

The Lisbon Treaty

What the Changes in EU Governance Mean to the Chemical Industry

September 2010

The Lisbon Treaty establishes a new balance among the institutions of the European Union and changes the ways in which the chemical industry should interact with them. The treaty amends the Treaty on the European Union (i.e., the Maastricht Treaty) and the treaty establishing the European Community (the Treaty of Rome), which has been renamed the **Treaty on the Functioning of the European Union** (TFEU). Some key terms have been modified or replaced and important procedures, including comitology and judicial review, have been altered substantially.

Legislative and non-legislative acts

The Lisbon Treaty continues to distinguish between legislative and non-legislative acts. Legislative acts, principally Directives or Regulations, are now adopted under the “**ordinary legislative procedure**”, formerly “codecision”, or one of the special legislative procedures (consent or assent procedure). While the article laying out the ordinary legislative procedure is much more detailed than the earlier codecision article, it does not appear to introduce any deliberate changes.

The chemical industry regularly faces issues with non-legislative acts and it is precisely these procedures that have been substantially changed. Companies and trade associations will be well-served to understand the new processes early and to evaluate the potential opportunities for intervention which they offer. Non-legislative acts are now divided into “**implementing acts**” and “**delegated acts**”; the term “comitology” no longer applies. Delegated acts are quasi-legislative in nature and amend or supplement nonessential elements of a legislative act, such as its annexes. For example, inclusions of substances into positive lists, such as the inclusion of biocidal active substances into the Annex I of the Biocidal Products Directive, might in the future be subject to the delegated act procedure. Implementing acts are purely executive measures, intended to ensure uniform implementing conditions in the Member States.

Judicial review

The Lisbon Treaty also alters access to the European Court system and enhances opportunities for judicial review. Perhaps the most important modification is lowering the barrier that the doctrine of standing previously posed to access the courts. To date, natural or legal persons could only access the courts if they could demonstrate their direct and individual concern (the *Plaumann* test). The Lisbon Treaty introduces the concept of a “regulatory act” which a potential litigant can challenge by showing that this act is (i) of direct concern to him/her, and (ii) does not require implementing measures. This change means that judicial review will be available for a much larger number of actions than was previously the case.

For the chemicals industry, decisions that may now be subject to judicial review include, for example, authorisation decisions under REACH; decisions under the Classification, Labelling, and Packaging (CLP) Regulation that affect product hazard warnings; and decisions not to include certain product uses in Annex I to the Biocidal Products Directive or Plant Protection Products Directive (and the subsequent Plant Protection Products Regulation). Steptoe already has exploited this new standing threshold to bring a number of judicial challenges, including a challenge to the withdrawal of approval to use a compound in certain food contact applications.

The importance of understanding the new EU rules

As explained above, the Lisbon Treaty has altered substantially the operation of fundamental aspects of EU governance. The ways in which laws and regulations are made, implemented and may be subject to review all have changed. For companies in regulated industries in the EU, such as those in the chemicals sector, the new governance procedures present both issues and opportunities. It is important that affected entities understand the new structure to function effectively within this regime. Steptoe’s experienced lawyers and

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policy professionals have detailed knowledge of the new procedures. We can not only explain them to our clients, but also develop approaches to achieve clients' objectives, whether legislative, regulatory, or judicial, under the new governing processes.

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