

Title of the Entry: **The Lisbon Treaty**

Referring Entries: **The Lisbon Treaty**

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Summary:

The Lisbon Treaty is the short descriptor of the Lisbon Treaty amending the Treaty on European Union and the Treaty establishing the European Community (OJ C 306, 17.12.2007), signed at Lisbon on 13 December 2007. The Treaty entered into force on 1 December 2009.

The EU's institutions, processes and competences are governed by two Treaties: the Treaty on European Union (TEU) (OJ C 202, 7.6.2016) and the Treaty on the Functioning of the European Union (TFEU) (OJ C 202, 7.6.2016). The TFEU was named the Treaty establishing the European Community (TEC) until 2009. The Lisbon Treaty is a binding agreement between the Member States which makes a number of amendments to the TEU and the TFEU with the aim of making the EU more democratic, more efficient and better able to address global problems.

Main text:

The Lisbon Treaty is the latest in a long line of Treaties which have made changes to the way in which the EU functions and is governed. The Lisbon Treaty was proposed following a "period of reflection" which lasted from June 2005 to December 2006 as a way to salvage elements of the failed Constitutional Treaty. The Member States agreed that the EU needed to become more democratic and more efficient but the constitutional terminology which had dominated the Constitutional Treaty had to be abandoned (for example the flag, anthem and motto) or amended (the new 'Union Minister for Foreign Affairs' was replaced by a 'High Representative of the Union for Foreign Affairs and Security Policy'). The content of the Lisbon Treaty otherwise remained similar to that of the Constitutional Treaty. It was signed on 13 December 2007. Additional concessions were made during the subsequent ratification process to Ireland to facilitate the Treaty's adoption in a second referendum, after the first had failed, and a Protocol to the Treaties relating to the Czech Republic and the Charter of Fundamental Rights was also added in order to enable the Czech President to ratify the Treaty. The Lisbon Treaty came into force on 1 December 2009.

Form and content

The Lisbon Treaty is an agreement between the Member States to amend the TEU and the TEC. It reconstructed the legal framework for European integration. The Treaty contains seven Articles (of which Articles 1 and 2 are the most significant) as well as a number of Protocols and Declarations which make changes to the name, form and content of the TEU and the TEC. Since the Treaty of Maastricht, the TEU and the TEC have contained the provisions which govern the EU's institutions, processes and competences. Most visibly, the Lisbon Treaty has brought to an end the legal entity called the European Community and absorbed it into the European Union. The TEC has been renamed

as the Treaty on the Functioning of the European Union (TFEU). The EU is henceforth governed by two treaties: the TEU which sets out the principles, basic institutional framework and main policy areas over which the EU has responsibilities; and the TFEU which provides a more detailed statement of the powers and procedures of the EU institutions.

There is no transfer of additional exclusive competence from the Member States to the EU institutions but the Lisbon Treaty makes changes to the way the Union exercises its existing and some new (shared) powers; the latter are mainly in the areas of environmental policy, intellectual property rights, sport, space, tourism, civil protection and administrative cooperation.

Amendments to the TEU

Article 1 of the Lisbon Treaty amends the TEU to include some constitutional principles and to make visible the EU's commitment to democracy and human rights. The Union is given legal personality and thereby obtains the ability to sign international treaties in the areas of its attributed powers or to join an international organisation. Member States may only sign international agreements that are compatible with EU law.

The Lisbon Treaty does not maintain the "Pillar" system which had been established by the Maastricht Treaty. Although the European Community is formally abolished, its content (formerly the first Pillar) remains largely unchanged within the TFEU.

In the area of freedom, security and justice (the former third Pillar in the old TEU), the Lisbon Treaty progresses and consolidates a process begun with the Treaties of Amsterdam and Nice which had recognised the need for increased powers and clarity on the Union's objectives in this area. The Lisbon Treaty moves the provisions from the intergovernmental TEU into Part Three of the TFEU where they become, for the first time, subject to the ordinary legislative procedure (ie qualified majority voting in the Council as well as providing a role for the European Parliament) unless otherwise specified, and fall within the jurisdiction of the Court of Justice (Article 19 TEU). The Treaty also introduces an urgent preliminary ruling procedure where a case is pending and a person is in custody (details contained in the Rules of Procedure of the Court of Justice).

Although it is no longer a separate Pillar, distinctive rules for the Common Foreign and Security Policy (CFSP) remain in Title V of the TEU. The approach to the CFSP mirrors that of the Constitutional Treaty. It is based on inter-governmental cooperation through the European Council and Council. The newly-created High Representative for Foreign Affairs and Security Policy, who is also the Vice-President of the European Commission, is responsible for ensuring and enhancing coherence in external policies. The Court of Justice and other supranational institutions are largely excluded from the CFSP.

The Lisbon Treaty for the first time inserted into the TEU a formal procedure to be followed by Member States wishing to withdraw from the European Union in accordance with their constitutional requirements, namely Article 50 of the Treaty on European Union (TEU).

Amendments to the TFEU

Article 2 of the Lisbon Treaty makes a number of amendments to the TEC, including renaming it as the TFEU and generating a substantial level of renumbering. The Court of First Instance is renamed as the General Court and the Court of Justice as the Court of Justice of the European Union. The Lisbon Treaty amends Article 263 TFEU to make it easier for individuals to bring judicial review actions before the Court of Justice. The number of MEPs is set at 751 (although this was reduced to 705 following the UK's departure from the EU at the end of 2020). The term 'Community' is replaced by 'Union' throughout the texts. The TEU and TFEU are given equal legal value. The EU takes the place of the Community and is its legal successor.

The TFEU is restructured into seven Parts. It attempts to clarify the demarcations of responsibility between Member States and the EU. A new Article 2 inserted into the TFEU distinguishes between three types of competences: exclusive competence, where the Union alone can legislate, and Member States only implement; shared competence, where the Member States can legislate and adopt legally binding measures if the Union has not done so; and supporting competence, where the EU adopts measures to support or complement Member States' policies. Union competences can be handed back to the Member States in the course of a future Treaty revision. Articles 4 and 5 TEU set out a "principle of conferral", under which "competences not conferred upon the Union in the Treaties remain with the Member States" (Article 4(1) TEU).

In areas of shared competence (Article 4 TFEU), the Lisbon Treaty considerably strengthens the principle of subsidiarity by involving the national parliaments in the EU decision-making process through the so-called 'subsidiarity control mechanism' (Protocol No 2 on the application of the principles of subsidiarity and proportionality). The mechanism has two stages. Under the 'yellow card procedure', the Commission must revisit a legislative proposal (maintain, revise or withdraw – with reasons for its decision) when at least one-third of national Parliaments send a reasoned opinion that the proposal does not comply with the principle of subsidiarity. The 'orange card procedure' is triggered when a majority of national parliaments send reasoned opinions. It requires the Commission to review its proposal and to maintain, change or withdraw it. If the Commission decides to maintain its proposal, it must justify its decision to the European Parliament and Council as to why the proposal complies with the principle of subsidiarity. If a simple majority of members of the European Parliament, or 55% of Council members, disagrees then the proposal will not be given further consideration. By July 2021, the yellow card procedure had been used three times. The orange card procedure has not yet been used.

Unlike the Constitutional Treaty, the Lisbon Treaty does not formally proclaim the supremacy/primacy of EU law over national legislation. Instead, Declaration No 17 references the Opinion of the Council Legal Service of 22 June 2007 which reiterates the settled case law of the Court of Justice on the matter (see *Costa v ENEL*, 15 July 1964, Case 6/641).

Changes to the institutions

The Lisbon Treaty amends the TEU to formally recognise the European Council as an EU institution, responsible for providing the Union with the 'impetus necessary for its development' and for defining its 'general political directions and priorities' (Article 15 TEU). The European Council

is to be led by a President to be elected by a qualified majority for a renewable term of 30 months.

Legislative functions continue to be shared between the Commission, the Council and the European Parliament. The Treaty of Lisbon maintains the principle of double majority voting (citizens and Member States) in the Council that had been introduced by the Treaty of Nice in 2003. However, with effect from 1 November 2014, it altered the majorities necessary for a proposal to pass. Under the new rules, a qualified majority is reached when 55% of members of the Council (in practice, 15 states out of 27), comprising at least 65% of the population, support a proposal (Article 16(4) TEU). When the Council is not acting on a proposal from the Commission, the necessary majority of Member States increases to 72% (Article 238(2) TFEU). To block legislation, at least four Member States have to vote against a proposal. From 1 April 2017, 55% of the Member States necessary for the blocking minority can ask for reconsideration of a proposal during a 'reasonable time period' (Declaration 7).

The Lisbon Treaty continues the trend of earlier Treaties in transferring powers to the European Parliament. The codecision procedure is renamed as the 'ordinary legislative procedure' (Article 294 TFEU) and is extended to cover 85 policy areas which fall within the EU's legislative competence (for example, economic governance, immigration, energy, transport, the environment and consumer protection). It has become the 'normal' procedure for the adoption of the majority of EU laws. Other 'special' legislative procedures (Article 289 TFEU) either require the Parliament's 'consent' (previously 'assent') or consultation. The Lisbon Treaty also introduces a new and simplified budgetary procedure which creates full parity between the European Parliament and the Council for approval of the annual budget (Article 314 TFEU). The EU's multiannual financial framework requires Parliament's consent before it can be adopted by the Council (Article 312 TFEU).

The European Parliament also plays a role in determining the selection and the eventual election of the President of the European Commission. This is in addition to the continued approval of the Commission as a college.

Democracy and human rights

Since the 1970s, the EU had increasingly integrated human rights concerns into many of its policies. The Lisbon Treaty builds on earlier changes made by the Maastricht and Amsterdam Treaties to formally proclaim the EU's commitment to democracy, equality and human rights, as well as incorporating the Charter of Rights as an equal source of law.

European Citizens' Initiative

The Lisbon Treaty implements a commitment to participatory democracy in practical terms by introducing a requirement in Article 11 TEU and Article 24 TFEU for the European Parliament and Council to set up a European Citizens' Initiative (ECI). The procedure and conditions for an ECI are contained in Regulation (EU) 2019/788. The ECI is intended to give EU citizens the possibility to participate directly in the development of EU policies. The initiative enables one million EU citizens who are nationals of at least one quarter of the Member States, to call directly on the European Commission to propose a legal act

(notably a Directive or Regulation) in an area where the Member States have conferred powers to the EU level. This right to request the Commission to initiate a legislative proposal, in theory, puts citizens on the same footing as the European Parliament and the European Council, who enjoy this right according to Articles 225 and 241 TFEU, respectively. The first registered ECI, *Fraternité 2020*, was initiated on 9 May 2012. The first submitted ECI (but second registered) was *One Single Tariff*. As of July 2021, 81 initiatives have been registered and six have received a response from the Commission. In *C-418/18 P Puppinck and Others v Commission* the Court of Justice restricted the effectiveness of the ECI to force legislation at EU level when it confirmed the General Court's judgment that held that the Commission is not bound to implement a successful ECI, but retains discretion as to 'the action it intends to take, *if any*' (para 74) [emphasis added].

Charter of Fundamental Rights

The Charter of Fundamental Rights (CFR), which had been proclaimed in 2000 and which had formed part of the Constitutional Treaty, is not incorporated directly into either the Lisbon Treaty or the TEU/TFEU, but acquires a legally binding character through Article 6(1) TEU. Article 6(1) gives the CFR the same legal value as the Treaties. The provisions of the CFR are binding on the EU, its institutions and bodies in all of their activities, and on the Member States when they act within the scope of EU law. The CFR brings together the fundamental rights contained in the European Convention on Human Rights and other international treaties with the primary and secondary sources of EU law. Rather than creating "new" rights, the CFR codifies existing rights. Declaration No 1 annexed to the Lisbon Treaty clarifies that the CFR does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined by the Treaties. Nonetheless, the adoption of the CFR as a legally binding text caused anxiety amongst some Member States. Protocol No. 30 on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom confirms that the CFR does not create new justiciable rights or extend the jurisdiction of the Court of Justice. The Protocol was to be extended to the Czech Republic (Conclusions of the European Council of 29 and 30 October 2009). The precise meaning of the opt-out is unclear but the Court of Justice confirmed in *Joined Cases C-411/10 and C-493/10 NS v. Secretary of State for the Home Department* that the CFR still applies in both countries. The Court of Justice has since made frequent use of the CFR in a range of different policy areas.

Article 6(2) TEU declares that the EU shall accede to the European Convention on Human Rights (ECHR). The purpose of this step is to introduce external accountability of the EU's actions in the sphere of human rights. It necessitated the adoption of the 14th Protocol to the ECHR which paved the way for an international organisation to become a signatory to the Convention. Negotiations over a draft accession agreement between the EU and the Council of Europe were concluded in April 2013 when the agreement was submitted to the Court of Justice. In *Opinion 2/13*, the Court of Justice deemed the agreement incompatible with the EU Treaties and with the autonomy of the EU legal order. Negotiations have since stalled and it is not clear when a solution will be found. Once a new draft agreement is concluded, EU accession to the ECHR will also depend on ratification, not only by EU Member States, but also the States party to the ECHR. European

Parliament consent to the accession agreement (Article 218(6) TFEU) is also required.

Reactions to the Lisbon Treaty

The Lisbon Treaty was greeted with widespread relief by Member State governments. It was hoped that it signified a stable and lasting settlement which would "complete the process started by the Treaty of Amsterdam and by the Treaty of Nice with a view to enhancing the efficiency and democratic legitimacy of the Union and to improving the coherence of its action" (Preamble to the Lisbon Treaty). Scholarly reactions were more mixed. There was a recognition that the Lisbon Treaty introduced a number of subtle but important changes, for example in the delimitation of competences; the increase in the role of national parliaments and the European Parliament; in the area of freedom, security and justice; or in the case of giving the Charter of Fundamental Rights legal value. Overall however, there was general agreement that the reforms introduced by the Treaty were limited in scope. In addition, the political compromises that had been necessary to ensure the adoption of the Treaty resulted in tempered expectations as to the Treaty's possible achievements. Ziller has described the Lisbon Treaty as a "remake" of the Constitutional Treaty (Ziller, 2021). Craig states that the Lisbon Treaty would "not represent 'constitutional finality'", though it would "provide the institutional foundations for the EU to move forward in the next decade" (Craig, 2008). There has been a substantial scholarly discussion on the merits of Treaty reform in general and the likely path of future EU integration (for an overview see, for example, Craig and de Búrca, 2020) which has intensified in the wake of the crises (the financial crisis, the refugee crisis, the Brexit crisis, and the COVID-19 pandemic) which have faced the EU since 2007.

Important Cases:

Joined Cases C-411/10 and C-493/10 *NS v. Secretary of State for the Home Department*

Opinion 2/13

C-418/18 P *Puppinck and Others v Commission*

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