

BEFORE THE LISBON TREATY

The European Union first began to discuss anti-racism measures in the mid 1990s, as the European Commission noted that “public opinion has been widely alerted to the fact that persistent racism, xenophobia and anti-Semitism is striking at the roots of democratic society throughout the community.”¹ A European Year against Racism was launched in 1997 but at this stage the existing EU Treaties provided no real powers that allowed the EU to combat racism and xenophobia.

The Treaty of Amsterdam 1999 amended the former Treaties giving the EU new competencies. In 2000 ‘The Race Equality Directive’ and ‘The Employment Equality Directive’ were created from the Treaty provisions providing comprehensive legal protection from discrimination. However the directives failed to cover some important areas, for example, protection against religious discrimination was only covered under ‘The Employment Equality Directive’ but was not extended to other areas and ‘The Race Equality Directive’ did not cover national discrimination which means that third country nationals were not protected under this Directive. Despite efforts to prevent racism and discrimination, gaps remained in the EU’s protection framework.

THE LISBON TREATY – WHATS NEW?

The Lisbon Treaty came into effect on 1 December 2009. It replaces the failed Constitutional Treaty and instead amends existing EU Treaties ‘Treaty of the European Union (TEU)’ and ‘The Treaty establishing the European Community (TEC)’. It aims to “provide the Union with the legal framework and tools necessary to meet future challenges and respond to citizens’ demands”². The Lisbon Treaty makes fundamental changes to the structure of the European Union and the way that it operates.

Structure

The Treaty abolishes the three pillar structure of the EU, merging the European Communities pillar, the Common Foreign and Security Policy pillar and the Police and Judicial pillar into one common framework. This has implications for the way that decisions are made, as policy decisions which

¹ Communication from the Commission on racism, xenophobia and anti-Semitism and proposal for a Council Decision designating 1997 as European Year against Racism, COM(95)653.

² EUROPA, Treaty of Lisbon: The Treaty at a Glance available at http://europa.eu/lisbon_treaty/glance/index_en.htm.

used to be made in the second and third pillars through unanimity of all member states have now been transferred into the first pillar area where decisions are made by Qualified Majority Voting.

The Lisbon Treaty does provide special measures which mostly retain the intergovernmental nature of Common Foreign and Security Policy decision-making, however the merger has provided greater scope to promote fundamental rights abroad. Common Foreign and Security Policy must now be subject to general EU principles such as of rule of law, respect for human rights and human dignity, equality and solidarity, in its dealings with third countries and international organisations. The merger of the Police and Judicial cooperation pillar will take around 5 years, but when complete the EU will have greater decision making power in this area. The UK and Ireland, however, have secured 'opt outs' allowing them to decide whether they want to adopt police and judiciary legislation or not.

Transparency, Democracy and Efficiency

One of the core aims of the Treaty was to ensure that EU legislation is made simpler and more transparent to its citizens and that EU decision making is made more efficient and democratic. To improve compliance to these qualities the Lisbon Treaty:

- Provides clarification on how decisions are made, defining in which policy areas competency is held by the member states, in which areas the institutions have decision-making power and where the competency is shared.
- Extends the use of Qualified Majority Voting in the European Council to new policy areas such as immigration and culture, making decision making processes quicker and more efficient. Only the sensitive issues such as tax, citizens' rights and foreign and security policy remain under the unanimity voting methods.
- Introduces the idea of 'Double Majority Voting' to be implemented in 2014. EU laws will require a majority both from the EU member countries and EU population to be passed.
- Strengthens the role of the European and national Parliaments. The European Parliament now has equal standing with the Council and is involved in the decision making of almost all policy areas. National parliaments have greater decision-making capabilities.
- Creates a direct link between the outcome of the European Parliament elections and the choice of candidate of the President of the Commission. The President is also given new powers to dismiss fellow commissioners.
- Gives the EU a public 'face' by creating two new prominent positions. Herman van Rompuy is the first permanent President of the European Council and Baroness Cathy Ashton is the EU Foreign Policy Chief responsible for representing Common Foreign and Security Policy and external relations.
- Gives the EU Charter of Fundamental Rights binding legal force within the European Union, although UK, Poland and the Czech Republic has secured opt outs on some Charter elements.

DOES THE LISBON TREATY PROVIDE NEW MECHANISMS FOR COMBATTING RACISM AND DISCRIMINATION?

The Lisbon Treaty gives much needed clarification on the values and the objectives which underpin the framework of the Union. Article 2 of the Treaty names human dignity, freedom, democracy, equality, the rule of law and the respect for human rights as core EU values to be incorporated into all areas of policy making. The Article also adds respect for the ‘rights of persons belonging to minorities’ as a key EU principle, reaffirming the EU’s commitment to the protection of minority rights at European level. Looking more closely at the specific articles we can see key areas where the Lisbon Treaty is likely to impact.

Rights

	Article Contents	What this means for NGOs
Article 8	Reaffirms the EU’s commitment to gender equality “the union shall aim to eliminate inequalities and promote equality, between men and women.” ³	
Article 10	The Union will “aim to combat discrimination based on sex, racial and ethnic origin, belief, disability, age or sexual orientation” when defining and implementing all policies and activities. ⁴	All European Union activity must aim to combat discrimination.
Articles 18-25	These articles give a comprehensive listing of all rights applicable to EU citizens and what protection the EU can provide against discrimination. Existing protection for EU citizens is improved through introduction of ‘The EU Charter of Fundamental Rights’	Although protection is extended for EU citizens, protection still does not apply to third country nationals.
Article 19	The Council is given legal basis to instigate protection against discrimination, rather than just the mechanism to adopt measures to prevent such discrimination.	Individuals have a very broad right to equal treatment under the Lisbon Treaty.

Democracy

Article 11	Adopts the ‘principle of participatory democracy’. This improves the opportunity for citizens and representative groups to exchange their views on the action of the Union. The Commission is responsible for consulting with concerned parties to ensure the Union engages regularly in open and transparent dialogue. Right to ‘Citizens initiative’. One million citizens from a number of Member States have the possibility to call	NGOs could have a much stronger voice in EU policy making if this article is properly used. Anti-racist NGOs could have a direct voice in the legislative process, however so could anti-EU and
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³ Article 8 TFEU

⁴ Article 10 TFEU

<p>(....)</p>	<p>on the Commission to bring forward new policy proposals.</p> <p>Increased role of National Parliaments, national parliaments given the right to scrutinise EU legislation prior to its adoption. If enough member states object to a proposal they can ask for it to be reviewed or dismissed by the Commission.</p> <p>Increased role of European Parliaments</p> <p>It is now easier for individuals to challenge a directive or regulation in the European Court of First Instance. Yet it remains to be seen how loosely the European Court of Justice will interpret this provision.</p>	<p>discriminatory organisations.</p> <p>NGOs can influence EU policy making through their national parliaments.</p> <p>NGOs can play a greater role in decision making by lobbying European MPs. Useful for challenging policies which are adverse to anti-racism or anti-discrimination.</p>
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Justice and Home Affairs and Common Foreign and Security Policy

<p>Article 67</p>	<p>“The Union shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia.”⁵ However the article contains no further reference to prevention of racist and xenophobic crime.</p>	<p>It remains unclear whether progress has been made in relation to the treatment of racist and xenophobic crime.</p>
<p>Article 79</p>	<p>Requires the Union to develop a common immigration policy which efficiently manages migration flows, ensures the fair treatment of third country nationals, and combats illegal immigration and human trafficking. The Lisbon Treaty reduces national veto power on immigration and asylum policies and makes it easier for immigration policy measures to be adopted.</p> <p>Member states still have the right to set the volume of entry of third country nationals.</p>	<p>Potential to encourage equal treatment of third country nationals.</p> <p>This policy allows discrimination through the selection process.</p>

⁵ Article 67 TFEU

WHATS IN THE EU CHARTER OF FUNDAMENTAL RIGHTS?

The Lisbon Treaty takes valuable steps to improving anti-racism and anti-discrimination provisions by incorporating the EU Charter of Fundamental Rights. Although still a separate document, Article 6 of the Lisbon Treaty refers to the Charter and makes it legally binding in the EU. While no new rights have been created within the Union, the status of the Charter of Fundamental Rights has risen and as it now has equal legal standing with the EU Treaties. Member states must respect the Charter when applying and implementing EU Law and additionally individuals may rely on the Charter before the European Courts.

Some member states however, were worried that the Charter would interfere with their national human rights provisions, and the UK, Poland, and Czech Republic have secured 'opt-outs' from the enforceability of the Charter. The UK opt-out ensures the Charter cannot be used by the ECJ to alter British labour laws, or other laws affecting social rights. Poland's opt-out prevents the Charter from affecting national control over family issues and morality, such as abortion. The Czech opt-out guarantees that Germans expelled from the Czech Republic after WW2 will not receive new property rights.

The adoption of the EU Charter of Fundamental Rights means that the rights of all European citizens have been set out clearly and unambiguously for the first time at EU level. Rights are divided into seven chapters: dignity, freedoms, equality, solidarity, citizens' rights, justice and general provisions. The language and scope of the Charter is progressive as it prohibits 'any discrimination on any grounds such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority,

Taken as a whole, the addition of the EU Charter of Fundamental Rights into the Lisbon Treaty should be seen as a very positive development for the protection of fundamental rights in the EU.

Overall the Lisbon Treaty and the Charter have the potential to have a positive impact on the prevention of racism and xenophobia in the European Union, however they do not create comprehensive protection. So while the Treaty has improved the situation gaps still remain in the protection from discrimination.

The principles of equality and non-discrimination feature prominently and repeatedly in the Lisbon Treaty's provisions, but by and large, the Treaty fails to create new mechanisms for implementation of these principles. While the Treaty amendments have potentially strengthened the platform from which NGOs can tackle racism and xenophobia in the European Union, the success of this strategy is largely dependant on how the European Court of Justice (ECJ) interprets these provisions.

property, birth, disability, age or sexual orientation."⁶ In spite of this it is unlikely that individuals will be able to make claims to equality rights directly on the Charters provisions, as the Charter is limited in its application to the Union and the member states, and the Charter provides no new competences in this area. However it can be argued that the creation of non-discrimination and equality rights at EU level could have significant effects in the long term. Non-

⁶ Article 21 Charter of Fundamental Rights

discrimination is named by the Charter as a fundamental right and this can be used by NGOs to give weight to any argument opposing discriminatory and racist practices.

The Charter places fundamental social rights alongside human rights for the first time in any international document. However it does not set a minimum level of social protection that the member states should conform to and thus the Charter's effect is still largely dependant on how national governments decide to implement it. Although the Charter is generally applicable to everyone residing in the EU, certain rights are reaffirmed for EU citizens only and NGOs have expressed their dissatisfaction that the Lisbon Treaty does not strive to improve the equality between EU citizens and third-country nationals.

Case law has already indicated that the European Court of Justice supports the rights contained in the Charter. No case has been yet been decided directly on the Charter provisions but the ECJ is referring frequently to the Charter in its judgements. Opt-outs have complicated the applicability of the Charter but since member states must comply with EU law and the ECJ seems to support the Charter, it will not be long until these 'opt outs' are tested.

HOW CAN NGOs APPLY THE LISBON TREATY IN THEIR WORK TO COMBAT RACISM AND DISCRIMINATION?

- 1. The Lisbon Treaty reiterates a number of non-judicial remedies which can be used to fight racism and discrimination including: putting petitions before the European Parliament, making citizen complaints to the European Commission, accessing European Institutions documents and making use of the European Ombudsman.**
- 2. The Lisbon Treaty's commitment to 'dialogue with civil society', namely the principle of participatory democracy and the citizens initiative give NGOs greater scope to become involved in EU Policy making.**
- 3. Because of the strengthening of influence of national and European parliaments NGOs can more effectively influence European policy-making by lobbying European MPs and can exert greater influence through their national parliaments.**
- 4. The equality mainstreaming clause means all areas of EU practice and policy-making must aim to combat discrimination and any act which does not comply with the principles of the EU Charter of Fundamental Rights and the Lisbon Treaty can be now brought before the European Court of Justice by individuals and not just national courts.**
- 5. NGOs should be encouraged to use the Charter in any claims of discrimination brought before the ECJ, as the Charter is more progressive in language and scope than other Treaties and the ECJ seems to be supportive of the rights of this charter.**

This is a briefing summary of the ENAR publication 'The EU Lisbon Treaty: What implications for anti-racism?' To read the full report online please visit the ENAR website publications page (www.enar-eu.org) or to request a printed copy of this publication please contact the UKREN Secretariat on 02073779222 or ukren@runnymedetrust.org.