

Following the adoption of the Lisbon Treaty: what is new in European law?

The entry into force of the Lisbon treaty was scheduled at the beginning of the month starting after the end of the ratification process. After the second referendum in Ireland and the ratification of the treaty by Poland and the Czech Republic, the treaty will thus enter into force on 1 December 2009.

As the Nice treaty, the Lisbon treaty is a recast of the two existing treaties that can be seen as the EU “constitution”:

- the Treaty on the European Union (TEU)
- the Treaty on the Functioning of the European Union (TFEU, formerly known as “Treaty Establishing the European Community” - TEC).

1. New grounds for anti-discrimination and social policies

The Lisbon treaty brings a number of new elements that increase the legitimacy of the EU when it comes to the implementation of legislation and policies against discrimination.

- The Union’s values: Article 2 TEU lists the fundamental values on which “the Union is founded”. These values include the respect for human rights and the rights of persons belonging to minorities; they are the ground of a “society in which [...] non-discrimination, tolerance [...] and equality between women and men prevail.” According to Article 49 TEU, only the States that respect these values and are committed to their promotion can apply for accession to the EU.
- Breach by a Member State of the Union’s values: Article 7 TEU says what are the conditions needed to acknowledge a clear risk of a breach by Member States of the Article 2 values. The new contents of Article 2 TEU are now relevant, including in the cases in which the Council may decide on sanctions.
- A new heading on non-discrimination in the TFEU: New articles introduce in the treaty two transversal clauses against discrimination.

Article 8 TFEU is dedicated to gender equality, it is an improvement of the previous provisions promoting equality between men and women.

Article 10 TFEU is a new article. The way it reads (see annex) implies that all EU policies and actions should now be decided and implemented taking in consideration the EU’s mission “to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”

Article 9 TFEU does not explicitly refer to discrimination. However, as a social horizontal clause, it mentions the “*fight against social exclusion*” as a requirement to be considered in all EU activities and policies. It further reinforces the clauses of articles 8 and 10.

- The Charter of fundamental rights: the Charter has been adopted in 2000, but will only become binding with the entry into force of the Lisbon treaty, despite the fact that some Member States negotiated opt-out provisions (UK, Poland: protocol 7; Czech Republic: unilateral declaration only). Article 6 TUE is the article that refers to the Charter and gives it the same legal values as the treaties; see also Declaration 1 annexed to the Lisbon treaty.

Article 9 of the Charter re-asserts “*the right to marry and the right to found a family*”, which “*shall be guaranteed in accordance with the national laws governing the exercise of these rights*”. This article does not bring anything new by itself, but it can be interpreted together with other articles of the Charter (Article 21 to start with) for the purpose of advocacy discourses.

Article 21 of the Charter brings a new binding non-discrimination clause in the EU treaties. It broadens the list of discriminations prohibited in Union as it quotes “*sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.*”

- The European Charter of Human Rights (ECHR): Article 6 TUE, paragraph 2, reads as follows: “*the Union shall accede to the ECHR. Such accession shall not affect the Union’s competences as defined in the treaties*”. Paragraph 3 mentions the fact that Human Rights, as guaranteed by the ECHR and the national constitutional traditions, shall constitute general principles of the Union’s law. The EU Member States already ratified the ECHR, but these new provisions are important if we consider the policies and the legislation adopted at EU level.

Questions:

- How can we promote an actual implementation of the transversal clauses?
- Will there be a systematic review of the legislative proposals made by the Commission (transversal clause: how did the former article 2 on gender equality TEC work)?
- Consequences of new values and transversal clauses on assessment of Member States’ policies and accession countries’ ones?
- On Articles 9 and 21 of the Charter: see advocacy strategies already existing at national/constitutional level (Portugal?)
- How can ECHR and ECtHR case-law have an impact on EU policy-making?

2. Changes in the legislative procedures and policy-making processes

The Lisbon treaty brings several changes in a number of law-making processes and policy implementation procedures.

- Article 19 TFEU (former Article 13): before the Lisbon treaty, “article 13 directives” had to be adopted by the Council, acting unanimously after a mere consultation of the Parliament. From now on, the Parliament’s role is stronger since it has to give its consent to the proposal. The Council will still act unanimously, in the frame of a “*special legislative procedure*”.

In addition, the second paragraph of the article mentions the possibility, for the Parliament and the Council, “*by derogation from paragraph 1, acting in accordance with the ordinary legislative procedure, (to) adopt the basic principles of Union incentive measures, excluding any harmonisation of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1*”. The ordinary legislative procedure is the so-called co-decision, where the Parliament and the Council share equal power.

These changes are certainly improvements, since the Parliament has always been a much more reliable institution when it comes to combating discrimination.

- Co-decision as default legislative procedure (Article 289 TFEU and 294 TFEU): the co-decision procedure will now be the default law-making process, except where the treaties explicitly require a different procedure (unanimous vote of the Council, mere consultation of the Parliament...).

A lot of EU policies were already covered by this legislative procedure, formerly known as “Article 251 TEC procedure”. But several policy areas were not: immigration, culture, services, penal and judicial cooperation, police cooperation, aspects of the trade policy. In fact, most of the “justice, freedom and security” field is concerned. This is particularly interesting when it comes to ILGA-Europe’s strategy against hate violence and crimes.

In addition, a new voting method will be introduced in the Council in 2014, based on a double majority requirement: 55% of the member countries, representing 65% of the EU population (Article 238 TFEU).

- Article 48 TEU (paragraph 7) gives the possibility to extend the ordinary legislative procedure, where it does not apply yet, without having to recast the treaties: “*Where the Treaty on the Functioning of the European Union provides for legislative acts to be adopted by the Council in accordance with a special legislative procedure, the European Council may adopt a decision allowing for the adoption of such acts in accordance with the ordinary legislative procedure [...] For the adoption of the decisions referred to in the first and second*

subparagraphs, the European Council shall act by unanimity after obtaining the consent of the European Parliament.”

- Article 83 TFEU provides the grounds for an increased EU action to “establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.” See also article 87 TFEU on police cooperation.
- Article 168 TFEU defines a slightly increased scope for the actions of the EU on public health. For example, the Commission will now be able to organise “exchange of best practices” or to take initiatives aiming at the “establishment of guidelines and indicators” in the fields mentioned in the 1st paragraph of the article, which includes “improving of public health, preventing physical and mental illness and diseases, and obviating sources of danger to physical and mental health. Such action shall cover the fight against the major health scourges, by promoting research into their causes, their transmission and their prevention, as well as health information and education”.
- Article 225 TFEU gives to the Parliament a form of power to formulate legislative initiative. This article is not new (former article 192 TEC), except for the last sentence on the Commission’s reaction to an EP proposal. “*The European Parliament may, acting by a majority of its component Members, request the Commission to submit any appropriate proposal on matters on which it considers that a Union act is required for the purpose of implementing the Treaties. If the Commission does not submit a proposal, it shall inform the European Parliament of the reasons.*”

Questions:

- The consequences of the Article 13/Article 19 change for the adoption of the horizontal directive: the Parliament will have to vote again after the Council makes a decision. Given the content of the Buitenweg report, this can be a mean for political pressure.
- What about the measures mentioned in paragraph 2 of Article 19 TFEU? More expertise is needed to assess the opportunities offered by this new language.
- We need to keep in mind the changes in the legislative procedure in the various policy fields we covered, to think of exploring the new opportunities, when necessary with EU law experts.
- Assessment of the opportunities under new Article 83 TFEU (“need to combat [particularly serious crimes] on a common basis”, and end of paragraph 1)
- Assessment of Article 168 opportunities in the field of sexual health and exchange of good practices (ex: reassignment surgery?).

3. New institutions and mechanisms

- The Presidency of the European Council (article 15 TEU, par. 5 and 6): the newly created president of the Council will not have a specific role in the legislative procedure. His main job will be to prepare the Council's work, ensure its continuity and work to secure consensus among member countries. However, establishing a relation of confidence with the new Presidency would be an asset. In addition, the President will have a role in the “*external representation of the Union on issues concerning its common foreign and security policy*”, which is an area of interest for ILGA-Europe and other NGOs.
- The High Representative of the Union for Foreign Affairs and Security Policy (Article 18 TEU): the last remark on the President of the European Council also applies to the High Representative, who will be assisted by a new European external action service. The High Representative will also be one of the Vice-Presidents of the Commission.
- The role of national Parliaments (Article 12 TEU, Protocol 1 of the Lisbon treaty): their role will be enhanced, and if one third of them say an action should be taken at local or national level, the Commission will have to give a justification or withdraw the proposal.
- Participatory democracy and right to petition right (Article 11 TEU and 24 TFEU): a petition with at least one million signatures obtained from a number of Member States can be sent to the Commission inviting it to take a legislative initiative.

NGOs, political parties and Unions may try to find together ways to use these new provisions. Coalition making will be interesting (remember that ETUC say they have 60 millions members).

Questions:

- How to develop the best strategies to engage with the new institutions, together with other NGOs? What about our relations the High representative and the external action service (aiming at facilitating our actions in non-EU countries)?
- How to deal with the role of national Parliaments, in coordination with ILGA-Europe's membership? This question is not new (see developments with Dutch and French Parliaments on the horizontal directive)

Annex: Important articles quoted from the Charter and the Treaties

Charter of Fundamental Rights of the EU

Article 9

Right to marry and right to found a family

The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.

Article 21

Non-discrimination

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.

Treaty on the EU

Article 2

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Article 3

(ex Article 2 TEU)

1. The Union's aim is to promote peace, its values and the well-being of its peoples.
2. The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.
3. The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a

highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.

It shall promote economic, social and territorial cohesion, and solidarity among Member States.

It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.

4. The Union shall establish an economic and monetary union whose currency is the euro.

5. In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.

6. The Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties.

Article 6

1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

Treaty on the functioning of the EU

Article 10

In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Article 19

(ex Article 13 TEC)

1. Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

2. By way of derogation from paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt the basic principles of Union incentive measures, excluding any harmonisation of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1.