

A dark silhouette of a classical building facade, featuring a triangular pediment, a horizontal entablature, two columns, and a tiered base. The text is centered over the columns.

HUMAN RIGHTS IN THE EU

HOW THE LISBON TREATY COULD HELP



OPEN SOCIETY
FOUNDATIONS

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PREFACE

The Lisbon Treaty could have major implications for the protection of human rights in Europe, but nobody knows exactly what they will be. To promote greater understanding of the opportunities that the treaty has opened up for human rights advocates, the Open Society Institute–Brussels commissioned this report from Hugo Brady, a leading expert on EU policy on justice and home affairs and senior research fellow at the Centre for European Reform, a European think tank based in London. This report is the first of a series on vital issues for the future of open society in Europe, with a focus on how EU-level institutions, political processes, and legal frameworks can be used to protect and advance open society.

SUMMARY AND RECOMMENDATIONS

The Lisbon Treaty is important for human rights advocates

THE LISBON TREATY GIVES THE EU NEW POWERS to promote human rights, help protect the security of citizens, and—to an extent—conduct a common foreign policy. Human rights advocates have new opportunities to advance their agenda by engaging with the EU’s revamped institutions: the European Council, European Commission, Council of Ministers, European Parliament, and Court of Justice of the European Union (CJEU). Yet advocates should also be prepared for a degree of uncertainty in EU business as the institutions adjust to their new powers.

The EU now has its own “Bill of Rights”

THE CHARTER OF FUNDAMENTAL RIGHTS now has the binding force of law and represents a significant opportunity to expand fundamental freedoms wherever EU law is involved. The charter’s length, legal standing, and multiple ambiguities make it fruitful ground for defence lawyers and policy advocates alike. Human rights advocates should become as familiar with the charter as they are with the U.S. Bill of Rights, European Convention on Human Rights, or UN Charter. As a first step, advocates focused on EU policy should prioritise the individual freedoms that could be strengthened by the charter. These should include areas such as the protection of personal data, the right to asylum, the right to good administration, and nondiscrimination of minorities. (For more on the charter, see annex II.)

EU institutions can better protect privacy and civil liberties

THE EU’S INSTITUTIONS, PARTICULARLY THE EUROPEAN PARLIAMENT, have gained greater powers to prevent encroachment of individual rights. They will push for more ambitious legislation for EU-wide protection of the rights of defendants to balance security measures like the European arrest warrant. The European Commission is also preparing an overhaul of the currently weak EU rules on protecting personal data exchanged in cross-border investigations. Confrontations between the United States and the European Parliament over issues such as the transfer of financial data and passenger records for counterterrorism purposes will continue. However, the lack of a clear distinction in the treaty between “internal security” (where the EU has a role) and “national security” (where it does not) is likely to lead to much confusion in justice and security policy.

The way EU foreign policy works will change radically

THE TREATY DOES NOT LEGALLY OBLIGE EU COUNTRIES to have the same foreign policy. But it will change the way the EU executes whatever common foreign policies governments are able to agree, through a newly powerful high representative for foreign policy and new external action service (EAS). The service will consist of a central bureaucracy and about 140 missions worldwide. The European Parliament will have only a peripheral influence over EU foreign policy and the Court of Justice is specifically excluded from ruling on actions of the high representative, Foreign Affairs Council, or EAS. Control over EU development aid, which constitutes the largest single area of EU foreign policy spending, is a contested issue in the establishment of the new service.

The Court of Justice of the European Union has become more powerful

UNDER THE LISBON TREATY, THE COURT OF JUSTICE has stronger powers than the European Court of Human Rights (ECtHR), also known as the Strasbourg Court, to protect human rights and individual freedoms. Yet, of all the EU's institutions, it is the most poorly understood. As with the U.S. Supreme Court, its composition and the core beliefs of its judges are key to future interpretations of the charter and other new treaty measures, such as those on criminal law and judicial review of the actions of EU agencies. Human rights advocates need to be intimately aware of how the Court of Justice works and which of its justices might take a more ambitious interpretation of the treaties.

The EU will join the European Convention on Human Rights by 2012

THE TREATY MAKES THE EU A SINGLE LEGAL ENTITY IN INTERNATIONAL LAW.

The EU is also obliged to join the European Convention on Human Rights (ECHR) as a body in its own right, closing a legal lacuna where EU legislation was technically outside the purview of the ECtHR despite the fact that every member state is a signatory. Human rights advocates have an immediate interest in making sure that the member states do not make it too difficult to take the EU to the ECtHR under the terms of its accession treaty to the convention. The EU's accession to the ECHR is likely by 2012.

NGOs and private citizens will have greater access to the EU courts

THE LISBON TREATY RELAXES THE RULES under which individuals or organisations qualify to challenge EU law in national courts. It is also possible that they will occasionally be given special leave to appear before the CJEU itself, as currently happens in the Strasbourg Court. The full extent of this change will be made clear in changes to the CJEU's statute and on a case-by-case basis as civil society actors take cases on certain points of EU law that affect their policy areas. But human rights advocates will have greater scope to challenge EU law directly through strategic litigation.

National parliaments and citizens have new tools to influence European law

THE TREATY CREATES NEW OPPORTUNITIES FOR HUMAN RIGHTS ADVOCACY

by introducing reforms allowing national parliaments to block new laws and citizens to request legislation from the European Commission. Both will require much cooperation across borders in order to be politically effective. Human rights advocates should explore the practicalities of lobbying European scrutiny committees of several national parliaments simultaneously on a single issue. They could also organise the collection of a million signatures across Europe to request minimum EU standards on core issues like integration policy. But—as with ECHR accession—the immediate priority for human rights advocates is to influence the laws that will govern how these new procedures work in practice.

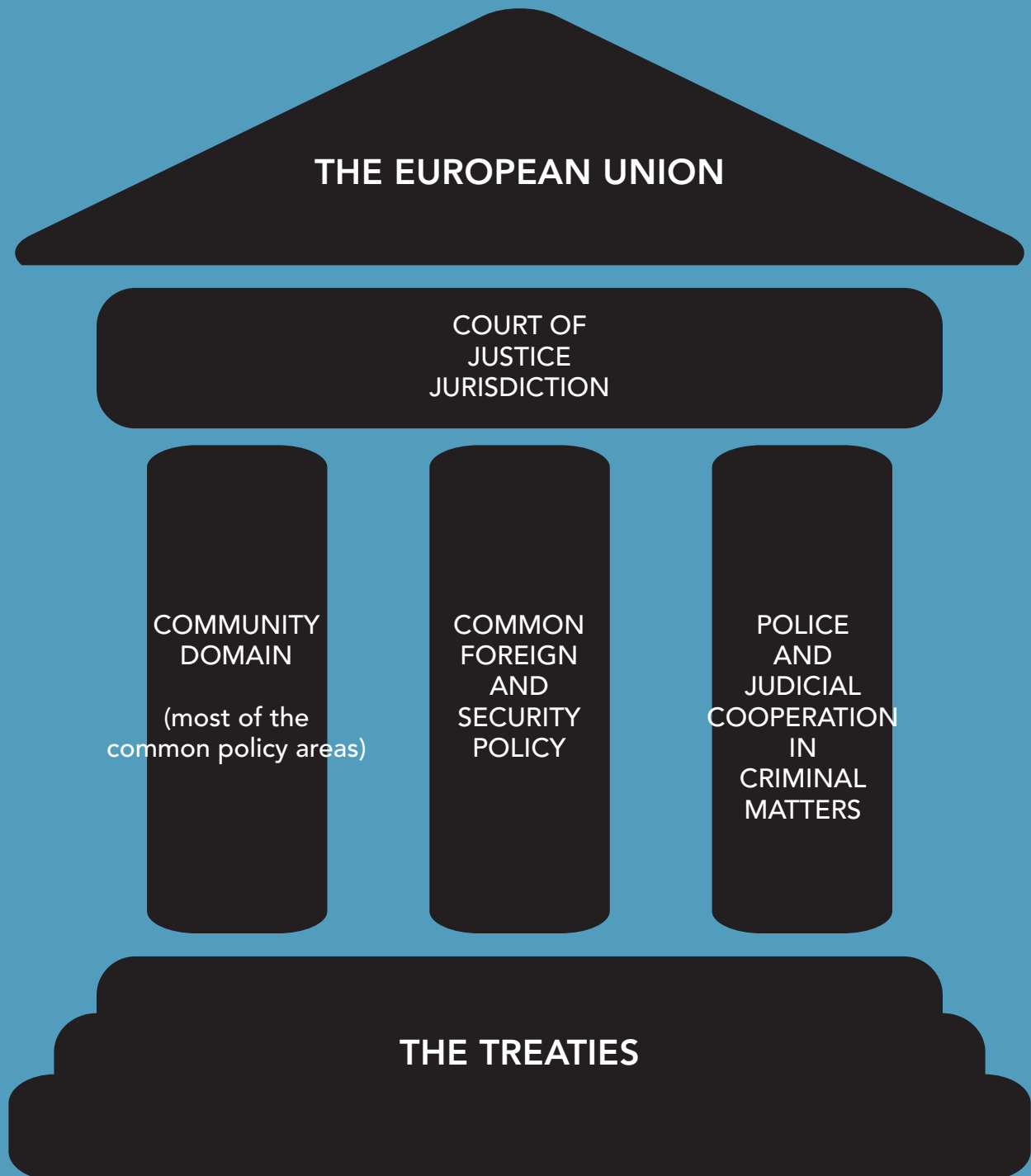
The EU's formal role in matters like sport and culture is somewhat increased

THE TREATY GIVES THE EU A MODEST ROLE IN SOME NEW AREAS. The most important are space policy, sport, culture, education, public health, and vocational training. These changes mean that civil society actors with programmes in these policy areas should be aware of the EU's new potential to make recommendations, release funds, and participate in regional and international forums focused on such issues.

THE EU AS IT WAS UNDER THE TREATY OF NICE

FIGURE 1

Its three pillars represented different policy areas with different decision-making systems.



THE EU UNDER THE TREATY OF LISBON

FIGURE 2

Full CJEU jurisdiction over pre-Lisbon justice and security measures will be limited until 2014.



* Standard EU procedure means a law is proposed by the European Commission, negotiated between the Council of Ministers and European Parliament, and subject to review by the Court of Justice.

THE TREATY OF LISBON

The Treaty of Lisbon entered into force on 1 December 2009, concluding almost 20 years of debate on the balance of power between the EU's central institutions and its member states. The treaty was originally conceived as an elegant "constitution for Europe", and in part intended to bring the ordinary citizen closer to the EU. However, the document's messy and drawn-out ratification process arguably achieved the opposite effect, going through popular rejections in France, the Netherlands, and Ireland, a complete reordering of the first agreed text, partial renegotiations, and further subsequent amendments. Partly as a result, there is much ambiguity about how the treaty will change the way EU countries are governed.

The treaty is actually a series of amendments to the EU's two founding treaties, now called the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). The Charter of Fundamental Rights is made legally binding and human rights advocates should consider it a treaty in its own right. Annexed to these treaties are 37 protocols, which have the same legal status as the main text and mostly deal with member states' individual concerns and clarifications on interpretation of contentious provisions. In addition, there are around 65 declarations, which have political value only.

1. HOW THE LISBON TREATY CHANGES THE EU

ARTICLE 1, TREATY ON EUROPEAN UNION:

“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.”

THE EU IS IN THE PROCESS OF RADICAL CHANGE as its member states and institutions implement the Treaty of Lisbon. The treaty is the EU’s “constitution” and sets out how the Union works, both politically and legally. Since the text is garbled and hugely technical, its significance is not yet fully clear to most observers. Yet key reforms in the treaty have profound implications for how democracy works in Europe, and how EU values and freedoms are realised.

The Lisbon Treaty establishes a more ambitious legal framework for the European Union, expanding the EU’s role in foreign policy, policing, and criminal justice and human rights protection. It also improves political accountability, principally by an expansion of the European Parliament’s powers over how the EU’s budget is spent, as well as over immigration policy and internal security matters. (The European Parliament still cannot propose or repeal laws, however.) Domestic parliaments now have formal powers to block EU proposals that infringe national sovereignty. And citizens will be able to petition for legislation from the EU’s executive, for the first time, on collection of a million signatures from at least nine member states.

Notwithstanding the importance of these changes, a caveat is necessary. EU treaties are the highest form of constitutional law in Europe, supreme over the national constitutions of the 27 member states. Nonetheless, the real impact of the treaty relies greatly on the political will of its signatories to act on its provisions with follow-up legislation. For example, EU member states have been obliged to allow the free movement of services throughout Europe since 1957. But this has yet to happen since attempts to agree ambitious implementing legislation have failed. Many EU freedoms, such as the right to move and reside freely throughout the member states,

The real impact of the Lisbon Treaty relies greatly on the political will of its signatories to act on its provisions.

1. HOW THE LISBON TREATY CHANGES THE EU

Ambiguities remain in the division of powers between the EU's institutions and national governments.

took decades of incremental progress to become everyday realities. It is likely that many rights contained in the Lisbon Treaty will have a similar incubation period.

The Treaty of Lisbon's most fundamental political and legal change is the end of the "pillar structure" or the strict legal division of EU business into three distinct areas. These were previously divided thus: the European Community (where the EU institutions had powers to set the agenda and take nonconforming countries to court); European foreign policy (which was mostly intergovernmental apart from technical programmes and some development policy); and cooperation on criminal justice and migration, known as justice and home affairs (JHA) issues (where the EU had some powers but no real ability to enforce laws).¹

The new treaty sweeps away these distinctions, creating instead a two-pronged structure for the EU. Henceforth, all EU business, except foreign policy, will be subject to the "Community method", meaning that the European Commission proposes most laws, decisions are taken by majority vote by governments with the agreement of the European Parliament, and the EU's Court of Justice will have the right to make rulings on these laws.

Major foreign policy decisions are now negotiated in a new Foreign Affairs Council and remain subject to unanimous agreement. Minor or routine matters like the appointment of foreign envoys or dispersal of disaster aid will be subject to majority votes. An EU high representative now chairs the Foreign Affairs Council and also serves as a vice president of the commission. In other areas, the treaty sets up a more ambitious power structure for the EU, albeit with certain safeguards for national sovereignty. For example, the member states have significantly expanded the EU's powers and role in internal security matters (and with it, the protection of human rights, the rule of law, and individual freedoms). But, in some areas, they have also laid down clear, legally unambiguous provisions that protect national sovereignty. These include a blanket ban on EU involvement in matters of "national security", though this term is not properly defined. Also, the European Council—the quarterly meetings of national leaders, which take decisions unanimously—is given some power to set the EU's agenda at the expense of the European Commission.

The treaty attempts to categorise the exact division of powers between the EU's institutions and national governments, but ambiguities remain. Under a "principle of conferral", the EU's powers are divided into three different categories. In the first, the EU's institutions have undisputed dominance in customs, competition policy, monetary policy (for the eurozone), trade, fisheries, or international agreements that touch on EU law. In the second, the EU's powers trump those of the member states wherever European legislation exists. That includes agriculture, commercial regulation, consumer protection, the environment, criminal and civil justice, social and regional policies, transport, energy and public safety.

Lastly, there are the policy areas where the EU has the weakest influence: health, culture, tourism, education, youth, sport and vocational training, civil protection, and administrative cooperation. For these policies, the EU might set up technical programmes or issue guides to best practice, but it lacks any power to direct

national policies. Hence, the pillars might be gone but the treaty does not expand the EU's basic powers drastically beyond what they were prior to the treaty. Minor exceptions are energy policy and international agreements, where the EU's hand is strengthened by clearer legal bases for EU-level action.

The treaty does give the EU scope to expand its powers incrementally in the medium to long term, however. A “flexibility clause” can be used to allow the EU to move into new policy areas; and passerelle or bridging clauses can be used to switch decision making on existing policies away from unanimity to a majority vote. (These clauses cannot apply to decisions with military implications.) Such clauses allow the EU, if all member states agree, to move into new policy areas or to deepen its involvement in existing fields without having to ratify a new treaty. The treaty contains safeguards for the use of the passerelle clause in particular: the European Council must notify all national parliaments of its decision and allow them six months to object. If any one national parliament objects, the move to majority voting is blocked. Thus, national parliaments have greater power to prevent an unwarranted transfer of power to the EU.

On top of this new legal structure sit the EU's principal institutions: the European Commission, Council of Ministers, and a slightly enlarged European Parliament, which will grow to 754 members.² The European Commission and European Parliament gain greater powers than before in approximately 40 specific policy areas where national vetoes are removed.³ These include decisions governing agriculture, fisheries, transport, infrastructure funds, and policing and criminal justice (see Annex I for an exact list). When the EU negotiates laws in areas where each member country still wields a veto, the resulting legislation has tended to be weak, ineffective, and unenforceable. Abolition of national vetoes promotes compromise, implies that the European Commission gains the sole right to initiate new laws, and gives the European Parliament new rights to codecide the final version with governments.⁴ The CJEU will be able to rule on the legality and application of the resulting European laws and the treaty makes it easier for the European Commission to launch cases against the member states for failure to implement such laws.⁵

At the apex sits the European Council, which was legally an informal body since it began meeting in 1979 but which is politically the highest decision-making forum in the EU. The heads of government meeting in the European Council elect a chair, or president (for a term of two and a half years, renewable once), whose job is vaguely defined as being to “drive forward” the council's work.⁶ Apart from the power to set the European Council's agenda, the post has little formal executive power. The previous system—whereby the council was chaired by a different national leader every six months—will continue for all ministerial-level councils, except in foreign affairs, where the high representative will always be the permanent chair. That means policy in areas such as justice and home affairs, agriculture, or transport will continue to be led by a different EU country every six months.

Starting in 2014, apart from a handful of issues, a new law will be passed in these councils if it is supported by 55 percent of the member states, provided these countries

The Commission and Parliament gain greater powers in approximately 40 policy areas.

represent 65 percent of the total EU population. Under this system, it should be easier to pass new legislation than in the current regime of weighted votes, where small groups of member states are usually able to block measures they do not like.⁷

SECTION 1 NOTES:

- 1 The treaty uses the term "ordinary legislative procedure" rather than "Community method" to describe this process. That means that almost all EU business will now employ the Community method unless the treaty states otherwise. In such cases, a "special legislative procedure" will be employed which can involve simple unanimity between the governments, a majority vote with a curtailed role for the EU's institutions, or a mix of the two depending on the issue.
- 2 A handful of extra seats in the Parliament were given to Poland, Spain, and others to compensate for a loss of voting power in the European Council and Council of Ministers.
- 3 See Annex I.
- 4 In policing and criminal justice matters, a quarter of member states can still bring proposals to the EU's JHA Council. Initial signs are that this option will be frequently exercised.
- 5 The Court of Justice of the European Union is the new name for what was previously known as the European Court of Justice. The CJEU's lower court, previously known as the Court of First Instance, is now called the General Court. The court may convene chambers consisting of smaller groups of judges to hear cases in specialist areas like criminal law.
- 6 The first European Council president is Herman van Rompuy, a former Belgian prime minister; Baroness Ashton is the first high representative for foreign affairs and security policy under the Lisbon Treaty provisions.
- 7 The move to this "double majority" voting system was controversial. Because it is partly based on population, the new voting regime represents a shift of voting power to the bigger member states. Some sensitive issues, such as those dealing with foreign policy, defence, or tax, will still require unanimity; others will require a "super majority," defined as 72 percent of the member states representing 65 percent of the EU population.

2. HUMAN RIGHTS

ARTICLE 67, TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION:

“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 EU WILL BECOME A NEW TYPE OF HUMAN RIGHTS ACTOR under the Lisbon Treaty. EU law provides the basis for at least 40 percent of its member countries’ national laws but it previously provided little real scope for directly challenging such measures on human rights grounds.⁸ The treaty employs two reforms to fix this: by giving legal effect to the Charter of Fundamental Rights, previously only a political declaration, and by allowing for the EU’s accession to the European Convention on Human Rights and Fundamental Freedoms (ECHR).⁹

By acceding to the ECHR, the EU will establish the Strasbourg Court as the final authority on human right standards in Europe. Previously, although claiming “inspiration” from the convention, EU actions could not be appealed to the Strasbourg Court for external scrutiny of their compliance with human rights standards. Both the EU and the Council of Europe have had their founding treaties amended to allow the EU to become the convention’s first nonstate signatory. But the member states must agree a further law setting out the conditions under which cases involving European law can be referred to the Strasbourg Court. Since that law is subject to unanimous agreement, EU countries are likely to make such conditions—the exhaustion of all available internal legal remedies—difficult to satisfy.¹⁰ Nonetheless, the EU’s new justice and fundamental rights commissioner, Viviane Reding, has committed to fast-track the accession decision, meaning it is likely to happen some time before the end of 2012.¹¹

The member states’ controversial decision to make the EU’s Charter of Fundamental Rights legally binding is likely to have the biggest future impact on Europe’s legal order. The charter contains 54 articles, which fall under seven headings or “titles”.

Making the Charter of Fundamental Rights legally binding is likely to have the biggest future impact on Europe’s legal order.

2. HUMAN RIGHTS

The charter has the potential to be a “game changer” in the field of human rights protection.

The first six are dignity, freedoms, equality, solidarity, citizens’ rights, and justice, and the seventh deals with provisions for interpreting and applying the charter. Among the rights listed are the right to marry and found a family, the right to education, the right to asylum, the right to equality before the law, the rights of the child, the elderly, and those suffering from disabilities, the right to collective bargaining and action, and judicial rights, including the right to a fair trial.

Ultimately, the interpretation of the charter is a matter for the courts. For human rights advocates, the most immediate benefit of the entry into force of the Lisbon Treaty is that the charter is now a proper legal basis for challenging the validity of EU laws on human rights grounds. Advocates should note in particular that the application of EU law is much stronger than international human rights law in member countries since the CJEU can and does impose fines. In addition, the CJEU, unlike the ECtHR, has the power to award punitive damages as well as costs against member states or EU bodies. That will make it a much more attractive court of choice for individuals seeking redress of their rights.

But what will be the extent and scope of the charter and what will it change? The fact that this question has been so hotly debated over the last decade and remains mired in ambiguity suggests that the charter has the potential to be a “game changer” in the field of human rights protection, a development openly hinted at by CJEU judges and advocate-generals in law conferences and in interviews.¹²

There are two schools of argument—the maximalist and the minimalist—that trace the fault-lines of this debate. Minimalists make two main points. First, that the charter only applies to the member states when they are implementing EU law and that the text is unambiguous in stating that its provisions cannot be used “to extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union.” Second, that the charter’s provisions are divided between classical “rights”, almost all of which are already in the ECHR, and “principles”, mostly aspirational and socioeconomic in nature. Articles containing principles include those relating to the rights of the elderly, the rights of people with disabilities, the right to strike, and environmental protection. Rights are justiciable, that is, they can be enforced by the CJEU; principles are not unless the EU specifically legislates for them. Some argue that the charter’s principles are the same as those in the UN Charter, which no government has transposed into national law. As such, the Charter of Fundamental Rights is chiefly a public relations exercise to make rights more visible to citizens, most of whom have little personal interest in the EU.

Maximalists retort that there is nothing in the charter itself that makes clear which articles are rights that are indisputable and can be enforced before the CJEU and which are merely principles. (This is true: nowhere in the charter is there a distinction between which rights are fundamental and which are merely declaratory.) Furthermore, a critical test of the scope of the charter’s application will be how the EU court determines what is meant by “implementing Union law”. This condition could be triggered by accidental factors like nationality or travel even when EU law is not directly involved. For example, the CJEU has in the past struck down national laws which merely have the potential to affect EU law. That suggests

the charter could potentially be widely applicable where any action by an EU country could adversely affect, however indirectly, an EU citizen's freedom to travel and settle in another member state.

There are other factors that could influence the impact of the charter. First, the argument about the distinction between rights and principles is likely to be settled on a case-by-case basis. Some rights, such as access to preventative health care, have no corresponding EU legislation and are therefore not enforceable. Some are nullified by language in the charter itself or elsewhere in the treaty: the right to marry, for example, is only guaranteed "in accordance with the national laws governing the exercise of these rights". Similarly, the charter's right to collective action is clearly in conflict with Article 153 of the treaty itself, which excludes any role for EU law in regulating the right to strike. Detailed "explanations" attached to the treaty in a declaration are supposed to clarify further how certain rights are to be interpreted (see Annex II). But these have no legal value save a reference in the Treaty on European Union and the charter's preamble that the CJEU must have "due regard" to them. The explanations, which contain ambiguities, are likely to become less and less relevant over time.

Second, how easy is it to defend and expand rights under the charter? The majority of cases will be taken before a national court on the grounds that a national law incorrectly or inadequately transposes EU law or is contrary to a right contained elsewhere in EU law. For example, a third country national resident in a Schengen-area country might challenge intrusive or discriminatory checks by border guards in front of a national court, citing the charter's articles on dignity. The national court will then ask the CJEU to rule on the limitations the charter's right to dignity places on the discretion of border authorities to carry out searches under the terms of the Schengen border code. It is possible that cases could also be taken purely on the basis of the charter text itself, through the doctrines of "direct" and "indirect" effect. Direct effect is a cornerstone principle of EU law. It means that, even though the European Union is a club of sovereign countries, its agreements grant to European citizens direct rights that they can demand before national courts. This is true even in cases where citizens apply for a government to give effect to an EU freedom for which they have failed to legislate. If the principle of direct effect is found to apply to the charter, which now has the same legal value as the treaties, then its impact could be very great indeed, perhaps even superseding the role of the member states' supreme courts in determining "national" freedoms. But even in such cases—if the history of human rights jurisprudence is any guide—the CJEU is most likely to be expansionary in areas involving classical rights and restrictive when interpreting socioeconomic rights.¹³ In that sense, the distinction between rights and principles is likely to hold.

Third, what sort of "esprit de corps" does the CJEU have and how might this be changing? Hitherto the court has always been activist in the cause of greater EU integration. It has traditionally handed down judgments that confirm the primacy of European law over national law, often past anything conceived by governments when they signed the treaty. But no analysis has yet delved into how the institution might be changing under the influence of EU enlargement and the arrival of 12

The CJEU is most likely to be expansionary in areas involving classical rights and restrictive when interpreting socioeconomic rights.

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new judges who do not necessarily subscribe to traditional ideas of European federalism. Furthermore, for the first time, the treaty establishes a judicial panel of former magistrates to vet government nominees to the court. It is possible that member states would seek to influence such panels to take greater account of their prerogatives when approving candidates.

SECTION 2 NOTES:

- 8 Concerns that the EU lacks robust fundamental rights protections have repeatedly provoked the ire of Germany's constitutional court (Bundesverfassungsgericht) in the Solange I and II judgments of 1974 and 1986, then in a ruling on the Maastricht treaty in 1993, and most recently in June 2009, when it ruled on the Lisbon Treaty (or more accurately: on the German laws implementing the treaty). All of the rulings share a common theme: the court feels that the EU's fragile democratic legitimacy and lack of robust fundamental rights protections risk undermining the German constitution.
- 9 Article 6, Treaty on European Union.
- 10 A 2006 ruling of the European Court of Human Rights (*Bosphorus Airlines v. Ireland*) attempts to define the relationship between the ECHR and EU law. In precis, the court's ruling in the case suggests that EU countries cannot cite the special nature of EU law to escape review under the ECHR. However, the legal test for this is strictly on a case-by-case basis whereas EU accession to the ECHR would establish the principle as a legal norm.
- 11 The consequences of EU accession to the ECHR are hard to predict. But one outcome might be that the Strasbourg Court becomes a check on European integration where it poses a danger to human rights. This is because the ECHR will be viewing EU law without the inherent sympathy to greater integration exhibited by the CJEU. A more practical implication is that the Strasbourg Court's caseload will increase, resulting in even longer waits for rulings.
- 12 See: "The EU Charter of Fundamental Rights: Why a fudge won't work", Open Europe, June 2007. Open Europe is a UK-based campaigning group opposed to EU integration. This analysis is not a reliable source of information on the charter itself. But the brief is valuable for its verbatim interviews with CJEU judges, even if quoted selectively.
- 13 There is a legitimate alternative view to this argument. Some experts argue that the court will not provoke a conflict with the ECHR by taking an overly expansive view of classical rights and will rather seek to expand its social principles, which are unique to the charter and the EU.

3. FOREIGN POLICY

ARTICLE 21, TREATY ON EUROPEAN UNION:

“The Union’s action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.”

THE LISBON TREATY DOES NOT GRANT THE EU SWEEPING NEW POWERS in foreign policy. Rather it reorganises the EU’s existing foreign policy machinery in the hope that creating a more efficient system will result in greater European influence in the world. The new Foreign Affairs Council succeeds the EU’s old “general affairs and external relations council” in foreign policy. Catherine Ashton, the EU’s first combined vice president of the European Commission and high representative for foreign affairs and security policy, chairs its monthly meetings and relies on the member states to agree decisions that will give her a mandate to act on the global stage. Ashton is in the curious position of chairing a council to which she must also bring forward her own proposals. The exact dynamic this will create is unclear as yet. Under the council sit numerous working groups, where diplomats from all 27 EU countries thrash out common positions on almost every area of foreign policy. Under Lisbon, many of these working groups will be chaired by members of a new external action service (EAS), an important change since this will put EU diplomats in charge of consensus building, a job previously done by national civil servants only.

The role of high representative has the potential to be tremendously influential since the incumbent can command not only the diplomatic clout of the entire EU backed up by the new EAS, but also the technical and financial sources of the European Commission. The EAS will have a network of 140 embassies worldwide

The new external action service will only be as strong as the message it has to deliver.

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to assist in the delivery of policy and help coordinate the member states' national diplomats in foreign capitals. However, the services will only be as strong as the message it has to deliver and that depends on the success of the high representative in chairing the Foreign Affairs Council.

The treaty gives the high representative the legal right to coordinate any European Commission portfolio with a bearing on the EU's external relations, a spectrum which potentially includes trade, agriculture, enlargement, migration, internal security, and development. However, it is clear that Ashton's brief is already so large that she will need at least three deputies, as well as a flotilla of personal representatives, to act on her behalf internally in the EU while she concentrates on shuttle diplomacy. Hence, commissioners with briefs related to foreign affairs have little need to fear an intrusive high representative, as they will remain in control of their own shops in practice.

The treaty expressly forbids the CJEU from ruling on actions of the high representative, the Foreign Affairs Council, or the EAS in their execution of EU foreign policy. But there are potentially significant exceptions to this: under Article 275 TFEU, the court has the power to review the legality (and therefore compliance with fundamental rights) of sanctions adopted by the Foreign Affairs Council against individuals. This could pave the way for challenges to the inhumane impact of trade sanctions, or provide a stronger basis to test the legality of the EU's counterterrorism lists, for example.¹⁴ The court may also be called on to rule on legal turf battles between the high representative, her colleagues in the European Commission, and the president of the European Council, to whom the treaty also gives a role in representing the EU to foreign heads of state. The European Parliament is likely to resort to the court in order to defend and expand its powers over the EU's budget to give it a greater role in foreign policy matters. Finally, since the treaty makes the European Council a formal EU institution for the first time, it could be argued that actions of that institution—and presumably those of its president, who has a role in foreign policy—are open to review by the court.

The EU's international agreements concerning the sharing of private data such as passenger records are another area of potential disagreement between the Foreign Affairs and Justice and Home Affairs councils and the European Parliament. The treaty contains an article which appears to govern foreign policy agreements that could allow for the transfer of such personal data to other non-EU countries for security reasons. Agreements adopted on this basis (Article 39 TEU) would bypass both the European Parliament and the Court of Justice. However, EU countries know they could expect an immediate legal challenge from the European Parliament if they attempted such a move. Since all justice and home affairs matters are now clearly a shared competence of the EU, such a case would be upheld by the court, especially where it involves the use of data originally gathered for commercial purposes.¹⁵ What kinds of data are intended to be covered by the article is unclear at the time of writing.

In the field of development aid, the treaty makes subtle but important changes. First, the primary aim of EU development cooperation is defined as the elimination of poverty (development policies conducted at national level are not bound by this dictum). Decisions on the disbursement of EU aid can now be taken by majority

vote on a basis of a single provision in the treaty, which should lead to a swifter release of funds and less chance that actions in reaction to future humanitarian crises could be blocked by a country wielding a national veto for its own purposes.

As well as obliging EU development policy to respect international humanitarian principles, the treaty also provides for the establishment of a European Peace Corps, called the European Voluntary Humanitarian Aid Corps. The intended purpose of this body is to provide a vehicle for young volunteers to identify with and assist in the delivery of EU aid efforts, since there is little public awareness in Europe of the EU's role as an actor in humanitarian aid.

SECTION 3 NOTES:

- 14 In a key ruling from September 2008, the CJEU quashed the listing of Yasin al-Qadi, an individual believed by European security services to be linked to al-Qaeda. In June 2009, this ruling was cited in another CJEU decision to delist the high-profile Islamist preacher and al-Qaeda supporter Abu Qatada, currently in prison in the UK. The EU subsequently amended its procedures for adding people to its terror list.
- 15 *The Treaty of Lisbon: An impact assessment*, volume 1, UK House of Lords report 62-1, pp 186–187.

4. JUSTICE AND HOME AFFAIRS

The EU has new powers to set and guarantee minimum standards of justice across its territory.

ARTICLE 67, TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION:

“The Union shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws.”

THE SINGLE MOST RADICAL SHIFT OF POWER in the Lisbon Treaty concerns the role of the EU’s institutions on justice and home affairs (JHA) policy. Prior to the entry into force of the treaty, the EU’s institutions had only a limited role in policing and criminal justice matters. From 2010 on, all new JHA legislation—borders, visas, asylum, policing, and criminal justice—will be subject to the “Community method”. This is significant for human rights advocates because EU policies in JHA have been devoted almost exclusively to control- and security-orientated measures for almost a decade. Because the EU had little or no fundamental rights dimension, governments were able to agree measures like the European arrest warrant, which extends the coercive powers of the EU countries across borders, without enacting compensatory measures on defendants’ rights or civil liberties in general.

The treaty allows for a rebalancing between security and civil liberties in two ways. First, the European Parliament will for the first time become a colegislator with the member states on policing and criminal justice matters. The European Parliament’s civil liberties committee is particularly bullish about making the most of its new powers in JHA, such as the power to veto international agreements; it is already asserting itself with regard to the exchange of private commercial data with the United States for counterterrorism purposes. Second, the treaty greatly enhances the EU’s formal legal powers to strengthen civil liberties by harmonising criminal procedures in the member states. That includes areas such as defendants’ rights, rules on double jeopardy, the

protection of personal data exchanged for security purposes.¹⁶

The EU therefore has new powers to set and guarantee minimum standards of justice across its territory, and defendants will be able to rely on these standards before national courts. Some compensatory measures had been attempted under the previous treaties (such as the “victims’ decision”, a loosely worded law stipulating minimum standards for the treatment of victims in court proceedings). But safeguards like the victims’ decision, agreed by unanimity, tend to be so general as to be ineffective, and, in any case, member states did not implement them effectively since the European Commission had no infringement powers.

Another key battleground will be data protection. The EU operates a robust regime for the protection of personal data in the commercial sector. But this regime does not cover a plethora of databases and other arrangements for sharing police information agreed within the EU over the last 10 years. The treaty partly erases the distinction between commercial data and records exchanged for security purposes. The European Commission hopes to have a revised law on data protection passed by mid-2011.

The treaty’s changes regarding criminal justice mean that the CJEU is likely to develop a special chamber for criminal justice matters. This is because of its new role in hearing cases taken by the European Commission for incorrect or incomplete transposition of EU laws dealing with policing and criminal justice. The court also gains another power that has huge potential significance: for the first time it gains jurisdiction to review the actions of EU agencies like Europol, Eurojust, and Frontex¹⁷ when they affect “third parties” or ordinary individuals.¹⁸ It is likely to carry out judicial review in this area with reference to rights in the charter such as the integrity of the person, protection in the event of extradition, protection of personal data, and the right to asylum.

There are several caveats to the extension of the EU’s powers into this exceptionally sensitive area of national sovereignty, however. First, the UK and Ireland have the right to opt out of any EU decision on immigration, asylum, the police, or criminal justice. These countries cannot stop other EU countries from harmonising their criminal laws if they wish to do so, but they do not have to take part. Second, any EU country can trigger an “emergency brake” procedure for most EU negotiations on criminal law when it considers that a draft law poses a threat to its criminal justice system. (This is especially likely to be the case when matters of court procedure or state coercion are discussed.) The country that presses the brake cannot block the law, if nine or more member states are in favour, but it is not obliged to take part in the arrangements that are agreed. The upshot is that a core of EU countries might adopt a harmonised criminal code but not necessarily the whole EU.

Third, the CJEU is banned from having any say over matters affecting national security, the use of force by a country’s police, or the activities of intelligence services. That exemption means the EU is not potentially an instrument for checking police brutality or ethnic profiling by intelligence services. But the lack of a clear distinction in the treaty between “national security” and “internal security” means that the court could try to establish a legal test for this separation at some point in the future.

The Court of Justice has no say over national security, the use of force by a country’s police, or intelligence services’ activities.

4. JUSTICE AND HOME AFFAIRS

Finally, the court's powers to rule on policing and criminal justice laws passed at the EU level is initially limited only to those laws passed after the Lisbon Treaty entered into force. Existing JHA laws like the European arrest warrant or the Europol decision will not come under its purview until 2014, unless they are amended before then with fresh legislation requiring the agreement of EU interior ministers.¹⁹ Hence, it may now be legally possible to establish a robust European regime for civil liberties, but progress toward this goal is likely to be slow in the medium term.

European governments are already concerned about the expansion of the EU's legal writ into policing and justice matters, particularly as regards their freedom to strike deals on internal security with non-EU countries. Take the European arrest warrant and individual countries' extradition arrangements with countries outside the EU. If the EU now has a single extradition regime, can Estonia agree its own extradition arrangements with, say, Tajikistan without fear of the law being struck down by the CJEU? The answer is that the member states are still free to agree their own extradition deals as long as there is no corresponding deal at the EU level (as per the rule for "shared" competences). At present, there is only one EU-wide extradition agreement, concluded with the United States before the Lisbon Treaty was ratified and which entered into force on 1 February 2010. Member states are no longer allowed to have their own extradition arrangements with the United States. The EU plans to conclude several similar accords with countries in Africa and the Middle East in the coming years. But, under the Lisbon Treaty, these will now be subject to approval by the European Parliament, which has the power to veto any international agreement concluded by the EU.

SECTION 4 NOTES:

- 16** Article 16, TEU: 1. Everyone has the right to the protection of personal data concerning them. 2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall lay down the rules relating to the protection of individuals with regard to the processing of personal data by Union institutions, bodies, offices and agencies, and by the Member States when carrying out activities which fall within the scope of Union law, and the rules relating to the free movement of such data. Compliance with these rules shall be subject to the control of independent authorities.
- 17** Europol is the EU's police agency, Eurojust is its unit of national prosecutors, and Frontex is the agency charged with improving the management of the Schengen border area.
- 18** Article 267, Treaty on the Functioning of the European Union.
- 19** Alone amongst the member states, the UK has the right to decide to leave all EU JHA cooperation six months before the CJEU gains full jurisdiction in 2014. It will be exposed to CJEU jurisdiction only for those EU justice and security laws it opts into in the meantime.

5. NATIONAL PARLIAMENTS AND CITIZENS IN EU LAW

ARTICLE 67, TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION:

“Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen. . . . National parliaments contribute actively to the good functioning of the Union.”

ASIDE FROM GRANTING MORE POWERS TO THE EUROPEAN PARLIAMENT, three reforms in the treaty stand to strengthen the links between EU law-making and European citizens. First, the treaty creates a formal procedure for a European “citizens’ initiative”, whereby a multicountry petition with one million signatures can request the European Commission to propose legislation. The fine points of how this provision will work in practice are currently being debated inside the EU’s institutions. For example, what constitutes a bone fide signature (can children petition for children’s rights, for example)? What is the threshold for the minimum number of participating states for an initiative to be accepted by the European Commission? What happens if the European Commission decides not to initiate legislation following a legitimate petition? Draft legislation circulated at the time of writing suggests that legitimate initiatives will need to be based on signatures collected on a proportional basis from a minimum of nine countries and filed at a special EU website where they will be checked for their compatibility with the charter and EU law. It is important not to overestimate this change as a form of California-style direct democracy for the EU. Nonetheless, future initiatives will be influential in shaping the European Commission’s agenda.

Second, the treaty grants formal powers for national parliaments to block EU laws they feel impinge wrongly on states’ rights. Under a legal principle called subsidiarity, the EU is only supposed to legislate if action cannot be taken more effectively at the national or local level. To enforce this principle, the Lisbon Treaty will, for the first time, give national parliaments the right to challenge a piece of European legislation that they consider infringes their sovereignty. The European Commission will in future send draft laws directly to national parliaments. If a third of them express concerns, the European Commission must explain why the legislation is needed or submit a redrafted version.²⁰ If half of them continue to oppose the measure, a majority of member states or MEPs can insist that the draft be dropped altogether. However, as in the past, the role that each national parliament plays in EU law-making will depend on how actively it wishes to be

A multicountry citizens’ petition of one million signatures can request the European Commission to propose legislation.

5. NATIONAL PARLIAMENTS AND CITIZENS IN EU LAW

involved. For example, the Danish parliament has long been extremely active in scrutiny of EU laws and holding the government to account during negotiations; other national parliaments much less so. As in the case of the citizens' initiative, this reform should not be overestimated and does not replace ordinary scrutiny of EU laws by national parliaments for their policy content.

Third, it will now be possible for private institutions and individuals to challenge certain regulatory measures of the EU institutions before the Court of Justice without having to show that the measure is of "individual concern" to them. The treaty has therefore made it somewhat easier for ordinary citizens to mount challenges to EU law before national or European courts on pure matters of principle. Previously individuals could not take cases against EU law unless they themselves were financially or otherwise harmed by its impact.

SECTION 5 NOTES:

- 20 For justice and home affairs issues, the bar for national parliaments to block legislation is set lower. Because of the sensitivity for national sovereignty, a quarter of national parliaments can ask the European Commission to reconsider a JHA proposal.

6. QUESTIONS AND ANSWERS

QUESTION:

Will the treaty give the EU powers to protect and promote “freedoms” in Europe and the wider world?

MANY OF THE TREATY’S REFORMS are aimed at making the EU’s institutions more transparent and accountable and strengthening individual rights. The behaviour of national administrations is only addressed to the extent that EU law is involved. This might trigger certain rights in the Charter of Fundamental Rights, namely, those freedoms included in Title II, which guarantees freedom of information, freedom of expression, the right to liberty and security, and freedom of association and assembly. The charter itself makes no distinction between freedoms, rights, and principles. Therefore, when weighing the relative strength and applicability of each freedom, one must consider the potential connection between the case in question and EU law. In places, this connection can make a real difference. Even before it entered into force, the CJEU previously cited media pluralism, protected under the charter’s provision on freedom of expression, as a reason to curtail state control of the media in Italy and elsewhere. Most freedoms in the charter, such as freedom of expression, are also guaranteed by the ECHR. But some, such as the freedom of the arts and sciences, are not. This is likely to mean that the latter have lesser standing.

Foreign policy is expressly excluded from the remit of the CJEU. Therefore, testing of EU foreign policy actions against the charter will be exceedingly difficult.

QUESTION:

Will the treaty strengthen the EU’s role in democracy promotion abroad?

YES AND NO. The EU and individual member states pursue separate democracy promotion activities and this will not change under the treaty. However, the creation of a newly empowered high representative for foreign policy and the external action service (EAS) has triggered a bitter row over control of the EU’s development aid programme, which spent €1.6 billion on promotion of good governance in 2008 alone. This includes the European Commission’s specific vehicle for democracy promotion, the Instrument for Democracy and Human Rights (known as EIDHR, €1.104 billion allocated for 2007–2013). The high representative will take full control of the EIDHR and will take decisions on distribution of funds in conjunction with governments in the Foreign Affairs Council. That means future democracy promotion projects are likely to become more politicised and tailored to more immediate concerns.

QUESTION:

Do the treaty’s provisions on foreign policy affect how the EU applies sanctions?

THE TREATY STREAMLINES, RATHER THAN CHANGES, EXISTING PRACTICES.

For sanctions aimed at foreign regimes (such as Iran, for example), the high representative can now propose both political and economic sanctions for agreement by the Foreign Affairs Council. Previous sanctions would have to be treated as two different sets of sanctions, one from the council and one from the European Commission. As before, sanctions against foreign countries will be agreed by a majority vote and the CJEU has no jurisdiction over these. However, financial sanctions against individuals or groups, such as freezing the bank accounts of those suspected of terrorism, are subject to legal redress on the following grounds: lack of competence, infringement of an essential procedural requirement, infringement of the treaty or of any rule of law relating to its application, or misuse of powers.

6. QUESTIONS AND ANSWERS

QUESTION:

Does the treaty have any military implications?

THE TREATY RESTATES THE EU'S LONG-TERM ASPIRATION to establish a common defence when all 27 member states agree. A “mutual assistance clause” (Article 42) further states that EU countries have an “obligation of aid and assistance” to any fellow member state that is a victim of “armed aggression on its territory”. But this falls short of a legal basis for standing European military forces or a NATO-like obligation of mutual defence. Unanimity in defence matters remains the rule and consequently future military actions under an EU flag are likely to remain humble in scope and ambition. That means the EU’s ability to respond to crisis situations with specific military and civilian missions will remain subject to 27 national vetoes.

The same article also allows for “permanent structured co-operation”, meaning that EU countries willing and able to do so may establish pioneer groups on defence matters to undertake “the most demanding missions”, that these groups must have the capacity to deploy targeted combat missions for at least 30 days, and that they can be established by a majority vote. These “battle-groups” were intended to boost the EU’s military capabilities but seem unlikely to be seriously discussed while the current economic outlook for most European countries remains poor.

QUESTION:

Does the treaty give the EU new powers over the actions of police?

THE EU WILL HAVE NO SAY OVER THE EVERYDAY ACTIONS OF POLICE OFFICERS

or how member states organise their internal security services. But the treaty (Article 87 TFEU) provides for new EU laws dealing with common training and investigation techniques as well as the exchange of police information across borders. The latter presumably provides a legal basis for the establishment of further EU databases to store law enforcement information. These laws will be decided by majority voting with the involvement of the European Parliament and will be open to challenge before the CJEU. A subclause in the treaty also allows for common rules for police from one EU member state operating on the territory of another. But such rules will be agreed by unanimity only, with no real role for the European Parliament or the Court of Justice. For the first time a detailed article on the actions of Europol is included in the EU’s treaties, including provisions for the agency’s activities to be scrutinised by both the European Parliament and national parliaments.

QUESTION:

Will the treaty affect the Roma in any way?

THE TREATY MAKES NO SPECIFIC MENTION OF ANY ETHNIC MINORITY. But it does employ stronger language on the need to protect ethnic minorities and, for the first time, the Lisbon Treaty provides some basis for common legislation on the integration of minorities (Article 79(4) TFEU). The article only applies to common “incentives” and “supporting measures” regarding newly arrived immigrants from non-EU countries. The treaty does amend the EU’s list of fundamental values to include the responsibility to protect the rights of minorities and the specific inclusion of the word “minorities” in a list of basic EU values strengthens its role in antidiscrimination *vis a vis* ethnicity. Therefore, EU law that applies to antidiscrimination, social exclusion, access to education, and health could be more expansively interpreted by the CJEU.

QUESTION:

Will the treaty prevent European countries from cooperating on security issues if they do not involve the EU's institutions?

UNDER THE LISBON TREATY, THE EU GETS STRONGER POWERS in justice and security issues, including a stronger right for the European Commission to table new laws on terrorism, organised crime, and illegal immigration. This should presumably make it much harder for member states to set up smaller, separate cliques outside EU structures for security cooperation. Based on EU practice in other policy areas, countries must first attempt to adopt new rules across the EU as a whole and can only resort to core groups as a last resort. Even then they are subject to the scrutiny of the EU's institutions: the European Commission, European Parliament, and Court of Justice. However, the treaty seems to allow for pioneer groups for the purposes of cooperation on national security questions (Article 73, TFEU). (As alluded to elsewhere, the exact difference between national security and EU internal security has yet to be clarified.) But it seems likely that intergovernmental bodies like the G6—where the interior ministers of Britain, France, Germany, Italy, Poland, and Spain meet every six months to strengthen practical cooperation between the EU's largest domestic security and immigration services—will be unaffected. Therefore, they are unlikely to become more transparent or accountable via the constraints of EU law-making.

QUESTION:

Does the treaty move the EU closer to a single immigration policy?

EU COUNTRIES PURSUE VERY DIFFERENT IMMIGRATION POLICIES, each defined by different historical, geographic, economic, and cultural factors. The Lisbon Treaty makes it legally possible for the EU to move closer to a single immigration policy by introducing majority voting in this area for the first time. However, immigration remains a highly sensitive issue in most EU countries. Key countries such as Germany are opposed to handing powers to the EU's institutions to determine the acceptance and treatment of non-EU nationals on their territories. As a result, the EU is unlikely to become a driver for more liberal immigration policies in the short term. (Britain and Ireland are entitled to opt out of legislation on legal migration and almost always do so.) In the absence of a robust common internal policy on immigration, the EU is likely to attempt to add value to national policies via single readmission agreements on returning illegal immigrants with countries such as Libya, Pakistan, and Turkey. Interestingly, new readmission agreements must now be approved by the European Parliament. That leaves scope for advocates to lobby MEPs to reject such accords where these give rise to human rights concerns.

QUESTION:

What impact will the treaty have on EU policies toward refugees?

THE EU'S COMMON ASYLUM POLICY IS NOT WORKING. Large variations remain between the treatment of refugees in different European countries despite frequently restated political commitments to the contrary. This is partly due to an overreliance on the power of common legislation to equalise standards for receiving refugees and processing their claims. But it is also due to the reluctance of the European Commission to take infringement proceedings against laggard member states (for example, Greece and Italy). The Lisbon Treaty does not fundamentally increase the EU's powers over member states' asylum policies from what they are at present. But it does allow much greater leeway for legal challenges to national asylum decisions on the basis that they infringe EU law. The treaty obliges judges from any domestic court to refer cases involving a point of EU law to the CJEU. Previously only courts of final appeal could do this.²¹ In EU jargon, these queries are called "preliminary references" and have been traditionally used by the court as a means to expand the reach of

6. QUESTIONS AND ANSWERS

Community law. At a minimum, this greatly expands the “bandwidth” of EU asylum law and is likely to lead to an expansion of the rights of refugees in Europe, driven from the ground up. Previously, the court dealt with relatively few cases involving asylum law and there is a question as to its current capacity to absorb a large increase in referrals unleashed by the treaty.

QUESTION:

Will the treaty change the way the EU sets visa policy?

ONLY A LITTLE. The key EU legislation relating to the Schengen area, such as the Schengen borders code, is already subject to majority voting, the approval of the European Parliament, and judicial review by the Court of Justice. Previous treaties excluded only two areas from this: rules on which countries need a visa to enter the EU and rules on a common format for visas. The Lisbon Treaty adds these items to the full purview of the EU’s institutions.

QUESTION:

Does the EU have greater powers to protect intellectual property rights under the treaty?

INTELLECTUAL PROPERTY QUESTIONS ARE HUGELY SENSITIVE IN THE EU, both politically and legally. Efforts to agree a single EU patent system have been mired in disagreement for the last decade. In practice, the treaty makes little change to how IP rights are created and defended. A new article restates the EU’s current powers to protect intellectual property rights though it does move the creation of IP rights to the ordinary legislative procedure (Article 118 TFEU). But member states will continue to decide by unanimity on a case-by-case basis what intellectual property issues the CJEU has a right to rule on, and this means that the EU’s ability to set criminal sanctions for infringement of IP rights will remain limited. Unlike most other commercial areas, EU trade agreements involving intellectual property will be subject to unanimous agreement among the member states.

QUESTION:

Will the treaty change member states’ social policies?

THERE IS PLENTY OF NEW RHETORICAL COMMITMENT in the treaty to respect for the “social dimension” of EU policy with regard to sustainable development, the linked goals of full employment and social progress, and the fight against social exclusion and discrimination. But the EU’s social policy powers are only clearly increased in one area: agreement of social security arrangements for migrant workers and their dependents (Article 48 TFEU). However, since such agreements have the potential to impose significant burdens on national treasuries, any one member state can temporarily block new social security laws with the so-called “emergency brake” procedures.

QUESTION:

Does the treaty have any implications for the current concerns over Greece and the future of the euro?

THE TREATY MAKES NO REAL CHANGE TO THE DIVISION OF POWERS between the EU’s institutions and member states on economic or finance matters. It does not give the EU any new powers over national taxation or budgetary policies. However, in 2010 EU countries somewhat creatively invoked Article 122 TFEU as the legal basis for the transfer of EU funds to Greece as part of a €110 billion debt relief package. The clause underlines that “where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council, acting by a qualified majority on a proposal from the Commission, may grant, under certain conditions, Community Union financial assistance to the Member State concerned.”

SECTION 6 FOOTNOTES:

21 Article 267, Treaty on the Functioning of the European Union.

ANNEX I: EU'S POWERS AND MOVES TO MAJORITY VOTING AND CODECISION IN THE LISBON TREATY

Before basing arguments on the EU's Charter of Fundamental Rights advocates should remind themselves of the EU's basic ranking of competencies, as they appear in the treaty:

EXCLUSIVE	SHARED	SUPPORTING
<ul style="list-style-type: none"> Customs Union Competition Monetary policy Trade Fisheries 	<ul style="list-style-type: none"> Internal Market Social policy (limited) Economic, social, and territorial cohesion Agriculture Environment Consumer protection Transport Trans-European networks Energy Freedom, security, and justice Common public health matters Development policy* Space policy* Research and development* 	<ul style="list-style-type: none"> Protection and improvement of human health Industry Culture Tourism Education, vocational training, youth, and sport Civil protection Administrative cooperation Development policy* Space policy* Research and development*

Under the "doctrine of pre-emption", EU countries can only adopt legislation in shared competence areas to the extent that the EU's institutions have not done so. But this doctrine is weakened for the last three items in this category where the member states and EU may both exercise their own policies.

ANNEX I: EU'S POWERS AND MOVES TO MAJORITY VOTING AND CODECISION IN THE LISBON TREATY

Advocates should then consider what involvement the EU's institutions have in the policy area in question. The EU has more power in a policy area when it is decided by a qualified majority vote (QMV) with codecision powers for the European Parliament. Below is a checklist of the areas of EU policy where national vetoes no longer apply or where the European Parliament gains powers. Items marked with * include shifts to both QMV and codecision. Items marked with † are shifts to codecision only (and where the governments still decide by unanimity). Articles with no marking are shifts to QMV only.

PROCEDURAL AND INSTITUTIONS

- Election of European Council president
- Presidency of Council configurations
- Appointment of high representative
- Council review of general rules on composition of the Committee of the Regions and European Economic and Social Committee
- Comitology*
- Citizens' initiatives *
- Negotiation of withdrawal agreement
- Judicial appointments panel
- Specialised courts*
- CJEU jurisdiction on intellectual property rights*
- CJEU Statute*
- Appointment of ECB Executive Board
- Principles of European administration*
- Staff regulations of EU officials†

EU BUDGET

- Implementation of own resources decisions
- Financial regulations*

COMMON COMMERCIAL POLICY

- Aspects of the common commercial policy*

SOLIDARITY CLAUSE

- Implementation of solidarity clause

INTERNAL MARKET

- Services of general economic interest*
- Official and government employment†
- Coordination of provisions for self-employed persons
- Freedom to provide services for established third country nationals†
- Freedom to provide services†
- Movement of capital to or from third countries†
- Freezing of assets†
- Provisions enabling repeal of the aspects of this article related to state aids policy and the effect of the past division of Germany
- Distortion of competition†
- Authorisation, coordination, and supervision of intellectual property rights protection*

EXTERNAL AFFAIRS AND CFSP

- Diplomatic and consular protection measures
- Role of the high representative in CFSP implementing measures (with emergency brake)
- Membership of structured cooperation in defence
- Urgent financing of CFSP measures
- Economic, financial, and technical cooperation with third countries†
- Urgent aid to third countries
- Humanitarian aid operations*

SOCIAL SECURITY

- Social security (with emergency brake)

MONETARY POLICY

- Multilateral surveillance procedure†
- Amendments to certain parts of the Statute of the European System of Central Banks *
- Use of the euro*
- Measures relating to the Broad Economic Guidelines and excessive deficit procedure (applicable only to member states who have adopted the euro and affecting them only)
- Procedure for entry into the euro

EU POLICIES

- Structural and cohesion funds†
- Agriculture and fisheries†
- Transport*
- Provisions enabling repeal of transport policy as it affects areas of Germany affected by its past division
- European research area*
- Space policy*
- Energy
- Culture
- Tourism*
- Sport*
- Civil protection*
- Administrative cooperation*

FREEDOM, SECURITY, AND JUSTICE

- Mechanism for peer review of member states' implementation of policies in this area
- Border checks*
- Immigration and frontier controls*
- Judicial cooperation in criminal matters (with emergency brake)*
- Minimum rules for criminal offences and sanctions (with emergency brake)*
- Crime prevention*
- Eurojust *
- Police cooperation*
- Europol*

ANNEX II: THE CHARTER OF FUNDAMENTAL RIGHTS

This annex matches articles in the Charter of Fundamental Rights with an edited version of the explanations attached to the Lisbon Treaty.

TITLE I:

DIGNITY

ARTICLE 1

HUMAN DIGNITY

COMMENTARY: The dignity of the human person is not only a fundamental right in itself but constitutes the real basis of fundamental rights. The 1948 Universal Declaration of Human Rights enshrined human dignity in its preamble: “Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.” In its judgment of 9 October 2001 in case C-377/98 *Netherlands v. European Parliament and Council*, 2001 ECR 7079, the Court of Justice confirmed that a fundamental right to human dignity is part of EU law.

ARTICLE 2

RIGHT TO LIFE

COMMENTARY: This right is a restatement of Article 2 of the European Court of Human Rights and the CJEU will follow all the jurisprudence laid down by the ECtHR in interpreting that right over the last 60 years.

ARTICLE 3

RIGHT TO THE INTEGRITY OF THE PERSON

COMMENTARY: This is a new way of stating an existing right. In a key judgment of 9 October 2001 in case C-377/98 *Netherlands v. European Parliament and Council*, 2001 ECR 7079, the Court of Justice confirmed that a fundamental right to human integrity is part of Union law and encompasses, in the context of medicine and biology, the free and informed consent of the donor and recipient. This right also outlaws reproductive cloning and eugenic practices, involving campaigns for sterilisation, forced pregnancy, compulsory ethnic marriage, among others.

ARTICLE 4

PROHIBITION OF TORTURE AND INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

COMMENTARY: This article has the same wording, meaning, and scope as Article 3 of the ECHR.

ARTICLE 5

PROHIBITION OF SLAVERY AND FORCED LABOUR

COMMENTARY: This article corresponds to Article 4(1) and (2) of the ECHR, which has the same wording. Paragraph 3 of this article takes account of recent developments in organised crime, such as the organisation of lucrative illegal immigration or sexual exploitation networks.

ANNEX II: THE CHARTER OF FUNDAMENTAL RIGHTS

TITLE II: FREEDOMS

ARTICLE 6 RIGHT TO LIBERTY AND SECURITY

COMMENTARY: This article extends the rights covered by Article 5 of the ECHR to EU law, particularly to cooperation in criminal justice matters. The right to liberty may only be curtailed in the instances already allowed for under the ECHR. These are as follows:

1. Lawful detention of a person after conviction by a competent court.
2. Lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law.
3. Lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.
4. Detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority.
5. Lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants.
6. Lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

The extension of Article 5 ECHR to EU law for the first time means that measures like the European arrest warrant (EAW) are now covered by its scope. The CJEU will not have jurisdiction over the EAW until 2014 but does have jurisdiction over any justice and security measures passed by the European Parliament and Council of Ministers, particularly ongoing efforts to define minimum European standards as regards the categorisation of offences and punishments and certain aspects of procedural law.

ARTICLE 7 RESPECT FOR PRIVATE AND FAMILY LIFE

COMMENTARY: The rights guaranteed in this article correspond to those guaranteed by Article 8 of the ECHR. To take account of developments in technology the word “correspondence” has been replaced by “communications”. Interference with this right by a public authority can be defended on the grounds of national security, public safety, or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

ARTICLE 8 PROTECTION OF PERSONAL DATA

COMMENTARY: This article is based on the former Article 286 TEC and Directive 95/46/EC of the European Parliament and of the Council of Ministers on the

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FREEDOMS

protection of individuals with regard to the processing of personal data and cross-border movement of such data. Reference is also made to Regulation No 45/2001 of the European Parliament and of the Council of Ministers on the protection of individuals with regard to the processing of personal data by the European Community institutions and bodies and on the free movement of such data. The above mentioned directive will shortly be renegotiated by the EU to take account of the EU's new powers in transmitting data for law enforcement purposes and whatever compromise the member states reach will determine the scope of this right.

ARTICLE 9

RIGHT TO MARRY AND RIGHT TO FOUND A FAMILY

COMMENTARY: This article is based on Article 12 of the ECHR, which reads as follows: "Men and women of marriageable age have the right to marry and to found a family according to the national laws governing the exercising of this right." The wording of the article has been modernised to cover cases in which national legislation recognises arrangements other than marriage for founding a family. This article neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex. This right is thus similar to that afforded by the ECHR, but its scope may be wider when national legislation so provides.

ARTICLE 10

FREEDOM OF THOUGHT, CONSCIENCE, AND RELIGION

COMMENTARY: The right guaranteed in paragraph 1 corresponds to the right guaranteed in Article 9 of the ECHR. Limitations must therefore respect Article 9(2) of the ECHR, which reads as follows: "Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

ARTICLE 11

FREEDOM OF EXPRESSION AND INFORMATION

COMMENTARY: Article 11 has the same meaning and scope as Article 10 of the ECHR, which reads as follows:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

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TITLE II: FREEDOMS

This article will be interpreted in line with previous EU cases circumscribing national control over the audio-visual sector in order to protect media pluralism (as in Italy, for example). Key cases include C-380/05 *Centro Europa 7* [2007], concerning the granting of broadcasting licenses in Italy, and C-288/89 *Stichting Collectieve Antennevoorziening Gouda* [1991].

ARTICLE 12

FREEDOM OF ASSEMBLY AND OF ASSOCIATION

COMMENTARY: This article partly corresponds to Article 11 of the ECHR and also on previous drafts of the charter. The meaning of its provisions is the same as that of the ECHR, but their scope is wider since they apply at all levels, including the European level.

ARTICLE 13

FREEDOM OF THE ARTS AND SCIENCES

COMMENTARY: This is a new right and could have implications for efforts to create a European research area. This right is deduced primarily from the right to freedom of thought and expression. It is to be exercised having regard to Article 1 of the charter and may be subject to the limitations authorised by Article 10 of the ECHR.

ARTICLE 14

RIGHT TO EDUCATION

COMMENTARY: This article is based on the common constitutional traditions of member states and on Article 2 of the Protocol to the ECHR, which states that “No person shall be denied the right to education.” By expressing the right as a positive, the EU may have potentially expanded its scope but its powers in this area exclude harmonisation. It was considered useful to extend this article to access vocational and continuing training and to add the principle of free compulsory education. As it is worded, the latter principle merely implies that as regards compulsory education, each child has the possibility of attending an establishment which offers free education. It does not require all establishments that provide education or vocational and continuing training, in particular private ones, to be free of charge. Nor does it exclude certain specific forms of education having to be paid for, if the state takes measures to grant financial compensation.

ARTICLE 15

FREEDOM TO CHOOSE AN OCCUPATION AND RIGHT TO ENGAGE IN WORK

COMMENTARY: Freedom to choose an occupation, as enshrined in Article 15(1), is recognised in Court of Justice case law and the European Social Charter. Paragraph 2 deals with the three of the EU’s “four freedoms” guaranteed by the TEU, namely freedom of movement for workers, freedom of establishment, and freedom to provide services. This article also covers the question of recruitment of seamen having the nationality of third states for the crews of vessels flying the flag of a member state of the EU is governed by EU law and national legislation and practice.

TITLE II:
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ARTICLE 16
FREEDOM TO CONDUCT A BUSINESS

COMMENTARY: This article is based on Court of Justice case law which has recognised freedom to exercise an economic or commercial activity. This right is to be exercised with respect for EU law and national legislation. Under Article 52 of the charter, it is subject to a proportionality test to judge whether an action is necessary to achieve the EU's objectives and whether it respects the rights and freedoms of others.

ARTICLE 17
RIGHT TO PROPERTY

COMMENTARY: This is a fundamental right common to all national constitutions. It has been recognised on numerous occasions by the case law of the Court of Justice, initially in the Hauer judgment (13 December 1979, ECR [1979] 3727). The wording has been updated but, in accordance with Article 52(3), the meaning and scope of the right are the same as those of the right guaranteed by the ECHR and the limitations may not exceed those provided for there.

ARTICLE 18
RIGHT TO ASYLUM

COMMENTARY: The text of the article has been based on TEC Article 63, now replaced by Article 78 of the Lisbon Treaty, which requires the EU to respect the Geneva Convention on refugees. There is a further Protocol on Asylum annexed to the treaty.

ARTICLE 19
**PROTECTION IN THE EVENT OF REMOVAL, EXPULSION,
OR EXTRADITION**

COMMENTARY: The purpose of this article is to guarantee that every decision is based on a specific examination and that no single measure can be taken to expel all persons having the nationality of a particular state (see also Article 13 of the Covenant on Civil and Political Rights). It could apply to extradition agreements with the EU and third countries such as the United States or decisions involving the European arrest warrant in certain cases.

TITLE III:
EQUALITY

ARTICLE 20
EQUALITY BEFORE THE LAW

COMMENTARY: This right corresponds to a general principle of law that is included in all European constitutions and has also been recognised by the Court of Justice as a basic principle of EU law.

ARTICLE 21
NONDISCRIMINATION

COMMENTARY: This right should be read along with Article 19 of the TFEU, which outlines the EU's role in preventing discrimination: "Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic

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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.” This article confers power on the EU to adopt laws, including harmonisation of the member states’ laws and regulations, to combat certain forms of discrimination, listed exhaustively in that article. Such legislation may cover action of member state authorities (as well as relations between private individuals) in any area within the limits of the EU’s powers.

The explanations are at pains to point out that the extensive list of areas of discrimination outlined at the beginning of the article only addresses actions by the institutions and bodies of the EU themselves.

ARTICLE 22

CULTURAL, RELIGIOUS, AND LINGUISTIC DIVERSITY

COMMENTARY: The EU has weak powers in these areas but the Lisbon Treaty does contain stronger references to “respect for” cultural and linguistic diversity as well as recognising the status of churches and nonconfessional organisations for the first time.

ARTICLE 23

EQUALITY BETWEEN WOMEN AND MEN

COMMENTARY: This right is new and based on EU legislation and repeated references throughout the rest of the treaty. It therefore has the potential for expansion. EU law already lays down specific conditions for the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. The Lisbon Treaty also states that the principle of equal treatment does not prevent the maintenance or adoption of measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

ARTICLE 24

THE RIGHTS OF THE CHILD

COMMENTARY: This article is based on the New York Convention on the Rights of the Child signed on 20 November 1989 and ratified by all the member states. It also takes account of the fact that, as part of the establishment of an area of freedom, security, and justice, EU legislation on civil matters having cross-border implications may include visiting rights, ensuring that a child can maintain personal and direct contact with his or her parents on a regular basis.

ARTICLE 25

THE RIGHTS OF THE ELDERLY

COMMENTARY: This article draws on Article 23 of the revised European Social Charter and Articles 24 and 25 of the Community Charter of the Fundamental Social Rights of Workers. At present no EU legislation directly addresses the rights of the elderly.

TITLE IV:
SOLIDARITY

ARTICLE 26

INTEGRATION OF PERSONS WITH DISABILITIES

COMMENTARY: Similarly, the EU has not legislated for this right: The principle set out in this article is based on Article 15 of the European Social Charter and also draws on point 26 of the Community Charter of the Fundamental Social Rights of Workers.

ARTICLE 27

**WORKERS' RIGHT TO INFORMATION AND CONSULTATION
WITHIN THE UNDERTAKING**

COMMENTARY: The EU has extensive legislation in this area including basic rules for informing and consulting employees, collective redundancies, business transfers, and European works councils.

ARTICLE 28

RIGHT OF COLLECTIVE BARGAINING AND ACTION

COMMENTARY: This article should be read in conjunction with Article 153 (6) of the treaty, which sets out the EU's role in social policy: "this Article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs."

ARTICLE 29

RIGHT OF ACCESS TO PLACEMENT SERVICES

COMMENTARY: This article is based on the European Social Charter and point 13 of the Community Charter of the Fundamental Social Rights of Workers.

ARTICLE 30

PROTECTION IN THE EVENT OF UNJUSTIFIED DISMISSAL

COMMENTARY: This article draws on Article 24 of the revised Social Charter and EU laws governing the safeguarding of employees' rights during takeovers and the protection of employees of businesses that go bankrupt.

ARTICLE 31

FAIR AND JUST WORKING CONDITIONS

COMMENTARY: The EU's main power in this area is the power to agree common legislation on health and safety rules in the work place. The Lisbon Treaty restates that other "working conditions" are not subject to harmonisation and are subject to peer review by the European Commission.

ARTICLE 32

**PROHIBITION OF CHILD LABOUR AND PROTECTION
OF YOUNG PEOPLE AT WORK**

COMMENTARY: This prohibition is based on a specific piece of EU law: Directive 94/33/EC on the protection of young people at work. Some concern has been raised about its potential to restrict part-time work by students under 15.

ARTICLE 33

FAMILY AND PROFESSIONAL LIFE

COMMENTARY: This article is based on an amalgam of EU law, including legislation on

ANNEX II: THE CHARTER OF FUNDAMENTAL RIGHTS

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parental leave and measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding. For the purposes of the article “maternity” covers the period from conception to weaning.

ARTICLE 34 SOCIAL SECURITY AND SOCIAL ASSISTANCE

COMMENTARY: The explanations make clear that this right is qualified within the limitations set out in the Lisbon Treaty’s articles governing social policy, namely that social security and unemployment benefits remain matters for the member states except in cases dealing with the rights of migrant workers. This issue is subject to an emergency brake procedure.

ARTICLE 35 HEALTH CARE

COMMENTARY: The EU has no competence and little relevant legislation in this area since it mostly deals with preventative health care. The article provides for a high level of human health protection.

ARTICLE 36 ACCESS TO SERVICES OF GENERAL ECONOMIC INTEREST

COMMENTARY: This article deals with public services and the attached explanations are at pains to stress that it does not create any new right, but rather a principle to be “respected”.

ARTICLE 37 ENVIRONMENTAL PROTECTION

COMMENTARY: The article also provides for a high level of protection and can be read with reference to the EU’s substantial acquis on the protection of the environment.

ARTICLE 38 CONSUMER PROTECTION

COMMENTARY: This right applies a high level of rights protection to areas covered by EU consumer law.

TITLE V: CITIZENS’ RIGHTS

ARTICLE 39 RIGHT TO VOTE AND TO STAND AS A CANDIDATE AT ELECTIONS TO THE EUROPEAN PARLIAMENT

COMMENTARY: Article 39 applies under the conditions laid out in the Lisbon Treaty for the conduct of European elections. A candidate must be a national of an EU member state to run for election to the European Parliament.

ARTICLE 40 RIGHT TO VOTE AND TO STAND AS A CANDIDATE AT MUNICIPAL ELECTIONS

COMMENTARY: Every EU citizen has the right to vote and to stand as a candidate at municipal elections in the member state in which he or she resides under the same conditions as nationals of that state.

ARTICLE 41**RIGHT TO GOOD ADMINISTRATION**

COMMENTARY: This right is new and is potentially significant as a tool to force EU institutions to carry out their obligations under the treaty. It states: “Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.” The right was established through the jurisprudence of the Court of Justice dealing with complaints against EU bodies. But it could potentially apply to asylum or data protection cases and also be used to act as a check on EU agencies concerned with law enforcement and border control.

ARTICLE 42**RIGHT OF ACCESS TO DOCUMENTS**

COMMENTARY: This right is also potentially significant. It has been carried over from Article 255 of the EC Treaty, on the basis of which Regulation 1049/2001 has subsequently been adopted. The Lisbon Treaty extends this right to documents of institutions, bodies, and agencies generally, regardless of their form, except for certain actions of the CJEU, the European Central Bank, and the European Investment Bank.

ARTICLE 43**OMBUDSMAN**

COMMENTARY: Any EU citizen and any natural or legal person residing or having its registered office in a member state has the right to refer to the European Ombudsman cases of maladministration in the activities of the institutions, bodies, offices, or agencies of the EU, with the exception of the CJEU acting in its judicial role.

ARTICLE 44**RIGHT TO PETITION**

COMMENTARY: Any EU citizen and any natural or legal person residing or having its registered office in a member state has the right to petition the European Parliament.

ARTICLE 45**FREEDOM OF MOVEMENT AND OF RESIDENCE**

COMMENTARY: This article restates the basic EU freedom for its citizens to move and reside freely throughout the EU. But it also draws on CJEU case law to state that this right can be extended to third country nationals in certain instances.

ARTICLE 46**DIPLOMATIC AND CONSULAR PROTECTION**

COMMENTARY: Every EU citizen shall, in the territory of a third country in which the member state of which he or she is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any member state, on the same conditions as the nationals of that member state.

ANNEX II: THE CHARTER OF FUNDAMENTAL RIGHTS

TITLE V: CITIZENS' RIGHTS

ARTICLE 47

RIGHT TO AN EFFECTIVE REMEDY AND TO A FAIR TRIAL

COMMENTARY: This right is mostly based on Article 13 of the ECHR: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity." However, EU law offers greater protection since it guarantees the right to an effective remedy before a court. The CJEU has established this as a "general principle of EU law" from a plethora of rulings handed down since its inception.

The article also guarantees that legal aid shall be provided where this is necessary to ensure an effective legal remedy. The CJEU already operates a system of legal assistance for cases before it.

ARTICLE 48

PRESUMPTION OF INNOCENCE AND RIGHT OF DEFENCE

COMMENTARY: Article 48 is the same as Article 6(2) and (3) of the ECHR, which reads as follows:

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
 - (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
 - (b) to have adequate time and facilities for the preparation of his defence;
 - (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
 - (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

This right has the same meaning and scope as the right guaranteed by the ECHR but could potentially be relied on to expand the issue of "equality of arms" in EU criminal justice cooperation. Over 10 years, the EU has devised many common laws making it easier for police, prosecutors, and judges to work together. But no such regime exists for cross-border defence matters, though EU justice ministers are developing some common procedural rights.

ARTICLE 49

PRINCIPLES OF LEGALITY AND PROPORTIONALITY OF CRIMINAL OFFENCES AND PENALTIES

COMMENTARY: This article ensures that two general principles of EU law also apply to the traditional rule of the nonretroactivity of laws and criminal sanctions. There has been added the rule of the retroactivity of a more lenient penal law, which exists

TITLE V:
CITIZENS' RIGHTS

in a number of member states and which features in Article 15 of the Covenant on Civil and Political Rights.

These principles are based on Article 7 of the ECHR, which is worded as follows:

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

ARTICLE 50
RIGHT NOT TO BE TRIED OR PUNISHED TWICE IN CRIMINAL PROCEEDINGS FOR THE SAME CRIMINAL OFFENCE

COMMENTARY: *The non bis in idem* (no double jeopardy) rule already applies in EU law and has been defined and expanded in several CJEU court cases. It has the same meaning and the same scope as the corresponding right in the ECHR.

Article 4 of Protocol No 7 to the ECHR reads as follows:

1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.
2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and the penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

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