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THE LISBON EUROPEAN UNION REFORM TREATY IMPACT ON ASYLUM AND IMMIGRATION POLICY

Summary

Introduction

1. This article describes the changes proposed in the powers and procedures of the EU institutions for deciding European policy on asylum and immigration questions in the new European Reform Treaty (The Lisbon Treaty), signed by Gordon Brown in Lisbon on 18th October 2007. I also try to assess how these changes will affect the UK's freedom of manoeuvre in deciding its own policies in these two areas.

2. The main focus of the article is on the ways in which the Lisbon Treaty increases the powers of the EU institutions to decide and enforce policy in these two areas and how the UK will be affected by these changes. The article does not enter into much detail on the EU's current or likely future proposals on asylum and immigration issues. This may be the subject of a subsequent article. I comment in the final section of the main report on the case for the EU having powers to legislate on these issues. But I express no views on the merits of either the EU's or the UK's policies on asylum and immigration.

(a) Main Characteristics of the Lisbon Treaty

3. The Lisbon Treaty, although very different in form, is (except on foreign policy) virtually identical on all matters of substance to the European Constitution, which it replaces following the latter's rejection by French and Dutch voters in their referendums in 2005.

4. The new Treaty transfers powers from the Member States to the EU institutions in four main ways:

- The creation of new, or the expansion of existing, EU powers to legislate ("EU competences");
- The substitution of Qualified Majority Voting (QMV) for unanimity in all areas of policy, except for taxation, social security, foreign policy, security and defence, some key EU budgetary issues (including the UK's budget rebate) and one specific area of policy relating to asylum and immigration controls;
- Changes in the weighted voting system for determining Qualified Majorities within the Council of Ministers, which from 2014 onwards will make it more difficult for Member States to form "blocking minorities" to influence EU legislation;
- The incorporation in the Treaty of the Charter of Fundamental Rights (CFR), which contains 50 political, justicial, economic and social rights. This will give the European Court of Justice (ECJ) wide powers to interpret the standards to be followed by the EU institutions in making EU law and by the Member States in implementing it and in some cases in their national law.

(b) Asylum and Immigration

(i) General

5. All the four types of Treaty change just described will affect the future making and implementation of EU policies relating to asylum and immigration, which are now contained within a part of the Treaty entitled “The Area of Freedom, Security and Justice”. The new Treaty, however, also retains, with some amendments (discussed in more detail in the main report), the UK’s two existing “opt-outs” from both the Schengen agreement on the removal of internal frontier controls and from the asylum and immigration provisions of the Treaty of Amsterdam.

(b) (ii) EU Competences in Asylum and Immigration

6. The Lisbon Treaty significantly widens the EU’s competences for asylum and immigration questions. First, the Treaty now sets the EU the specific aim of developing “common policies” for both asylum and immigration (legal as well as illegal) and accordingly empowers it to legislate for “uniform standards” (as opposed to the “minimum standards” provided for in the Amsterdam Treaty) and for “the gradual introduction of an integrated management system for external borders.” Second, the Treaty widens the EU’s power to legislate to define all the rights of third country immigrants legally resident in one Member State, including their rights to move to and reside in other Member States. Virtually, the only major policy decision left in the hands of Member States is that of deciding how many nationals from non-EU countries it is prepared to admit directly from third countries. In short, the Lisbon Treaty gives the EU almost as much power over asylum and immigration issues as the CAP gives it over agricultural policy.

7. In addition, the Lisbon Treaty removes restrictions in the Amsterdam Treaty on the ECJ’s jurisdiction over asylum and immigration policy, which effectively prevented immigration cases from being brought before the ECJ until they had been taken to the highest court in the Member State concerned. Again, however, our opt out provides that no ECJ judgements interpreting any legislation passed under the asylum and immigration sections of the Treaty would apply to the UK, unless we had opted into those measures. However, our opt-out would not necessarily protect us from judgements, which might be made by the ECJ on immigration and asylum rights, relying solely on the provisions of the CFR.

(b)(iii) Qualified Majority Voting

8. The Lisbon Treaty removes all national vetoes over all asylum and immigration decisions. In December 2004 the UK agreed to give away the vetoes over asylum and illegal immigration issues, but did not agree to remove the veto on legal migration questions. This too has now been given up. From 2014 onwards the changes in the Council’s voting system will make it more difficult for the UK to protect its interests in all policy areas where QMV applies. These two changes could significantly affect the UK’s decisions on whether to opt in to new legislation on asylum and immigration. Whenever the UK decides to opt in, it will therefore have to face the risk that it may be outvoted during the negotiations on points it regards as vital.

(b)(iv) The Charter of Fundamental Rights (CFR)

9. The CFR sets out 50 “fundamental” political, juridical and economic and social rights, drawn from a variety of sources, including the European Convention on Human Rights (ECHR). The Charter states that its provisions “are addressed to the institutions.....of the Union and to the Member States only when they are implementing Union law.” The CFR itself is given the same status as a Union Treaty, with the proviso that nothing in it extends the competences of the Union. The CFR contains a number of provisions, which might in principle be invoked in relation to aspects of asylum and immigration policy. For example, Article 19(2), following the ECHR, prohibits extradition to a State where there is a serious risk of being subjected to death, torture or other inhuman or degrading treatment. Other articles in the CFR set out in more detail below could affect Member States’ rights to impose restrictions on

immigrants being joined by spouses or other family members and to discriminate against immigrants in matters of social security, social housing etc.

10. The impact of these and other CFR provisions is very difficult to assess, because their meaning will ultimately depend on how the ECJ interprets them in particular cases. In the case of the UK and Poland the ECJ also has to interpret a Protocol they negotiated on how it will apply in their courts and how it might affect their national legislation. The Protocol certainly does not provide an “opt-out” from the CFR for the UK and Poland, but it does appear to offer an assurance that the articles on economic and social rights in its Title IV will be interpreted cautiously by the ECJ. But the UK and Poland will still be exposed to the risks of cases against them being referred to the ECJ on the grounds that, in implementing Union law, they have infringed rights and principles embodied in the CFR, though the UK’s opt-out from asylum and immigration legislation explicitly protects us from ECJ judgements relating to legislation from which we have opted out. Moreover, it is possible that the ECJ could take the view that some CFR provisions create “directly effective” rights, even in the absence of EU legislation, and in this event the UK and other Member States could face challenges on the grounds that their national legislation or practices breach these provisions.

(b)(v) Overall Assessment

11. The main impact of the Lisbon Treaty’s provisions on the UK’s policies on asylum and immigration is that the UK’s decisions on whether or not to opt-in to new EU legislative proposals will become more problematic now that all such legislation will now be decided by QMV. HMG will need to balance the potential advantages of co-operating with other Member States against the risk of being outvoted in the Council of Ministers. We are likely to be faced with particularly awkward decisions when the Commission proposes to amend previous asylum or immigration or asylum decisions we have previously opted into and we dislike the amendments proposed. We may then be faced with losing the benefits of our previous opt-in. A possible amendment, recently aired by the Commission, to amend the Dublin Convention to provide for burden-sharing between Member States in receiving immigrants is an example of this dilemma.

12. However, even if the UK adopted a firm policy of opting-out of all new EU legislation on asylum and immigration matters, there are still other ways in which the provisions of the Lisbon Treaty could affect the UK’s policy in these areas. First, as noted above, the Treaty could lead to our courts referring to the ECJ more cases involving appeals by asylum seekers against decisions by the UK authorities to refuse them admittance or to repatriate them. Second, if we decide to opt out of any EU proposal to define the rights of third-country residents residing in one Member State to move to and reside, we would be faced with a potentially difficult negotiation with other Member States on what access we would give to this category of migrant. Last, but not least, the UK’s general room for manoeuvre on a range of immigration issues could be narrowed if the ECJ decides that some of the relevant rights contained in the CFR have “direct effects” rights for immigrants or their families.

THE LISBON EUROPEAN UNION REFORM TREATY IMPACT ON ASYLUM AND IMMIGRATION POLICY

Main Report

(a) General nature of the Lisbon Treaty

The Lisbon Treaty, agreed by Gordon Brown and the other Heads of State and Government in Lisbon on 18th October, is (except on foreign policy) virtually identical on all matters of substance in both language and meaning to the draft European Constitution, which it replaces following the latter’s rejection by French and Dutch voters in their referendums in 2005. “Open Europe” (www.openeurope.org.uk), an independent think-tank, which is campaigning for a referendum on the Lisbon Treaty, has estimated that 96% of the provisions in the new Treaty correspond exactly to provisions in the draft Constitution. In form the Lisbon Treaty is much more difficult to read than the draft Constitution, since it consists of a series of

amendments to the EU's two earlier treaties, the Treaty on European Union (the TEU) and the Treaty establishing the European Community (the TEC), though the latter is now renamed the Treaty on the Functioning of the European Union (TFEU). In contrast, the draft Constitution was a self-contained document.

2. The stated purpose of the Lisbon Treaty (and of the Constitution) is to make the EU institutions more "efficient" to enable the EU to cope more easily with its enlargement from 15 Member States to 27 currently and potentially to well over 30. The authors of the Treaty interpret this remit to mean that they should make it easier for the enlarged EU to pass new legislation, although independent research suggests more new EU legislation has gone through at a faster rate, since the enlargement of the EU to 25 and subsequently to 27.

3. The new Treaty proposes the following main changes, which transfer powers from the Member States to the EU institutions in a variety of different ways: -

- The creation of new, or the expansion of existing, EU powers to legislate ("EU competences").
- The substitution of Qualified Majority Voting (QMV) for unanimity and the introduction of the full co-decision legislative procedure, giving the European Parliament (EP) full powers of amendment, to 61 new areas of policy. As a result, unanimity is now reserved only for taxation, social security, certain areas of employment law, strategic foreign policy and defence decisions, some key EU budgetary issues (including the UK's rebate) and one specific area of policy relating to free movement of persons;
- Changes in the weighted voting system for determining qualified majorities within the Council of Ministers, which from 2014 onwards will reduce the ability of the UK and all other Member States, except Germany, to form "blocking minorities" to influence EU legislation. "Open Europe" has estimated that the UK's ability to form a blocking minority will be reduced by around 30%;
- The reduction of the size of the Commission, so that each Member State will be without a Commissioner for 5 years in every 15;
- The incorporation in the Treaty of the Charter of Fundamental Rights (CFR), which contains 50 political, juridical, economic and social rights. This will give the European Court of Justice (ECJ) wide powers to interpret the standards to be followed by the EU institutions in making EU law, by Member States in implementing EU law and in some cases in making or applying national law;
- The so-called "self-amending" provisions in the Treaty, which will allow the European Council to substitute QMV for unanimity in any or all of the areas where national vetoes remain at any time. Under this procedure no Treaty ratification would be required to endorse the European Council's decision, though individual national Parliaments would have a right to object;
- The creation of an outside President of the European Council and of a European Foreign Minister in all but name.

4. The single most important transfer of a new competence to the EU in the Lisbon Treaty is probably in relation to police and criminal law matters as well as civil law, which, except for asylum and immigration issues, had previously been contained in the so-called "Third Pillar." Under the Third Pillar action in this area had in the main been confined to facilitating co-operation between police and juridical authorities in dealing with cross-frontier crime. The EU was only given limited powers to legislate and the roles of the Commission, the EP and the ECJ were severely restricted. The Treaty of Amsterdam carved out the "Visa, Asylum and Immigration" provisions from the Third Pillar and turned them into an EU "shared competence", giving the Commission a full role, but requiring unanimity for most legislation and restricting access to the ECJ.

5. Title IV of Part III of the Lisbon Treaty abolishes the Third Pillar altogether and brings all co-operation on police matters and on civil and criminal law, together with "Visas, Asylum and Immigration", into a "shared competence, now entitled "The Area of Freedom, Justice and Home Affairs." In relation to criminal law Title IV gives the EU extensive powers to harmonise national laws dealing with the juridical rights of criminals and victims and other aspects of criminal law procedures, including the penalties to be applied for specified serious crimes. The new Title also envisages the creation of a European Public Prosecutor and enables

Europol to initiate criminal investigations in any Member State. QMV now applies to all these issues, as do the normal legislative procedures with the full involvement of the Commission, the EP and the ECJ. The changes proposed in respect of asylum and immigration are discussed in more detail below.

6. The opt-out negotiated by the UK and Ireland from the “Visa, Asylum and Immigration” provisions in the Amsterdam Treaty is now widened to cover all the provisions in the “Area of Freedom, Security and Justice” Title of the Lisbon Treaty. The opt-out is largely identical in substance to that contained in the Protocol to the Amsterdam Treaty. Both countries retain the right to “opt-in” to individual legislative proposals put forward by the Commission on a case-by-case basis. They also continue to enjoy the same protection from the consequences of any international treaty negotiated by the EU and from any judgements by the ECJ on the basis of legislative provisions from which either or both countries have opted out.

7. There are, however, two differences of substance from the Amsterdam Treaty Protocol. First, an amendment to the Protocol makes it clear that the right to opt out applies not just to entirely new proposals from the Commission, but also to proposals to amend existing measures based on Title IV of Part III, which either or both of the UK and Ireland have already opted into. Further amendments then lay down a detailed procedure for dealing with situations, in which the UK or Ireland decides to opt-out of the amending measure, but the Council takes the view that the non-participation of the UK or Ireland makes the application of the amending measure, side by side with the original provisions, inoperable for other Member States. At the end of the procedure, if either the UK or Ireland stick to their decision not to opt-in to the new measure, the original measure is effectively annulled and the Council is free to go ahead and adopt the amending measure without the opting-out State(s).

8. Moreover, the Protocol further provides that the Council can decide by QMV on a proposal from the Commission that where, as a result of this procedure, the UK or Ireland cease to participate in an existing measure which they had previously accepted, the non-participating state or states “shall bear the direct financial consequences, if any, necessarily and unavoidably incurred as a result of the cessation of its participation in the existing measure.” There is no definition of what is meant by “direct costs.” It is not even clear whether this means “direct costs” incurred by the EU institutions or (more probably) those incurred by the other Member States. Since, in the circumstances hypothesised, it is likely that an opting-out state will also incur additional costs from ending its participation in the original measure, a fairer solution would have been to let any costs lie where they fell.

9. The EU’s policy-making on asylum and immigration matters will also be significantly affected by the move to more QMV, the changes in the Council’s weighted voting system, the reduction in the size of the Commission and the treaty status given to the CFR. The last of these changes will be discussed in more detail in the next section, but it may be helpful to comment on the first three in more general terms at this point.

10. The importance of a move from unanimity to QMV in the EU’s legislative procedures cannot be underestimated. The EU’s legislative history shows that virtually every proposal put forward under QMV is eventually adopted, even if in some cases in a heavily amended form and many years later. Relatively fewer proposals requiring unanimity are adopted, particularly in sensitive areas such as direct taxation and social security.

11. When it becomes evident in early official-level discussions of a Commission proposal, to which QMV applies, that its eventual adoption is likely, a band-wagon effect develops and each Member State focuses on getting the proposal amended to protect its own national interests. In this context the size of QMV required and its obverse, the number of votes required to make a “blocking minority”, are crucial. Contrary to what the term implies “blocking minorities” are rarely used to block proposals altogether. Nor does the blocking minority necessarily have to be formed by Member States, which share the same interests. Rather the existence of a blocking minority creates a breathing space for the Member States in question to persuade the Commission and the other Member States (in particular the Member State holding the Presidency) that their amendments are reasonable and do not conflict with the main object of the proposal.

12. Persuading the Commission to come on board is particularly crucial, because it plays a pivotal role in the negotiations in the Council of Ministers. The Commission not only puts forward the initial proposal, but also has the power to amend it both to help the Council to reach a “common position” and subsequently to broker a deal between the Council and the EP. Having the Commission’s support for an amendment is crucial, because only a proposal supported by the Commission can be adopted by QMV; without Commission support the Council can only amend a Commission proposal by unanimity. Given the Commission’s role, the proposal to reduce the size of the Commission, so that in 5 out of every fifteen years a Member State will not be represented in it, is potentially damaging to all Member States. There is very little cross-departmental consultation between Commission officials at levels below the Commission itself. It is the full body of Commissioners, which has to approve every new legislative proposal and every subsequent amendment to the original proposal. Significant changes to legislation are quite often introduced in the Commission itself as a result of behind the scenes “trading” by individual Commissioners. One of the Declarations attached to the Lisbon Treaty commits the Commission to consult particularly closely with the Member States not represented in it on the preparation of new legislation. But at best this will be a poor substitute for having one’s own Commissioner at the Commission table when legislative decisions are taken.

13. The changes proposed in the Lisbon Treaty to alter the weighted voting system to make it more difficult for Member States to form a blocking minority and to reduce the size of the Commission are clearly intended to make it more difficult for all Member States to hold up or amend EU legislation. The UK is arguably particularly likely to suffer as a result of these changes, because we have a number of special interests and characteristics which are not shared by many other Member States, notably our system of common law, (including our historic civil liberties), our general preference for “light-touch” and permissive legislation, our island status and the dominance of financial services in our economy.

The UK’s “red lines.”

14. The main argument now advanced by the British Government against holding the referendum promised before the last General Election is that their success in protecting their “red lines” in the negotiations on the Lisbon Treaty makes one unnecessary. This argument is unconvincing. The “red lines”(which relate to the national vetoes on taxation, foreign policy and social security, to the impact of the CFR and to the harmonisation of criminal law) are in substance very little different from those negotiated by Tony Blair in relation to the draft Constitution and therefore pre-date the promise of a referendum. One of the “red lines”, the maintenance of unanimity voting on taxation, was never seriously at risk in either the negotiations on the European Constitution or on the Lisbon Treaty. The new Treaty preserves unanimity for legislation harmonising social security, but allows the Council of Ministers (the ordinary Council, not the European Council) to remove this veto and the veto on the conditions of employment of third country nationals without any need for ratification by national Parliaments. The provisions on foreign policy, although improved to make it clear that Member States retain their sovereign rights to determine their own foreign policy, still allow QMV on several issues, including, importantly, on any proposal submitted by the EU’s High Representative on Foreign and Security Policy.

15. The Protocol negotiated by the UK and Poland in relation to the CFR is discussed in more detail below. But it is in no sense an “opt out” from the CFR. At best it appears to offer an assurance that the CFR provisions on economic and social rights will be interpreted cautiously by the EU’s institutions. But it is not clear that even this will be binding on the ECJ, which has the last word.

16. The UK’s “opt out” from any legislation under provisions under the “Area of Freedom, Security and Justice is genuine enough, but its existence in no way weakens the case for a referendum. As noted above, the obverse of the UK’s right to opt out is its right to opt-in to individual measures, (as it has done four times in exercising its similar right to opt-in to measures on asylum). The Government can commit itself to opt-in to any proposals put forward by the Commission to use the new criminal law powers, as well as on asylum,

immigration, under Title IV of the Area of Freedom, Security and Justice provisions without even a vote in the House of Commons. So for those British voters who are opposed in principle to the EU having the power to legislate on some or all of these matters the opt-out provides no guarantee that the UK will not accept EU jurisdiction and legislation in this sensitive area.

17. In short, with the exception of the Title IV opt-out, the “red lines” do very little to mitigate most of the major shifts of power to the EU institutions described in paragraph 3 above.

(b) Asylum and Immigration Policy

(I) EU competences in Asylum and Immigration

18. The Treaty of Amsterdam set goals for achieving only “minimum standards” in relation to the admission and treatment of asylum seekers and did not envisage a “common policy” either for asylum or for legal or illegal immigration issues.

19. The Lisbon Treaty, which, as noted above, preserves the UK and Irish opt-outs in this area of policy, widens the EU’s competences in a number of ways. First, Article 61(2) of the Treaty now sets the EU the goal of framing:

- *“A common policy on asylum, immigration and external border controls, based on solidarity between Member States, which is fair towards third country nationals. For this purpose stateless persons shall be treated as third country nationals.”*

20. To achieve these goals Articles 63 and 63a specify that the European Union shall: -

- *“Develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection.....in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967.”*

And (in relation to legal immigration) shall: -

- *“Develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings.”*

21. In keeping with this emphasis on common policies, Article 62 of the Lisbon Treaty mandates the adoption of a “common policy on visas and other short-stay residences and “the gradual establishment of an integrated management system for external borders.” Similarly, Article 63 of the Lisbon Treaty empowers the EU institutions to legislate for a “common European asylum system” based on “uniform standards” (as opposed to the “minimum standards” provided for in the Amsterdam Treaty) in the following areas:-

- A uniform status of asylum for nationals of third countries;
- A uniform status of subsidiary protection for nationals of third countries, who, without obtaining European asylum, are in need of international protection;
- A common system of temporary protection for displaced persons in the event of a massive inflow;
- Common procedures for the granting and withdrawing of uniform asylum or subsidiary protection.

22. Article 63a follows the Amsterdam Treaty in granting to the EU a power to legislate on “conditions of entry and residence and the standards to be used by Member States in issuing long-term visas and residence permits” and also on illegal and unauthorised residence, including removal and repatriation of persons residing without authorisation.” It appears to go further than Amsterdam in including a commitment to “the fair treatment of third-country nationals residing legally in Member States, which is followed up in Article 63a,2(b), which grants the EU a power to adopt legislation on:-

- *“The definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States”*

The Amsterdam Treaty had been limited to the last part of this clause, dealing only with the conditions governing freedom of movement and residence in other Member States. The amended wording appears to cover the possibility of EU legislation defining third country residents' rights in areas such as access to social security and other social and civil rights.

23. It is unclear at this stage whether these references to "common policies" and "uniform standards" will lead to significant changes in EU policy or in the legislation already adopted. In relation to the treatment of asylum-seekers, for example, different Member States have in the past applied more or less restrictive (or liberal) interpretations of the Geneva Convention. The minimum standards contained in the asylum legislation adopted under the Amsterdam Treaty (which the UK opted into) and also immigration measures on e.g. Family Reunification and Admission of Students (neither of which the UK opted into) allow the Member States a degree of freedom to maintain their differences of interpretation and historic links with particular third countries. There is a risk that these differences would be removed entirely by the adoption of common standards, which could be too restrictive for some Member States and too liberal for others. The Commission has already announced that it wishes to move towards "burden-sharing" between Member States in accepting asylum-seekers. If such a move were agreed, it would increase the pressure to adopt common standards, probably at the most restrictive level.

24. Again, in relation to legal immigration, a common "European Green Card" system, which has been suggested by Signor Frattini, the member of the Commission responsible for asylum and immigration, would not necessarily accommodate the economic needs of particular Member States to attract immigrants with particular skills or their historic links with particular third countries.

25. It is also unclear at this stage what is meant by the development of an "integrated management system for external borders." If all that is meant is co-operation and exchanges of information between the Member States and perhaps financial and material assistance of the type now being given to the newer Member States, that would seem uncontroversial. Detailed Commission intervention or oversight by the Commission seems neither acceptable nor desirable.

26. In addition to common policies on asylum and immigration, Article 62,3, creates a specific power to adopt by unanimity, after consulting the European Parliament: -
"Measures concerning passports, identity cards, residence permits or any other such document", where this is necessary to facilitate the free movement of European citizens.

27. It is debatable how far this provision is entirely new. Article 18 of the Section of the Amsterdam Treaty, dealing with the rights of EU citizens, gave the Council a general power to legislate, where the Treaties did not otherwise provide the necessary powers in order to facilitate the free movement of EU citizens and their right to reside in other Member States. This made no specific reference to a power to legislate on travel or identity documents. (The EU had, of course, already introduced the common format for Member States' passports in the 1980s, now probably quite uncontroversial). In its new position among the Area of Freedom, Security and Justice provisions the more explicit power would appear to be covered by the UK/Ireland opt-out. EU legislation, requiring Member States to have identity cards, would clearly be controversial in the UK.

28. Article 63,a,3 empowers the EU to conclude agreements with third countries:-
"For the readmission to their countries of origin or provenance of third-country nationals who do not or who no longer fulfil the conditions for entry, presence or residence in.... one of the Member States".

29. Again, although the wording of this Article is new, the substance is not, since the EU has already negotiated four so-called Re-admission Agreements with Hong Kong, Macao, Sri Lanka and Albania and further agreements are under negotiation. These were presumably based on the reference to measures on "the repatriation of illegal immigrants" in Article 73k (3)(b) of the Amsterdam Treaty. Neither the Amsterdam Treaty nor the new wording in the Lisbon Treaty would give the EU an exclusive power to negotiate Treaties on this subject. It

would in theory at least remain a “mixed” competence, though, once the EU had negotiated such an agreement with a particular third country, the Member States’ power to do so would fall away.

30. As noted above, the UK retains the right to opt out of any international agreement negotiated by the EU on any aspect of asylum and immigration policy, if HMG wishes to do so. Articles 2 and 6 of the UK and Ireland’s original opt out Protocol from the Sections of the Amsterdam Treaty dealing with asylum and immigration specify that “no provision of any international agreement concluded by the Union pursuant to those Sections.....shall be binding upon or applicable in the UK or Ireland,” unless they opt-in to the agreements in question. However, it is understood that the UK has supported the four agreements referred to above and will be covered by them.

31. Last but not least, the Lisbon Treaty repeals the limitations in the Treaty of Amsterdam, which effectively prevented immigration cases being brought before the ECJ until they had been taken to the highest court in the Member State concerned. The ECJ will now have the same jurisdiction in relation to asylum and immigration matters as it has in relation to any of the traditional areas of EU common policies. Again, however, Articles 2 and 6 of the UK and Ireland’s opt-out Protocol specify that “no decision by the ECJ shall be binding upon or applicable in the UK or Ireland;” and that “no such.....decision shall in any way affect the Community or Union *acquis* nor form any part of Union law as they apply to the UK and Ireland”, except to the extent that they have opted into the measures in question. The ECJ would, however, be able to hear cases referred to it by lower level UK courts relating to appellants on migration issues where they could claim that the UK had breached any EU asylum or immigration legislation, which the UK had opted into or, if, as is possible, the ECJ decides that relevant rights contained in the CFR have direct effect. The removal of the limitations on the ECJ’s jurisdiction could well lead to more asylum cases being referred earlier by UK courts; (under the Amsterdam Treaty only one UK asylum case has reached the ECJ).

32. Leaving aside the effects of the UK/Ireland opt-outs, the consequence of all these changes is that virtually the only major policy decision left solely in the hands of the Member States is, as stated in Article 69b, 5, is that of deciding how many nationals from non-EU countries it is prepared to admit directly from countries. The ability of the Member States to control the total volume of immigration into their territories will, however, also be constrained by how the EU exercises its right to legislate on the right of third-country immigrants, who are legally resident in one Member State, to move to and reside in other Member States. This in turn may be influenced by ECJ interpretations of the CFR.

33. In short, the Lisbon Treaty gives the EU powers to manage common policies on asylum and immigration almost as extensive as they now have over agriculture under the CAP.

(b)(ii) Asylum and Immigration: Qualified Majority Voting

34. As previously proposed in the draft Constitution, the Lisbon Treaty removes all national vetoes over asylum and immigration decisions, with the single exception, referred to above of legislative proposals on passports, identity cards etc. In December 2004 the UK agreed as part of a scheduled review of the unanimity provisions of the Amsterdam Treaty to give away the vetoes over asylum and illegal immigration issues, (no doubt because they had already conceded this in the negotiations on the draft Constitution). But we did not agree at that stage to remove the veto on legal migration questions. This too has now been conceded. In addition, as noted above, from 2014 onwards the changes in the Council’s voting system will make it more difficult for the UK to protect its interests in all policy areas where QMV applies. These two changes (and the shadow cast by the CFR) will complicate the UK’s exercise of its right to opt-into new proposals on asylum and immigration issues. The UK has to decide whether to opt-into a new proposal within three months of it being tabled by the Commission. Once it has committed itself to opt-in, the UK cannot thereafter back out of the negotiations if they take an unwelcome turn. Whenever the UK opts-in, it will therefore have to run the risk that it may be outvoted during the negotiations on points it regards as vital.

35. The UK is liable to be faced with some particularly difficult decisions, when the Commission makes proposals to amend EU legislation, which the UK has opted into, because of the punitive provisions for opting out now introduced into the UK's opt-out Protocol (see paragraphs 7-8 above). A potential example of this emerged recently, when Signor Frattini outlined possible Commission proposals to amend the Dublin Convention, which contains the agreed EU rules for determining which Member State is responsible for handling asylum applications, where the applicant has no particular connection with any Member State. The existing Convention allows the UK to send back about 100 immigrants per month to the first Member State, which they had entered. Signor Frattini now envisages a system of burden-sharing to relieve countries such as Italy and Malta, which currently receive large numbers of immigrants arriving from North Africa. If this proposal were tabled, the UK would have to balance the benefits it receives under the existing Convention against the risks of being required either to contribute financially to Italy and Malta or to take some of their immigrants. (The UK's decision on whether or not to opt-into the negotiations could, of course, be affected by the attitude of other northern Member States towards the burden-sharing proposals).

(b)(iii) The Charter of Fundamental Rights: possible relevance to asylum and immigration.

36. The 50 "fundamental" political, juridical and economic and social rights in the CFR are drawn from a variety of sources. The political and juridical rights come mainly from the European Convention on Human Rights (the ECHR). The economic and social rights come mainly from the European Social Charter of 1996 and the Community Charter on the Rights of Workers signed in 1961. Some provisions are drawn from or influenced by the case law of the ECJ itself, some are simply taken over from other provisions in the Treaty and others come partly or (in a very few cases) entirely from the national legislation or traditions of Member States.

37. The Charter in its current text was adopted as a political text in December 2000 simultaneously with the agreement on the Treaty of Nice, but at that stage had no legal force. It was incorporated as Part II of the European Constitution after the UK had dropped its resistance. Article 6 of the Lisbon Treaty now states that the CFR "shall have the same legal value as the Treaty.

38. The CFR states in its preamble that it "reaffirms the rights, freedoms and principles recognised in the Union and makes those rights more visible, but does not create new rights or principles." Its provisions "are addressed to the institutions....of the Union and to the Member States only when they are implementing Union law." All the addressees "shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the other Parts of the constitution." Article 1(2) of the CFR makes it clear that the "Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union. The Treaty also contains an official commentary on the Charter produced by a group of lawyers acting under the aegis of the Convention, which drafted the Constitution. Article 52 of the CFR states that this commentary "shall be given due regard by the courts of the Union and the Member States." This formula, of course, leaves the courts free to take a different view.

39. Two main concerns have been expressed about incorporating the CFR into Union law. First, as noted above, a number of its articles are based on the provisions of the European Convention on Human Rights (ECHR) and accordingly the ECJ becomes an alternative forum to the European Court of Human Rights in Strasbourg. Article 52 of the CFR gives an assurance that, insofar as the CFR contains rights, which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights will be the same as those laid down by the latter and subject to the same qualifications and limitations. This is reassuring as far as it goes. However, Article 52 adds that: "This provision shall not prevent Union law providing more extensive protection." This addition seems likely to prove an irresistible temptation to lawyers to take their clients' cases to the ECJ rather than the Strasbourg Court, where there is an opening to do so.

40. Second, Title IV of the CFR (entitled "Solidarity") gives binding legal Second status to a "wish-list" of very loosely-phrased social and economic objectives, covering almost every aspect of social, economic and labour market policies. While few would quarrel with the general drift of many of these provisions as broad aspirations, their incorporation as "fundamental rights" in the Charter will put the ECJ in the position of the final arbiter of how they should be translated into detailed policies. This is a function which has hitherto and should more properly continue to be carried out by democratically accountable governments. How the ECJ interprets many of these principles and rights could lead to substantially increased transfers of resources from Member States' taxpayers to the beneficiaries or impose other economic costs.

41. Ten Articles in the CFR contain provisions, which on the face of it could be invoked in relation to asylum or immigration issues. Nine of them come from a list published by "Open Europe" in their detailed commentary on the Lisbon Treaty; the tenth (Article 34) is my own addition. They are set out below, followed by a statement taken from the official commentary on the sources from which each provision has been taken. In some cases I have added a comment on how the provision might be invoked in relation to asylum and immigration issues, usually on a "worst-case" hypothesis:-

- **Article 18:** -*"The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the New York Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community;"* (Source:- **Article 63 of the EC Treaty, now replaced by Article 63 of the amended Treaty on the Functioning of the EU (TFEU)**);
- **Article 19:** -*"(1) Collective expulsions are prohibited. (2) No one may be removed, expelled, extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment"*. (Sources: -**Article 19(1) is drawn from Article 4 of Protocol No 4 to the ECHR; Article 19 (2) incorporates case-law from the European Court of Human Rights regarding Article 3 of the ECHR. Comment:-In principle, Article 19(2) might be invoked to challenge repatriations based on a "Memorandum of Understanding" about the future treatment of those repatriated between a Member State and /or the EU and a third country).**
- **Article 4:** -*"No one shall be subjected to torture or to inhuman or to other degrading treatment."* (Source: - **Article 4 of the ECHR. Comment: - this could be invoked alongside Article 19).**
- **Article 9:** -*"The right to marry and found a family is guaranteed in accordance with the national laws governing the exercise of these rights."* (Source: -**Based on Article 12 of the ECHR).**
- **Article 7:** -*"Everyone has the right to respect for his or her private and family life, home and communications."* (Source: -**Article 8 of the ECHR. Comment: - Both Articles 7 and 9 are both worded somewhat more broadly than their ECHR equivalents. It seems possible that either or both of these articles could be invoked to challenge specific barriers in EU legislation or imposed by Member States to permitting the immigration of spouses or intended spouses or other family members from third countries).**
- **Article 15(3)** *"Nationals of third countries, who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union."* (Source: - **This paragraph is said by the official commentary to be based on Article 137 (1)(g) of the TEC and also on Article 19 (4) of the 1961 European Social Charter. The official commentary adds that this is a right, which falls under Article 52 (2) of the Charter and therefore has to be exercised under the conditions and limits defined by that Treaty provision. Comment: - The wording of the CFR Article seems to go well beyond Article 137(1)(g), which together with Article 137(2) merely permits the Council of Ministers to legislate by unanimity to set minimum standards on the conditions of employment for third-country nationals legally residing in Union territory. There would seem to be some risk that the ECJ might ignore the commentary and apply a more extensive interpretation.**
- **Article 21;** - *"(1) Any discrimination based on any ground such as sex, race, colour, ethnic or social origin genetic features, language, religion or belief, political or other*

opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. (2) 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 the grounds of nationality shall be prohibited.” (Sources: - Article 13 of the EC Treaty and its equivalent in the Lisbon Treaty, Article 14 of the ECHR and Article 11 on the Convention on Human Rights and Biomedicine. Comment: -According to the official commentary the provision in paragraph 1 does not “lay down a sweeping ban of discrimination in such wide-ranging areas” or create a power to enact anti-discrimination laws. The implication of the commentary appears to be that the ECJ would be cautious in interpreting this provision except where specific EU legislation had been adopted. However, unlike the ECHR equivalent, this Article could be combined with other CFR provisions to allow the non-discrimination requirement to be applied to a wide variety of EU policies, e.g. the social security rights of short-term immigrants. It also looks possible that a test case could be brought e.g. challenging repatriation of an immigrant where this was based on the grounds of promoting or supporting terror in a “political” statement).

- **Article 34:** - *“(2) and (3) Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Union laws and national laws and practices. (3)...The Union recognises and respects the right to social and social housing assistance...in accordance with the rules laid down by Union law and national laws and practices.” (Source: -The European Social Charter, the Community Charter of Workers Rights and the rules arising from Regulations No 1408/71 and 1612/68. Comment: This Article could be invoked, together with the non-discrimination provision in Article 31 to ask the ECJ to outlaw any form of discrimination between citizens and even temporary residents);*
- **Article 45(2):** - *“Freedom of movement and residence may be granted, in accordance with the Treaty establishing the European Community, to nationals of third countries legally resident in the territory of a Member State.”. (Source: -Article 63a (2) b of the TFEU. Comment: - The official commentary on this Article makes it clear that since this right is based on another provision in the body of the Treaty, the granting of this right depends on the EU institutions exercising their power to legislate on this matter. In this case the UK’s opt-out would protect it from any ECJ judgement on this matter, assuming we opted out of any proposal under Article 63a(2) b to define the freedom of movement etc of third –country residents legally resident in other Member States into the UK).*
- **Article 47(2):** - *“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.”. (Source: -Article 6(1) of ECHR. Comment; -This provision might be used to challenge Member State’s appeal systems for dealing with immigration cases. Some of the provisions of recent UK anti-terror legislation might also be open to challenge under this provision).*

42. The impact of these and other CFR provisions is particularly difficult to assess, because their meaning will ultimately depend on how the ECJ interprets them in particular cases. There are strong differences of view between expert European lawyers on the significance of the decision to give the CFR Treaty status. Some (usually pro-European lawyers) argue that making the CFR legally binding is unlikely to make much difference to the judgements reached by the ECJ. I understand that one commentator has even described the Charter as “a paper tiger.” Lawyers, who defend this view, point in particular to the assertion in the CFR itself that it does not create any new rights or principles, but only reaffirms existing ones. They also point out correctly that the protection of fundamental rights, in particular those contained in the ECHR, has been a part of the European legal system and recognised by the ECJ for many decades. On the other side of the argument, in 2005 “Open Europe” interviewed a number of past and present judges and advocates-general of the ECJ several of whom asserted that the CFR would have a substantial impact on the ECJ’s work-load and jurisprudence.

43. The argument that all the EU institutions have already been long committed to the observance of the human rights contained in the ECHR and that the ECJ has been ready, where necessary to enforce them is indisputable and to that extent the simple incorporation of the ECHR's provisions in the CFR is not an innovation. But in my view that falls well short of justifying the claim that the CFR will have little or no substantive effect on the making and implementation of law within the EU.

44. The assertion in the preamble to the CFR that it does not create new rights and principles itself verges on the disingenuous, since the social and economic rights and principles contained in Title IV of the CFR previously had no status in EU law at all and in past judgements the ECJ refused to take the CFR into account when invited to do so, inter alia, because it had no status. Moreover, thirteen of the articles in the Charter are derived at least in part from the ECJ's own past jurisprudence, two Articles are taken from the Schengen Treaty to which the UK, Ireland and Denmark are not parties and several Articles come from the 1996 European Social Charter to which the UK and various other Member States were never parties.

45. Even in relation to the rights taken over from the ECHR, in some cases the wording has been amended to widen the protection. In other cases their inclusion within the CFR may implicitly widen their scope. For example, the non-discrimination provisions in Article 21 of the CFR, quoted above, are in part derived from Article 14 of the ECHR. However, the application of the latter is explicitly limited to the other political and juridical rights and freedoms within the ECHR. Article 31 of the CFR does not seem to be so limited. On the contrary, the official commentary declares that it can be applied to discriminations in all other areas of Union law, including presumably economic and social legislation.

46. So the CFR in practice requires the EU's institutions and its Member States to comply with a more extensive array of human rights than was previously the case. This will have an impact in three ways. First, the Commission, the Member States acting in Council and the EP will all be explicitly required to take all the CFR's provisions into account, when legislating. There is a well-founded expectation that Commission officials are already busy preparing new legislation to implement provisions in the CFR. Second, the Member States are obliged to observe the CFR "when they are implementing EU law".

47. Third, litigants will be able for the first time directly or indirectly through their national courts to ask the ECJ to interpret the provisions of the CFR and to decide how they apply to their particular case. In the case of the economic and social rights in Title IV, the ECJ, as noted above, would be breaking new ground in such judgements. Concerns have been expressed, for example, as to whether the derogation in the Working Time Directive, which allows UK workers to agree contractually with their employers to work for longer than the 48 hours per week average specified in the Directive may be open to challenge under Article 31(2) of the CFR. But even in relation to the rights taken over from the ECHR, the ECJ is explicitly allowed under Article 52 of the CFR to "provide more extensive protection." Against this background it is only realistic to expect that there will be some judicial surprises in store.

48. It should also be noted that, although the CFR applies to Member States "only when they are implementing EU law," the definition of "EU law" goes wider than the subordinate legislation (Directives and Regulations) adopted by the Council of Ministers and the EP and includes the text of the Treaties themselves and therefore the text of the CFR itself. Moreover, the ECJ has in a number of policy areas evolved a doctrine of "direct effect", which they have used to infer the existence of rights and obligations from the texts of the Treaties even in the absence of subordinate legislation. Two of the ECJ judges interviewed by "Open Europe" in 2005 (former Judge Puissechet and Judge Arestis) appear to envisage that the ECJ may interpret some of the provisions of the CFR as having such "direct effects". For example, European Court Judge George Arestis commented that "The EU Charter could be used to deliver rights at work (i) as a legal source, by itself, through the doctrines of "direct" and "indirect" effect and (ii) as a basis for challenging national law, which incorrectly or inadequately transposes EU law."

49. The possibility that the ECJ may be able to decide that some provisions in the CFR have direct effect also seems to be borne out by the official commentary on the Charter. This states that Article 52(5) draws a distinction between “rights” and “principles” set out in the Charter. Article 52(5) makes it clear that “principles “ have to be implemented through the legislative or executive acts (adopted by the Union in accordance with its powers and by the Member States only when they implement Union law). Accordingly, the commentary states, “ they become significant for the Courts only when such acts are interpreted or reviewed. They do not, however, give rise to direct claims for positive action by the Union’s institutions or Member States authorities.” This statement appears to leave it open to the ECJ to find that some of the “rights” in the CFR are capable of giving “rise to direct claims for positive action” by the Union or Member States. Unfortunately, the commentary offers the reader no clear guidance on how to distinguish “principles” from “rights” in the CFR; and the word “principle” only occurs in one of the six articles it lists.

50. Some close observers of the ECJ discount the risk of the ECJ finding that provisions in the CFR have direct effect on the grounds that the ECJ has become much more cautious in recent years both in applying the doctrine of “direct effect” and, more generally, in making radical judgements in sensitive areas of economic and social policy. This may be true in the short-term. But the ECJ, like the Supreme Court of the United States, has sometimes changed direction sharply following changes in the zeitgeist or in the composition of the Court itself. The possibility that the ECJ may find that some provisions in the CFR have direct effect can certainly not be ruled out. The notion that “fundamental rights” need only be applied by Member States, when they are implementing EU law, will be unappealing to legal minds.

51. In relation to asylum and immigration (and to the area of criminal law) the risks of UK policy being overturned by adverse judgements from the ECJ are clearly less than in other areas of EU policy, because of our right to opt out of new legislation. As noted in paragraph 6 above our opt-out Protocol states (Article 2) that “no decision by the Court of Justice of the European Union interpreting” any measure from which we have opted out “shall be binding upon or applicable to the UK or Ireland.” However, the question arises whether this immunity would in practice apply if the ECJ found that either a Directive or a Member State’s implementations of it were in breach of human rights within the CFR. If a follow-up case against the UK were referred to the ECJ by a UK court in respect of UK practices, which were identical to those of another Member State, which the ECJ had already condemned, would the ECJ agree that the UK need not uphold the human right in question, because we had opted out of the Directive? Or would they find a way of deeming it to be a “directly effective” right? For that matter would the British courts accept that a breach of the CFR by the UK would be acceptable in these circumstances? It is only fair to add that cases involving the classical liberal and political and juridical rights stemming from the ECHR could already be brought to the UK courts under our own Human Rights Act.

52. Any discussion of the CFR would be incomplete without considering the Protocol negotiated by the UK and Poland, which the UK Government has claimed makes the incorporation of the CFR into the Treaty acceptable to the UK. The text of the Protocol is as follows:-

- *Article 1(1) The Charter does not extend the ability of the Court Of Justice, or any Court or tribunal of Poland or the United Kingdom to find that the laws, regulations or administrative provisions, practices or action of Poland or the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.*
- *Article1(2) In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom, except in so far as Poland or the United Kingdom has provided for such rights in its national law.*
- *Article 2 To the extent that a provision of the Charter refers to national laws and practices, it shall only apply to Poland and the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of Poland or of the United Kingdom.*

53. The Protocol is obscurely worded and, like the CFR itself, its interpretation will be decided by the ECJ in dealing with any cases where a UK Court refers a case to the ECJ. It

is clear, however, that the Protocol in no sense provides the UK or Poland with an “opt-out” from any of the CFR’s provisions. The UK and Poland, like all other Member States, will be exposed to the risk of cases being brought against them on the grounds that, in implementing Union law (defined broadly as explained in paragraph 25 above) they have infringed rights embodied in the CFR. The comments in the next three paragraphs are inevitably more speculative.

54. The assurance in Article 1(1) of the Protocol that the CFR does not extend the ability of either the ECJ to find that the laws....etc of the UK or Poland inconsistent with the fundamental rights, freedoms and principles that it reaffirms seems to be no more than a repetition of the assertion in the preamble that the CFR does not create any new rights and the implicit consequence that the courts could already have made such findings on the basis that the rights already existed either in the ECHR or EU law or in Member States’ law.

55. Articles 1(2) and 2 of the Protocol do, however, seem to go a little way beyond a mere clarification of the meaning of the CFR. Article 1 (2) appears to indicate that nothing in Title IV of the CFR (entitled “Solidarity”) will create “directly justiciable” rights applicable in the UK or Poland, except to the extent that the rights or principles it contains are already recognised in the UK or Polish law. The implication is that, unless UK (or Polish) law already recognised such rights, they would only be crystallised to the extent that future EU legislation formulated them precisely. Since one of the main concerns in the UK about the CFR has been about the impact of the social and economic rights in Title IV, this assurance may provide some limited comfort. Second, Article 2 of the Protocol appears to promise that where a provision in the CFR relies on national laws and practices, the UK would not be held to a stricter interpretation of the provision than that implied by its own national laws and practices.

56. Given the uncertainties about the impact of the CFR, it should be stressed again that the final word on its interpretation and that of the UK-Polish Protocol rests with the ECJ alone. Most of the legal experts interviewed by “Open Europe” rejected the proposition that the Protocol created a special regime for the UK and Poland and were more generally sceptical that any safeguards, which the Protocol may create for the UK and Poland, would survive the scrutiny of the EC.

(b)(iv) Overall Assessment

57. The amendments made to the EU’s asylum and immigration regime by the Lisbon Treaty, in particular the move to a common policy with uniform standards, all to be adopted by QMV, represent a significant shift of power from the Member States to Brussels.

58. The need for some level of harmonisation of asylum and immigration policy by the EU is a logical development from the provision in the Single European Act of 1985 that the “internal market comprised an area without internal frontiers” and that this entailed the removal of frontier controls on traffic between Member States. This stimulated the subsequent decision of most of the Continental States to follow the example of Germany and France by setting up the Schengen Agreement. The difficulties of policing long internal land frontiers both made it easier for the Schengen countries to give up controls at their internal frontiers and created a case for a harmonised approach to controlling immigration at their external frontiers. There seems no strong reason, however, even for the Schengen countries, which would justify moving to a full common policy on asylum and immigration as proposed in the Lisbon Treaty. The case for full harmonisation of law on legal immigration seems particularly questionable.

59. Between 1985 and 1997 the UK government disputed the majority interpretation of the Single European Act as requiring some legislation for the removal of internal frontier controls and in 1997 negotiated the opt-outs both from this requirement and the Schengen agreement and the asylum and immigration policy in the Amsterdam Treaty. Quite apart from the political difficulty of removing our frontier controls on arrivals from the EU, the UK’s decision is logical as long as we believe that our airport and sea port controls are even partially effective in helping our authorities to prevent illegal immigration, tax evasion and illegal imports.

60. However, there are two reasons why the UK needs some level of co-operation with our EU partners to improve the effectiveness of our own policies. The first is purely geographical, namely that a significant proportion of asylum seekers or refugees, who arrive in the UK, will have arrived via one or more of the other Member States; so exchanges of information and an arrangement on which Member State should take responsibility for which of these immigrants are highly desirable and have been provided by the Dublin Convention. The latter, as noted above, currently allows the UK to return about 100 immigrants a month to other EU Member States. The second reason is that at some point the EU's commitment to free movement of persons within the EU is likely to require some agreement on whether and to what extent third-country immigrants, who become legally resident in one Member State should enjoy freedom of movement and the right to reside in other Member States. So far as the UK is concerned neither of these requirements justifies our buying into full common policies on asylum and immigration as envisaged in the Lisbon Treaty.

61. The Lisbon Treaty's amendments will, however, make the UK's decisions on whether or not to opt-in to new EU legislative proposals more problematic, now that virtually all such legislation will be decided by QMV. HMG will need to balance the potential advantages of co-operating with other Member States against the risk of being outvoted in the Council of Ministers and take that decision at a time when the final outcome of the negotiations cannot be foreseen. The fact that the ECJ will have full powers to adjudicate on how any such legislation is implemented in this area will also discourage opting in. As noted above, we may be faced with the possibility of losing some or all of the advantages of the Dublin Convention, if Signor Frattini goes ahead with his proposals to amend it to provide for burden-sharing between Member States.

62. However, even if the UK adopted a firm policy of opting-out of all new legislation on asylum and immigration matters, there are still a number of ways in which the provisions of the Lisbon Treaty could affect the UK's policy. First, as noted above, the Treaty could lead to the UK courts referring to the ECJ more cases involving appeals from asylum seekers and refugees against decisions by the UK authorities to refuse them admittance or to repatriate them, under the EU asylum legislation we have opted into.. Second, even if we decide to opt out of any EU-wide proposal to define the rights of residents residing legally in one Member State to move to and reside in other Member States, we could be faced eventually with an awkward negotiation with the other Member States on what access we are prepared to give this category of migrant.

63. Last but not least, the UK's room for manoeuvre on asylum and immigration issues, including the treatment of third-country residents, could be narrowed, if the ECJ were to decide either that some of the EU legislation, which we had accepted, breached relevant provisions of the CFR or that one or more of these provisions had "direct effect" and that the UK's national law or practices were therefore in breach of the CFR.

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Note

This report was prepared for Migrationwatch by a consultant, Mr Geoffrey Fitchew, who was formerly a senior Treasury official, working on European and international financial questions and later Director General for Financial Institutions and Company Law in the European Commission (1986 to 1993). Subsequently, he was Head of the European Secretariat in the Cabinet Office, dealing with all aspects of European policy. He is strongly in favour of Britain's continued membership of the EU, but was a supporter of the campaign against Britain adopting the Euro. He also supports the current campaign for a referendum on the Lisbon Treaty.