



The Law Society

A guide to the Treaty of Lisbon

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insight

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FOREWORD

The Law Society's Guide to the Treaty of Lisbon has proved invaluable to solicitors, policy makers and parliamentarians alike.

"The Law Society has taken an objective, professional view of the matter, not a politician's view. The guide is not prejudiced in any way, but offers a clear elucidation of what the treaty contains. It gives good advice to the legal profession about how the treaty will help those who practise criminal, civil and commercial law. It will simplify the legal code, and allow legal professionals to do their business in Europe on behalf of this country's people and companies much more effectively."

Michael Connarty MP, Chair of the European Scrutiny Committee, House of Commons

"This Guide is simple, accessible and well put together. It provides a clear and concise overview of information on the new treaty."

Diana Wallis MEP, Vice President of the European Parliament

"This is an excellent, useful, and incidentally positive guide to the Treaty. Well worth reading."

John Purvis CBE, MEP

Such has been the demand for the Guide that it has now been reprinted and I thank the sponsors who have made this possible. For further information please contact the Law Society's Brussels Office at: brussels@lawsociety.org.uk



Andrew Holroyd,
President of the Law Society of England and Wales



OVERVIEW

Treaty unveiled

THE TREATY OF LISBON WAS SIGNED BY THE EU COUNTRIES ON 13 DECEMBER 2007 AND, SUBJECT TO RATIFICATION, WILL COME INTO FORCE IN JANUARY 2009. THE LAW SOCIETY'S EU COMMITTEE LOOKS AT THE DETAILS AND LEGAL IMPLICATIONS OF THIS LANDMARK AGREEMENT

The Treaty of Lisbon (the Treaty) was adopted on 13 December 2007 and amends the existing EU treaties. It does not have the same ambitions as the previous Constitutional Treaty, which was not fully ratified. The Treaty will now be subject to national ratification procedures and it is hoped that it will enter into force in January 2009.

On 17 December 2007, the European Union (Amendment) Bill was introduced in the House of Commons. The Bill is intended to enable the UK to ratify the Treaty.

This guide sets out to explain briefly how the Treaty will update the legal order of the EU and how this relates to you as solicitors.

This new Treaty will affect your work in the following ways.

- It adapts the structures of the EU and its institutions to an enlarged membership, and brings about changes in how EU

legislation is proposed and adopted.

● Through the creation of an elected fixed-term president of the European Council and the formal attribution of legal personality to the EU, alongside the High Representative of the Union for Foreign Affairs and Security Policy, it enhances the EU's role on the international stage in key areas such as trade, international relations, and energy and climate change.

● It impacts on the tools available to you to assist your clients.

● It improves the rights of individuals, businesses and organisations in the EU.

● It spells out the EU's role in areas of day-to-day legal practice where lawyers have not always had to focus on the EU dimension to a large extent, for example, in the fields of criminal law, alternative dispute resolution and family law (see chart below).

While the guide refers to the particular implications for the

UK, it does not address political questions such as whether a referendum should be held in the UK to ratify the Treaty.

Key EU terms are highlighted and explained in the glossary of terms on page 22, which also lists further sources of information.

This guide has been prepared by the EU Committee of the Law Society of England and Wales in order to provide the solicitors' profession with an overview of the Treaty (1). It aims to offer a clear, concise and insightful overview of the practical effects of the Treaty and its future relationship with UK law, and as such, is aimed at assisting key stakeholders as well as solicitors.

We hope that it will be of benefit to a wider audience during the UK's ratification Bill.

The Treaty of Lisbon can be found at:
<http://www.consilium.europa.eu/igcpdf/en/07/cg00/cg00014.en07.pdf>

Treaty of Lisbon – the EU's role in areas of day-to-day legal practice

Dispute Resolution

It should be simpler under the Treaty of Lisbon for individuals and businesses to challenge the legality of certain EU regulatory acts directly. An improved redress mechanism will thus be available for clients. The Treaty also highlights the development of alternative methods of dispute resolution.

Family Law

Family law matters fall within the remit of the Treaty and this will build on work already under way in cross-border divorce, parental responsibility and wills and succession matters. Such measures will, however, be subject to unanimous agreement. Any plan to remove the national veto in relation to family law must be approved by Westminster and every other national parliament in the EU.

Criminal Law

The Treaty underlines the principle of mutual recognition, allowing a court in one EU country to recognise and enforce a criminal conviction from another. It also envisages that minimum rules will be adopted in relation to the mutual admissibility of evidence, rights of individuals and victims of crime in criminal proceedings. It allows for the possibility of a European Public Prosecutor should all national governments agree to create this office.

(1) Members of the EU Committee are: Rachel Bickler (Chair), John Wotton, Mark Clough Q.C, Julian Creasey, Kiran Desai, Jane Golding, David Harrison, Paul Henty, Louise Hodges, Hugh Mercer, Megan Pullum, John Forman (Observer), Diana Wallis MEP (Observer) and Dr Christopher Kerse (Observer).



BACKGROUND

The Treaty establishing a Constitution for Europe 2004

This section contains a brief overview of the Treaty and the general principles that underpin it

The main purpose of the Treaty establishing a Constitution for Europe 2004 (the Constitutional Treaty) was to update and, at the same time, consolidate and replace the disparate European treaties that have accumulated over the years.

The Constitutional Treaty sought to improve the EU's institutional structure by: changing decision-making procedures to re-balance voting rights between EU countries; enhancing the role of the directly elected Parliament in certain areas where it had little influence; and streamlining legislative procedures.

It emphasised the concept of European citizenship and associated rights, and provided for the Charter of Fundamental Rights (the Charter) to be incorporated into

the Constitutional Treaty and thus be legally binding. It also set out a vision of the EU on the world stage, with a Foreign Minister representing the EU.

The Constitutional Treaty was billed by some as the 'blueprint' for the future of Europe. It was signed on 29 October 2004 by the (then) 25 EU countries and national ratifications began. However, this process came to an abrupt halt when, in their national referenda, Dutch and French voters said 'no'. Although some EU countries continued the ratification process, ultimately the Constitutional Treaty did not enter into force.

Consequently, it was time for national leaders to go back to the drawing board.

The road to reform 2007
When the Federal Republic of

Germany took over the six-month presidency of the EU in January 2007, Chancellor Merkel steered her fellow leaders towards a 'roadmap for the future of Europe'. At the European Council summit meeting at the end of June 2007, the EU's national leaders declared that, 'after two years of uncertainty over the EU's treaty reform process, the time has come to resolve the issue and for the EU to move on'. A detailed mandate for negotiation was prepared and an Inter-Governmental Conference convened. For the avoidance of doubt, the message from the summit was 'the constitutional concept is abandoned'. This opened on 23 July 2007. Political agreement on the Treaty of Lisbon was reached on 19 October 2007, and the final declaration and signature took place on 13 December 2007.

The EU's effectiveness on the international stage and its difficulty in dealing with issues such as the Balkans led many to conclude that it was necessary to have a single voice in foreign and security policy. The creation of a Foreign Minister under the Constitutional Treaty was intended to address this issue.

With the expansion into central and eastern Europe in 2004, and with the accession of Bulgaria and Romania in 2007, the EU now has 27 member countries. Post-enlargement, it was increasingly difficult for the EU to function effectively because the institutional structure and decision-making mechanisms were those put in place in 1957 for the original six EU countries, and had remained largely unchanged since then.



The Treaty of Lisbon 2007

1951 <i>Treaty of Paris (ECSC)</i>	1957 <i>Treaty of Rome (EEC)</i>	1986 <i>Single European Act</i>	1992 <i>Treaty of Maastricht (EU)</i>	1997 <i>Treaty of Amsterdam</i>	2001 <i>Treaty of Nice (EU)</i>	2004 <i>Constitutional Treaty (failed)</i>	2007 Treaty of Lisbon
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The Treaty of Lisbon takes the form of an amending treaty, one that updates the existing Treaty on European Union and the Treaty establishing the European Community.

This follows the model of other amending treaties such as the Treaty of Amsterdam and the Treaty of Nice (see chart above). In this respect, it differs from the Constitutional Treaty, which would have consolidated and replaced the existing treaties.

Institutional change is the key driver behind the Treaty of Lisbon. The need for transparency, better democratic accountability and enhanced judicial scrutiny has led to some important improvements in the

EU's make-up.

Of particular significance is the new system of qualified majority voting – the re-balancing of the voting system between national governments in the Council of Ministers (the Council). This is designed not only to reflect the growth of the EU from 15 to 27 EU countries, but also to ensure a balance between large and small countries, old and new EU countries and Northern and Southern Europe (see chapter 4, *Who does what and how*)

In terms of legislative procedure, the model whereby the European Commission (the Commission) proposes legislation and the

democratically-elected European Parliament (the Parliament) shares decision-making power with the Council – known as 'co-decision' – becomes the norm and is referred to as 'the ordinary legislative procedure'. This ensures that, as in other areas of EU law, Members of the Parliament (MEPs) have a right to decide on matters in the field of criminal justice and fair-trial rights.

The European Court of Justice (the ECJ) also assumes full jurisdiction in this area. Under the Treaty, national parliaments also have a stronger voice and greater power in terms of screening legislative proposals (see chapter 4).

Member States of the European Union "EU countries"

Austria
Belgium
Bulgaria
Czech Republic
Cyprus
Denmark
Estonia
Finland
France
Germany
Greece
Hungary
Ireland
Italy
Latvia
Lithuania
Luxembourg
Malta
Netherlands
Poland
Portugal
Romania
Slovakia
Slovenia
Spain
Sweden
United Kingdom

The Treaty of Lisbon:

Does not introduce a written Constitution into the UK through the back door

Does not create a European federal super-state

Under the Treaty of Lisbon:

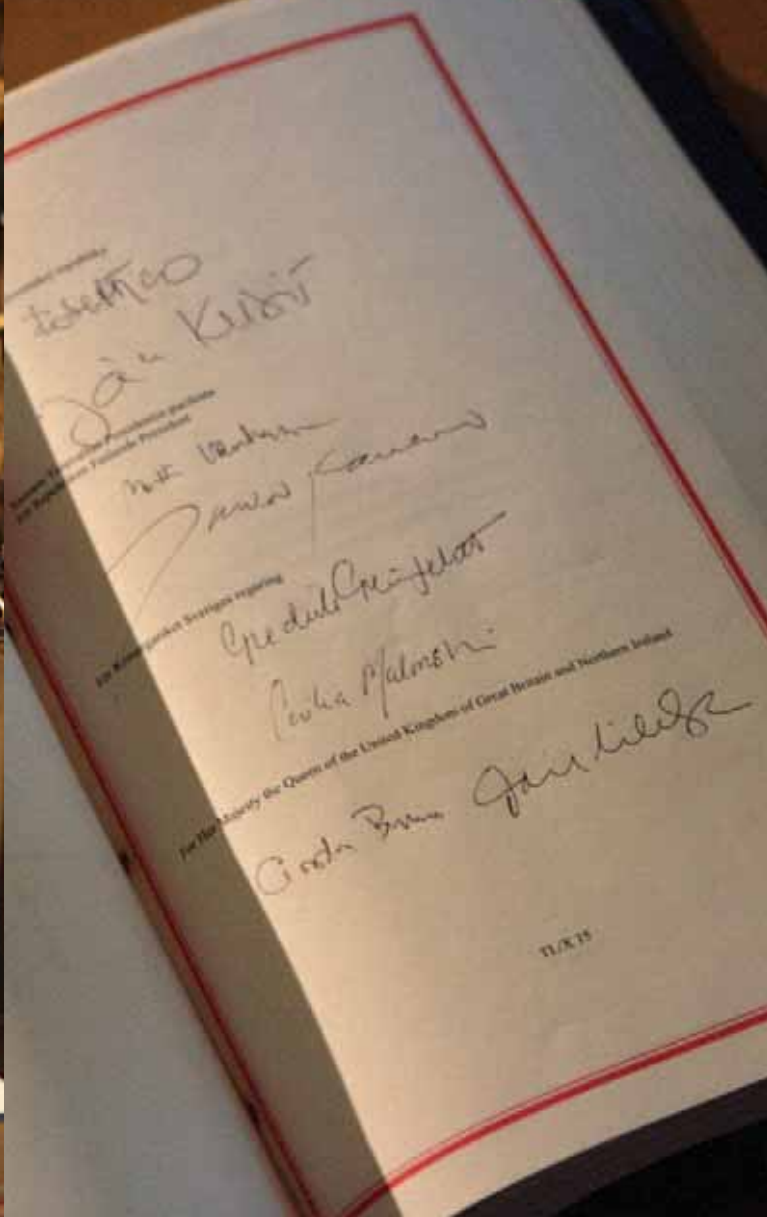
- The UK has secured certain political and legal exceptions and guarantees compared to most other EU countries. Ireland, Denmark and Poland have secured similar exceptions (see chapter 1).
- Key areas of activity are emphasised such as alternative dispute resolution, energy, climate change, and data protection (see chapter 2).
- The Charter of Fundamental Rights becomes a fundamental part of EU law, although the UK has reserved its position (see chapter 3).
- The conferring of legal personality on the EU allows the EU to enter into international agreements in its own right as

the European Community has done previously.

- In due course, the EU, in addition to individual EU countries, may become party to the European Convention on Human Rights (ECHR) (see chapter 3).
- An elected president of the European Council replaces much of the role of the rotating presidency and the European Council now has institutional recognition in the EU's legal order.
- The position of the High Representative of the Union for foreign affairs and security policy is strengthened. The High Representative will act as the EU's 'ambassador' to the world (see chapter 5).

The need for transparency, better democratic accountability and enhanced judicial scrutiny has led to some important improvements in the EU's make-up







The UK perspective

This section explains the impact of the Treaty of Lisbon on the relationship between UK and EU law

The political perspective

The UK, in the course of the negotiations on the Treaty of Lisbon, maintained a number of pre-conditions for its agreement – known as ‘red lines’. These were designed to:

- protect the UK’s existing labour law and social legislation;
- protect the UK’s common law system, and police and judicial processes;
- maintain the UK’s independent foreign and defence policy; and
- protect the UK’s tax and social security system.

The UK also wished to make it clear that national security is a matter for EU countries and provisions, to that effect, have been included.

The UK Government’s position is that these objectives have, by a variety of means, been achieved through a number of express provisions set out in the Treaty and its Protocols, which have equal legal value.

It should be recalled that the UK’s ability to influence legislation is significant compared to most other EU countries.

The UK, along with Italy, France and Germany, has the largest number of votes in the European Council. In addition, the UK MEPs are a material force in the Parliament, as approximately 11 to 10 MEPs are from the UK. Given that decisions made at EU level are determined by the national governments, sharing power

with the Parliament, the UK is well represented.

The legal perspective

Since the UK joined the European Economic Community in 1973, the treaties themselves, legislation passed under them, and the rulings of the European Court of Justice, have all been sources of UK law. These EU-sourced laws have a unique character because of the way they are created, their application to people, businesses and the governments of EU countries, and the ability and method of enforcing those laws.

A key element of EU law is that it has primacy over UK law and this has been the case since the UK joined the EU in 1973. The effect of this is particularly apparent for EU law that seeks to create a common market (more often referred to as the ‘internal market’ or ‘single market’) within the EU for goods, services, people and capital.

Such laws are often intended to harmonise or approximate the various laws of EU countries on a particular topic. The Treaty will not change the relationship between EU and UK law, although it does make clearer what are the UK’s withdrawal rights from the EU.

The legal implications of the UK’s political perspective on the Treaty of Lisbon

Under the Treaty, the Charter of Fundamental Rights of the European Union (the Charter) becomes an integral part of EU law. Rather than being incorporated into the body of the Treaty itself, as was the case under the Constitutional Treaty, the Charter remains a separate instrument, but has the same legal value as the treaties. Solemnly declared in December 2007, it has since been published separately in the Official Journal. However, the fact that the Charter is to be found in a Protocol does not in itself change its legal status.

A Protocol on the application

The primacy of EU law

It is often said that EU-sourced laws take precedence over domestic laws. This means that once an EU-sourced law is applicable in the UK, it would be contrary to the EU treaties for the UK to keep or pass any laws that contradicted the EU-sourced law. The primacy of European law is not new. This well-established principle has applied in the EU

since the Court of Justice developed it in the 1960s, before the UK joined the EU. While the Constitutional Treaty re-stated this principle in the text, the Treaty of Lisbon does not explicitly refer to it, but rather includes this in a declaration. However, this was a political move, and it is clear that the case law of the Court of Justice and the primacy of European law remain cornerstone principles.

of the Charter of Fundamental Rights of the European Union to Poland and to the UK has been agreed.

This states that ‘the Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the UK, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the UK are inconsistent with the fundamental rights, freedoms and principles that it reaffirms’.

This specific position appears to suggest that the Charter has been interpreted as introducing new rights. Arguably, this move was not necessary, as the Charter does not create new general rights under national law, and only applies when national governments are implementing EU law.

Exactly how this Protocol will work in practice remains to be seen.

The UK has been a member of the EU since January 1973. Successive governments have confirmed that the UK could leave the EU if it wished. The Treaty of Lisbon makes clear that EU countries may withdraw from the EU in accordance with their own constitutional requirements.

EU justice measures: the UK opt-in

Since 1999, the UK and Ireland have had the right to choose whether to be bound by legislation in the field of civil judicial co-operation – essentially, measures that relate to cross-border civil litigation and family law. Often called an ‘opt-out’, the UK has a right to signal that it wishes to opt in to a proposal three months after it has been published or following its adoption. So far, the UK has chosen to take part in most civil litigation measures, such as small claims and cross-border

legal aid, but not measures that deal with divorce and family law. Under the Treaty of Lisbon, this opt-out has been extended to cover police and judicial co-operation, essentially measures that deal with the fight against organised crime and terrorism, cross-border prosecution, and investigation and rights for the individual. It remains to be seen whether the UK will choose to opt in to those measures which will bolster individual rights and procedural guarantees, or only those which will expand cross-border police powers and investigative activity.

The EU: policies and procedures

The Treaty of Lisbon is the legislative and political framework within which the EU will function for the foreseeable future

What does the EU do?

EU law can only be made in those areas in which all EU countries, including the UK, have agreed that it is appropriate for action to be taken at European level.

The European treaties define the role and responsibilities of EU institutions and other bodies involved in the decision-making process. They define where the EU has competence to act.

The scope of EU activity has developed over the years and successive treaties have led to an expansion in the range of activities undertaken at EU level. The Treaty of Lisbon follows in that line of expansion. It sets out clearly the circumstances in which the EU would have exclusive competence to make law, where it would have shared competence alongside national governments, and those circumstances in which its role would be purely supportive.

Whatever the level of EU involvement, the exercise by the EU of these competences must take into account a number of principles (see box, bottom).

TREATY OF LISBON OBJECTIVES

In the Treaty, a new set of objectives for the EU does not include 'a single market where competition is free and undistorted', as had been the case in the draft Constitutional Treaty. Instead, a Protocol records that the EU's internal market includes a system which ensures that competition is undistorted. This does not change the current legal position.

EU competence under the Treaty of Lisbon is established on the following principles:

- **Conferral:** the EU can only exercise those competences which are conferred on it by the treaties.
- **Subsidiarity:** in areas that do not fall within its exclusive competence, the EU may only act if and insofar as the objectives of the intended action cannot be achieved by individual EU countries, either at

EXCLUSIVE COMPETENCE

There are five areas in which the UK and other EU countries have agreed that the EU alone may pass new laws. None of these is new to the Treaty of Lisbon.

- Customs union;
- Competition rules necessary for the functioning of the internal market;
- Monetary policy for those countries which have the euro;
- Conservation of marine resources under the common fisheries policy; and
- International trade policy.

SHARED COMPETENCE

There are 11 areas where the EU and the UK will share responsibility to pass new laws, with the EU focusing on the cross-border effects and the importance of minimum standards (such as on the environment) within a single market, if trade barriers are to be removed. This is not new.

- Internal market;
- Social policy;
- Economic, social and territorial cohesion;
- Agriculture and fisheries;
- Environment;
- Consumer protection;
- Transport;
- Trans-European networks;
- Energy;
- Safety in relation to public health; and
- Area of freedom, security and justice.

CO-ORDINATION COMPETENCE

EU countries will co-ordinate their economic and employment policies with one another to minimise distortions or disruptions in the single market.

This applies even to those countries outside the eurozone. This represents no change to existing EU treaties.

SUPPORT COMPETENCE

The EU will support and complement EU countries' activities in seven areas, including protection and improvement in human health; tourism; industry; education; and civil protection. None of this would restrain EU countries from acting alone in these areas. This represents no change to existing EU treaties.

The EU alone may pass laws that affect the monetary policy of those countries which have adopted the euro

national level or at regional and local level, or can be better achieved at EU level. National parliaments have an enhanced role under the Treaty in terms of raising concerns about subsidiarity.

- **Proportionality:** neither the content nor the form of any action taken by the EU can go beyond what is necessary to achieve the objectives set by EU countries in the Treaty of Lisbon.



Photographs: European Community 2007



The Treaty introduces a small number of new areas of EU activity, and it goes into more detail on the scope of co-operation at EU level in a number of areas of particular interest to solicitors and their clients, such as co-operation in criminal matters.

The objective to adopt measures to facilitate access to justice is also set out. It is not possible to deal with all these changes in detail in this guide, but the main areas where there are significant changes are set out below.

Criminal justice

EU criminal justice policy is built on police and judicial co-operation; minimum rules concerning the definition of criminal offences, and sanctions in the areas of particularly serious crime with a cross-border dimension; and the organisations of Europol and Eurojust.

The Treaty reinforces and consolidates progress in this area to date. It underlines the principle of mutual recognition, allowing a court in one EU country to recognise and enforce a criminal conviction from another.

It also would allow for minimum rules to be adopted in relation to the mutual admissibility of evidence, rights of individuals, and victims of crime in criminal proceedings.

Substantive criminal law

Under the Treaty, the EU is only able to legislate to influence national criminal law in two circumstances:

- Where serious crime with a cross-border dimension is concerned, for example, in relation to terrorism; trafficking in human beings; sexual exploitation of women and children; illicit drug trafficking; illicit arms trafficking; money-laundering; corruption; counterfeiting of means of payment; computer crime; and organised crime.
- Where the law in a certain field has already been harmonised throughout the EU, and uniform



Sniffing out drug trafficking: EU legislation can influence national criminal law

definitions and sanctions are needed to make the law work properly and consistently. For example, the EU would like to introduce minimum criminal penalties for environmental crimes, which already have standard definitions.

Under the Treaty, legislation in the field of judicial co-operation in criminal matters will be decided by

the ordinary legislative procedure. This means that decision-making power will be shared between the Parliament and national governments in the Council.

Until now, the need for unanimity has made it difficult for EU countries to agree on certain proposals in this area, such as procedural safeguards for individuals, but the abolition of the national veto should break the deadlock.

Continued on page 10

To off-set the removal of the national veto, the UK can decide on a case-by-case basis whether to opt in to a piece of legislation in the criminal law field.

A minimum level of protection in criminal matters across the EU will be particularly relevant for people involved in criminal proceedings outside their home state, although it is unlikely to affect the level of protection already afforded to suspects in the UK. While the rights of crime

victims do not take a central role in criminal proceedings in the UK, there is an increasing emphasis on the rights of victims, and this will continue if new European rules are introduced. Therefore, there may be some impact from this on the UK's criminal procedure.

Continued from page 9

Police co-operation

The Treaty provides for police co-operation involving all police and specialised law enforcement agencies, for example Revenue & Customs, and the Serious Organised Crime Agency, and so on. This co-operation is to include the collection, storage, processing, analysis and exchange of relevant information. This is likely to impact on the conditions for availability and admissibility of evidence in cross-border cases.

Civil justice and family law

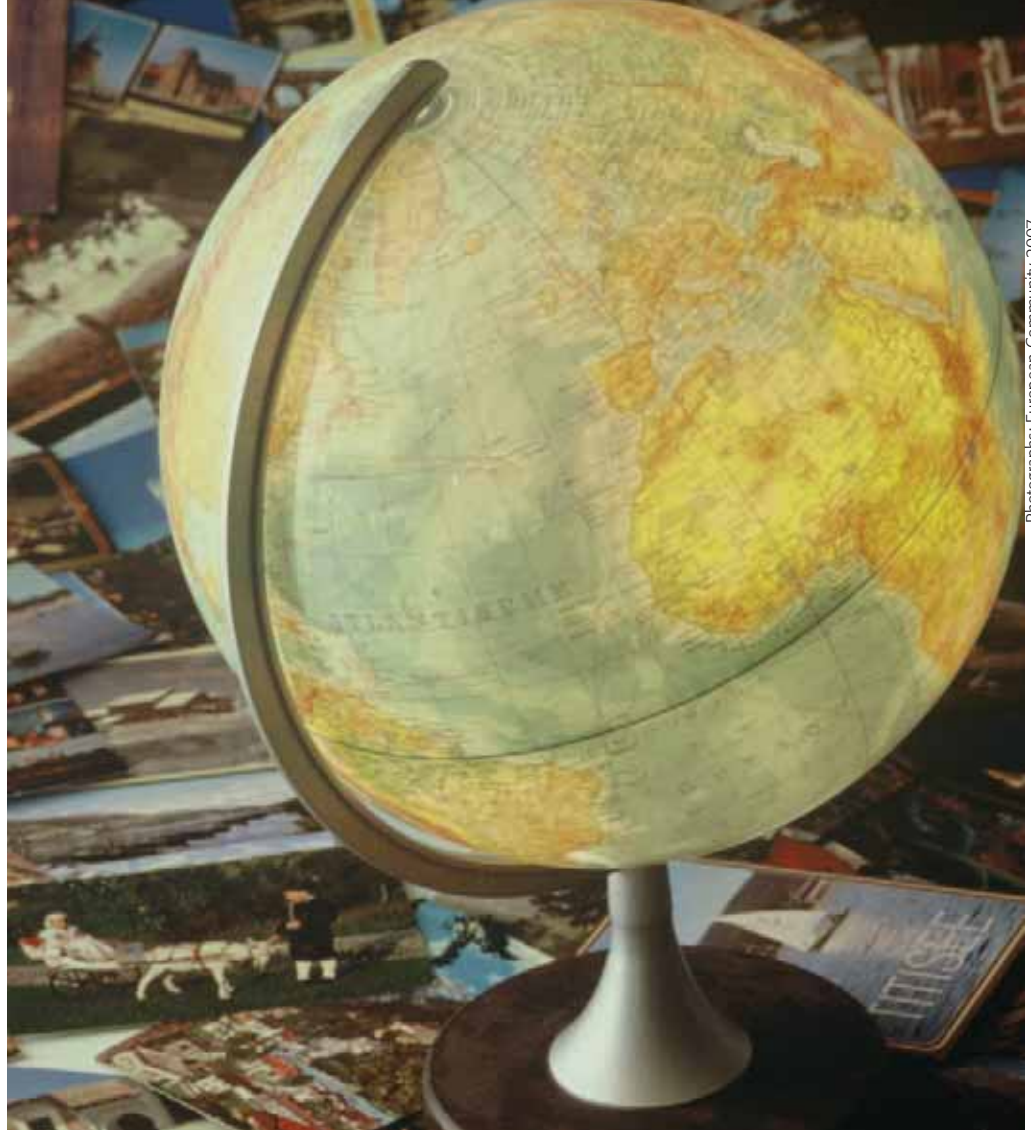
The Treaty offers greater impetus for more co-operation in civil law on issues with a cross-border dimension. Specifically, the EU can already act to improve cross-border service of documents, develop co-operation in the taking of evidence, and make provision for the cross-border recognition and enforcement of judgments in civil cases.

In common with the provisions on criminal law, the ordinary legislative procedure applies, and the UK can choose to opt in to these provisions.

The EU only legislates on family law issues that have cross-border implications, and which might act as a barrier to people moving around within the EU.

Issues under consideration include divorce, parental responsibility, and wills and succession, where there is a cross-border element.

Family law decisions under the Treaty are subject to a special procedure. National governments will continue to wield their national veto and the European Parliament will only be consulted. Any change to this decision-making model will have to be approved by national parliaments. This actually gives more power to national parliaments in this area than they have at present.



Photographs: European Community 2007

World at your feet: greater co-operation at a European level could help to resolve cross- border problems relating to civil and criminal matters

Access to justice

The Treaty of Lisbon gives the EU the right to legislate to promote alternative dispute legislation and access to justice.

What does greater co-operation in civil and criminal matters mean for solicitors and their clients?

A growing number of individuals are now travelling, living and working in other countries. Inevitably, some of them become involved in legal proceedings or become victims or suspects of crime.

- Greater co-operation at a European level could help not only to resolve cross-border problems experienced by clients more quickly, but could also act as a separate check and balance on the developments in our own system.
- Clients who are arrested in another EU country cannot easily obtain bail under the current system. An extension of co-operation between EU countries in the future should enhance the availability of bail before to and during proceedings. This should mean less time spent by individuals in detention in a foreign country.
- More co-operation between criminal justice systems will allow for exchange of information on criminal records and enable courts to take into account convictions from another EU country.
- Areas of traditional practice for solicitors, which have remained largely unaffected by EU law, such as wills and succession, family law and even conveyancing, will be subject to increasing pressure to develop cross-border solutions to deal with the problems of those who lead cross-border lives.

National interest – the ‘emergency brake’

Under the Treaty of Lisbon, an EU country can apply the emergency brake procedure if it feels that the measures proposed will affect fundamental aspects of its criminal justice system.

This provision applies both to mutual recognition and to substantive law reform. Once applied, the emergency brake will halt the legislative process

while the matter is referred to the European Council.

The European Council has four months to refer the draft back to the Council of Ministers, thus terminating the suspension. If there is no agreement on referral back then, within the same time frame, if at least nine EU countries want to go ahead with the proposal, they can do so under a procedure called ‘enhanced co-operation’.

The European Public Prosecutor can only be created when all national governments agree to this move. Therefore, the UK Government can prevent any move in this direction.



Dealing with climate change and energy

Environmental policy is at the heart of EU legislative and political activity. The Treaty of Lisbon addresses one of the most pressing global issues of our time – climate change. A core aim is promoting measures at international level to deal with regional or worldwide environmental problems, and in particular

combating climate change. Preserving the environment is also central to the EU's energy policy. Under the Treaty of Lisbon, the aims are clearly set out:

- Ensure the functioning of the energy market;
- Ensure security of energy supply in the Union; and
- Promote energy efficiency and energy saving, and the development of new and renewable forms of energy.

Promotion of sport

Sport is added to the area of education and culture, and a clear reference is made to the European Union contributing to the promotion of European sporting issues.

Turning on the power: promoting new forms of energy, such as windfarms (below), is at the heart of the EU legislative agenda; and the European Commission headquarters (bottom) spells out the 'You control climate change' campaign



Data protection

The Treaty of Lisbon sets out that everyone has the right to the protection of personal data. The EU shall lay down the rules relating to the protection of individuals with regard to the processing of personal data by European Union institutions, bodies, offices and agencies, and by EU countries when carrying out activities which fall within the scope of EU law. Data protection compliance shall be subject to the control of independent authorities.



Intellectual property rights

The Treaty of Lisbon builds on the numerous measures already in place to harmonise aspects of trademark law, copyright and related rights and design rights, aspects of patent law, and certain procedural matters relating to intellectual property. A new specific provision is set out under which the EU will establish measures for the creation of European Intellectual Property Rights. This puts providing uniform intellectual property rights protection at the heart of the EU's internal market strategy.



Photographs: Rex Features/European Community 2007





Head to head: EU leaders attended a ceremony in the Portuguese capital to ratify the Treaty of Lisbon

The Treaty of Lisbon and your rights

This section deals with the principal ways in which the Treaty affects the rights of EU citizens, businesses and other organisations

Charter of Fundamental Rights

The Treaty of Lisbon amends article 6 of the Treaty on European Union to provide for recognition of the Charter, which was originally proclaimed by EU institutions at the Nice Inter-Governmental Conference in December 2000.

On 12 December 2007, the day before the signing of the Treaty, the Presidents of the European Parliament and the European Commission, and the current President of the Council of Ministers, signed and 'solemnly declared' a revised version of the Charter, which was published in the Official Journal together with the official Explanations.

While the text of the Charter has not been incorporated into the Treaty, article 6 provides that it will have the same legal value as EU treaties – it will thus become legally binding, which will make the fundamental rights that it contains operational. This means that for the first time, the EU has set out in one place the existing fundamental rights from which every EU citizen can benefit.

The Charter covers a whole raft of traditional human rights, such as the right to life, and the prohibition of torture, drawn from those set out in the European Convention on Human Rights (ECHR). In the area of civil rights, it expressly sets out the right to a fair trial, the presumption of innocence until proved guilty, and the right not to be punished twice for the same offence. These are all



Photograph: Getty Images

The Charter of Fundamental Rights sets out the right to a fair trial

important safeguards and principles to be borne in mind as the EU moves towards greater co-operation in criminal justice.

The Charter also covers social and economic rights and principles, such as the right to fair and just working conditions, and the right to a family and professional life. Furthermore, the Charter sets out modern rights, such as the right of access to information in relation to the EU institutions, and the protection of personal data. These rights are not new, and the treaty does not change the legal effect or enforceability of those rights. The Charter does not create new general rights under national law and only applies when national governments are implementing EU law. However, the fact that they will have the same legal value as the EU treaties is significant because it will allow them to be recognised or interpreted in new ways that

could bring positive benefits to individuals.

Moreover, where Charter rights correspond to those set out in the ECHR, the Treaty provides that the meaning and scope of those rights would be the same – this would allow lawyers and their clients to rely on the interpretation of fundamental rights developed by the case law of the European Court of Human Rights. However, the UK has negotiated a Protocol (annexed to the Treaty) on the Charter. It seeks to clarify the scope of application of the Charter in the UK (see Chapter 1).

Accession to the European Convention on Human Rights (ECHR)

Accession to the ECHR will mean that the EU and its institutions will be accountable to the European Court of Human Rights for issues concerning the ECHR, in the same way that the UK

Scope of Charter rights

The rights under the Charter apply to the activities of EU institutions to the benefit of all EU citizens. The rights will also apply when EU law is implemented in national law but ONLY in this situation. The Charter would not create fundamental rights of general application in national law, for example a general right to strike will not be created.

All EU countries, both present and future, will have to abide by these rights when implementing EU law. The UK and Poland have a separate Protocol to clarify their position.

In addition, there will be scope for relying directly on the provisions of the Charter before European courts.

currently is in relation to domestic matters where ECHR issues arise. In other words, the EU institutions would be directly subject to the ECHR and the European Courts would be able to directly apply the ECHR as part of EU law. This means that if a lawyer wished to raise arguments before the European Courts, based directly on the rights set out in the ECHR, or to the provisions of the treaties themselves, this will be possible.

Following accession to the ECHR (provided for by the Treaty), the EU will be required to accede to the ECHR. EU law will then have to be interpreted in the light of the ECHR, not only as a general principle of EU law but as a Convention directly

What is the difference between the Charter of Fundamental Rights of the EU and the European Convention on Human Rights?

The European Convention on Human Rights (ECHR) is an international treaty which was signed on 4 November 1950 in Rome under the auspices of the Council of Europe.

It sets out a number of fundamental rights. To date, 47 countries across the European continent have ratified this convention, including all 27 EU countries. However, the EU itself is not, and currently cannot be, a party. The fundamental rights it protects must be respected by the national courts in all states that are signatories, and individuals can bring cases against the signatory states in the European Court of Human Rights in Strasbourg (which is NOT an EU Court).

Since the EU itself does not have legal personality, it cannot yet itself accede to the ECHR, but the EU must already comply with the rights in the ECHR.

The Treaty of Lisbon will amend the EU Treaty to allow the EU to become a party to the ECHR and ensure that the interpretation of human rights made by the EU and ECHR move in parallel in future.

The Charter of Fundamental Rights, on the other hand, is a declaration of fundamental rights made by EU leaders in December 2000, which contains many rights similar to those set out in the ECHR, in addition to further rights and principles already recognised in EU law.

Until now the Charter has had no binding effect, but this will change as a result of the Treaty of Lisbon.



applicable to the EU and to which the EU adheres. Nevertheless, the Treaty of Lisbon and its Protocols do state that accession to the ECHR will not affect the EU's competences and that provision will be made for preserving the specific characteristics of the EU and EU law.

Citizens' rights

The Treaty sets out the citizens' rights which were agreed under the Maastricht Treaty. Citizenship is a key principle. All EU nationals are citizens of the EU and the Treaty recognises the importance of the rights that flow from that status. These citizens' rights include:

- The right to move and reside freely within the territory of EU countries;
- The right to stand and vote in elections to the European Parliament and at municipal elections in the country in which an EU citizen resides (even if this is not the home state);
- The right of access to documents; and
- The right to diplomatic and consular protection.

As well as providing for greater involvement of the directly elected national and European parliaments in EU decision-making, the Treaty also contains a new measure designed to promote direct participatory democracy in the EU. It gives European citizens the right to propose a 'citizens' initiative'. Citizens will be entitled to invite the European Commission to take action in one of the areas covered by the Treaty if at least one million citizens from a 'significant number' of EU countries put forward such a proposal.

Access to justice in the EU

The Treaty improves access to justice before the European courts for one important category of cases. Currently, a person or business can challenge the legality of certain EU acts directly before the Court of First Instance, if it can be shown that the act is of 'direct and individual concern' to that person or business.

The Court has been heavily criticised for interpreting the notion of 'individual concern' in a strict manner so that few can bring a challenge. The only way of



Maastricht: the Treaty of Lisbon outlines citizens' rights agreed under the Maastricht Treaty

opening the doors for these individuals and to ensure their right to effective judicial protection at EU level was to amend the EU Treaty. The Treaty of Lisbon removes the requirement of 'individual concern' when a person or business challenges '...a

regulatory act which does not entail implementing measures'. This can cover certain regulations which previously were almost impossible to challenge. Individuals may challenge the legality of those acts if they can show 'direct concern'.

What does this mean for solicitors and their clients?

- The improvement in direct access to European courts for individuals and organisations through the abolition of the requirement of individual concern for regulatory acts which are not subject to implementing measures represents a big improvement on the current situation, and paves the way for many more challenges to be brought by individual businesses in European courts.
- The recognition of the Charter of Fundamental Rights in the Treaty of Lisbon and confirmation that it will have the same legal value as the EU Treaty will have little impact in the UK.
- The Treaty of Lisbon will clarify the position of the ECHR under EU law and make it easier for lawyers to raise arguments based on the rights set out in the ECHR before European courts.

The European Court of Justice (below) has been re-named the Court of Justice of the EU by the Treaty of Lisbon



Photograph: Rex Features

Non-judicial remedies

While using European law can be a powerful tool in arguing your client's case before national courts and/or the European courts, there are also some non-judicial remedies that may assist. They have the advantage of generally being less costly and time-consuming than legal proceedings. While none of these is new, the Treaty of Lisbon tries to focus more on citizens and their rights. Here are examples of remedies that you could use on behalf of your client:

- Petitions before the European Parliament. Any EU citizen or natural or legal person present in the EU can submit a petition to the petitions committee of the European Parliament. The subject matter of the petition must come within the EU's sphere of activity. An example of a petition could be a client from another EU member state not receiving the social security benefits to which they are entitled: <http://www.europarl.europa.eu/parliament/public/staticDisplay.do?id=49>.
- Complaints to the European Commission. Any EU citizen or business present in the EU can make a formal complaint to the European Commission where it suspects that European law is being misapplied. An example of this was a solicitor wishing to practise in Luxembourg being required to sit an exam in Luxembourgish before being permitted to do so. The Commission intervened on his behalf and took the case to the European Court of Justice. The SOLVIT network contains information on how to enlist the Commission's help: <http://ec.europa.eu/solvit/>.
- Access to documents. Under the 'access to documents' regulation, EU citizens and natural or legal persons present in the EU can request documents from the Parliament, Council and Commission. This is similar in some respects to 'discovery' requests in legal proceedings and can be particularly useful in competition cases: http://ec.europa.eu/transparency/access_documents/index_en.htm.
- Complaints to the European Ombudsman. The Ombudsman is empowered to deal with complaints of maladministration by EU institutions. He can also carry out investigations on his own initiative. In other words, if one of the EU institutions has not acted according to a rule or principle which is binding on it, then you and/or your client can bring this to the attention of the ombudsman who must look into the matter. Examples of this being used successfully include a case concerning a change to the EU fisheries regime, access to documents (refusal) and late payments by EU institutions: <http://ombudsman.europa.eu/home/en/default.htm>.

What are the European Courts?

There are two European courts in the EU system: the Court of Justice of the European Communities (called the European Court of Justice, or ECJ) and the Court of First Instance. These are renamed the Court of Justice of the EU and the General Court by the Treaty of Lisbon. The Court of First Instance deals in particular with direct actions against EU institutions (including those brought by individuals). The ECJ deals, among other things, with appeals from such decisions and 'preliminary references' from a national court. Preliminary references are made where a national judge requires a ruling from the ECJ on a specific point of EU law, which is essential to deciding the case in the national court. The General Court shall also have jurisdiction to hear preliminary rulings in specific areas.

Who does what and how?

This chapter goes behind the scenes of the EU decision-making process and looks at the roles each actor plays

EU decision-making processes involve a variety of actors in order to ensure that the EU works as efficiently and as democratically as possible.

The EU is a political entity, as well as being a legal entity, and this is reflected in the powers it possesses and the instruments that emerge following the interaction between the institutions.

As has been stated previously, EU law takes precedence over national law and, therefore, solicitors may come into contact with EU legislative and non-legislative instruments when

advising their clients.

The main legislative instruments are directives (fairly general, leaving much of the detail to be worked out once implemented) and regulations (more prescriptive), as well as non-binding recommendations and opinions.

The Treaty shied away from renaming these instruments, as had been suggested in the Constitutional Treaty.

Depending on the subject matter under discussion, different legislative procedures are followed. In its simplest form, this usually involves a Commission proposal, which is

then adopted by the Parliament and the Council once they arrive at an agreement on a text through a process of up to three readings.

The Treaty will result in more proposed legislation being adopted using the co-decision procedure, which means that both the Parliament and the Council must agree before legislative instruments can be adopted and become EU law. Under the Treaty, the co-decision procedure is renamed the 'ordinary legislative procedure', in recognition of the presumption that it will apply unless otherwise stated.



Who are the main actors?

European Council

High-level political deliberations
Composed of heads of state or government of 27 EU countries (UK Prime Minister and counterparts)
Under Treaty of Lisbon (ToL), formally recognised as an institution, and a president will be appointed

European Commission

Executive body
Once strategic direction set by Council, drafts legislative proposals, which are sent to the Council and Parliament
Composed of 27 Commissioners from EU countries (UK: Peter Mandelson)
Under ToL, number of Commissioners will be reduced. Only two-thirds of EU countries will have a Commissioner at any one time



Council of Ministers

Legislative body – without its consent, legislation cannot be adopted
Shares powers with the Parliament to amend EU legislation
Composed of different national government ministers according to subject under discussion
Presidency of Council rotates every six months between EU countries
Under ToL team, presidencies will be introduced

European Parliament

Legislative body
Shares powers with the Council to amend EU legislation
Composed of 785 deputies (78 from the UK)
Under ToL, Parliament will have greater say over legislation, since the ordinary legislative procedure gives Council and Parliament equal powers.
Number of members reduced to 750 plus the President



European Court of Justice

Responsible for ensuring the correct interpretation and application of EU law
Under ToL, courts will be renamed and have jurisdiction over new areas including justice and home affairs

National Parliaments

Composed of national parliamentarians
Scrutinise EU legislation before it is adopted
Implement certain EU legislative proposals into national law
Under ToL, parliaments will have a formalised role in decision-making through its new powers of review



National Parliaments

So far in the life of the EU, there has been no formalised role for national parliaments in the European decision-making process.

It has been left to each individual EU country to decide how far to involve its national parliament in European law-making, and very different

practices have arisen.

Under the Treaty, however, the involvement of national parliaments in the EU legislative process is increased and formalised.

For the first time, the adoption of EU legislation will be subject to prior scrutiny by national parliaments, which will be given

the opportunity to challenge proposed legislation if it does not conform to the principle of subsidiarity (ie legislation should be adopted at the appropriate (which might be national rather than European) level).

If one-third of national parliaments object to a proposal,

it is sent back to the Commission for review (a 'yellow card').

The Treaty also introduces what has been dubbed an 'orange card': if a majority of national parliaments oppose a Commission proposal, and they have the backing of the Parliament or the Council, then the proposal is abandoned.

The voting system in Council

At present, where unanimity is not required (the vast majority of cases), at least 255 votes out of a total of 345 votes must be in favour, representing a majority of EU countries. Under the Treaty, new areas of law, such as criminal law, will be decided this way. The UK currently possesses 29 votes. The voting rules under the Treaty of Lisbon will become more complex. From 2014 onwards, a weighted system will apply whereby at least 55% of EU countries representing 65% of the EU's population will need to agree in order for proposals to become law. This strengthens the position of the larger EU countries, including the UK.

Figure 1 illustrates the different participants who are involved in each stage of the life of any piece of European legislation







CHAPTER 5

The EU on the world stage

This chapter looks at how the Treaty of Lisbon seeks globally to strengthen the EU's voice and how it will affect trade

The EU has a total population of nearly 500 million and now accounts for around 30% of global GDP and 20% of global trade flows. The new arrangements will strengthen the ability of the EU to speak with a single voice in the international arena.

However, inadequacies in the existing treaty arrangements have prevented the EU from gaining due recognition for its economic might at an international level.

The Treaty of Lisbon seeks to strengthen the EU's voice on the world stage by bolstering the position of the High Representative of the Union for Foreign Affairs and Security Policy, who will have a dual role. He will preside over the Foreign Affairs Council, replacing the current six-month post occupied by the Minister of Foreign Affairs for the country holding the rotating EU Presidency, and will also be Vice-President of the Commission. The expansion of this new position is intended substantially to reinforce the EU's presence on the world stage.

The High Representative will be supported by the creation of a European External Action Service, made up of EU officials and national civil servants and designed to co-ordinate with the diplomatic services of EU countries. EU countries or the High Representative, rather than the Commission, will propose common foreign and security initiatives, with the European Council deciding by unanimity whether or not to implement the proposals. This is a compromise between the reluctance of EU countries to give the Commission more direct powers to act on their behalf and their recognition of the need for the EU to act more effectively on the world stage.



The Treaty of Lisbon defines how international trade agreement negotiations should be carried out

In contrast to the lack of transparency which has hitherto surrounded Council decisions, the principles and objectives of the Community's external competence are expressly set out, and a procedure is again laid down for the manner in which the EU will negotiate and conclude treaties. However, the relevant declaration makes it clear that the common foreign and security policy will not affect the responsibilities of the EU countries, as they currently exist for the formulation and conduct of their foreign policy.

Overall, these measures are

designed to provide a significant strengthening of the EU's capacity to act in international relations. It is hoped that the changes will ensure that appropriate weight is given at an international level to the views and initiatives of the EU countries.

Trade

As the EU is one single trading area with common customs tariffs, the external trade policy of the EU is already decided exclusively at EU level. The Treaty provides for a common external commercial policy and defines more clearly than existing treaties

how the negotiation of international trade agreements should be carried out by the EU. For example, not only will the EU represent its members at the World Trade Organisation, as it does at present, but it may also sign treaties on their behalf.

The powers of the Parliament in the domain of trade will be increased under the Treaty, giving it the power of co-decision with the Council. In addition, all trade agreements will remain subject to the approval of the Parliament, which will have to be kept informed of the state of play of negotiations on such agreements.

What does this mean for solicitors and their clients?

- The EU's international policies will become more predictable and carry more weight on the international stage.
- The greater involvement of Parliament in the negotiation of trade

agreements will allow for public participation in the process of ratification and will create greater transparency in the debate leading to the adoption of such agreements.

Glossary of key EU terms

Term	Definition
Enhanced Co-operation	When new developments cannot be undertaken by the EU as a whole, a group of at least a third of all EU countries can proceed on the basis of enhanced co-operation by themselves in an area of non-exclusive EU competence. Acts adopted under enhanced co-operation are only binding on participating EU countries.
European Citizenship	Nationals of EU countries are also citizens of the EU. Citizenship of the EU is in addition to national citizenship. Citizens of the EU enjoy various rights and duties as provided for in the Treaty of Lisbon, such as the right to move and reside freely within the EU, the right to vote in Parliament elections, the right to consular protection by any EU country when outside the EU, and the right to petition the Parliament.
Legal Personality	The EU has a single legal personality under the new Treaty of Lisbon. This will enable the EU to act at an international level and make treaties in all areas of its competence.
Citizens' Initiative	Citizens have the opportunity to make known and publicly exchange their views on EU action, and the institutions must maintain transparency and open dialogue. The Commission must carry out broad consultations with stakeholders. In addition, one million or more citizens from a significant number of EU countries can submit a 'Citizens' Initiative', a form of petition, to the Commission, calling on it to take action in one of the areas covered by the Treaty of Lisbon. Any citizen, or resident, of the EU and any company registered in an EU country has the right to petition the Parliament.
Representative Democracy	Citizens are directly represented at the EU level in the Parliament. EU countries are represented in the Council by the heads of state or government and in the council by their governments, themselves democratically accountable either to their national parliaments, OR to their citizens.

Useful websites and contacts

As English is one of the 23 official languages of the EU, you can write to/call all of these contacts in English.

Website/Institution	Contact details	Comment
Consilium	www.consilium.europa.eu Tel: +32 (0)2 281 6111	The Council of the European Union: information and news
European Court of Justice	www.curia.europa.eu Tel: +352 43031	Responsible for the interpretation and application of European law
EU-ABC	www.euabc.com	A dictionary of words relating to the EU: includes a reader-friendly version of the Reform Treaty
Europa	www.europa.eu	The European Union On-line: a vast website with news information on policies, law and the institutions, and contacts
European Commission	www.ec.europa.eu	The European Commission: information, key issues and guides to EU policy
European Commission Representation in the UK	www.ec.europa.eu/unitedkingdom Tel: +44 (0)20 7973 1992 Email: reijo.kemppinen.ec.europa	The London office co-ordinates the European Commission's activities in the UK and takes specific responsibility for England
European Court of Auditors	www.eca.europa.eu Tel: +352 4398	Oversees Community expenditure
European Parliament office in the UK	www.europarl.org.uk London Office: + 44 (0)20 7227 4300 Edinburgh Office: +44 (0)131 557 7866	The European Parliament's office in the UK exists to provide information about the role and activities of the Parliament itself and the EU more generally
Europe Direct	www.europa.eu/europedirect Freephone: 00 800 67 89 1011 From any EU country	A service which will help you find an answer to your questions about the EU
The Foreign and Commonwealth Office Home Page	www.fco.org.uk Tel: +44 (0)20 7008 1500	Information on the FCO, its services and policies, with links to the Treaty of Lisbon
The Law Society	www.lawsociety.org.uk Tel: +44 (0)20 7242 1222	The Law Society: news and events, what we do, and how to become a lawyer



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