

Brussels

**Date:** 1 December, 2009

**From:** Alastair Sutton

**Re:** **Entry into force of the Lisbon Treaty on 1 December 2009 – practical implication for lawyers and laymen inside and outside the EU**

### **A new era in European integration?**

1. The Lisbon Treaty entered into force today. After much political controversy over the last 8 years since negotiations were initiated, there is today (in Europe and around the world) little apparent interest or concern about what is, by any standards, a momentous event in the history of European integration since the Second World War. The Commission has today published a useful layman's guide to the Treaty, which is attached to this note for ease of reference. The Commission's guide is not a legal text, but it is useful for lawyers and laymen alike. The purpose of this memorandum is to highlight certain issues which, in my personal view, may not be immediately obvious from the press coverage or the Commission's own press statement.
2. In my view, based on 35 years' experience as an EU official and practising lawyer, the Lisbon Treaty ranks alongside the most momentous steps in European integration over the last 60 years since the entry into force of the Treaty of Paris establishing the European Coal and Steel Community (ECSC) in 1951. These include the first enlargement of the EC in 1973 (when the UK, Ireland and Denmark joined the EU), the launch of the Single Market in 1985 and the abolition of internal frontiers under the Maastricht Treaty in 1992, the achievement of monetary union and the introduction of the euro in 1999/2002 and the re-unification of Europe through the enlargements of 2004/2007. The implementation of the Lisbon Treaty ranks alongside these earlier landmarks. It is likely to be the last significant "constitutional change" in the EU for many years to come.

### **The EU replaces the EC**

3. First and foremost, the Lisbon Treaty in effect abolishes the European Community (EC) and replaces it with the European Union (EU), endowing the latter with full legal personality. It also abolishes the "pillar structure" upon which the European Union was based from 1992 under the Maastricht Treaty, till today. In other words, from now onwards, European integration will proceed under a single, unified, legal and institutional basis with foreign security and defence policies, as well as justice, freedom and security policies being treated under the same framework as "classical" EC policies (e.g. the fundamental freedoms, as well as "sectoral" policies such as environment, consumer protection, competition, agriculture, transport etc.).
4. The powers of the EU institutions in all these areas will differ from case to case, but a single institutional structure will now embrace all areas of EU law and policy. This is, in my view, likely to be by far the most significant change made by the Lisbon Treaty. As in

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the case of European integration under the EC Treaties over the last 50 years, much depends on the political and judicial activism of the EU's institutions, particularly the European Courts of Justice with their functional approach to Treaty integration.

### **The crucial integrationist role of the European Courts**

5. In 1971, the European Court of Justice (ECJ) gave judgment in the European Road Transport Agreement (ERTA<sup>1</sup>) case which confirmed that the doctrine of “implied powers” applied to the EC. In this respect, the ECJ followed the example of the International Court of Justice (ICJ) in 1949 in the famous *Reparation for Injuries suffered in the service of the United Nations* case.<sup>2</sup> This was merely one example of the functional or teleological approach consistently followed by the European Courts over the last 40 years and which has contributed to the extraordinary expansion of EU “competence” beyond that arguably envisaged in the founding Treaties in the 1950s.
6. Of course, only time will tell whether – over the next 50 years – the EU's institutions (including the European Courts) will be as activist as in the past. Only time will tell. As ever, the pace and direction of European integration will be dictated by politics and implemented by law and judicial decisions.

### **The Commission's explanatory memorandum – the importance of European citizens/voters**

7. The attached memorandum by the Commission highlights, in its introduction, the “populist” aspects of the Lisbon Treaty. The political crisis in many Member States over the pace, direction and depth of European integration (epitomised by the negative votes in the Dutch, French and Irish referenda) means that the Commission in particular takes every opportunity to draw attention to the benefits of the Lisbon Treaty for European citizens.
8. In my view, for the most part, this is mere “window-dressing”. The EU remains an organisation primarily of interest to Member States and to EU institutions themselves, even if – as a result of its unique legal character – many provisions of the EU Treaties are directly applicable in national law and create rights and obligations for European citizens. The Treaty rules on competition and State aids law are possibly the most well known provisions of directly applicable EU law, but certainly not the most far-reaching so far as ordinary citizens are concerned.

### **A three-part memorandum**

9. The attached memorandum is divided into three parts as follows:
  - a. the internal changes made by the Lisbon Treaty;
  - b. the external changes;

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<sup>1</sup> Case C-22/70.

<sup>2</sup> ICJ Reports 1949, page 174.

1 December, 2009

- c. the institutional and legal changes.

### **Internal changes**

10. My purpose here is not to repeat the content of the Commission's memorandum but rather to highlight some of its more important elements. These are as follows.

### **The autonomy of the eurozone**

11. The eurozone currently comprises 16 Member States. In the view of many, particularly as a result of the economic and financial crisis, it is likely that more EU law and policy will be decided in future within the eurozone led, at least in practice, by the "old" Member States, particularly France and Germany. The UK is of course excluded from the eurozone and, during the negotiations for the Lisbon Treaty, secured further derogations (including "opt-outs" and "opt-ins"), thereby making the UK more "semi-detached" from the EU than has been the case hitherto.
12. Of course, general legislation will continue to be made "at 27"; but the current economic crisis, coinciding with the entry-into-force of the Lisbon Treaty – tends to reinforce the likelihood of more being done within the eurozone, founded on the Paris-Berlin axis.

### **Fundamental and human rights**

13. Despite the incorporation of a legally-binding Charter of Fundamental Rights in the Lisbon Treaty, the EU as such has not yet acceded to the European Convention on Human Rights (ECHR). Laymen inside and outside the EU often confuse the "European Courts" in Luxembourg (EU) and Strasbourg (ECHR). Although the EU Courts in Luxembourg have held that virtually all the principles in the ECHR have effect in the EU's legal order as general principles of law recognised by the constitutional orders of all Member States, the EU Treaties and the ECHR are legally and institutionally distinct. Nonetheless, the conclusion of the Charter of Fundamental Rights and its incorporation with legal force in the Lisbon Treaty undoubtedly means that greater attention will be given in future to the concept of "fundamental rights" in EU law.

### **Climate change and energy**

14. The impending Copenhagen Conference, whether or not it leads to a binding Treaty this year, underlines the continuing importance of climate change and energy in the law and policy of all nations around the world. The new legal and institutional arrangements in the Lisbon Treaty should enable the EU to act more cohesively and to "speak with a single voice" than is currently the case.
15. The fact that a new legal basis for an EU energy policy has been included in the Treaty for the first time is likely to be of considerable legal significance going forward. The EU now has a more solid Treaty basis for internal legislation and external action than has hitherto been the case.

1 December, 2009

### Justice, freedom and security<sup>3</sup>

16. As indicated above, justice, freedom and security (like foreign defence and security policies) are now fully integrated into the EU's single institutional structure. Two important consequences flow from this. First, more decisions will be taken by the Member States in the Council of Ministers on the basis of qualified majority voting (QMV). Secondly, the European Courts will have a wider jurisdiction in this field than hitherto. The fact that the UK, Ireland and Denmark continue to "benefit" from derogations (or "opt-outs") in this crucial area for international cooperation merely emphasises the "semi-detached" relationship which the UK will have with the EU under the Lisbon Treaty.

### The impact of the Lisbon Treaty on the EU's external policy

17. First and foremost, as indicated above, the Lisbon Treaty will, in effect, "abolish" the European Community (EC) and replace it with the European Union (EU). The EU will have full international legal personality. This change will be more visible externally than internally. This development will not affect the fact that, depending on the sector involved (e.g. trade, defence, monetary policy etc.), the EU "spokesman" or representative may be the Commission, the Presidency of the Council, the High Representative or the European Central Bank. The Lisbon Treaty will therefore not provide a definitive answer to the question "who speaks for Europe?"!

18. In capitals around the world, EU delegations or diplomatic missions will replace the existing Commission delegations. A new European External Action Service (EEAS) will be created, with a force of several thousand diplomatic personnel (drawn from the Commission and Member States) reporting to the newly-created EU High Representative for Foreign Affairs and Security Policy.<sup>4</sup>

19. The newly-created President of the European Council (Herman van Rompuy) working together with the High Representative (Catherine Ashton) and the President of the European Commission (José Manuel Barroso), should ensure greater visibility for the EU in international relations. However, it must be said that much depends on the working relationship established between these individuals and their ministerial counterparts in the Member States. One important point to underline is that nothing in the Lisbon Treaty will mean that the EU (yet at least!) will replace Member States in organisations like the UN Security Council or General Assembly.

20. As indicated above, the extent to which the EU develops its international personality depends on how far the 27 EU Member States are politically willing to endow the EU with greater powers in "political" external relations in the years to come and the extent to which, in consequence, powers are transferred from Member States to the EU and its institutions. It remains to be seen whether, in this respect, the EU will emulate the EC, to which very substantial powers in the economic field have been transferred from Member States over the last 40 years since the ECJ's ruling in the ERTA case referred to above.

<sup>3</sup> This covers issues such as visas, asylum, immigration, economic crime, civil and criminal justice, family law, accession, etc.

<sup>4</sup> Who will be a Vice President of the Commission as well as President of the Foreign Affairs Council.

1 December, 2009

### **A wider “trade” policy with exclusive competence for the EU**

21. For the EU’s main trading partners (such as the United States, Japan, China, India and Brazil), the extension of “trade” policy to include investment is an important development. In addition, the Lisbon Treaty endows the European Parliament with legislative powers in the field of the common commercial policy for the first time. In future, the European Parliament’s consent is also required for the ratification of all trade agreements.

### **Institutional and legal changes under the Lisbon Treaty**

22. Nothing in the Lisbon Treaty has the effect of creating a “super State” in Europe. If anything, the Lisbon Treaty’s provisions on the division of functions and competences between the EU, its institutions and Member States reinforce the sovereignty of Member States in particular areas.

23. For political reasons linked to the prevailing “euroscepticism” in many Member States, much attention was focussed in the Lisbon Treaty on “ring-fencing” (or at least attempting to “ring-fence”) EU and national “competencies” under the Treaty. The Lisbon Treaty contains legally-binding provisions, subject to interpretation by the European Courts, establishing the division of competence between the EU and its Member States. Distinctions are drawn between exclusive and shared competencies on the one hand and areas, principally subject to national sovereignty, where the EU and its institutions may act to support Member States. A number of protocols and declarations attached to the Lisbon Treaty aim to clarify this allocation of competencies.

24. However, like the Maastricht, Amsterdam and Nice Treaties which preceded the Lisbon Treaty, the latter significantly extends qualified majority voting (QMV) in the Council (44 new policy areas are covered), as well as the powers of the European Parliament to participate in legislative activities. Through the co-decision procedure it also enhances the role of national parliaments in the EU’s decision-making process.

### **Legal issues**

25. The Lisbon Treaty amends, but does not replace, preceding Treaties (e.g. Maastricht, Amsterdam and Nice) which amended the “founding Treaties”. The failure to consolidate and simplify the fundamental law of the European Union (e.g. in the failed “Constitutional Treaty”) is regrettable. It was an opportunity missed. Nonetheless, the fact that a consolidated version of the EU Treaties, as modified by the Lisbon Treaty, has been produced by the Commission (even if it does not have formal legal effect) will considerably assist understanding of the new “constitutional order” of the EU.

26. The Lisbon Treaty is in fact a combination of the Treaty on European Union (TEU) and the former EC Treaty which will be renamed the “Treaty on the Functioning of the European Union” (TFEU). The two Treaties are however of equal legal weight and constitute a single legal “whole”, so to speak. The Lisbon Treaty is a single legal text with a single institutional structure.

27. Legal practitioners will need to familiarise themselves with a new numbering of the

Treaty articles. To facilitate this process, the Commission has produced a table of equivalence which is referred to in the attached memorandum.

### **Enhanced cooperation**

28. In an EU of 27 Member States, it may well prove difficult, even with qualified majority voting (QMV), to reach agreement on sensitive issues. This is particularly true where unanimous voting continues to apply, such as in taxation policy. The Lisbon Treaty therefore contains provisions for “enhanced cooperation”, whereby a number of Member States may decide to “go further and faster” in terms of integration, than other Member States.
29. It remains to be seen whether (and to what extent) these provisions will be used. It is conceivable, for example, that greater coordination of fiscal policy will occur in the eurozone of 16 Member States than in an EU of 27 Member States. As indicated above, it may well be that the eurozone of 16 Member States constitutes a “ready-made” vehicle for enhanced cooperation in certain areas such as, for example, justice, freedom and security or certain aspects of taxation policy.

### **The “supremacy” of EU law over national law**

30. The principle of “supremacy” was confirmed by the European Court of Justice (ECJ) in the 1960s in the celebrated cases of *Van Gend en Loos*<sup>5</sup> and *Costa v ENEL*.<sup>6</sup> The concept now finds legal expression in the Lisbon Treaty itself. This is not a legal innovation, but nonetheless tends to reinforce the “constitutional” nature of EU law.

### **Withdrawal from the EU**

31. For the first time, the Lisbon Treaty provides that, under certain circumstances, the Member State may withdraw from the EU.

### **Changed legal basis for pending legislation**

32. Tomorrow (2 December 2009) the Commission will produce a Communication clarifying measures which are currently in the EU’s legislative pipeline for which new legislative procedures (or legal bases) will apply under the Lisbon Treaty.

### **Conclusion**

33. As with all previous Treaty changes (in 1986, 1992, 1997 and 1999), the new rules, procedures and institutions created by the Lisbon Treaty will take time to “bed down”. In the short term, in my view, the external impact of the Lisbon Treaty is likely to be more visible and tangible than the internal dimension.
34. On the internal side, many changes (notably the extension of QMV and co-decision procedures) are incremental in the sense that they build on similar changes made in the

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<sup>5</sup> Case C-26/62.

<sup>6</sup> Case C-6/64.

1 December, 2009

Single European Act (SEA), as well as the Maastricht (1992), Amsterdam (1997) and Nice (1999) Treaties.

35. In the longer term however, the fact that the EU will now operate with a single institutional structure, with an expanded jurisdiction for the European Courts, as well as the European and national parliaments, is likely to mean an ever greater concentration of law and policy at European level, even if – because of the wide variety of political attitudes in a 27-Member union – recourse to “enhanced cooperation” (particularly within the eurozone) may become inevitable over time.

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