Legislative Update: EU Immigration and Asylum Competence and Decision-Making in the Treaty of Lisbon

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1. Introduction

Perhaps the biggest changes that the Treaty of Lisbon would make as compared to the current Treaties affect Justice and Home Affairs (JHA) law, which concerns issues of great significance for national sovereignty and identity. The new Treaty would abolish the current ‘third pillar’ (policing and criminal law) and move its provisions into Title IV of Part Three of the current Treaty establishing the European Community (TEC),1 which presently concerns immigration, asylum and civil law. The European Community (EC) would be merged into the European Union (EU); consequently the TEC would be renamed the Treaty on the Functioning of the European Union (TFEU), and the current Title IV of the TEC would be renumbered Title V. In conjunction with this change in the structure of the Treaties, the Treaty of Lisbon would make major changes to the competence and decision-making procedures regarding JHA matters. This paper analyses the specific changes which the Treaty would make to decision-making and competence concerning immigration and asylum law.

Simultaneously changes would also be made to the jurisdiction of the Court of Justice as regards immigration and asylum law (as well as civil law), entailing the application of the Court’s normal jurisdiction in this area, which would almost certainly lead to a significant increase in the Court’s role in this area. On the other hand, for the UK, Ireland and Denmark, the effect of the various changes is limited because of their opt-outs concerning JHA law, which would in turn be altered significantly by the Treaty of Lisbon. I have examined these issues in separate articles.2

1) Hereinafter referred to as ‘Title IV’.
The changes in the area of immigration and asylum law in the Treaty of Lisbon would be identical to the provisions of the Constitutional Treaty,\(^3\) except for changes to the opt-out rules relating to the UK, Ireland and Denmark and the addition of the legal base relating to passports and other documents to Title V (ex-Title IV) of the Treaty.

2. **Background and Overview**

The EC’s current competences as regards immigration and asylum law are set out in Articles 62 and 63 TEC. Article 61 TEC sets out the objectives of Title IV; Article 64(1) TEC maintains ‘the responsibilities incumbent upon Member States with regards to the maintenance of law and order and the safeguarding of internal security’; Article 64(2) provides for the possible adoption of emergency measures in the case of a ‘sudden inflow of nationals of third countries’; and Article 66 TEC confers competence relating to the adoption of rules on administrative cooperation. As for decision-making, Article 67 TEC sets out a complex system providing for a transition to qualified majority voting (QMV) and co-decision of the European Parliament (EP) after a transitional period of five years following the entry into force of the Treaty of Amsterdam (so by 1 May 2004). This was made further complex by the Treaty of Nice, which added a further paragraph to Article 67 and a Protocol to the TEC concerning Article 66, along with a Declaration to the Final Act dealing with the issue of Title IV decision-making. Subsequently, the Council adopted a decision applying QMV and co-decision to aspects of Title IV as from 1 January 2005.\(^4\)

The simplest approach to the issue is to describe the current position as regards Title IV decision-making in the area of immigration and asylum, which is as follows:

a) Co-decision and QMV apply to the adoption of measures concerning internal and external border controls, some aspects of visas (conditions and procedures for issuing visas and rules on a uniform visa), freedom to travel for third-country nationals, asylum policy and irregular migration;

b) QMV and consultation of the EP apply to the adoption of measures concerning administrative cooperation and legislation on a common visa format and on a common list of countries whose nationals require visas (or do not require visas) to cross the external borders of the Member States; and

c) Unanimity and consultation of the EP apply to the adoption of measures concerning legal migration.

\(^{3}\) OJ 2004, C 310.

The Commission has enjoyed a monopoly of initiative over the entirety of Title IV since the end of the transitional period.

Under the Treaty of Lisbon, QMV and co-decision (which would be renamed the ‘ordinary legislative procedure’) would be extended to measures concerning legal migration. The ordinary legislative procedure would also apply to measures concerning visa lists and visa formats, which would enhance the EP’s current powers on these matters. By way of exception, unanimity in the Council, with consultation of the EP, would apply as regards passports, residence permits, identity cards and other such documents. In addition to these major changes to the decision-making rules, each current legal base conferring competence to adopt immigration or asylum measures would be amended to a greater or lesser degree.

There would be further legal bases within the ‘general provisions’ (Chapter 1) of Title V (ex-Title IV), discussed further below. Furthermore, the general provisions of the TFEU would specify that (as at present) the EU and the Member States would share competence on JHA matters. This would mean that Member States could exercise competence to the extent that the Union had not exercised, or had ceased exercising, its competence. It would still be necessary to distinguish between Title V (ex-Title IV) and other provisions of the Treaties, due to the specific opt-outs for the UK, Ireland and Denmark that would apply to Title V.

3. General Provisions of Title V (ex-Title IV)

The general provisions of Title V (ex-Title IV) of Part Three of the TFEU would concern in turn:

- a) general objectives (Article 67 (ex-61));
- b) the role of the European Council (Article 67 (ex-61 A));
- c) the role of national parliaments as regards policing and criminal law (Article 69 (ex-61 B));
- d) evaluation of JHA policies (Article 70 (ex-61 C));
- e) the creation of a standing committee (Article 71 (ex-61 D));
- f) a general security restriction (Article 72 (ex-61 E)), repeating the current Article 64(1) TEC;

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5) The detailed rules regarding the ordinary legislative procedure would be set out in Art. 294 (ex-251) TFEU.
6) Art. 4(2)(j) (ex-2C(2)(j)) TFEU. The current references to Title IV in the list of the ‘activities’ of the EC would be repealed (Art. 3(1)(d) TEC).
7) See Art. 2(2) (ex-2A(2)) TFEU.
8) On the general issue of the distinction between JHA and other provisions, see Peers, EU Justice and Home Affairs Law, 2nd ed. (Oxford: OUP, 2006), particularly 72–77. See further s. 4.1 and 4.3 below as regards specific issues.
g) a rule about coordination of national security agencies (Article 73 (ex-61 F));
h) competence to adopt measures concerning administrative cooperation (Article 74 (ex-61 G)), replacing the current Article 66 TEC;
i) competence over anti-terrorism measures (Article 75 (ex-61 H)); and
j) a rule reserving power for Member States to propose policing and criminal law initiatives collectively (Article 76 (ex-61 I).

Of these provisions, Articles 69, 73, 75 and 76 (ex-61 B, 61 E, 61 G and 61 H) TFEU would have no relevance to immigration and asylum, and so will not be discussed further here.9

Examining the other provisions in turn, although the current reference to JHA in the list of the general objectives of the Union in the TEU would be retained,10 the more specific JHA objectives listed in Title V (ex-Title IV) would be altered. Currently the relevant provisions of Article 61 TEC provide as follows:

In order to establish progressively an area of freedom, security and justice, the Council shall adopt:

(a) within a period of five years after the entry into force of the Treaty of Amsterdam, measures aimed at ensuring the free movement of persons in accordance with Article 14, in conjunction with directly related flanking measures with respect to external border controls, asylum and immigration, in accordance with the provisions of Article 62(2) and (3) and Article 63(1)(a) and (2)(a), and measures to prevent and combat crime in accordance with the provisions of Article 31(e) of the Treaty on European Union;
(b) other measures in the fields of asylum, immigration and safeguarding the rights of nationals of third countries, in accordance with the provisions of Article 63; . . .

The future Article 67 (ex-61) TFEU would begin with the general proviso that ‘[t]he Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States’.11 This new clause would place at the centre of JHA policy the twin obligation to respect both human rights and the divergences between national laws across the EU.

The following paragraph would set out the particular objectives of immigration and asylum law:12

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10) Compare the current fourth indent of Art. 2 TEU to the future Art. 2(2) TEU. It should be noted that the Constitutional Treaty would have deleted this provision. The Court of Justice has not yet referred to the current Art. 2 TEU in the context of immigration or asylum.
11) Art. 67(1) (ex-61(1) TFEU.
12) Art. 67(2) (ex-61(2) TFEU. Paragraphs 3 and 4 would focus upon criminal and policing law and civil law respectively.
2. It shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. For the purpose of this Title, stateless persons shall be treated as third-country nationals.

Compared to the existing provisions, the obligation to ensure the (continued) abolition of border controls would still be placed first, and would now be referred to explicitly. The other EC/EU powers in this area would no longer be referred to as ‘directly related flanking measures’ or as ‘other measures’, but rather as a ‘common policy’, which is ‘based on solidarity’ and ‘fair’ towards third-country nationals, with a useful clarification (reflecting the practice under the existing Treaty) of the position of stateless persons. Although the new clause would still be relatively vague, it would offer somewhat more clarity as regards the EU’s immigration and asylum objectives. It would remain to be seen whether the Court of Justice would take these objectives into account when interpreting EC/EU measures. Of course, it should be observed that the new provision would in part restate the principles set out by the EU leaders at the Tampere summit of 1999. The more specific elements of the Tampere principles have been referred to in the preambles to EC legislation since, so the Court is already able to take account of these principles within the current legal framework.

Next, Article 68 (ex-61 A) TFEU would provide expressly for the role of the European Council (the heads of state and government of Member States) as regards JHA matters. It ‘shall define the strategic guidelines for [JHA] legislative and operational planning’. In fact, the European Council is already setting such guidelines for JHA matters as part of its overall power to set political guidelines for the EU, for example in Tampere in 1999 and Seville in 2002, among others. The only difference in the Treaty of Lisbon would be the specific reference to operational cooperation, but surely the European Council would not expect to play a major role in as regards, for instance, the planning of operations by the EU’s Border Agency, since EU leaders obviously lack the specialist knowledge for this; moreover, their involvement could compromise the Agency’s operations.


14) The Court has not yet referred to these principles as regards immigration and asylum law in its judgments. However, this can of course be explained by the limited number of cases which the Court has decided in this area.

15) See the current Art. 4 TEU. The role and functioning of the European Council would be set out in more detail in Art. 15 (ex-9B) TEU if the Treaty of Lisbon is ratified.

As for the evaluation of JHA policies (Article 70 (ex-61 C) TFEU), this legal base could not extend to the adoption of measures concerning substantive law. The point is important because the decision-making procedure for the adoption of evaluation measures foresees no involvement of the EP; these measures would not be ‘legislative’ at all. Currently, the evaluation rules are primarily focussed upon the third pillar and upon application of the Schengen acquis, and moreover the new Treaty provision would refer to evaluation ‘in particular’ to facilitate the full application of the principle of mutual recognition, which the Treaty would describe as a principle governing civil and criminal law. This provision would therefore likely have little relevance to immigration and asylum law outside the context of Schengen evaluation, where it might be used soon after the entry into force of the new Treaty.

Next, the standing committee on operational security (Article 71 (ex-61 D) TFEU) would presumably have a role as regards border security, in particular as regards joint operations by Member States collectively, and/or together with the Borders Agency. It would remain to be seen whether the committee could add any value to the Agency’s current operations.

The general security restriction in Article 72 (ex-61 E) TFEU would, as noted above, simply repeat the current Article 64(1) TEC. Logically, it must have the same interpretation. As I have suggested elsewhere, the current Article 64(1) TEC is not a limitation on EC competence, but rather ‘confirms that implementation of measures adopted pursuant to Title IV . . . is left to the Member States’ authorities, particularly as regards coercive measures’ and that the Borders Agency ‘must therefore continue to be limited to supporting actions of national authorities’.

Finally, the competence to adopt measures concerning administrative cooperation (Article 74 (ex-61 G) TFEU), would be identical to the current Article 66 TEC, except as regards its application to policing and criminal law issues. It is important to distinguish this provision, which is subject to QMV with consultation of the EP, from the substantive legal bases in Chapter 2 of Title V (ex-Title IV) which provide either for the ordinary legislative procedure (ex-co-decision procedure) or unanimous voting in the Council. Again, in the

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17) On the definition of ‘legislative’ procedures pursuant to the Treaty of Lisbon, see Art. 289 (ex-249 A) TFEU.
18) See Joint Action on evaluation (OJ 1997, L 344/7); Decision on evaluation of terrorism commitments (OJ 2002, L 349/1); and Executive Committee Decision on Schengen evaluation (OJ 2000, L 239/138).
19) See Arts. 67(3) and (4), 81 and 82 (ex-61(3) and (4), 65 and 69 A) TFEU.
20) The Commission is planning to propose amendments to the Schengen evaluation system in Sept. 2008, and it may prove difficult to adopt those proposals before the new Treaty enters into force. In that case, the proposal would probably switch to the new ‘legal base’ of Art. 70 (ex-61 C), if it restricts itself to evaluation issues and does not alter the relevant substantive law.
21) EU JHA Law (n. 8 above), 114.
22) The same point applies equally to Chapters 3 to 5 of Title V (ex-Title IV) as regards civil, criminal and policing law, but those provisions are obviously outside the scope of this article.
absence of any substantive change to this Article as regards immigration and asylum law, it would retain the same meaning after the new Treaty entered into force. This would mean that the Article could not be the legal base for any measure affecting the substance of immigration or asylum law, as regards (for instance) border checks, the process of considering visa applications, or the substantive rules or process concerning asylum or long-term migration applications. Instead, the Article would be the legal base for measures concerning issues such as exchanges of personnel or exchanges of general information (as distinct from the exchange of specific information on individuals to be used in the process of considering visa applications or carrying out border checks).23

4. Immigration and Asylum Competence

Articles 77–80 (ex-62, 63, 63a and 63b) TFEU would replace the current Articles 62, 63 and 64(1) TEC. The new Articles would address: border controls and visas (Article 77 (ex-62)); asylum (Article 78 (ex-63)); immigration (Article 79 (ex-63a)); and solidarity between Member States (Article 80 (ex-63b)). The first three issues will be considered in turn, while the ‘solidarity’ clause will be considered as part of the analysis of the asylum provisions.

4.1 Border Controls

Article 77 (ex-62) TFEU would provide as follows:

1. The Union shall develop a policy with a view to:
   (a) ensuring the absence of any controls on persons, whatever their nationality, when crossing internal borders;
   (b) carrying out checks on persons and efficient monitoring of the crossing of external borders;
   (c) the gradual introduction of an integrated management system for external borders.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures concerning:
   (a) the common policy on visas and other short-stay residence permits;
   (b) the checks to which persons crossing external borders are subject;
   (c) the conditions under which nationals of third countries shall have the freedom to travel within the Union for a short period;
   (d) any measure necessary for the gradual establishment of an integrated management system for external borders;
   (e) the absence of any controls on persons, whatever their nationality, when crossing internal borders.

23) The current Art. 66 has therefore rightly been used as the legal base for measures on the exchange of general operational information on migration management, the exchange of information on national policies and the creation of a European migration network (see respectively OJ 2005, L 83/48, OJ 2006, L 283/40 and COM (2007) 466, 10 Aug. 2007). On the other hand, it is not (and would not be) the legal base for legislation on immigration statistics, since there is (and still would be) a lex specialis on statistics legislation: Art. 338 TFEU (current Art. 285 TEC). See Reg. 862/2007 (OJ 2007, L 199/23).
3. If action by the Union should prove necessary to facilitate the exercise of the right referred to in Article 17(2)(a), and if the Treaties have not provided the necessary powers, the Council, acting in accordance with a special legislative procedure, may adopt provisions concerning passports, identity cards, residence permits or any other such document. The Council shall act unanimously after consulting the European Parliament.

4. This Article shall not affect the competence of the Member States concerning the geographical demarcation of their borders, in accordance with international law.

This can be compared to the current powers in the present Article 62 TEC:

The Council, acting in accordance with the procedure referred to in Article 67, shall, within a period of five years after the entry into force of the Treaty of Amsterdam, adopt:

1. Measures with a view to ensuring, in compliance with Article 14, the absence of any controls on persons, be they citizens of the Union or nationals of third countries, when crossing internal borders;

2. Measures on the crossing of the external borders of the Member States which shall establish:
   (a) standards and procedures to be followed by Member States in carrying out checks on persons at such borders;
   (b) rules on visas for intended stays of no more than three months, including:
      (i) the list of third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement;
      (ii) the procedures and conditions for issuing visas by Member States;
      (iii) a uniform format for visas;
      (iv) rules on a uniform visa;

3. Measures setting out the conditions under which nationals of third countries shall have the freedom to travel within the territory of the Member States during a period of no more than three months.

As compared to the current competence in Article 62 TEC, Article 77 TFEU would contain: an identical rule concerning the abolition of internal border controls; a nearly identical rule concerning the crossing of external borders; wider competence as regards visas and the freedom to travel for third-country nationals; and a new express competence concerning an integrated management system for external borders. Article 77(3) (ex-62(3)) TFEU would contain a new express competence regarding passports, residence permits, identity cards or other such documents. This would be, as noted above, the only immigration-related legal base which would be subject to a ‘special legislative procedure’ which would differ from the ‘ordinary’ procedure of co-decision and QMV. The Constitutional Treaty had placed this new legal base in the citizenship provisions of the Treaty; placing it here entails the application of opt-outs for the UK, Ireland and Denmark.

Examining the new or revised legal bases in turn, the ‘common policy on visas and other short-stay residence permits’ would be an extension of competence as

24) This Article would be renumbered Art. 20(2)(a) TFEU.
25) On the concept of a ‘special legislative procedure’ generally, see Art. 289(2) (ex-249 A(2)) TFEU.
26) See further ‘In a World of Their Own?’ (n. 2 above).
compared to the current competence concerning visas ‘for an intended stay of no more than three months’, as it would drop the time limit on the competence and would add a new competence relating to ‘other’ forms of short-stay permit, which would also form part of the ‘common’ policy. Moreover, competence over visas would no longer be broken down into four separate sub-areas, although it is doubtful whether this would extend the current competence because the four sub-areas, taken together, were quite broad, and arguably the four specific powers listed in the current Article 62(2)(a) TEC are not an exhaustive list of EC visa powers anyway. There would no longer be any reason to doubt the EC/EU competence over airport transit visas. However, the new Treaty would not explicitly settle the question as to whether measures concerning entry control for foreign policy purposes should have a legal base relating to foreign policy (the current practice) or relating to visas and borders (which, in my view, is the correct legal base for such measures). However, the new Treaty would at least give the persons concerned the power to bring annulment actions against the relevant foreign policy measures.

As to the intensity of the EU’s powers, it is doubtful whether the competence over a ‘common’ visa policy would be any more intensive per se than the current power to adopt rules concerning a ‘uniform’ visa, considering that the Court of Justice has stressed the requirements (which must logically entail a corresponding power) for harmonisation and uniformity as regards visas and border policy. As noted above, the decision-making rules concerning visa lists and the visa format would become subject to co-decision (the future ‘ordinary legislative procedure’). It is interesting to speculate whether, in practice, the EU might wish to offer to certain third-countries, and/or to provide for the issue to certain categories of individuals, the issue of visas for more than three months or short-stay permits of a longer validity.

Next, the EU would have the power to regulate the freedom to travel of third-country nationals within the EU ‘for a short period’, rather than (under the current Article 62(3) TEC) ‘for a period of no more than three months’. This limitation prevented the adoption of a Commission proposal which combined together rules on freedom to travel for up to three months and a ‘specific travel

27) EU JHA Law (n. 8 above), 109–10.
29) EU JHA Law (n. 8 above), 111.
30) See Art. 275 (ex-240a) TFEU.
32) This would impact on any measures pending at the date of entry into force of the Treaty. The Commission is planning to propose amendments to the visa format and visa list legislation in 2008, as well as consolidated texts of this legislation: see the Commission’s forward planning document <http://ec.europa.eu/atwork/programmes/docs/forward_programming_2008.pdf>, last accessed 14 April 2008.
authorisation’ to stay in successive Member States for a longer period. This would have addressed a complex situation arising from the application of pre-existing treaties between Member States and third countries dealing with the issue. If the Treaty of Lisbon were ratified, the EU would be free to adopt a measure extending freedom to travel for more than three months.

What would the new power to establish an ‘integrated management system’ for external borders entail? Since the current Treaty already provides for sufficient power to regulate the movement of persons and goods across external borders (Articles 62(2)(b) and 135 TEC), and the Treaty of Lisbon would retain these powers, the new power would have to relate to the regulation of the link between these powers. The awkward point is that the customs cooperation powers are not subject to opt-outs, so a dividing line would have to be drawn between the regulation of the movement of goods at the external borders per se (subject to the customs cooperation powers) and the regulation of the synergy between the different borders administrations (subject to the ‘integrated management’ powers). Proposed measures in this area would have to be examined on a case-by-case basis to see whether they built upon the Schengen acquis concerning external border controls, with the result that the UK and Ireland would not be able to participate in the adoption of such measures as long as those Member States were not participating in the underlying Schengen acquis. Conversely, the EU’s Schengen associates would have to participate in Schengen-building measures but could not participate in measures concerning the customs union.

Finally, what about the new legal base relating to passports and other documents? It is obviously necessary to distinguish this provision from the general external borders powers because it is subject to unanimity in Council and consultation of the EP, rather than the ordinary legislative procedure (ex-co-decision). Furthermore, surely the passports legal base, and measures adopted pursuant to it, would have to be interpreted in light of EU citizenship, not in light of the objectives of the borders powers or the general objectives of Title V (ex-Title IV).

In order to interpret the scope of the new provision, it should be recalled, first of all, that at present Article 18(3) TEC, which is part of the Treaty Article concerning the free movement rights of EU citizens, rules out the adoption of measures on such issues. The Council nonetheless adopted in 2004 a Regulation on security features in passports issued by Member States, on the basis of the EC’s

33) COM (2001) 388, 10 July 2001 (proposal); OJ 2006, C 64/3 (withdrawal).
34) For a discussion of the legal complications, see EU JHA Law (n. 8 above), 111–113, 172–173 and 177–178.
35) The Treaty of Lisbon would revise Art. 135 TEC and move it into the internal market provisions of the TFEU (Art. 33 (ex-27a) TFEU).
36) Cases C-77/05 and C-137/05 UK v Council, judgments of 18 Dec. 2007, not yet reported.
external borders powers, on the grounds that such rules help to facilitate checks at external borders.\textsuperscript{38} However, the common format of the EU passport has traditionally been set out in Resolutions of Member States, on the assumption that the EC lacked the competence to regulate such matters.\textsuperscript{39} At first sight, this assumption is clearly correct in light of Article 18(3) TEC, for (by analogy with the case law relating to public health) the Community should not be able to circumvent restrictions on its competence set out in one legal base by employing another legal base instead.\textsuperscript{40}

On the same grounds, it is doubtful whether the current external borders legal base in fact provided competence for the EC to adopt the passport security Regulation, as passports are not merely used at the external borders of the Member States, but also at EC internal borders (to the extent that passport checks are still carried out), to prove identity within Member States, and to cross the borders of non-Member States.\textsuperscript{41} Indeed, one purpose of the passport security Regulation was to continue to ensure visa-free entry for the nationals of most Member States into the United States.\textsuperscript{42} However, the Court of Justice’s judgment on the validity of the passport security Regulation has implicitly endorsed the use of the EC’s external borders powers as a valid legal base for this measure.\textsuperscript{43}

The position if the Treaty of Lisbon enters into force is that the Union would have express competence to regulate not just passports, but also identity cards, residence permits and similar documents. But this is subject to two provisos: such measures must be necessary for facilitating EU citizens’ rights to ‘move and reside freely’; and this power can only be applied if other provisions of the Treaty ‘have not provided the necessary powers’. Taking the second proviso first, it is arguable that the general external borders legal base can still be used to adopt measures relating to passport security, because such measures will ensure more effective checks at the external borders by reducing the risk of document fraud.\textsuperscript{44} The objection that the use of the external borders legal base is circumventing an express prohibition elsewhere in the Treaty is obviously no longer valid. As for identity cards, at first sight the external borders legal base cannot be used, since identity cards cannot be used for crossing external borders, unless they are considered to be travel documents or documents authorising the person concerned


\textsuperscript{39} OJ 1981, C 241/1; OJ 1982, C 179/1; OJ 1986, C 185/1; OJ 1995, C 200/1; OJ 2000, C 310/1; and OJ 2004, C 245/1.

\textsuperscript{40} See Case C-376/98 Germany v EP and Council (tobacco advertising) [2000] ECR I-8419.

\textsuperscript{41} For a summary of this argument, see EU JHA Law (n. 8 above), 108–109, with further references.

\textsuperscript{42} See the explanatory memorandum to the Commission’s proposal for the Regulation (p. 3 of COM (2004) 116, 18 Feb. 2004).

\textsuperscript{43} Case C-137/05 UK v Council (n. 35 above), paras. 58–66. However, there is nothing in the Court’s judgment that addresses the human rights arguments against the validity of this Regulation.

\textsuperscript{44} Ibid.; see Art. 7 of the Schengen Borders Code (Reg. 562/2006, OJ 2006, L 105/1).
to cross the border. Next, as for residence permits or similar documents, the question is moot for EU citizens since they do not require such documents to cross the external borders. The issue is not moot, however, for third-country national family members of EU citizens, since a ‘residence card’ (which could be considered an ‘other such document’) will simplify border checks for them.

As for the proviso relating to facilitation of free movement rights, an EU citizen crossing the border between a Schengen State and a non-Schengen State is simultaneously crossing an internal border (from a free movement perspective) and a Schengen border (from the perspective of Title V (ex Title IV)), and passports and identity cards can be used to cross such a border. The same is true of citizens’ family members’ residence cards. Therefore the two provisos relating to the use of the new power would overlap. Also, passports and identity cards can be used by EU citizens to exercise the right to reside in another Member State, as can passports for third-country national family members. But since EU citizens do not need residence permits to cross the internal borders or to reside in Member States, there is no link to facilitation of free movement rights there.

The best resolution of these conflicts is to accept that the EU’s external borders competence would be a valid legal base for the adoption of measures concerning the security features of EU citizens’ passports, identity cards held by EU citizens, and residence cards held by EU citizens’ family members, since such measures relate to checks at external borders, at least where such borders are also internal borders between Schengen and non-Schengen Member States. Moreover, the harmonisation of such security features would not as such facilitate EU citizens’ right to move and reside freely. On the other hand, harmonisation of the format of such documents facilitates free movement of EU citizens and their family members (the latter free movement constituting a corollary of the former), because a common format ensures the immediate recognition of such documents by border guards when crossing internal EU borders – not just when entering and exiting the Schengen area, but also when entering and exiting non-Schengen EU Member States as well.

Also, it should be pointed out that the ‘passports’ legal base would not confer power on the EU to regulate the issue of identity cards, residence permits or any other such documents to third-country nationals, other than the family members of EU citizens, because the issue of such documents to such persons is uncon-

45) Art. 5 of the Borders Code, which moreover only sets out entry conditions for third-country nationals.
46) See ibid.
47) See Art. 10(2) of the Borders Code.
nected with the free movement of EU citizens. So is the issue of passports to such persons, but of course in any event the issue of passports to third-country nationals (even those who are family members of EU citizens) is a matter for their home countries, not Member States or the EU. The external borders power would continue to be a valid legal base regarding the issue of travel documents by Member States to third-country nationals, where there is a link to external border crossing but no link to facilitation of free movement.52

It is clear, though, that neither legal base would confer competence upon the EU to require Member States to introduce identity cards or to harmonise national law on the \textit{internal} use (i.e., within a Member State’s national territory) of such cards. Such matters are not sufficiently connected to the crossing of external borders or the facilitation of EU citizens’ free movement rights, considering that identity cards are only an \textit{optional} method of proving nationality when crossing internal borders.

To what extent could either legal base govern the creation of databases and the exchange of information concerning such documents? Extrapolating from the previous analysis, the external borders power would be a sufficient legal basis for the adoption of such measures to the extent that storing, exchanging and accessing such data was linked to checks at the Member States’ external borders. The applicable data protection rules would, however, have to be adopted on the basis of Article 16 (ex-16 B) TFEU, which I will discuss elsewhere,53 although these general rules could be supplemented by specific rules set out in the external borders legislation. But the ‘passports’ legal base would not confer power to establish or regulate such databases or exchange of information, since the development of such policies would not facilitate EU citizens’ rights to move and reside freely.

Finally, it should also be emphasised that the EU’s ‘passports’ power is distinct from its external borders power, because the former measures will not build upon the Schengen \textit{acquis}, because of their link to the free movement of \textit{all} EU citizens, while the latter measures usually (perhaps always) will build upon the Schengen \textit{acquis}, because of the central role that harmonised external border checks play as regards that \textit{acquis}.54 This would mean that different opt-out rules will be applicable to the two powers.55

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52) See Art. 1 of Reg. 2252/2004 (n. 37 above).
53) See ‘EU Policing Competence and Decision-Making’ (n. 9 above).
54) In light of the Court’s judgments in the borders cases (n. 35 above), it is hard to imagine a measure which falls within the scope of the external borders legal base but which does not build upon the Schengen \textit{acquis}.
55) The Schengen rules would apply to the external borders power, while the Title V (ex-Title IV) rules would apply to the passports power. On the practical differences between the two sets of rules, see ‘In a world of their own?’ (n. 2 above).
4.2 Asylum

Article 78 (ex-63a) TFEU would provide as follows:

1. The 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 and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for a common European asylum system comprising:
   (a) a uniform status of asylum for nationals of third countries, valid throughout the Union;
   (b) a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection;
   (c) a common system of temporary protection for displaced persons in the event of a massive inflow;
   (d) common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status;
   (e) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection;
   (f) standards concerning the conditions for the reception of applicants for asylum or subsidiary protection;
   (g) partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection.

3. In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament.

This can be compared to the current Article 63(1) and (2) TEC, which provide as follows:

The Council, acting in accordance with the procedure referred to in Article 67, shall, within a period of five years after the entry into force of the Treaty of Amsterdam, adopt:

1. Measures on asylum, in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and other relevant treaties, within the following areas:
   (a) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum submitted by a national of a third country in one of the Member States,
   (b) minimum standards on the reception of asylum seekers in Member States,
   (c) minimum standards with respect to the qualification of nationals of third countries as refugees,
   (d) minimum standards on procedures in Member States for granting or withdrawing refugee status,

2. Measures on refugees and displaced persons within the following areas:
   (a) minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin and for persons who otherwise need international protection,
   (b) promoting a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons;
In fact, the final line of Article 63 exempts paragraph 2(b) from the five-year deadline, although the point is now moot.

Furthermore, the future Article 78(3) (ex-63(3)) TFEU should be compared to the current Article 64(2) TEC, which provides as follows:

2. In the event of one or more Member States being confronted with an emergency situation characterised by a sudden inflow of nationals of third countries and without prejudice to paragraph 1, the Council may, acting by qualified majority on a proposal from the Commission, adopt provisional measures of a duration not exceeding six months for the benefit of the Member States concerned.

Although the Treaty of Lisbon would not make any change to decision-making as regards asylum, since qualified majority voting and co-decision (the future ordinary legislative procedure) already applies to asylum law and would still do so in future, there would be significant changes to EC/EU competence. As compared to the current powers, Article 78(1) (ex-63(1)) TFEU would make clear that the EU ‘shall develop a common policy on asylum, subsidiary protection and temporary protection’, an objective also referred to in Article 67(2) (ex-61(2)) TFEU.\(^{56}\)

On the other hand, the current Treaty provides more modestly that the EC shall adopt ‘measures on asylum’ as well as measures on refugees and displaced persons, setting only ‘minimum standards’ except as regards burden-sharing and determining responsibility for applications.\(^{57}\)

The new paragraph 1 would also specify that the EU would act ‘with a view to offering ‘appropriate status to any third-country national requiring international protection’ and would require ‘compliance with the principle of non-refoulement’. As with the current Treaty, the policy would have to be ‘in accordance with’ the Geneva Convention, the New York Protocol, and ‘other relevant treaties’. The EU would therefore have to continue to ensure compliance with these treaties (and now also with the principle of non-refoulement and the obligation to provide appropriate status) as an obligation deriving from the Treaty,\(^{58}\) not merely from Member States’ treaty obligations, customary international law or \textit{jus cogens}. Moreover, this power would explicitly apply to all aspects of the the EU’s protection-related policies, not just (as at present) to the competences related to the Geneva Convention.\(^{59}\)

\(^{56}\) However, Art. 67(2) (ex-61(2)) TFEU would refer more briefly to a ‘common policy on asylum’, without referring to temporary or subsidiary protection. On the general provisions of Title V (ex-Title IV), see s. 2 above.


\(^{58}\) See Gil-Bazo, \textit{ibid.}, 233–234.

\(^{59}\) See \textit{ibid.}. 
The extended powers of the EU would be confirmed by Article 78(2) (ex-63(2)) TFEU, which would state that all of the specific asylum powers comprise ‘measures for a common European asylum system’, including a ‘uniform status’ of asylum and subsidiary protection, the former of which shall be ‘valid throughout the Union’, a ‘common’ system of temporary protection and ‘common’ procedures for granting or withdrawing uniform asylum or subsidiary protection status. Three further powers would not be described as ‘common’ or ‘uniform’, but would nevertheless fall within the scope of the general objective of developing a ‘common’ policy and system: the criteria and mechanisms for determining responsibility for applications; the reception standards for applicants; and relations with third countries. This compares with the current powers, as mentioned above, to adopt ‘minimum standards’ on most of these issues, which moreover largely refer to refugees and asylum, and only indirectly to subsidiary protection. Not only would the EU have the capacity under the Treaty of Lisbon to harmonise the law fully, it would also become explicit that the EU’s powers in this area would concern subsidiary protection, although the current powers have also been understood to include subsidiary protection already.60

Of course, the explicit treaty reference to creating a Common European Asylum System reflects the political objective first set out in the 1999 Tampere conclusions, and reiterated in the 2004 Hague Programme,61 which set an end-2010 deadline to establish the second phase of the System. This political objective is referred to expressly in the preambles of EC asylum legislation,62 and must therefore presumably be taken into account when interpreting the legislation. But since the current Treaty limits the Community to setting ‘minimum’ standards, it is hard to see how a genuinely ‘common’ system could ever be established pursuant to the current legal framework.

There are several other noteworthy differences between the current competence and competence under the Treaty of Lisbon. First of all, the current competence relates only to third-country nationals as regards temporary protection, responsibility for asylum-seekers and qualification as a refugee, but the EC’s other powers are not limited to third-country nationals only. However, the EC institutions, doubtless because of the Protocol on asylum for nationals of Member States, which greatly limits EU citizens’ ability to apply for asylum in other Member States,63 have used the EC’s current asylum powers in practice exclusively as regards third-country nationals, not EU citizens. The new powers in the Treaty of Lisbon would restrict the EU to regulating asylum for third-country nationals

62) See recitals 1 to 3 of the reception conditions Directive, recitals 1, 2 and 5 of the Dublin II Regulation, recitals 1, 2 and 4 of the qualification Directive, and recitals 2 and 3 of the asylum procedures Directive (all n. 13 above).
63) The Treaty of Lisbon would not make any substantive changes to this Protocol.
only, but in light of the self-imposed restriction on the personal scope of the current provisions, this would not constitute a change in practice.

Another change would be the power to regulate the status of asylum (and subsidiary protection), instead of qualification as refugees. This wording would reflect the full title of the Geneva Convention and could therefore be understood as encompassing the main content of that Convention – both the definition (‘qualification’) of refugees and their status on the territory (in terms of, for example, residence and access to employment and benefits). Within the current legal framework, the latter issues were dealt with by using the EC’s immigration powers,64 which creates problems at present due to the different decision-making rules now applicable to asylum matters on the one hand and legal immigration on the other, but this should not be necessary in future. It might also be argued that the EC legislation regulating long-term residents’ status and movement between Member States should, as regards at least refugees, be adopted in future on the basis of the EU’s asylum powers after the entry into force of the Treaty of Lisbon, since that (proposed) legislation regulates the status of refugees and persons with subsidiary protection as regards immigration law (although not the distinct protection aspects of the status of such persons.65 In any event, in future there would be no conflict between the decision-making rules applicable to asylum on the one hand and legal migration on the other. The most important point is to avoid regulating the immigration status of persons with international protection purely on the basis of their protection need, because then they would lose their status if that need ceased.

An interesting question is the scope of the provision concerning ‘a status of asylum... valid throughout Union’. This would have to entail some degree of recognition by each Member State of other Member States’ recognition of refugee status, but the full extent of that requirement is not clear. Could it be confined to recognition of the non-refoulement obligation, with the consequence that a refugee recognised by one Member State who is irregularly on the territory of another Member State must be returned to the Member State which first recognised that person’s refugee status? Would it extend as far as to provide for a right of residence, valid in any Member State, entailing also all of the benefits (access to welfare, housing and employment) accorded to legally resident Convention refugees, to the extent required by the Convention (and/or the qualification Directive)? Or would it entail something in between?

The best interpretation, in the absence of any clear indication in the Treaty, is that the EU institutions would have a degree of discretion between different

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64) Directive 2004/83 (n. 13 above) was adopted with both asylum and immigration legal bases.
65) See the proposal to extend the long-term residents’ directive (n. 13 above) to refugees and persons with subsidiary protection (COM (2007 298, 6 June 2007), which has the current immigration powers as a ‘legal base’.
interpretations of this provision, and could choose to develop the Union-wide validity of that status gradually. It would always have to be kept in mind, however, that the Treaty would not refer expressly to a Union-wide validity of subsidiary protection status, so a distinction would not always be made between the two types of status. However, it is arguable that even though the EU institutions would not be required to provide for EU-wide validity of subsidiary protection status, they would still have the option to provide for it, in the absence of a provision in the Treaty expressly limiting EU competence on this point.

As for temporary protection, the power following the entry into force of the Treaty of Lisbon would not only constitute a power to establish a ‘common’ policy, as noted above, but also it would be limited, unlike the current Treaty, to cases where there is a ‘massive inflow’. However, it should be noted that the EC’s current temporary protection Directive is in any event limited to cases of a ‘mass influx’.66

Next, the new provision relating to ‘partnership and cooperation’ with third countries would more clearly confer powers on the EU as regards this issue as compared to the current Treaty, which expressly refers in most cases only to powers to regulate protection issues within or between Member States.67 Furthermore, Article 78 (ex-63) TFEU would be a lex specialis on this issue, which would arguably not therefore fall within the scope of the EU’s development policy. The importance of this is that the EU would have powers to harmonise asylum law fully, whereas development policy would be (as it is currently) a shared and parallel competence, meaning that the EU can never pre-empt national policy.68

The current ‘burden-sharing’ power set out in Article 63(2)(b) TEC would not be retained as such. However, the Treaty of Lisbon would introduce a new general rule that the EU’s immigration and asylum policies and their implementation ‘shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States’ (Article 80 (ex-63b) TFEU). Moreover, EU immigration and asylum legislation ‘shall contain appropriate to give effect to this principle’ whenever this is ‘necessary’. The objectives set out in Article 67(2) (ex-61(2)) TFEU would also provide that EU immigration and asylum policy shall be ‘based on solidarity between Member States’. This new provision would not be a legal base in itself, but would provide justification for the adoption of measures such as the European Refugee Fund,69 and possibly for non-financial measures concerning ‘burden-sharing’ as well.

67) See the current Art. 63(1)(a), (b) and (d) and 2(b). The exceptions are Art. 63(1)(c) and 2(a), concerning the qualification of refugees and temporary protection.
68) See Art. 4(4) (ex-2C(4)) TFEU.
69) The legislation providing for the Fund is currently set out in OJ 2007, L 144/1.
The revised asylum competence of the EC/EU could have an impact upon the Commission’s plan to propose amendments to all the EC’s asylum legislation during 2008, to the extent that this legislation is not yet adopted by the time of the entry into force of the Treaty of Lisbon. Logically, it would be inappropriate to propose legislation based on the revised EC/EU powers before the Treaty of Lisbon enters into force, but it would be entirely legitimate to revise those proposals which are outstanding when the new Treaty enters into force, to take account of the amended Treaty provisions.

Finally, Article 78(3) (ex-63(3)) TFEU would concern the issue of an ‘emergency situation’ constituting a ‘sudden inflow’ of third-country nationals, following which the Council, by QMV on a proposal from the Commission, could adopt ‘provisional measures for the benefit of the Member State(s) concerned’. This would be identical to the current Article 64(2) TEC, except for the requirement to consult the EP, its placement in an Article dealing with asylum issues, the absence of a cross-reference to the general ‘law and order’ clause (Article 72 (ex-61 E) TFEU), and the abolition of the requirement that measures should not exceed six months in duration.

What would be the impact of these changes? The requirement to consult the EP would be a straightforward change, although it should be noted that satisfying this procedural obligation might delay the adoption of measures to address the perceived ‘emergency’. Next, the abolition of the cross-reference to the ‘law and order’ clause would be immaterial, since this ‘law and order’ clause would expressly apply in any event to the entire Title V (ex-Title IV). However, the placement of this clause inside an Article solely concerned with asylum would be new. Logically, this must mean that the ‘sudden influx’ clause in the Treaty of Lisbon would be limited in its application to asylum-related issues, and moreover that its application would be governed by the general obligations set out in Article 78(1) (ex-63(1)) TFEU as regards offering ‘appropriate status’ to persons needing international protection, along with compliance with the principles of non-refoulement, the Geneva Convention and other relevant treaties. As for the abolition of the six-month limit, this can only mean that measures could, if necessary, last longer than six months; but the requirement that they be ‘provisional’ in nature would obviously mean that the measures could not apply indefinitely or for a very lengthy fixed period either. Also, I have argued that the current Article 64(2) TEC cannot be used to amend existing EC legislation; this would

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70 The Commission is planning proposals to amend the Eurodac Regulation, the ‘Dublin II’ Regulation and the reception conditions Directive in September, and the qualification and asylum procedures Directives in November. See the Commission’s forward planning document (n. 32 above).

71 This power has never been used.

72 The current Art. 64(2) is ‘without prejudice’ to Art. 64(1), the current version of the ‘law and order’ clause.

73 See JHA Law (n. 8 above), 114.
apply *mutatis mutandis* to the new powers. If the above interpretation is correct, then Article 78(3) (ex-63(3)) TFEU could not be used to establish a temporary protection regime as long as the EC/EU has temporary protection legislation ‘on the shelf’ and available for use.\(^\text{74}\) Instead, the ‘sudden influx’ power could be used to provide, for example, immediate financial assistance to Member States which are affected particularly by such an ‘influx’.

4.3 Immigration

Article 79 (ex-63b) TFEU would provide as follows:

1. The Union 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.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures in the following areas:
   
   (a) the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunification;
   
   (b) 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;
   
   (c) illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation;
   
   (d) combating trafficking in persons, in particular women and children.

3. The Union may 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 the territory of one of the Member States.

4. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish measures to provide incentives and support for the action of Member States with a view to promoting the integration of third-country nationals residing legally in their territories, excluding any harmonisation of the laws and regulations of the Member States.

5. This Article shall not affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed.

This can be compared to the current Article 63(3) and (4) TEC, which provide as follows:

The Council, acting in accordance with the procedure referred to in Article 67, shall, within a period of five years after the entry into force of the Treaty of Amsterdam, adopt: [....]

3. Measures on immigration policy within the following areas:
   
   (a) conditions of entry and residence, and standards on procedures for the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunion,
   
   (b) illegal immigration and illegal residence, including repatriation of illegal residents;

\(^{74}\) See currently Directive 2001/55 (n. 66 above).
4. Measures defining the rights and conditions under which nationals of third countries who are legally resident in a Member State may reside in other Member States.

Measures adopted by the Council pursuant to points 3 and 4 shall not prevent any Member State from maintaining or introducing in the areas concerned national provisions which are compatible with this Treaty and with international agreements.

In fact, the final line of Article 63 exempts paragraphs 3(a) and 4 from the five-year deadline, although the point is now moot.

It can be seen first of all that the EU’s powers as regards migration would be more intensive than the current powers, given the obligation to develop a ‘common’ policy and the abolition of the penultimate paragraph of the current Article 63 TEC, reserving to Member States the power to maintain or introduce national provisions alongside EC legislation. It is not clear what this current proviso means, but arguably it would still be relevant to any immigration measures adopted before the Treaty of Lisbon, until they are amended after the entry into force of the Treaty. Moreover, as noted above (s. 3), the obligation to establish a ‘common’ immigration policy would be referred to in Article 67(2) (ex-61(2)) TFEU.

Furthermore, the future Article 79(1) (ex-63a(1)) TFEU, unlike the current Article 63 TEC, would contain objectives specific to immigration policy: ‘efficient’ management, ‘fair treatment’ of legal residents and prevention and combating of illegal immigration and human trafficking. Of these objectives, fairness would also be mentioned in part of the general Title V (ex-Title IV) objectives in Article 67(2) (ex-61(2)) TFEU. While immigration would still remain a shared competence of the EU and its Member States, as noted above (s. 2), the wording of the new provisions suggests that it would be easier to justify more intensive EU action pursuant to the principles of proportionality and subsidiarity, and harder to argue that any particular area would be outside EU competence, apart from the express restriction on competence in Article 79(5) (ex-63a(5)), discussed further below.

4.3.1 Legal Migration

The EU’s powers over legal migration, currently provided for in Article 63(3)(a) and (4) TEC, would in future be set out in Article 79(2)(a) and (b) and (4) (ex-63a(2)(a) and (b) and (4)) TFEU, with an important limitation on competence in Article 79(5) (ex-63a(5)) TFEU. Of these provisions, Article 79(2)(a)

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(ex-63a(2)(a)) TFEU would be identical to the current Article 63(3)(a) TEC, although it should not be forgotten that, as noted above, the overall legal framework of the EU’s immigration powers would change, which might suggest a different interpretation of these provisions. On the other hand, Article 79(2)(b) (ex-63a(2)(b)) TFEU would set out a wider express competence as regards the rights of third-country nationals legally resident in a Member State, and a different wording as regards third-country nationals’ movement to other Member States (including an express reference to ‘freedom of movement’, which would obviously be distinct from the ‘freedom to travel for a short period’ referred to in Article 77 (ex-62) TFEU). However, it should be noted that the EC’s current powers have already been used to define the rights of third-country nationals.76 Furthermore, given that Article 77 (ex-62) TFEU would be less precise as regards the time limit for short-term entry of third-country nationals (as compared to the current three-month limit), the dividing line between that Article and Article 79 (ex-63a) TFEU would be less precise than at present.

Also, there would be a new ‘legal base’ providing for the adoption of EU measures ‘to provide incentives and support’ for Member States’ action ‘promoting the integration’ of legally resident third-country nationals.77 Again, the EC has already been active on this issue within the current legal framework, in particular by establishing a ‘European integration fund’ which would obviously fall within the scope of the EU’s new competence to support Member States’ integration policies.78 In all of these cases, decision-making would change from the current rules (unanimity in the Council and consultation of the EP) to a qualified majority vote in Council and co-decision of the EP (the future ‘ordinary legislative procedure’). This would obviously be a significant change to decision-making in this politically sensitive area.

The change in the decision-making rule would particularly impact upon proposals for legislation on legal immigration still under discussion when the new Treaty enters into force. This may apply to proposals on the extension of long-term resident status,79 social security for third-country nationals,80 admission of the highly-skilled81 and the rights of legal migrant workers,82 as well as planned proposals on the admission of seasonal workers, paid trainees and intra-corporate transferees.83 In the medium to long term, the shift to QMV in this area may

76) See Directive 2003/109 on long-term residents (n. 13 above), although in this Directive, there is a link between the regulation of the status of long-term resident in a first Member State and the right to move to another Member State.
77) Art. 79(4) (ex-63a(4)) TFEU.
79) N. 55 above.
83) See the Commission’s ‘forward planning’ document (n. 32 above).
encourage the Commission to propose additional and more ambitious measures, including amendments to existing legislation.

However, the impact of the new decision-making rules would be limited by the new Article 79(5) (ex-63a(5)) TFEU, which reserves competence of Member States over volumes of third-country nationals coming from third countries to seek work, including self-employed work. Arguably, this would be a new restriction on competence as compared to the current Treaty, although the Commission has in practice incorporated this limit on competence in its recent proposals for EC legislation on legal migration. In any event, in practice no legislation has been adopted which restricts Member States from adopting such measures, and it is hard to imagine that such legislation ever would be adopted as long as unanimous voting is applicable to this area.

Moreover, there has been some dispute as to whether the EC even has competence, within the scope of its existing powers, to regulate economic migration of third-country nationals. I have argued previously (with Elspeth Guild) that competence on this matter is currently divided between three legal bases: the power in Article 40 TEC to regulate the movement of ‘workers’ between Member States (with no restriction upon the workers’ nationality), the power to regulate the ‘conditions of employment’ of third-country nationals in Article 137 TEC, and the immigration powers in the current Article 63 TEC. Following the Treaty of Lisbon, the power to adopt measures regarding a ‘common immigration policy’ and the express restriction regarding economic migration in Article 79(5) (ex-63a(5)) TFEU would both point to a power to regulate economic migration within the scope of the future Article 79(2) (ex-63a(2)) TFEU, as would the addition of the express power to regulate ‘the rights of third-country nationals residing legally in a Member State’. Taking these provisions in turn, a ‘common immigration policy’ would obviously be incomplete without regulation of economic migration; a restriction relating to volumes of admission of economic migrants would be meaningless unless the EU had competence to regulate such migration in the first place; and the regulation of the ‘rights’ of resident third-country nationals would logically include the regulation of their access to employment, in the absence of any indication to the contrary.

It must therefore be concluded that Article 79 (ex-63a) TFEU would include the power to regulate economic migration of third-country nationals, limited only by the express restrictions on competence in Article 79(5) (ex-63a(5)) TFEU. As compared to other Treaty Articles, it could no longer be argued that any power to regulate this issue would be contained within Article 40 TEC (future

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84 See Art. 7 of the ‘Blue Card’ proposal (n. 81 above).
Article 46 TFEU), because Article 79 (ex-63a) TFEU would be a *lex specialis*. On the other hand, Article 153 TFEU (current Article 137 TEC) would still be a *lex specialis* as regards ‘conditions of employment’ of third-country nationals. The distinction between Articles 79 and 153 (ex-63a and 137) TFEU would matter because the social policy competence would remain subject to unanimous voting and consultation of the EP (ie, another ’special legislative procedure’),86 with no facility for the UK, Ireland or Denmark to opt out of legislation.

The best approach to the relationship between the future Articles 79 and 153 (ex-63a and 137) TFEU would be that the former Article confers competence to regulate the conditions of employment of third-country nationals (or categories of third-country nationals) generally,87 if the regulation of this issue were ancillary to a measure regulating the rights of third-country nationals (or a category of them) generally, while the latter Article would be the correct legal base for a matter solely concerning the conditions of employment of third-country nationals.88

Three other provisions of the Treaties also need to be considered as regards the EC’s/EU’s competence to regulate economic migration. First, Article 49 TEC/future Article 56 TFEU explicitly gives (and would still give) the EC/EU competence to regulate the provision of services in one Member State by third-country nationals who are legally resident in another Member State. The Treaty of Lisbon would change the decision-making rules as regards this issue, from QMV with no role for the EP to the ordinary legislative procedure, but the competence itself would not be altered.89 So it must be concluded that Article 56 (ex-49) TFEU would continue to be a *lex specialis* as regards this issue.

Next, Article 217 (ex-188 M) TFEU (current Article 310 TEC) would continue to confer competence as regards the negotiation and conclusion of association agreements. As the Court of Justice has confirmed, this Treaty Article confer competence upon the EC/EU to extend the entirety of the EC Treaty rules to non-member countries.90 Indeed, the EC has used this power to extend the full free movement of persons to some non-EU states.91 Since Article 217 (ex-188 M) TFEU would not significantly amend the current Article 310 TEC, the relationship between this provision and the EU’s express immigration competence (by

86) See n. 25 above.
87) Except for persons seeking or obtaining protection status, who would fall within the scope of Article 78 (ex-63) TFEU.
88) See by analogy Opinion 1/94 [1994] ECR I-5273, as regards the relationship between the commercial policy powers of the EC and the European Coal and Steel Community.
89) On the scope of this competence, see Guild and Peers (n. 85 above), 105–109.
91) See the treaties establishing the European Economic Area (OJ 1994, L 1/1) and the EC-Swiss treaty concerning the free movement of persons (OJ 2002, L 114).
Finally, the Treaty of Lisbon would revise the EC’s/EU’s commercial policy powers (Article 207 (ex-188 C) TFEU; current Article 133 TEC) in order, *inter alia*, to extend the EU’s powers as regards the free movement of services from third states. Article 207 (ex-188 C) TFEU would provide a legal base not only for the negotiation and conclusion of treaties on this issue (as at present), but also for the adoption of internal legislation on this issue, by means of the ordinary legislative procedure. Unanimity would only apply as regards the negotiation and conclusion of agreements where unanimity would be required for the adoption of internal rules (an irrelevant point in the immigration context), or where agreements would ‘risk prejudicing the Union’s cultural or linguistic diversity’ – as regards trade in cultural or audio-visual services – or would risk seriously disturbing the national organisation of social, educational and health services and prejudicing the responsibility of Member States to deliver them. The EU’s power over the entire common commercial policy would be exclusive, unlike at present, although the EU would be able to delegate this power to the Member States. Since the Community for many years delegated aspects of its ‘classic’ commercial policy competence to the Member States, it could well decide to delegate power as regards the newer aspects of commercial policy as well, at least for a transitional period, although the Court of Justice has attached conditions to such delegation.

Article 207 (ex-188 C) TFEU would need to be distinguished from the EU’s powers over labour migration because the commercial policy power would be fully exclusive and uniform, with no opt-outs for Member States. Logically, the concept of ‘services’ for the purpose of Article 207 (ex-188 C) TFEU would follow the international definition, which includes the movement of companies as well as natural persons. So the short-term movement of persons within the context of international trade negotiations would fall within the concept of the

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92) On the scope of this competence, see Guild and Peers (n. 85 above), 98–100.
93) Since the ‘passports’ legal base, the only immigration legal base where unanimity would apply, would be limited to facilitation of the movement of EU citizens, rather than the admission of third-country nationals from outside the EU (see s. 4.1 above).
94) Art. 207(4) (ex-188 C(4)) TFEU.
95) Art. 3(e) (ex-2B(e)) TFEU. Art. 207 (ex-188 C) TFEU, like the current Art. 133 TEC, would also refer to the ‘uniform principles’ on which the entire common commercial policy is based.
96) Art. 133(5) TEC, fourth sub-paragraph; exclusivity only applies to the ‘classic’ commercial common policy (which primarily concerns trade in goods).
97) Art. 2(1) (ex-2A(1)) TFEU.
common commercial policy, not the immigration policy, although the issue of transition to a long-term stay, and arguably also the specific regulation of visas for entry of service providers, would fall within the scope of the immigration powers. Again, it should be reiterated that the EU could always delegate some or all of this exclusive power back to Member States for a considerable period.

It remains to be determined to what extent Article 79(5) (ex-63a(5)) would restrict the EU’s competence. The starting point for the interpretation of the exclusion should be that as an exception from the EU’s competence to establish a ‘common’ policy, it should be narrowly interpreted. Then the four specific aspects of the restriction need to be considered in turn. First of all, the provision would only restrict competence in respect of ‘[t]his Article’, i.e. Article 79 (ex–63a) TFEU. So competence regarding economic migration conferred by Articles 153, 207 and 217 (ex-137, 188 C and 188 M) TFEU would be unaffected. Secondly, the restriction only concerns volumes of admissions, rather than the question of access to employment for persons who have already been admitted or other aspects of the admission of economic migrants (such as the technical aspects of the admissions process or the grounds for admission, which could be separated from the question of permitted volumes per Member State). Thirdly, the restriction only applies to third-country nationals who come directly from third countries. Therefore, third-country nationals who are already resident, or at least legally resident, in a Member State (including presumably a Member State which has opted out of some EC/EU immigration legislation) are not covered by the exclusion. So the EU would be competent, for example, to abolish Member States’ ability to restrict the movement of long-term residents between Member States by means of quotas.

Fourthly, the limitation on competence would only concern people who seek employment or self-employment. It would be possible to interpret this aspect of the limitation on competence very restrictively indeed, so that the EU competence would be restricted only as regards the volumes of work-seekers, as distinct from the volumes of persons who already have work contracts or arrangements for self-employment. But such a highly restrictive interpretation would go too far, because it would leave Member States with a highly ineffective reserve of compe-

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100 See, by analogy, the judgment in Case C-307/05 Del Cerro Alonso [2007] ECR I-7109 and the Opinion of 9 Jan. 2008 in Case C-268/06 Impact, pending, as regards the exclusions from competence in the current Article 137(5) TEC (future Art. 153(2) TFEU) which, moreover, does not concern a limitation on competence to establish a ‘common’ policy.

101 This analysis is consistent with my ‘anti-circumvention’ argument relating to the current ban on harmonising passport legislation (n. 41 above), because the relevant legal bases confer more specific legal powers.

102 These topics are the subjects of the Commission’s proposals of Oct. 2007 (ns. 81 and 82 above).

103 See Art. 14(4) of Directive 2003/109 (n. 13 above), although this condition would not apply in any event to long-term residents who hold an EU Blue Card (Art. 20(1) of the proposed ‘Blue Card’ Directive, n. 81 above).
tence. The EU would be able to nullify that national reserve of competence entirely by simply requiring any third-country nationals admitted for employment or self-employment in a Member State to have a contract of employment or to have made arrangements for self-employment beforehand. On the other hand, the limitation on competence should not be construed so widely as to reserve to Member States a power to regulate the volumes of third-country nationals from third countries who might seek employment or self-employment on an ancillary basis, where the main reason for admission is for a non-economic purpose such as family reunion, study or seeking international protection, but where EC/EU legislation nevertheless regulates access to employment.

Finally, the new Treaty provisions would not expressly settle the question as to whether the EC/EU’s migration powers would extend to the regulation of social security for all third-country nationals who move between Member States. Currently it is assumed by the EU institutions that the EC’s migration powers apply to this issue, rather than its powers to regulate social security for EC workers pursuant to Article 42 TEC. However, a Declaration to the Treaty of Lisbon clearly assumes that the immigration powers would apply. It should be noted that under the Treaty of Lisbon, the social security legal base (unlike any of the migration legal bases) would be subject to an ‘emergency brake’ which any Member State could pull in certain cases; but it would not be subject to any opt-outs.

4.3.2 Irregular Migration

As for irregular immigration, the current Article 63(3)(b) TEC would be replaced by the future Article 79(2)(c) and (d) and (3) (ex-63a(c) and (d) and (3)) TFEU. Compared to the current Treaty powers, the first of these revised provisions would refer to ‘unauthorised’, rather than ‘illegal’ presence, and also refer expressly to ‘removal’. It is doubtful whether either of these changes would add to the EC’s/ EU’s competence, because persons who are not authorised to reside would likely be considered ‘illegal’, and the existing powers over irregular migration, which are expressly non-exhaustive (‘including . . .’) are obviously apt to include competence concerning removals, which presumably differ from ‘repatriation’ in that a ‘removal’ could take place other than to the country of origin. Indeed, there are several adopted or proposed measures which address this issue. The
decision-making rules would remain, as at present, qualified majority voting and co-decision (the future ordinary legislative procedure).

A new express competence would be conferred by Article 79(2)(d) (ex-63a(2)(d)) TFEU, as regards trafficking in persons. The parallel change to the decision-making process regarding legal migration means that there would no longer be an awkward problem if the EU wanted to amend the existing Directive concerning the legal status of victims of trafficking.\(^{110}\) However, the new express competence would have to confine itself to immigration-related issues, as the criminal law response to trafficking in persons would fall within the scope of the lex specialis set out in Article 83(1) (ex-69 B(1)) TFEU.\(^{111}\) The distinction between Articles 79(2) and 83(1) (ex-63a(2) and 69 B(1)) TFEU would be important because an ‘emergency brake’ would apply to the adoption of legislation under the latter provision.

On the other hand, the criminal law aspects of facilitation of illegal migration, or of sanctioning employers of irregular migrants,\(^{112}\) would fall within the scope of Article 83(2) (ex-69 B(2)) TFEU, which provides for EU competence over criminal law measures if such measures are necessary to ensure the effective implementation of a Union policy, once harmonisation measures had been adopted. The same decision-making procedure would apply to the adoption of such measures as would apply to the original Union policy, except that the ‘emergency brake’ would again be applicable.\(^{113}\)

Finally, a new express competence would be conferred by Article 79(3) (ex-63a(3)) TFEU as regards readmission treaties. While the latter issue is beyond the scope of this paper, it should be noted that the EC has already been exercising its implied competence to agree such treaties.\(^{114}\)

5. Conclusion

It can be seen that the Treaty of Lisbon would in many respects confer a broader competence, or at least a clearer competence, upon the European Union as regards immigration and asylum law as compared to the present rules. Furthermore, the changes regards decision-making for legal immigration, and the extension of full jurisdiction for the Court of Justice (not discussed here), would be of great importance.


\(^{111}\) See ‘EU Criminal law Competence and Decision-Making’ (n. 9 above).


\(^{113}\) See ‘EU Criminal law Competence and Decision-Making’ (n. 9 above).

\(^{114}\) Readmission treaties with Hong Kong (OJ 2004 L 64/38); Macao (OJ 2004, L 143/97); Sri Lanka (OJ 2005, L 124/43); Albania (OJ 2005, L 124/22); Russia (OJ 2007, L 129); Ukraine (OJ 2007, L 332); and Serbia, Montenegro, Bosnia and Herzegovina, the Former Yugoslav Republic of Macedonia and Moldova (OJ 2007, L 334).
There would, if the Treaty were ratified, be few legal obstacles to the Union developing a much more far-reaching policy in these areas, with a much greater degree of harmonisation of national law and a higher level of protection for third-country nationals. The main legal issues which could be raised would concern the relationship between the EU’s immigration powers with other legal bases and the precise scope of the limitation of EU competence as regards volumes of economic migrants. But primarily the disputes would be political: it would remain to be seen whether the EU institutions could muster the political will to develop a far-reaching degree of harmonisation that offers a sufficient level of protection for third-country nationals.