

The EU Lisbon Treaty: What implications for anti-racism?



european network against racism

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Table of contents

Foreword	2
1. Introduction	3
2. General introduction to anti-racism measures in the European Union prior to the Lisbon Treaty	4
3. The Lisbon Treaty	7
3.1 Pillar structure	8
3.2 General content.....	9
4. The Lisbon Treaty’s impact on fundamental rights and anti-racism policies 11	
4.1 Values and rights	11
4.2 Mainstreaming.....	11
4.3 Citizenship and non-discrimination.....	12
4.4 Participatory democracy	13
4.5 Justice and Home Affairs, including migration.....	14
4.6 Institutional change.....	15
4.7 Accession to the ECHR.....	16
4.8 Summary	16
5. The EU Charter of Fundamental Rights	17
5.1 General overview	17
5.2 Provisions.....	19
5.3 Citizenship and third country nationals	20
5.4 Enforceability.....	20
5.5 The ECJ and its case law	21
5.6 Opt-out.....	22
5.7 Summary	22
6. Advocacy strategy recommendations for NGOs seeking to combat racism and discrimination in the European Union	23
7. Conclusion	24
8. Selected bibliography	25
9. Abbreviations	25

Foreword



The long awaited ratification of the Lisbon Treaty, which amends the current Treaty on the European Union and the Treaty establishing the European Community, is much welcome. The Treaty aims to provide the EU with modern institutions and optimise working methods, to make Europe more democratic and transparent and to create a “Europe of rights and values, freedom, solidarity and security”. In light of this, our latest publication explores the potential implications of the Lisbon Treaty for fundamental rights protection and anti-racism. In addition to providing an insight into the main changes to be brought about by the Lisbon Treaty, this publication will also be a useful advocacy tool for NGOs seeking to combat racism and discrimination on the ground.

One crucial element of the Treaty is the incorporation of the EU Charter of Fundamental Rights, making the latter legally binding. The Charter’s new legal status will be an important step forward for ethnic and religious minorities across Europe in the protection of their fundamental rights to non-discrimination, religious freedoms and social rights. The principles of equality and non-discrimination also feature prominently in the Treaty’s provisions. In addition, principles of participatory democracy promoting civil society’s involvement in the shaping of Europe will be firmly placed as core values of the European Union.

Nevertheless some gaps remain, in particular the fact that third country nationals remain excluded from many of the protections provided for by the Treaty. The Treaty also fails to create new mechanisms for the realisation of the principles of equality and non-discrimination. Furthermore, the Charter of Fundamental Rights’ scope is limited to the EU institutions and to the EU member states when they are implementing EC law and in theory cannot be used against a private party.

Despite these shortcomings, it is hoped that the Treaty will come into force across the European Union by the end of 2009. The clearer focus on the values that underpin the EU and the incorporation of the Charter of Fundamental Rights should enable the EU to reinforce its commitment to respect for equality, fundamental rights and diversity. Citizens will have more opportunities to have their voices heard and the European Parliament and national parliaments will have a strengthened role, bringing new ways of working for the anti-racist civil society. It is now crucial that mechanisms are established to ensure the Charter becomes a key reference and guiding document for all EU policies and actions taken by EU institutions.

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1. Introduction

Anti-racism policy in the European Union has evolved since the mid-1990s from scattered policies contained in a wide range of documents to a more comprehensive protection. However, there is still scope for improvement and the question that must be asked is whether the Lisbon Treaty contributes to the protection of fundamental rights in the European Union. The aim of this publication is to trace the origin and development of anti-racism policy in the European Union prior to the Lisbon Treaty before turning to an explanation and assessment of the main changes brought about in this area by the Treaty and its Charter of Fundamental Rights. Anti-racism is to be interpreted as the fight against racial discrimination and xenophobia and the promotion of equal treatment for ethnic and religious minorities and third country nationals residing in the EU. On the basis of this definition this publication suggests advocacy strategies for NGOs seeking to combat racism and discrimination in the European Union. The target audience of the publication are civil society groups combating racism and discrimination in Europe.

The structure that is adopted first presents a general introduction to anti-racism measures in the European Union prior to the Lisbon Treaty. The focus is then on the content of the Lisbon Treaty itself, its main structural and institutional changes as well as its impact on fundamental rights. Following on from this, the publication looks at the main provisions and enforceability of the Charter of Fundamental Rights. The opt-out granted to the Polish and UK governments is also explained. A final section sets out advocacy strategy recommendations for NGOs seeking to combat racism and discrimination in the European Union.

The methodology which is used in this publication aims to present a complete analysis of the implications of the Lisbon Treaty and its Charter for anti-racism. In order to do so, a number of different areas are covered: (i) specific articles relating to non discrimination and anti-racism; (ii) certain policies, e.g. immigration, that affect the status of third country nationals; (iii) more transversal measures not directly linked to anti-racism but which could, nonetheless, act as levers in fundamental rights protection and mainstreaming, e.g. participatory democracy and institutional changes; and, (iv) the broader fundamental rights framework through the Charter.

2. General introduction to anti-racism measures in the European Union prior to the Lisbon Treaty

Racism manifests itself in a wide range of areas across the European Union. It is a “complex and multi-faceted phenomenon [which] has evolved over the last decades and has taken many different forms.”¹ However, the European Union has not always provided for anti-racism measures. The first notable anti-racism measures were introduced in the European Union in the mid-1990s as a result of an increasing awareness of the challenges posed by racism in the European Union as a whole. This was largely due to political developments such as the rise of the far right, in particular in Austria, which sparked fears across the Union of increased racism and xenophobia. The European Parliament played an important role in raising awareness of the implications of racism and xenophobia. Its Resolutions and Committee of inquiry into racism and xenophobia stressed the need to act.² Moreover, the Joint Action adopted by the Council in 1996³ encouraged action to combat racism and xenophobia in the Union. All of this resulted in the declaration of a European Year Against Racism which took place in 1997.

In its Communication which supported the designation of a European Year Against Racism the Commission noted that “public opinion has been widely alerted to the fact that persistent racism, xenophobia and anti-Semitism is striking at the roots of democratic society throughout the Community.”⁴ The Commission, therefore, felt the need to act due to the perceived transnational nature of the problem. This marked the beginning of an increase in anti-racism measures across the Union as a whole. Yet the EU Treaties as well as general Union policy provided no effective tools or mechanisms for combating racism in the European Union. Neither the original EEC Treaty nor the Treaty on the European Union of 1992 contained anti-racist provisions.

1 ENAR, Racism in the EU available at <http://www.enar-eu.org/Page.asp?docid=15886&langue=EN>

2 For an overview of the European Parliament’s actions in this area see www.europarl.europa.eu/compar/libe/elsi/zoom_in/02_en.htm

3 Joint Action 96/443/JHA of 15 July 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, concerning action to combat racism and xenophobia

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

As a first step, European Union policy focused on the concept of equality. In one guise or another, the concept of equality has always been central to the evolving legal order of the European Union.⁵ So far as the Union is based on an international law system of treaties, it draws upon the fundamental international law principle of the equality of sovereign states. Non-discrimination, or equal treatment, on grounds of nationality is a core principle of the single market, underpinning many aspects of the free movement of goods, services, persons and capital. However, protection against discrimination on grounds of nationality is limited to EU nationals and does not include third country nationals.

Gender equality - initially in the limited form of a guarantee of equal pay for equal work for women and men, and subsequently in the form of a more wide ranging equal treatment principle applying to all aspects of employment and training, and most aspects of welfare - is deeply rooted in the EC and EU Treaties, in legislation, and in an extensive case law of the European Court of Justice.⁶ The Court of Justice has recognised gender equality in its case law as a ‘fundamental principle’ of the Union legal order.⁷ Gender equality has come to be widely viewed in the literature as a constitutionally embedded fundamental right under EU law. Since 1999 and the Treaty of Amsterdam, gender equality perspectives have been given an integrated constitutional basis in EU policy-making through Article 3(2) TEC: “In all [its] activities..., the Community shall aim to eliminate inequalities, and to promote equality, between men and women.” Increasingly, therefore, the principle of gender equality has moved into the ‘mainstream’ of Union policy.⁸ However, a broader approach to equality encompassing other discrimination grounds, including ethnic origin and religion, took longer to develop.

5 For more information see J. Shaw, *Mainstreaming Equality in European Union Law and Policy-Making*, ENAR Publication, 2004

6 Case 149/77 *Defrenne v SABENA* (No. 3) [1978] ECR 1365 at 1378

7 C. Barnard, ‘Gender Equality in the EU: A Balance Sheet’, in P. Alston (ed.), *The EU and Human Rights* (Oxford: Oxford University Press, 1999), 215-279

8 J. Shaw, ‘The European Union and Gender Mainstreaming: Constitutionally Embedded or Comprehensively Marginalised?’, (2002) 10 *Feminist Legal Studies*, 213-26

A Council Regulation establishing the European Union Monitoring Centre on Racism and Xenophobia (EUMC), adopted in 1997, marked the beginning of a period of awareness of the need for anti-racism measures. It drew upon the results of the 'Kahn Commission', a consultative Commission on Racism and Xenophobia set up in 1994 which paved the way for the establishment of the European Union Monitoring Centre on Racism and Xenophobia.⁹ The Centre was set up to study the phenomena and manifestations of racism, xenophobia and anti-Semitism in the European Union with a view to encouraging best practice across the EU member states. The Centre also established a European Racism and Xenophobia Information Network (Raxen) in order to involve research centres, NGOs and specialised centres from across the member states in its fight against racism and xenophobia. Raxen has contributed primarily to the study of the extent and development of racism and xenophobia, and analysed their causes, consequences and effects. In 2007 EUMC was replaced with the European Union Agency for Fundamental Rights (FRA) which was given a wider remit than the EUMC. It provides the institutions and authorities of the Community and its member states with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights.¹⁰

A surge in measures to combat racism and xenophobia was not evident until after the entry into force of the Treaty of Amsterdam in 1999. The Treaty of Amsterdam introduced two major amendments which give the European Union power to act in order to prevent and to combat racism and xenophobia. First, the Treaty of Amsterdam introduced into the EC Treaty a legal basis for the adoption of measures combating discrimination on grounds of sex, racial or ethnic origin, age, disability, religion and sexual orientation (Article 13 TEC). The Community was given the competence to adopt measures under article 13 TEC to combat discrimination on grounds of racial or ethnic origin. Second, the Treaty of Amsterdam introduced article 29 TEU which posits the prevention and combating of racism and xenophobia as a central objective of the European Union. However, despite making it a central objective, the TEU does not provide for specific measures which would enable the Union to combat racism and xenophobia. As a result, the attainment of the objective is difficult. This lack of enforceability is therefore one of the major weaknesses of European Union policy in the area of the prevention and combating of racism prior to the Lisbon Treaty.

9 Council Regulation 1035/97 OJ 1997 L151/1

10 For more information see www.fra.europa.eu/fraWebsite/about_us/about_us_en.htm.

Increasingly, therefore, the principle of non-discrimination on grounds of racial or ethnic origin has been mainstreamed into Union policy much like the principle of gender equality briefly discussed above. This implies: "the incorporation of equal opportunities issues into all actions, programmes and policies from the start."¹¹

Following the introduction of the Treaty of Amsterdam, the Community adopted a Directive establishing a general framework for equal treatment in employment and occupation¹² and a Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin¹³ (the 'Race Equality Directive') in 2000. The Directives aimed at providing comprehensive legal protection from discrimination on grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation. The Directives contain precise definitions of direct and indirect discrimination and of harassment. However, gaps remained in the protection against discrimination. For example, religious discrimination was only covered in employment and protection was not extended to other areas. In addition, the Race Equality Directive does not cover nationality discrimination and exempts immigration matters from its remit, which has left third country nationals unprotected from much discrimination. To complement the Directives, a Council Decision¹⁴ establishing a Community action programme to combat discrimination for 2001-2006 was adopted. The programme aimed at supporting any action taken by member states to combat all forms of discrimination. Active cooperation between member states, the Commission and civil society groups lay at the heart of the programme. This was replaced in 2007 by the PROGRESS Community programme which aimed to establish common principles to combat discrimination.

In 2008, the Council adopted a Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law¹⁵. The Decision approximates criminal law provisions in order to combat racist and xenophobic offences more effectively by promoting a full and effective judicial cooperation between EU member states. However, the Decision, which has been weakened in comparison to the original proposal, has been criticised for not providing sufficient protection to combat racist crime and violence.¹⁶

11 T. Rees, *Mainstreaming Equality in the European Union: Education, Training and Labour Market Policies*, London: Routledge, 1998, pp. 3-4.

12 Council Directive 2000/78/EC, OJ 2000 L 303/16.

13 Council Directive 2000/43/EC, OJ 2000 L 180/22.

14 Council Decision 2000/750, OJ 2000 L 303/23.

15 Council Framework Decision 2008/913/JHA, OJ 2008 L 328/51.

16 Letter from the European Network against Racism (ENAR) to Members of the EP Committee on Civil Liberties, Justice and Home Affairs regarding the Framework Decision on Racism and Xenophobia, November 2007.

Therefore, despite efforts by the EU gaps still remain that have an impact on the fight against racism.

The Framework Decision criminalises all intentional behaviour aimed at inciting violence or hatred. However, in order to fall within the scope of the definition such crimes must be committed on the grounds of race, colour, religion, descent or national or ethnic origin. Punishable intentional conduct includes public incitement of violence or hatred, public condonement, denial or trivialisation of crimes of genocide, crimes against humanity and war crimes as defined in the Statute of the International Criminal Court (Articles 6, 7 and 8) as well as of crimes defined by the Tribunal of Nuremberg (Article 6 of the Charter of the International Military Tribunal, London Agreement of 1945). There is, however, some scope for member states on how and when to punish some behaviour. Thus, member states may choose to punish only conduct which is either carried out in a manner likely to disturb public order or which is threatening, abusive or insulting.

Finally, the Commission proposed a new Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation in 2008¹⁷. The aim of the Directive is to fully implement the principle of equal treatment between persons in order to complete the legal framework of the European Union. The proposal has been welcomed as it uses the scope of the Race Equality Directive as its starting point and largely adopts the same concepts and definitions as the Race Equality Directive. It also opens up opportunities for NGOs to gain enhanced legal standing. However, the proposal has been criticised for not recognising the importance of positive action in securing non-discrimination as well as for providing for broad exceptions to the protection against discrimination.¹⁸

While a comprehensive protection against racism and discrimination is still lacking in the European Union as a whole, the amendments introduced by the Treaty of Amsterdam mark the departure point for real progress to be achieved. The mainstreaming of anti-racism now figures prominently in policy rhetoric, especially since the adoption of the 1998 Action Plan against Racism which was followed up by further documents, such as the Commission report in 2000 on the implementation of the Action Plan against Racism, entitled "Mainstreaming the fight against racism", as well as in documents prepared by the Commission before and since the Durban World Conference Against Racism in 2001. Due to the increasing awareness of the importance of anti-racism measures in European Union policy there is hope that the Lisbon Treaty will reinforce equality and non-discrimination principles as the core values of the European Union.

¹⁷ Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM(2008) 426 final.

¹⁸ See for example ENAR, Preliminary Position and Proposed Amendments of the European Network Against Racism on the Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, December 2008.

3. The Lisbon Treaty



Signature of the Lisbon Treaty, December 2007 - © Council of the European Union

The Lisbon Treaty was signed in December 2007 by the leaders of all EU member states. It replaces the failed Constitutional Treaty¹⁹ and amends the current Treaty on the European Union (TEU) and the Treaty establishing the European Community (TEC). The Constitutional Treaty was preceded by the Convention on the Future of Europe convened in 2002. Civil society groups played a key role during the Convention to ensure the introduction of many of the concepts which are now part of the Lisbon Treaty. Following the negative referenda in France and the Netherlands in 2005 which spelt the end of the Constitutional Treaty, an Intergovernmental Conference (IGC) was convened in 2007 which decided upon the text of the Lisbon Treaty. The negotiations on the new Treaty were largely closed to civil society groups, however, following adoption of the text there were calls for EU leaders to open up to people and NGOs to discuss the practical implementation of the new treaty provisions.²⁰ The Lisbon Treaty was due to come into force in January 2009. However, delays were caused by the failed referendum in Ireland in June 2008. A second Irish referendum was held on 2 October 2009,

leading to the approval of the Treaty by a majority of Irish voters. All member states have now approved and ratified the Treaty and it is expected to enter into force on 1 December 2009.²¹

At this stage it should be noted that the Lisbon Treaty renames the EC Treaty as the 'Treaty on the Functioning of the European Union' (TFEU). Both the TEU and the TFEU will have the same legal rank.²² The intention of the Lisbon Treaty differs from the Constitutional Treaty which sought to consolidate and replace the existing Treaties. Instead, the Treaty of Lisbon follows the model of other amending treaties such as the Treaty of Amsterdam. Its core aim is to "provide the Union with the legal framework and tools necessary to meet future challenges and to respond to citizens' demands."²³

In terms of structure, the Treaty of Lisbon is divided into amendments to two main texts: the TEU and the TFEU. From a functional point of view, the TEU, which covers democratic principles, the institutions, enhanced cooperation, external action and common foreign

19 For an overview of the content of the Constitutional Treaty see J. Shaw, *The EU Constitution and Racism: New Legal Tools*, ENAR 2005.

20 For more information see www.socialplatform.org/News.asp?news=15173.

21 http://europa.eu/lisbon_treaty/index_en.htm.

22 Article 1 TEU.

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

and security policy, contains more general provisions whereas the TFEU, as its name suggests, “organises the functioning of the Union and determines the areas of, delimitation of, and arrangements for exercising its competences.”²⁴ The content of the TFEU focuses on non-discrimination and citizenship of the Union, union policies and internal actions, associations of the overseas countries and territories, external action by the Union, and institutional and financial provisions.

3.1 Pillar structure

In terms of structure of the Union, the Lisbon Treaty formally abolishes the current three pillar structure introduced by the Treaty of Maastricht in order to create one common framework. The three pillars describe the basic structure of the European Union. The first pillar corresponds to the three Communities: the European Community, the European Atomic Energy Community (Euratom) and the former European Coal and Steel Community (ECSC). The second pillar refers to the common foreign and security policy, which comes under Title V of the EU Treaty. The third pillar contains police and judicial cooperation in criminal matters, which comes under Title VI of the EU Treaty. The three pillars functioned on the basis of different decision-making procedures: the so-called ‘Community procedure’ for the first pillar, and the intergovernmental procedure for the other two. In the case of the ‘Community procedure’, only the Commission can submit proposals to the Council and Parliament, and a qualified majority is sufficient for a Council act to be adopted. In the case of the second and third pillars, this right of initiative is shared between the Commission and the member states, and unanimity in the Council is generally necessary. Article 1 TEU reflects the abolition of the pillar structure by stating that “the Union shall replace and succeed the European Community.” Formally, this means that the special instruments applied hitherto in Common Foreign and Security Policy (second pillar) and in Justice and Home Affairs (third pillar) are abandoned.

The second pillar on Common Foreign and Security Policy will be assimilated into the first pillar, however, it will still be subject to specific intergovernmental procedures²⁵ and policies taken will be in the form of so-called ‘decisions’. The ‘Community procedure’ will not therefore apply. Instead, the policy decisions are subject to ‘specific rules and procedures’.²⁶ These specific rules and procedures mean that, in practice,

the area of Common Foreign and Security Policy will be distinct from other areas of policy making due to the safeguards which prevent decision-making at a European level in the form of the ‘Community procedure’. The Treaty of Lisbon also introduces a solidarity clause into the TEU. This means that member states are bound to assist each other in the event of an armed aggression on another’s territory.

Despite these restrictions the common foreign and security policy of the Union following the Lisbon Treaty may nonetheless offer some hope in the promotion of fundamental rights abroad. The principles that apply to it are the same as those which have guided the Union’s own creation. These principles include democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.²⁷ It is clear therefore that policies on combating racism and xenophobia can and should play a role in the Union’s relationships with third countries and international organisations. More specifically, article 21 TEU highlights as an objective of the Union’s common policies and actions in the external sphere consolidation and support for democracy, the rule of law, human rights and the principles of international law. It is therefore to be hoped that the European Union will act upon these provisions in order to support fundamental rights principles in its dealings with third countries.

The third pillar is due to disappear entirely following a five year transitional period. As a result, common policies in the area of freedom, security and justice such as Schengen²⁸ are assimilated within the Community method (i.e. the standard rules on the institutions and law-making involving the EU institutions).²⁹ However, the Commission’s right of initiative in this area is shared with one quarter of the member states.³⁰ The UK and Ireland have specific protocols which enable them to opt into or opt out of EU policies in the area of freedom, security and justice. However, controls are strict and they may only exercise their right according to terms, conditions and timetables to be established in each case by the Council and Commission.³¹

²⁴ Article 1 TFEU.

²⁵ Articles 21-46 TEU.

²⁶ Article 24 TEU.

²⁷ Article 21 TEU.

²⁸ The Schengen Agreement was signed by five of the then ten member states of the European Economic Community in 1985. The Agreement provides inter alia for the removal of border controls between participating States. It has been widened to apply, to varying extents, to all member states of the European Union. A large extent of the Agreement is already contained in the first pillar and this is to be increased by the Lisbon Treaty.

²⁹ Article 10 - Protocol on transitional provisions.

³⁰ Article 76 TFEU.

³¹ Article 5 Schengen Protocol; Protocol on position of the UK and Ireland in respect of the area of freedom, security and justice.

3.2 General content

In its content, the Lisbon Treaty focuses heavily on institutional change in order to enhance transparency, better democratic accountability and greater judicial security. The Treaty, for the first time, also introduces a voluntary withdrawal clause which member states can invoke should they wish to leave the European Union.³² This was hitherto non-existent in the Treaties.

Article 2 introduces a **more precise delimitation of competences between the member states and the Union**. Thus, the Union now enjoys three categories of competence: exclusive³³, shared or complementary³⁴, and supporting or supplementary³⁵. This implies that, other than in an area of exclusive competence, the Union should cooperate with member states. In the area of shared competence the member states may only act insofar as they either act together with the Union, when the Union has not exercised its competence or when the Union has decided to cease acting. Supporting and supplementary competence implies that the Union will only adopt a supporting, coordinating or supplementary role, however, core competence remains with the member states. Both types of competences are subject to the principles of subsidiarity and proportionality.³⁶

The Lisbon Treaty **enhances the role of the European and national Parliaments** in order to create a more democratic and transparent Europe. For example, the legislative co-decision procedure³⁷ becomes the norm and is referred to as ‘the ordinary legislative procedure’ thereby enhancing the role of the democratically-elected Parliament. The ordinary legislative procedure is also extended to cover agriculture, fisheries, transport and structural funds as well as the whole of the current third pillar. The Parliament thus becomes an equal co-legislator for almost all areas of competence. More detail on the enhanced role of the Parliament is provided below.

32 Article 50 TEU.

33 The areas where this competence applies are set out in article 3 TFEU.

34 The areas where this competence applies are set out in article 4 TFEU.

35 The areas where this competence applies are set out in article 5 TFEU.

36 Article 5 TEU: Subsidiarity is the principle whereby the Union does not take action (except in the areas which fall within its exclusive competence) unless it is more effective than action taken at national, regional or local level. It is closely bound up with the principle of proportionality which requires that any action by the Union should not go beyond what is necessary to achieve the objectives of the Treaty.

37 This is contained in art. 251 of the EC Treaty, now art. 294 TFEU. Under this procedure the Commission proposes legislation and the Council and Parliament share the decision-making power.

The Treaty also provides for a more efficient Europe by **simplifying the working methods of the European institutions**.³⁸ The size of the Commission was meant to be reduced from currently 27 to 18 Commissioners from 2014 onwards. This would have resulted in only two-thirds of member state governments having a Commissioner at any one time. The posts were to be rotated. However, for political reasons, it is unlikely that the size of the Commission will be reduced as the European Council decided in response to the failed Irish referendum that every member state would retain one Commissioner when the Lisbon Treaty enters into force.³⁹ This decision was taken in the form of legal

guarantees and assurances which will be attached to the EU Treaties as a protocol after the Lisbon Treaty enters into force.⁴⁰

The choice of **candidate for the office of President of the Commission** is to be linked directly to the outcome of the European Parliament elections and his/her office is to be strengthened so as to

allow him/her to dismiss fellow Commissioners. Thus, following the entry into force of the Lisbon Treaty, the Council, taking into account the results of the European Parliament elections, will propose a candidate for President of the Commission. The candidate needs to be elected by a majority of the European Parliament.⁴¹ Prior to the Lisbon Treaty the European Parliament was only allowed to approve the Commission President rather than to elect him/her.

In addition, **changes to the operation of the Council** mean that the default voting method for the Council will now be by qualified majority except where the Treaties require a different procedure. Qualified majority voting, which enables easier decision-making than unanimity, will therefore be extended to a large number of new areas such as immigration and culture. Altogether, forty significant items move from unanimity to qualified majority voting. Only the most sensitive areas remain subject to unanimity. These include tax, citizens’ rights, and the main lines of common foreign, security and defence policies. A new voting method will also be introduced in 2014, so-called ‘double majority voting’. Under this system, proposed EU laws will require a

38 See Part 6 TFEU and articles 15-17 TEU.

39 For more information see European Commission, The Lisbon Treaty and Ireland, http://ec.europa.eu/ireland/lisbon_treaty/lisbon_treaty_progress/index_en.htm.

40 For more information see www.lisbontreaty.ie/guarantees.

41 Article 17 (7) TEU.

majority not only of the EU’s member countries (55 %) but also of the EU population (65 %) in order to be passed. This system is intended to reflect the legitimacy of the EU as a union of both peoples and nations. It is meant to make EU lawmaking both more transparent and more effective. However, it could also lead to a stalemate in the Council in important decision-making areas if no such majorities can be reached. Double majority voting will also be accompanied by a new mechanism enabling a small number of member state governments (close to a blocking minority) to demonstrate their opposition to a decision. Where this mechanism is used, the Council will be required to do everything in its power to reach a satisfactory solution between the two parties, within a reasonable time period. The reasonable time period is, however, not defined. Whether this system works in practice remains to be seen.

The Lisbon Treaty also creates the post of an **EU High Representative for Foreign Affairs and Security Policy** in order to ensure for consistency in dealings with third countries and to enhance the EU’s presence on the world stage. The High Representative will have a dual role: representing the Council on common foreign and security policy matters thereby replacing the current six-month post occupied by the Minister of Foreign Affairs for the country holding the rotating EU Presidency; and also being Commissioner for external relations. He/she will be supported in this role by the newly created ‘European external action service’ which is composed of officials from the Council, Commission and national diplomatic services. Common foreign and security initiatives are to be proposed either by the High Representative or the individual member states rather

than the Commission. The Council must decide by unanimity on the implementation of the proposals. This compromise seeks to strike a balance between member states’ reluctance to transfer increased powers to the Commission and their recognition of the usefulness of a common European voice on world affairs.

Finally, the Lisbon Treaty introduces the **Charter of Fundamental Rights** into European primary law in the hope of creating a Europe of rights and values. It does so by amending article 6 of the Treaty on European Union to provide for recognition of the Charter. Article 6 therefore gives it the same legal value as the Treaties even though it is not incorporated into the Treaty as such. In contrast, therefore, to the Constitution, the Charter is given a separate legal existence. Indeed, the Charter was solemnly proclaimed and signed a day before the Lisbon Treaty. While this creates uncertainty as to the exact nature of the Charter vis-à-vis the Lisbon Treaty, it also allows it to be used as a more general reference for fundamental rights protection both in a European but also in an international context. The Charter is examined in more detail below.

Overview: structure and main changes of the Lisbon Treaty

LISBON TREATY		CHARTER OF FUNDAMENTAL RIGHTS
<p>Treaty on the Functioning of the European Union (TFEU)</p> <p>The TFEU organises the functioning of the Union and determines the areas of, delimitation of, and arrangements for exercising its competences (article 1 TFEU).</p>	<p>Treaty on the European Union (TEU)</p> <p>The TEU establishes the European Union and contains general provisions as to the competences of the Union.</p>	<p>Contains 54 articles grouped into 7 chapters on dignity, freedoms, equality, solidarity, citizens’ rights, justice, and general provisions.</p> <p>The Charter applies to actions of the European institutions but also to the member states when implementing EC law.</p>
<p>Main Changes: Defines the role of the institutions; Changes the second and third pillars of the Union; Aims to enhance participatory democracy; Defines the role of national parliaments and enhances the role of the European Parliament; Establishes a more precise delimitation of competences; Gives the European Union legal personality.</p>		

4. The Lisbon Treaty's impact on fundamental rights and anti-racism policies

4.1 Values and rights

In comparison to the existing Treaties, the Lisbon Treaty is much clearer on the values and objectives which are said to characterise and underpin the framework of the Union. From the outset, the Preamble refers to the “universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law” and “the rights of each individual”. The Preamble also confirms the Union’s attachment to “the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law”.

Article 2 TEU articulates the Union’s values and is similarly clear on the need for respect for individuals and, indeed, certain groups. It provides that: “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the member states in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”

The concept of ‘minority rights’ remains highly controversial within EU law and policy.⁴² It has been, in particular, a contested aspect of human rights conditionality applied to candidate countries during the 1990s and 2000s.⁴³ Following the end of the Cold War, adherence to human rights standards was incorporated into accession agreements with candidate countries. Particularly the difficult situation within which the Roma, especially in the new member states of central and Eastern Europe, find themselves has drawn attention to the importance of the protection of minority rights at an EU level. The phrase ‘rights of persons belonging

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

to minorities’ is a phrase drawn from international law on minority rights. It was first inserted into the failed Constitutional Treaty as in particular the new member states were eager to see the formal constitutional inclusion in the Constitutional Treaty of norms against which they have been held to account, in particular by the European Commission, during the course of the accession process.⁴⁴ The drafters of the Lisbon Treaty recognised the importance of such an over-arching protection and adopted the wording of the Constitution.

These principles are therefore not just rhetorical. Equality and non-discrimination principles appear prominently and repeatedly in the Treaty’s core provisions. However, in most issues of detail, especially in relation to the possibilities for adopting policies and legal measures in areas of non-discrimination

and equality, as indeed in relation to other areas of social policy, the Lisbon Treaty does not introduce any new mechanisms and largely preserves the status quo established in the existing Treaties. The text often lacks precision on the scope of the rights granted and fails to mention means of implementation. As a single European standard on fundamental rights protection is often lacking, the formulation of advocacy strategies on the basis of the rights contained in the Lisbon Treaty is difficult. While the Treaty offers some ways forward towards securing anti-discrimination measures, it does not radically alter the European landscape for NGOs working in the field of anti-racism and non-discrimination.

4.2 Mainstreaming

Article 8 TFEU replicates article 3 TEC on gender equality mainstreaming and provides that “the Union shall aim to eliminate inequalities, and to promote equality,

42 G. Schweltnus and A. Wiener, ‘Contested Norms in the Process of EU Enlargement: Non-discrimination and minority rights’, *Constitutionalism Web-Papers*, ConWEB, No. 2/2004.

43 On that process, see C. Hillion, ‘Enlargement of the European Union - The Discrepancy between Membership Obligations and Accession Conditions as Regards the Protection of Minorities’, (2003-2004) 27 *Fordham International Law Journal* 716.

44 J. Shaw, *The EU Constitution and Racism: New Legal Tools*, ENAR 2005.

between women and men". 'Mainstreaming' equality is an idea which, according to Christopher McCrudden, is "the principle that equality be seen as an integral part of all public policy-making and implementation, rather than something separated off in a policy or institutional ghetto."⁴⁵ In other words, all policy fields must take account of the core principle of equality.

While there was disappointment amongst NGOs campaigning on equality issues that the Lisbon Treaty did not alter the nature of the legal basis for the adoption of harmonisation measures in the field of anti-discrimination so that the ordinary legislative procedure and qualified majority voting would apply, in some respects this failure is offset by the inclusion of an equality mainstreaming clause which refers to each of the six grounds familiar from Article 13 TEC. Article 10 TFEU provides that: "In defining and implementing the policies and activities referred to in this Part, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation." This is an important step forward for the European Union. The provision was first introduced in the Constitutional Treaty and has been kept by the Lisbon Treaty. Article 10 TFEU clearly adds weight to the existing Commission practices in relation to the mainstreaming of anti-racism. The mainstreaming of anti-racism has been said to be an important element of Union policy since the publication of the Commission's 1998 Action Plan against Racism,⁴⁶ which lists many areas where the fight against racism should be incorporated into policy considerations, including employment strategy and external relations. In theory, this already amounts to a substantial commitment to a policy of mainstreaming anti-racism.

Yet in practice, there has been little solid action to position the fight against racism at the forefront of the full range of the Union's policy concerns, as required by the very nature of mainstreaming, whereby anti-racism concerns should not be confined merely to some policy areas whereas others remain untouched.⁴⁷ The late 1990s were an important era for intensive policy-making in the anti-racism sphere. In contrast, the 2000s appear to have been the era in which anti-racism policy-making

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

has been watered down⁴⁸, even though the decade began with the adoption of the Race Equality Directive which requires member states to make substantial amendments to national legislation and the adoption of the Action Programme which enables the Commission to proactively promote equality-focused activities. The loss of focus appears to have been signalled by the European Council initiative in December 2003 to replace the European Union Monitoring Centre on racism and xenophobia with a Fundamental Rights Agency.⁴⁹ The EUMC was very concerned that its transformation should not detract from "the urgent fight against racism".⁵⁰ The Commission itself admits that transforming the EUMC into a Fundamental Rights Agency raises 'delicate questions',⁵¹ as the agency has a much wider remit than the EUMC. The only area of anti-racist work which has received specific high level political attention has been the particularly hostile social and economic conditions in which the Roma, especially in the new member states of central and Eastern Europe, find themselves. Consequently, the incorporation of equality mainstreaming, including the mainstreaming of anti-racism, in the Lisbon Treaty, represents a significant strengthening of the existing legal basis for current practices and for policy-making. As mainstreaming equality in European law and policy has already been the subject of detailed analysis in an ENAR publication it will not be treated in any more detail at this stage.⁵²

4.3 Citizenship and non-discrimination

In terms of citizenship, the Treaty first hopes to increase the level of participatory democracy in the EU by reiterating citizens' rights as agreed under the Treaty of Maastricht.⁵³ The Treaty on the European Union ('Maastricht Treaty') created the concept of European citizenship which is held by every person who is a national of a member state. Citizenship of the Union therefore complements national citizenship but does not replace it. Citizenship rights include the right to move and reside freely in the Union; the right to vote and stand as a candidate for European and local

45 C. McCrudden, 'Equality', in C.J. Harvey, Human Rights, Equality and Democratic Renewal in Northern Ireland, Oxford: Hart Publishing, 2001, 75.

46 COM(1998) 183, 25 March 1998.

47 J. Shaw, Mainstreaming Equality in European Union Law and Policy-making, ENAR Publication, 2004.

48 J. Shaw, Mainstreaming Equality in European Union Law and Policy-making, ENAR Publication, 2004.

49 J. Shaw, Mainstreaming Equality in European Union Law and Policy-making, ENAR Publication, 2004.

50 EUMC Media Release, 15 March 2004, Issue: 194-03-04-03-01-EN, 'Future EU human rights agency must not detract from urgent fight against racism, says EUMC'.

51 The Fundamental Rights Agency: Public consultation document, SEC(2004) 1281, Brussels, 25 October 2004, COM(2004) 693, p3.

52 J. Shaw, Mainstreaming Equality in European Union Law and Policy-making, ENAR Publication, 2004.

53 Articles 20-25 TFEU.

elections in the host country; and the right to protection by the diplomatic or consular authorities of a member state other than the citizen's member state of origin on the territory of a third country in which the state of origin is not represented.

Like the EC Treaty, the Lisbon Treaty reserves the privileges of citizenship of the Union to the nationals of EU member states alone. Part two of the TFEU provides for non-discrimination and citizens' rights. Articles 18-25 set out comprehensive protection against non-discrimination and provide for over-arching rights applicable to European citizens. Thus, article 18 prohibits discrimination on grounds of nationality and allows the Council and Parliament to act by qualified majority voting when adopting rules designed to prohibit such discrimination. However, it should be noted that the prohibition against discrimination on grounds of nationality applies only to EU nationals, and not third country nationals. Articles 18-25 TFEU are not new and the provisions are a mere reiteration of articles 12 and 13, and 17-22 of the TEC. The Treaty of Lisbon does, however, place these provisions on non-discrimination within a context of increased rights for European citizens and thus strengthens the already existing protection from discrimination through the adoption of the Charter of Fundamental Rights.

Article 19 provides a legal basis for the Council, acting unanimously, to take action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. Article 19 TFEU does not therefore directly prohibit discrimination on the basis of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. Instead, it enables the Council to adopt measures to combat such discrimination. However, the ECJ has potentially widened the scope of the article in its Mangold judgment.⁵⁴ In Mangold, a 52-year old employee did not benefit from the protection under Directive 2000/78 establishing a general framework for equal treatment in employment and occupation because he was alleged to be too old. When asked by the German Labour Court whether there could be discrimination on the grounds of age in this case, the ECJ ruled that: "The principle of non-discrimination on grounds of age must be regarded as a general principle of Community law. [...]"⁵⁵

This therefore has the potential to considerably widen the scope of article 19 TFEU as it seems to indicate the recognition of a general principle of equal treatment. If that is the case then article 19 must be seen as giving rise to a protection against discrimination in itself rather

than just a mechanism to adopt measures to prevent such discrimination. This would give individuals a very broad right to equal treatment enshrined in the Treaty. However, there have already been "adverse reactions to the Mangold case" which "may induce the ECJ to return to a more conservative approach"⁵⁶ which would deny the existence of a general principle of equal treatment. This has already been demonstrated in recent opinions of the Advocates General.⁵⁷

The Treaty does not contain any specific protection for third country nationals. Merely article 67 TFEU requires the Union to frame a common policy on asylum, immigration and external border control which is 'fair towards third-country nationals' but no meaning is given to the provision.

4.4 Participatory democracy

It is not only representative democracy which will be strengthened by the text of the Lisbon Treaty. The explicit adoption of the principle of participatory democracy is an extremely important innovation in the Lisbon Treaty from the perspective of advocacy groups working in the field of racism and xenophobia. Thus, article 15 TFEU requires the Union to ensure the promotion of good governance and the participation of civil society in its work. Article 11 TEU states:

1. 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.
2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.
3. The European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent.

According to Shaw, "a conservative interpretation of the first three paragraphs might suggest that this merely codifies current practice, where the Commission is already quite open to consultations with civil society. It is often the case that new innovations in the Treaty texts merely reflect existing practices."⁵⁸ She goes on to argue that "a more radical interpretation would

⁵⁴ Case C-144/04 Mangold v Rüdiger Helm (2005) ECR I-9981.

⁵⁵ Case C-144/04 Mangold v Rüdiger Helm (2005) ECR I-9981 at para 75-76.

⁵⁶ P. Craig & G. de Búrca, *EU Law: Text, Cases and Materials*, 4th ed., OUP, Oxford, 2008 at p. 412.

⁵⁷ Mazák AG Case C-411/05 Palacios de la Villa v Cortefiel Servicios judgment of 15 February 2007 and Sharpston AG Case C-277/04 P Lindorfer v Council judgment of 30 November 2006.

⁵⁸ J. Shaw, *The EU Constitution and Racism: New Legal Tools*, ENAR 2005.

not only emphasise that this principle applies to all the Union's institutions and bodies, but would develop links between this text and others, such as the rather restrictive rules on standing before the Court of Justice to bring actions to challenge measures adopted by the Union.⁵⁹ The provision may therefore have wide-reaching consequences for NGOs if it is properly used. One example in which an action might be generated could be if the Commission were to ignore inputs from civil society groups in relation to a measure.

Article 11 (4) TEU also adds a new measure which aims to enhance direct participatory democracy in the European Union: the right to propose a so-called 'citizens' initiative'⁶⁰ which enables citizens to require the Commission to initiate action in one of the areas of competence covered by the Treaty if at least one million citizens from any number of EU countries put forward such a proposal. The details of the scheme will, however, not be finalised until the Treaty has come into effect. Nonetheless, should the scheme be successful, it may have the potential to give NGOs and citizens fighting racism and discrimination in the European Union a direct voice in the Union's legislative process. It should however also be noted that the initiative may provide anti-EU, discriminatory, and xenophobic organisations with a voice as the initiative is to be open to all. NGOs combating discrimination, racism and xenophobia in the EU must therefore be vigilant following the introduction of the citizens' initiative.

4.5 Justice and Home Affairs, including migration

The Treaty of Amsterdam already marked a significant breakthrough for the European Union in the area of police and judicial cooperation in criminal matters. Article 29 TEU made specific reference to the prevention and combating of racism and xenophobia as an objective defined by reference to the area of freedom, security and justice. Copying article 29 TEU, article 67 TFEU confirms that "the Union shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia." However, there is no further reference to the prevention of racist and xenophobic crime and any reference to such crimes is omitted from the explicit list of areas of 'particularly serious crime with a cross-border dimension', contained

in article 83 TFEU to which qualified majority voting applies. Arguably, the fight against racism and xenophobia could be said to be an area where "the approximation of the 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"⁶¹. In this case the ordinary or special legislative procedure could be used in order to adopt directives laying down minimum rules with regard to the definition and sanctions applicable to the crimes concerned. However, this is not clear and, consequently, it remains to be seen whether the Lisbon Treaty makes progress in relation to the treatment of racist and xenophobic crime.

With the entry into force of the Amsterdam Treaty, member states also committed to working together to develop a common immigration and asylum policy, and since then efforts have been underway to formulate common EU rules. Most recently, in June 2008, the European Commission published a Communication on a common

"Article 79 TFEU requires the Union to develop a common immigration policy which ensures the fair treatment of third country nationals."

EU immigration policy and the EU member states, at the initiative of the French Presidency of the EU, adopted a "European Pact on immigration and asylum" in October 2008. The Commission also published in June 2009 a Communication entitled "An area of freedom, security and justice serving the citizens", which will serve as a basis for the future "Stockholm Programme" for justice and home affairs in the EU, due to be adopted by EU Heads of State and government at the end of 2009. There have also been a number of initiatives in the area of integration which have been taken at EU level. For example, in October 2002, the Commission set up the network of national contact points on integration to facilitate exchange of information and best practice among EU member states. However, migration and integration policies remain the subject of debate across the European Union.

In terms of migration, the Lisbon Treaty reduces national veto power on immigration and asylum policies. Qualified majority voting had already been applicable to a majority of the rights contained in Title IV TEC on Visa, Asylum, and Immigration, however, it had been excluded from immigration. Article 79 TFEU requires the Union to develop a common immigration policy which ensures the fair treatment of third country nationals.⁶² Qualified majority voting shall apply whenever legislative measures are adopted. This

59 J. Shaw, *The EU Constitution and Racism: New Legal Tools*, ENAR 2005.
60 Article 11 TEU and article 24 TFEU.

61 Article 83 (2) TFEU.

62 For more detailed information see Background Paper to ENAR Policy Seminar, *Framing a Positive Approach to Migration*, 6-7 November 2008.

is a positive development as it has the potential to encourage equal treatment of third country nationals. It makes it easier for the Union to adopt measures on a common immigration policy and paves the way for more flexibility as well as for more effective and democratic decision-making. Particularly article 79(4) TFEU may be significant as it enables the Parliament and Council to provide incentives and support for the action of member states with a view to promoting the integration of third country nationals. However, article 79(5) TFEU still gives member states the right "to determine volumes of admission of third-country nationals coming from third countries to their territory." This undermines the positive development for anti-racism work contained in the rest of article 79 TFEU as it potentially allows member states to discriminate at the stage of selection of third country nationals.

4.6 Institutional change

The Lisbon Treaty enhances the role played by national and European parliaments in order to provide for democratic legitimacy and representative democracy within the European Union. The Treaty of Lisbon gives the European Parliament a greater say over legislation by introducing the co-decision procedure as the norm as mentioned above. This is particularly significant as it opens the way for more democratic and transparent decision-making in the European Union. This development is also important for NGOs as it gives them the potential to play a greater role in the legislative process by lobbying Members of the European Parliament who now have a greater say over legislation.

National parliaments have, thus far, not had a formalised role in the European decision making process. The extent of their involvement has always depended on the individual member states. The Lisbon Treaty alters this by increasing and formalising the role of national parliaments in the legislative process. A new clause sets out the rights and duties of the national parliaments within the EU.⁶³ It deals with their right to information, the way they monitor subsidiarity, mechanisms for evaluating policy in the field of freedom, security and justice, and procedures for reforming the treaties. Most importantly, the clause gives national parliaments the power to enforce the principle of subsidiarity⁶⁴. Thus, EU legislation will be subject to scrutiny by national parliaments prior to its adoption. National parliaments can challenge EU legislation at this stage if it does not

conform to the principle of subsidiarity. Should one-third of national parliaments object to proposed legislation, it is given a so-called 'yellow card'⁶⁵ and is sent back to the Commission for review. An 'orange card'⁶⁶ refers to the scenario where a majority of national parliaments oppose a Commission proposal in which case, if they are able to secure the support of the Council and the Parliament, the Commission proposal is abandoned. This provides NGOs working at a national level with an opportunity to influence EU law-making through their national members of parliament.

Second, the Treaty expands the jurisdiction of the European Court of Justice and enhances access to the Court. Following the entry into force of the Lisbon Treaty the European Court of Justice will have jurisdiction to hear cases on all matters that fall within Union competence with the express exception of the common foreign and security policy⁶⁷. However, under article 275 TFEU, the Court does have limited competence to monitor compliance with the common foreign and security policy as set out in the Treaties.

It will also be easier for individuals to challenge an act of the European institutions such as a Directive or Regulation directly in the European Court of First Instance⁶⁸. Previously, under article 230 TEC, individuals were allowed to challenge an act of the European institutions in the Court of First Instance only if they could show that the act was of 'direct and individual concern' to them, a hurdle which caused many applicants to fail. In practice, therefore, individuals were virtually never allowed access to the European Court of First Instance. This was due to the strict interpretation of the Treaty provision by the Court⁶⁹ which makes it very difficult for individuals to challenge an act of the European institutions which they think may be contrary to EU law. Instead, the Court was of the opinion that individuals wishing to challenge an act of the European institutions should do so by asking a national court to make a reference to the ECJ for a preliminary ruling. The Court did not want to encourage individuals to bypass national courts. However, this posed problems whenever individuals, for various reasons, could not go to a national court. Not allowing individuals to access the Court of First Instance had the potential to deprive individuals of their fundamental right to judicial protection. The Treaty of Lisbon changes the phrasing of article 230 TEC with a view to easing the requirements

65 The Law Society of England and Wales, A guide to the Treaty of Lisbon, January 2008.

66 The Law Society of England and Wales, A guide to the Treaty of Lisbon, January 2008.

67 Article 275 TFEU.

68 This is an independent European Union Court of first instance which is attached to the European Court of Justice. Appeals can be brought from the Court of First Instance to the European Court of Justice.

69 See C-50/00 *Unión de Pequeños Agricultores v. Council* [2002] ECR I-6677 and T-177/01 *Jégo-Quéré v. Commission* [2002] ECR II-2365.

63 Article 48 TEU.

64 The principle of subsidiarity is defined in Article 5EC. It requires the Union not to take action (except in the areas which fall within its exclusive competence) unless it is more effective than action taken at national, regional or local level.

that individuals need to fulfil to gain access to the Court of First Instance. In the future, individuals will only have to show 'direct concern' which means that they have only to show that the measure that they are trying to challenge produces direct legal effects on them. There is no requirement of showing 'individual concern'. It is hoped that by deleting the requirement of individual concern, the Treaty will provide for effective judicial protection of individuals' rights at the EU level. However, it remains to be seen how loosely the Court will interpret this provision. In any case, it could be used by individuals and NGOs wishing to challenge the validity of European acts such as Directives and Regulations which are adverse to anti-racism and non-discrimination.

4.7 Accession to the ECHR

The Treaty of Lisbon gives the European Union legal personality thereby establishing it as an actor on the global stage.⁷⁰ Separate legal personality of the Union could have far reaching implications as it paves the way for the European Union to sign up to the European Convention on Human Rights should it wish to do so.⁷¹ The European Convention on Human Rights (ECHR) was adopted in 1950 by the Council of Europe⁷². It consists of eighteen articles and a number of protocols which aim to protect human rights and fundamental freedoms in Europe. The specific legal basis for accession of the EU to the ECHR is important, given that the Court of Justice concluded in its Opinion on Accession of the European Community to the ECHR that this was not possible under the article 308 TEC residual legal basis or any other provision of the EC Treaty as it stands.⁷³ Accession to the ECHR will require the Union first to join the Council of Europe, and that organisation's own legal instruments will need to be changed to permit another international organisation to come into membership. Accession however has the potential to increase the level of fundamental rights protection in the European Union and to make the EU and its institutions accountable to the European Court of Human Rights on matters arising under the European Convention on Human Rights. So far, article 6 TEU recognises that: "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the member states, shall constitute general principles of the Union's law."

⁷⁰ Article 47 TEU.

⁷¹ Article 6 TEU.

⁷² The Council of Europe was established in 1949 to foster human rights, democratic development, the rule of law and cultural co-operation in Europe. 47 States, including all member states of the European Union, are members.

⁷³ Opinion 2/94 [1996] ECR I-1759.

However, the Convention is not a source of EU law and the European Court does not rely directly on it in its judgments. Nonetheless, the European Convention on Human Rights and the case law of the European Court of Human Rights are often referred to by the ECJ in its judgments. Should the EU accede, the ECJ would be able to directly apply the Convention as part of EU law. It should be noted, however, that the Treaty and its Protocols do not provide for an extension of competences of the EU just by virtue of it joining the European Convention on Human Rights.⁷⁴ Moreover, should the EU join the Convention, provision will be made for preserving the specific characteristics of the EU and EU law.

4.8 Summary

The Lisbon Treaty introduces a number of institutional and legal changes in order to provide for more transparency, flexibility and democratic accountability. In doing so, the Treaty is much clearer on the values and objectives which underpin the framework of the EU. The principles of equality and non-discrimination feature prominently and repeatedly in the Treaty's core provisions but the Treaty fails, for the most part, to create new mechanisms for implementation of these principles. One exception is in the area of civil society for which the Treaty creates new ways of ensuring for increased representative and participatory democracy. Coupled with changes to the rules governing access to the European courts, this has the potential to give NGOs a platform from which to combat racism and xenophobia in the European Union. However, much of such a strategy's success will depend on the interpretation by the Court. Changes in the sphere of immigration and in the prevention of racist and xenophobic crime are also positive developments which should be applauded. However, third country nationals are still the subject of less protection from discrimination than EU citizens. Overall, the Lisbon Treaty does increase protection against racism and discrimination in the EU, however, it falls short of providing for a complete protection of fundamental rights in the EU especially as the mechanisms for implementation have not been greatly increased.

⁷⁴ Article 6 TEU.

5. The EU Charter of Fundamental Rights



Signature of the EU Charter of Fundamental Rights, December 2000 - © European Parliament

The Charter was first proclaimed in 2000 in Nice and was then incorporated into the failed Constitutional Treaty. Sparked by the 50th anniversary of the United Nations' 1948 Universal Declaration of Human Rights, a debate began regarding the need for a catalogue of fundamental rights in the European Union. In an effort to increase the visibility of fundamental rights in the European Union through consolidation in a comprehensive document, the process leading to the development and adoption of the Charter was launched.⁷⁵ The Charter's provisions have been influenced primarily by the European Convention on Human Rights but also by the EU Treaty, European Court of Justice case law, and the constitutional traditions of the member states. The Charter is contained in a separate document from the Lisbon Treaty but remains an instrument of soft law until the Lisbon Treaty enters into force. The Lisbon Treaty will give the Charter binding legal effect by the insertion of an amendment into article 6 which results in it having the same legal value as the Treaties. Despite this absence of legal effect so far, the European Court of Justice has referred to the Charter's provisions in an ever-growing number of cases.⁷⁶ It therefore remains to be discussed whether the Charter will add any value to fundamental rights protection and the fight against racism and discrimination in the European Union.

5.1 General overview

The purpose of the Charter is set out in its preamble: "It is necessary to strengthen the protection of fundamental

rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter." While the Charter does not extend the competences of the European Union, it for the first time sets out all existing rights from which persons residing in the EU can benefit in one document. While it does not purport to create new rights, the "fact that [the rights in the Charter] will have the same legal value as the EU treaties is significant because it will allow them to be recognised or interpreted in new ways that could bring positive benefits to individuals."⁷⁷ It therefore has important implications for the fight against racism, discrimination and inequalities in the European Union.

The Charter contains 54 articles which provide for a wide range of rights that are grouped into seven chapters: dignity, freedoms, equality, solidarity, citizens' rights, justice, and general provisions. The rights are derived mainly from the European Convention on Human Rights but also from other international conventions to which the European Union or its member states are parties. The Charter covers traditional human rights, drawn from the European Convention on Human Rights, such as the right to life and the prohibition of torture. It also sets out social and economic rights such as the right to fair and just working conditions, and the right to family life. Finally, it covers 'newer' rights such as the right of access to information, and the protection of personal data. However, it does not create rights for the protection of minorities. These are solely contained in the Lisbon Treaty (see above). Article 52 of the Charter provides that the interpretation to be given to its rights should be the same as their meaning and scope under the European

⁷⁵ ENAR, Fact Sheet 30: The Charter of Fundamental Rights of the European Union & The European Commission's Impact Assessment Procedure, December 2006.

⁷⁶ See, for example, Case C-540/03 European Parliament v Council judgment of 27 June 2006.

⁷⁷ The Law Society, A guide to the Treaty of Lisbon, January 2008 at p. 17.

Convention on Human Rights. One can, therefore, rely on the settled case law developed by the European Court of Human Rights under the Convention in order to interpret the rights contained in the Charter.⁷⁸

The Charter applies to the actions of the European institutions but also to the member states when implementing EC law.⁷⁹ Article 51 provides that: “The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the member states only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.” The Explanations drawn up as a way of providing guidance in the interpretation of the Charter of Fundamental Rights, which were originally prepared for the Praesidium of the Charter Convention in 2000, also suggest that member states must respect fundamental rights when they act in the scope of Union law.⁸⁰ The European Court of Justice confirmed this in recent cases such as *Omega*⁸¹. In *Omega*, Germany claimed that it derogated from EC free movement rules in order to protect fundamental rights. Germany had restricted the marketing in Germany of laser games which simulated the killing of human beings on the basis that it violated the right to human dignity. The ECJ upheld Germany’s claim by confirming that “both the Community and its member states are required to respect fundamental rights.”⁸²

Member states must therefore respect the fundamental rights set out in the Charter when applying and implementing provisions of EC law. Moreover, individuals may rely directly on the provisions of the Charter before the European Courts. This has led some member states to fear that their national systems of human rights protection was being threatened by the Charter. The UK and Poland have therefore secured a so-called ‘opt-out’⁸³ from the Charter which provides that the Charter “does not extend the ability of the Court of Justice of the European Union, or any other court or tribunal of Poland or of the UK, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the UK are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.”

Moreover, the opt-out guarantees that the Charter will not create any new justiciable rights, i.e. rights that can be relied upon in a court, in Poland or the UK. In the UK,

there was a worry that the Charter would create new social rights. In particular, there was a fear that the Charter would threaten the UK’s labour market flexibility and would overturn its more rigid laws governing unions.⁸⁴ In Poland, the opt-out was prompted by a dislike for the Charter’s “supposed liberalism on moral issues”⁸⁵ such as abortion. Arguably, however, the Charter never intended to create new fundamental rights, such as a general right to strike, under national law as it applies only when governments are applying EC law. The implications of the opt-out are discussed in more detail below.

The provisions of the Charter go beyond those of the European Convention on Human Rights in that it is of a wider scope and expands on the right of access to the law. It codifies all the personal, civil, political, economic and social rights bestowed upon citizens of the European Union. In terms of non-discrimination, the Charter is progressive in scope and language in that it prohibits “any discrimination on any grounds such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation.”⁸⁶ While this article is similar in its wording to article 19 TFEU, it is wider and open-ended in scope. Thus, it prohibits “any discrimination on any grounds such as...” Moreover, it directly prohibits discrimination which article 19 TFEU does not. However, since the Charter of Fundamental Rights is limited in its application to the Union and to the member states, it seems unlikely that individuals will be able to base claims to equality rights directly on the Charter’s provisions with regard to the actions of other private parties. This is supported by the fact that the Charter does not extend the competences of the European Union. In other words, it would not appear at first sight that the effect of the Charter will be to widen the application of the various equality directives.⁸⁷ However, it has been argued that the existence of certain types of rights at the Union level, including rights to non-discrimination and equality, can have very significant effects in the long term.⁸⁸

The European Union has, over the years, developed numerous anti-discrimination policies. However, as mentioned above, these were spread across Directives, the Treaty, and case law. In contrast to this scattered regime applicable to non-discrimination and human rights prior to the introduction of the Lisbon Treaty, the Charter provides for a progressive and all-inclusive protection of citizens’ rights in the European Union. Its implications for the fight against racism and xenophobia across the European Union could therefore

78 See also the Text of the explanations relating to the complete text of the Charter as set out in CHARTE 4487/00 CONVENT 50, Brussels, October 2000.

79 The ECJ has confirmed that member states must respect fundamental rights (Case C-292/97 *Karlsson and Others* judgment of 13 April 2000).

80 The text here refers to Case 5/88 *Wachauf* [1989] ECR 2609; Case C-260/89 *ERT* [1991] ECR I-2925; C-309/96 *Annibaldi* [1997] ECR I- 7493.

81 Case C-36/02 *Omega v. Oberbürgermeisterin der Bundesstadt Bonn*, judgment of 14 October 2004.

82 Case C-36/02 *Omega v. Oberbürgermeisterin der Bundesstadt Bonn*, judgment of 14 October 2004.

83 The Protocol establishing the opt outs is available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:306:0156:0157:EN:PDF>

84 UK wins opt out on charter of fundamental rights - draft treaty, 22/6/2007 available at www.forbes.com/feeds/afx/2007/06/22/afx3850256.html.

85 Poland to join UK in EU rights charter opt out, 7/9/2007 available at <http://euob-server.com/9/24723>.

86 Article 21 Charter of Fundamental Rights.

87 J. Shaw, *The EU Constitution and Racism: New Legal Tools*, ENAR 2005.

88 J. Shaw, *The EU Constitution and Racism: New Legal Tools*, ENAR 2005.

be wide-reaching. However, a more detailed examination of the provisions is necessary in order to determine their precise implications for anti-racism.

5.2 Provisions

Chapter one of the Charter entitled ‘dignity’ contains a catalogue of primary rights such as the right to life, the prohibition of torture and slavery, from which no derogation is permissible. They apply to individuals as human beings and protect them from interference by the State or by other persons. The chapter also introduces a right hitherto absent from international human rights texts: the right to the integrity of the person contained in article 3. This is in response to contemporary concerns in the sphere of biology and medicine and, as a result, the article provides comprehensive protection against any sort of interference for medical or scientific reasons.

Chapter two of the Charter entitled ‘freedoms’ brings together 14 articles (articles 6-19) which vary in scope and content but all guarantee individuals certain rights upon which the state may not encroach: right to liberty and security, respect for private and family life, protection of personal data, right to marry and right to found a family, freedom of thought, conscience and religion, freedom of expression and information, freedom of assembly and of association, freedom of the arts and sciences, right to education, freedom to choose an occupation and engage in work, freedom to conduct a business, right to property, right to asylum, and protection in the event of removal, expulsion or extradition. The European institutions and the member states are bound to respect these rights and freedoms, and, according to article 52 of the Charter, no limitations may be placed upon them except in cases of ‘general interest’. According to article 52(3) of the Charter the rights and freedoms contained in the chapter are to be given the same meaning as the corresponding provisions in the European Convention on Human Rights. Other rights, such as the protection of personal data (article 8) are included for the first time in a human rights document as a right in and of itself. The European Court of Justice has not had to interpret this provision. However, according to the European Court of Human Rights, who deduces the right from the right to respect for private life (article 8 ECHR), personal data may only be stored if the action pursues a legitimate aim.⁸⁹

⁸⁹ Leander v. Sweden, 26 March 1987, 9 EHRR 433.

The most important provisions for the fight against racism and discrimination in the European Union are contained in chapter three of the Charter on ‘equality’. Articles 20-26 contained therein set out the principle of equality before the law and the content of the right to equality. While these articles primarily aim to abolish all forms of discrimination, they also provide the broader basis for all other rights in the Charter. Thus, without the principle of equality no other rights can be guaranteed. Article 21 therefore contains an absolute prohibition on all forms of discrimination whether direct or indirect.⁹⁰ This is elaborated upon by articles 23-26 which recognise specific groups where positive action, such as the adoption of measures providing for specific advantages in favour of the groups mentioned in articles 23-26, may be used in order to achieve equality. These groups include women, children, the elderly and persons with disabilities. The Charter provides for unequivocal rights of equality in both public and private relationships. Therefore, articles 20-26 may be invoked against a public authority or against another individual. However, since the Charter of Fundamental Rights is limited in its application to the Union and to the member states, it seems unlikely that individuals will be able to base claims to equality rights directly on the Charter’s provisions with regard to the actions of other private parties. In other words, it would not appear at first sight that the effect of the Charter will be to widen the application of the various equality directives, where the difficulty arises from time to time that provisions of directives are only enforceable

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

directly against the organs of the member states, and not against other private parties. Also, the rights, at first sight, apply to all persons in the European Union regardless of their nationality with the exception of article 21(2) which prohibits discrimination on grounds of nationality. In keeping with the EC Treaty this provision only applies to EU nationals. The

rights created in this chapter are not new rights as such. However, they have not so far been enshrined in Community law in such a clear and unambiguous form. The provisions can therefore form the basis of concrete actions by NGOs working in the field of anti-discrimination and anti-racism. The remedies provided by the Charter also ensure that the equality rights can be relied upon before a court.

Chapters four and five of the Charter bestow so-called ‘solidarity’ and ‘citizens’ rights’. Chapter four brings together all social rights recognised in the Union and, in doing so,

⁹⁰ Article 21: Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.

goes much further than the European Convention on Human Rights which only mentions freedom of association as a fundamental social right. Prior to the Charter, the non-binding Community Charter on the Fundamental Social Rights of Workers, adopted in 1989 by eleven member states, encouraged recognition of these rights. Moreover, the Agreement on Social Policy included in the Treaty of Amsterdam in 1997 (articles 136 and 137 EC) provides that the Community shall “support and complement the activities of the member states in areas which are also included in this chapter of the Charter (health and safety of workers, working conditions, information and consultation of workers, integration of people outside the labour market, equality of men and women), with the possibility of adopting directives which fix minimum requirements for gradual implementation.” The Charter recognises this nature by placing fundamental social rights alongside more easily recognisable fundamental rights such as the right to life⁹¹ or the prohibition of torture⁹². In this it is exceptional as it is the first international document to recognise the indivisibility of human rights by placing civil, political, social, cultural and economic rights on the same level. However, the Charter does not require member states to respect a minimum level of social protection. The extent to which the chapter on solidarity rights will be useful in practice is therefore in doubt as the legal force of the rights granted in the Charter depends on implementation by national governments.

5.3 Citizenship and third country nationals

The eight provisions making up chapter five of the Charter stand in stark contrast to the rest of the Charter as they only apply to European citizens. This is the same principle as that guiding article 21(2) which prohibits discrimination on grounds of nationality as between EU citizens. Chapter five contains political rights and rights concerning administration. In terms of political rights, the right to vote and to stand as a candidate at elections to the European Parliament (article 39) and at municipal elections (article 40) are “the expression of the principle of democracy transposed to fit the reality of the European Union.”⁹³ The right to good administration (article 41) was initially developed by the European courts and has been ‘codified’ by the Charter. The obligation to give reasons for decisions, the right to have the Community make good any damage and the right to communicate with the Union in one of the languages of the Treaties reproduce the provisions of the EC Treaty. For the most part, this chapter copies, in identical terms, the European Union’s existing rights concerning the definition of European citizenship.

⁹¹ Article 2.

⁹² Article 4.

⁹³ European Parliament Committee on Citizens’ Freedoms and Rights, Justice and Home Affairs, Charter of Fundamental Rights of the European Union, available at http://136.173.159.21/compar/libe/elsj/charter/default_en.htm.

The chapter’s contribution to an enhanced protection against discrimination and racism in the European Union is, therefore, relatively limited.

However, the exclusion of third country nationals from the rights guaranteed in this chapter is seen as a disappointment by NGOs campaigning for equality between EU citizens and third country nationals. As ENAR points out, third country nationals enjoy neither freedom of movement nor the right to settle; under Community law they do not have the right to all the social and economic benefits granted by the member states to their nationals; they do not have the freedom to have access to economic activities in the territory of the European Union, nationals of the European Union may be favoured over them. Community law does not guarantee them the same conditions for exercising their activities or the same living conditions as nationals of the host member state, neither does it guarantee them equal treatment in the area of social protection. Moreover, third country nationals do not enjoy the political rights that are accorded to European Union nationals, they do not have the right to vote or to stand as a candidate in local or European elections in the host member state.⁹⁴ Even though the majority of rights contained in the Charter ensure for equality between EU citizens and third country nationals, this omission has the consequence that third country nationals are still treated less favourably than EU citizens.

5.4 Enforceability

The Preamble of the Charter indicates that the rights contained therein are to be enforceable. This means that individuals and NGOs can rely upon them and can hold European institutions accountable for a breach of the rights. The Charter also places an emphasis on the provision of remedies and justice in the case of a breach of its rights. By applying human rights to EU bodies in their actions, the Charter marks a decisive step forward from the Amsterdam Treaty. The Amsterdam Treaty, as mentioned above, did not grant individuals any fundamental rights. Instead, it established procedures which ensured that rights were protected and guaranteed in the EU. The Directives which were passed following Amsterdam are examples of the successful operation of these procedures.

Fundamental rights protection in the EU prior to the Lisbon Treaty was guaranteed under the banner of ‘general principles’ which EU bodies must abide by when they act. The Charter, once it comes into effect, has the potential to alter this by putting all rights on the same level in terms of their importance. Individuals and NGOs will also be able to rely directly on the rights contained in the Charter in front of a court. This creates certainty as to what rights are guaranteed

⁹⁴ ENAR, The Charter of Fundamental Rights - Response of the European Network Against Racism, December 2000.

in the EU. However, so far, the Charter has not become legally binding. Nonetheless, some commentators have suggested, in relation to social rights, that so-called 'new governance' approaches such as the open method of coordination and mainstreaming might be the most appropriate mechanisms for the enforcement of the rights contained in the Charter.⁹⁵ This would mean that the rights in the Charter would be filtered into EU policy through various mechanisms. Alternatively, the provisions of the Charter could be seen as minimum objectives which governments at the national and EU levels should pursue. If this is the case, then the social rights would be interpreted as minimum levels of protection which cannot be undercut. Moreover, despite the restriction contained in article 51(2) of the Charter which prescribes that the Charter does not create any new competences for the EU (for example in the field of social policy which was a fear of the UK and Polish governments), it may be that the mere existence of certain types of rights at the Union level, including rights to non-discrimination and equality can have very significant effects in the long term especially if they are seen to be filtering into national law.

So far as concerns the fight against racism and xenophobia, one important contribution of the continued existence of the Charter of Rights alongside the Lisbon Treaty is the unambiguous confirmation that the right to non-discrimination on grounds of racial or ethnic origin constitutes a fundamental right. It can therefore be used by NGOs working the field of anti-discrimination and anti-racism as a tool to lend weight to their arguments.

In the Charter itself, article 41 contains a general provision on the right to good administration by institutions and bodies of the European Union. In the case of a breach of this right, the article provides for redress by requiring the Community to "make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the member states."⁹⁶ This could be of use in the case of acts of discrimination by Community institutions. Moreover, article 43 of the Charter allows any natural or legal person residing or having its registered office in a member state to refer cases of maladministration by Community institutions or bodies to the Ombudsman. This provision could be used by NGOs working in the field of anti-racism and non-discrimination who have their registered office in a member state of the European Union in order to obtain redress for themselves or those who they represent.

⁹⁵ See, for example, N. Bernard, 'A 'New Governance' Approach to Economic, Social and Cultural Rights in the EU', in T. Hervey and J. Kenner (eds.), *Economic and Social Rights under the EU Charter of Fundamental Rights. A Legal Perspective*, Oxford: Hart Publishing, 2003.

⁹⁶ Article 41 (3).

Article 47 goes even further in scope by providing that "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice." In its content article 47 is based on article 13 of the European Convention on Human Rights. However, it is broader in scope. Article 13 ECHR has allowed "potential victims access to justice when they face the imminent threat of irreparable harm."⁹⁷ The European Court of Justice is likely to interpret the Charter in an equally broad way as it has already highlighted the importance of access to justice in confirming in its case law that access to justice is "one of the constitutive elements of a Community based on the rule of law."⁹⁸ It is therefore important to note that victims of discrimination and racism are entitled to redress under the Charter. However, as the Charter is only intended to apply to the European institutions and member states when applying EC law, the effects of the provision may be limited in scope. The Charter does not, therefore, provide for an all-encompassing right to redress in the case of a breach of fundamental rights.

5.5 The ECJ and its case law

There have already been indications in case law that the ECJ supports the rights contained in the Charter. So far, no case brought before the European courts has been decided on the basis of the Charter. However, since first citing the Charter in a judgment given in 2006⁹⁹, the Court has continued to refer to the provisions of the Charter in subsequent judgments. Moreover, applicants to the Court are increasingly making reference to the Charter to buttress their arguments.¹⁰⁰

For example, in the recent Viking and Laval cases¹⁰¹ where the Court was asked to balance the fundamental right to strike with free movement provisions guaranteed by the EC Treaty the trade unions involved placed an emphasis on the social rights contained in the Charter which

⁹⁷ D. Shelton, 'Remedies and the Charter of Fundamental Rights of the European Union' in S. Peers & A. Ward (eds.), *The European Union Charter of Fundamental Rights*, Hart, Oxford, 2004 at p. 357 citing the Soering case 11 EHRR 439 (1989).

⁹⁸ Joined Cases T-377/00, T-379/00, T-380/00, T-260/01 and T-272/01 Philip Morris January 15 2003.

⁹⁹ Case C-540/03 European Parliament v Council judgment of 27 June 2006.

¹⁰⁰ See, for example, Case T-127/09 (Action brought on 15 April 2009) Abdulrahim v Council and Commission.

¹⁰¹ C-438/05 The International Transport Workers' Federation and The Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti ECR [2007] I-10779; C-341/05 Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundet avd. 1, Byggettan, Svenska Elektrikerförbundet judgment of 18 December 2007.

grant a fundamental right to collective action. Although the Court did not rule in their favour, it emphasised the fundamental nature of the right to take collective action and, as authority, cited the Charter of Fundamental Rights. This thus allows trade unions in future to rely on a fundamental rights argument in cases where their right to take collective action is doubted. This may be of particular significance in countries where the right to strike is not legally recognised, such as the UK. Similarly, NGOs working in the field of anti-discrimination and anti-racism may invoke the provisions of the Charter before the ECJ in order to add weight to any argument opposing discriminatory and racist practices.

Other cases such as *Omega*¹⁰² mentioned above further illustrate that the Court is willing to uphold fundamental rights in the EU even if this means derogating from the EC free movement rules which are at the very core of the EU's policy. In an earlier case, *Schmidberger*¹⁰³, the Court also recognised the importance of fundamental rights in the face of EC free movement rules. *Schmidberger* concerned a conflict between the right to free movement of goods and the right to freedom of expression. In its decision, the Court considered that the underlying interests of both freedoms should be balanced in order to reach a proportional outcome. It should be noted that *Omega* and *Schmidberger* were decided without reference to the Charter. This did not, however, stop the Court from making reference to fundamental rights arguments in its decisions. It is to be hoped that this position will be strengthened once the Charter comes into force meaning that the Charter can be effectively relied upon by victims of discrimination and racism.

5.6 Opt-out

The opt-out secured by Poland and the UK complicates the matter of the applicability of the Charter somewhat. However, the exact nature and effect of the Protocol granting the opt-out will continue to remain unclear until the Charter is given legal effect with the entry into force of the Lisbon Treaty. The opt-out was initially secured amid fears that the Charter would create new, broad social rights for individuals which they could enforce in UK and Polish courts. However, as the Charter only applies when member states are acting in the scope of Union law this fear is unfounded. Equally, Poland and the UK must comply not only with the TEU and the TFEU but also with judgments issued by the ECJ. As the ECJ continues to refer to the Charter in its judgments it is only a matter of time before difficult questions as to the extent of the opt-out arise.

¹⁰² Case C-36/02 *Omega v. Oberbürgermeisterin der Bundesstadt Bonn*, judgment of 14 October 2004.

¹⁰³ Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich*, judgment of 12 June 2003.

Indeed, the *Viking* case mentioned above was referred to the ECJ by an English court. The judgment by the ECJ has implications for the future interpretation of the right to strike by national courts in the UK as the ECJ recognised, on the basis of the Charter, that trade unions and their members have a fundamental right to strike to protect their jobs. However, a fundamental right to strike does not exist in the UK and it would have been interesting to observe the English court deciding the *Viking* case on the basis of a right drawn from the Charter of Fundamental Rights. This would have given some indication as to how courts may deal with the ECJ's judgment in future. However, this opportunity did not present itself as the case was settled out of court following the judgment by the ECJ.¹⁰⁴

5.7 Summary

The Charter of Fundamental Rights represents a codification of all the existing rights applicable to persons residing in the European Union. It contains a wide range of rights of which some, such as the protection of personal data, are new and innovative. Moreover, the Charter is progressive in scope and language when it comes to the right to non-discrimination. However, the Charter omits references to the rights of minority groups and excludes third country nationals from certain rights even though the majority of rights in the Charter are applicable to everybody residing in the European Union. Most importantly, the Charter, once it comes into effect, will have the same legal value as the EU Treaties. It does not, however, extend the competences of the European institutions. Moreover, its scope is limited to the European institutions and the member states when they are implementing EC law. It is therefore unclear to what extent it will benefit individuals in the member states who are seeking to rely on the rights against another private party. As the provisions of the Charter, once it comes into effect, can be relied upon by individuals and NGOs in a court it may prove to be very useful in the protection of fundamental rights. The ECJ has so far reacted positively to the Charter even though it is not yet legally binding. It is to be hoped that the ECJ will continue to protect and enforce the provisions of the Charter. The opt-outs secured by Poland and the UK, in theory, represent a set-back for the Charter but it is doubtful that the opt-outs will have a negative effect in practice. Overall, therefore, the Charter should be rated as a very positive development for the protection of fundamental rights in the EU.

¹⁰⁴ M. Murphy, 'Finish shipping group settles case over cheap labour' *Financial Times* 04/03/2008.

6. Advocacy strategy recommendations for NGOs seeking to combat racism and discrimination in the European Union

1. While the Treaty of Lisbon does not create any new non-judicial remedies, it does focus to a greater extent on citizens and their rights and therefore reiterates a number of **non-judicial remedies** which may assist in combating racism and discrimination in the European Union. In addition, the remedies have the advantage of being less costly and time-consuming than, for example, legal proceedings at a national or European level. Non-judicial remedies include:
 - a. **Petitions before the European Parliament:** These can be brought by any natural or legal person present in the EU as long as the subject matter of the petition falls within the EU's sphere of activity.
 - b. **Complaints to the European Commission:** Any EU citizen or legal person present in the EU can make a formal complaint to the Commission in cases where a misapplication of EU law is suspected.
 - c. **Access to documents:** The 'access to documents' regulation¹⁰⁵ allows natural or legal persons present in the EU to request documents from the Parliament, Council and Commission.
 - d. **European Ombudsman:** This position was already created by the Treaty of Maastricht in 1992 but has been reiterated in the Lisbon Treaty. Complaints can be directed to the Ombudsman who deals with maladministration by EU institutions. In response, he can initiate an investigation of the institution accused of the rule breach.
2. The emphasis on **dialogue with civil society** opens up new ways for NGOs to become involved in EU policy making. Specifically, the citizens' initiative enables individuals to lobby the Commission to initiate legislation on a specific measure. This could be used by NGOs working in the field of racism and non-discrimination to advance policy issues if sufficient public support can be gathered.
3. The **strengthened role of the European Parliament** paves the way for more democratic and transparent decision making in the European Union. The enhanced role for the European and national parliaments opens up opportunities for individuals and NGOs to influence EU law-making through their MEPs and national representatives on issues of concern.
4. The Lisbon Treaty keeps the **equality mainstreaming clause** first introduced by the Constitutional Treaty which aims to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. This is an important step forward for the European Union as the incorporation of equality mainstreaming, including the mainstreaming of anti-racism, in the Lisbon Treaty, represents a significant strengthening of the existing legal basis for current practices and for policy making.
5. The **non-discrimination rights** contained in articles 18-25 TFEU are not new and the provisions are a mere reiteration of articles contained in the TEC. However, the Treaty of Lisbon places these provisions on non-discrimination within a context of increased rights for European citizens and thus strengthens the already existing protection from discrimination through the adoption of the Charter of Fundamental Rights. In terms of non-discrimination, the Charter is progressive in scope and language and, once it becomes legally binding, it can add substantial weight to any claims of discrimination brought by NGOs in a court.
6. Increased and **easier access to the European Court of Justice** enables NGOs and individuals to bring an action challenging European acts that do not comply with procedure (such as the requirements for dialogue with civil society) and/or the principles of non-discrimination. All acts of the European Union must comply with the principles of non-discrimination as enshrined in the Charter of Fundamental Rights and the Lisbon Treaty. Any act that does not is open to challenge before the European Court of Justice. Arguments brought before the European Court of Justice will benefit from being based upon provisions of the Charter of Fundamental Rights.
7. Even though the **Charter of Fundamental Rights** is not yet legally binding it has been used in support of arguments in front of the European Court of Justice. NGOs should therefore be encouraged to use the Charter in the fight against racism and xenophobia as the ECJ has been supportive of the use of the Charter.
8. The Lisbon Treaty opens up the possibility of the **European Union acceding to the European Court of Human Rights** should it wish to do so. This has the potential to increase the level of fundamental rights protection in the European Union and to make the EU and its institutions accountable to the European Court of Human Rights on matters arising under the ECHR.

¹⁰⁵ Article 255EC, implemented through Regulation 1049/2001 of 30 May 2001, grants a right of access to European Parliament, Council and Commission documents to any Union citizen and to any natural or legal person residing, or having its registered office, in a member state.

7. Conclusion

The aim of this publication was to explain the changes brought about by the Lisbon Treaty and to analyse the implications of the Lisbon Treaty and its Charter of Fundamental Rights for combating racism and xenophobia in the European Union. There have been a number of positive developments since the Treaty of Amsterdam which marked the departure point for real progress to be achieved in the establishment of comprehensive protection against racism and discrimination. It was not only the text of the Treaty of Amsterdam which made a substantial difference, but also the manner in which it was implemented.

The Lisbon Treaty provides NGOs with a number of new, particularly non-judicial, mechanisms to combat racism and xenophobia in the European Union. There is also hope that the European Parliament will evolve into a democratic motor for the Union and for Union policy-making. Moreover, the provisions of the Treaty provide increased opportunities for individuals and civil society groups to become more involved in EU decision-making. Yet overall, the Lisbon Treaty provides few real innovations with the exception of the Charter of Fundamental Rights.

The codification of fundamental rights guaranteed in the European Union is an important step for the Union itself and reinforces the European Union's respect for democracy, human rights and fundamental freedoms. The European Court of Justice has confirmed its support in upholding the Charter and there is hope that it will lay the foundations for a comprehensive protection of fundamental rights in the European Union. Overall, the Lisbon Treaty and its Charter have the potential to have a positive impact on the prevention of racism and xenophobia in the European Union, however, they do not create comprehensive protection. As a result, gaps still remain.

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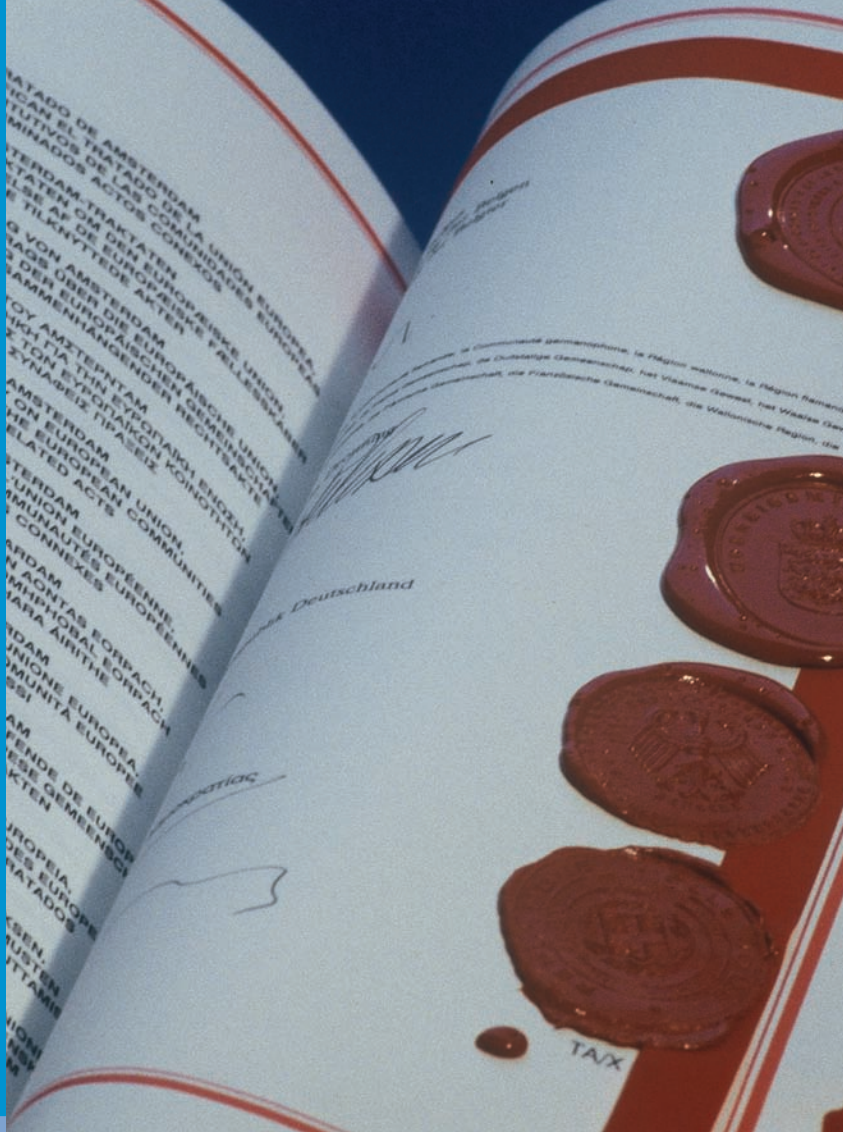
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9. Abbreviations

EC	European Community
ECHR	European Court of Human Rights
ECJ	European Court of Justice
EEC	European Economic Community
ENAR	European Network Against Racism
EU	European Union
EUMC	European Monitoring Centre on Racism and Xenophobia
FRA	European Fundamental Rights Agency
MEP	Member of the European Parliament
NGO	Non-governmental organisation
TEC	Treaty establishing the European Community
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom



The EU Lisbon Treaty: What implications for anti-racism?

Anti-racism policy in the European Union has evolved since the mid-1990s from scattered policies contained in a wide range of documents to a more comprehensive protection. However, there is still scope for improvement and the question that must be asked is whether the Lisbon Treaty contributes to the protection of fundamental rights in the European Union. This publication describes and assesses the Lisbon Treaty's impact on fundamental rights protection.

The European Network Against Racism (ENAR) consists of some 600 organisations working to combat racism in all EU member states and acts as the voice of the anti-racist movement in Europe. ENAR is determined to fight racism, racial discrimination, xenophobia and related intolerance, to promote equality of treatment between European Union citizens and third country nationals, and to link local/regional/national initiatives with European Union initiatives.



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