

Springer Commentaries on International and European Law

Hermann-Josef Blanke  
Stelio Mangiameli *Editors*

# Treaty on the Functioning of the European Union – A Commentary

Volume I: Preamble, Articles 1-89

 Springer

Springer Commentaries on International  
and European Law

The Springer Commentaries on International and European Law Series publishes practice oriented article-by-article commentaries on legal instruments written for researchers and practitioners.

More information about this series at <http://www.springer.com/series/16559>

Hermann-Josef Blanke • Stelio Mangiameli  
Editors

# Treaty on the Functioning of the European Union – A Commentary

Volume I: Preamble, Articles 1-89

 Springer

*Editors*

Hermann-Josef Blanke  
Faculty for Economics, Law  
and Social Science  
University of Erfurt  
Erfurt, Germany

Stelio Mangiameli  
Università degli Studi di Teramo  
Teramo, Italy

ISSN 2662-9666

ISSN 2662-9674 (electronic)

Springer Commentaries on International and European Law

ISBN 978-3-030-43509-7

ISBN 978-3-030-43511-0 (eBook)

<https://doi.org/10.1007/978-3-030-43511-0>

© Springer Nature Switzerland AG 2021

This work is subject to copyright. All rights are reserved by the Publisher, whether the whole or part of the material is concerned, specifically the rights of translation, reprinting, reuse of illustrations, recitation, broadcasting, reproduction on microfilms or in any other physical way, and transmission or information storage and retrieval, electronic adaptation, computer software, or by similar or dissimilar methodology now known or hereafter developed.

The use of general descriptive names, registered names, trademarks, service marks, etc. in this publication does not imply, even in the absence of a specific statement, that such names are exempt from the relevant protective laws and regulations and therefore free for general use.

The publisher, the authors, and the editors are safe to assume that the advice and information in this book are believed to be true and accurate at the date of publication. Neither the publisher nor the authors or the editors give a warranty, expressed or implied, with respect to the material contained herein or for any errors or omissions that may have been made. The publisher remains neutral with regard to jurisdictional claims in published maps and institutional affiliations.

This Springer imprint is published by the registered company Springer Nature Switzerland AG.  
The registered company address is: Gewerbestrasse 11, 6330 Cham, Switzerland

*To Ernesto Rossi and Altiero Spinelli,  
who in the dark years of confinement  
dictatorship and war wrote the Ventotene  
Manifesto, “For a free and united Europe”  
(1941), to which we can still look with  
admiration as a founding thought and  
programme of the European Union*

# Preface

More than seven years after the publication of the Commentary on the Treaty on European Union, and while crises of European integration follow each other, the editors present the first of the four volumes of the Commentary on the Treaty on the Functioning of the European Union. This publication is greatly delayed, but, despite very considerable impediments, the editors have succeeded to bring together authors from 28 (27) Member States of the Union within this work.

In the meantime, on 31 January 2020, the United Kingdom has left the European Union after concluding a Withdrawal Agreement in October 2019. On 24 December 2020, shortly before the end of the transition period and the UK's leaving of the Internal Market and Customs Union, the European Union/European Atomic Energy Community and the United Kingdom, after tough negotiations, reached a Trade and Cooperation Agreement. Seeking to establish clear and mutually advantageous rules governing trade and investment between the Parties (Preamble), that Agreement aims to provide a legal base for economic partnership. Despite this negotiating success, the United Kingdom's withdrawal marks a sharp break in the history of European integration. The future relationship between the Union and its new autonomous and sovereign partner across the Channel, "broad", "close and peaceful" though it is articulated in the Agreement (Article 1), will become more complicated, bureaucratic and time-consuming, to the detriment of citizens and businesses.

The editors are grateful to all the authors of this pan-European project for their contributions. In particular, they are grateful to those authors, who had to update their manuscripts several times over the years. Johannes Graf von Luckner, LL.M., deserves many thanks for his revision of several pieces. Special thanks are due to Dr. Robert Böttner, B.A., LL.M., assistant at the Chair for Public Law, International Public Law and European Integration at the University of Erfurt, Dr. Paolo Colasante, researcher at the Institute for the Study of Regionalism, Federalism and Self-Government of the National Research Council (ISSiRFA-CNR), as well as to Manoël Jöhr, B.A., and Aimee Sander, B.A., both assistants at the Erfurt Chair.

For her constant patience and editorial support, our thanks and appreciation go to Dr. Brigitte Reschke from Springer.



# Structure of the Commentary

The whole Commentary is organised as follows:

The Treaty on the European Union (TEU) – A Commentary

The Treaty on the Functioning of the European Union (TFEU) – A Commentary

Volume I: Preamble—Articles 1–89

Volume II: Articles 90–164

Volume III: Articles 165–358

Volume IV: Protocols (No 3 CJEU, No 4 ESCB and ECB, No 5 EIB, No 19 Schengen)

# Contents

## Preamble

Preamble (*Blanke*) . . . . . 3

## Part One Principles

**Article 1.** [Functioning of the Union, Treaties Same Value] (*Blanke*) . . . . . 61

## Title I Categories and Areas of Union Competence

**Article 2.** [Competences of the Union and Member States] (*Mangiameli*) . . . . . 133

**Article 3.** [Exclusive Competence of the Union] (*Mangiameli*) . . . . . 175

**Article 4.** [Shared Competence] (*Mangiameli*) . . . . . 197

**Article 5.** [Coordination of the Economic Policy] (*Mangiameli*) . . . . . 235

**Article 6.** [Support, Coordination or Supplement by the Union] (*Mangiameli*) . . . . . 243

## Title II Provisions Having General Application

**Article 7.** [Policy Consistency; Principle of Conferral of Powers] (*Mangiameli*) . . . . . 255

**Article 8.** [Equal Treatment, Equality Between Men and Women] (*Flóvenz*) . . . . . 261

**Article 9.** [Social Aims] (*Sommermann*) . . . . . 275

**Article 10.** [Non-Discrimination] (*Davulis*) . . . . . 281

**Article 11.** [Compliance with the Requirements of Environmental Protection] (*Amato Mangiameli*) . . . . . 299

<b>Article 12.</b> [Consumer Protection] ( <i>Józson</i> ) . . . . .	315
<b>Article 13.</b> [Animal Protection] ( <i>Amato Mangiameli</i> ) . . . . .	331
<b>Article 14.</b> [Services of General Economic Interest] ( <i>Pielow/Schuelken</i> ) . . . . .	347
<b>Article 15.</b> [Observance of the Principle of Openness] ( <i>Porras Ramírez</i> ) . . . . .	371
<b>Article 16.</b> [Protection of Personal Data] ( <i>Docksey/Zanfir-Fortuna</i> ) . . . . .	401
<b>Article 17.</b> [Confessional and Non-confessional Organisations] ( <i>Di Gesù</i> ) . . . . .	431
<b>Part Two Non-Discrimination and Citizenship of the Union</b>	
<b>Article 18.</b> [Combating Discrimination Based on Nationality] ( <i>Favilli</i> ) . . . . .	453
<b>Article 19.</b> [Combating Discrimination Based on Other Grounds] ( <i>Favilli</i> ) . . . . .	469
<b>Article 20.</b> [Union Citizenship] ( <i>Hilpold</i> ) . . . . .	489
<b>Article 21.</b> [Free Movement and Establishment] ( <i>Morviducci</i> ) . . . . .	517
<b>Article 22.</b> [Right to Vote] ( <i>Morviducci</i> ) . . . . .	545
<b>Article 23.</b> [Diplomatic and Consular Protection of Another Member State] ( <i>Hilpold</i> ) . . . . .	563
<b>Article 24.</b> [Participative Rights] ( <i>Morviducci</i> ) . . . . .	573
<b>Article 25.</b> [Monitoring and Further Development of Union Citizenship] ( <i>Hilpold</i> ) . . . . .	595
<b>Part Three Union Policies and Internal Actions</b>	
<b>Title I The Internal Market</b>	
<b>Article 26.</b> [Establishing the Internal Market] ( <i>Blanke</i> ) . . . . .	601
<b>Article 27.</b> [Exceptions to Internal Market Regulations] ( <i>Blanke</i> ) . . . . .	665
<b>Title II Free Movement of Goods</b>	
<b>Article 28.</b> [Free Movement of Goods] ( <i>Lyons</i> ) . . . . .	687
<b>Article 29.</b> [Products from Third Countries] ( <i>Lyons</i> ) . . . . .	703

## Chapter 1 The Customs Union

<b>Article 30.</b> [Prohibition of New Customs Duties or Charges Having Equivalent Effect] ( <i>Kerikmäe/Särav</i> ) . . . . .	711
<b>Article 31.</b> [Common Customs Tariff] ( <i>Kerikmäe/Särav</i> ) . . . . .	719
<b>Article 32.</b> [Principles for Commission Duties] ( <i>Kerikmäe/Särav</i> ) . . . . .	725

## Chapter 2 Customs Cooperation

<b>Article 33.</b> [Customs Cooperation] ( <i>Kerikmäe/Särav/Hamul'ák</i> ) . . . . .	733
---	-----

## Chapter 3 Prohibition of Quantitative Restrictions Between Member States

<b>Article 34.</b> [Prohibition of Quantitative Restrictions on Imports] ( <i>Hojnik</i> ) . . . . .	739
<b>Article 35.</b> [Prohibition of Quantitative Restrictions on Exports] ( <i>Hojnik</i> ) . . . . .	779
<b>Article 36.</b> [Derogations] ( <i>Hojnik</i> ) . . . . .	787
<b>Article 37.</b> [State Monopolies of Commercial Character] ( <i>Hojnik</i> ) . . . . .	813

## Title III Agriculture and Fisheries

<b>Article 38.</b> [Common Agriculture and Fisheries Policy] ( <i>Jurcewicz/Popardowski</i> ) . . . . .	829
<b>Article 39.</b> [Objectives of Common Agricultural Policy] ( <i>Jurcewicz/Popardowski</i> ) . . . . .	845
<b>Article 40.</b> [Common Organisation of Agricultural Markets] ( <i>Jurcewicz/Popardowski</i> ) . . . . .	879
<b>Article 41.</b> [Measures Under a Common Agricultural Policy] ( <i>Jurcewicz/Popardowski</i> ) . . . . .	909
<b>Article 42.</b> [Application of Rules on Competition] ( <i>Jurcewicz/Popardowski</i> ) . . . . .	913
<b>Article 43.</b> [Implementing the Common Agricultural Policy] ( <i>Jurcewicz/Popardowski</i> ) . . . . .	933
<b>Article 44.</b> [Countervailing Charge] ( <i>Jurcewicz/Popardowski</i> ) . . . . .	951

**Title IV Free Movement of Persons, Services and Capital**  
**Chapter 1 Workers**

<b>Article 45.</b> [Free Movement of Workers] ( <i>Tryfonidou</i> ) . . . . .	959
<b>Article 46.</b> [Implementation of the Free Movement of Workers] ( <i>Tryfonidou</i> ) . . . . .	1013
<b>Article 47.</b> [Exchange of Young Workers] ( <i>Tryfonidou</i> ) . . . . .	1017
<b>Article 48.</b> [Social Security] ( <i>Tryfonidou</i> ) . . . . .	1021

**Chapter 2 Right of Establishment**

<b>Article 49.</b> [Freedom of Establishment] ( <i>Xuereb</i> ) . . . . .	1033
<b>Article 50.</b> [Implementation of the Freedom of Establishment] ( <i>Xuereb</i> ) . . . . .	1049
<b>Article 51.</b> [Exemptions in the Exercise of Official Authority] ( <i>Xuereb</i> ) . . . . .	1089
<b>Article 52.</b> [Special Provision on Public Policy, Public Security, or Public Health] ( <i>Graf Kielmansegg</i> ) . . . . .	1093
<b>Article 53.</b> [Mutual Recognition of Diplomas] ( <i>Papadopoulos</i> ) . . . . .	1121
<b>Article 54.</b> [Equality of Treatment of Companies and Firms] ( <i>Papadopoulos</i> ) . . . . .	1131
<b>Article 55.</b> [Equal Participation in the Capital of Companies or Firms] ( <i>Papadopoulos</i> ) . . . . .	1147

**Chapter 3 Services**

<b>Article 56.</b> [Freedom to Provide Services] ( <i>Segura Serrano</i> ) . . . . .	1159
<b>Article 57.</b> [Notion of Services] ( <i>Segura Serrano</i> ) . . . . .	1191
<b>Article 58.</b> [Services in Transport, Banking, Insurances] ( <i>Segura Serrano</i> ) . . . . .	1201
<b>Article 59.</b> [Liberalisation] ( <i>Segura Serrano</i> ) . . . . .	1205
<b>Article 60.</b> [Further Liberalisation] ( <i>Segura Serrano</i> ) . . . . .	1209
<b>Article 61.</b> [Transitional Rules] ( <i>Segura Serrano</i> ) . . . . .	1211
<b>Article 62.</b> [Application of the Rules on the Right of Establishment] ( <i>Segura Serrano</i> ) . . . . .	1213

## Chapter 4 Capital and Payments

<b>Article 63.</b> [Free Movement of Capital and Payment] ( <i>Seyad</i> ) . . . . .	1247
<b>Article 64.</b> [Restrictions on Third Countries] ( <i>Seyad</i> ) . . . . .	1287
<b>Article 65.</b> [Restrictions by Member States] ( <i>Seyad</i> ) . . . . .	1297
<b>Article 66.</b> [Short-Term Protection Measures] ( <i>Seyad</i> ) . . . . .	1321

## Title V Area of Freedom, Security and Justice

### Chapter 1 General Provisions

<b>Article 67.</b> [Establishing the AFSJ] ( <i>Chevallier-Govers</i> ) . . . . .	1329
<b>Article 68.</b> [Strategic Guidelines] ( <i>Chevallier-Govers</i> ) . . . . .	1377
<b>Article 69.</b> [Control by National Parliaments and Subsidiarity Principle] ( <i>Olivetti</i> ) . . . . .	1393
<b>Article 70.</b> [Evaluation of the Implementation of the Union Policies] ( <i>Oller Rubert/García Macho</i> ) . . . . .	1399
<b>Article 71.</b> [Standing Committee and Operational Cooperation on Internal Security] ( <i>Thym</i> ) . . . . .	1405
<b>Article 72.</b> [Clause on Maintaining Internal Security by Member States] ( <i>Thym</i> ) . . . . .	1407
<b>Article 73.</b> [Interstate Cooperation] ( <i>Oller Rubert/García Macho</i> ) . . . . .	1411
<b>Article 74.</b> [Administrative Cooperation] ( <i>Oller Rubert/García Macho</i> ) . . . . .	1417
<b>Article 75.</b> [Prevention and Combating Terrorism] ( <i>Seyad</i> ) . . . . .	1427
<b>Article 76.</b> [Legislative Initiative] ( <i>Chevallier-Govers</i> ) . . . . .	1439

## Chapter 2 Policies on Border Checks, Asylum and Immigration

<b>Article 77.</b> [Features and Measures of the Policy] ( <i>Thym</i> ) . . . . .	1451
<b>Article 78.</b> [Common Policy on Asylum] ( <i>Thym</i> ) . . . . .	1467
<b>Article 79.</b> [Common Immigration Policy] ( <i>Bačić Selanec</i> ) . . . . .	1491
<b>Article 80.</b> [Solidarity and Responsibility] ( <i>Goldner Lang</i> ) . . . . .	1517

## Chapter 3 Judicial Cooperation in Civil Matters

<b>Article 81.</b> [Judicial Cooperation in Civil Matters] ( <i>Rodríguez Pineau</i> ) . . . . .	1529
--	------

## Chapter 4 Judicial Cooperation in Criminal Matters

<b>Article 82.</b> [Principle of Mutual Recognition] ( <i>De Pasquale/Pesce</i> ) . . . . .	1559
<b>Article 83.</b> [Minimum Harmonisation] ( <i>De Pasquale/Pesce</i> ) . . . . .	1581
<b>Article 84.</b> [Promotion of Crime Prevention] ( <i>De Pasquale/Pesce</i> ) . . . . .	1597
<b>Article 85.</b> [Eurojust] ( <i>Nilsson</i> ) . . . . .	1603
<b>Article 86.</b> [European Public Prosecutor's Office] ( <i>Nilsson</i> ) . . . . .	1623

## Chapter 5 Police Cooperation

<b>Article 87.</b> [Establishment and Measures of Police Cooperation] ( <i>Milazzo</i> ) . . . . .	1645
<b>Article 88.</b> [Europol] ( <i>Milazzo</i> ) . . . . .	1671
<b>Article 89.</b> [Interstate Cooperation] ( <i>Milazzo</i> ) . . . . .	1699
<b>Bibliography</b> . . . . .	1705
<b>Index</b> . . . . .	1711

# Abbreviations

AEUV	Vertrag über die Arbeitsweise der Europäischen Union (Treaty on the Functioning of the European Union—TFEU)
AFSJ	Area of freedom, security and justice
AG	Advocate General
All ER	All England Law Reports
arg.	Argumentum
BBA	British Bankers' Association
BDI	Bundesverband der Deutschen Industrie (Federation of German Industries)
BGBI.	Bundesgesetzblatt
BGEP	Broad guidelines for the economic policies
BL	Basic Law (German Constitution = Grundgesetz)
BN	Billion
BVerfG	Bundesverfassungsgericht (German Federal Constitutional Court)
BVerfGE	Entscheidung des Bundesverfassungsgerichts (Decision of the German Federal Constitutional Court)
CAP	Common agricultural policy
CCT	Common customs tariff
CE	Communauté Européenne (Treaty establishing the European Community)
CEAS	Common European Asylum System
CEDH	Convention européenne des droits de l'homme <i>or</i> Cour européenne des droits de l'homme
CEPS	Centre for European Policy Studies
CETA	Comprehensive Economic and Trade Agreement
cf.	Confer (compare)
Chap.	Chapter
CISA	Convention implementing the Schengen Agreement
cit.	Cited



CJEU Statute	Protocol (No 3) on the Statute of the Court of Justice of the European Union
CJEU	Court of Justice of the European Union
CMO	Common Organisation of the Markets
CoE	Council of Europe
COREPER	Committee of Permanent Representatives
COSAC	Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union
COSI	Standing Committee on Operational Cooperation on Internal Security
CSA	Community Supported Agriculture
CSDP	Common Security and Defence Policy
CST	European Union Civil Service Tribunal
CUP	Cambridge University Press
DEM	German Deutsche Mark (currency code)
DG	Directorate-General
DNA	National Anticorruption Directorate
Doc.	Document
DPA	Data Protection Authority
DPD	Data Protection Directive
DVGW	Deutscher Verein des Gas- und Wasserfaches
e.g.	Exempli gratia (for example)
EA	Euro area
EAFRD	European Agricultural Fund for Rural Development
EAGF	European Agricultural Guarantee Fund
EAGGF	European Agricultural Guidelines and Guarantee Fund
EAW	European Arrest Warrant
EBA	European Banking Authority
EC Treaty	Treaty establishing the European Community
EC	European Community/European Communities
ECB	European Central Bank
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ Statute	Protocol (No 3) on the Statute of the Court of Justice of the European Union
ECJ	European Court of Justice (“Luxembourg Court”, <i>see also</i> CJEU)
ECN	European Competition Network
ECOFIN	Economic and Financial Affairs Council
ECR	European Court Reports
ECSC Treaty	Treaty establishing the European Coal and Steel Community
ECSC	European Coal and Steel Community
ECSR	European Committee of Social Rights
ECtHR	European Court of Human Rights (“Strasbourg Court”)

Ed.	Editor/Edition
EDA	European Defence Agency
Eds.	Editors
EEA	European Economic Area
EEC Treaty	Treaty establishing the European Economic Community
EEC	European Economic Community
EFSF	European Financial Stability Facility
EFSM	European Financial Stability Mechanism
EFTA	European Free Trade Association
EIB Statute	Protocol (No 5) on the Statute of the European Investment Bank
EIB	European Investment Bank
EIF	European Investment Fund
EIOPA	European Insurance and Occupational Pensions Authority
EJN	European Judicial Network
EMFF	European Maritime and Fisheries Fund
EMI	European Monetary Institute
EMS	European Monetary System
EMU	Economic and Monetary Union
EP	European Parliament
EPC	European Patent Convention
EPPO	European Public Prosecutor's Office
ERDF	European Regional Development Fund
(E)ESC	(European) Economic and Social Committee
ESA	European System of National and Regional Accounts
ESCB	European System of Central Banks
ESCB Statute	Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank
ESF	European Social Fund
ESI	European Structural and Investment Funds
ESM	European Stability Mechanism
et al.	et alii (and others)
et seq(q).	et sequens, et sequentes (and the following page/s or article/s)
EU	European Union
EUCFR	European Union Charter of Fundamental Rights
EUR	Euro (currency)
EURATOM	European Atomic Energy Community
EUROPOL	European Police Office
EUSFTA	EU-Singapore Free Trade Agreement
EUV	Vertrag über die Europäische Union (Treaty on European Union—TEU)
F.A.Z.	Frankfurter Allgemeine Zeitung
FCC	Federal Constitutional Court
FDI	Foreign direct investment

FIDE	Fédération Internationale pour le Droit Européen (International Federation of European Law)
fn.	Footnote
FTA	Free Trade Agreement(s)
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GC	General Court (part of the CJEU)
GC	Grand Chamber/Grande Chambre
GDP	Gross domestic product
GDPR	General Data Protection Regulation
GDR	German Democratic Republic
GG	Grundgesetz (German Basic Law)
GNI	Gross national income
GNP	Gross national product
HdR	Habilitation à diriger des recherches (authorised to steer researches)
HR	High Representative (of the Union for Foreign Affairs and Security Policy)
i.a.	inter alia (among other things)
i.e.	id est (that is)
ibid.	Ibidem (at the same place)
ICC	International Criminal Court
ICJ	International Court of Justice
ICR	International Court Reports
id.	idem (the same)
IGC	Intergovernmental conference
ILM	International Law Materials
ILO	International Labour Organization
IMF	International Monetary Fund
JHA	Justice and Home Affairs
LSE	London School of Economics and Political Science
MEP	Member of the European Parliament
MoU	Memorandum of Understanding
MS	Member State(s)
n.	number
NATO	North Atlantic Treaty Organization
NCA	National competent authority
NCB	National Central Bank
n.F.	neue Fassung (new version)
NGEU	Next Generation EU (COVID-19 recovery package)
NGO	Non-governmental organisation
No/No.	Number
NRP	National Reform Programme
NZZ	Neue Zürcher Zeitung

O.J. C	Official Journal of the European Union (Communications)
O.J. L	Official Journal of the European Union (Legislation)
O.J.	Official Journal
OCTs	Overseas Countries and Territories
OECD	Organisation for Economic Co-operation and Development
OEEC	Organisation for European Economic Co-operation
OLAF	European Anti-Fraud Office
OMC	Open method of coordination
OMRs	Outermost regions
OMT	Outright Monetary Transactions
OSCE	Organization for Security and Cooperation in Europe
OUP	Oxford University Press
p./pp.	Pages(s)
para	Paragraph(s)
passim	Widely mentioned, at various places
PCIJ	Permanent Court of International Justice
PIF	Protection of the Financial Interests of Union (protection des intérêts financiers)
PJCC	Police and judicial cooperation in criminal matters
PNR	Passenger name record
PSD	Payment Services Directive
QMV	Qualified majority voting
RAP	Rules of application
scil.	scilicet (namely)
SE	Societas Europaea
SEA	Single European Act
Sec./Sect(s).	Section(s)
SEK	Swedish Krona (currency)
SEPA	Single Euro Payments Area
SGEI	Services of general economic interest
SGP	Stability and Growth Pact
SIS	Schengen Information System
SMEs	Small- and medium-sized enterprises
SSM	Single Supervisory Mechanism
TCA	Trade and Cooperation Agreement Between the European Union and the United Kingdom
TCE	Treaty establishing a Constitution for Europe; <i>Traité instituant la Communauté européenne</i>
TEC	Treaty establishing the European Community
TECSC	Treaty establishing the European Coal and Steel Community
TEEC	Treaty establishing the European Economic Community
TEU	Treaty on European Union (as amended by the Treaty of Lisbon)

TEU-Amsterdam	Treaty on European Union as amended by the Treaty of Amsterdam
TEU-Maastricht	Treaty on European Union as drawn up by the Treaty of Maastricht
TEU-Nice	Treaty on European Union as amended by the Treaty of Nice
TFEU	Treaty on the Functioning of the European Union
TFUE	Trattato sul funzionamento dell'Unione europea (Treaty on the Functioning of the European Union—TFEU)
TiSA	Trade in Services Agreement
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
TSCG	Treaty on Stability, Coordination and Governance in the Economic and Monetary Union
TTIP	Transatlantic Trade and Investment Partnership
TUE	Trattato sull'Unione europea (Treaty on European Union—TEU)
UEF	Union Européenne des Fédéralistes
UK	United Kingdom
UNC	Charter of the United Nations
UNTS	United Nations Treaty Series
US	United States
USA	United States of America
v/v.	Versus (against)
VAT	Value added tax
VCLT	Vienna Convention on the Law of Treaties (1969)
Vol.	Volume
VVDStRL	Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer
WHO	World Health Organization
WTO	World Trade Organization

# Contributors

**Agata C. Amato Mangiameli, Dr.** Professor of Legal Philosophy, University of Rome Tor Vergata, Rome, Italy

**Nika Bačić Selanec, L.L.M.** Senior Assistant Lecturer in European Public Law, University of Zagreb, Zagreb, Croatia

**Hermann-Josef Blanke, Dr.** Professor of Public Law, International Public Law and European Integration, University of Erfurt, Erfurt, Germany

**Constance Chevallier-Govers, Dr.** Maître de conférences (HdR), Vice-Dean for International Relations, Chaire Jean Monnet, University Grenoble Alpes, Grenoble, France

**Tomas Davulis, Dr.** Professor of Labour Law, Vilnius University, Vilnius, Lithuania

**Patrizia De Pasquale, Dr.** Professor of European Law, Libera Università Mediterranea (Jean Monnet University), Casamassima, Bari, Italy

**Jacopo Di Gesù, Dr.** Official of the Ministry of the Interior, Siracusa, Italy

**Christopher Docksey** Director General at the European Data Protection Supervisor (EDPS), Brussels, Belgium

**Chiara Favilli, Dr.** Associate Professor of European Law, University of Florence, Florence, Italy

**Brynhildur G. Flóvenz** Associate Professor of Equality and Non-Discrimination, Womens Law, Social Law, Gender Based Violence, University of Iceland, Reykjavík, Iceland

**Ricardo García Macho, Dr.** Professor Emeritus of Public Law, University Jaume I, Castellón de la Plana, Spain

**Iris Goldner Lang, Dr.** Jean Monnet Professor of EU Law and Holder of the UNESCO Chair on Free Movement of People, Migration and Inter-Cultural Dialogue, University of Zagreb, Zagreb, Croatia

**Ondrej Hamuřák, Dr.** Senior Lecturer in European Law, Palacký University Olomouc, Olomouc, Czech Republic

**Peter Hilpold, Dr.** Professor of International Law, European Law and Comparative Public Law, University of Innsbruck, Innsbruck, Austria

**Janja Hojnik, Dr.** Professor of Free movement of persons, University of Maribor, Maribor, Slovenia

**Mónika Józson, Dr.** Associate Professor of European Law, Sapientia-Hungarian University of Transylvania, Cluj-Napoca, Romania

**Alina Jurcewicz, Dr.** Professor of Law, Institute of Law Studies, Polish Academy of Sciences, Warsaw, Poland

**Tanel Kerikmäe, Dr.** Professor of European Law, Tallinn University of Technology, Tallinn, Estonia

**Timothy Lyons, Dr.** QC, BL, Barrister at 39 Essex Chambers, London, UK

**Stelio Mangiameli, Dr.** Professor of Constitutional Law, University of Teramo, Teramo and Associated Member of the Institute for the Study of Regionalism, Federalism and Self-Government, National Research Council, Rome, Italy

**Pietro Milazzo, Dr.** Professor of Public Law, University of Pisa, Pisa, Italy

**Claudia Morviducci, Dr.** Professor of European Union Law, University of Roma Tre, Rome, Italy

**Hans G. Nilsson, Dr. h.c.** Honorary Professor, College of Europe, Bruges, Belgium

**Marco Olivetti, Dr.** Professor of Public Law, LUMSA University, Rome, Italy

**Marta Oller Rubert, Dr.** Lecturer in Administrative Law, University Jaume I, Castellón de la Plana, Spain

**Thomas Papadopoulos, Dr.** Assistant Professor of Business Law, University of Cyprus, Nicosia, Cyprus

**Celeste Pesce** Researcher of European Law, Pegaso University, Rome, Italy

**Johann-Christian Pielow, Dr.** Professor of Public Law, Ruhr-University Bochum and Executive Director at the Institute for Mining and Energy Law, Bochum, Germany

**Paweł Popardowski, Dr.** Assistant Professor of Law, Institute of Law Studies, Polish Academy of Sciences, Warsaw, Poland

**José María Porrás Ramírez, Dr.** Professor of Constitutional Law, University of Granada, Granada, Spain

**Elena Rodríguez Pineau, Dr.** Associate Professor of Private international law, Autonomous University of Madrid, Madrid, Spain

**Sandra Särav** Global Affairs Director, Office of the Chief Information Officer, Ministry of Economic Affairs and Communications, Tallinn, Estonia

**Tobias Schuelken, Dr.** Lecturer on EU Law, Ruhr-University Bochum, Institute for Mining and Energy Law, Bochum, Germany

**Antonio Segura Serrano, Dr.** Professor of international Public Law, University of Granada, Granada, Spain

**Sideek Mohamed Seyad, Dr.** Associate Professor of European Law, University of Stockholm, Stockholm, Sweden

**Karl-Peter Sommermann, Dr. Dr. h.c.** Professor of Public Law, Political Theory and Comparative Law, University of Administrative Sciences Speyer, Speyer, Germany

**Daniel Thym, Dr.** Professor of Constitutional, European and International Law, University of Konstanz, Konstanz, Germany

**Alina Tryfonidou, Dr.** Professor of Law, University of Reading, Reading, UK

**Sebastian Graf von Kielmansegg, Dr.** Professor of Public Law and Medical Law, University of Kiel, Kiel, Germany

**Peter G. Xuereb, Dr.** Professor of European and Comparative Law, University of Malta, Msida, Malta

**Gabriela Zanfir-Fortuna, Dr.** Senior Policy Counsel (European Privacy Law) at the Future of Privacy Forum, Washington, DC, USA



# Preamble

## Preamble

HIS MAJESTY THE KING OF THE BELGIANS, THE PRESIDENT OF THE FEDERAL REPUBLIC OF GERMANY, THE PRESIDENT OF THE FRENCH REPUBLIC, THE PRESIDENT OF THE ITALIAN REPUBLIC, HER ROYAL HIGHNESS THE GRAND DUCHESS OF LUXEMBOURG, HER MAJESTY THE QUEEN OF THE NETHERLANDS,<sup>1</sup>

(1)<sup>2</sup> DETERMINED to lay the foundations of an ever closer union among the peoples of Europe,<sup>4, 7, 11, 17-37</sup>

(2) RESOLVED to ensure the economic and social progress of their States by common action to eliminate the barriers which divide Europe,<sup>38-47</sup>

(3) AFFIRMING as the essential objective of their efforts the constant improvements of the living and working conditions of their peoples,<sup>48-51</sup>

(4) RECOGNISING that the removal of existing obstacles calls for concerted action in order to guarantee steady expansion, balanced trade and fair competition,<sup>52-63</sup>

(5) ANXIOUS to strengthen the unity of their economies and to ensure their harmonious development by reducing the differences existing between the various regions and the backwardness of the less favoured regions,<sup>64-66</sup>

(6) DESIRING to contribute, by means of a common commercial policy,<sup>67-69</sup> to the progressive abolition of restrictions on international trade,<sup>70-76</sup>

(7) INTENDING to confirm the solidarity which binds Europe and the overseas countries and desiring to ensure the development of their prosperity, in accordance with the principles of the Charter of the United Nations,<sup>77-81</sup>

(8) RESOLVED by thus pooling their resources to preserve and strengthen peace and liberty, and calling upon the other peoples of Europe who share their ideal to join in their efforts,<sup>82-83</sup>

(9) DETERMINED to promote the development of the highest possible level of knowledge for their peoples through a wide access to education and through its continuous updating,<sup>84-87</sup>

and to this end HAVE DESIGNATED as their Plenipotentiaries:

*(List of plenipotentiaries not reproduced)*

WHO, having exchanged their full powers, found in good and due form, have agreed as follows.

---

<sup>1</sup>The Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, the Republic of Estonia, Ireland, the Republic of Croatia, the Hellenic Republic, the Kingdom of Spain, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, and the Kingdom of Sweden have since become members of the European Union. The United Kingdom of Great Britain and Northern Ireland, which had acceded in 1973, withdrew from the European Union on 31 January 2020.

<sup>2</sup>The numbers attached to the paragraphs of the Preamble, not present in the original version, have been added by the author to facilitate the reading of the comments.

## Contents

1.	Development, Context, and Aims of the Preamble .....	1
1.1.	Development .....	1
1.2.	Context .....	4
1.3.	Aims .....	6
2.	Legal Relevance and Function of the Preamble .....	9
2.1.	Legal Relevance .....	9
2.2.	Function .....	14
3.	The Substantive Issues of the Recitals .....	16
3.1.	An Ever-Closer Union Among the Peoples of Europe .....	17
3.1.1.	The “Ever Closer Union” Topos in the Case Law of the Court of Justice of the EU .....	21
3.1.2.	The “Ever Closer Union” Topos in Light of the Brexit .....	25
3.1.3.	Reaffirming the Mission of an “Ever-Closer Union Among the Peoples of Europe” .....	27
3.1.4.	Interpreting the Phrase at the Intersection Between National Sovereignty and Democratic Legitimation of the Union .....	28
3.1.5.	The “Ever Closer Union” as a Criterion Determining the Finality of the Union? .....	30
3.2.	Economic and Social Progress and Elimination of Barriers .....	38
3.2.1.	Economic Progress .....	39
3.2.2.	Elimination of Barriers .....	40
3.2.3.	Social Progress .....	43
3.3.	Constant Improvements of Living and Working Conditions .....	48
3.4.	Steady Expansion, Balanced Trade, and Fair Competition .....	52
3.4.1.	Steady Expansion .....	55
3.4.2.	Balanced Trade .....	56
3.4.3.	Fair Competition .....	58
3.5.	The Unity of Economies and Their Harmonious Development .....	64
3.6.	A Common Commercial Policy .....	67
3.6.1.	Free Trade Agreements .....	70
3.6.2.	The Developmental Dimension of Free Trade Agreements .....	75
3.7.	Solidarity with Overseas Countries and Development of Their Prosperity .....	77
3.8.	Preserving and Strengthening Peace and Liberty .....	82
3.9.	Development of the Highest Possible Level of Knowledge .....	84
	List of Cases	
	References	

## 1. Development, Context, and Aims of the Preamble

### 1.1. Development

- 1 The Preamble to the TFEU is inherited from the Treaty Establishing the European Community (1992/1993), which is **derived from the Treaty Establishing the European Economic Community** (1957/1958), with the sole addition of paragraph 9 on education and on lifelong training introduced by the Treaty of Amsterdam (1997/1999). The current version of the Preamble is characterised by the

**following predominantly formal modifications (of editorial nature):** the passage that contained the intention of establishing an Economic Union has been dropped. Moreover, a footnote to the Preamble lists all Member States that joined the Union after the original conclusion of the Treaty. However, this footnote only has documentary character. The normative and political statements of the Preamble are borne by each Member State, regardless of the date of accession.<sup>3</sup> Finally, the Reform Treaty of Lisbon (2007/2009) has replaced in the second recital the word “countries” with “States”. In the last recital, the words “HAVE DECIDED to create a EUROPEAN COMMUNITY and to this end have designated” has been replaced by “and to this end HAVE DESIGNATED [...]”.

The Preamble to the TFEU conveys the impression of continuity<sup>4</sup> and nourishes the **illusion** that the TEU and TFEU are two “independent” treaties (Article 1.3 second sentence TEU: “Both Treaties [...]”). According to international law, this is true because both Treaties have their own specific and temporal scope and even have their own ratification requirement. In this way, the impression should be avoided that this is the (previously failed) Constitutional Treaty under camouflage. In substance, the Reform Treaty of Lisbon, which is at the same time a dissolution (Article 1.3 third sentence TEU) and amendment treaty, **has merged** the TEU (Maastricht until Nice) and the EC **into one Treaty** but outwardly split the contents into two Treaties.<sup>5</sup>

However, the authors of the Treaty of Lisbon decided not to significantly change the Preamble to the TFEU as they did not consider such changes necessary, and above all, to avoid political discussions on the precise wording of the Preamble between the—at the time of the Treaty of Lisbon—27 Member States.<sup>6</sup> Despite a decades-long process of integration and a meanwhile well-established European union of integration (*Integrationsverband*), the extensive recourse of the authors of the TFEU to the Preamble to the EC Treaty of 1957 shows a “strangely anachronistic” feature.<sup>7</sup> The Preamble to the TFEU, due to the lack of designation of core contents regarding common policies that have been developed in recent decades on a supranational level, seems to an extent “have fallen out of time”. Thus, there is no references to recent developments, such as non-discrimination, Union citizenship, the area of freedom, security, and justice, or the meanwhile—even though incompletely—realised economic and monetary union. Only to a limited extend does this Preamble formulate<sup>8</sup> “the quintessence of the following Treaty

<sup>3</sup> Nettesheim, in Grabitz et al. (2020), AEUV Präambel para 4 (released in 2010).

<sup>4</sup> Kotzur, in Geiger et al. (2015), TFEU Preamble para 1, who points out that the text of the Preamble underlines the great continuity on the way from the original Economic Community to the present (economic and political) Union”; see also Heintschel von Heinegg, in Vedder and Heintschel von Heinegg (2018), AEUV Präambel para 2.

<sup>5</sup> Niedobitek (2020), para 45 et seq.

<sup>6</sup> Nettesheim, in Grabitz et al. (2020), AEUV Präambel para 5 (released in 2010).

<sup>7</sup> Terhechte, in von der Groeben et al. (2015), AEUV Präambel para 14 (our translation).

<sup>8</sup> Ipsen (1972), p. 989, already at the beginning of the 1970s, regarded among the preambles of the integration treaties also the content of the Preamble to the EEC Treaty as “objectively inefficient” insofar as it postulates or promises other targets “than prosperity progress and freedom.”

provisions”.<sup>9</sup> Therefore, if taken alone (→ para 4), the task of the Preamble is limited to being “the prologue and promise of the constitutional Europe”.<sup>10</sup> Yet it still includes a reservoir of principles, values, and objectives that, as **elements of the European “culture constitutional law”**,<sup>11</sup> continue to determine the process of European unification in the twenty-first century.

## 1.2. Context

- 4 The Preamble to the TFEU should also be interpreted contextually (→ para 9 et seqq.), hence in the **overall context of the triad of Preambles of European constitutional law**,<sup>12</sup> such as the introduction to the Maastricht Treaty on European Union (1992/1993) and later the Treaty of Lisbon (2009), as well as the Charter of Fundamental Rights of the European Union (2000/2007/2009). The numerous protocols attached to the TFEU also include protocol-specific preambles emphasising special aspects of integration policy or fundamental rights— also with a view to their respective scope of application and thus limiting actions to be taken under that protocol.<sup>13</sup> In European legal culture, the **Preamble to the failed Constitutional Treaty** remains memorable. In particular, it reformulated, in close accordance with the Preamble to the EUCFR (→ para 20), the topos of the “ever closer union”, which had already shaped the Preamble to the ECC Treaty. The peoples of Europe become the driving force behind the emergence of a fateful connection: they “[. . .] [are] united ever more closely, to forge a common destiny” (third recital to the TCE Preamble). This is where the idea of a “Paneurope” of *Count Coudenhove-Kalergi* is discernible.<sup>14</sup> Also, *V. Giscard d’Estaing*, former Chairman of the European

<sup>9</sup> Cf., however, Kotzur, in Geiger et al. (2015), TFEU Preamble para 1.

<sup>10</sup> That is the function which Häberle and Kotzur 2016, para 806, ascribe to the Preambles in the European constitutional law.

<sup>11</sup> According to Häberle and Kotzur (2016), para 805, the Preambles in the European constitutional law describe “the ‘culture of European constitutional law’ par excellence”; cf. also *ibid.*, para 803 (“Culture”).

<sup>12</sup> On the designation of the Community Treaties as a “constitution”, cf. Opinion 1/91, *European Economic space* (ECJ 14 December 1991) para 21; and Case 294/83 *Les Verts v European Parliament* (ECJ 23 April 1986) para 23.

<sup>13</sup> Cf., e.g., the third recital in the Protocol on Denmark: “CONSCIOUS of the fact that a continuation under the Treaties of the legal regime originating in the Edinburgh decision will significantly limit Denmark’s participation in important areas of cooperation of the Union, and that it would be in the best interest of the Union to ensure the integrity of the acquis in the area of freedom, security and justice”; further the second recital in the Protocol on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland: “GIVEN that on 16 October 1996 and 30 October 1997 the United Kingdom government notified the Council of its intention not to participate in the third stage of economic and monetary union.”

<sup>14</sup> Cf. von Coudenhove-Kalergi (1923), p. 153; “The coronation of the pan-European endeavours would be the establishment of the United States of Europe after the model of the United States of America.” Some years later von Coudenhove-Kalergi (1929), p. 2 et seq., commented under the title “Switzerland as a rolemodel” again: “The name ‘United States of Europe’ caused several

Convention, shared that vision. In his acceptance speech, on the occasion of the Charlemagne Prize (2003), he spoke in light of the political intentions of the founding fathers of the “gradual emergence” of a “**common destiny**”. “It is Europe’s leaders who will carry forward its joint destiny.”<sup>15</sup> But the Constitutional Treaty had emerged without the blessing of the “constitutional moment” (*B. Ackerman*).

There is no instrumental relationship between the different preambles, spelt out in different moments of the history of European integration, but a synchronic reading reveals the **comprehensiveness of the aims of the aspired integration** as laid down in the different preambles or—to put it another way—of the “constitutional principles” of the European edifice (→ TEU Preamble para 9).

### 1.3. Aims

Preambles to international treaties spell out motives, convictions, and aims, which hold the Contracting Parties “**together in its innermost core**”. They are essential for the treaty-based work of international organisations and shall be **guidelines** for the interpretation and implementation of the treaty contents (on the part of the treaty organs).<sup>16</sup>

It has been pointed out that particular considerations of the Preamble to the TFEU seem to be in a certain asymmetrical relation to the contents of the Treaty, at least to the contents of the EEC Treaty (1957/58). The aim of the former Community was to regulate the economic life of the Contracting Parties and **create a common legislation for economic purposes, whereas the preamble copes with the more complex issues of European political integration**, imposing respect for

---

misunderstandings. It was understood as the European analogy to the United States of America [...]. Europe will never be able to copy the American constitution; every attempt to do so, would endanger the pan-European development. Europa cannot follow in its realisation a foreign, but only a European example; not the United States of America, instead the Swiss Confederation.” In his speech delivered at the University of Zurich on 19 September 1946, Churchill, without mentioning Coudenhove-Kalergi, referred to “the Pan-European Union, which owes so much to the famous French patriot and statesman Aristide Briand.” Here, Churchill also called up the “new Europe [...] to create the European family in a regional structure called, it may be, the United States of Europe [...] [u]nder and within that world concept [...] of the United Nations Organisation”.

<sup>15</sup> Speech delivered by Giscard d’Estaing (2003), who made reference to Article 1 TEC: “Reflecting the will of the citizens and States of Europe to build a common future [...]” and who spoke of the founding fathers’ approach “of a joint destiny” which will “gradually emerge” between the Member States. <http://www.karlspreis.de/de/preistraeger/valery-giscard-destaing-2003/rede-von-valery-giscard-destaing-francais>

<sup>16</sup> Especially among Germans it is a wide-spread opinion to interpret the Preambles to the European Treaties as the site for codification of “legitimacy bases” that convey identity. Insofar they are brought closer to the preambles to national constitutions in order to get them out of the realm of the classic international treaties. Cf., e.g., Kotzur, in Geiger et al. (2015), TFEU Preamble para 1, who, in this respect, is obviously inspired by P. Häberle; Häberle and Kotzur (2016), para 480: “identity taken out of constitution” (“Identität aus Verfassung”); Otoo (2013), p. 225, in reference to Häberle: “Preambles as the expression of a European Constitution patriotism”; see to the context of the symbols codified in the Constitutional Treaty Mateos y de Cabo, in Alvarez Conde and Garrido Mayol (2004), p. 190 et seq.