
The Lisbon Treaty: The next steps forward for Europe

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This briefing note provides an overview of the main changes made through the Lisbon Treaty,¹ which entered into force on 1 December 2009, some two years after it was signed on 13 December 2007.

Institutional reform was the key driver, with changes intended to make the EU institutions more efficient and to streamline the decision-making process in a European Union that now consists of 27 Member States. However, the Lisbon Treaty goes beyond that and also makes changes which will impact on the daily lives of EU citizens and companies doing business in or with Europe.

Here, we outline the main *institutional* changes and give some more focussed examples relating to *EU trade policy, competition policy and human rights/access to justice*.

Adapting the EU's institutional framework to 27 Member States

The bulk of the amendments contained in the Lisbon Treaty relate to the *EU institutions and how they function*. They should be of major significance if, as intended, these amendments improve the capacity of the EU to adopt and implement effective decisions in the areas of its responsibility and to operate more cohesively at international level.

The Lisbon Treaty amends the current Treaty on European Union (signed in Maastricht in 1992) and the Treaty establishing the European Community (signed in Rome in 1957), but does not replace them. Together, the two amended Treaties establish the European Union and govern its operation.

The following are the main institutional changes:

- **The unitary "European Union" replaces the former "three pillar" approach.** Under the previous approach the European Community was responsible mainly for the internal market and external trade relations (the "first pillar") and intergovernmental cooperation between EU Member States dealt with common foreign and security policy (the "second pillar") and police and judicial cooperation in criminal matters (the "third pillar"). New provisions added to the former EC Treaty (now the "Treaty on the Functioning of the European Union") enumerate the policy areas in which the EU has either exclusive, shared or supporting competence, together with its Member States. The EU is responsible both

internally and externally for all of these areas of EU policy, within the limits of its degree of competence and has a single legal "personality."

- **A full-time President of the European Council.** The European Council, now a formally recognized EU institution in which EU Heads of State meet every three months, will have a full-time President. This replaces the current system of rotating the Presidency every six months among the EU's Heads of State. Belgian Prime Minister Herman Van Rompuy was appointed the first President of the European Council, for a 2 ½ year term.
- **EU Foreign Policy representative.** The High Representative for Foreign Policy and Security, British Commissioner Baroness Ashton, will take over the merged jobs of the existing High Representative for Foreign Affairs (currently Javier Solana) and the External Relations Commissioner (Benita Ferrero-Waldner) and will serve as Vice-President of the European Commission.
- **A streamlined EU Commission?** The number of Commissioners in the European Commission was to be reduced to two-thirds the number of EU Member States, as from 2014, with countries providing Commissioners in rotation. This was to make Commissioners more representative of the EU and less advocates of national interest. However, to secure Irish approval for the Lisbon Treaty the European Council agreed that one Commissioner per Member State would be maintained. At least for the near term therefore efficiency has given way to the political need for all 27 Member States to be involved in the College of Commissioners. However, the President of the Commission obtains the new power to dismiss fellow Commissioners.
- **Role of the EU Parliament.** The European Parliament becomes the co-equal legislator with the Council in almost all policy areas. (The "Council" is the legislative body that represents the Member States. It is distinct from the "European Council" referred to above, which serves a more political function.) Thus, the current legislative process of co-decision is substantially extended and becomes the "ordinary legislative procedure."
- **A new voting system.** The voting system in the Council will become simpler and better reflect the relative size of a Member State's population within the EU. After a phase-in period from 2014 to 2017, a decision can be approved if voted for by Council members representing 55% of Member States, accounting for 65% of the EU's population.
- **Expanded jurisdiction of the European Courts.** The European Court of Justice now has jurisdiction over all areas of EU activity, with the exception of foreign and security policy. Notably, this extends the Court's jurisdiction to police and judicial cooperation in criminal matters. National courts and tribunals will be able to refer questions relating to immigration, asylum, internal security and criminal law to the Court. Acting unanimously, the Council can further expand the Court's jurisdiction to disputes arising under treaties that establish European intellectual property rights.
- **EU policies.** All EU policies will have to take into account the overarching goals of boosting employment, providing adequate social protection and fighting against social exclusion. New treaty provisions have been introduced to support measures in the areas of intellectual property rights, data protection, sport, research (including a European space policy), tourism, disaster protection and administrative cooperation. Combating climate change is expressly designated as part of the EU's environmental policy; security and

interconnection of energy supplies, as well as solidarity within the EU, are now specified as part of its energy policy.

EU Trade Policy

The Lisbon Treaty introduces two major changes in trade policy. First, it strengthens the EU's role by confirming that all key aspects of trade policy, now also including issues related to foreign direct investment, are areas of exclusive EU competence. Second, the Lisbon Treaty increases the powers of the European Parliament in trade policy.

Exclusive EU competence, including FDI. External trade policy has been a matter of exclusive EU competence since the Treaty of Rome. However, the Lisbon Treaty now expressly states that this includes trade in services, trade-related intellectual property rights and, in a major extension, foreign direct investment ("FDI"). With certain exceptions, the added competence for FDI is also exclusive.

However, since the Lisbon Treaty does not specify whether the EU's competence for FDI includes both investment *protection* and investment *liberalisation*, there may be some uncertainty about this. Currently, each EU Member State negotiates its own bilateral investment treaties ("BITs"), which contain investment protection measures such as rules on the repatriation of funds and safeguards against unlawful expropriation. Investment liberalisation (e.g., reciprocal agreements on national treatment) is clearly within the exclusive competence of the EU. By extending EU competence to FDI, without expressly limiting it to investment liberalisation, the Lisbon Treaty arguably has granted competence for investment protection to the EU.

We will have to see what happens, but this might have consequences for the many BITs currently in force. Exclusive EU competence in this area would mean that the Member States would lose their competence to (re-)negotiate, conclude and implement these investment treaties.

Increased role of the European Parliament. Another important change is the increased role for the European Parliament in trade policy. First, Parliament is granted shared powers with the Council to adopt implementing measures in areas such as anti-dumping, safeguard measures, "fair trade" instruments (e.g., the Trade Barriers Regulation) and rules of origin. Second, Parliament will have stronger influence on the negotiation of international trade agreements, since it must be formally consulted on the conduct of such negotiations.

EU Competition Policy: Is a Protocol enough to protect competition?

Article 3 of the amended EC Treaty no longer includes "a system ensuring that competition in the internal market is not distorted" as a policy objective of the EU. Instead, the reference to undistorted competition has been moved to a *protocol* annexed to the Treaty. The amended Article 3 now refers to "competition rules necessary for the functioning of the internal market." This appears to reflect the French government's success during the Lisbon negotiations in convincing EU leaders that competition is not an end in itself, but a means to serve the end, the EU Internal Market. The competition law provisions of the Treaty are otherwise unchanged, except that they have been renumbered again!²

Whether this change will have real practical consequences is unclear. The European Courts have referred to competition as an objective of the Community legal order pursuant to Article 3 of the EC Treaty in interpreting the broader implications of the prohibition on anti-competitive agreements,³ rules on abuse of a dominant position,⁴ as well as the State aid rules.⁵ For example, in a line of cases the European Court of Justice held that Article 3, in combination with Articles 10 and 81 or 82 of the EC Treaty, requires Member States not to adopt legislative measures that eliminate the effectiveness (*effet utile*) of Articles 81 and 82 as applied to companies. After the Lisbon Treaty, the balancing exercise conducted by the Court in analysing the harm to competition caused by a State measure as compared to its benefits in attaining intended policy objectives *might* turn out differently.

Interpretative issues could also arise due to the stronger references to full employment and social objectives, including the reference to a "*highly competitive social market economy*," in amended Article 3 of the Treaty on European Union. This might fuel arguments, for example, that a broader industrial policy standard should apply.

On the other hand, as long as the objective of an undistorted competition policy is still anchored somewhere in the Treaties, even if in a protocol, it can be used to interpret them. It will be interesting to see how the European Courts react.

Human Rights and Access to Justice

Human Rights. The Lisbon Treaty provides for recognition of the Charter of Fundamental Rights of the European Union, proclaimed by the EU institutions at the inter-governmental conference in Nice in December 2000.⁶ By giving the Charter's provisions binding legal force, the Lisbon Treaty formalises the principle that fundamental human rights are part of EU law. The European Courts decided this already, but had anchored the protection of fundamental rights among the general principles of Community law.

The Lisbon Treaty also requires the EU to become a formal party to the European Convention on Human Rights ("ECHR"), rather than simply treating its substantive rules as a source of the fundamental rights that are respected in the EU, as at present.

The Charter of Fundamental Rights does not create new rights under national law and applies only when national governments implement EU law. However, the fact that the Charter will have the same legal status as the EU Treaties is potentially significant, creating the possibility that the rights which it enshrines may be recognised or interpreted by the European Courts in ways that bring more direct benefits to individuals and/or legal persons. Moreover, where fundamental rights contained in the Charter correspond to those in the ECHR, the amended EC Treaty provides that the meaning and scope of these rights are to be regarded as the same, thus giving greater weight to the case-law of the European Court of Human Rights in interpreting them.

This might turn out to have some important consequences. For example, this change could have an impact on interpretation of the right not to be punished twice for the same offence (*ne bis in idem* – i.e., prohibition on double jeopardy), notably in relation to international cartels (an issue frequently raised in cartel appeals). According to the case-law of the European Court of Human Rights, the prohibition on double jeopardy is breached not only when a company is tried and/or punished twice

for the same offence (as the European Courts have recognised), but also when a company is punished for two offences, albeit nominally different, each of which comprises the "content of the wrongdoing" of the other in every respect, provided that they embody the same essential elements of each other.⁷

Access to justice. Standing to seek judicial review of Community legislation is significantly broadened by the Lisbon Treaty. Currently a person or company may challenge *decisions* addressed to them or *regulations and decisions* addressed to other persons, provided they are of direct *and individual* concern to them. (They may also follow the longer and more uncertain route of bringing an action before a national court, with the goal of obtaining a referral of the issue to the European Courts.) The Lisbon Treaty removes the requirement that an appellant must show "*individual concern*" to challenge regulatory acts. This will enable individuals or companies to seek review of such measures (provided that they do not require further implementing legislation).

A final thought:

Last but not least, the Lisbon Treaty provides a partial answer to the question long attributed to former U.S. Secretary of State Henry Kissinger: "Who do I call if I want to talk to Europe?" As of 1 December 2009, the answer is that the Secretary of State of the U.S. can phone the High Representative of the EU - Baroness Ashton.

However, if U.S. President Barack Obama asks a similar question, the answer is not as straightforward. In a statement following their appointment, President Obama indicated he looked forward to working with European Council President Van Rompuy, EU foreign policy chief Ashton and Commission President Barroso, just illustrating that the Lisbon Treaty has not yet eliminated difficulties in identifying *the* leader of the EU.

Nevertheless, as is apparent from the summary above, the Treaty has made a great many political and legal changes, which may well prove to be important steps towards the transnational development of the world's largest economic area.

¹EC Official Journal C 306/2 of 17.12.2007, p. 1.

²The provisions on anti-competitive agreements (formerly Article 81) are now in Article 101; abuse of dominance (formerly Article 82) now in Article 102; public undertakings (formerly Article 86) now in Article 106; and State aid (formerly Articles 87-88) now in Articles 107-108.

³See Case 6/72, *Continental Can*, [1973] ECR 215, para. 24; and Case C-453/99, *Courage Limited v Crehan*, [2001] ECR I-6297, para. 20.

⁴See Case C-95/04 P, *British Airways v Commission*, [2007] ECR I-2331 para. 68.

⁵See Case T-358/94, *Air France v Commission*, [1996] ECR II-2109, para. 55.

⁶A Protocol specifies that the Charter does not extend the ability of the courts to find that actions of Poland or the UK are inconsistent with the fundamental rights it reaffirms. Also, the Czech Republic will be able to opt out from the Charter to be shielded from property claims by ethnic Germans

expelled after World War II.

⁷See the judgment of the European Court of Human Rights, *Franz Fischer v. Austria*, 29 May 2001, paragraph 25.

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