



The impact of the Lisbon Treaty - an environmental perspective

The Lisbon Treaty, signed in Lisbon on 13 December 2007 and designed to change the workings of the European Union (EU), entered into force on 1 December 2009 following its ratification by all EU Member States.¹

This legal analysis is a background document on the impact of the Lisbon Treaty on the EU policies dealing with climate and energy from an environmental perspective. It is structured as follows:

1. The aim of the Lisbon Treaty
2. Structure of the Treaties
3. The legal personality of the EU
4. The principle of environmental protection under the EU Charter of Fundamental Rights
5. The principle of sustainable development
6. The competencies of the EU
7. Changes in the legal basis for the EU environmental policy
8. The Legal basis for an EU energy policy
9. Other legal basis relevant to climate and energy issues
10. The choice of legal basis between energy and environmental chapters
11. Enhanced cooperation and the choice of legal basis
12. International Agreements in the environmental field
13. Changes in decision making
 - 13.1. Instruments
 - 13.2. Decision-making procedures for adopting legislative acts
 - 13.3. Procedures for non-legislative acts: comitology
 - 13.4. National parliaments' role in the decision making process
 - 13.5. Citizens' rights and role in the decision making process
14. Changes in the EU enforcement policy
15. New posts in the EU institutions
16. Revision of the Treaty and withdrawal from the EU
17. Conclusions

¹ Article 6 of the Lisbon Treaty establishes the date for the entry into force on the first day of the month following the deposit of the instrument of ratification by the last signatory State to take this step.

Executive summary

This legal briefing examines from an environmental perspective the changes brought by the Lisbon Treaty to the EU institutional structure and decision making processes and their impact on the EU policies on environment, energy, marine and fisheries.

It underlines the legally binding force which was given to the Charter of Fundamental Rights and discusses the principles of sustainable development and of the integration of environmental requirements into other EU policies. The report values positively the definition of competences between the EU and its Member States included in the Lisbon Treaty as it provides legal certainty and includes a detailed evaluation of the situation regarding the EU Fisheries Policy which has become shared competence, except for the “conservation of marine biological resources under the common fisheries policy”, which is maintained as exclusive competence. The paper discusses the consequences of a narrow or a wide interpretation of this provision in relation with other fisheries and environmental policy objectives.

The change of the Treaty provisions for EU environment policy is limited to the explicit reference to “climate change” which could enhance the role and responsibility of the EU in this field in particular with regards to international negotiations.

Furthermore, the Treaty provisions on energy policy have changed, providing now for shared competences between the EU and the Member States in this area. A detailed description of the new energy provisions highlights the importance of granting the EU the competence to develop a strategic EU energy policy and the explicit reference to the objective of promoting energy efficiency, energy saving and renewables. This section evaluates the consequences of the prohibition to adopt EU measures based on article 194 TFEU on energy policy if they affect a Member State’s right to determine the conditions for exploiting its energy resources, the choice of its energy mix or the general structure of its energy supply. The paper considers whether the environmental provisions of the TFEU can be used as legal basis for energy related measures and describes the legal consequences of the choice between environmental or energy provisions of the Treaty on the basis of a distinction between environmentally-related energy measures and energy-related environmental measures.

The problem has significant practical consequences because energy related measures with ambitious climate change objectives would not be possible if proposed to be adopted under the energy chapter but could be adopted through ordinary legislative procedure or special legislative procedure if proposed for adoption under environmental legal basis.

In addition, the choice of Article 192 TFEU (environment) will allow Member States to maintain or introduce more stringent environment protection measures (Article 193 TFEU), whereas Article 194 TFEU (energy) does not provide for such a possibility.

Further sections of the article address specific changes in the decision-making procedure at EU level including the enhanced cooperation procedure among Member States, the adoption of international agreements, the so-called Comitology procedure for EU implementing acts, the rules for the delegated acts and the new structures within the EU institutions. The report highlights specific amendments which aim at improving the democratic legitimacy of the EU decision making process such as the role of national Parliaments, the scope of the citizen's initiative, the EU institutions' consultation obligations, changes in the relevant articles providing for access to information and access to the EU Court of Justice or changes improving the EU enforcement policy.

1. The aim of the Lisbon Treaty

The aim of the Lisbon Treaty is to simplify the institutional structure and in the decision making process in order to boost efficiency, coherence and democratic legitimacy. This is intended to result in improved involvement from citizens and the institutions representing them and increased competencies in areas of citizens' concern. The Preamble states that the aim of the treaty is: 'to complete the process started by the Treaty of Amsterdam [1997] and by the Treaty of Nice [2001] with a view to enhancing the efficiency and democratic legitimacy of the Union and to improving the coherence of its action'.

The changes brought by the Lisbon Treaty require quite a lot of acts and measures due to be taken in the near future. It remains to be seen how the new system will be implemented in practice, whether democracy and legitimacy have increased and how the simplification achieved could be further developed.

2. Structure of the Treaties

The Lisbon Treaty consists of a number of amendments to the existing Treaties and keeps the same structure. It maintains the difference between the Treaty of the European Union (TEU) and the Treaty of the Functioning of the European Union (TFEU), previously named Treaty establishing the European Community (TEC). The TEU continues to include Common Foreign and Security Policy and affords the Union a legal personality. The TFEU includes the former third pillar (Justice & Home affairs, subsequently renamed Police and Justice Cooperation in Criminal matters). The Euratom Treaty remains a separate Treaty modified by Protocol No 12 amending the Treaty establishing the European Atomic Energy Community and annexed to the Treaty of Lisbon.

3. The legal personality of the EU

Under the current Treaties and in particular the Treaty of the European Union, the EU was based on a system of three pillars where only the European Community (first pillar) had its own legal personality. With the Treaty of Lisbon now in force, the pillar system has been abolished and the European Community as such is replaced and succeeded by the European Union, which has its own legal personality.

The recognition of the Union's legal personality should have a significant impact on its external action and should allow it to conclude international agreements and become a member of international organisations in its own right.

4. The principle of environmental protection under the EU Charter of Fundamental Rights

The Lisbon Treaty gives legally binding force to the Charter of Fundamental Rights of the European Union.² The Charter recognises a number of rights, freedoms and principles that will apply to the EU Institutions and Member States when they implement EU law.

In the environmental field, the Charter includes Article 37 on Environmental Protection, which states that:

'A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.'

This wording reflects and combines the provisions already present in the environmental chapter of the TEC and the TFEU. Article 191 (2) requires the Union policy on environment to aim at a high level of protection. However the Charter article is broader since it covers all Union policies. The exact boundaries of the interpretation of this article will have to be set by case-law. The inclusion of the principle of high level of environmental protection, per se, does not give citizens 'a right' to claim in courts for positive action by the EU Institutions or Member States. However, it could serve as a basis for a demand of a judicial review of legislative acts/omissions in cases where the EU Institutions or Member States would have manifestly breached their margin of discretion. For instance, could an EU measure be subject to review or challenge before the Court of Justice if it sets energy efficiency standards or any other type of standards that would not be strong enough and therefore would not aim at high level of environmental protection?

5. The principle of sustainable development and integration of environmental protection

Article 3 of the TEU states the objectives of the EU and defines the principle of sustainable development in Europe with its three elements (economic, social and environmental). The wording of the definition is changed from that in Article 2 of the TEC with regards to the social element of sustainable development. However, the commitments to the environment are maintained through the use of similar words:

'The Union shall establish an internal market. It shall work for the **sustainable development** of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, **and a high level of protection and improvement of the quality of the environment**. It shall promote scientific and technological advance.' [emphasis added]

² Except for the opt-out by UK and Poland defined in Protocol 30 and the opt-out negotiated by the Czech Republic and not included in the Lisbon Treaty.

Another novelty in this article is the recognition of sustainable development as one of the specific **policy goals of the EU in its external relations**. This reference broadens the scope of the implementation of the principle of sustainable development beyond the jurisdictional boundaries of Europe to the world. Paragraph 5 of Article 3 states:

'In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, ... as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.'

Article 6 of the TEC promotes the implementation of the principle of sustainable development by requiring the integration of environmental protection requirements in the definition and implementation of other policies and activities.³ The Lisbon Treaty keeps this provision in Article 11 of the TFEU. While the wording is modified, the meaning is basically the same:

'Environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development.'

It is also worth noting that the integration principle is already a **binding principle** of EU law (as established by case law – see *Greece v Council*, case 62/88, at para 20) and applies to all EU policies and activities including energy and fisheries.

As we will see below in Section 8, Article 194 of the TFEU on energy policy includes a provision to integrate environmental considerations into this EU policy which goes beyond Article 11 TFEU and frames it with regard for the need to preserve and improve the environment.

In relation to fisheries, in addition to the general EU law obligations, EU fisheries law and policy also specifically and expressly requires the integration of environmental protection requirements into the Common Fisheries Policy (including in particular the precautionary principle and an ecosystems based approach). A more detailed analysis of the integration principle as regards fisheries is available from ClientEarth.⁴

6. Legal competences of the EU.

For the first time, the Treaty defines the different **categories of the EU's competences** as being exclusive, shared and supporting. Exclusive competence means that the Union has the responsibility to legislate and Member States are only able to do so if they are empowered by the Union or for the implementation of Union acts. Shared responsibility means that legislation and policy are formulated jointly by the EU and the Member States.

³ Article 3 of the TEC lists all the areas of EC work such as internal market, commercial policy, agriculture and fisheries, transport, competition, etc.

⁴ See section 2, ClientEarth Response to the Commission's Green Paper on the reform of the Common Fisheries Policy, December 2009 (http://ec.europa.eu/fisheries/reform/docs/clientearth_en.pdf or at <http://www.clientearth.org/publications/cfp-green-paper-response> (ClientEarth Green Paper Response).

Articles 2 to 6 of the TFEU list the respective areas for each type. In relation to the policies where the Community already had competences, the Treaty only provides a codification of the situation. For instance, it codifies the EU environmental competence, which remains a **shared responsibility**. The Treaty explicitly mentions new areas of EU competence such as energy as a shared competence and civil protection as supporting competence.

Article 2 of the TFEU states:

1. When the Treaties confer on the Union **exclusive competence** in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.
2. When the Treaties confer on the Union a competence **shared with the Member States** in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area.

The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.

3. The Member States shall coordinate their economic and employment policies within arrangements as determined by this Treaty, which the Union shall have competence to provide.
4. The Union shall have competence, in accordance with the provisions of the Treaty on European Union, to define and implement a common foreign and security policy, including the progressive framing of a common defence policy.
5. In certain areas and under the conditions laid down in the Treaties, the Union shall have competence to carry out actions **to support, coordinate or supplement** the actions of the Member States, without thereby superseding their competence in these areas.

Legally binding acts of the Union adopted on the basis of the provisions of the Treaties relating to these areas shall not entail harmonisation of Member States' laws or regulations...'

Article 3 of the TFEU lists the areas where the Union has exclusive competence as follows:

1. The Union shall have exclusive competence in the following areas:
 - (a) customs union;
 - (b) the establishing of the competition rules necessary for the functioning of the internal market;
 - (c) monetary policy for the Member States whose currency is the euro;
 - (d) the conservation of marine biological resources under the common fisheries policy;
 - (e) common commercial policy.

2. The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.'

Article 4 of the TFEU lists the areas where the Union has **shared competence** with the Member States as follows:

- '1. The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6.
2. Shared competence between the Union and the Member States applies in the following principal areas:
 - (a) internal market;
 - (b) social policy, for the aspects defined in this Treaty;
 - (c) economic, social and territorial cohesion;
 - (d) agriculture and fisheries, excluding the conservation of marine biological resources;
 - (e) environment;
 - (f) consumer protection;
 - (g) transport;
 - (h) trans-European networks;
 - (i) energy;
 - (j) area of freedom, security and justice;
 - (k) common safety concerns in public health matters, for the aspects defined in this Treaty.
3. In the areas of research, technological development and space, the Union shall have competence to carry out activities, in particular to define and implement programmes; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.
4. In the areas of development cooperation and humanitarian aid, the Union shall have competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.'

Article 5 of the TFEU requires the Council to adopt measures, and in particular guidelines, to ensure Member States' coordination within the Union on economic (ref to solidarity clause), employment and social policies.

According to Article 6 of the TFEU, the Union shall have competence to carry out actions to support or supplement Member States actions on the protection and improvement of human health, industry, culture, tourism, education, vocational training, youth and sport, **civil protection** and administrative cooperation.

7. Changes in the legal basis for the EU environmental policy

The following sections 7 to 10 of this paper focus on the impact of the Lisbon Treaty in climate change policy due to the changes in the provisions for the EU environmental policy and the new chapter establishing the legal basis for an EU energy policy. Our analysis takes into account the potential consequences of the new structure of European Commission portfolios with climate change issues being withdrawn from DG environment and placed in a new Directorate General under the Commissioner in charge of Climate Action.

The Lisbon Treaty maintains almost intact the environmental provisions in Articles 174 to 176 of the TEC establishing the legal basis for environmental legislation in Articles 191 to 193 of the TFEU. However, it includes a specific modification by including an explicit reference to climate change in the definition of the policy's objectives. Article 191 of the TFEU presents the objectives of the Union policy on environment stating that:

'Union policy on the environment shall contribute to pursuit of the following objectives:

- preserving, protecting and improving the quality of the environment;
- protecting human health;
- prudent and rational utilisation of natural resources;
- promoting measures at international level to deal with regional or worldwide environmental problems, **and in particular combating climate change.**'
(emphasis added)

The explicit recognition of the EU's responsibility on climate change (in the last part of the fourth indent, above) might not have a huge impact, since the EC has comfortably utilised the broad scope of environmental provisions in Article 174 and 175 of the TEC as the basis for its competence on climate change and energy issues for measures at internal or international level.

However the reference to climate change as a worldwide environmental problem requiring the adoption of international measures, in parallel to internal measures, could enhance the role (responsibility) of the EU in international negotiations. It could also have positive environmental implications for the integration (Article 11 TFEU) of environmental/climate change considerations in EU policies such as energy, requiring an additional effort to promote GHG reduction. In addition, the expressed recognition of climate change could justify the use of environmental legal basis for legislation on climate and energy issues instead of the new energy chapter in the TFEU as referred to in Section 10 of this document.

The rest of the articles dealing with environmental policy remain unchanged. Regarding the decision-making procedures established under Article 192, the ordinary legislative procedure (ex co-decision) continues to be the main rule for the adoption of environmental legislation, including the adoption of the legally binding acts setting out the General Action Programmes defining the priority objectives of the EU environmental policy.

Article 192 (2) requires unanimity of the Council (with consultation of the European Parliament, Economic and Social Committee and the Committee of the Regions) following the special legislative procedure for the adoption of specific measures *inter alia* provisions primarily of a fiscal nature or 'measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply'.

This same provision enables the Council, acting by unanimity, to apply the ordinary procedure to those matters listed in Article 192 (2) as reserved to unanimity.

Article 193 maintains the principle of minimum harmonisation in EU environmental policy and legislation, allowing Member States to keep or adopt more stringent measures if they respect the Treaty and do not distort the market.

8. The legal basis for an EU Energy policy

The Lisbon Treaty introduces the energy chapter in the TFEU recognising powers of the EU to develop an energy policy. Previously it had competence to adopt energy measures under various and different provisions that were scattered throughout the EC Treaty but which did not explicitly recognise any EU competence on energy issues. Those provisions included Article 95 TEC concerning the internal market, Articles 154–156 TEC for trans-European networks, Articles 81–88 TEC concerning competition, Article 175 TEC for the adoption of energy measures adopted for the purposes of environmental protection, or even the general Article 308 TEC.

The energy chapter makes it possible for the EU to develop a more strategic and harmonised energy policy to be implemented by the Union as a whole. Article 194 of TFEU (1) set up the policy framework of the EU energy policy and states four objectives guiding its development:

'In the context of the establishment and functioning of the internal market and **with regard for the need to preserve and improve the environment**, Union policy on energy shall aim, in a spirit of solidarity between Member States, to:

- (a) ensure the functioning of the energy market;
- (b) ensure security of energy supply in the Union;
- (c) **promote energy efficiency and energy saving and the development of new and renewable forms of energy**; and
- (d) promote the interconnection of energy networks.' (Emphasis added)

The requirement 'to preserve and improve the environment' clearly frames the energy policy and explicitly applies the existing obligation to integrate environmental considerations in Article 11 of the TFEU (ex-Article 6 of TEC) to energy legislation and policy. However, Article 194 of the TFEU goes further and requires that any measure based on the energy legal basis will not only have to take into account environmental considerations but will also have to preserve and improve the environment. Energy policy

must now work towards the need to preserve and improve the environment even if this is not an objective of the energy policy.

The objectives set out in this article are meant to provide the basis justifying the need for an EU legislative measure under the energy policy. Those objectives do not generate an obligation for the adoption of specific legislative measures at EU level. However, following the European Court of Justice Jurisprudence and the interpretation of article 3 TEU in relation to article 194 TFEU we can conclude that the EU has the obligation to develop an EU Energy policy which the Treaty confers competence upon and the Union shall pursue its objectives by appropriate means⁵.

The inclusion of the objective 'to promote energy efficiency and energy saving and the development of renewable forms of energy' makes the energy title an obvious legal basis for these measures which before were linked to other policies and legislation such as those concerning the environment or the internal market. However, this recognition does not exclude the use of other provisions of the Treaty as legal basis of energy related measures if justified under the criteria for the choice of legal basis.

The general rule for the adoption of EU measures on energy is the **ordinary legislative procedure**, ex co-decision, and would require joint adoption by the European Parliament and the Council after consultation with the Economic and Social Committee and the Committee of the Regions.

Article 194 of the TFEU **does not** provide the EU with competence to adopt energy policy measures that would affect the:

- Member States' right to determine the conditions for exploiting its energy resources;
- Member States' choice between different energy sources; and
- The general structure of a Member State's energy supply.

However the same provision refers to Article 192 (2)c of the TFEU (environmental title) which establishes that environmental policy measures 'significantly affecting the Member State's choice of energy source and the structure of its energy supply' can be adopted but through the special legislative procedures requiring unanimity of the Council (which in effect allows a Member State veto) and consultation of the European Parliament, the Economic and Social Committee and the Committee of the Regions.

In addition, under the energy chapter rules, the EU has competence to adopt through the special legislative procedure (requiring Council unanimity and consultation of the European Parliament) measures necessary to achieve the objectives of energy policy but which are primarily of fiscal nature.

The above referred provisions in Article 194 of TFEU state:

⁵ ECJ ruling of 22 May 1985 on case 13/83, related to the Common Transport policy (paras 2, 28, 31 33, 50) recognise the existence of an obligation to introduce a common (transport policy based on article 3 of the EEC Treaty (before the single Act)

- '2. Without prejudice to the application of other provisions of the Treaties, the European Parliament and the Council, acting in accordance with the **ordinary legislative procedure**, shall establish the measures necessary to achieve the objectives in paragraph 1. Such measures shall be adopted after consultation of the Economic and Social Committee and the Committee of the Regions.

Such measures shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, without prejudice to Article 192(2)(c).

3. By way of derogation from paragraph 2, the Council, acting in accordance with a special legislative procedure, shall unanimously and after consulting the European Parliament, establish the measures referred to therein when they are primarily of a fiscal nature.'

9. Other legal basis relevant to climate and energy issues

The 'solidarity clause' in Article 222 of the TFEU calls for the Union and its Member States to act jointly in a spirit of solidarity and assist a Member State in its territory in the event of a natural or man-made disaster.

Complementarily, Article 122 of the TFEU under the Title on Economic and Monetary Policy makes it possible for the Council to decide appropriate measures in solidarity with Member States facing severe difficulties in the supply of certain products, notably in the area of energy.

This is directly linked with the new Title on EU Civil Protection in the TFEU. Article 196 of the TFEU provides for EU action to encourage co-operation between Member States in order to improve the effectiveness of systems for **preventing and protecting** against natural and man-made disasters. The measures necessary to assure civil protection will be adopted using the ordinary legislative procedure (co-decision). Under the system prior to the entry into force of the Lisbon Treaty this was decided by the Council in unanimity after consulting the Parliament using the Treaty provisions that allows the EU, if necessary, to take action in areas where the EU has not yet been granted competences (Article 308 TEC).

Under Article 214 TFEU, the Union's action on humanitarian aid will extend to ad hoc assistance and relief and protection for people in third countries who are victims of natural or man-made disasters.

10. The choice of legal basis between energy and environmental chapters

The Lisbon Treaty therefore makes it possible for climate and energy measures to be based in different Treaty provisions with different consequences in terms of competences

and procedures. In this section we focus on the choice of legal basis between the provisions of the environmental title of the TFEU and those of the energy chapter of the TFEU.

The question of how to determine the legal basis for specific legislation is based on the European Court of Justice jurisprudence which states that the choice of legal basis must be informed by the stated objectives and the content of the measure.⁶ Where a measure pursues two objectives at the same time, priority is given to the legal basis representing the objective of higher importance. Where a measure has more than one objective and they are of similar importance, it must be based on the various provisions unless there is a clear incompatibility in the decision-making procedures.⁷

The new European Commission structure placing the management of climate change issues in the DG for Climate Action and outside DG Environment might lead to consequences that need to be assessed. It is certainly possible that the establishment of different DGs – one for climate change, a different one for energy and another one for environment – could increase the level of complementary actions to ensure the reduction of CO₂ emissions. However, it is expected that the choice of legal basis for the adoption of climate and energy measures might be often subject to discussion with different consequences regarding environmental protection objectives.

For instance, civil servants at the European Commission DG Energy dealing with issues affecting climate change objectives might consider energy market and energy supply interests above environmental/climate change considerations and decide that the energy provisions are the most adequate legal basis for legislative proposals. However, the structure of the European Commission allows a measure dealt with by the DG Energy be based on whatever the legal basis are more appropriate. It is therefore important to assess the consequences of the use of each different legal basis in the adoption of specific EU measures dealing with climate change or energy.

From the **procedural/competencies point of view**, the following rules can be identified:

- The basic rule for defining the choice of legal basis is the primary objective of the measure to be adopted. The use of dual legal basis is possible if decision making procedures are not incompatible.
- The ordinary legislative procedure applies generally for the adoption of measures based in Article 192 (1) of the TFEU in the environmental chapter and in Article 194 (2) of the TFEU in the energy chapter.
- Under the energy chapter the EU cannot adopt any measure **affecting a member state's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply.**

⁶ Case C-300/89, Commission v. Council [1991] ECR I-287, para. 10.

⁷ Case C-300/89 Commission v. Council [1991] ECR I-2867, paras 17-21 (Titanium dioxide case); and Case C-388/01 Commission v. Council [2004] ECR I-4829, para. 58

- However under Article 192 (2) of the environmental chapter in the TFEU, measures that 'significantly affect Member State's choice between different energy sources and the general structure of its energy supply' can be adopted by the special legislative procedure of the Council acting unanimously after consulting Parliament and the Economic and Social Committee and committee of the regions. The energy chapter explicitly refers to the environmental provision.
- Under the environmental legal basis, the Council by unanimity could change the rules of procedure for the adoption of the measures mentioned above requiring unanimity so that they are adopted by co-decision.

The key conclusion that can be reached is that EU measures based on the environmental provisions of the Treaty provide legal grounds for broader EU measures as follows:

- Under environmental legal basis most measures dealing with energy issues from an environmental/climate change perspective can be adopted, either by co-decision under Article 192 (1) of the TFEU or by special legislative procedure (unanimity of the Council) under article 192 (2) of the TFEU.
- The limitation in Article 194 (2) TFEU in the energy chapter regards EU measures affecting, whereas the limitation in Article 192 (2) TFEU of the environmental chapter refers to EU measures significantly affecting. The consequences of this are:
 - Measures at EU level affecting Member States' choice between energy sources or the structure of the energy supply could not be adopted if its legal basis is the energy provision of the TFEU but could be adopted by the ordinary legislative procedure (ex co-decision) under Article 192 (1) of the environmental policy provisions.
 - EU measures significantly affecting Member States' choice between energy sources or the structure of their energy supply could be adopted (by unanimity) at EU level if based on the Article 192 (2) of the TFEU under the environment title.

`In other words, under the environmental chapter, EU measures only **affecting** Member States' choice of energy sources and structure of their energy supply but not **significantly affecting** that choice could be adopted by the ordinary legislative procedure (ex co-decision) under Article 192 (1) TFEU, whereas they could not be adopted at all under the energy chapter legal basis. Only those EU measures significantly affecting Member States' choice of energy supply would require unanimity under Article 192 (2) of the environmental chapter.

The European Court of Justice could decide that Article 194 word 'affecting' should be interpreted as 'significantly affecting'. However, this is not the wording of the provision and we do not consider that it can be interpreted in this sense yet, since Article 194 explicitly refers to Article 192 (2) which introduces energy issues in the environmental policy. In addition, the legislator would have used the same wording if considered appropriate.

- The article 194 (2) in the energy chapter prohibits the adoption of EU measures affecting states' **rights to determine the conditions for exploiting their own energy resources**. This element is not mentioned in the environmental provision of Article 192 (2c) referred to in the energy chapter, allowing unanimous Council decisions to override the limitation above. Therefore article 192 (1) could be the legal basis for these type of EU measures which would therefore be adopted by the ordinary legislative procedure.

On that basis we can conclude that any EU measure based on the energy provisions of the TFEU will not be possible if it affects a Member State's rights to determine the conditions for exploiting its energy resources. However the EU measure could be based on Article 192 (1) of the environmental policy title and therefore could be adopted by ordinary legislative procedure (ex co-decision) even if it affects Member States' rights to determine the conditions for exploiting their own energy resources.

Those conclusions have great significance for future EU measures to promote the use of energy efficiency, energy savings or energy generated through renewable sources which are crucial for environmental climate change objectives. For example, an EU measure imposing harmonised national targets of energy efficiency or a higher EU target on the percentage of energy generated through renewable sources would affect Member State's choices of energy sources and structure of its energy supply and therefore could be adopted under environmental legal basis but would be against the energy provision in Article 194 (2) of the TFEU. Those EU measures are crucial to achieve EU CO₂ reduction objectives under the climate change policy. Another example, an EU measure could include provisions to reduce or ban the use of coal for generating energy on the basis of CO₂ reduction purposes. Depending on the Member State, this EU measure might affect the Member State's right to determine the way to exploit their energy resources since it might require not using its coal resources and investing in other resources such as solar power, wind power, hydro power, etc. This type of EU measure, important for climate change CO₂ reduction objective, could not go through if based on the energy chapter.

From a substantive point of view the choice of legal basis can lead to the following consequences:

1. The objectives and principles of the EU environmental policy recognised in article 191 (1) and (2) of the TFEU Treaty do not apply to the legislation adopted on the Energy chapter provisions.

The objectives and principles of the Treaty provisions represent the justification for the use of these provisions as the legal basis of secondary legislation. EU legislation under energy chapter provisions would not be justified under the principles of the environmental chapter such as 'prudent and rational utilisation of natural resources', the 'precautionary principle' or 'the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.' However, the requirement in the Energy Chapter to consider 'the need to preserve and improve the environment' (article 194(1)) together with Article 11 of the TFEU would allow the conclusion that the environmental principles of environmental chapter should be taken into consideration in energy legislation.

2. Legislation based on the energy provisions of the TFEU aim at harmonising rules at EU level on the energy issues they deal with. The energy chapter provision of the TFEU do not recognize Member States the possibility to maintain or introduce more stringent measures that the ones adopted at EU level, as exists under article 192 of the TFEU in relation to environmental legislation.

This is particularly relevant with regards to legislation aiming to implement the objective in the energy title to promote energy efficiency, energy savings and renewable sources of energy. For example, if an EU legislative measure setting up EU targets on the above-mentioned areas were adopted under the energy chapter legal basis (which as stated above it would not be the appropriate legal basis if it would affect Member State's choices) Member States would not be able to set national legally binding targets more stringent than the ones fixed at EU level.

A way to sort out this problem could be to include an expressed provision in the text of the EU act allowing Member States to adopt or maintain more stringent measures than the ones established at EU level. However this would require the agreement of all EU Institutions involved in the legislative process. On the other hand a similar result is guaranteed if the EU measure is based on any of the environmental chapter provisions.

3. Could a measure regulating energy efficiency or the use of renewables be based on environmental chapter provisions?

We consider that the explicit reference to energy efficiency, energy savings and renewable energy sources in the objectives of article 194 of the Energy chapter of the TFEU does not exclude the use of environmental provisions for these types of measures.

As we have stated above, the basic rule for defining the legal basis is the primary objective of the measure to be adopted. The Court of Justice recognizes the possibility to use dual legal basis in certain cases but not if there is incompatibility in the decision making procedures. In this particular case the ordinary legislative procedure is the general rule but, as we have explained above, there is incompatibility in the procedures. Under Article 192 (1) of the TFEU in the environmental chapter, measures affecting Member States right to determine the conditions for exploiting its energy resources, its choice between energy sources or the structure of energy supply could be adopted by ordinary legislative procedure, ex co-decision, whereas they could not be adopted at all under article 194 (2) of the energy chapter in the TFEU. When those measures would be **significantly affecting** Member States choice between energy sources and the structure of energy supply Article 192 (2) TFEU would be applicable requiring unanimity for its adoption.

Regarding the energy provisions in the TFEU, Article 194 (1) TFEU refers to the objectives that EU legislation would aim to and which justify the choice of energy provisions as the legal basis. Legislation aiming at ensuring security of energy supply

or the proper functioning of the internal market or the promotion of the interconnection of energy networks would use article 194 as the legal basis.

In addition energy measures under article 194 (2) shall also aim to 'promote energy efficiency and energy saving and the development of new and renewable forms of energy'. However EU measures on energy efficiency, energy savings or renewable forms of energy could also be justified under environmental objectives and be based on Article 192 of the TFEU.

EU measures that aim to promote, from purely energy considerations, energy efficiency and energy savings and the development of renewable forms of energy would in principle be based on energy chapter provisions.

It is not clear whether the wording of this objective would exclude those measures that would not aim at **promoting** energy efficiency, energy savings or renewable but rather at regulating certain aspects of it.

Article 194 states that these objectives have to be carried out 'with regard for the need to preserve and improve the environment' introducing the environmental considerations and making the framework to decide the legal basis less clear. We consider that the best interpretation would be that **EU measures responding to purely energy considerations would be based on energy chapter provisions and the requirement to preserve and improve the environment would apply to the drafting and implementation of the EU legislation without affecting the objective of the measure or the choice of legal basis.**

Measures dealing with energy efficiency, energy savings or development of renewable forms of energy could also be based on the environmental provisions of the EU Treaty if they were adopted with the aim to ensure environmental objectives such as the 'prudent and rational utilisation of natural resources', 'protecting and improving the quality of the environment', 'protecting human health' or 'combating climate change'. These are the stated objectives of environmental policy according to Article 191 of the TFEU. Climate change is only mentioned in relation to measures at international level, however this objective cannot be achieved without action and measures at EU level and the legislator would certainly not aim at excluding internal measures. In addition climate change is described as one of the key objectives under the Environmental Action Programme adopted through codecision.

In addition when the above mentioned EU measures would be needed in response to environmental principles such as the 'precautionary principle' or 'the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay' would have to be based on the provisions of the environmental chapter.

Therefore, when EU legislation on energy efficiency, energy savings or development of renewable forms of energy is required for environmental objectives in particular climate change considerations, the legal basis would always be the environmental provisions of the Treaty.

This would be the case of measures establishing legally binding national targets on energy efficiency harmonized at EU level or EU targets related to the percentage of energy generated nationally from renewable sources. Those type of measures could affect Member States choices defined under Article 194 in the Energy chapter of the TFEU and therefore would be illegal under this provision but would be justified under environmental climate change objectives and therefore possible under the environmental provisions of the TFEU.

The legislator would have to bear in mind that EU measures adopted under the energy chapter aim at setting up **EU standards that would not allow the maintenance or adoption of more stringent measures** at national level as we have develop in point 2 of this section. Similarly any legislation on energy efficiency, energy savings or renewable forms of energy would have to take into account the need to adapt to technical progress and this would be without difference on the legal basis.

The analysis regarding the choice of legal basis presented in section 10 is based on the assessment of the provisions, relevant literature and Court of Justice jurisprudence. However the potential to use energy or environmental provisions of the TFEU will only be clarified once the Court of Justice will be asked to deal with a particular case.

11. Enhanced cooperation and the choice of legal basis between energy and environmental chapters

Could enhanced co-operation be invoked by some Member States to move ahead in energy (security) matters even if measures would 'affect choice of energy sources or structure of energy supply'?

In cases where agreement on a measure cannot be attained within a reasonable period by the Union as a whole, those Member States willing to go further have the option to adopt it within the framework of enhanced cooperation. Member States which wish to establish enhanced cooperation within the framework of the Union's non-exclusive competences (and the common foreign and security policy which is not relevant for this question we are dealing with) may make use of the EU Institutions and exercise those competences by applying the relevant provisions of the Treaties, subject to the limits and procedures lay down in article 20 of the TEU and articles 326 to 334 of the TFEU.

Energy and environmental policies are EU non-exclusive competences and, therefore, enhanced cooperation measures can be adopted to further objectives of the Union and reinforce integration. Measures under Common Fisheries policy which are shared competence are also subject to enhanced cooperation excluding the conservation of marine biological resources which are of exclusive competence.

As stated above, enhanced cooperation is possible for adoption of measures according to the provisions of the Treaty. The limitations in the articles of the Treaty would also be applicable to initiatives under enhanced cooperation. Article 20 of the TEU requires that enhanced cooperation is established within the framework of the Union's shared

competences and to 'exercise those competences by applying the relevant provisions of the Treaties'. Article 326 of the TFEU requires that any enhanced cooperation shall comply with the Treaty and Union law and Article 334 requires the Council and the Commission to ensure the consistency of activities undertaken in the context of enhanced cooperation and the consistency of such activities with the policies of the Union.

Thus, any measure based on energy chapter would have to comply with Article 194 TFEU and respect the limitations of its scope. Therefore, an EU legislative measure affecting Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply would not be possible to be adopted through enhanced cooperation if based on article 194 of the TFEU because it would fall outside the scope of the EU energy policy competence in the same way as this measures could not be adopted as an EU measure. However as stated in previous sections, those measures could be adopted under Article 192 (1) or (2) of the Environmental chapter of the TFEU either through enhanced cooperation or as a measures for the whole of the Union.

Enhanced cooperation measures can be adopted only as a last resort solution when the objectives of such cooperation cannot be attained within a reasonable time period by the Union. This requirement reflects the main characteristic and limitations of the enhanced cooperation. For example, if an EU measure aims at defining energy efficiency or renewable energy targets, the justification for it is that EU targets are considered more effective than different national ones. The enhanced cooperation would not fulfil that objective to harmonize standards at EU level since it would only be applicable to Member States involved in the adoption of the specific rules and participating in the enhanced cooperation. The Treaty does not require the EU to fail the adoption of the measure at EU level for its authorisation by the Council but it has to be demonstrated that the Union would not attained the objectives sought within a reasonable time limit.

Member States willing to establish enhanced cooperation in one of the areas covered by the Treaties (with the exception of fields of exclusive competence and the common foreign and security policy) should send a request to the Commission specifying the scope and objectives. The Council would grant by qualified majority the authorisation to proceed with the enhanced cooperation on a proposal from the Commission and with the consent of the European Parliament.

Article 20 of the TEU requires that at least 9 Member States participate in an enhanced cooperation initiative, similar to the level under the system before the Lisbon Treaty (as amended by the Nice Treaty) where article 43 TEU required a minimum of 8 Member States willing to establish it. The measures adopted would only be binding for those Member States who agree to participate.

In accordance with the Title III provisions of the TFEU any enhanced cooperation measure should not distort competition between Member States or undermine the internal market or economic, social and territorial cohesion. Article 332 of the TFEU requires that expenditure resulting from implementation of enhanced cooperation (other than administrative costs entailed for the institutions) shall be borne by the participating Member States or otherwise established by the Council by unanimity after consulting with

the European Parliament. Therefore the cost of implementing, for example, a measure establishing energy renewable standards or energy efficiency standards through enhanced cooperation could not receive EU funding support.

12 International agreements in the environment field

The system to adopt International Agreements has been modified by the Lisbon Treaty to accommodate the institutional changes. International agreements in the environmental field are considered part of the external relations. For that reason we are not covering the Common Foreign and Security Policy (CFSP) in this section.

Where agreements with one or more third countries or international organisations need to be negotiated and concluded, Article 218 of the TFEU applies establishing the rules and procedures to follow. This article replaces Article 300 of the TEC.

Under this article **the Council** has the competence to:

- authorise the opening of the negotiations
- adopt negotiating directives
- authorise the signing of agreements, and
- conclude the agreements.

The Council acts by a qualified majority throughout the procedure. However, unanimity would be required when the agreement covers a field for which unanimity is the rule applied for the adoption of a Union act.

Regarding the opening of the negotiations, the Commission (or the High representative for issues related to CFSP) will present a proposal to the Council who would adopt a decision authorising the opening of the negotiations and nominating a negotiator or the head of the Union's negotiating team. The Council generally adopts specific directives or a mandate for the Commission to establish the limits of the negotiating powers of the Commission. At the same time the Council can designate a Committee to assist in the negotiations.

Regarding who represents the EU in external relations article 17 of the TEU recognises the role of the European Commission to ensure the Union's representation with the exception of the common foreign and security policy and other cases provided for in the Treaties. This article confirms the situation in the system previous to the Lisbon Treaty where Article 300 TEC referred to the Commission as the negotiator of the International Agreements. Reading article 218 together with article 17 of the TEU it is clear that the European Commission is the EU Institution representing the Union as the negotiator for external relations issues.

Before signing the agreement the Commission would need the authorisation by the Council to sign. However signing an agreement is different from concluding it for which the adoption of a Council decision on a proposal by the Commission (as the negotiator) would be required.

The Council shall adopt the decision concluding the International agreement on environmental issues only after obtaining the consent of the European Parliament which according to Article 218 (6) is required, amongst others, for the agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required.

International agreements to combat climate change currently have a particular relevance in relation to the changes brought by the Lisbon Treaty. The result of last December meeting in Copenhagen of the Conference of the Parties to the UN Climate Change Convention regarding a future international legislative framework on climate change opens a situation of legal uncertainties.

The Lisbon Treaty modifies the environmental chapter specifically regarding the adoption of International measures on climate change. Article 191 of the TFEU includes the objective of the EU to promote the adoption of measures at international level to deal with environmental problems and in particular to combat climate change. Legally there is not a direct obligation to adopt a specific measure deriving from a stated objective of an EU policy in the relevant article of the EU Treaty, however the change in this article could be the basis for claiming an active role of the EU to promote the adoption of an ambitious international measure that would effectively combat climate change. We could therefore argue that the 20% CO₂ reduction commitment of the EU responding to the Copenhagen Accord does not promote the adoption of an ambitious International Agreement that would effectively mitigate the impact of climate change.

Article 21 (3) of the TEU regarding General provisions of the Union's external policy requires the Union to respect the principles and objectives set out in paragraphs 1 and 2 of the same provision in the development and implementation of the Union's external action and of the external aspects of its other policies. Those principles refer to the respect of human rights and the principles established in the United Nations Charter. The EU Charter of fundamental rights is legally binding and applicable to the external actions of the EU. Therefore we could argue that Article 37 of the Charter requires the EU actions to aim at a high level of protection. As stated above in this document, in the framework of the climate change policy, the question is whether the EU could be challenged for not aiming at a high level of protection when pledging 20% for CO₂ emissions reduction under the UNCCC and the Copenhagen Accord agreed in December 2009.

Climate change is part of the EU environmental policy and therefore shared competence. It is therefore clear that the European Commission is the competent body to lead the negotiations of the future International Agreement. In this situation, the EU Member States, parties of the UNCCC, will participate in the negotiations by discussing with the European Commission in internal meetings the positions to be taken. This is even more important when the Council is the EU Institution competent to adopt by qualified majority the International Agreement. However the negotiator for the EU will be the European Commission and will follow the mandate issued by the Council by qualified majority. The future International Agreement should not be considered a mix agreement since it relates to an issue that is of shared competence that has already been exercised by the EU (ref Article 2 of the TFEU defining shared competence). Similarly the Copenhagen Accord, even

if it has a non-legally binding international character because it has not been adopted by the COP, relates to an issue of EU competence. Therefore its implementation should require the EU to act jointly when presenting the EU commitments for CO₂ reduction or the EU commitment for funding, different to the additional individual funding commitments that different EU Member States might want to undertake.

13 Changes in the decision making

13.1. Instruments

The Lisbon Treaty keeps the differentiation between legislative acts (legal acts adopted by legislative procedure) and non legislative acts. This differentiation aims at establishing a clearer hierarchy of norms: those acts adopted on the basis of primary law (Treaty) and those adopted on the basis of secondary legislation (Directives, etc).

Article 288 of TFEU does not bring any change in the legal acts that the Union can adopt to exercise the Union's competences. They are regulations, directives, decisions, recommendations and opinions.

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. **A directive** shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. However one instrument is changed: **the decision** which shall be binding in its entirety and will cover not only those decision mentioned in article ex-249 of the TEC binding only for those to whom they are addressed but also 'sui generis' decision which have no addressees (for instance those adopting action programmes). In the Common Foreign and Security Policy the rationalisation leads to renaming acts so that a common strategy becomes a 'European Council decision on the strategic interests and objectives of the Union' and a joint action 'a decision defining a Union action' or a common position 'a decision defining a Union position'. Recommendations and opinions shall have no binding force. In most cases recommendations and opinions are not adopted through legislative procedure and are considered non-legislative acts.

Article 292 TFEU describes the procedure for the adoption of recommendations as non-legislative acts. In most cases Regulations and Directives are adopted through legislative procedure and are considered legislative acts. If a decision is adopted through comitology or the procedure applied to delegated powers, instead of the use of a legislative procedure, it will be a non-legislative act.

The Commission will present an Omnibus proposal amending the legal bases and the adoption of procedures for pending proposals.

13.2. Decision making procedures for adopting legislative acts

The decision-making procedure has been simplified and made more democratic in order to enhance the European Union's ability to act.

Qualified majority voting

The new Treaty provides for an extension of qualified majority voting in the Council of the European Union, which is redefined and becomes the default rule. Qualified majority voting has been extended to around 40 new policy areas.

It will be based on the principle of double majority requiring the support of 55 % of the Member States, representing 65 % of the European population. At least four Member States will be needed to form a blocking minority. However, this system will only enter into force in November 2014. The current system for the weighting of votes will continue to apply until 1 November 2014.

During a transitional period until 31 March 2017, it will still be possible for a Member State to request that the system of weighting under the current Treaty be applied. Of course in certain areas decisions will continue to be taken by unanimity such as in tax matters.

Legislative procedures

The Lisbon Treaty extends significantly the use of **the co-decision procedure** in the adoption of EU legislation-making decisions more legitimate. The Treaty refers to it as 'the ordinary legislative procedure' which consists in the adoption jointly by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission. This procedure is defined in Article 294.

This procedure is applied to about 40 new areas including agriculture, certain areas of fisheries and most of the former third pillar (policy and judicial cooperation in criminal matters); However on the latter an emergency brake is established for decisions on criminal procedure, definition of offences and sanctions or the establishment of a European Public Prosecutor's Office.

In the specific cases provided for by the Treaties, the adoption of a regulation, directive or decision by the European Parliament with the participation of the Council, or by the latter with the participation of the European Parliament, shall constitute a **special legislative procedure**. Examples of such a procedure are as follows:

- The annual budget negotiations, where the differentiation between compulsory and non compulsory expenditure has disappeared, will be adopted within a Conciliation Committee procedure.
- The European Parliament can adopt regulations on its own initiative regarding the right of enquiry, the Ombudsman duties or conditions on the performance of MEPs and can even use the Parliament's right to propose Treaty changes.
- However the European Parliament can only give its consent in the adoption of decisions regarding procedures for the European elections, citizens rights, measures

for the system of own resources, and the multiannual financial framework (the financial perspectives).

- In twenty other sensitive areas such as taxation and social security, the Council acts unanimously and the Parliament is only consulted.

Article 294 describes the co-decision legislative procedure. One proposal can be adopted after one, two or even three readings, if the proposal goes through the Conciliation Committee. Article 294 states:

1. Where reference is made in the Treaties to the ordinary legislative procedure for the adoption of an act, the following procedure shall apply.
2. The Commission shall submit a proposal to the European Parliament and the Council.

First reading

3. The European Parliament shall adopt its position at first reading and communicate it to the Council.
4. If the Council approves the European Parliament's position, the act concerned shall be adopted in the wording which corresponds to the position of the European Parliament.
5. If the Council does not approve the European Parliament's position, it shall adopt its position at first reading and communicate it to the European Parliament.
6. The Council shall inform the European Parliament fully of the reasons which led it to adopt its position at first reading. The Commission shall inform the European Parliament fully of its position.

Second reading

7. If, within three months of such communication, the European Parliament:
 - (a) approves the Council's position at first reading or has not taken a decision, the act concerned shall be deemed to have been adopted in the wording which corresponds to the position of the Council;
 - (b) rejects, by a majority of its component members, the Council's position at first reading, the proposed act shall be deemed not to have been adopted;
 - (c) proposes, by a majority of its component members, amendments to the Council's position at first reading, the text thus amended shall be forwarded to the Council and to the Commission, which shall deliver an opinion on those amendments.
8. If, within three months of receiving the European Parliament's amendments, the Council, acting by a qualified majority:
 - (a) approves all those amendments, the act in question shall be deemed to have been adopted;
 - (b) does not approve all the amendments, the President of the Council, in agreement with the President of the European Parliament, shall within six weeks convene a meeting of the Conciliation Committee.

9. The Council shall act unanimously on the amendments on which the Commission has delivered a negative opinion.

Conciliation

10. The Conciliation Committee, which shall be composed of the members of the Council or their representatives and an equal number of members representing the European Parliament, shall have the task of reaching agreement on a joint text, by a qualified majority of the members of the Council or their representatives and by a majority of the members representing the European Parliament within six weeks of its being convened, on the basis of the positions of the European Parliament and the Council at second reading.
11. The Commission shall take part in the Conciliation Committee's proceedings and shall take all necessary initiatives with a view to reconciling the positions of the European Parliament and the Council.
12. If, within six weeks of its being convened, the Conciliation Committee does not approve the joint text, the proposed act shall be deemed not to have been adopted.

Third reading

13. If, within that period, the Conciliation Committee approves a joint text, the European Parliament, acting by a majority of the votes cast, and the Council, acting by a qualified majority, shall each have a period of six weeks from that approval in which to adopt the act in question in accordance with the joint text. If they fail to do so, the proposed act shall be deemed not to have been adopted.
14. The periods of three months and six weeks referred to in this Article shall be extended by a maximum of one month and two weeks respectively at the initiative of the European Parliament or the Council.

Special provisions

15. Where, in the cases provided for in the Treaties, a legislative act is submitted to the ordinary legislative procedure on the initiative of a group of Member States, on a recommendation by the European Central Bank, or at the request of the Court of Justice, paragraph 2, the second sentence of paragraph 6, and paragraph 9 shall not apply.

In such cases, the European Parliament and the Council shall communicate the proposed act to the Commission with their positions at first and second readings. The European Parliament or the Council may request the opinion of the Commission throughout the procedure, which the Commission may also deliver on its own initiative. It may also, if it deems it necessary, take part in the Conciliation Committee in accordance with paragraph 11.'

13.3. Procedures for non legislative acts: Comitology

The Lisbon Treaty introduces two categories of non-legislative acts: the delegated acts, which respond to legislative delegation and the implementing acts which respond to executive delegation. It aims at harmonising the procedures for the Commission's consultation to Committees ensuring the European Parliament's right to supervision of implementing measures adopted by co-decision and intends to limit the control of the Commission's exercise of its powers by the Committees. This differentiation is reflected in the comitology system. The comitology rules will change for acts adopted after the Lisbon Treaty enters into force. Comitology procedures **will apply to implementing acts but will not apply to delegated acts.**

Delegated acts are measures supplementing or amending certain non-essential elements of the legislative act and for whom the use of comitology regulatory procedure with scrutiny was established under the system prior to the Lisbon Treaty. Delegated acts will be the responsibility of the Commission under the direct control of the European Parliament and the Council which can reject the act or revoke the delegation.

Article 290 of the TFEU regulates delegated acts:

- '1. A legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to **supplement or amend certain non-essential elements of the legislative act**. The objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative acts. The essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power.
2. Legislative acts shall explicitly lay down the conditions to which the delegation is subject; these conditions may be as follows:
 - (a) the European Parliament or the Council may decide to revoke the delegation;
 - (b) the delegated act may enter into force only **if no objection has been expressed by the European Parliament or the Council within a period set by the legislative act**.

For the purposes of (a) and (b), the European Parliament shall act by a majority of its component members, and the Council by a qualified majority.

3. The adjective 'delegated' shall be inserted in the title of delegated acts.'

The delegated acts are a category of acts which now have a formal recognition deriving their nature directly from this article of the Treaty and not via secondary legislation. Rules have been adopted to ensure a consistent approach. On the 9th of December 2009, the European Commission published Communication COM (2009) 673 final to the European Parliament and the Council setting up the modalities for the implementation of this new concept. One important element of this Communication is the right of opposition from the Parliament and the Council which should fulfil time and procedural requirements. However the Communication leaves it to the discretionary power of the Parliament and the Council

the decision on the grounds on which the objections can be raised including those defined in the Comitology Decision 1999/468/CE under the regulatory procedure with scrutiny.

Article 291 of the TFEU refers to **implementing acts**:

1. Member States shall adopt all measures of national law necessary to implement legally binding Union acts.
2. Where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer **implementing powers on the Commission**, or, in duly justified specific cases and in the cases provided for in Articles 24 and 26 of the Treaty on European Union, on the Council.
3. For the purposes of paragraph 2, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall lay down in advance the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.
4. The word 'implementing' shall be inserted in the title of implementing acts.'

Implementing acts are those measures adopted by the Commission within the framework of its implementing powers according to secondary legislation provisions. Rules for the adoption of implementing acts will follow the comitology procedure as in the system prior to the Lisbon Treaty. However the rules will change. The European Commission will present a proposal for a new **comitology regulation** establishing rules and general principles on the control mechanism for the way the Commission will exercise the implementing powers. The regulation will replace the existing comitology decision adopted in 1999 and amended in 2006.

The Regulation will be applied to basic legal acts adopted after the entry into force of the Lisbon Treaty. The existing legislation will not be affected by the new rules and will continue to function on the basis of the existing Comitology decision.

The proposal for Regulation should be submitted by the Commission immediately after the entry into force of the new Treaty to be adopted through co-decision by Council and European Parliament as soon as possible. This is particularly important if the Parliament wants to retain the current right of scrutiny but applied to implementing acts and to ensure increased transparency.

In the meantime an **interim arrangement** would have to be agreed by the three institutions in dialogue to rule the procedure applied during the period between the entry into force of the new Treaty and the adoption of the new Comitology Regulation. This arrangement would allow legal acts in the middle of the decision making process to be adopted.

13.4. National Parliaments' role in the decision making process

The role of national Parliaments is very much increased in particular to assess the implementation of the principles of subsidiarity and proportionality in the decision making. The new article 12 of the TFEU states the ways national parliaments will 'contribute actively to the good functioning of the Union'. The Protocol on the role of National Parliaments in the European Union and the modified Protocol on the Principles of Subsidiarity and Proportionality provide greater detail.

National parliaments should receive directly all draft legislative acts as well as amended drafts, legislative resolutions of the European Parliament and positions of the Council. Each national parliament will have two votes and within eight weeks of receipt of the draft acts (in all official languages) may issue a 'reasoned opinion' arguing the non-compliance of the draft act with the principle of subsidiarity.

If the opinion represents 1/3 of the total number of votes from all national parliaments the draft will have to be reviewed by the body author of it. If the proposal is to be adopted through ordinary legislative procedure, the draft will have to be reviewed if the opinion represents a simple majority of the total number of votes from national parliaments. However the Commission could maintain the proposal by issuing a reasoned opinion stating why the proposal is justified and complies with the subsidiarity principle. The European Parliament or the Council may intervene and decide to terminate the legislative procedure.

In addition, any single national parliament has also the possibility to react against a legislative proposal in specific cases of family law with cross-border implications adopted by ordinary legislative procedure (ex co-decision).

All this process will require a change in the decision making procedures in order to allow national parliament's involvement and input. National parliaments are due to develop their own organisational rules to ensure their involvement and communicate them to the European Institutions.

13.5. Citizens' rights and role in the decision making process

Citizens rights recognized under the TEC are maintained in the Lisbon Treaty. Article 20(2) states that 'citizens of the Union shall enjoy rights and be subject to the duties provided for in the Treaties'. The novelty is that it adds a non-exhaustive lists of citizens rights recognised in the Treaty as follows:

- '(a) the right to move and reside freely within the territory of the Member States;
- (b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State;
- (c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic

and consular authorities of any Member State on the same conditions as the nationals of that State;

- (d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.'

The right of petition is also described in Article 227 of the TFEU (ex Article 194 TEC) and article 228 TFEU refers to the citizens right to address complaints to the European Ombudsman concerning issues of maladministration in the activities of the European Union institutions, bodies, offices or agencies.

Citizens rights are increased under article 11 of the TEU in two ways: Broader consultation is required for legislative acts and it recognises the Citizens initiative.

Broader consultation of citizens and stakeholders before a formal proposal is launched is now required under the Treaty and not only in order to increase chances of adoption by the two co-legislators. A Green paper is intended to be published in early 2010 by the Commission in order to promote a thorough consultation before a proposal is made. Article 11 of the TEU requires:

'The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.

The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.

The European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent.'

The new participatory democracy provision establishing the Citizens' initiative provides that one million citizens from a significant number of Member States may take the initiative of sending their signatures to invite the Commission to submit a proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties.

The European Parliament has already indicated some criteria for its implementation arguing that any initiative should be admissible if concerns and EU competence and if it is not contrary to the general principles of the Treaty and it should not take more than two months to decide on its admissibility.

There are many elements that need to be clarified. The Treaty talks about 'a million signatures' without specifying whether it requires signatures to come from a minimum number of countries or a minimum number per country involved or what are the requirements for their collection, verification and authentication. It also does not define what it means that the Commission is 'invited' to make a proposal. Is it obliged to draw up a proposal or is it only invited to consider it? The Commission has prepared a Green paper where it proposes answers to these questions, recognizing the Commission responsibility to present conclusions and propose measures accordingly (including studies). The details of this procedure need to be set out in an EU Regulation before citizens can start

exercising this new right. Potentially, this initiative will allow citizens to make EU Institutions and governments in Member States more accountable.

Citizens' rights to information are also broadened in the new article 15 of the TEU ex - article 255 of the TEC. This article requires the Council to meet in public when considering and voting on a draft legislative act. Citizens shall have access to documents of the Union institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined by co-decision through a Regulation. These provisions will also be applicable to the Court of Justice of the European Union, the European Central Bank and the European Investment Bank when exercising their administrative tasks.

Citizens' rights to access to Court of Justice is modified in Article 263 (ex 230) stating that:

'Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.'

The change proposed gives the possibility for a natural or legal person to institute proceedings against a **regulatory act** that is of direct concern without requiring the act to be of **individual** concern. The impact of the change proposed in the Lisbon Treaty is not measurable at the moment since there is no clarity on what a regulatory act is at EU level within the framework of the new hierarchy of acts. In the same provision, the Treaty maintains the requirement that an act (other than regulatory acts) adopted by EU Institutions has to be of direct **and** individual concern for it to be challenged by a natural or legal person. These requirements have been interpreted to exclude environmental NGOs from having access to the ECJ.

14. Changes in the EU enforcement policy

The Lisbon Treaty modifies the enforcement procedure described in article 260 of the TFEU and abolishes the requirement to issue a 'reasoned opinion' for cases of non-compliance with ECJ judgements. It also introduces the possibility of a penalty payment in case of non-communication of transposition measures. These changes will require an act from the Commission revising the Communication on the application of article 228 of the TEC published in 2005 in order to clarify the way it intends to use this possibility.

Linked to these changes, Article 261 of the TFEU (ex Article 229 TEC) allows the Court of Justice to rule on the penalties established in Regulations adopted by co-decision:

'Regulations adopted jointly by the European Parliament and the Council, and by the Council, pursuant to the provisions of the Treaties, may give the Court of Justice of the European Union unlimited jurisdiction with regard to the penalties provided for in such regulations.'

Another novelty in this area is the recognition that the acts of the European Council can be challenged before the European Court of Justice. Indeed, Article 263 (1) TFEU provides that the Court of Justice of the European Union has jurisdiction to review not only the legality of legislative acts, of acts of the Council, of the Commission, of the European Central Bank and of the European Parliament when they are intended to produce legal effects vis-à-vis third parties (as in previous Article 230 TEC) but also the legality of acts of the European Council intended to produce legal effects on third parties. This is the consequence of the final recognition of the European Council as a Union's Institution (Article 13 of the TEU). Actions can be brought by a Member State, the European Commission, the European Parliament or the Council. They can also be brought by the Court of Auditors, by the European Central Bank and by the Committee of the Regions for the purpose of protecting their prerogatives. Changes regarding actions by any natural or legal person have been dealt with in section 14.5 of this briefing.

The European Commission capacity of enforcement is greatly increased with the Lisbon Treaty. Article 83 (2) of the TFEU recognises the EU capacity to impose sanctions in an area of the Union policy. This article applies criminal law rules to all policies of the EU. The article states:

'If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regards to the definition of criminal offences and sanctions in the area concerned. Such Directives shall be adopted by the same ordinary or special procedure as was followed for the adoption of the harmonisation measures in questions, without prejudice to Article 76.'

This article reflects the principle of subsidiarity when requiring that the approximation of criminal laws and regulations of the Member States is proved to be essential to ensure the effective implementation of a Union policy. If this requirement is respected a Directive could establish minimum rules for the definition of sanctions on environmental issues. For example these rules could include fines within different ranges to be applied by Member States according to national specific conditions if specific environmental obligations were breached.

The legislative procedure can be changed if the Council considers that the draft directive would affect fundamental aspects of its criminal justice system. In this case, it may request that the draft Directive is referred to the European Council and the ordinary legislative procedure is suspended for a maximum of four months. After discussion and in case of consensus, the draft will be referred back to the Council to continue the ordinary legislative procedure.

15. New posts in the EU institutions

The Treaty of Lisbon states that as from 1 November 2014 the size of the **European Commission** will be reduced from one per member state to two thirds of member states, which means 18 out of the 27 States. Article 17 of the TEU states that the Commission

appointed between the date of entry into force of the Treaty of Lisbon (1 December 2009) and the 31 October 2014 shall consist of one national of each Member State, including its President and the High Representative of the Union for Foreign and Security Policy. However, the Treaty also provides that the European Council can unanimously decide to alter this number. Following the Irish referendum, the European Council state in its December 2008 European Council Conclusions that the rule of one Commissioner per member state will be maintained.

The Treaty changes the way in which the number of Member of the **European Parliament** (MEPs) seats are defined. Under the Lisbon Treaty, the number of MEPs would be 751 and the number for each Member State is digressively proportional to the respective number of citizens. From the moment the Lisbon Treaty comes into force, 18 new Members representing 12 different countries would take up their seats in the European Parliament due the democratic representation criteria and will need to be elected. The number of MEPs would temporarily rise to 754, because under the Lisbon Treaty Germany would retain the current (i.e. 99) number of MEPs until the Parliament term expires. New Internal rules foresee that the new MEPs take their seats in Parliament after the new Treaty enters into force but, until then, they can receive an observer status without voting right. A legal text confirming the addition of 18 MEPs has been ratified by all Member States.

A new permanent post is created within the **European Council**, responsible for defining the broad policy guidelines of the EU's actions. The **President** of the European Council is appointed by the European Council by qualified majority for a two and a half years period. This will provide greater continuity and stability to the work of the European Council which brings together the Heads of State or Government of the Member States and the President of the Commission. The President is meant to give a voice and a face to the European Union, represent the Union in the international arena and chair and co-ordinate the European Council's work and will not be able to assume a national mandate. However the European Parliament has asked for a clearer and more specific definition of its obligations including the possibility for a judicial scrutiny of its actions.

The possibility for a **Member State to chair the EU on six months rotation basis** is maintained at the Council level, working together with the other two Troika members in advancing their national priorities in EU policies. The Council of the European Union represents the governments of the Member States. The different Councils are composed by one minister from each Member State. It meets in Brussels, except in April, June and October, when it sits in Luxembourg. It shares its legislative and budgetary powers with the European Parliament.

The EU member states agreed on a joint declaration (9) annexed to the Lisbon Treaty the rules for the Presidencies including a draft decision waiting to be formally adopted for the Lisbon Treaty to enter into force. Article 1 of European Council Decision of 1 December 2009 on the exercise of the Presidency of the Council (2009/881/EU), published in the Official Journal of the European Union (OJEU 2.12.2009 L 315/50) presents the six monthly presidencies as part of the so called trio presidencies to be carried out within 18

months on the basis of a common programme. The rotating presidency country chairs all the Council configurations (except for the General Affairs Council):

- '1. The Presidency of the Council, with the exception of the Foreign Affairs configuration, shall be held by pre-established groups of three Member States for a period of 18 months. The groups shall be made up on a basis of equal rotation among the Member States, taking into account their diversity and geographical balance within the Union.
2. Each member of the group shall in turn chair for a six-month period all configurations of the Council, with the exception of the Foreign Affairs configuration. The other members of the group shall assist the Chair in all its responsibilities on the basis of a common programme. Members of the team may decide alternative arrangements among themselves'.

Article 2 of the European Council Decision of 1 December 2009 tells us that the country chairing the coordinating General Affairs Council also chairs Coreper.

Article 16(6) of the TEU establishes that the Council shall meet in different configurations and paragraph 9 of the same Article 16 TEU states that the presidency of the Council configurations is held by member state representatives (ministers) in the Council on the basis of equal rotation. The Foreign Affairs Council is an exception and it is chaired by the High Representative.

Article 236 of the Treaty on the Functioning of the European Union (TFEU) establishes the procedure for the adoption by the European Council acting by qualified majority, of a decision on the list of Council configurations and a decision on the presidency of these configurations (except the Foreign Affairs Council).

The Treaty creates the figure of a **High Representative of the Union for Foreign Affairs and Security Policy** and **Secretary General of the Council** merging the High Representative of the Union for Foreign Affairs and Security Policy and the European Commissioner for external relations (which is eliminated from the Commission structure). The High Representative is appointed by the European Council (by qualified majority) in agreement with the President of the Commission and the European Parliament and will become Vice-President of the Commission, and chair the External Relations Council.

The intention of these changes is to make the EU stronger in the international arena. The High Representative of the Union for Foreign Affairs and Security Policy should ensure a more coherent external policy and action and raise the EU's profile in the world, 'putting a face' on the Union. However our personal impression is that the existence of so many different Heads does not clarify who is responsible for the external relations. The European Parliament has proposed a system where the President of the European Council will represent the Union at the level of Heads of State or Government and the negotiations on behalf of the Union will be carried out by the High Representative/Vice President on CFSP issues when they are held at ministerial level or in international organisations.

16. Revision of the Treaty and withdrawal from the EU

Article 48 of the TEU set up two different mechanisms for amendments the European Union treaties. The ordinary revision procedure (broadly similar to the present process) requires convening an intergovernmental conference after the request by a Member State, the European Parliament or the European Commission submitted to the Council of Ministers.

The simplified revision procedure allows the review of Part three of the Treaty on the Functioning of the European Union, dealing with internal policy and action of the Union, by a unanimous decision of the European Council subject to ratification by all member states in the usual manner.

Article 48 (7) also provides for an 'umbrella clause' which allows the European Council to decide to move from a special legislative procedure to the ordinary legislative procedure for the adoption of legislative acts.

In addition, article 48 (7) includes a 'passerelle' clause allowing the European Council to decide on different voting procedures without amending the EU treaties and authorise the Council to act by qualified majority in an area where the Treaty provide the Council to act by unanimity.

A decision of the European Council to use either of these provisions can only come into effect if, six months after all national parliaments had been given notice of the decision, none object to it.

Article 48(7) TEU states that:

'Where the Treaty on the Functioning of the European Union or Title V of this Treaty provides for the Council to act by unanimity in a given area or case, the European Council may adopt a decision authorising the Council to act by a qualified majority in that area or in that case. This subparagraph shall not apply to decisions with military implications or those in the area of defence.

Where the Treaty on the Functioning of the European Union provides for legislative acts to be adopted by the Council in accordance with a special legislative procedure, the European Council may adopt a decision allowing for the adoption of such acts in accordance with the ordinary legislative procedure.'

Withdrawal from the EU

Article 50 of the TEU introduces an exit clause allowing Members who wish so to withdraw from the European Union. In this case the Member State should notify its decision to withdraw to the European Council. Upon such notification, withdrawal negotiations start and if no other agreement is reached the Treaty cease to apply to the withdrawing state two years after such notification. Before the Lisbon Treaty entered into force, there was not any provision in the Treaties recognizing the ability of a Member State to voluntary withdraw from the EU.

17. Conclusions

How far the objectives behind the adoption of the Lisbon Treaty will be reached with the changes proposed?

The ordinary legislative procedure provides greater transparency and legitimacy in the decision making process, however the objective of greater efficiency with might be compromised by the longer procedure of co-decision, the involvement of national parliaments or the new comitology rules.

Greater powers to the European Parliament might not translate into higher acceptance of the EU by the public. However, the involvement of the national parliaments might increase national debates or press follow up of EU affairs. It also seems that transparency will be increased and the system will be clearer for citizens to understand the type of decisions adopted and how.

Most of the changes proposed require the adoption of acts and measures to further define their functioning. The achievement of the stated objectives might depend on the future rules.

Contacts

Marta Ballesteros
Senior lawyer, ClientEarth

t +32 (0)2 808 34 67
m +32 (0)495 265 990
e mballesteros@clientearth.org

Useful sources of information

European Commission:

Glossary: http://europa.eu/scadplus/glossary/comitology_en.htm

Europe at a glance: http://europa.eu/lisbon_treaty/glance/index_en.htm

European Parliament:

Press release on European Parliament analysis of the Lisbon Treaty:

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+IM-PRESS+20090506IPR55226+0+DOC+PDF+V0//EN&language=EN>

Report: Parliament's new role and responsibilities implementing the Treaty of Lisbon, (2008/2063(INI)), Committee of Constitutional Affairs, Rapporteur Jo Leinen

<http://www.europarl.europa.eu/oel/file.jsp?id=5608622>

Non-EU Institutions:

UK House of Lords:

House of Lords, European Union Committee, *'Treaty of Lisbon: An Impact Assessment'*, 10th Report of session 2007-2008

<http://www.parliament.the-stationery-office.co.uk/pa/ld200708/ldselect/ldeucom/62/62.pdf>

EIPA:

'The Lisbon Treaty: A qualified advance for EU Decision-Making and Governance', Dr Edward Best, EIPASCOPE 2008/1

http://www.eipa.eu/files/repository/eipascope/20080509183728_SCOPE2008-1-2_EdwardBest.pdf

Robert Shuman Foundation:

'The Lisbon Treaty: 10 easy-to-read fact sheets', Foundation Robert Shuman, December 2007.