU

*The Council, on a proposal from the Commission, may adopt appropriate measures to ensure unified representation within the international financial institutions and conferences. The Council shall act after consulting the European Central Bank.*

[Article 138 TFEU](#) deals with the external representation of the euro area, as it falls under Chapter 4 of Title VIII of the TFEU containing provisions specific to the euro-area Member States. Article 138(2) TFEU allows the adoption by the Council of appropriate measures to ensure unified representation within the international financial institutions and conferences. Decisions under Article 138(2) TFEU are taken on the basis of a Commission proposal, after consultation with the ECB. Only euro-area Member States cast their vote and measures are adopted by qualified majority (QMV) in accordance with Article 283(3)(a) TFEU, providing for QMV when only part of EU Member States vote (Article 138(3) TFEU). The use of Article 138(2) TFEU must respect the division of competences as enshrined in the Treaties and the external competences given by the Treaty to the ECB and to the National Central Banks (NCBs) (Articles 6, 23, 30 and 31 of [Protocol No 4](#)). Article 138 TFEU [changed](#) the previous Nice Treaty provision (Article 111(4) TEC). As opposed to the TEC version, the unified external representation of the euro area has become an objective in its own right, as it is no longer subject to the conclusion of exchange rate arrangements. At the same time, the TFEU no longer mentions the Union's representation ('Community' in the TEC), referring only to '*unified* representation', not necessarily implying a single Union seat. Finally, as opposed to the TEC, there is no legal obligation ('the Council *may*'). Article 138(2) TFEU could therefore either be viewed as a further integration step beyond the obligation of issuing common positions, or it could be seen as instrumental for achieving the obligation to reach common positions, which are the basis for the unified representation of the euro area.

## Use of legal basis to date

The Commission's 2012 [communication](#) 'A blueprint for a deep and genuine EMU' mentions the need to strengthen the euro area's external representation, proposing a two-stage process, leading ultimately to the creation of a single seat in the IMF bodies. That two-stage plan is the basis of the [2015 Commission proposal](#) under Article 138 TFEU, [replacing](#) a 1998 [proposal](#). The 2015 [proposal](#) for a Council decision lays down measures in view of progressively establishing unified representation of the euro area in the IMF. It proposes that by 2025 the President of the Eurogroup should present euro-area views to the Board of Governors, and represent the euro area in the IMFC. It also foresees direct representation of the euro area on the IMF Executive Board, following the creation of one or several euro-area constituencies. The ECB issued its [opinion](#) in 2016, highlighting the need to respect ECB and NCB competences.

### FURTHER READING

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

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

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

## 29 Facilitating balance of payments assistance

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

### Current challenges and policy debates

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

When it comes to the EU and its non-euro area Member States, the BoP assistance rules are based on a complex mechanism that is outlined in [Council Regulation \(EC\) No 332/2002](#). Under this mechanism, the country applying for BoP assistance must [submit a request](#) to the European Commission and the Council explaining how it intends to address its balance of payments problems. Before funds are released, the applicant country must provide information detailing the economic policies outlined in the adjustment programme endorsed by the Council. According to [experts](#), the conditions usually relate to fiscal consolidation, structural reforms (e.g. labour market or public administration reform) and safeguard clauses against fraud. In terms of type of financial assistance, the BoP facility can provide loans or lines of credit. The current legislation for non-euro area Member States does however have shortcomings, such as the absence of sovereign bailout loans, bank recapitalisation programmes or [precautionary conditioned credit lines](#). In this context, it does not take into account the new coordination tools and instruments created in the context of the financial crises such as the [European stability mechanism \(ESM\)](#).

In addition, an enhanced BoP assistance is needed in the context of the coherence of the European [banking union](#), which includes a single rulebook for all financial actors in the 28 Member States.

### Scope for action

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

Enhanced BoP assistance for non-euro area Member States could strengthen economic governance and economic and budgetary coordination. The credit line could take the form of a precautionary conditioned credit line (PCCL), which is a credit line based on eligibility conditions, or an [enhanced conditions credit line](#) (ECCL), based on the combination of eligibility conditions and new policy measures. Currently, both instruments are used in the ESM and are applicable to euro-area Member States. In addition, banking union demands fair and equal treatment of all participating Member States. Non-euro Member States that have opted into the single supervision mechanism (SSM) would need to adopt an appropriate set of rights and duties in terms of supervision, consultation and decision-making. Currently, the SSM provides for 'close cooperation' with the European Central Bank (ECB) without decision-making rights for non-euro area Member States. So far, only Bulgaria has requested this 'close cooperation'. This raises the question of whether BoP assistance should remain separate from the ESM or become one of its arms.

## The legal basis

### Article 143 TFEU

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

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

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

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

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

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

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

### Use of legal basis to date

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

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

BoP assistance is granted on a case-by-case basis by the Council acting by [qualified majority](#). The maximum sum of outstanding loans granted under this facility was in principle limited to [€12 billion](#) per country. This amount was then raised to €25 billion in 2008 and €50 billion in 2009. The loans are generally granted in conjunction with financing by the International Monetary Fund (IMF) and other multilateral lenders.

With Regulation (EC) No 332/2002, the Council finished setting up a Community (now EU) borrowing scheme. The Council has decided to grant mutual assistance within the meaning of Article 143 TFEU to Latvia ([Council Decision 2009/289](#)), Romania ([Council Decisions 2009/458](#) and [2011/289](#)) and Hungary ([Council Decision 2009/103](#)).

### FURTHER READING

Economic Governance Support Unit, [Macro-Financial Assistance to EU Member States - State of Play](#), 2018.

Factsheets on the European Union, [Financial Assistance to EU Member State](#), 2018.

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

## 30 Developing a stronger EU energy policy

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

### Current challenges and policy debates

According to a series of Eurobarometer surveys carried out for the European Parliament, 65 % of EU citizens would like to see [greater EU involvement in energy policy](#). The current [energy union strategy](#) (2015) outlines five broad areas for EU action in the field: security of energy supplies; a fully integrated internal market; energy efficiency; climate actions to decarbonise the economy; and research and innovation on low-carbon and clean energy technologies. The accompanying [roadmap to energy union](#) includes a series of legislative proposals and non-legislative initiatives, most of which are designed to deliver on the EU climate and energy objectives for [2030](#) and [2050](#). Many legislative proposals in the energy union package have now been agreed by Council and Parliament, while others are in an advanced stage of inter-institutional negotiation. However, greater ambition will be necessary in the coming years if the EU wants to fully meet the goals of the [Paris Climate Change Agreement](#), decarbonise the EU economy by 2050, and ensure clean and secure energy supplies. This in turn may require the EU to develop new legislation in areas of energy policy that are typically the preserve of its Member States.

### Scope for action

#### Energy mix

In its wide-ranging own-initiative resolutions on [European energy union](#) (15 December 2015) and [energy market design](#) (13 September 2016), the European Parliament pushed for greater EU ambition on energy efficiency, promotion of renewables, design of electricity markets, and security of supply. Parliament positions in negotiations over the [clean energy package](#) have included higher EU-wide targets on renewables and energy efficiency, to be delivered via binding national targets and a greater oversight role for the EU. However, some countries still consider that binding national targets undermine the right of Member States to determine their energy mix and structure of energy supply, as guaranteed under EU law. Recent inter-institutional [agreements](#) on energy efficiency and promotion of renewables envisage ambitious and binding EU targets for 2030 being realised through indicative national contributions. If in the longer run this approach does not succeed in delivering on EU energy and climate goals, the EU may demand a greater oversight role, including the capacity to set and enforce more binding national targets.

#### Energy taxation

EU action on energy taxation has been limited. Yet greater harmonisation of energy taxes could help the functioning of the internal market, incentivise the use of renewable and low-carbon energy sources, and discourage the use of high polluting fossil fuels. The introduction of an EU-wide form of 'carbon tax' could discourage the use of energy sources with high greenhouse gas emissions. More generally, meeting global objectives in the climate field may require stronger EU intervention in national energy policies, including the adoption of EU decisions that affect the choice of energy sources ('energy mix') and the structure of energy supply across Member States.

#### Integrated energy market

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

## The legal basis

### Article 194 TFEU

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

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

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

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

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

Since the Lisbon Treaty, Article 194 TFEU has been the preferred legal basis for EU legislation in the energy field, where necessary in conjunction with other legal bases (e.g. Articles 191 and 192 on environment). Article 194 was the legal basis for recent EU legislation (2017) on [security of gas supply, intergovernmental agreements](#) in the energy field, and the [energy performance of buildings](#).

Article 194 lists the broad areas for EU action in the energy field, as well as the three main policy areas where Member States have the 'right' to fully determine their energy policies. However, Article 194(2) makes an explicit link to Article 192(2)(c), which provides for a special legislative procedure allowing the adoption of 'measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply' (i.e. two of the three Member State 'rights' in Article 194). This special procedure requires a unanimous decision by Council and needs to be justified on environmental grounds.

Article 192(2)(c) also includes a *passerelle* clause allowing the Council (through an initial decision by unanimity) to make the ordinary legislative procedure applicable to such policy areas in future. In September 2018 the Commission [said](#) it would propose an initiative to develop a new institutional framework for EU energy and climate policy by 2025, including 'options for enhanced qualified majority voting'. This proposal is due to be adopted by the Commission in early 2019. Article 194(3) introduces specific requirements for energy policies that are 'primarily of a fiscal nature', involving a special legislative procedure requiring unanimity in Council after consultation of Parliament.

### Use of legal basis to date

As the special legislative procedure of Article 192(2)(c) has never been used, the *passerelle* clause it contains has never been activated. The special legislative procedure in Article 194(3) for energy taxation was used once in an attempt to revise the 2003 [Energy Taxation Directive](#) (ETD). The ETD sets minimum levels of taxation on energy products and electricity, but has since become outdated and rather counter-productive to EU goals in the energy and climate field, because it sets low tax rates on highly polluting fuels such as coal, and much higher tax rates on cleaner energy sources. Yet this effort to [revise the ETD](#) failed because it was not possible to reach unanimity in the Council, so the Commission eventually withdrew the proposal in 2015 after four years of negotiation. Unanimity would likewise be required if the EU ever sought to introduce a form of EU-wide energy taxation, such as a 'carbon tax'.

### FURTHER READING

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

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

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

## 31 Putting in place a uniform electoral procedure for the European Parliament

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

### Current challenges and policy debates

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

### Scope for action

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

### Ensuring equal treatment among EU citizens

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

### Strengthening the European dimension of European elections

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

## The legal basis

### Article 223 TFEU

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

*The Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, which shall act by a majority of its component Members, shall lay down the necessary provisions. These provisions shall enter into force following their approval by the Member States in accordance with their respective constitutional requirements. [...]*

This Article gives the EP the power to submit legislative proposals aimed at establishing the rules for the election of Members of the European Parliament in the Member States. It envisages the possibility to propose common rules or to establish common principles governing the electoral procedure in Member States. The legislative procedure according to which such common rules or principles may be finally adopted is rather complex. It first requires a proposal from the European Parliament, which the Council then needs to adopt by unanimity subject to the consent of the absolute majority of EP Members. However, a further condition is required for the legislative act to enter into force, which is the final approval, often in the form of 'ratification' of the EU act (e.g. a Council decision), by each and every Member State according to national constitutional requirements. This enhanced legislative procedure takes account of the fact that electoral rules touch upon constitutional and fundamental principles of Member States. Article 223 TFEU seems to leave a certain margin of discretion as to the choice of form of the legislative act (decision, directive or regulation).

### Use of legal basis to date

EU legislation has so far been based on Article 223 TFEU or other provisions contained in previously applicable treaties, similar in function and wording to this one.

The 1976 Electoral Act (based on Article 138(3) of the EEC Treaty) provided the first fundamental common rules for the first direct elections to the EP. This Act introduced [direct universal suffrage](#), established the number of MEPs per country, determined the five-year term of office, laid down several incompatibilities between the mandate and other national or European offices, prohibited the double vote (i.e. casting a vote in two Member States), determined the electoral period and fixed the date of the first elections.

The 1976 Electoral Act was amended by [Council Decision 2002/772](#), based on Article 190(4) of the [EC Treaty](#). This decision introduced proportional representation using the list system or the single transferable vote, confirmed the principle of freedom and secrecy of elections, introduced the possibility to set a national minimum threshold not exceeding 5 % of votes cast, and identified a set of offices incompatible with that of Member of the European Parliament (e.g. member of a national parliament).

Recently, on 13 July 2018, the Council adopted [Decision](#) 2018/994. Based on a proposal of the European Parliament, this made a number of further amendments to electoral rules by introducing an obligatory minimum threshold of between 2 % and 5 % for constituencies (including single-constituency Member States) with more than 35 seats, to be implemented by the 2024 EU elections at the latest. In addition, it allows Member States to use different voting methods (postal, electronic, internet); requires the protection of personal data; establishes that 'double voting' should be penalised and sets a deadline of three weeks before the election day for the submission of lists.

### FURTHER READING

EPRS, [Reform of the electoral law of the EU](#): Legislative Train Schedule, 2018.

EPRS, [Reform of the electoral law of the EU](#), 2018.

EPRS, [The Reform of the Electoral Law of the European Union](#): European Added Value Assessment, 2015.

EPRS, [Ten issues to watch in 2018](#), 2018.

## 32 Strengthening Social Europe

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

### Current challenges and policy debates

EU policies influence core redistributive areas through social regulation (mainly setting minimum standards), hard coordination ([economic governance](#) and the European Semester), soft coordination (the [open method of coordination](#)) and re-distribution (through programmes and funds). [Analyses](#) reveal the many obstacles for European social policies to include: the need for unanimity in the Council, the insistence on national identity and sovereignty, which makes regulation and redistribution at European level difficult, and the strong focus on market exchange. After a rather active period between 1991 and 2004, there followed a period of stagnation when no major social directives were adopted. Globalisation, demographic challenges and digital transformation have put labour markets and the welfare state under enormous pressure. From 2004 onwards the explosion of centre-periphery conflicts in the wake of the sovereign debts crisis and the appearance of the new East-West conflicts have amplified the challenges. In response, the Juncker Commission declared Europe's ambition to be to earn a '[Social Triple A](#)', by achieving fair and balanced growth, decent jobs and social protection. The jointly proclaimed [European Pillar of Social Rights](#) (social pillar) in November 2017 shows the commitment of the three institutions (the European Parliament, the Council and the European Commission) to update European welfare states and labour markets. As a reference framework, it has the [potential](#) to open a new chapter in European social policies.

### Scope for further EU action

#### **Simplifying the decision-making procedure and strengthening social governance**

Two parallel tendencies can be observed in the social policy decision-making procedure since the 1980s: a tendency for the gradual reduction of unanimity by consultation, cooperation, co-decision and now the ordinary legislative procedure; and a growing ability of the European Parliament to block legislation, and thereby increase the number of veto-players. In its [2019 work programme](#) the Commission announced a non-legislative initiative on identifying areas of social policy where qualified majority voting could be introduced. This would further simplify the decision-making process and address some of the challenges mentioned above. As for strengthening the social aspects of economic governance, in a 2017 [resolution](#) Parliament called for greater consideration of its views within the European Semester before Council takes decisions, and for its Employment and Social Affairs Committee to be put on an equal footing with its Economic and Monetary Affairs Committee in that context. It also reiterated the idea of introducing a [social imbalances procedure](#) when designing the country specific recommendations.

#### **Further implementing the social pillar**

The social pillar aims to support EU Member States in adjusting their [social protection systems](#) to the new realities of work and everyday life. It ultimately paves the way for bringing [non-standard workers](#) into existing social protection schemes, for making further efforts to individualise social protection and ultimately move towards universal social protection, where this would be removed from the employment relationship, and for strengthened European social citizenship. In this vein, a European Parliament October 2017 [resolution](#) urged all Member States to provide minimum income schemes or update their existing schemes so that they can also reach out to the most vulnerable. However, moving beyond that and having a harmonised (or) homogenous European minimum income scheme, which some would find useful, still poses [questions](#) about the potential impact on the different welfare regimes.

## Promoting fairness though funding

In its 2017 [resolution](#) on the social pillar, the European Parliament called for sufficient financial capacity for social investment partly through the existing funds but also through additional financial instruments for the euro area. The 2018 Commission proposal for the [new budget](#), the Multiannual Financial Framework, covers these areas. The June 2018 [Meseberg Declaration](#) advocates a euro-area budget, but whose stabilisation function would mainly be carried out through a yet to be explored European unemployment stabilisation fund.

## The legal basis

### Article 153 TFEU

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

2. To this end, the European Parliament and the Council: [...] (b) may adopt, in the fields referred to in paragraph 1(a) to (i), by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States. Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.

The European Parliament and the Council shall act in accordance with the ordinary legislative procedure after consulting the Economic and Social Committee and the Committee of the Regions.

In the fields referred to in paragraph 1(c), (d), (f) and (g), the Council shall act unanimously, in accordance with a special legislative procedure, after consulting the European Parliament and the said Committees. [EESC, CoR]

The Council, acting unanimously on a proposal from the Commission, after consulting the European Parliament, may decide to render the ordinary legislative procedure applicable to paragraph 1(d), (f) and (g).

This highly complex legal basis, first introduced by the Treaty of Amsterdam (Article 118a TEC), and profoundly reformulated by the Treaty of Nice (Article 137 TEC), gives the EU competence to adopt directives in **nine precisely defined fields of social policy** (including labour relations), enumerated in Article 153(1)(a)-(i) TFEU, excluding pay, the right of association, the right to strike or the right to impose lock-outs (Article 153(5) TFEU). The directives may only have the form of 'minimum requirements for *gradual* implementation', must take into account 'the conditions and technical rules' in the Member States and may not create constraints for small and medium-sized enterprises (SMEs). As pointed out by [experts](#), the aim of Article 153 TFEU is *not* to bring about uniform conditions of social protection; but merely [approximation](#) – not harmonisation – of national rules. With regard to legislation on workers' health and safety, working conditions, information and consultation of workers, labour market integration and equal treatment of male and female workers, the ordinary legislative procedure (OLP) applies. With regard to social security and social protection of workers, protection of workers at termination of employment, representation and collective defence of the interests of workers and employers, conditions of employment for third-country nationals – the Council acts unanimously and the European Parliament is merely consulted. A *passerelle* clause allows the Council to extend the OLP to the areas covered by unanimity, except for legislation on social security and social protection of workers, which are excluded from the scope of the *passerelle*.

## Use of legal basis to date

A total of [62 legislative acts](#) have been adopted on the basis of Article 153 TFEU and its predecessors, including [27 directives](#). These include directives on a [European Works Council](#), [temporary work](#), [employee protection in case of insolvency](#), [working time](#), as well as a number of detailed directives on safety in the workplace (e.g. concerning [electromagnetic fields](#), [asbestos](#) or [optical radiation](#)).

## FURTHER READING

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

## 33 Encouraging cooperation between schools and business

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

### Current challenges and policy debates

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

### Scope for action

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

#### Cooperation with social enterprises

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

#### Inclusive placements

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

#### Tackling the gender gap

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

## Improving the Erasmus+ programme and providing for flexible learning paths

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

## The legal basis

### Article 166 TFEU

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

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

## Use of legal basis to date

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

### FURTHER READING

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

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

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

## 34 Making it easier to find factual information on Europe in third countries

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

### Current challenges and policy debates

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

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

### Scope for action

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

### Upholding the European narrative and identity

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

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

share at the expense of European public broadcasters, prompting [concerns](#) over the broadcaster's editorial independence. At this point, a political decision backed by Parliament and Council to strengthen Euronews financially and structurally would be instrumental to its continued presence in the media landscape, including in various non-EU languages.

### Countering propaganda from third countries

Russia's ongoing disinformation campaigns were the main reason for the creation of the [East StratCom Task Force](#) in 2015, with the aim of exposing and countering myths and wrong statements on the EU, its history, and present-day functioning. The 14-strong East StratCom team, consisting mainly of seconded staff, received dedicated resources only in 2018 when a [budget](#) of €1.1 million was allocated under the 2018 preparatory action 'StratCom Plus', proposed by the European Parliament. Even though in December 2018 the European Commission [announced](#) plans to increase its strategic communication budget, to reach €5 million in 2019, the efforts need to be sustained through the establishment of a long-term dedicated budget for the East StratCom Task Force.

Such budgetary reinforcement could allow for the possible extension of the task force's thematic and geographical coverage, since Russia is not the only active disseminator of false narratives on the EU. Proper staffing and adequate budgetary resources are critical to ensuring continuity in upholding the EU's image abroad. Repeated calls in this direction have been voiced by [Parliament](#), [academics](#) and [security experts](#).

## The legal basis

### Article 167(2) TFEU, first indent

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

[...]

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

### Article 167(5) TFEU, first indent

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

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

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

## Use of legal basis to date

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

## FURTHER READING

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

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

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



---

Public opinion often express the view that the European Union should do more to improve the lives of citizens in various policy areas, but a lack of convergence among Member States on the desired changes, not to mention likely hurdles in the ratification process, as well as other factors make any significant reform of the EU Treaties unlikely in the near term. This study identifies and analyses 34 policy areas where there may be the potential to do more under the existing legal bases provided by the Treaties without recourse to any amendment or updating of those texts. It looks at currently unused or under-used legal bases in the Treaties with a view to their contributing more effectively to the EU policy process.

---

This is a publication of the Members' Research Service  
EPRS | European Parliamentary Research Service

This document is prepared for, and addressed to, the Members and staff of the European Parliament as background material to assist them in their parliamentary work. The content of the document is the sole responsibility of its author(s) and any opinions expressed herein should not be taken to represent an official position of the Parliament.



PDF ISBN 978-92-846-4404-9 | doi:10.2861/45233 | QA-07-18-117-EN-N