



# The Lisbon Treaty

## How will it affect the EU and you?

November 2009

### Overview

On **1 December 2009** the controversial Treaty of Lisbon ("the Treaty") will enter into force.

With a view to 'taking Europe into the 21st century' the Treaty will introduce arguably the most significant changes to the policies, powers and structure of the European Union since the Maastricht Treaty in 1992.

In response to queries regarding the implications of the Treaty, this briefing note explains:

- how the Treaty will reform the EU institutions and legislative procedures;
- the impact of the Treaty in specific policy areas: climate change and energy; defence and security; research and development; intellectual property; plus competition and state aid; and,
- the day-to-day practical differences in terms of new terminology and article number references to which we will have to adapt from 1 December 2009.

In summary, and contrary to certain outspoken critics, the Treaty does not constitute a "seismic shift"<sup>1</sup>, centralising the EU by moving powers away from national governments. However, by the same token, the Treaty is more than just a "tidying-up exercise" and, so, it is important to be aware of how it affects both the EU as a whole and your particular business sector.

### Background

The Treaty was originally conceived in June 2007 in the aftermath of the doomed Constitution for Europe which had been rejected in referendums held in the Netherlands and France in 2005.

The Treaty was signed in Lisbon on 13 December 2007 and was intended to enter into force on 1 January 2009. However, the process of getting the Treaty ratified by all 27 Member States proved problematic. Ireland was the only Member State to hold a referendum on the Treaty and its voters initially rejected the Treaty, before reversing their decision in a second referendum in 2009. The Czech Republic was the last of the 27 EU Member States to ratify the Treaty on 3 November 2009 and even this was done with theatrical reluctance by euro-sceptic President Vaclav Klaus<sup>2</sup>.

### Institutional changes to the EU

It is certainly the case that the institutional changes introduced by the Treaty have been the "headline-grabbing" issues focused on by media across Europe. In practice, the following amendments to the existing structures and institutions of the EU appear to be the most significant:

#### A President of the European Council - but not (yet) a President of Europe

The Treaty creates the post of President of the European Council, who will be elected for a two-and-a-half year term, renewable once. This will effectively replace the current system of the Presidency of the Council rotating from one Member State to another every six months.

It is envisaged that the President's work will be largely administrative, consisting of the co-ordination of the work of the European Council and organising its meetings. President-elect Van Rompuy will not be "the President of Europe" and will have no legislative or executive powers.

#### More power to the European Parliament and to national parliaments – tackling the democratic deficit

Responding to the most common criticism levelled at the EU, namely that it often legislates without a clear democratic mandate, the Treaty introduces new measures which will ensure that the European Parliament and, to a lesser extent, national parliaments are more involved in the legislative process.

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<sup>1</sup> Nigel Farage MEP (UK Independence Party), 3rd November 2009.

<sup>2</sup> As reported in The Guardian, 4th November 2009.

**European Parliament:** The Treaty extends the co-decision procedure<sup>3</sup> to almost 50 new areas, including legal immigration and aspects of trade and agricultural policy. In effect, this means that legislation cannot be adopted if it is opposed by the European Parliament<sup>4</sup>.

**National parliaments:** The Treaty gives national parliaments the right to challenge a piece of European legislation that they consider unnecessary. A sufficient number of national parliaments acting collectively can compel the European Commission to review or withdraw legislation.

### Exit clause for leaving the EU – euro-sceptic delight?

The Treaty introduces a provision that makes it possible for an EU Member State for the first time to legally and officially terminate its membership. There is currently no regulated provision for leaving the EU.

### Climate change and energy

The Treaty introduces an entirely new and distinct body of rules on energy, thereby raising the profile of the EU's energy policy.

EU legislation on energy will focus on delivering the objectives of the EU's energy policy, stated in the Treaty to be:

- ensuring the functioning of the energy market;
- ensuring the security of the energy supply in the EU;
- promoting energy efficiency and energy saving, and the development of new and renewable forms of energy; and
- promoting the interconnection of energy networks.

The Treaty also adds the objective of combating climate change to the EU's environmental policy.

However, Member States' rights to determine the conditions for exploiting their energy resources, their choices between energy sources and the general structure of their energy supply are not affected. Moreover, a declaration to the Treaty also clarifies that Member States' rights to take the necessary measures to ensure the continuity of their energy supplies are unaffected.

### Defence and security

The Treaty introduces a "solidarity clause" under which the EU and its Member States must provide assistance by all possible means to a fellow Member State affected by a human or natural catastrophe or by a terrorist attack.

In the longer term, the Treaty envisages that the existing European Security and Defence Policy will ultimately lead to a common defence policy for the EU. However, the Treaty

respects that this can only happen with the unanimous consent of each Member State. Accordingly, it will continue to be the case that Member States are responsible for their own territorial defence.

As regards the defence industry more specifically, the Treaty confirms the existence of the European Defence Agency, with a view to developing an EU arms policy and to co-ordinating work to equip the various national armed forces.

### Research and development

The Treaty extends the EU's objectives in this area by providing for the creation of a 'European research area' in which researchers, scientific knowledge and technology circulate freely. This reflects the intention of the EU to establish free movement of knowledge as the "fifth fundamental freedom." <sup>5</sup>

### Intellectual property

The Treaty introduces a new provision that specifically allows for the EU to establish measures for the creation of European intellectual property rights (IPRs) to provide uniform protection of IPRs throughout the EU and for the setting up of centralised EU-wide authorisation, co-ordination and supervision arrangements.

The EU has already adopted a raft of legislation harmonising aspects of Member States' trade mark, copyright, design right and patent laws, mainly under internal market powers. There already exists a number of European rights, including the Community trade mark and the Community design right. This new provision is seen as a statement of political commitment to achieving a Community patent, in relation to which there are a number of outstanding issues, including the issues of translation of claims and the distribution of renewal fees to national patent offices.

### Competition and state aid

At present, one of the stated objectives of the EU is to implement 'a system ensuring that competition in the internal market is not distorted.' The Treaty will remove this reference to competition policy from the list of the EU's objectives. Some commentators question whether this omission will serve to undermine the European Commission's ongoing efforts to end protectionist national policies and anti-competitive state aid. However, Neelie Kroes, the EU Competition Commissioner, has recently stated that this change will have no effect whatsoever and that an Internal Market without competition rules would be an empty shell.

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<sup>3</sup>To be renamed the 'ordinary legislative procedure' (see section on terminology below).

<sup>4</sup>In contrast, under the 'consultation procedure' which applies to a number of fields including competition, the Council must consult the European Parliament but it is not bound by its opinion.

<sup>5</sup>In addition to free movement of (i) goods (ii) capital, (iii) services and (iv) persons

## Terminology – know your Eurobabble!

From 1 December 2009, much of terminology used by and in relation to the EU will be changing:

### Current terminology

European Community

EC Treaty

Co-decision

Common market

Court of First Instance (CFI)

### New Terminology

European Union

Treaty on the Functioning of the European Union (TFEU)

Ordinary legislative procedure

Internal market

General Court

## New numbering of Treaty provisions – know your numbers!

As well as changing the name of the EC Treaty to the Treaty on the Functioning of the European Union (TFEU), the amendments introduced by the Lisbon Treaty also affect the numbering of some of the main provisions we have become accustomed to:

### Current numbering in EC Treaty

Article 23 (free movement of goods)

Article 39 (free movement of workers)

Article 81 (competition – restrictive agreements)

Article 82 (competition – abuse of dominance)

Article 87 (state aid)

Article 226 (failure to fulfil Treaty obligations)

Article 230 (review of legality of acts by EU institution)

Article 234 (preliminary reference)

### New article number in TFEU

Article 28

Article 45

Article 101

Article 102

Article 107

Article 258

Article 263

Article 267

## Contact

If you would like to discuss any of the issues raised in this briefing, or have any queries relating to the effect of EU law on your business, please do not hesitate to contact:



**John Houlden**

**Partner**

+44 (0) 117 902 2796

john.houlden@burges-salmon.com



**Marc Shrimpling**

**Solicitor**

+44 (0) 117 939 2221

marc.shrimpling@burges-salmon.com

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