

A view on the Lisbon Treaty

The Lisbon Treaty entered into force on December 1, 2009. Eight years after the kick-off of a Constitutional Convention at the Laeken Summit and five years after France and the Netherlands voted ‘no’ on the earlier ‘constitutional treaty,’ all Member States finally ratified the long-awaited reform of the European Union. The result is an important step on the long road towards European integration, but one that is stripped of all originally envisaged ‘constitutional language.’ The Lisbon Treaty is based on and reconfirms the principles on which the European Community was based and provides for (at least some of) the necessary adaptation of the institutional infrastructure in light of the 2004 and 2007 enlargements of the European Union to a total of 27 Member States.

The institutions of the European Union have endeavored to provide European citizens with guidance on the Lisbon Treaty and its relevance. The Council described the main changes in an Information Note ([Information Note – Treaty of Lisbon](#)), the Commission published a brochure ([Your Guide to the Lisbon Treaty](#)) and answered various frequently asked questions ([Explaining the Treaty of Lisbon](#)) while the European Parliament presented a list of the top 10 changes ([10 things about the Lisbon treaty you should know](#)).

This Alert Memo aims to give a brief overview of the main institutional and substantive changes contained in the Lisbon Treaty and provide a few references to easily accessible additional information (through internet links embedded in the text).

I. THE TREATY STRUCTURE

The Lisbon Treaty, which is formally an amendment to the Treaty on European Union (‘TEU’) and the EC Treaty, modifies the structure of those Treaties and the main composition of the European Union:

- Before the entry into force of the Lisbon Treaty, the European competences were governed by different sets of procedures, the so-called three pillars (European Community, Common Foreign & Security Policy, and Justice & Home Affairs). These pillars are integrated into and replaced by the European Union, which now constitutes a single legal personality. However, the ‘Common Foreign and Security Policy’ is still subject to special rules and procedures.

- The European Union is based on two treaties with the same legal value: the TEU and the Treaty on the Functioning of the European Union ('TFEU'). The former contains the basic principles of the structure, objectives, and organization of the Union; the latter is the successor to the EC Treaty and is largely inspired by the existing structure and EC policies. The articles of both Treaties are renumbered.
- For the first time in 60 years of European integration, an explicit 'right to withdraw' for Member States is incorporated in the TEU.

II. INSTITUTIONAL CHANGES

The institutional framework of the European Union is amended in various ways. The Commission issued a [Communication regarding the consequences of the entry into force of the Treaty of Lisbon for ongoing interinstitutional decision-making procedures](#).

- For the first time, the TEU separately recognizes the European Council, i.e. the institutional framework provided for the meeting of the Member States' Heads of State or Government. The European Council defines the general political objectives and priorities of the Union. It decided to appoint as its first President Mr. Herman Van Rompuy, the former Belgian Prime Minister, who will coordinate the work of the European Council. His responsibilities were described in a Council press release ([Background on the President of the European Council](#)).
- One of the main objectives of the reform process was to create an institutional framework for an effective and coherent Union foreign policy. To that end, a 'High Representative for Foreign Affairs and Security Policy' will be responsible for ensuring the consistency of the Union's external action. Baroness Catherine Ashton, the former UK Commissioner, has been appointed in that role. The Council has provided further information concerning her role in a press release ([Background on the High Representative for Foreign Affairs and Security Policy / The European External Action Service](#)).
- During the Lisbon Treaty's ratification process, it has been agreed that each Member State will continue to have one European Commissioner. José Manuel Barroso, the president-elect of the new Commission, presented his new team on November 27, 2009 ([President Barroso unveils his new team](#)), which still needs to be confirmed by the European Parliament ([Parliament to hold hearings of Commissioners-designate on 11-19 January](#)).
- The (directly elected) European Parliament gained influence and power under the Lisbon Treaty. For example, the co-decision procedure, which requires a favourable vote by the Parliament for a legislative proposal to take effect, has

become the rule and will now apply in most areas of EU competence. Moreover, the Parliament will have to approve the entirety of the Union's budget (its powers in the past were focused on the so-called 'non-obligatory' expenses). The European Parliament describes the modifications on its website ([New EP: more power, more responsibilities](#)). As a result of the added weight of the Parliament, its role in overall policy shaping can be expected to increase. And while such a change may not happen overnight, the change may be particularly significant in the longer run.

- Qualified majority voting also became the rule in the Council. As from November 1, 2014, a qualified majority will require that 55% of the Member States comprising at least 65% of the population of the Union vote in favour of a measure. Until that date, the existing qualified majority rules remain applicable.

III. JUDICIAL PROTECTION

The Lisbon Treaty also amends the organisation and jurisdiction of the Court of Justice of the European Union ([Press Release Court of Justice](#)).

- In accordance with the broader reform of the institutional framework, the Courts are renamed: the EU court system as a whole is now known as the Court of Justice of the European Union and comprises the Court of Justice, the General Court (formerly the Court of First Instance), and the Specialised Courts (so far this is mainly the Civil Service Tribunal). The creation of a specialized European patents court is currently being discussed ([Draft Council Conclusions on an enhanced patent system in Europe](#)).
- The number of judges (27) as well as the duration of their mandate (six years) remains the same. The number of Advocates-General has not changed, although the Member States have agreed to increase their number by three if the Court of Justice requested this.
- The jurisdiction of the EU Courts was extended to cover also the formerly excluded second and third pillars, with significant exceptions and limitations.
- More private parties will have standing to sue, in particular as regards certain legislative measures. Individuals may in future bring proceedings against certain legislative measures, if they directly affect them, without also being required to prove that they are more specifically affected than the average population.

IV. COMPETENCES

The Lisbon Treaty restates the principles concerning the division of competences between the European Union and the Member States. The Lisbon Treaty reaffirms that the European Union has only those competences that Member States have specifically entrusted to the Union. It reaffirms that the Union can only adopt measures that are proportionate to their objective and only if such measures are better taken at the level of the Union than at the level of the Member States (subsidiarity). National Parliaments of the Member States are given a role in the enforcement of the subsidiarity principle through a new ‘Early Warning System.’

The Treaty distinguishes between exclusive, shared, and supported competences of the Union (the former not being subject to a strict subsidiarity requirement). The Treaty principally confirms the existing competences and the case law of the Court of Justice in that respect. The few new areas of competence include additional powers in the areas of external trade policy, space, and energy. Additionally, the rules on international relations and external policies of the European Union have changed significantly.

V. COMPETITION LAW

Except for the renumbering of the Treaty, the competition rules have seen very little change.

- Articles 81 - 89 EC Treaty are now known as articles 101 – 109 TFEU.
- The reference to ‘free and undistorted competition’ is no longer included in the objectives of the TEU, but has been moved to a protocol, which is a legally binding part of the Treaty. Some authors have stated that this change could influence the competition policy of the Union. We expect that the impact of this ‘Sarkozy initiative’ should be minimal.
- An additional protocol deals exclusively with services of general interest. This clearly shows the commitment of the Union towards these services. Moreover, Member States seem to have greater freedom to determine the services of general interest that they want to support.

VI. FUNDAMENTAL RIGHTS

The Charter of Fundamental Rights remains a separate document. Nevertheless, its legal relevance has been significantly strengthened.

- The European Union recognizes explicitly in Art. 6(1) TEU that the Charter has the same legal value as the Treaties. Therefore, the Charter not only becomes legally binding, but will take precedence over all secondary

legislation (i.e., all regulations, directives and decisions adopted by any EU institution).

- The TEU allows accession of the European Union to the European Convention of Human Rights. Once such an accession occurs, the European Court of Human Rights will have jurisdiction to review measures taken by European institutions.

VII. CONCLUSION

It is not the first time that institutional and substantive changes affect the European Union and the treaties on which it is based. Many of the amendments made by the Lisbon Treaty do not affect citizens immediately and directly. Rather, the changes provide the different institutions of the European Union and the Member States with new opportunities and challenges. The practical impact of the different changes, restatements, and clarifications will only gradually become visible in day-to-day practice.

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If you have any questions, please feel free to contact any of your regular contacts at the firm or any of our partners and counsel listed under Antitrust and Competition under the 'Practices' section of our website at <http://www.clearygottlieb.com>.

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