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The *Treaty of Lisbon*: an Uncertain Future

On 12 June 2008 the Republic of Ireland voted by 53.4% to 46.6% against ratification of the *Treaty of Lisbon*. This result, although not totally unexpected, has thrown the EU once again into uncertain waters. The Lisbon Treaty, like all EU amending treaties, must be ratified by all 27 Member States in order to come into force. If it does not come into force the EU will continue to work on the basis of the present Treaties as amended by the *Treaty of Nice* in 2000, although many believe some institutional reform will be needed to enable the Union to function efficiently with 27 or more Members. The Irish Taoiseach, Brian Cowen, was asked by the former Slovenian EU Presidency to propose a way forward for Ireland by October 2008 and the current French EU Presidency has discussed the situation with the Irish Government. Although most Member States, including the UK, have continued with their ratification processes, the future of the Lisbon Treaty remains uncertain.

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Summary

On 12 June 2008, with a turnout of 53.1%, the Republic of Ireland voted by 53.4% to 46.6% against ratification of the *Treaty of Lisbon*. Ireland is the only EU Member State to use a referendum to approve ratification of the Treaty. This is because Lisbon would require an amendment to the Constitution of Ireland, and constitutional amendments must be approved in a referendum.

The not entirely unexpected result has thrown the EU once again into uncertain waters. Following rejections by France and the Netherlands of a very similar treaty, the *Treaty Establishing a Constitution for Europe* in 2005, several Member States suspended or abandoned their ratification procedures. There was a period of reflection lasting several months and then the reform project was resumed under the German EU Presidency in 2007. This time there has been no political will for a lengthy period of reflection, but in June 2008 the Slovenian Presidency asked the Taoiseach, Brian Cowen, to return to the European Council on 15-16 October 2008 with an idea of how Ireland wants to proceed.

There has been a great deal of speculation about what might happen now. Member States, including the UK, have continued with ratification. President Sarkozy, representing the French EU Presidency, has held talks with the Irish Government with a view to understanding the reasons behind the rejection of Lisbon. It was also widely reported that President Sarkozy said Ireland should vote again on the Treaty.

Various options have been suggested informally but these are not being formally discussed at EU level. They include: a second referendum on Lisbon in Ireland but with concessions; abandoning Lisbon, continuing under the present Treaties and implementing aspects of Lisbon intergovernmentally; abandoning the Treaty altogether; continuing with ratification with a view to implementing Lisbon among 26 Member States with Ireland temporarily withdrawing from the EU; implementing aspects of Lisbon by attaching them to the next accession treaty (likely to be Croatia).

In the UK the Opposition called for the ratification process to be halted pending clarification from Ireland but the British Government continued with the ratification process and deposited its instrument of ratification on 16 July 2008. In spite of the similarity¹ of Lisbon to the EU Constitution, on which the Government had pledged a referendum, attempts by the Conservatives in the Commons and the Lords to introduce an amendment making ratification of Lisbon conditional upon a referendum were not adopted during the passage of the *European Union (Amendment) Bill*. Such amendments were resisted with the help of the Liberal Democrats, who either abstained or voted against a referendum.

¹ This refers to the textual similarity between the two texts. There is a distinct legal argument about whether the Lisbon Treaty has the same constitutional impact as the 2004 Treaty.

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I Introduction

The *Treaty of Lisbon* was concluded in Lisbon on 19 October 2007 by EU Member State governments meeting as an informal European Council, and signed on 13 December 2007. The Lisbon Treaty amends the *Treaty on European Union* (TEU) and the *Treaty Establishing the European Community* (TEC).²

On 12 June 2008, with a turnout of 53.1%, the Republic of Ireland voted by 53.4% (862,415 people) to 46.6% (752,451 people) against ratification of the *Treaty of Lisbon*. This was the second time Ireland had voted against an EU amending Treaty. In 2001 the electorate voted against the *Treaty of Nice*. On that occasion turnout was low, at under 35%, and a second referendum was held at which turnout rose to 49%.³ The margin of the no-vote on Lisbon was similar to that on Nice, while turnout for the Lisbon referendum was significantly higher.⁴

Ten constituencies (Clare, Dublin South, Dublin South East, Dublin North, Dublin North Central, Dún Laoghaire, Kildare North, Laois Offaly, Carlow Kilkenny and Meath East) voted in favour of Lisbon (compared with only two in favour in the first Nice referendum), and among those that voted against were the constituencies of the President, Mary Coughlan, Fine Gael leader, Enda Kenny, and the former Taoiseach, Bertie Ahern. RTE News commented that in general “the picture is that working class and rural constituencies voted against, while middle class areas were in favour”.⁵

A *Flash Eurobarometer* analysis of the vote published on 18 June noted:

Looking at the socio-demographic profiles of those who did not vote in the referendum revealed that the younger people were much less likely to participate than their older counterparts (64% of the 18-24 year-olds abstained compared to less than a third of the 55+ age group, 31%).

Furthermore, while six out of 10 manual workers and half of the employees (51%) did not vote in the referendum, the self-employed and those not working were much more likely to have voted – only 39% of the self-employed and 44% of non-working individuals abstained.

Eighty-six percent of respondents who did not vote in the referendum said they supported Ireland’s membership of the EU (compared to 89% of voters) – voters and non-voters hold similar views about Ireland’ membership of the EU.

A relatively high proportion of people who had not voted in the last general election (20%) participated in the referendum. This showed that the referendum had reached a segment of the population that did not normally get involved in

² For information on the reforms to the two Treaties, see Research Paper 07/86 and 08/09 at http://www.parliament.uk/parliamentary_publications_and_archives/research_papers.cfm

³ For information on the Irish referendum on the *Treaty of Nice*, see Research paper 01/57 21 June 2001, “The Irish Referendum on the Treaty of Nice”, at http://www.parliament.uk/parliamentary_publications_and_archives/research_papers/research_papers_2_001.cfm

⁴ The full results of the Lisbon referendum, compared with the vote on the Nice Treaty, were reported by constituency in *The Times* at <http://extras.timesonline.co.uk/irelandtable2008.html>. See Appendix 1.

⁵ RTE News 13 June 2008 at <http://www.rte.ie/news/2008/0613/eul Lisbon.html?rss>

internal politics. At the same time, as the referendum turnout was substantially lower than that of the last general election (53% and 67%, respectively), it is not surprising that about one-third of those who claimed that they had voted in the last election did not turn out in the referendum.⁶

II Background to the Irish Referendum

A. Constitutional requirements for ratification

Under Article 48 of the *Treaty on European Union* (TEU) EC/EU Treaty amendments “shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements”. The EU has no role in Member States’ methods of treaty ratification.

Ireland is the only European Union Member State holding a referendum on ratification of the *Treaty of Lisbon*. A ‘significant’ amendment to EU Treaties requires an amendment to the Irish Constitution. This requirement dates back to a Supreme Court ruling in 1987 in a case brought by Raymond Crotty⁷ on ratification of the Single European Act (SEA). The ruling stated that provisions in Title III of the SEA requiring consultation with other EC Member States in foreign policy matters of general interest warranted a constitutional referendum on an amendment to Article 29⁸ of the Constitution and ratification was accompanied by a declaration asserting the status of Ireland’s military neutrality. The Court further ruled that any EC treaty that substantially altered the character of the Union had to be approved by a constitutional amendment. For this reason Article 29 was amended to allow Ireland to ratify the SEA, the *Treaty on European Union* (Maastricht Treaty), the Amsterdam and Nice Treaties.⁹

The implications of the Crotty ruling for EU Treaty ratification have not gone unchallenged. Rossa Fanning, a lecturer in law at University College Dublin, writing in the *Irish Times* in April 2008, was critical of successive Irish governments’ adherence to *Crotty*, which had resulted, he thought, unquestioningly, in referendums on all EU amending treaties since the SEA, regardless of their import. He wrote:

Crotty in fact authorises the ratification of future treaties by statute provided that “such amendments do not alter the essential scope or objectives” of the existing EU. The only aspect of the Single European Act that the Supreme Court felt required constitutional amendment, and this only by a 3:2 majority, was Title III, as for the first time, it fettered the sovereignty of the state in foreign policy and affairs. Other aspects of the Single European Act, such as the introduction of a

⁶ http://ec.europa.eu/public_opinion/flash/fl_245_en.pdf

⁷ *Crotty v. An Taoiseach*, legal action taken in 1987 by Raymond Crotty, historian and social scientist, against the Irish Government. Ruling at <http://www.bailii.org/ie/cases/IESC/1987/4.html>

⁸ Article 29 is on international relations and permits separately each EU Treaty ratification since the SEA.

⁹ The Nice amendment was the last such amendment. The *Twenty-sixth Amendment of the Constitution Act 2002* was approved by referendum on 19 October 2002 and became law on 7 November 2002. The text of the Constitution is available at [http://www.taoiseach.gov.ie/attached_files/html%20files/Constitution%20of%20Ireland%20\(Eng\).htm](http://www.taoiseach.gov.ie/attached_files/html%20files/Constitution%20of%20Ireland%20(Eng).htm)

Court of First Instance, and changes to qualified majority voting rules on the European Council, were, the Supreme Court held, validly introduced by statute.

The true position therefore is not that a referendum is required to amend our Constitution every time a new EU treaty is agreed. A referendum to ratify Lisbon is only required if "the essential scope and objectives" of the existing treaties are altered. It is plainly arguable that the changes made by Lisbon are not of this magnitude and that it would be competent for the Oireachtas to ratify by statute.

The Government never seriously considered this approach. But the reason for that is ultimately political rather than legal. The Government would fear a political backlash if it attempted to deprive people of the right "to have their say". Particularly in the context of the initial rejection of Nice, the Government would stand accused of bypassing the electorate for fear of rejection by it. There would also be some risk of a Crotty-type admonishment from the Supreme Court.

But the simplistic political analysis that it is better to "let the people have their say" is a fig-leaf that does not explain the impending travesty of a wholly ill-informed electorate being asked to vote on Lisbon. After all, this is a representative democracy in which we elect those whom we entrust to enact laws on our behalf. We didn't have a referendum for the smoking ban and we don't ever have a referendum to approve the budget. The cognoscenti deride the Californian-style fetish of legislation-by-popular-ballot and the little-known provision in our Constitution (Art. 47.2) which allows the public to have its say on ordinary legislation by way of veto has since 1937 only gathered dust.¹⁰

Fanning concluded:

There is no clear legal requirement to ratify Lisbon by referendum and the political rationale for doing so is not, as is often suggested, to empower the electorate, but rather is to immunise the Government from subsequent criticism. The impending referendum, far from being a demonstration of democracy in action that ought to embarrass our neighbours, is an unedifying buck-passing exercise on the part of our politicians that, zealots aside, will be met with the apathy that it entirely deserves.¹¹

Responding to the Fanning article, Dr Gavin Barrett, also a law lecturer at University College Dublin, wrote of the "failure" in Ireland to ask "why the holding of a referendum has become a stimulus-response type reaction of Irish political culture to any significant EU treaty".¹² He regretted that "Irish governments continue to find themselves boxed into a corner by the unfortunate Supreme Court decision in the 1987 Crotty case". He found "unobjectionable" the principle that a referendum was required wherever the "essential scope or objectives" of the existing structures of EU integration were altered, but thought Ireland was now "shackled" in a way other EU Member States were not. However, the possible consequences of ratifying by the parliamentary method and subsequently being told by the Supreme Court that Lisbon altered the EU's "essential scope or objectives"

¹⁰ *Irish Times* 22 April 2008

¹¹ *Ibid*

¹² *Irish Times* 24 April 2008. See also Dr Gavin Barrett, "Brief Reflections on the Holding of a Referendum in Ireland on the Treaty of Lisbon: A Response to Rossa Fanning", 24 April 2008, available at SSRN: <http://ssrn.com/abstract=1125246>

would, Barrett thought, have such “unthinkable consequences” for Ireland and the EU that “The prospect of such a scenario, however remote, means that no government can contemplate ratifying the Lisbon Treaty by Act of the Oireachtas”. Calling a referendum on Lisbon was not, therefore, “buck-passing by politicians”, but “the only sensible response to a Supreme Court decision which would in an ideal world have been long ago overruled or modified by the court itself”. He disagreed strongly with Fanning’s suggestion that the referendum should be treated with “apathy”, stating that alterations to the Irish Constitution needed to be “considered with appropriate regard”. Furthermore, he contested:

... the stakes are high in the Lisbon Treaty referendum. In the balance are the results of seven years’ difficult negotiations by states with a combined population of half a billion people.

Barrett concluded that the complexity of Lisbon “may be a good argument for not having a referendum but we have been compelled to by our judiciary”.

After the no-vote there was further questioning of the necessity of a referendum. The Fine Gael MEP, Gay Mitchell, asked the Dáil Joint Committee on European Scrutiny whether the Irish electorate should be asked to adjudicate on complex European issues and whether a referendum was “the right vehicle” for issues such as the ratification of the Lisbon Treaty.¹³ The Government had accepted the Attorney General’s opinion that a referendum was necessary, but Mitchell doubted the whole document needed to be put to the people. He thought some of it could have been adopted by legislation, and the rest put to the popular vote. He called for the Attorney General’s advice on the matter to be made available to the Joint Committee on European Scrutiny, which Micheál Martin declined to do, telling the Committee that it was a long-standing precedent not to publish the Attorney General’s view on matters before Cabinet.¹⁴

B. Referendum Bill

Under Article 46 of the Irish Constitution, a proposed amendment takes the form of a bill to amend the Constitution. It must be formally approved by both the Dáil and the Senate and then endorsed by a simple majority of the electorate in a referendum, with no minimum turn-out requirement.

On 12 February 2008 the Cabinet approved the draft referendum bill to provide for a referendum on the Lisbon Treaty. The Fine Gael opposition front bench had agreed to support the Bill in principle, but said it would comment on the detail of the final published text. Sinn Féin’s Mary Lou McDonald doubted the Government had done enough to meet the party’s neutrality concerns, but they too would wait for the final text before deciding whether to support it. Following negotiations with the main Opposition parties, the final text was agreed on 26 February 2008. According to the Minister for Foreign Affairs, Dermot Ahern, the wording of the Bill specifically emphasised that Ireland’s traditional

¹³ Oireachtas Joint Committee on European Scrutiny, 3 July 2008 at <http://debates.oireachtas.ie/DDebate.aspx?F=SRJ20080703.xml&Node=H2#H2>

¹⁴ Ibid at <http://debates.oireachtas.ie/DDebate.aspx?F=SRJ20080703.xml&Node=H2&Page=3>

neutrality would not be undermined by Lisbon. It provided for a continuing constitutional prohibition on Irish participation in an EU common defence policy¹⁵ and granted an enhanced role for the Irish Parliament, the Oireachtas, in EU decision-making. The Bill had its first reading on 4 March 2008 and was passed on 7 May 2008.¹⁶

On 6 March 2008, John Gormley, the Minister for the Environment, Heritage and Local Government, announced that he had made an order under the *Referendum Act 1998* establishing an independent statutory Referendum Commission for the purposes of the referendum on the Lisbon Treaty, with a budget of €5.8 million. The role of the Commission was to “explain the subject matter of the referendum, to promote public awareness of the referendum, and to encourage the electorate to vote”.¹⁷ On 13 May 2008 the Referendum Commission Chairman, Mr Justice Iarfhlaith O’Neill, launched a public information campaign. The campaign sought not to influence the electorate to vote for or against the Treaty, but to vote with “an informed and measured view”.¹⁸

The Referendum Commission set out the wording of the referendum:

The current wording of Article 29.4 of the Constitution of Ireland is as follows:

1° The executive power of the State in or in connection with its external relations shall in accordance with Article 28 of this Constitution be exercised by or on the authority of the Government.

2° For the purpose of the exercise of any executive function of the State in or in connection with its external relations, the Government may to such extent and subject to such conditions, if any, as may be determined by law, avail of or adopt any organ, instrument, or method of procedure used or adopted for the like purpose by the members of any group or league of nations with which the State is or becomes associated for the purpose of international co-operation in matters of common concern.

3° The State may become a member of the European Coal and Steel Community (established by Treaty signed at Paris on the 18th day of April, 1951), the European Economic Community (established by Treaty signed at Rome on the 25th day of March, 1957) and the European Atomic Energy Community (established by Treaty signed at Rome on the 25th day of March, 1957). The State may ratify the Single European Act (signed on behalf of the Member States of the Communities at Luxembourg on the 17th day of February, 1986, and at the Hague on the 28th day of February, 1986).

¹⁵ Neutrality had been an important factor in the Irish rejection of the Treaty of Nice in 2001 and in order to be able to ratify, Ireland secured guarantees against being obliged to join a common EU defence policy.

¹⁶ The full text of the *Twenty-Eighth Amendment of the Constitution Bill 2008* and Explanatory Memorandum are available at <http://www.oireachtas.ie/documents/bills28/bills/2008/1408/b1408d.pdf> and all debates and business relating to the passage of the Bill are on the Oireachtas website at <http://www.oireachtas.ie/viewdoc.asp?DocID=8981>.

¹⁷ Press briefing by Chairman, Mr Justice Iarfhlaith O’Neill, 28 April 2008 at <http://www.lisbontreaty2008.ie/OpeningReferendumCommissionChairman.pdf>

¹⁸ Referendum Commission public information campaign details 28 April 2008 at <http://www.lisbontreaty2008.ie/PublicInformationCampaignDetails.pdf>

4° The State may ratify the Treaty on European Union signed at Maastricht on the 7th day of February, 1992, and may become a member of that Union.

5° The State may ratify the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related Acts signed at Amsterdam on the 2nd day of October, 1997.

6° The State may exercise the options or discretions provided by or under Articles 1.11, 2.5 and 2.15 of the Treaty referred to in subsection 5° of this section and the second and fourth Protocols set out in the said Treaty but any such exercise shall be subject to the prior approval of both Houses of the Oireachtas.

7° The State may ratify the Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related Acts signed at Nice on the 26th day of February, 2001.

8° The State may exercise the options or discretions provided by or under Articles 1.6, 1.9, 1.11, 1.12, 1.13 and 2.1 of the Treaty referred to in subsection 7° of this section but any such exercise shall be subject to the prior approval of both Houses of the Oireachtas.

9° The State shall not adopt a decision taken by the European Council to establish a common defence pursuant to Article 1.2 of the Treaty referred to in subsection 7° of this section where that common defence would include the State.

10° No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State which are necessitated by the obligations of membership of the European Union or of the Communities, or prevents laws enacted, acts done or measures adopted by the European Union or by the Communities or by institutions thereof, or by bodies competent under the Treaties establishing the Communities, from having the force of law in the State.

11° The State may ratify the Agreement relating to Community Patents drawn up between the Member States of the Communities and done at Luxembourg on the 15th day of December, 1989.

Proposed changes (*Script in bold italics involves explanations of the changes*)

It is proposed to delete the current subsections 9° and 11° (in italics above)

Subsection 9° is re-cast as subsection 15° with the additional reference to the Treaty of Lisbon;

Subsection 11° is effectively redundant as the Luxembourg Patents Convention never came into force

It is proposed to renumber the current subsection 10° as subsection 9° and add the following subsections:

10° The State may ratify the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon on the 13th day of December 2007, and may be a member of the European Union established by virtue of that Treaty.

(This allows for the ratification of the Treaty of Lisbon)

11° No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State that are necessitated by the obligations of membership of the European Union referred to in subsection 10° of this section, or prevents laws enacted, acts done or measures adopted by the said European Union or by institutions thereof, or by bodies competent under the treaties referred to in this section, from having the force of law in the State.

(This is similar to the existing subsection 10° and allows for the provisions of the Treaty of Lisbon to be put into effect in Ireland)

12° The State may exercise the options or discretions provided by or under Articles 1.22, 2.64, 2.65, 2.66, 2.67, 2.68 and 2.278 of the Treaty referred to in subsection 10° of this section and Articles 1.18 and 1.20 of Protocol No. 1 annexed to that Treaty, but any such exercise shall be subject to the prior approval of both Houses of the Oireachtas.

(This allows Ireland to opt-in or opt-out of various provisions in relation to The Area of Freedom, Security and Justice and enhanced co-operation subject to the prior approval of the Oireachtas – that is the Dail and Seanad).

13° The State may exercise the option to secure that the Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union (formerly known as the Treaty establishing the European Community) shall, in whole or in part, cease to apply to the State, but any such exercise shall be subject to the prior approval of both Houses of the Oireachtas.

(The Protocol mentioned here is the one which allows Ireland to opt out of the Area of Freedom, Security and Justice. This clause would allow Ireland to withdraw from the opt-out. The government has made a declaration which is attached to the Treaty of Lisbon that it will examine this opt-out within 3 years – declarations are not legally binding)

14° The State may agree to the decisions, regulations or other acts under—

- i Article 1.34(b)(iv),
- ii Article 1.56 (in so far as it relates to Article 48.7 of the Treaty referred to in subsection 4° of this section),
- iii Article 2.66 (in so far as it relates to the second subparagraph of Article 65.3 of the Treaty on the Functioning of the European Union),
- iv Article 2.67 (in so far as it relates to subparagraph (d) of Article 69A.2, the third subparagraph of Article 69B.1 and paragraphs 1 and 4 of Article 69E of the Treaty on the Functioning of the European Union),
- v Article 2.144(a),
- vi Article 2.261 (in so far as it relates to the second subparagraph of Article 270a.2 of the Treaty on the Functioning of the European Union), and
- vii Article 2.278 (in so far as it relates to Article 280H of the Treaty on the Functioning of the European Union), of the Treaty referred to in subsection 10° of this section, and may also agree to the decision under the second sentence of the second subparagraph of Article 137.2 of the Treaty on the Functioning of the European Union (as amended by Article 2.116(a) of the Treaty referred to in the

said subsection 10°) but the agreement to any such decision, regulation or act shall be subject to the prior approval of both Houses of the Oireachtas.

(This deals with the provisions in the Treaty of Lisbon which allow the European Council to agree certain changes to the governing Treaties. Some of these changes could come into effect only when ratified by the Member States in accordance with their own requirements – this could mean that a referendum would be required in Ireland. This amendment to the Constitution would allow Ireland to agree at the European Council to allow certain decisions which currently require unanimity to be made by QMV but this could be done only with the prior approval of the Oireachtas.)

15° The State shall not adopt a decision taken by the European Council to establish a common defence pursuant to—
i Article 1.2 of the Treaty referred to in subsection 7° of this section, or
ii Article 1.49 of the Treaty referred to in subsection 10° of this section, where that common defence would include the State.¹⁹

C. The campaigns

1. The 'yes' campaign

The governing Fianna Fáil/Green Party/Progressive Democrat coalition and the main opposition parties, Fine Gael and the Labour Party, all supported the Lisbon Treaty. In the Oireachtas only Sinn Féin was against it. The Irish Alliance for Europe's "Yes to Lisbon" campaign, which included trade unionists, business, academics and politicians, appears to have been slow to take off.²⁰ The Government's 'Vote Yes' campaign did not effectively counter the anti-Lisbon claims (see below), in spite of attempts by the European Affairs Minister, Dick Roche, to reassure the population about Lisbon in speeches and visits throughout the country from early 2008.²¹

The yes-campaign emphasised the economic benefits Ireland had received through EU membership by way of structural funding and subsidies. According to evidence given by the Department of Finance Secretary General, David Doyle, Ireland has received net receipts of approximately €40 billion since it joined the then EEC in 1973. Ireland is currently a net recipient of around €500 million a year, but by 2013, the end of the current financial perspective, it expects to be a net contributor (of around €500 million):

[...] Turning to the question the Deputy asked about Ireland's EU receipts and payments, the total cash the State has received since we joined the European Community in simple historical cash terms is €60 billion. The total payments we have made to Europe in that period were €20 billion. The net receipts to date have been €40 billion. That is €40 billion that European citizens have invested in Ireland since 1973. The net receipts in any one year in the past would have been as high as €2.5 billion in 1997. Currently they would be running at approximately €500 million. At the very early stage, it was virtually all one-way traffic because the nature of the

¹⁹ <http://www.lisbontreaty2008.ie/ReferendumWordingEnglish.pdf>

²⁰ See campaign website at <http://www.yestolisbon.ie/>

²¹ For details see his website at <http://www.dickroche.com/>

Irish economy was such that there were huge inflows. We were seriously economically underdeveloped. That position is now changed, where Ireland is among the wealthiest countries in terms of gross domestic product per head, whatever about some of the other measures. Our level of contributions is now significant because the base on which it is measured has grown so large and the level of transfers to Ireland has begun to decline.

The EU investment in our agriculture system continues at a very high level. The EU investment in our infrastructure is rapidly tailing off. Currently, as I said, the net receipt is approximately €500 million. We receive €2 billion and we pay approximately €1.5 billion. That situation will go into positive contribution territory overall in 2011, by which stage we will be roughly at break even. By 2013, which is the end of the current budget envelope in Europe we will be paying about €500 million more than we receive. Taking the total receipts to date and what we will be looking at out to 2013, roughly we will have received €72 billion in cash terms between 1973 and 2013 - 40 years - and we will have paid out roughly €31 billion. So the contribution to the Irish economy has been massive and will continue to be substantial.²²

In March 2008 press reports suggested that enquiries into payments made to Bertie Ahern in the 1990s and his appearance before a tribunal over the on-going financial scandal had affected his poll ratings, which might affect the way the population voted on Lisbon and turn it into a vote of confidence in Mr Ahern. Although some observers thought he might therefore postpone the referendum until the autumn, the Taoiseach told the Irish Parliament on 11 March that the referendum on Lisbon would be held in the week of 9 June 2008.

On 2 April Bertie Ahern announced he would be stepping down as Prime Minister and his Foreign Minister, Brian Cowen, took over as Taoiseach on 7 May. On 12 May the new Government launched its official campaign, with Mr Cowen maintaining Ireland needed the EU to tackle globalisation, climate change and cross-border crime. He accused the no camp of distorting the contents of the Treaty with their claims about its effect on taxation and abortion. Fianna Fáil's slogan was "Good for Ireland, Good for Europe."

The Government campaign in support of Lisbon was damaged in early May when the Technical Engineering and Electrical Union (TEEU) asked its 45,000 members to vote against the treaty. According to its General Secretary, Eamon Devoy, recent ECJ judgments showed that the pendulum had "swung against workers' rights and in favour of big business" and that it would therefore be "foolish to provide the institutions of the European Union with more power".²³ Towards the end of May the Irish EU Internal

²² Dáil Committee of Public Accounts, 21 February 2008 at <http://debates.oireachtas.ie/DDebate.aspx?F=ACC20080221.xml&Node=H2#H2>

²³ *EUObserver* 6 May 2008 at <http://euobserver.com/18/26086>. In *Laval* (Case C-341/05, see <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=FR&Submit=rechercher&numaff=C-341/05>) the ECJ found against Swedish workers who had been blockading a building site to prevent Latvian workers, with lower wages, from accessing the site. *Viking* (Case C-438/05, see <http://curia.europa.eu/en/actu/communiqués/cp07/aff/cp070088en.pdf>) concerned a Finnish company that used cheaper Estonian workers on its boats. In *Ruffert* (Case C-346/06, see

Market Commissioner, Charlie McCreevy, began to speak despondently about achieving a positive vote. He thought it would be hard to sell Lisbon “because it does not bring tangible benefits to the population” and does not promise Ireland the generous CAP and structural funding it has had in the past. Predictions indicated a low turnout and a negative vote.²⁴ Some reports thought the Government campaign relied heavily on warnings of “disasters” if the electorate voted against Lisbon, whereas the no-campaign had focussed on emotive issues such as taxation, abortion and neutrality, even though they were not directly linked to the Treaty.

2. The ‘no’ campaign

The no-campaign, with its slogan, “If you don’t know, vote no”, comprised Sinn Féin, the country-wide *Cóir* headed by Richard Greene, and *Libertas*, a lobby group chaired by the pro-EU but anti-Lisbon businessman, Declan Ganley.²⁵ It appears to have been better organised and more persuasive than the yes-campaign. According to the Sinn Féin website, in the weeks before the referendum, party members and elected representatives distributed 500,000 newsletters and participated in more than 100 public meetings and debates. They also organised briefing meetings for trade unionists, development workers, business organisations and local community groups. Party members also did door-to-door canvassing.²⁶ *Cóir’s* Lisbon Information Campaign was organised on a country-wide constituency level and run by volunteers. It emphasised the protection of Irish sovereignty and the constitutional rights of the Irish people. It also argued that the loss of an Irish Commissioner and the increase in Qualified Majority Voting (QMV) in Lisbon would weaken Ireland’s voice in Europe. They also focussed on issues not directly relevant to the Treaty, including Irish farming interests at the World Trade talks, EU tax harmonisation and Ireland’s traditional positions on abortion and neutrality.²⁷

Other sectors predominantly in the no-camp were farmers and rural groups. Irish farmers had warned early on that they would vote against Lisbon if World Trade Organisation (WTO) talks on liberalising trade, at which Peter Mandelson has been negotiating on behalf of the EU, resulted in damage to their livelihoods. The farmers feared widespread job losses if a WTO deal opened Irish and EU food markets to cheaper imports. The 80,000 strong Irish Farmers Association (IFA) claimed the direction Peter Mandelson was taking at the WTO would lead to a deal opening up Irish beef markets to imports from South America, threatening 50,000 farm jobs and a further 50,000 jobs in the rural economy.²⁸ However, on 3 June the IFA voted to recommend a yes-vote, after Mr Cowen pledged to veto in the European Council any agreement on liberalisation plans at the WTO talks. The Taoiseach’s stance was not supported by the Foreign Minister, Micheál Martin.

<http://curia.europa.eu/en/actu/communiqués/cp08/aff/cp080020en.pdf>) found that the internal market principle of freedom of services takes precedence over collective bargaining deals.

²⁴ *EUObserver* 22 May 2008 at <http://euobserver.com/9/26193/?rk=1>

²⁵ See *Libertas* website at http://www.libertas.org/component/option.com_frontpage/Itemid,1/

²⁶ <http://www.no2lisbon.ie/en/no-2-lisbon-treaty>

²⁷ There is an interesting summary of the two campaigns in the *Sunday Business Post Online* 8 June 2008 “Yes, No, and in fact”, at <http://www.sbpost.ie/post/pages/p/story.aspx-qqqt=NEWS+FEATURES-qqqm=nav-qqqid=33526-qqqx=1.asp>

²⁸ *Financial Times* 3 June 2008 at http://www.ft.com/cms/s/0/11df5f3e-3198-11dd-b77c-0000779fd2ac.html?nclick_check=1

Thomas Legge, writing in *The World Today*, commented on the use of the referendum for EU Treaties, concluding that this one has been different:

Previous referendums on EU treaties have been very effective in generating an informed debate that would otherwise not have occurred, as well as subsequently providing a high level of legitimacy to the state's ceding power to international institutions.

This year, however, a well-organised 'No' campaign and a widespread lack of trust in politicians caused many people who did not understand the Treaty to ignore their elected representatives' appeal for a 'Yes' vote.²⁹

D. Public opinion in Ireland

1. Before the referendum

Ireland was under considerable pressure as the only EU Member State to be ratifying the Treaty by referendum, as referendums have in the past proved more likely than parliamentary methods to result in a failure to ratify.³⁰ Will Hutton, writing in the *Observer*, was scathing about their use: "referendums work best for the demagogue, the dissimulator and scaremonger, as Hitler and Mussolini, lovers of referendums, proved".³¹

Hugo Brady, of the Centre for European Reform, thought the Irish electorate might have other feelings about their hand in the process:

The stakes are high. Technocratic though it is, the treaty is the result of a painstaking consensus within the EU to revive itself after a disastrous experiment in constitution-writing. One rejection – from the Irish or a national parliament elsewhere – would thrust it back to jaded national negotiators with no plan B. The Irish may not care. For their Yes or No will have less to do with the treaty text than with their view on whether the EU is still a positive force, at a time when their prosperity is threatened by a global economic downturn.³²

Opinion polls have shown that a large majority of Irish citizens are positive about EU membership.³³ Views on EU membership in general have been more positive than those on the Lisbon Treaty in particular.³⁴ A poll published by the *Irish Times* in January 2008 suggested that 64% of voters were undecided, with 26% in favour of the Treaty and 10% against it. The Referendum Commission asked the company 'Behaviour and Attitudes' to conduct a survey on its behalf in mid-April 2008 to determine the level of awareness and knowledge of the referendum and the Lisbon Treaty. The telephone poll, conducted

²⁹ "Ways out of the Irish puzzle", Thomas Legge, *The World Today* July 2008 at http://www.chathamhouse.org.uk/files/11742_wt070806.pdf

³⁰ See also SN/IA/2709, "European Union: treaty ratification and the use of referendums", 20 October 2003

³¹ *The Observer* 15 June 2008 at <http://www.guardian.co.uk/commentisfree/2008/jun/15/eu.ireland>

³² Hugo Brady, CER Bulletin 58, February/March 2008 "Bad omens loom over Irish referendum" at http://www.cer.org.uk/articles/58_brady.html

³³ According to *Standard Eurobarometer 68* autumn 2007, 74% viewed membership favourably, while 6% were negative, http://ec.europa.eu/public_opinion/archives/eb/eb68/eb68_ie_nat.pdf

³⁴ *EUObserver* 31 January 2008 at <http://euobserver.com/843/25568/?rk=1>

among a national representative sample of 500 voters over three days in April, included the following questions and answers:

Q Are you aware of any referendum which is due to be held in Ireland over the next few months?

Yes 72%

No 28%

Q And as far as you are aware, what is the name or subject of this referendum

Lisbon/Lisbon Treaty 61%

Other 9%

Don't know 30%

Q Thinking of the forthcoming Lisbon Treaty Referendum, on a scale of 1 to 5, where 1 is you do not understand it at all, and 5 is you understand it very well...how well do you feel you understand what the Lisbon Treaty is about?

Do not understand it at all 62%

Do not understand it particularly well 18%

Understand it to some extent 15%

Understand it quite well 3%

Understand it very well 2%

Don't know 1%³⁵

A poll in early May by the *Sunday Business Post* put Lisbon supporters ahead, with 38%, against 28% in the no camp and 34% 'don't knows'.³⁶ Towards the end of May polls showed that the gap between the yes and no camps was narrowing. A poll for the *Sunday Business Post* gave 41% to Lisbon supporters and 33% to opponents, with 25% still undecided.³⁷

In early June 2008 an *Irish Times* poll showed an increase in the no-vote, with 35% against to 30% in favour and 'undecideds' at 28%.³⁸ At this point, according to the report, the reason most often cited for voting against Lisbon was not based on domestic reasons (only 5%) but on a lack of knowledge about what was in the Treaty and a lack of understanding of it, followed by a desire to keep Ireland's power and identity, followed by the preservation of neutrality. The *EUObserver* reported on 6 June:

The poll revealed a clear socio-economic divide, with a majority of better-off voters intending to vote "yes," and a majority among the working class planning a "no" vote. Meanwhile, older voters tended to be more positive towards the treaty, but there was only a majority of "yes" supporters among the over-50s.³⁹

³⁵ <http://www.lisbontreaty2008.ie/PublicInformationCampaignDetails.pdf>

³⁶ *EUObserver* 13 May 2008 at <http://euobserver.com/9/26124/?rk=1>

³⁷ *EUObserver* 26 May 2008 at <http://euobserver.com/18/26205>

³⁸ *Irish Times* 6 June 2008 at <http://www.ireland.com/newspaper/frontpage/2008/0606/1212696236403.html>

³⁹ *EUObserver* 6 June 2008 at <http://euobserver.com/9/26281/?rk=1>

Preparations for the referendum, it was reported, were not always clear or consistent. A Government booklet explaining the Treaty differed from a summary of it published by the Referendum Commission. Senior members of the Irish Government were reported to have been hazy about its contents and to have described it as “incomprehensible”. The media reported widely that the Taoiseach himself had not read the Treaty and that Charlie McCreevy had said people would be “insane” to read it.⁴⁰ For one commentator, the complexity and opacity of Lisbon was a clear failing on the part of Brussels:

An EU committed to democratic accountability would have ensured that the document was written in clear language with the important content properly flagged and explained. The fact it was not is indicative of a mentality in Brussels which has problems relating to normal democratic standards.⁴¹

A poll in the *Sunday Business Post* on 8 June put supporters just ahead, while the *Irish Times* reported significant gains for opponents.⁴² It was clear that the outcome was far from assured for the Government.

2. After the referendum

On 18 June *Eurobarometer* published a survey of public opinion on Lisbon conducted by Gallup on 13-15 June. Its main findings were:

- Over half of the people who did not vote in the referendum said this was due to a lack of understanding of the issues; younger people were much less likely to participate than their older counterparts (a ratio of 2:1)
- For the “yes” voters, the prime motivation was the feeling that “Lisbon” was in Ireland’s best interest; the reasons mentioned were mostly one-dimensional, centred around how Ireland has benefited from the EU
- The “no” voters presented a much wider diverse spectrum of reasons to explain their preference. They displayed a multidimensional character of the explanations: a lack of information (a quarter of “no” voters) led the way
- The young people who participated, women and those not working were significant supporters of the “no” vote; the majority of professionals, managers and retirees were backing the “yes” campaign
- In the “no” camp, voters thought that the result would put Ireland in a strong position to renegotiate the treaty, to allow Ireland to maintain its neutrality and to keep its tax system (all backed by three-quarters of voters or more)
- The “yes” voters felt less strongly about the issues, but they did emphasise the fact that the result would weaken Ireland’s position in the EU (two-thirds of “yes” voters)
- A large majority of Irish voters (68%) said the “no” campaign was the most convincing; even a majority of “yes” voters felt that way (57%)

⁴⁰ *Timesonline* 18 June 2008. The PSE leader in the European Parliament, Martin Schultz, accused Mr McCreevy of “arrogance” for this public revelation that he had not read the Lisbon Treaty.

⁴¹ Robin Shepherd, “Trust the People” *The World Today* July 2008 at http://www.chathamhouse.org.uk/files/11741_wt070804.pdf

⁴² *EUObserver* 9 June 2008 at <http://euobserver.com/9/26291/?rk=1>

- Despite that judgment, within the "yes" camp we found more people who changed their minds during the campaign (25% of the "yes" and 17% of "no" voters started out from a different position)⁴³

A *Red C* poll commissioned by Open Europe on 21-23 July 2008 found that the majority of the Irish electorate would be opposed to a second referendum on the Lisbon Treaty. An Open Europe press release summarised the key findings as follows:

- 71% oppose a second referendum on the Lisbon Treaty. Only 24% are in favour.
- Of those who expressed an opinion, 62% said they would vote "no" in a second referendum, compared to 38% who would vote "yes".
- That would mean the "no" lead would increase from 6 points in the recent referendum to a commanding 24 point lead in a second vote.
- 17% of those who voted "yes" in the recent referendum would vote "no" in a second referendum, while only 6% of those who voted "no" would now vote "yes". Perhaps most significantly of all, those who did not vote last time would vote more than two-to-one against in a second referendum: 57% would vote "no" and 26% would vote "yes".
- 67% agreed with the statement that "politicians in Europe do not respect Ireland's no vote". Only 28% disagreed.
- 61% disagreed with the statement that "If all of the other 26 EU countries ratify the Treaty in their parliaments then Ireland has to change its mind and support the Treaty." Only 32% agreed.
- 53% said they would be less likely to vote for Brian Cowen at the next election if he called a second referendum. In particular, 43% of Fianna Fail voters said they would be less likely to vote for him.⁴⁴

III Analysis of the no-vote

Initial reports were unclear about concrete reasons for the rejection of Lisbon, as a report in the *EUObserver* pointed out:

There appears also not to have been a clear reason for voting No, but rather a motley selection of grumbles, making it difficult to add a few provisos to the treaty to make it more palatable.⁴⁵

Some commentators suggested Irish voters simply did not understand the implications of the vote. David Charter and David Sharrock, writing in the *Times*, noted:

In more evidence that the "yes" campaign failed to explain the impact of the treaty, it appears three quarters of voters mistakenly believed that the treaty could easily be renegotiated to give Ireland a better deal. Young voters were against it

⁴³ *Eurobarometer* "Post-referendum survey in Ireland Preliminary results", Fieldwork:13-15 June 2008 Report: 18 June 2008 at http://ec.europa.eu/public_opinion/flash/fl_245_en.pdf

⁴⁴ Open Europe press release 27 July 2008 at <http://www.openeurope.org.uk/media%2Dcentre/pressrelease.aspx?pressreleaseid=81>. The full results are available at <http://www.openeurope.org.uk/research/redc.pdf>

⁴⁵ *EUObserver* 16 June 2008 at <http://euobserver.com/9/26329/?rk=1>

by a majority of two to one, while those that abstained felt they did not have enough information about its impact.⁴⁶

Fintan O'Toole, writing in *The Times* just before the referendum, described the Irish people as having a "bit of a sulk" over the loss of EU funding to the new EU States from Eastern Europe:

For a long time, Ireland was the EU's little pet. Being poor and small and charming, we were showered with money (about Euro 40 billion or Pounds 32 billion) and encouragement. We responded by being model Europeans and, to be fair, used the money to better ourselves. Now, the attention has all shifted eastwards and Ireland's new wealth means that it is about to become a net contributor to the EU budget, rather than a big beneficiary. Although no one in Ireland says so publicly, EU solidarity looks a little different when the Irish taxpayer is building roads in Estonia than it did when the German taxpayer was building roads in Co Mayo.

The temptation to grab the spotlight, to make the EU notice us again, is strong. Add the opportunity, in these disgruntled times, to put up two fingers to the entire local establishment, and it becomes almost irresistible. But it is held in check by the fear that the Irish, so used to being liked in Brussels, will be written off as troublemakers and ultimately lose the little lustre that we still have. And then there is that pesky "What has the EU ever done for us?" question. The Eurocrats, damn them, have done rather a lot. We are poised between the pleasure of poking authority in the eye on the one side and the fear, on the other, of seeming like ungrateful sods.⁴⁷

Although Ireland was and is fundamentally pro-EU, a number of issues have been clearly identified as contributing to the no-vote.⁴⁸ Sinn Féin's "Alternative guide to the Lisbon Treaty",⁴⁹ included a number of criticisms of the Treaty, which included:

- Ireland's voting strength in the Council of Ministers will diminish.
- There will be no Irish Commissioner for five out of every fifteen years (with possibly serious implications for Irish agriculture).
- There is more EU action and EU 'exclusive competence' over international trade agreements, reducing Irish influence in the CAP.
- Loss of Irish veto with more decision-making by QMV.
- Lisbon does not address EU bureaucracy, with particular reference to the failure to pay REPS⁵⁰ on time and red tape surrounding farm payments and inspections.

⁴⁶ *Timesonline* 18 June 2008 at <http://www.timesonline.co.uk/tol/news/world/ireland/article4160252.ece>. The British Foreign Secretary had also conceded that Lisbon was not an easily accessible treaty, telling the Foreign Affairs Committee in June 2008: "the quite abstruse nature of significant parts of the treaty are not the immediate talk of kitchen tables around Europe, so, in that sense, I think that there is a major job to be done after ratification to show that Europe is actually addressing the big issues that people care about", Uncorrected evidence to FAC, 11 June 2008 at

<http://www.publications.parliament.uk/pa/cm200708/cmselect/cmfa/uc713-i/uc71302.htm>

⁴⁷ Fintan O'Toole *The Times* 11 June 2008

⁴⁸ See *Eurobarometer* 69, June 2008 at http://ec.europa.eu/public_opinion/archives/eb/eb69/eb_69_first_en.pdf. In Ireland 65% of those asked were positive about the EU (compared with 29% in UK).

⁴⁹ <http://www.no2lisbon.ie/media/LisbonAlternativeGuide1.pdf>

- Lisbon does not address unfair fishing quotas and illegal fishing, which is damaging Irish fisheries.⁵¹
- Lisbon threatens Ireland's traditional neutrality.
- Lisbon will affect Irish taxation laws.
- Lisbon will threaten Ireland's constitutional law on abortion.

These complaints are considered in more detail below and include the views of Ireland's Referendum Commission.

1. Loss of influence in the Council of Ministers

The Sinn Féin campaign maintained that Ireland would lose 50% of its influence in the Council of Ministers under the Lisbon arrangements for weighted votes. The number of Irish Council votes would remain at seven until 2014, while the threshold for the adoption of a decision by QMV would rise from at least 232 votes to at least 255. The current Council weighting system roughly reflects the populations of the Member States but it is weighted in favour of the smaller States. QMV currently requires 74% of the total weighted votes. The Lisbon system is strictly proportional to population but requires that decisions must meet two conditions. From 2009 the adoption of a proposal from the Commission will need:

- 55% of the total number of Member States must agree (i.e. 15 in the EU-27)
- The supporting Member States must represent 65% of the EU population (i.e. it could not be formed by a grouping of the States with the smallest populations).

In addition, at least four Member States must be opposed to a decision in order for it to be blocked, thereby ensuring that decisions cannot be blocked by just three of the larger Member States acting together, even if the population criterion is met. 45% of Member States, or Member States representing 35% of the EU's population, will be able to block a proposal. If a number of Member States representing at least three-quarters of either of these figures indicate that they oppose a proposal, the Council will delay adoption of the proposal and continue discussion in an effort to reach a satisfactory solution. This mechanism will be valid until 2014 and will then be removable by QMV.

Pat Leahy and Niamh Connolly commented in the *Sunday Business Post Online*:

The relative loss of influence will to some extent be counterbalanced by a double-majority clause. The new system permits four countries including Germany and France to take a blocking minority to decisions of the Council of Ministers and extends the number of areas in which the veto is removed. Most decisions are currently reached by forming deals with other member states, and not by member states threatening to form a bloc to veto deals.⁵²

⁵⁰ REPS, the Rural Environmental Payments Scheme. The Irish Department of Agriculture and the European Commission reached an impasse when the Commission questioned the Irish Government's practice of making payments at the beginning of the contract year. The situation was partially resolved in late February 2008 when Commissioner Marian Fischer Boel agreed that Ireland could continue paying REPS 2 and REPS 3 payments at the beginning of each contract year.

⁵¹ See Sinn Féin campaign leaflet at <http://www.no2lisbon.ie/media/LisbonRuralLeaflet2.pdf>

⁵² 8 June 2008 at <http://www.sbpost.ie/post/pages/p/story.aspx-qqqt=NEWS+FEATURES-qqgm=nav-qqqid=33526-qqqx=1.asp>

2. Loss of an Irish Commissioner

The first Commission after the intended Lisbon implementation date, from 2009 to 2014, will contain one Commissioner from each Member State (including the President and the High Representative for Foreign Affairs). As from 1 November 2014 the whole Commission will be reduced to two-thirds of the number of Member States at that time, unless the European Council decides by unanimity to alter this figure.

The present Treaty, as amended by Nice, requires a reduction in the number of Commissioners from 2009. Ironically, the loss of an Irish Commissioner will therefore happen earlier under the present Treaty than it would under Lisbon. The *EUObserver* commented in mid-June:

"As the actual number of the reduced commission is not specified in the Nice Treaty, several diplomats said it would probably still be 18, representing two thirds of the member states, as is foreseen by the Lisbon Treaty," the diplomat said.⁵³

3. More EU action and loss of veto in trade negotiations

Lisbon *does* increase the number of areas in which the EU could act or would have a role. It sets out lists of areas in which the EU would have exclusive competence, joint competence or a supporting/co-ordinating role:

a. *Exclusive competence*

In the following areas decisions would have to be made at EU level and national decision-making would not be permitted: customs union, competition rules for the internal market, monetary policy for euro-zone States, conservation of marine resources, common commercial policy and the conclusion of international agreements if within the framework of EU law or when necessary to help the EU carry out an internal competence, or if there is a possibility of common rules being affected or changed.

b. *Joint competence*

This is where both the EU and national governments can decide and act, as long as national decisions do not conflict with EU obligations: within the internal market, specific elements of social policy, economic, social and territorial cohesion, agriculture and fisheries except the conservation of marine life, the environment, consumer protection, transport, trans-European networks, energy, the area of freedom, security and justice, aspects of public health, research, technological development, space, development cooperation and humanitarian aid.

⁵³ *EUObserver* 16 June 2008 at <http://euobserver.com/9/26328/?rk=1>

c. Supporting or co-ordinating role

Here, Member States have exclusive competence, but the EU may provide support or co-ordination (this cannot include harmonisation): protection and improvement of human healthcare, industry, culture, tourism, education, professional training, youth, sport, civil protection, administrative co-operation.

There are also specific arrangements for the co-ordination of economic and employment policies and the Common Foreign and Security Policy (CFSP).

The Lisbon provisions on trade negotiations were of particular concern in Ireland. In line with ECJ rulings on EU competence in this matter, the Union would have exclusive competence to conclude international agreements where such conclusion is provided for in a Union legislative act, or is necessary to enable the Union to exercise its internal competence. The Commission already negotiates on behalf of the Union and Member States in many instances. Trade in services is an area of so-called 'mixed competence', which means that Member States take part in individual bilateral negotiations with other World Trade Organisation (WTO) Members, but the Commission acts as lead negotiator and speaks on behalf of Member States in the WTO. Common positions are agreed unanimously with all EU Member States with respect to trade in services.

In contrast, for negotiations concerning the trade in goods, the Commission has had 'exclusive competence'. This means that it has the power to negotiate agreements with international organisations on behalf of the Member States under Articles 133 and 300 TEC. Proposals to the Nice Intergovernmental Conference (IGC) in 2000 on the Common Commercial Policy (CCP) included specific discussion of the EU's position at WTO negotiations. Article 133 was amended to include the negotiation by the Commission and the conclusion by the Council, acting by QMV, of external agreements relating to the trade in services and the commercial aspects of intellectual property. Unanimity would apply where internal Community rules were decided by unanimity or for areas in which the Community had not yet adopted internal rules. At French insistence, agreements relating to trade in cultural and audiovisual services, educational services and social and human health services would require unanimous agreement and would continue to be matters of mixed competence, in which agreements would be concluded jointly by the Community and the Member States.

The Referendum Commission elaborated as follows:

Decisions on agreements with one or more non-EU countries or international organisations are generally made by Qualified Majority Voting (QMV). However if that agreement includes an element on which unanimity is required for an internal EU decision, then the decision on the entire agreement must be made unanimously.

This will remain the rule if the Lisbon Treaty is ratified.

However the ratification of the Lisbon Treaty would mean some policy areas where unanimity is currently required, would in future be decided by Qualified Majority Voting. After the Lisbon Treaty is ratified, the agreements on which unanimity will still be required will include:

- Agreements in the fields of trade in services and the commercial aspects of intellectual property, as well as foreign direct investment, where such agreements include provisions for which unanimity is required for the adoption of internal rules;
- Agreements in the field of trade in cultural and audiovisual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity;
- Agreements in the field of trade in social, education and health services, where these agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them. World trade agreements up to this have always included some of the above elements.⁵⁴

4. Moves to QMV

Lisbon *does* reduce the number of areas in which individual Member States would have a veto, in an attempt to increase efficiency in the larger Union. A number of Articles currently subject to unanimity in the Council are moved to QMV. The Referendum Commission sought to clarify the extent of the loss of the veto, setting out a list of the main areas in which Member States currently do not have a national veto and a list of the areas where Lisbon removes the veto. The latter is as follows:

Areas over which the Lisbon Treaty will remove the national veto and introduce QMV instead

Election of the President of the European Council by the European Council
 Configurations of the Council of Ministers (other than the Foreign Affairs Council)
 Appointment of the High Representative of the Union for Foreign Affairs and Security Policy by the European Council
 Conclusion of a withdrawal agreement with a Member State wishing to leave the EU
 Determination of the procedures and conditions required for a citizens' initiative for legislation
 Arrangements for how Member States evaluate the implementation of EU policies in the areas of freedom, security and justice*
 Administrative cooperation within the area of freedom, security and justice after consulting the European Parliament*
 Measures concerning border checks*
 Measures concerning an asylum system*
 Measures concerning an immigration policy*
 Measures concerning judicial cooperation in criminal matters and aspects of police co-operation*
 Regulations concerning Europol's structure, operation, field of action and tasks*
 Establishment of certain measures concerning transport
 Measures concerning the creation of European intellectual property rights to provide uniform intellectual property rights protection throughout the EU
 Amendment of some articles of the Statute of the European System of Central Banks
 Measures necessary for use of the euro
 Promotion of certain sporting issues
 Incentive measures in the cultural field
 Measures necessary to draw up a European Space Policy
 Measures relating to energy policy
 Some aspects of the common commercial policy
 Measures for drawing up a framework for humanitarian aid

⁵⁴ Speech by Referendum Commission Chairman, Mr Justice Iarfhlaith O'Neill, Press Briefing 4 June 2008 at <http://www.lisbontreaty2008.ie/chairmansspeechjune4.pdf>

Decision defining the European Defence Agency's statute, seat and operational rules
Implementation of the solidarity clause in the event of a Member State suffering a terrorist attack or a disaster
Amendment of some of the provisions of the Court of Justice's Statute and establishment of specialist courts
Arrangements for the control of implementing powers

* Areas marked with an asterisk * are those where Ireland has an opt-in or opt-out arrangement.⁵⁵

5. EU bureaucracy

The Charter of Fundamental Rights, to which Lisbon gives legal status, guarantees in Articles on citizens' rights and liberties the right to "good administration", guarding against excessive bureaucracy from the EU institutions. The Treaty does not specify how this will be achieved, but the Commission has long recognised, at least in theory, the need for simplification and transparency. Its problem has been in the practice, and in spite of various simplification and consolidation exercises,⁵⁶ surveys and polls frequently reveal a fundamental lack of understanding of EU processes together with an underlying suspicion of the activities of the institutions.

Lisbon goes some way towards tackling bureaucracy, although many would argue it does not go far enough. It provides for a reduction in the number of Commissioners from the present 27 to around 18. However, this reduction is seen by many as a loss of national influence rather than a reduction in bureaucracy.

Lisbon does not address the REPS issue specifically.

6. Illegal fishing

Lisbon does not tackle illegal fishing. Current Treaty provisions provide a basis for action and the problem has often been as much an issue of poor policing by the Member States themselves as by the EU. Amended Article 2B gives the Union exclusive competence for "the conservation of marine biological resources under the common fisheries policy"

⁵⁵ Speech by Referendum Commission Chairman, Mr Justice Iarfhlaith O'Neill, Press Briefing 4 June 2008 at <http://www.lisbontreaty2008.ie/chairmansspeechjune4.pdf>

⁵⁶ See, for example, the Commission White Paper on "European Governance" of July 2001 at http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0428en01.pdf; Commission Communication on European governance, "Better Law-Making", 5 June 2002 (COM(2002) 275 final) at http://europa.eu.int/eur-lex/en/com/cnc/2002/com2002_0275en01.pdf; Commission Action Plan simplifying and improving the regulatory environment, 5 June 2002 (COM(2002) 278 final) at http://europa.eu.int/eur-lex/en/com/cnc/2002/com2002_0278en01.pdf; Commission Consultation document towards a reinforced culture of consultation and dialogue containing a proposal for principles and minimum standards for consultation of interested parties by the Commission, 5 June (COM(2002) 277 final) at http://europa.eu.int/comm/governance/news/nl0902_en.pdf; Commission Communication on impact assessment (COM(2002) 276 final), 5 June 2002 at http://www.Europa.eu.int/comm/governance/docs/comm_impact_en.pdf; the Commission Framework for Action, "Updating and simplifying the Community acquis" (COM(2003) 71) at http://eur-lex.europa.eu/LexUriServ/site/en/com/2003/com2003_0071en01.pdf and Commission Communication on its implementation (COM(2004) 432 final), 16 June 2004 at http://ec.europa.eu/governance/docs/comm_communic_432_en.pdf; EP, Council and Commission Interinstitutional Agreement on better law-making, December 2003 at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2003:321:0001:0005:EN:PDF>

(CFP). This would allow the Union to introduce new policies regulating catches or banning fishing altogether in certain areas. This is not really different from the current position. The question of exclusive competence in this area was highlighted in a debate on the (then) Reform Treaty in the Scottish Parliament in September 2007. The Scottish Minister for Europe, Linda Fabiani, suggested that making fisheries conservation an exclusive Union competence might prevent the Scottish Executive supporting the Lisbon Treaty. Ms Fabiani also reiterated the Scottish Executive's opposition to the CFP as currently constructed.⁵⁷

On 16 June, using existing EU and national powers, Member States' fisheries ministers agreed to increase controls to stop illegal fishermen landing their catch in the EU from 2010. The Commission also agreed to step up port controls and ban fish that have not been certified under a new system, and to introduce other measures such as blacklisting vessels and fines.⁵⁸

7. Neutrality

For many years Irish governments have been anxious not to compromise Ireland's neutrality in negotiations on political union that have included a defence role for the EU. Ratification of the Maastricht Treaty, which contained new provisions on a Common Foreign and Security Policy (CFSP), was preceded by a constitutional referendum and there was a specific provision in the Treaty to take account of Ireland's commitment to neutrality. Article 17 TEU (then Article J7), which was retained in Amsterdam and Nice, states that "The policy of the Union in accordance with this Article shall not prejudice the specific character of the security and defence policy of certain Member States ...". At the Seville European Council in June 2002 the Taoiseach secured agreement on two declarations setting out an agreed interpretation of the relevant Nice Treaty provisions as they would apply after implementation of the Treaty. These declarations:

- confirm that the development of the CFSP shall not prejudice Ireland's traditional policy of military neutrality;
- make clear that the Treaties do not impose any binding defence commitments and that the development of the EU's capacity to conduct humanitarian and crisis management tasks does not involve the establishment of a European army;
- recognise that Ireland will not participate in a common defence arrangement without the approval of the Irish people in a referendum;

⁵⁷ See Scottish Parliament Plenary Debate on the EU Reform Treaty 19 September 2007 c1854 <http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-07/sor0919-02.htm#Col1852>

⁵⁸ See Council Decision "authorising the Commission to conduct negotiations for the elaboration of an international legally-binding instrument on port State measures to prevent, deter and eliminate illegal, unreported and unregulated fishing", 10490/08 PECHE 138, 9 June 2008 at <http://register.consilium.europa.eu/pdf/en/08/st10/st10490.en08.pdf>, adopted 23 June 2008, Council press release 10590/08 (Presse 169) (provisional) at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/agricult/101422.pdf

- confirm that Irish troop contingents will not take part in EU operations unless the operation is authorised by the UN, and the deployment is agreed by the Government and approved by the Dáil.⁵⁹

The declaration provisions were confirmed in the 26th Amendment to the Constitution on ratification of Nice, with the insertion of new Article 29.4.9 stating “The State shall not adopt a decision taken by the European Council to establish a common defence pursuant to Article 1.2 of the Treaty referred to in subsection 7 of this section where that common defence would include the State”.⁶⁰ This wording was confirmed in the 28th Amendment to the Constitution Bill (see above). Lisbon also retains the requirement for unanimity before peacekeeping or military missions can be deployed overseas, so Ireland could continue to veto operations it disapproved of. The Defence Minister, Willie O’Dea, insisted that “Ireland’s neutrality is in our hands and that is where it will be staying at all times. The Reform Treaty does not change or alter this” and “There is no threat to Ireland’s traditional policy of military neutrality or to our sovereign right to decide for ourselves when we participate in missions involving the Defence Forces”.⁶¹

However, it was also argued that Ireland’s neutrality was not secured in the wording of Article 29.4.11 of the 28th Amendment Bill:

No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State that are necessitated by the obligations of membership of the European Union referred to in subsection 10 of this section, or prevents laws enacted, acts done or measures adopted by the European Union or by institutions thereof, or by bodies competent under the treaties referred to in this section, from having the force of law in the State.

If no provision of the Irish Constitution is binding if it contradicts any measure of the Lisbon Treaty, any act by the EU or any EU body, or by any body set up by the Treaty, then, it was argued, the proposed constitutional amendment ‘exempting’ Ireland from an EU common defence was legally unenforceable. Ireland would have no option but to contribute to funding the European Defence Agency (EDA), for example, and the Sinn Féin MEP, Mary Lou McDonald, is reported to have said Lisbon would result in more “Irish taxpayers’ money being spent on Irish and EU military capabilities”.⁶² It should be noted that the decision to establish the EDA in November 2003 was intergovernmental and Ireland agreed to it. Ireland could have opted out, as Denmark did, thereby avoiding financial contributions to the Agency. The budget for the EDA is decided by unanimity, so Ireland could veto a decision to expand the budget. Furthermore, participation in EDA projects is established on a case-by-case basis, so Ireland would not have to take part in the development of specific military capabilities if it did not want to.

⁵⁹ Department of Foreign Affairs, 26th Amendment of the Constitution Bill: Second Stage, Speech by Minister Brian Cowen, Part 2, 4 September 2002 at <http://foreignaffairs.gov.ie/home/index.aspx?id=26221>

⁶⁰ Twenty-Sixth Amendment of the Constitution Act, 2002, at <http://www.irishstatutebook.ie/2002/en/act/cam/0026/sched1.html>

⁶¹ Ibid

⁶² *Irish Times* 15 May 2008 at <http://www.irishtimes.com/newspaper/breaking/2008/0515/breaking70.htm>. See also *Irish Times* 16 May 2008, “Neutrality undermined, or peacekeeping enhanced?” for arguments surrounding Ireland’s neutrality and the Lisbon Treaty.

Another possible threat identified by the no-camp is the arrangement for Permanent Structured Cooperation (PSC) in defence matters set out in Article 1 (50) of Lisbon. The focus of the PSC debate has been on the potential for using the mechanism to improve European military capabilities in order to support the wider European Security and Defence Policy (ESDP) agenda. However, once PSC is established, only participating Member States will be able to take decisions on its development, including over the future participation of other Member States.

The establishment of PSC will not affect Ireland's neutral status, nor is there any obligation for Ireland to participate in it (see above). However, critics have highlighted the potential for a two-tier Europe to evolve in ESDP matters if PSC is established among the larger and more militarily capable states. Given that decision-making will exclude non-participating Member States, they have argued that PSC will ignore the potential of smaller Member States and could be divisive in the longer term.⁶³ Concerns have also been expressed over the potential for 'mission creep' beyond the mere improvement of capabilities once PSC is established. For example, the *Protocol on Permanent Structured Cooperation* calls for participants to "bring their defence apparatus into line with each other as far as possible" and possibly review "their national decision making procedures" with respect to the deployment of forces. Some critics regard this as first steps toward a common European armed force. The French Presidency Work Programme makes the development of military capabilities under PSC a priority, and also proposes a revision of the funding structure for ESDP operations and the development of an independent EU military planning capability outside the framework of the NATO alliance.

8. Abortion

Ireland's constitutional opposition to abortion is currently safeguarded in a Treaty Protocol. The no-camp and the Catholic Bishops of Ireland raised fears that the primacy of EU law over national law, reiterated in Section 1(a) 11° of the 28th Amendment Act, could leave Ireland vulnerable in this respect. In a pastoral letter on Lisbon in May 2008 the Catholic Bishops referred indirectly to controversial social issues in Ireland (e.g. abortion, same sex marriage, euthanasia and embryonic stem cell research), warning that laws may be changed by the EU:

In a climate of legal positivism, attempts may well be made to use traditional language concerning human dignity in ways which are contrary to traditional sense. Court decisions on a national or EU level tend to interpret language. Administrative decisions may well tend to opt for particular interpretations of norms.⁶⁴

They continued:

⁶³ See for example, "Permanent Structured Cooperation and the Future of ESDP", *Royal Institute for International Relations*, 2008, p.6

⁶⁴ "Fostering a Community of Values", Pastoral Reflection from the Catholic Bishops of Ireland on the occasion of the referendum on the Treaty of Lisbon, 29 May 2008 at <http://www.catholiccommunications.ie/lisbon08/lisbon08-pastoralreflection.pdf>.

It is to be hoped that our public representatives will make a public commitment to engage actively with a broad coalition across the EU to resist interventions of this kind and to combat attempts to weaken the sense of subsidiarity which is an essential dimension of the Treaty of Lisbon.

During the launch of the pastoral the Archbishop of Dublin, Dr Diarmuid Martin, said the Lisbon Treaty recognised Ireland's constitutional safeguard against the introduction of legislation that supported abortion. However, many feel that it is not secure, particularly in the light of the 1991 Grogan ruling,⁶⁵ in which the ECJ ruled that abortion "constitutes a service within the meaning of Article 60 of the Treaty" (free movement of services) and that the distribution in Ireland of information on abortion services in other Member States was therefore permissible within this context.

Protocol No. 35 of Lisbon on Article 40.3.3 of the Irish Constitution states that nothing in the Treaties, or in the Treaties or Acts modifying or supplementing those Treaties, shall affect the application in Ireland of Article 40.3.3 of the Constitution. Protocols appended to EC Treaties are legally binding and have the same legal status as Treaty Articles themselves. Protocol No. 35 is therefore part of EU law and it explicitly excludes Article 40.3.3 of the Irish Constitution from any other EU law. Ireland's constitutional position on abortion would not therefore be affected by ratification of Lisbon.

9. Taxation

There were concerns among the business community that Lisbon would allow EU-wide tax harmonisation, threatening Ireland's low corporate tax rate of 12.5%. The no-campaign argued that Lisbon would weaken Ireland's ability to stop further integration in the area of taxation, while the yes-campaign maintained this was a red herring.

An Open Europe commentary on Lisbon said:

Tax did indeed feature in the campaign, driven by ongoing moves towards a common corporate tax base. On 9 June, during the campaign, the Irish Independent had a scoop on plans which will be presented by Taxation Commissioner Laszlo Kovacs on 2 July. Even the Irish business organisation IBEC, which was campaigning for the Treaty, described the proposal as "a Trojan horse to bring in common tax rates." The issue was linked to the Treaty because one proposal is to introduce the common tax base under enhanced cooperation, which the treaty enabled. So tax did feature in the campaign, and for good reason.⁶⁶

Amended Articles 90-93 of the *Treaty on the Functioning of the European Union* (TFEU, the amended *Treaty Establishing the European Community*) incorporate the existing tax provisions set out in Articles 90 to 93 TEC. New Article 93 has one substantive change:

⁶⁵ Case C-159/90, *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others* at http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&numdoc=61990J0159&lg=EN#DI

⁶⁶ Open Europe Background Briefing at <http://www.openeurope.org.uk/research/irelandbriefing.pdf>

legislation for harmonising indirect taxes may be adopted “provided that such harmonisation is necessary for the establishment or the functioning of the internal market and to avoid distortion of competition.” It remains the case that any such legislation must be agreed by the Council acting unanimously.

Harmonisation in the sphere of direct taxes under Article 94 TEC is much more limited than in that of indirect taxes. Although directives introduced under Article 94 TEC may be approved under the co-decision procedure, this does *not* apply to fiscal provisions.⁶⁷ The TFEU maintains the requirement for unanimity in amended Article 95 on any fiscal measure introduced under this Treaty base.⁶⁸ Articles 94 and 95(2) are fundamentally unchanged.

Writing in the *Irish Times* Jamie Smyth noted:

It is clear that some states want more integration in the tax field. French finance minister Christine Lagarde confirmed last month that Paris would promote a draft commission proposal to harmonise the way EU member states compute their corporate taxes during its upcoming six month presidency of the Union.

Germany is also interested in pursuing the controversial initiative, which it believes would boost the competitiveness of European companies by reducing the cost of doing cross-border business. The author of the initiative, EU tax commissioner Laszlo Kovacs, says he will publish his proposal for a common consolidated corporate tax base (CCCTB) in the autumn. Ireland and several other states strongly oppose it, arguing that it would inevitably lead to harmonised tax rates and undermine tax competition. But Lisbon contains no significant amendments in the field of taxation, which until now has guaranteed each state a veto over new proposals.⁶⁹

In response to the argument put forward by the no-campaign that enhanced co-operation among some Member States could be used to undermine Ireland's corporate tax policy, Smyth writes:

What is clear, however, is that the Lisbon Treaty doesn't change the rules on enhanced co-operation or on corporate tax. Tax experts also suggest that groups of EU member states can already club together and try to renegotiate their bilateral tax treaties with Ireland outside the EU framework to create their own common consolidated tax base.

Certainly, Paris and Berlin will be pushing for integration in the tax field in the months and years ahead. But voting against the Lisbon Treaty won't change the EU rulebook on corporate tax. Ironically, a No vote may only serve to weaken

⁶⁷ One of three exclusions from the co-decision procedure established under Article 95(2).

⁶⁸ The British Government has insisted that unanimity should remain the basis for decision-making in the area of taxation. See “Britain will veto common EU tax”, *Times*, 2 December 1998, and, “Blair fights for EU tax veto”, *Sunday Times*, 15 June 2003; HC Deb 9 June 2003 c 602W & HC Deb 21 June 2004 c 1079

⁶⁹ *IrishTimes.com* 19 May 2008 at <http://www.irishtimes.com/newspaper/ireland/2008/0519/1211123049286.html>

Ireland's political influence in Brussels and make it more difficult for the Government to defend its tax sovereignty.⁷⁰

IV Reaction to the referendum result

The immediate reaction to the referendum result was described in many reports as “shock”,⁷¹ and the implications of the outcome were for some a “defeat” for EU integration, and a “hammer blow at the morale of the EU’s political elites”,⁷² for others a “triumph for democracy”.⁷³ Samuel Brittan, writing in the *Financial Times*, called it, rather, a “defeat for a certain vision of the EU”,⁷⁴ which he went on to define as a post-WW2 aim of “more Europe” for its own sake, “even to extending to Brussels level decisions that are left to the state level in the US”. Wolfgang Münchau, writing in the *Financial Times*, found the no-vote “shocking”, “not in terms of what it means for the EU, but what it says about Ireland”.⁷⁵ He thought Ireland was one of the EU’s “great success stories” and that “Both Ireland and the EU should have celebrated their relationship”.

This section looks at reaction in Ireland, the UK and across the EU.

A. The Irish Government

Brian Cowen insisted the referendum result had to be respected, but, initially at least, he did not rule out a second referendum.⁷⁶ Other government ministers did not think a second referendum would be palatable. In a statement on the referendum outcome Mr Cowen said:

Yesterday, an issue of great importance was decided upon by the Irish people in the referendum on the Lisbon Treaty.

In a democracy, the will of the people as expressed at the ballot box is sovereign. The Government accepts and respects the verdict of the Irish people.

The rejection of the proposal to change our Constitution so that we could ratify the Lisbon Treaty is a source of disappointment to my Government colleagues, and to me.

It is our duty now to reflect on the implications of this vote for Ireland so that we can move forward and keep this country on the path of progress.

⁷⁰ *IrishTimes.com* 19 May 2008

⁷¹ See, for example, *IrishTimes.com* 14 June 2008 at

<http://www.irishtimes.com/newspaper/breaking/2008/0614/breaking3.htm>

⁷² Tony Barber, *FT.com* 13 June 2008 at <http://www.ft.com/cms/s/0/8eda1142-3949-11dd-90d7-0000779fd2ac.html>

⁷³ See, for example, statement by TEAM, The European Alliance of EU-critical Movements, 14 June 2008 at <http://teameurope.info/node/305>

⁷⁴ *Financial Times* 20 June 2008

⁷⁵ *Ft.com* “Europe’s plan B for the Lisbon treaty”, Wolfgang Münchau 15 June 2008 at http://www.ft.com/cms/s/0/8dc810e6-3ada-11dd-b1a1-0000779fd2ac.dwp_uuid=70662e7c-3027-11da-ba9f-00000e2511c8.html

⁷⁶ When Ireland voted against the *Treaty of Nice* in June 2001, a second, and this time positive, referendum was held in October 2002.

I am extremely mindful today also, of our European partners for whom this vote will represent a considerable disappointment and a potential set-back to many years of effort. Once again in Europe, a Treaty supported by the leaders of all Member States has been unable to secure popular support in a ballot. We must not rush to conclusions. The Union has been in this situation before, and each time has found an agreed way forward. I hope that we can do so again on this occasion.

As Taoiseach, I wish to make it clear to our European partners that Ireland has absolutely no wish to halt the progress of a Union, which has been the greatest force for peace and prosperity in the history of Europe. Equally, we still share the goal of a Union fit for purpose in this century. We will take the time to explain this to our partners in Europe and the wider international community.

Minister Martin will attend the General Affairs and External Relations Council on Monday. I will meet and consult with my counterparts at Head of State or Government level at the European Council on Thursday and Friday.

We have seen an energetic and hard-fought campaign waged by those in favour of and against the Treaty. I wish to particularly acknowledge and thank all those who campaigned on behalf of a Yes vote, whether as members of political parties or otherwise.

However, the result does bring about considerable uncertainty and a difficult situation. There is no quick fix. It will not be resolved easily. We will not rush into any particular action now.

We need to pause to absorb what has happened and why, and to consult widely at home and with our European partners.

As Taoiseach, I will be devoting my full political energies to finding a way forward for our country which needs to take into account the concerns reflected by the referendum result.⁷⁷

Cowen hoped the EU would be able to find a way forward and insisted Ireland did not want to “halt the progress of the Union”.⁷⁸ He conceded that the result had brought about “considerable uncertainty” and criticised the no-campaign, which he called an “orchestrated campaign of confusion”.⁷⁹ The Labour coalition partner, Eamon Gilmore, believed the Lisbon Treaty was now “dead”, and the leader of the no-campaign, Patricia McKenna, thought other Member States should halt their ratification processes in the light of the result in Ireland.

B. The UK

Immediately after the referendum the *Guardian* reported that the Foreign Secretary, David Miliband, had come close to declaring the Lisbon Treaty dead, urging EU leaders to abandon institutional reform and instead address the issues of concern to ordinary

⁷⁷ Government Statement 13 June 2008 at <http://www.taoiseach.gov.ie/index.asp?locID=582&docID=3919>

⁷⁸ *EUObserver* 13 June 2008 at <http://euobserver.com/9/26327/?rk=1>

⁷⁹ *Ibid*

citizens. He was also reported to have ruled out the idea floated in France and Germany of allowing the Treaty to be implemented in 26 EU Member States, with Ireland opting out.⁸⁰ According to the *Guardian* Miliband also said:

What's important is that in the end there are two agendas in the European Union. One is an old agenda about institutional reform, which the Lisbon treaty was designed to bring to an end. And there's another agenda, which is addressing the new sources of insecurity and threats to prosperity that's around terrorism or climate change or the economic problems with the fuel price rises that we are seeing. I think it's that modern role of the EU that is more necessary than ever.⁸¹

The shadow foreign secretary, William Hague, was reported as saying the EU was working well under the existing arrangements and there was no need for Lisbon.⁸²

The Foreign Secretary made a statement in the Commons on 16 June about the implications of the no-vote:

The no vote on the treaty in the referendum is important because of our strong national interest in an effective European Union, and that vote needs to be respected. The next step is for the Irish Government to give their views on how to proceed from this point, consistent with their aims for Ireland's role in the EU. They have made it clear that they need time to absorb and analyse the result and its implications and to consult widely at home and abroad. The Irish Prime Minister has said that he is disappointed by the result but wants Ireland to continue to play a full part in the life of the EU.

I have just returned from a meeting of EU Foreign Ministers in Luxembourg, and that message was reiterated by the Irish Foreign Minister at that meeting. He emphasised the diverse nature of the Irish debate, and the overlap in the debate between issues that are affected by the treaty and those that are not. He also expressed his appreciation that around Europe, leaders had committed themselves to work co-operatively with Ireland. He committed Ireland to work for a common European approach, with Ireland at the heart of Europe. There will be further discussion among Heads of State and Foreign Ministers at the European Council this Thursday and Friday not to take final decisions but to hear a preliminary report from the Irish Government and preliminary thoughts on the next steps.

The rules of the treaty and of the EU are clear. All 27 member states must ratify the treaty for it to come into force, and we on the Government Benches will defend that principle extremely strongly. There is no question of ignoring the Irish vote or of bulldozing Irish opinion. Ireland clearly cannot be bound by changes that it has not ratified. Equally, there is no appetite for a return to years of institutional negotiation. The EU as a whole

⁸⁰ BBC's Andrew Marr Show, reported in the *Guardian* 16 June 2008 at <http://www.guardian.co.uk/world/2008/jun/16/eu.davidmiliband>

⁸¹ *Guardian* 16 June 2008 <http://www.guardian.co.uk/world/2008/jun/16/eu.davidmiliband>

⁸² BBC *Politics Show*, reported in *Guardian* 16 June 2008

needs to find a way forward for all countries that allows the EU to focus on the big policy issues that confront us.

Eighteen countries have approved the Lisbon treaty. The Irish Government have set out clearly their respect for the right of other countries to complete their ratification processes. My conversations with other Foreign Ministers, representing all shades of political opinion across the EU, show this to be a very strongly held view. The reason for the approach is simple: an Irish vote is determinant of an Irish position but cannot determine the ratification decision of other countries. The British view is for this Parliament to determine. In this House and the other place, there have been 24 days of debate, and both Houses have voted strongly in favour of the European Union (Amendment) Bill at each stage. The final stage is Third Reading in the other place on Wednesday.

The Government believe that ratification should proceed as planned. It must be right that every country takes its own view on the treaty in accordance with its democratic traditions. That is right according to democratic principle; it is right in terms of our negotiating position in the EU; and it is right in terms of our national interest.

Our national interest is a strong Britain in a strong European Union. The EU now consists of 27 countries and 490 million people. The reform of EU institutions and working practices is important to ensure that the EU can function more effectively and cohesively, and to ensure that the EU embraces an outward-looking agenda that tackles in an effective way international issues such as migration, climate change, security and defence policy and counter-terrorism. But treaty change rightly requires unanimity across all countries. That is why it is right that we take the time to allow the Irish Government to make proposals on what they will do next, right that we assert Britain's national interest in an effective EU that addresses the problems of the modern world, and right that we work to maintain the cohesion of the EU. That is what the Government will be doing in the weeks and months ahead, and I commend that approach to the House.⁸³

The Government's position in 2005 was different. In June 2005, after the two no-votes on the EU Constitution, the then Foreign Secretary, Jack Straw, announced in the Commons that the Government had decided to postpone the Second Reading of the *European Union Bill*⁸⁴ because "until the consequences of France and the Netherlands being unable to ratify the treaty are clarified, it would not in our judgment now be sensible to set a date for the Second Reading".⁸⁵ Mr Straw said the Government would

⁸³ HC Deb 17 June 2008 cc 704-5 at <http://pubs1.tso.parliament.uk/pa/cm200708/cmhansrd/cm080616/debtext/80616-0008.htm#0806163000003>

⁸⁴ The *European Union Bill* [Bill 45 of 2004-05] was introduced on 25 January 2005 and had a Second Reading on 9 February, but it fell on the calling of the general election. The Bill provided for the Constitution to have legal authority in the UK conditional upon approval in a referendum. The Bill was reintroduced on 24 May 2005 [Bill 5, 2005-06]. For information on the Bill, see Library Research Paper 05/12, *The European Union Bill* 3 February 2005, at <http://www.parliament.uk/commons/lib/research/rp2005/rp05-012.pdf>

⁸⁵ HC Deb 6 June 2005 c 992 at http://pubs1.tso.parliament.uk/pa/cm200506/cmhansrd/cm050606/debtext/50606-05.htm#column_991

“keep the situation under review, and ensure that the House is kept fully informed”.⁸⁶ He insisted that neither legislation nor a referendum had been ruled out: “We reserve completely the right to bring back for consideration the Bill providing for a UK referendum should circumstances change, but we see no point in doing so at this moment”.⁸⁷ The Government kept its options open, but when the EU decided to ‘bury’ the EU Constitution and to come up with a different solution after a period of reflection, the Bill was not brought back, and it fell at the end of the session. The British Government came under some pressure, which it resisted, to halt the progress of the *European Union (Amendment) Bill* in the House of Lords. The Bill passed through its final stages in the Lords on 18 June and received Royal Assent on 19 June 2008.⁸⁸ The Bill’s passage through Parliament is discussed in more detail in section VII below.

Following the Miliband statement on 16 June William Hague called the referendum result “an inspiring example of democracy in action”, a “courageous vote”, and asked:

Following as it does the French and Dutch rejections of the original constitution— a treaty that was, in the words of Irish Prime Minister Bertie Ahern, “90 per cent.” the same as the Lisbon treaty—is it not now clear beyond doubt that there is profound opposition among the peoples of Europe to the substance of this treaty? Given that no one would ever call the peoples of France, the Netherlands and Ireland anti-European, is it not now clearer than ever that it is absurd to describe as anti-European disagreement with a treaty that further centralises power away from Europe’s nation states towards remote EU institutions?⁸⁹

He questioned the Government’s intention to continue with ratification:

Should not the Government now plainly state that Britain will suspend ratification in this country immediately, give a clear message at this week’s summit that the treaty is finished, and make the fundamental point that no lasting political institutions can be built in democratic societies without the people’s consent? Is that not what real respect for the referendum would mean? Is it not essential that all preparations for implementing the treaty, including on the European External Action Service, are now suspended and that the EU takes no action that is not legally provided for under the current treaties? Does the Foreign Secretary agree that respecting the result means not asking the Irish people to vote again? Will he undertake on the Government’s behalf that they will take no part in any bullying of Ireland? Would it not be extraordinary for the Irish to vote twice on this treaty, when British voters have not had the opportunity to vote once?⁹⁰

Edward Davey, for the Liberal Democrats, suggested that “many in Britain, including the Liberal Democrats, find it difficult to see any way in which to continue with the Lisbon

⁸⁶ HC Deb 6 June 2005 c 992

⁸⁷ Ibid

⁸⁸ For details of parliamentary stages, see <http://services.parliament.uk/bills/2007-08/europeanunionamendment.html>

⁸⁹ HC Deb 16 June 2008 c 705

⁹⁰ Ibid

treaty”, but thought it would be “wrong to be seen to anticipate discussions with our European partners[?]”.⁹¹ He continued:

Whether the European Union’s operation is to be based on Nice or Lisbon, is not our immediate challenge to obtain a decision, one way or the other, at the forthcoming summit and thus avoid further delay and uncertainty?

Whatever the frustrations and difficulties caused by the loss of Lisbon, could not the cause of European co-operation be much more seriously damaged by yet another protracted period of member states being distracted by institutional debate or talk of a two or three-speed Europe?

With or without Lisbon, in a world of uncertainty and danger, Britain’s national interest remains in the European Union, playing a positive role. It is time for the European Union to focus all its energy on the agenda of economic reform, climate change and tackling terrorism. The Foreign Secretary’s job now is to ensure that Britain plays that constructive role in Europe so that Europe’s benefits become ever clearer to the peoples of Europe.⁹²

The Foreign Secretary would not be drawn into arguments about a UK referendum and rejected suggestions of a two-tier Europe, which, he thought would be impracticable.

Media reaction to the no-vote was polarised.⁹³ The *Daily Telegraph*, which ran a Lisbon referendum campaign in the UK called “Let the people decide”, commented:

"As the only EU country to hold a referendum on the Lisbon Treaty, Ireland today carries the can for the cowardly evasion of its partners," the leader said.

The Telegraph has argued that Labour has wriggled out of holding a referendum despite promising to do so in its manifesto for the 2005 election.

The Government made a commitment in its 2005 manifesto to hold a national vote on the EU Constitution before it was halted by the French and Dutch votes.

Critics have claimed that the Lisbon Treaty, which replaced the EU Constitution, contains 90 per cent of the original document.

The rejection of the pact by Irish voters will increase pressure on other countries to offer a referendum, although Ireland is the only one of the 27 member states constitutionally bound to do so.⁹⁴

Will Hutton, writing in the *Observer*, was clearly angered by the suggestion that the vote had been a triumph for democracy:

⁹¹ HC Deb 16 June 2008 c 708

⁹² Ibid c 709

⁹³ For a useful overview of press reaction in Europe, see “EU referendum: What the European papers say”, *Telegraph.co.uk* 14 June 2008 at <http://www.telegraph.co.uk/news/worldnews/europe/2128013/EU-referendum-What-the-European-papers-say.html>

⁹⁴ *Telegraph.co.uk* 13 June 2008 at <http://www.telegraph.co.uk/news/newstopics/eureferendum/2123230/EU-treaty-Telegraph-campaign-for-British-referendum.html>

This is nonsense from top to bottom, a farrago of lies and disinformation. The European Union is a painfully constructed and fragile skein of compromises that allows 27 democratic states on our shared continent to come together and drive forward areas of common interest to further their citizens' well-being. The elite that plots this is a nonexistent phantom invented by populist demagogues. The beleaguered, unloved treaty would have improved Europe's effectiveness and tried to address its much talked about democratic weaknesses.

The reality is that Ireland's 'no' voters have trashed an EU that is precious but weak. Most 'no' voters, grabbing on to the worst fear rather than reasoned fact, have unknowingly set in train a political dynamic that, unless carefully handled, could lead not just to Ireland but Britain leaving the EU. Everybody will be the poorer.

Sometimes, fatalistically, I think this may have to happen. Eurosceptics, such as Ireland's leading 'no' vote campaigner Declan Ganley, like to position their fierce and unjustified attacks on the actual Europe we have as being pro-European because today's EU does not correspond to some impossible notion of Europe that meets their own very particular prejudices. Such is the flaw of referendums as a means to practise reasoned democratic decision-making that the only way voters will come to realise that the sceptics are wrong is to be forced to live through the consequences of their vote.

For although the first reaction in Ireland, Brussels and the rest of the European Union has been to say that the will of Ireland's voters must be respected, the wider political logic is that Irish voters are in effect saying no to the European Union, a will that can only be respected by other states freezing their ambitions. Ireland's voters have primed a bomb.⁹⁵

Bronwen Maddox, writing in the *Times*, was more subdued:

True, the "no" campaign was garnished with fears that would not obviously have followed the passage of the treaty, such as a loosening of Irish restrictions on abortion, or on the country's historic neutrality. But voters seem to have been clearly afraid that Ireland, as a small country, would lose its say in a bigger Union, where more laws and other internal arrangements would be agreed simply on the view of the majority. Ireland's power to veto these would drop.

It is impossible to dispute this point. It would be foolish for other countries to proceed with ratification and hope that the Irish will come to their senses, shamed into compliance by dislike of being the only one out. That is exactly the patronising attitude that leads voters to vote "no".

The only argument that the pro-treaty camp could offer is that the benefits of its passage would outweigh the costs; this is a hard case to make because some of them are invisible at this point.⁹⁶

⁹⁵ *The Observer* 15 June 2008 at <http://www.guardian.co.uk/commentisfree/2008/jun/15/eu.ireland>

⁹⁶ *Timesonline* 14 June 2008 at <http://www.timesonline.co.uk/tol/news/world/ireland/article4133458.ece>

C. The EU Institutions

1. European Commission

The EU Internal Market Commissioner, Charlie McCreevy, was reported on Ireland's RTÉ News as saying that Lisbon as it was intended could not now come into force, but that neither the Irish people nor their Government could be "bullied" into taking specific action. He was optimistic, however, that "new arrangements" could be made which would be in the best interests of Ireland and the EU.⁹⁷

The Commission President, José Manuel Barroso, said the no-vote was largely, though not exclusively, Dublin's responsibility, telling the EP on 18 June that "Ireland has a responsibility to contribute to finding a solution. When governments sign the Treaty they assume a responsibility to have it ratified".⁹⁸ Brian Cowen said in an interview with RTÉ News that he wanted "Europe to provide some of the solutions as well as just suggesting that it is Ireland's problem alone, although Ireland has a position here that we have to try to deal with".⁹⁹ Barroso, who said before the referendum that there was no 'Plan B' in the event of a negative vote in Ireland, called on other Member States to continue with their ratification processes.¹⁰⁰ Barroso and the Commission Vice-President, Margot Wallström, set out for the EP their position on the no-vote:

- the no-vote did not solve the problems that Lisbon was designed to address and the world would not stop to wait for Europe to sort out these institutional problems;
- the EU should not fall into paralysis due to a fixation with institutional positions and the energy and political capital spent trying to find an institutional solution should not be wasted;
- the Irish vote must be respected but the same respect must be shown for Member States that had ratified;
- ratification in other Member States must continue;
- Lisbon could not come into force unless it was ratified by 27 Member States;
- the Irish vote only spoke for Ireland and not for all Member States;
- the Irish Government had a responsibility to ratify the Treaty (after agreeing and signing it);
- the Irish Prime Minister should bring forward a solution for Ireland around which consensus must be built;
- this process should not be unnecessarily protracted and ideally should be completed in time for the 2009 EP elections;
- the EU should show solidarity by working together to find a solution, considering the result in Ireland as well as issues raised during the ratification process in other Member States;

⁹⁷ RTÉ News 16 June 2008 at <http://www.rte.ie/news/2008/0616/eul Lisbon.html>

⁹⁸ EP plenary debate on preparation of the European Council following the Irish referendum 18 June 2008 at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20080618+ITEM-002+DOC+XML+V0//EN&language=EN>

⁹⁹ EUObserver 16 June 2008 at <http://euobserver.com/9/26329/?rk=1>

¹⁰⁰ 19 of the 27 Member States have already approved Lisbon. There are legal challenges in Germany, the UK and Czech Republic

- years of treating the EU institutions as a scapegoat had given rise to problems and had backfired in Ireland. Member State governments had to change this approach to the EU.¹⁰¹

2. European Parliament

On 18 June 2008 the EP debated preparations for the European Council with the Presidents of the Council and the Commission (see also above).¹⁰² The debate focussed on the implications of the referendum result. The Slovenian Presidency wanted the important business of the EU to continue and thought institutional issues should not be allowed to dominate the Council, a view shared by the British Government.

A majority of MEPs did not want to spend any more time considering institutional matters, although views differed over what to do next. Amid interruptions from no-vote supporters, the EPP-ED spokesperson, Joseph Daul supported continued ratification and getting on with the “real business of Europe”, such as climate change and security. Martin Schultz (PES) said that the institutions were not to blame for the crisis, while the UK ALDE MEP, Graham Watson, said that European citizens had not been persuaded by the politicians that the EU should go any further. He advocated continuing to use the Nice Treaty if necessary, but telling people why Europe was a good thing. When the debate was opened up, a clear majority of Members believed the EU should not spend any more time considering institutional matters, although the solutions differed. Philip Bushill-Matthews (EPP-ED), the new leader of the UK Conservatives in the EP, pointed to a crisis in confidence in the EU and thought the EU needed to listen – and to show it was listening - in order to find a solution to the problems.

Poul Nyrup Rasmussen (PES), the former Danish Prime Minister, did not think more time for reflection was necessary and there appeared to be no desire generally among MEPs or Member State governments for another extended period of reflection like the one in 2005-06. The UK PES member, Richard Corbett, wanted the EU to listen, reflect on and digest the Irish vote, but also to listen to all the other Member States, taking note of the concerns they raised during ratification, and then rise to the challenge to bridge the gap. It was not inconceivable or unreasonable, he thought, to ask the Irish to reconsider in a second referendum.

Jo Leinen (PES) thought governments had not effectively promoted the EU in their own countries. The UK Liberal Democrat MEP, Andrew Duff, said the passage of the Bill in the Lords that afternoon would help restore the moral authority and credibility of the UK in Europe and should help to find a new consensus in Ireland.¹⁰³

Elmar Brok (EPP-ED) rejected a two-speed Europe and underlined the importance of working with the Irish to find a solution. Gary Titley (PES, UK) was concerned about the implications of the Irish vote for the accession of Croatia and other Western Balkan

¹⁰¹ EP plenary debate on preparation of the European Council following the Irish referendum 18 June 2008

¹⁰² For a summary of the debate see <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20080618+ITEMS+DOC+XML+V0//EN>

¹⁰³ Indeed, the passing of the European Union (Amendment) Act on 18 June sent a positive message about the UK in Europe which was widely noted in the continental press.

states to the EU, in view of remarks by the EP President and the French Government that Lisbon's demise would mean an end to all further accessions to the EU.

Irish MEPs also contributed significantly to the debate. They maintained the no-vote had not been anticipated and that it was difficult to understand the reasoning behind it. They believed the people of Ireland wanted a stronger Europe and that Ireland's views should be listened to in an attempt to find an acceptable text for a basically pro-European Member State. Proinsias de Rossa (PES) called for a second referendum in Ireland, saying that "Europe has very little to lose if it loses Ireland, but Ireland has everything to lose if it loses the EU".¹⁰⁴ Mairead McGuinness (EPP-ED) thought the problems raised during the referendum campaign were internal to Ireland and not matters for the EU to solve.

Janez Lenarčič, the Slovenian Minister for European Affairs, speaking on behalf of the Presidency, supported a continuation of the ratification process elsewhere and was confident that the EU would, as it had done before, find a solution to the situation. He did not think the no-vote had any direct implications for EU enlargement or neighbourhood policies and it would not affect Croatia's accession process.

On Monday 23 June Janez Lenarčič held an exchange of views with the EP's Constitutional Affairs Committee in what turned out to be a post-mortem of the referendum result. Andrew Duff thought the incoming French Presidency should draft a Council decision that would allay fears about losing a Commissioner¹⁰⁵ and suggested that protocols concerning fiscal policy, neutrality and family law could be helpful. Even then, he said, a second referendum could fail and preparations should be made for this. The Polish Independent MEP, Dariusz Grabowski, did not want the Irish situation to encourage other Member States with ratification issues to call for a renegotiation of parts of the Lisbon Treaty. Carlos Carnero Gonzalez (PES, Spain) wanted to continue with the "essentials" of Lisbon but above all to counter the growth of euroscepticism. The UK Conservative MEP, Timothy Kirkhope, who had been on the Convention on the Future of Europe in 2003-04, thought Lisbon was incomprehensible to the citizen and advised livening up European politics in order to engage people and help bring about the institutional changes that were needed. Richard Corbett called for respect for the Irish referendum. He did not want a two-tier Europe or for the Irish to be pushed out. He thought the EU needed to try to bridge the gap by listening to everybody's views and argued that it was legitimate to ask the minority to reconsider the text if their needs had been largely met.

The Presidency clarified that there was no deadline for a solution to be found, that the Council would not force Ireland to produce definitive solutions by October and it would be left to Ireland and the Commission to examine the reasons for the no-vote. The

¹⁰⁴ <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20080618+ITEM-002+DOC+XML+V0//EN&language=EN>

¹⁰⁵ It is hard to see how this could be done as a reduction in Commissioners is envisaged under the present Treaty as amended by Nice.

Committee also decided to defer any further work on its report into the implications of Lisbon.¹⁰⁶

V What now?

A. Is Lisbon 'dead' or 'alive'?

Does the Irish no-vote render the Lisbon treaty 'dead' or invalid under international law? While EU treaties are subject to the norms of international law and the *Vienna Convention on the Law of Treaties*, political solutions are almost invariably found to crises such as these. Professor Steve Peers believes Lisbon could be ratified in spite of the Irish 'no':

... there are several ways in which the Treaty might nevertheless be ratified. It would also be possible to agree on amendments to the Treaty, in which case the revised Treaty would not be exactly the same text as the Treaty which was rejected in the referendum – although it would probably still be called the 'Treaty of Lisbon'.¹⁰⁷

In a press conference on 14 June 2008 Jose Barroso said Lisbon was not dead as a result of the Irish no-vote and that Member States should continue with their ratification processes. Hans-Gert Pöttering, President of the European Parliament, said:

The rejection of the Treaty text by one European Union country cannot mean that the ratifications which have already been carried out by 18 EU countries become invalid. The ratifications in the other EU Member States must be respected just as much as the Irish vote. For that reason, the ratification process must continue in those Member States which have not yet ratified.¹⁰⁸

The EU Constitution did eventually 'die' because the Commission and Member States decided to 'kill' it, but other EU Treaties which suffered a ratification defeat did eventually come into force. Willem Buiter, Professor of European Political Economy, London School of Economics and Political Science, writing in the *Financial Times*, said "The rules for ratification of the Treaty were clear. To change the rules when you are losing is a violation of the rule of law. Respect for the rule of law is even more important than the fate of the Lisbon Treaty".¹⁰⁹ He continued:

It is, however, important that the death of the Lisbon Treaty is acknowledged in Brussels and in the national capitals that favoured the Treaty. Trying to achieve a

¹⁰⁶ Three reports had already been drafted on Parliament's new role and responsibilities implementing the Treaty of Lisbon (Rapporteur Jo Leinen); the financial aspects of the Reform Treaty (Rapporteur Alain Lamassoure.); the impact of Lisbon on the development of the institutional balance of the European Union (Rapporteur Jean-Luc Dehaene). Two reports into relations with national parliaments under Lisbon and the European External Action Service had also been planned and these were also postponed until after the October European Council.

¹⁰⁷ *Statewatch*, "Can the Treaty of Lisbon be ratified or implemented? A legal analysis", Professor Steve Peers, University of Essex, 19 June 2008 at <http://www.statewatch.org/news/2008/jun/analysis-lisbon-june-sp-2008.pdf>

¹⁰⁸ EP Press Release, 13 June at http://www.europarl.ie/httpwww.europarl.ieEP_President_on_Lisbon_result_13_June_2008.html

¹⁰⁹ *Ft.com* 14 June 2008 at <http://blogs.ft.com/maverecon/2008/06/wouldnt-it-be-nice-if-we-could-all-have-gone-to-lisbon/#more-264>

resurrection of Lazarus for the Lisbon Treaty by telling the Irish people: “keep on voting till you get it right”, would be both contemptible and counterproductive. This tactic worked once, when the Irish voters rejected the Nice Treaty in May 2001, held another referendum in October 2002 and passed the Treaty on that occasion. It will not work again. If it were to be attempted, I am certain that many of those who did not vote this time, and quite a few of those who voted in support of the Treaty, would want to hold up two fingers in the direction of the would-be bullies of Brussels, Paris and other corners of the continent.¹¹⁰

Open Europe commented:

EU law clearly states that the 27 Member States must ratify the Treaty before it can come into force. Ireland has failed to ratify the Treaty, meaning Lisbon in legal terms should be dead. It is a point of fundamental importance to the viability of the EU that the rule of law be applied consistently – whether to large or small countries.¹¹¹

B. Past precedents

The no-vote creates a situation in the EU which is both familiar and new. Although there has been some reluctance to speak of a ‘crisis’ or to pronounce Lisbon ‘dead’, it is undoubtedly a critical time for the credibility of EU aspirations towards deeper political integration on the one hand and bringing the EU closer to its citizens on the other. The European Council has tackled non-ratification problems in the past and of all the recent amending Treaties, only the *Treaty of Amsterdam* was ratified without problems. Professor Jo Shaw¹¹² considered some historical examples of non-ratification and their consequences. In the case of the 1954 treaty on the European Defence Community, which the French *Assemblée Nationale* refused to approve, the treaty initiative was abandoned. European integration efforts “were re-focussed on functional and economic questions, and the result was the Treaty of Rome in 1957”.¹¹³ More recent examples are Denmark rejecting the Maastricht Treaty in 1992, Ireland voting against the Nice Treaty in 2001 and France and the Netherlands voting against the *Treaty Establishing a Constitution for Europe* in 2005. In the two first cases a second referendum was held. The Danish electorate was asked to vote on a slightly different package agreed by all Member States to take account of Danish objections. In Ireland the electorate voted on the same text, but on the basis of a more informed debate. In both cases the second referendum was positive. In the case of the EU Constitution, the Treaty was eventually abandoned altogether, although its content was largely resurrected in 2007 in the form of the Lisbon Treaty.

Lisbon is intended to be implemented in January 2009 in good time for the next EP elections in mid-2009, but there is no set date by which Lisbon must come into force.

¹¹⁰ *Ft.com* 14 June 2008

¹¹¹ Open Europe Background Briefing on Lisbon, June 2008 at <http://www.openeurope.org.uk/research/irelandbriefing.pdf>

¹¹² Professor of European Law at the University of Manchester and Research Fellow at the Federal Trust for Education and Research

¹¹³ Jo Shaw “What happens if the Constitutional Treaty is not ratified?” 2005 at http://www.ecln.net/elements/conferences/book_prag/ShawFinal.pdf

The failure to ratify could delay or prevent implementation and MEPs do not know whether the next elections will take place under the Treaty of Nice or Treaty of Lisbon provisions.

C. Is institutional reform essential?

Many EU commentators believe that institutional reform will be necessary to enable the EU to function more efficiently as a union of 27 and to allow for further expansion. However, there is no concrete evidence for this. An Open Europe briefing on Lisbon commented:

There is no evidence to suggest that the enlarged EU will 'grind to a halt' without this new Treaty. In fact, a study of legislation by academics at Paris-based university Sciences-Po found that the EU has in fact been adopting new rules and regulations some 25% *faster* since the EU's enlargement to 10 new member states in 2004. A more recent study by Professor Helen Wallace from the LSE confirmed that the notion that the EU has become "gridlocked" since enlargement is wrong. Both the EU Commissioner for Enlargement and the foreign minister of current EU Presidency holders Slovenia, Dimitrij Rupel, have dismissed arguments that the Irish No vote damages prospects for EU enlargement.¹¹⁴

The British Government does not think further EU enlargement or changes to the number of MEPs at the next EP election will be problematic. Baroness Ashton said in the Lords debate on the June European Council:

When Croatia is ready, and if the EU expands from 27 to 28 member states, there will need to be some routine changes in the institution's arrangements with regard to the number of MEPs and so on. We will have to look at that situation then.¹¹⁵

Robin Shepherd, writing in *The World Today*, was concerned about the extreme positions being taken by eurosceptics and Europhiles in their responses to the referendum. He thought the incoming French Presidency had a challenging task ahead of it:

For the second half of this year, France holds the EU's rotating presidency. Sarkozy will shortly have the power to reorder the political agenda in Europe. If he uses it to promote an honest appraisal of what is going wrong, based on an understanding that the issue of democratic legitimacy is now the EU's priority number one, he will have performed a vital service. For make no mistake about it, there is much at stake. If the EU mishandles the situation following the Irish 'no' vote, matters could spiral out of control.

There have already been worrying indications that some in Europe are failing to see the point. More openly antidemocratic Europhiles have been arguing that the Irish should vote again, or that the Lisbon Treaty be forced on them through the back door. If they win, the EU risks becoming a laughing stock. Political projects,

¹¹⁴ Open Europe Background Briefing on Lisbon, June 2008

¹¹⁵ HL Deb 23 June 2008 c 1253

like individual politicians, can survive being unpopular, but only if they still command respect. If contempt and derision start creeping in, we may enter an entirely new phase.¹¹⁶

Shepherd concluded that even if Lisbon was 'dead', the debate on the future of Europe was not.

In the end, the most intelligent response to the Irish 'No' vote is the same as the honourable response. The death of the Treaty must be acknowledged. But more than this, it should provide the occasion for a thoroughgoing reassessment of how and why Europe got into this mess. At all costs, this must not be a re-run of the 'period of reflection' that was announced following the rejection of the constitution by the French and the Dutch when, having 'reflected', the EU decided to ignore it.

What is now needed is a full, frank and free debate conducted on behalf of the EU among a diverse group of people who have preferably not previously been connected with it. This would mean some sort of independent convention on democratic legitimacy conducted for the EU but not under its auspices. It would be composed of a diverse group of people with diverging starting points on the value and efficacy of the whole project. Only by this, or something like it, can the EU's credibility be restored.¹¹⁷

D. Council discussions

In Luxembourg the Irish Foreign Affairs Minister, Micheál Martin, told reporters: "The people's decision has to be respected and we have to chart a way through... It is far too early for proffering any solutions or proposals There are no quick fix solutions".¹¹⁸ On 16-17 June the General Affairs and External Relations Council (GAERC - foreign ministers) discussed the referendum results, in preparation for the European Council meeting on 19-20 June. Micheál Martin was asked to explain why the electorate had voted against the Treaty, but the reasons were far from clear. The GAERC President, Slovenian Foreign Minister Dimitrij Rupel, thought Member States "should take some time" to analyse the situation and consult each other. "We regret what has happened but we do not underestimate this event. Democracies have to respect the will of the people." He believed the EU would get over this hurdle, which was not a sign of crisis, but simply hesitation about reform, and maintained: "Most Member States believe the reforms are necessary".¹¹⁹ Mr Rupel wanted ratification to continue in those Member States which had yet to ratify Lisbon "to show that it is still alive" and to give Ireland a useful period for reflection on how to proceed. "We should take some time; the Irish Government will consult at home and with its European partners with a view to finding an appropriate solution."¹²⁰

¹¹⁶ "Trust the People" *The World Today* July 2008 at http://www.chathamhouse.org.uk/files/11741_wt070804.pdf

¹¹⁷ Ibid

¹¹⁸ *BBC News* 16 June 2008 at <http://news.bbc.co.uk/2/hi/europe/7455955.stm>

¹¹⁹ Slovenian Presidency website press release, 16 June 2008 at http://www.eu2008.si/en/News_and_Documents/Press_Releases/June/0616MZZ_Referendum.html

¹²⁰ Ibid

The European Council met on 19-20 June 2008, with the referendum result high on the agenda. There was a broad consensus among Member States that some time was needed to find a way forward. The Heads of State and Government concluded:

2. The European Council noted the outcome of the referendum in Ireland on the Lisbon Treaty and took stock of the situation on the basis of an initial assessment provided by the Taoiseach Brian Cowen.
3. The European Council agreed that more time was needed to analyse the situation. It noted that the Irish government will actively consult, both internally and with the other Member States, in order to suggest a common way forward.
4. Recalling that the purpose of the Lisbon Treaty is to help an enlarged Union to act more effectively and more democratically, the European Council noted that the parliaments in 19 Member States have ratified the Treaty and that the ratification process continues in other countries.¹²¹
5. The European Council agreed to Ireland's suggestion to come back to this issue at its meeting of 15 October 2008 in order to consider the way forward. It underlined the importance in the meantime of continuing to deliver concrete results in the various policy areas of concern to the citizens.¹²²

Reports on the summit considered the opinions of Member State leaders as to what could or should be done. The French President, Nicolas Sarkozy, who took over the EU Presidency on 1 July, supported ratification by the other 26 Member States and ruled out further EU enlargement until the reform of the EU's institutions foreseen by Lisbon was put into force.¹²³

There was little appetite for abandoning the Treaty altogether, and a four-month breathing space or period of reflection seemed to be the only short-term solution for Ireland. Press coverage of the summit suggested tension and recrimination had been in the air. Some reports suggested Mr Cowen had been accused of not running a positive enough campaign, while Mr Sarkozy allegedly accused Mr Mandelson of provoking the Irish no-vote because his proposals for freeing world trade were so unpopular.¹²⁴ Micheál Martin did not think EU States were blaming the Irish Government for the referendum outcome, but that they wanted to work with Ireland to find a solution to the situation.¹²⁵ The French and German leaders wanted a second Irish referendum, although Mr Sarkozy, in particular, was anxious not to be viewed as 'bullying' Ireland. In his statement on the outcome of the European Council, the Prime Minister, Gordon Brown, told the leader of the Opposition, David Cameron, who had suggested the British Government had taken the "easy" route and that Ireland had been bullied,

¹²¹ FN 1: The European Council noted that the Czech Republic cannot complete their ratification process until the Constitutional Court delivers its positive opinion on the accordance of the Lisbon Treaty with the Czech constitutional order.

¹²² European Council Conclusions 20 June 2008 at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/101346.pdf

¹²³ *Guardian.co.uk* 20 June 2008 at <http://www.guardian.co.uk/world/2008/jun/20/ireland.eu>

¹²⁴ For background to this issue and for Mr Mandelson's response, see *BBC News* 2 July 2008 at <http://news.bbc.co.uk/1/hi/world/europe/7484606.stm>

¹²⁵ *RTÉ News* 16 June 2008 at <http://www.rte.ie/news/2008/0616/eulisbn.html>

Let me make it clear that the Irish reported to us and said that they wanted time to discuss the matter in their country. They also said that they wanted to report to the Council. It is for the Irish to make their position known, and they made it absolutely clear. The Irish Government made it clear that they were not seeking to persuade other countries not to ratify the treaty.¹²⁶

The Liberal Democrat leader, Nick Clegg, thought that “Uncertainty beyond October would genuinely raise the spectre of a paralysed European Union, unable to deliver concrete benefits to European citizens” and asked for an assurance that the fate of Lisbon would be “sealed one way or another in October and that we will not be pitched into months of further uncertainty about the treaty”.¹²⁷ The Chairman of the European Scrutiny Committee, Michael Connarty, drew attention to the legal necessity for a referendum on any further amendments to Lisbon allowing for opt-ins or opt-outs and the possibility of re-ratification by all 27 Member States, to which Mr Brown replied:

There are many reasons that the Taoiseach will want to look at in reflecting on the result of the referendum and many issues were not exclusively concerned with the treaty itself. There are reasons such as the state of the economy and other matters in Ireland, as well as the provisions of the treaty, that could have contributed to the result—[Hon. Members: “Ah.”] I have to say that the Taoiseach has set these issues out in speeches over the last few days, which provides all the more reason for listening to the Irish Government as they review what has happened and make progress towards making a statement to the European Council in October. That is the right way to proceed—to be sensitive to what the Irish Government will wish to say.¹²⁸

E. French Presidency

France assumed the six-monthly EU Presidency on 1 July 2008. In an address on 24 June at the French Institute of International Relations (IFRI), the French European Affairs Minister, Jean-Pierre Jouyet, spoke of the possible guarantees that Ireland might want added to Lisbon, which would make it clear whether the Treaty would have to be reopened or not. Mr Jouyet acknowledged that the French Presidency programme would have to be revised in view of the referendum result and Pierre Ménat, director for European co-operation in the French Ministry of Foreign Affairs, thought the EU might need to make difficult decisions, such as reducing the number of Commissioners, or organising EP elections “without knowing if the number of MEPs to be elected is 751 according to the Lisbon Treaty or 732 according to the Nice Treaty”.¹²⁹ Mr Ménat also believed several Lisbon projects could be implemented before ratification. The European External Action Service (EEAS), he thought, could be established through “discrete talks”, possibly as a new “sui generis” institution, rather than part of the current EU

¹²⁶ HC Deb 23 June 2008 c 29 at

<http://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm080623/debtext/80623-0005.htm>

¹²⁷ Ibid c 30

¹²⁸ Ibid c 33

¹²⁹ *EurActiv* 25 June 2008 at <http://www.euractiv.com/en/future-eu/france-hints-lisbon-treaty-reopening/article-173620>

institutions. The British Government disagrees. The Minister for Europe, Jim Murphy, confirming the views of the Prime Minister and Foreign Secretary, said:

in light of the Irish referendum result, plans to have discussions on the External Action Service at the General Affairs Council and the European Council were cancelled. That was the right response to the referendum in Ireland. No further work will be carried out, and the work has stopped in the UK until such time as there is a new suggestion from the French presidency or a way forward suggested by the Irish Government. That is very clear.¹³⁰

According to a survey published in *Les Echos* on 24 June 2008, the majority of French do not think Mr Sarkozy will be able to boost Europe after Ireland's rejection of Lisbon. Asked if they trusted Sarkozy to re-launch Europe after the no-vote, 57% responded negatively and 31% positively.¹³¹

Finding a political solution to the impasse will be difficult and the French Government is reported to be playing down expectations of big policy breakthroughs in other areas of the Presidency programme.¹³² In mid-July it was reported that Mr Sarkozy wanted a second vote on Lisbon in Ireland and reiterated his intention to veto any further EU enlargement until the Treaty had been adopted. Addressing the EP on 10 July about the French EU Presidency, President Sarkozy said that a resolution of the Irish no-vote had to be found by the end of 2008, or the new EP and Commission would have to be constituted under the existing, allegedly out-dated, Nice Treaty procedures. He told the EP that the EU's repeated crises over reforming its institutions may eventually make it necessary to create a "multi-speed" or "multi-tier" Europe", with the most pro-integrationist countries at its heart. This would be a "last resort" and he did not want to leave anyone behind.

Mr Sarkozy visited Ireland on 21 July and held talks with the Government and pro- and anti-Lisbon campaigners. He is reported to have proposed to Mr Cowen a second referendum in Ireland on the same day at the next EP elections, but he was not optimistic that the situation would be resolved during the French Presidency.¹³³

F. Options

There are no formal options on the table, as the EU awaits Ireland's preliminary report in October, but Europe commentators and Member States have made various suggestions. This section looks at some scenarios.

¹³⁰ HC Deb 24 June 2008 c143 at <http://pubs1.tso.parliament.uk/pa/cm200708/cmhansrd/cm080624/debtext/80624-0002.htm#08062489000018>

¹³¹ *Les Echos.fr* 24 June 2008 at <http://www.lesechos.fr/info/france/4744686.htm>

¹³² *Ft.com* 13 June 2008 at http://www.ft.com/cms/s/0/38ec77f8-397a-11dd-90d7-0000779fd2ac,dwp_uuid=8dc6d42a-3160-11dd-b77c-0000779fd2ac.html

¹³³ *Irish Times* 22 July 2008 at <http://www.irishtimes.com/newspaper/frontpage/2008/0722/1216627320404.html>

1. Continue with ratification and see what happens in Ireland

The European Commission, the former Slovenian Presidency and the current French Presidency have all called on Member States to continue with their ratification procedures in spite of the Irish rejection of Lisbon, and several Member States have done so.¹³⁴ All the remaining methods of ratification are parliamentary, and all Member State governments and parliaments, with the possible exception of the Czech Republic and Poland, support Lisbon. Although continuation will give a clearer idea of the extent of EU-wide support for the Treaty, this will not indicate public support, as there are no other referendums. In 2005, when France and the Netherlands voted against the EU Constitution, Member States were urged to continue with ratification, but several decided to suspend or abandon their procedures until there was a clear indication of what would happen to the Treaty. Ireland was one of those States, along with the UK, Sweden, Portugal, Poland, Denmark and the Czech Republic. Had these States, particularly those which were to hold a referendum, continued with ratification of the EU Constitution in 2005, it might have been clearer then how much public support there was for that Treaty. If Ireland and the UK had voted against the EU Constitution, as opinion polls at the time suggested they might, four no-votes would probably have made it much more difficult politically to bring back a text such as Lisbon, with its similarities to the Constitution.

It has been argued that continuing with ratification might become an impetus for more negative responses from less committed Member States such as Poland and the Czech Republic, which might otherwise have gone with the majority and ratified. It could also give the impression that the EU is simply proceeding with business as usual without paying attention to views in Ireland. The Polish President, Lech Kaczynski, indicated that he would not sign the Lisbon Treaty until Ireland decided what to do.

Thomas Legge, writing in *The World Today*, argued that Ireland had to “define its own response” in a national discussion considering every option. He proposed using the National Forum on Europe to support this conversation.

The Forum is a public discussion process set up after the first Nice Treaty referendum in 2001 which airs concerns, grievances and misconceptions about the EU. If this consultation concludes that the Irish people would not accept a second vote on the Treaty, even in modified form, then that should be the government’s position. But if, as is more likely, the consultation reveals an approach that could command the support of portions of the ‘No’ side, for instance through a series of explanatory memoranda – addressing the misinformation of the ‘No’ campaign – or opt-out clauses – dealing with the more substantial concerns of some ‘No’ voters, then the treaty could legitimately be resubmitted.¹³⁵

The *Irish Times* reported in late July that the Government had initiated high-level contact with the two main opposition parties, Fine Gael and Labour, to discuss the formation of an all-party body on the Lisbon Treaty. Micheál Martin wrote formally to both parties,

¹³⁴ The state of play on ratification is set out in Appendix 2.

¹³⁵ *The World Today* July 2008 at http://www.chathamhouse.org.uk/files/11742_wt070806.pdf

setting out Government proposals for dealing with the implications of the referendum result, but “neither party would indicate if they were willing at this stage to support the Government or back an all-party approach”.¹³⁶

2. A second Irish referendum with concessions

When Denmark voted against the Maastricht Treaty in 1992, the Treaty itself was not subsequently amended, but clarifications and opt-outs were agreed in a Decision of the Edinburgh European Council in December 1992. The EU Heads of State and Government adopted a set of texts under the UK Presidency which resolved the ‘Danish problem’ by agreeing to opt-outs from the third stage of EMU, elements of security and defence policies and other matters which, when submitted to a second referendum in 1993, received the support of the electorate. The Edinburgh Decision in 1992 was described not as a decision taken by the European Council, but as a Decision of the Heads of State and Government meeting within the European Council.¹³⁷ It was thus strictly speaking an agreement of the then 12 governments and not of the European Council as an institution. Under international law any combination of governments may make a binding agreement among themselves which need not be signed (in practice, they usually are) or ratified, unless the parties have stipulated that it should be. Ratification is necessary when some or all parties need to pass domestic legislation in order to comply with an agreement, and is usually an implied condition when an agreement is formally designated a treaty. The Edinburgh Decision was not regarded as a treaty.¹³⁸ The Danish parliament was asked to adopt legislation directly associated with the Edinburgh agreement, not thereby ‘ratifying’ the agreement, but as a stage in the Danish ratification of the Maastricht Treaty *in the light of the Edinburgh Agreement*.

The British Government described the Edinburgh Agreement as “a clarification agreement” and “an agreement in the sense of Article 31 of the *Vienna Convention on the Law of Treaties*”.¹³⁹ Article 31 of the Vienna Convention concerns the rules for interpreting treaties. It recognises two categories of agreements which may be taken into account in interpreting a treaty: those which are made “in connection with the conclusion of the treaty” (31.2.a) and “any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions” (31.3.a). The Edinburgh Decision fell into the second category. Based on this model, it might be possible to negotiate an agreement on Ireland which would stand alongside the Treaty and be taken into account in any future EU decisions in the areas it covered.

A Declaration on the issues identified as being of particular concern to Irish voters would not have legal force and any agreement presented in this form would not be appended to the Treaty, meaning that Member States which have already ratified Lisbon would not have to re-ratify.

¹³⁶ *Irish Times* 28 July 2008 at <http://www.irishtimes.com/newspaper/ireland/2008/0728/1217013340597.html>

¹³⁷ See HC Deb, 17 December 1992, c356W.

¹³⁸ See HC Deb, 14 December 1992, c37.

¹³⁹ HC Deb, 17 December 1992, c356W.

Professor Steve Peers of Essex University considered how a Decision of the Member States “meeting in the framework of the European Council”, could address issues of concern in Ireland:

- confirming Ireland’s facility to opt-out from EU legislation concerning civil and criminal law issues, perhaps with reference in particular to specific topics like divorce;
- confirming that Ireland would retain a veto on all matters relating to any form of taxation;
- confirming that nothing in the Treaties, or the Charter of Rights, can impact upon Irish law concerning abortion (there is already a Protocol confirming that nothing in the Treaties can affect a specific provision of the Irish Constitution concerning abortion);
- confirming that nothing in the Treaties affects Irish neutrality, and confirming that Ireland retains a veto over all substantive decisions relating to security or defence. It would also be possible (as was the case with Denmark) to include within this Decision the decision by Ireland not to participate in certain EU measures, for example in the ‘structured cooperation’ regarding defence which the Treaty of Lisbon provided for. Furthermore, it would be possible (again, as in the Danish case) for the European Council and Ireland to adopt connected Declarations relating to the Decision.¹⁴⁰

Wolfgang Münchau, writing in the *Financial Times*, considered the possible form of a second referendum:

One possibility would be to ask the same question again, but it is difficult to see what should produce a different result. Ireland has already opted out of everything it wanted to opt out of. It is difficult to formulate any specific concessions, since nobody knows what the Irish electorate wants. This suggests that the Irish problem may not be fixable through a simple declaration by the other member states. A renegotiation of the treaty is out of the question. An alternative would be a referendum with a differently worded question, such as: "Do you want to remain in the EU on the basis of the Lisbon treaty?" Of course, this bundles two questions many people would like to answer separately. Yes, stay in the EU, No to Lisbon. But folding the two into a single question is politically more honest because it is Ireland's only real-world choice.¹⁴¹

Richard Laming, director of Federal Union, writing in the *EUObserver*, asked what a second Irish referendum would solve:

Treaties have been rejected before, it is true, but this time is different. The Danish No vote over the Maastricht Treaty in 1992 and the Irish No to Nice in 2001 were each followed by a period of discussion among the protagonists, a confirmation by the rest of the EU that the specific concerns of the Danish/Irish voters were not put at risk by the treaty in the way that some people had feared, and a second referendum a year later that reversed the earlier decision. Why can that route not simply be followed again?

¹⁴⁰ *Statewatch* “Can the Treaty of Lisbon be ratified or implemented? A legal analysis”, Professor Steve Peers, 19 June 2008 at <http://www.statewatch.org/news/2008/jun/analysis-lisbon-june-sp-2008.pdf>

¹⁴¹ *FT.com* 15 June 2008 at http://us.ft.com/ftgateway/superpage.ft?news_id=fto061520081351164973&page=2

A key factor in each of the two cases above was that the No votes themselves were a freak, an aberration, outside the trend of public opinion. They were not representative of the sustained view of public opinion. (They still counted, of course, which was why they set the political agenda, but it was realistic and reasonable to suppose that they might change.)

No-one can say that the Irish vote last week was a surprise. The referendum results in France and the Netherlands in 2005 presaged an era of suspicion by voters of official policy on Europe everywhere. The determination by the heads of government that the Lisbon treaty should avoid referendums where possible is testament to that.

Is there the prospect that a second referendum might reverse the outcome of the first? Of course it is possible, but one cannot view the prospect with the same confidence that might have been justified seven years ago. Public opinion is different now, and the European project has got to recognise that.

Even if the necessary guarantees can be given to the Irish voters and a second referendum held and won as a result, there are still good reasons to doubt that this is the best outcome.

First, it reinforces the idea that referendums do not really count. Opponents of the EU love to argue that a Yes means yes, and a No means yes a year later. That is a very damaging argument to make and it is not wise for supporters of the EU to add fuel to it. The fact that the second referendum result was in fact a Yes gets lost in the face of the suggestion that the second referendum should never have been held.

Secondly, it might lead to the idea that the process set in train by the Laeken Declaration has now been completed. The European Council meeting in December 2001 set out at Laeken a series of concerns about the functioning of the EU that needed to be addressed. These included some concerns about the effectiveness of the way the EU acted, but also some concerns about its relationship with the citizens.

The mess that has been made of the ratification first of the constitutional treaty and now of Lisbon only emphasises the scale of the problem. It is bigger than can be fixed by a set of treaty amendments, particularly this set of treaty amendments.

Now, there are some advantages that would flow from a second Irish referendum that produced a Yes vote – we would get the Lisbon treaty, for a start – but no-one should imagine that the problems of the EU would be magically solved as a result. We might get a short-term fix, merely postponing the difficult and important issues into the long term.

A second Irish referendum, therefore, is not a neat and tidy solution to the problem facing the EU. There are still democratic challenges ahead waiting to be solved.¹⁴²

Although the Commission insisted that there was no 'Plan B', within days of the referendum, there were reports of a plan to bring Ireland back on board with concessions and protocols in advance of a second referendum. The *Financial Times* reported:

Ireland will be offered additional guarantees of its sovereignty – possibly in areas such as taxation, military policy and family law – under an emergency plan to save the European Union's Lisbon treaty, government ministers and EU officials said on Monday.

¹⁴² 18 June 2008 at <http://euobserver.com/9/26344/?rk=1>

They said the plan, still in its early planning stages, would involve no changes to the treaty's text, because all governments that have approved Lisbon would then have to ratify the altered document – a process regarded as virtually certain to fail, especially in the UK.

[...]

According to one senior EU government official, the solution will involve an offer of “explanatory protocols” that would state explicitly that Lisbon does not affect Ireland’s power to set its own tax rates, maintain its traditional neutrality and control abortion policy.¹⁴³

Patricia McKenna, a former Irish Green MEP and leader of the People's Movement, one of the no-campaign groups, is reported to have said: "A couple of protocols, whether on neutrality or taxes is not enough because the very heart of the Lisbon Treaty will not have been changed in any way".¹⁴⁴

On 18 June Sinn Féin submitted to the Irish Government a detailed position paper outlining proposed changes to Lisbon if it is to be submitted to a second referendum, although it is doubtful that concessions could take into account everything they argued for:

- The retention of a permanent commissioner for all member states;
- The retention of the Nice Treaty formulae for qualified majority voting;
- The removal of all eight self-amending articles including the simplified revision procedure in Article 48;
- The removal of Article 46a giving the EU a single legal personality;
- A strengthened protocol on the role of member state parliaments;
- A significantly expanded protocol on the principles of subsidiarity and proportionality including the aims and values of the EU;
- Substantial amendments to aspects of the Common Foreign and Security Policy;
- Substantial amendments to the section of Common Defence and Security Policy;
- A new protocol on neutrality;
- A strengthened social clause;
- A substantially revised protocol on vital public services;
- Amendments to articles dealing with public services and state aid;
- The inclusion of the European Trade Union Confederation Social Progress Clause to protect workers' rights;
- A protocol on Irish tax sovereignty;
- Substantial amendments on Article 188 dealing with international trade agreements including a cast-iron veto on mixed World Trade Organisation agreements;
- A new protocol ending Ireland's participation in the European Atomic Energy Community;
- A series of amendments to Articles 10 and 188 promoting the needs of the developing world in the context of international trade.

¹⁴³ *Ft.com* 17 June 2008 at http://www.ft.com/cms/s/0/99973354-3bc3-11dd-9cb2-0000779fd2ac.dwp_uid=8dc6d42a-3160-11dd-b77c-0000779fd2ac.html

¹⁴⁴ *EUObserver* 17 June 2008 at <http://euobserver.com/9/26343/?rk=1>

Sinn Féin's agenda for the future of the EU is much broader and deeper than this list of demands. These are, in our opinion, modest and achievable. They represent both the detail of the better deal we argued for during the referendum campaign and what we believe to be the minimum changes required for any new treaty to be acceptable to the electorate.¹⁴⁵

The possibility of further amendment has given rise to requests from political parties and parliamentarians in other Member States, including the UK. In a debate in the Lords on 23 June, Lord Marlesford thought the Government should remove the "self-amending provisions" in Lisbon:

People do not want their sovereignty to be able to be decided without further treaty change by unanimity merely in the Council of Ministers. If the passerelle were removed, would we not be able to make progress?¹⁴⁶

The Government rejected the proposal, maintaining the Treaty was good for Europe and for the UK. It is unlikely, in spite of this and other similar suggestions, that the French Presidency will want to open up the Treaty to accommodate other Member States' concerns, particularly if those States have already ratified. José Manuel Barroso is reported to have said it would be "extremely difficult" to tinker with Lisbon to make it more palatable (for example, by guaranteeing the Irish a permanent Commissioner). The Austrian Prime Minister, Alfred Gusenbauer, has said he will call a referendum if Lisbon is "tweaked" for a second Irish vote.¹⁴⁷

The results of the July poll conducted by Open Europe showed clearly that there was not much appetite for a second referendum on the Treaty as it stands, although the questions did not concern a modified Lisbon Treaty. The organisation's Director, Neil O'Brien, commented:

"Voters don't feel that Europe's political class have respected Ireland's decision. Their response to the referendum result has obviously appeared arrogant to some voters. By appearing to bully the voters, EU politicians are actually driving lots more people into the no camp."

"EU leaders who are trying to force Ireland to vote again are playing a very dangerous game, and it looks like Brian Cowen could be putting his political life on the line by calling a second vote."

"Sadly, Europe's political leaders don't seem to have taken on board the Irish vote - or the French and Dutch votes for that matter. They should drop the Treaty and concentrate on solving the EU's real problems like the lack of openness and accountability."¹⁴⁸

¹⁴⁵ Mary Lou McDonald, *Irish Times* 18 June 2008 at

¹⁴⁶ HL Deb 23 June 2008 cc1252-3

¹⁴⁷ *EUObserver* 30 June 2008 at <http://euobserver.com/18/26415>

¹⁴⁸ Open Europe press release, 27 July 2008, at <http://www.openeurope.org.uk/media%2Dcentre/pressrelease.aspx?pressreleaseid=81>

3. Abandon Lisbon and negotiate a new treaty

Wholesale renegotiation of a new treaty is an unpopular option. Lisbon, based as it is on the EU Constitution, is the result of some seven years of negotiation and there is not much political will to start from scratch, or even to start from the basis of certain, uncontroversial elements of the Treaty. Furthermore, there is no guarantee that a re-negotiated treaty covering similar ground to Lisbon would be any more acceptable to the electorate of Ireland than Lisbon was.

4. Abandon Lisbon but adopt aspects of it intergovernmentally

Robin Shepherd, writing in the *World Today*, thought abandoning Lisbon was the most “sensible” and the “safest” option:

In response to the immediate problem, the safest option now would be to dump the Lisbon Treaty and have done with it. The current arrangements under the Nice Treaty are not perfect by a long way, but the Union has not collapsed because of them.¹⁴⁹

The Commission and some Member States believe that institutional amendments are necessary to cope with the enlarged EU and the possibility of further expansion in 2009-10 with Croatian accession. Some amendments (e.g. institutional changes) could be added to Croatia’s accession treaty. Accession treaties have thus far not required a referendum in Ireland, so parliamentary ratification could be assumed. Some changes could be brought about by using the ‘passerelle’ or bridging clauses allowing for a move from unanimous voting to QMV.¹⁵⁰

Some parts of Lisbon could be implemented under existing provisions or intergovernmentally. Daniel Korski, of the European Council on Foreign Relations, thinks the EU needs above all to work out how to maintain its influence and power in the world:

... European leaders should think about ways of improving the Union's foreign policy instruments. Many of the necessary changes could probably be created without the Treaty and through Council and Commission decisions. Commission chief José Manuel Barroso introduced the concept of several Vice-Presidents of the Commission. Lawyers need to find out whether he could appoint the High Representative for CSFP as the RELEX Commissioner and a Vice-President? Even though the External Action Service was created in the Treaty, what is to stop a double-hating of every staff member in RELEX and the Council Secretariat? Lawyers need to find out.

Other ideas (that were not in the Treaty) include appointing a high-level Climate Envoy; establishing a Climate Embassy in California; double-hatting the EU counter-terrorism ‘czar’ as a Deputy High Representative for CSFP so as to give the portfolio an external dimension and staff;

¹⁴⁹ *The World Today* July 2008 at http://www.chathamhouse.org.uk/files/11741_wt070804.pdf

¹⁵⁰ See Standard Note SN/IA/4639, “Lisbon Treaty: decision-making by Qualified Majority Voting or Unanimity” 28 February 2008

setting-up a network of Security and Justice Attaches in select EU delegations to work on security assistance; and so on.¹⁵¹

An editorial in the *Financial Times* considered that Lisbon should be “put on ice for several years”, and that it would be more sensible to:

... try to rescue those parts that are important, uncontentious, and capable of being carried out without treaty amendment. That does not include creating a semi-permanent president of the European Council, but it does mean beefing up an EU diplomatic service, and giving more resources to the EU high representative for foreign affairs.

Europe does not need to turn the drama of the Irish No vote into a fully-fledged crisis of confidence. Everyone is fed up with negotiating new treaties. The priority should be to make the EU work better with practical policies – on energy security and climate change, for a start – with its present rules and 27 member states. The Nice treaty is not ideal, but losing Lisbon should not be seen as the end of the world.¹⁵²

5. Continue to ratify and implement Lisbon in ratifying States

The German Foreign Minister, Frank Walter Steinmeier, and the French Europe Minister, Jean-Pierre Jouyet, are reported to have discussed a possible arrangement whereby Ireland would withdraw temporarily from the process of European integration, allowing the other 26 member States to press ahead with Lisbon, and rejoin it later.¹⁵³ It is hard to see how this effective ‘quarantining’ of Ireland from Lisbon could be achieved legally. The Treaty must be ratified by all 27 Member States in order to come into effect.

Some have suggested that a separate ‘bridging treaty’ could be drawn up, allowing Ireland to stay outside the Lisbon Treaty for a while, probably until Croatia joins, while the other 26 Member States, assuming they had ratified, went ahead under Lisbon. This was the gist of a proposal mooted by the Luxembourg Prime Minister, Jean-Claude Juncker, after the no-vote. He suggested those Member States that wanted to press on with further integration could form an informal club of ‘hard core’ members inside the EU, while others, such as Ireland (and possibly the UK?), which preferred a looser union, would be bound by various opt-outs, without formally ratifying Lisbon. After considering a number of options, Jonathan Eyal, Director of the International Security Studies at the Royal United Services Institute (RUSI), noted:

The last, and most significant option is one which has been touted for years: the creation of a two-speed Europe, divided between a ‘hard core’ of nations which accept all obligations (or, more correctly, nations which do not have referendums and therefore ratify everything) and a set of other nations which remain on the periphery of the EU, accepting some obligations, but not others. This is what was envisaged in the joint Franco-German statement issued immediately after the results of the Irish referendum became known; the ‘Club

¹⁵¹ 13 June 2008 at http://www.ecfr.eu/content/entry/commentary_irelands_creative_destruction/

¹⁵² *FT.com* 13 June 2008 at <http://www.ft.com/cms/s/0/f2466f88-3975-11dd-90d7-0000779fd2ac.html>

¹⁵³ See *Irish Times* 16 June 2008 at <http://www.irishtimes.com/newspaper/ireland/2008/0616/1213369968838.html>

of the Few' as Jean-Claude Juncker, the leader of Luxembourg – that European superpower – suggested over the weekend.¹⁵⁴

VI Ratification procedures in the other Member States

This section looks at the ratification processes in the other 26 EU Member States.¹⁵⁵

1. Austria

The Austrian Parliament voted in favour of the Lisbon Treaty on 9 April 2008 by 151 votes to 27. Lisbon was backed by the ruling Social Democrats and centre-right Austrian People's Party, as well as the opposition Greens. Only the two far-right opposition parties, the FPÖ and BZÖ, voted against. During April 2008 there were anti-Lisbon demonstrations in Vienna, with over 100,000 people signing a petition demanding a referendum. The Austrian President, Heinz Fischer, signed the text on 28 April 2008, completing the ratification process.

In early July, after 18 months in an uneasy cohabitation, Austria's grand coalition government collapsed. Disputes over domestic issues such as healthcare reforms were compounded by a disagreement triggered by the Irish rejection of Lisbon. The Social Democrat (SPÖ) Chancellor, Alfred Gusenbauer, had written an open letter to the *Kronenzeitung* saying Ireland's rejection of the Lisbon Treaty reflected widespread unease about the EU in Austria and a "mood of uncertainty and sometimes also rejection".¹⁵⁶ Gusenbauer said that if changes were made to the Lisbon Treaty to accommodate Ireland, it should be put to a referendum in Austria.¹⁵⁷ EU-critical sentiment was on the rise in Austria, he thought, and could best be tackled by ratifying future EU treaties by referendum. Although Austria has already ratified the Lisbon Treaty, Mr Gusenbauer suggested that if any changes were made to the text to help the Irish, then ratification should be put to the vote in Austria. A snap election is predicted for September 2008.

2. Belgium

Belgium was unable to start ratification until an interim government under Guy Verhofstadt was installed, following elections in June 2007 and several months of political paralysis.¹⁵⁸ The Belgian Senate voted in favour of Lisbon on 5 March 2008. The Lower House of the federal parliament and Belgium's five regional and community

¹⁵⁴ "The European Union after the Irish Referendum", RUSI, June 2008 at <http://www.rusi.org/research/studies/european/commentary/ref:C48577A840039A/>

¹⁵⁵ *EurActiv* contains a useful table of ratification methods and related *EurActiv* articles at <http://www.euractiv.com/en/future-eu/ratifying-treaty-lisbon/article-170245>. Wikipedia also looks at the ratification timetable and procedures at http://en.wikipedia.org/wiki/Treaty_of_Lisbon#Ratification. The COSAC site also looks at progress in ratification at <http://www.cosac.eu/en/info/Treaty/>.

¹⁵⁶ *EUObserver* 27 June 2008 at <http://euobserver.com/9/26405/?rk=1>

¹⁵⁷ Open letter also signed by the president of the Social Democrats, Werner Faymann, published in *Kronen Zeitung* and reported in *EUObserver* 27 June 2008 at <http://euobserver.com/9/26405/?rk=1>

¹⁵⁸ Yves Leterne, of the Flemish Christian Democrats, won the election but failed to form a coalition. Guy Verhofstadt continued as caretaker prime minister, before the Belgian King Albert II asked him to form a temporary government until 23 March 2008. Mr Leterne became Prime Minister on 20 March 2008.

assemblies also had to approve the Treaty before Belgium could formally ratify it. On 10 July Belgium completed the Lisbon ratification process, shortly before another political crisis emerged after a new dispute between the Dutch-speaking Flemish majority and the French-speaking minority.

3. Bulgaria

The Bulgarian Parliament approved Lisbon in a special session on 21 March 2008 by 193 of the 209 deputies present in the 240-seat parliament. President Georgy Parvanov and all three Government coalition parties, the left-wing Bulgarian Socialist party, the centrist National Movement for Stability and Progress and the Turkish minority Movement for Rights and Freedoms, endorsed the Treaty. It was also supported by the right-wing opposition and some independent deputies. The nationalist Ataka party voted against ratification.

4. Cyprus

On 3 July the House of Representatives ratified Lisbon by 31 votes in favour to 18 votes against and one abstention.

5. Czech Republic

The Lisbon Treaty was intended to come into force during the Czech EU Presidency in the first half of 2009. The timetable caused some concern in the Government, which thought it unusually ambitious. On 30 October 2007 the Czech parliament voted to ratify the Treaty by the parliamentary method. Only the Communist Party of Bohemia and Moravia and three Civic Democratic Party deputies voted in favour of a referendum.

On 1 April 2008 the Czech Chamber of Deputies passed Lisbon at first reading but the final vote may not be until the autumn. The Civic Democratic Party (ODS) wants the Constitutional Court to review the Treaty before Parliament has the final say. Following the Irish referendum, the eurosceptic Czech President, Vaclav Klaus, said the rejection meant Lisbon could not come into force.¹⁵⁹ However, the Czech Prime Minister, Mirek Topolánek, was optimistic that the country would proceed with ratification as soon as the Czech Constitutional Court had approved the text. In April 2008 the Senate voted in favour¹⁶⁰ of asking the Court to rule on Lisbon's constitutionality and the Czech Government advised the Court that Lisbon does not violate the Constitution. The Court is not due to make its ruling until September or October, so the parliamentary process has been suspended, pending the ruling. The Court has been asked to rule in particular on the transfer of certain powers to the EU institutions, the moves from unanimous voting to QMV and the implications of giving legal status to the Charter of Fundamental Rights.

Lisbon is expected to be passed by the 200-seat Lower House, but the eurosceptic ODS party has a 41-strong majority in the 81-seat Upper House. The President must also sign the Treaty, although the *EUObserver* noted that "The largely honorary office of the

¹⁵⁹ Interview with Spanish daily *El País*, reported in *EUObserver* 26 June 2008 at <http://euobserver.com/9/26402/?rk=1>

¹⁶⁰ Of the 70 senators present, 48 voted in favour, four against and 18 abstained.

Czech president would find it hard to block a parliamentary decision in practice".¹⁶¹ Comments by the chairman of the Constitutional Court, Pavel Rychetsky, in an interview for CT24 television, were reported in the *Prague Daily Monitor* as follows:

"The Czech Constitutional Court has never assessed the compatibility of an international treaty with the Czech constitutional order. We are doing this for the first time," Rychetsky said.

The judges must first discuss procedural questions such as whether they will assess the constitutionality of the parts of the Lisbon treaty that the Senate has questioned, or whether they will assess the treaty as a whole, he said.

"In the current phase we are collecting expert documents and solving the procedural questions and the question of the scale of the assessment," Rychetsky said.

He confirmed that politicians' pressure would not influence the constitutional judges' decision, nor would they mind the results of its assessment in other countries, for instance, the rejection of the treaty in Ireland.

"We are deciding whether the treaty that is to be ratified is in harmony with our constitution and our constitutional order. If we found disharmony we must name it, describe where it lies and what the political sphere must do in parliament, what it should change in the constitution to be able to ratify the Lisbon treaty if there is the will," Rychetsky said.¹⁶²

Public support for Lisbon is falling, according to a recent poll conducted by the STEM agency in June and released to the Czech News Agency ČTK on 11 July. The report outlined the results:

Over one half of Czechs are of the view that the parliament should not ratify the Lisbon treaty to reform the EU institutions that is to replace the rejected European constitution, according to a poll conducted by the STEM agency in June and released to ČTK Friday.

On the contrary, the Lisbon treaty's ratification is supported by 47 percent of the respondents.

Even though 53 percent of Czechs are against the treaty's ratification, only 23 percent understand what changes the treaty would introduce, according to the poll.

One third of the respondents admit that they do not understand the treaty's content at all and another two fifths or 43 percent say they rather do not know what the treaty is about.

The STEM poll shows that people's knowledge of the treaty has almost not changed since February 2008. However, the number of Czechs who oppose its ratification has slightly increased.

The poll respondents with a higher education and those who assess their living standards as good know more about the treaty.

The respondents who are satisfied with the Czech Republic's EU membership are for the Lisbon treaty's ratification most frequently (65 percent).

¹⁶¹ 30 June 2008 at <http://euobserver.com/9/26415/?rk=1>

¹⁶² *Prague Daily Monitor* 4 July 2008 at http://www.praguemonitor.com/en/371/czech_national_news/25047/

The treaty is more often supported by high-income groups (62 percent) as well as voters of the senior ruling Civic Democrats, ODS (61 percent), and of the junior ruling parties - the Christian Democrat, KDU-CSL (52 percent) and the Greens, SZ (51 percent).

On the other hand, over one half of the opposition Social Democrat (CSSD) voters are rather against the Lisbon treaty's ratification. The highest share of its opponents is among the opposition Communist (KSCM) followers (68 percent).

According to a June poll by the Centre for Public Opinion Research (CVVM), released on Thursday, only less than one fifth of Czechs are interested in the Lisbon treaty, while two fifths of the respondents have no idea what the Lisbon treaty is and another two fifths have only a vague idea about it.¹⁶³

6. Denmark

The Danish Government ruled out a referendum on Lisbon, although in recent months it has said it is planning votes, beginning in autumn 2008, on whether to end Denmark's current EC Treaty opt-outs from the security and defence co-operation, justice and home affairs, the euro and provisions on EU citizenship.

In early 2008 the opposition Social Democrats, wary of the ECJ's December 2007 *Vaxholm*¹⁶⁴ ruling that a Swedish trade union picket against cheap Latvian labour was illegal, advised the Government to seek guarantees on collective bargaining rights before ratifying the then Reform Treaty. On 24 April 2008 the Danish Parliament voted in favour of Lisbon by 90 votes to 25, although 64 deputies from the 179-seat parliament were absent. It rejected by the same majority a proposal to secure labour rights via a protocol attached to the Treaty.

7. Estonia

The Estonian Parliament ratified Lisbon on 11 June 2008 by 91 votes in favour to one against and nine abstentions. The President of Estonia must now sign the Treaty to formally complete the ratification process.

8. Finland

In early March 2008 the Finnish state broadcaster, YLE, reported that the semi-autonomous Åland Island Government might reject Lisbon, which could undermine Finland's ratification, in a dispute over snuff. Snuff is banned in Finland under EU law, but Åland wanted to be able to sell it in Swedish waters, where it is still legal, to avoid losing port business.¹⁶⁵

On 11 June the Finnish Parliament approved the Lisbon Treaty by 151 votes in favour, 27 votes against and 21 abstentions. The bill required a two-thirds majority vote to be

¹⁶³ *Prague Daily Monitor* 14 July 2008 at

http://www.praguemonitor.com/en/377/czech_national_news/25436/

¹⁶⁴ Case C-341/05. See press release 98/07, 18 December 2007 at

<http://curia.europa.eu/en/actu/communiqués/cp07/aff/cp070098en.pdf>

¹⁶⁵ *EUObserver* 12 March 2008 at <http://euobserver.com/9/25820/?rk=1>

passed. The final ratification of the treaty will be carried out by the President of the Republic within a period of 3 months, though this is considered to be a formality.

9. France

In January 2008 the National Assembly and the Senate voted to allow the Lisbon Treaty to be ratified by Parliament. Both Houses, constituted as the Versailles Assembly, cleared the amendment to the French Constitution by 560 to 181 votes on 4 February 2008.¹⁶⁶ Some opposition Socialist Party Senators and Deputies who supported a referendum abstained from voting, and although others were divided over the measure, the three-fifths majority needed for amendments to the Constitution was achieved. The ruling UMP largely voted in favour, apart from a few so-called 'sovereignists' and the Communist Party voted against the amendment.¹⁶⁷ The non-parliamentary groups that had organised the 2005 no-campaign, led by *Attac France*, demonstrated against the vote in Versailles.

On 7 February the Assemblée Nationale voted by 336 to 52 in favour of the Lisbon Treaty, and the Senate voted on 8 February by 265 in favour to 42 against and 13 abstentions. The Socialists, many of whom had been critical of the choice of parliamentary method for ratification of Lisbon, largely voted for the Treaty. President Sarkozy gave his assent on 13 February 2008.

According to a CSA poll for *Le Parisien/Aujourd'hui en France* on 21 June 2008, 56% would vote for Lisbon if they had the chance, while an IFOP survey for the *Sud-Ouest* journal said 53% would vote No.¹⁶⁸

10. Germany

On 24 April 2008 the *Bundestag* (the Lower House) voted by a two-thirds majority to ratify Lisbon (515 votes in favour; 58 against and 1 abstention) and on 23 May 2008 the German *Bundesrat* (the Upper House, composed of representatives from the 16 states or *Länder*) ratified the Treaty with a large majority. Only the Berlin representative voted against Lisbon in the *Bundesrat*. However, formal ratification has been delayed by two separate legal processes: one instigated by *Die Linke* (the left-wing coalition of the PDS and WASG, which is represented in the Berlin Government), and the other by Peter Gauweiler, a centre-right politician from the Christian Social Union (CSU, a junior partner in the Grand Coalition). He is represented by Albrecht Schachtschneider, a professor of law at the University of Nuremberg-Erlangen. Schachtschneider had helped with earlier appeals to the Court in 1992 (Maastricht) and 2005 (EU Constitution). Mr Gauweiler's challenge, submitted on 24 May 2008, concerns the compatibility of giving more powers to the EU with Germany's democratic principles. It is based on the legal opinion of Dr Dietrich Murswiek, a professor of law at the University of Freiberg, and maintains that Lisbon is substantially the same as the defunct EU Constitution; that it creates a de facto federal state with its own source of authority; that it deprives German citizens of their

¹⁶⁶ For information on the French bill see http://www.assemblee-nationale.fr/13/dossiers/titre_15constit.asp

¹⁶⁷ *EUObserver* 4 February 2008 at <http://euobserver.com/9/25597/?rk=1>

¹⁶⁸ *EUObserver* 23 June 2008 at <http://euobserver.com/9/26373/?rk=1>

fundamental political rights by weakening their representation in the German Bundestag and that amended Article 48(6) allows the EU to change its rules without permission from national parliaments.

The *Irish Times* reported that "Legal opinion is divided over how the constitutional court will react to the Irish vote".¹⁶⁹ The report continued:

One camp predicts that, in contrast to 2005, the judges in Karlsruhe will be anxious to have their say on the Lisbon Treaty as their contribution to the post-referendum debate.

Experienced court watchers suggest that it is unlikely Mr Gauweiler will succeed, although a ruling against his application could include a request for extra measures in the ratification bill to ensure the preservation of democracy and to secure the role of the Bundestag in Berlin.

That would be a simple matter to fix and would not disturb the treaty itself.

Mr Gauweiler's camp suggest that the judges will take a similar view now as in 2005, meaning a verdict on whether German ratification of the treaty can proceed is unlikely anytime soon.

"The judges are no longer under political pressure from Berlin but can decide at leisure if my claims are justified," said Dr Gauweiler.

His application of several hundred pages argues the Lisbon Treaty is "incompatible" with German democratic principles.

A spokesman for chancellor Angela Merkel in Berlin declined to discuss the timeframe for a ruling on the challenge, citing the state separation of powers.

Dr Gauweiler and his co-complainant, Prof Dietrich Murswiek, are optimistic of a ruling in their favour - or at least a stringent legal interpretation of the unanimity principle of Lisbon Treaty ratification - preventing the German president from signing the bill into law.

"As judges and not politicians, they only have to deal with the legal points of our complaint and not the given political circumstances," said Prof Murswiek, professor of law at the Albert Ludwigs University of Freiburg.¹⁷⁰

The *Linke* challenge was announced on 27 June after the Irish no-vote. The applicant, Diether Dehm, maintained that Lisbon would infringe the rights of parliamentarians and undermine German democracy by giving too much power to the European Council at the expense of national parliaments and the European Parliament.

The Treaty must be signed off by the President, Horst Kohler. In June 2005 Mr Kohler refused to sign the German law approving the EU Constitution pending the outcome of a case brought by Mr Gauweiler to the German Constitutional Court. When the French and

¹⁶⁹ *Irish Times* 18 June 2008 at <http://www.ireland.com/newspaper/ireland/2008/0618/1213735259851.html>

¹⁷⁰ Ibid

Dutch voted against the EU Constitution, the Court decided there was nothing left to rule on. Legally, the President can sign off the Treaty before the Court has ruled on its constitutionality, but politically this would be difficult, particularly if the Court eventually decided that the Treaty was unconstitutional.

11. Greece

On 12 June (before the Irish referendum result was announced) the Greek Parliament ratified the Lisbon Treaty by 250 votes in favour, 42 votes against and eight abstentions. Both the ruling New Democracy party and PASOK, the main opposition party, voted in favour, although the latter had argued in favour of holding a referendum. All other opposition parties voted against.

12. Hungary

Hungary held a parliamentary vote on 17 December 2007 and was the first Member State to vote in favour of Lisbon. The vote was 325 votes to 5 and 14 abstentions.

13. Italy

On 23 July 2008 the Italian Senate voted by 286 votes to 0 to ratify Lisbon. The Chamber of Deputies has yet to vote.

14. Latvia

The Latvian Parliament voted to ratify Lisbon on 8 May 2008 by 70 votes to 3 and 1 abstention.

15. Luxembourg

On 29 May the Luxembourg Chamber of Deputies adopted the bill on ratification of Lisbon by 47 votes to 1 and 3 abstentions. The Luxembourg Prime Minister, Jean-Claude Juncker, said in an interview in the German magazine *Bild* that in the future, Europe-wide referendums may be needed to give "clarity" to the mandate for further EU integration. He was open to the idea of Europe-wide referendums on future transfers of power to the EU, suggesting the question: "Do you want to be a member of the European Union and for this renounce the needed [national] competences?".¹⁷¹

16. Lithuania

The Lithuanian Parliament voted to ratify Lisbon on 8 May 2008 by 83 votes to 5 against and 23 abstentions.

¹⁷¹ *Bild am Sonntag* on-line, 21 June 2008 at <http://www.bild.de/BILD/news/politik/2008/06/22/jean-claude-juncker/volksabstimmung-in-ganz-europa.html>; reported in *EUObserver* 23 June 2008 at <http://euobserver.com/9/26373/?rk=1>

17. Malta

On 29 January 2008 the Maltese Parliament voted unanimously to approve a motion of ratification of Lisbon put by Prime Minister Lawrence Gonzi. Support from both Government and opposition was boosted by the allocation of an extra seat for Malta in the EP, which its size strictly speaking did not warrant.

18. Netherlands

The Netherlands rejected the EU Constitution in a referendum in May 2005 and the new Dutch Government faced a challenge selling the Lisbon Treaty to the Dutch electorate. The Government wanted to ratify by a parliamentary method, which the Dutch Parliament approved. The Dutch rejection in 2005 enabled the Government to demand and obtain various clarifications in the Lisbon Treaty that made it less controversial at home. They wanted clarification about which areas were within national competence and which would be vested in the Union; the inclusion of accession criteria for new Member States to be set out in the Treaty; and for the Treaty not to be called a constitution. The granting of these concessions meant that a smoother parliamentary ratification looked increasingly likely and on 5 June 2008 the Dutch House of Representatives (*Tweede Kamer*) approved the Treaty ratification law by 111 votes to 39. The Dutch Senate (*Eerste Kamer*) voted in favour of the Treaty on 8 July by a large majority (60 votes to 15), completing the ratification process. Only the far-left Socialist Party, the Protestant Reformed Political Party and an animal rights party voted against it.

19. Poland

Poland, where the EU Constitution had also been problematic, has wavered over ratification of Lisbon. In March 2008 the opposition, led by the former Prime Minister, Jaroslaw Kaczynski, threatened to reject the Treaty in Parliament unless the ratification bill contained legal guarantees respecting Polish sovereignty and the Constitution. He wanted the bill to confirm Poland's exemption from the effects of the Charter of Rights in order to avoid the imposition of 'unacceptable' practices such as abortion, euthanasia and gay marriage. A special addendum to the Polish bill stated that homosexual marriages could not be imposed on Poland and that Polish property rights were secure on territory taken from Germany after World War II.

The President, Mr Kaczynski's twin brother, Lech Kaczynski, who helped negotiate the Treaty, was reported to have shared concerns about ratifying Lisbon, but the Prime Minister, Donald Tusk, and his ruling Civic Platform party, wanted a speedy ratification. The *Sejm* (Lower House) passed the bill on 1 April by 384 votes to 56 against and 12 abstentions (all from the Law and Justice Party). The Senate passed it on 2 April by 74 in favour to 17 against and 6 abstentions. Although the two-thirds majority required for ratification was achieved, President Kaczyński declined to sign the Ratification Act until doubts about implementation following the Irish referendum had been resolved. He told the Polish daily, *Dziennik*, it would be "pointless" to sign at the moment, and he viewed the upholding of the principle of unanimity for treaty ratification as vital for the protection

of those Member States not considered to be major EU powers.¹⁷² However, a report in the *EUObserver* found the Polish tactic more strategic:

Polish neighbours and analysts speculate the president's stance is not really designed to protect Irish voters or the EU principle of unanimity, with Czech minister Alexandr Vondra and Swedish EU minister Cecilia Malmstrom both saying it is a "tactical" move in internal Polish games.

Mr Kaczynski is fighting to win oversight powers on Polish government behaviour in EU negotiations and to get government approval to host a US missile shield. The Lisbon row also generates momentum for his flagging conservative opposition party, as campaigning slowly begins for the 2009 European Parliament elections.

"If Lech Kaczynski signs the treaty it will be a victory for [Polish liberal Prime Minister Donald] Tusk. So the president wants his own victory by winning concessions from the liberals," Polish Institute of Political Sciences analyst Kazimierz Kik told AFP.

"Support for the treaty could also be traded [with France and Germany] for support for a Polish candidate for one of the most important EU positions [such as European Parliament president]," Polish daily *Rzeczpospolita* writes in an editorial comment.¹⁷³

In early July the ruling Civic Platform and Polish People's Party coalition prepared a draft resolution for the *Sejm* calling on President Kaczyński to ratify Lisbon. The resolution read:

The Sejm of the Republic of Poland expresses its conviction that the process of ratifying the Lisbon Treaty should continue in both Poland and other European Union countries. Putting the treaty into practice is a necessary condition for strengthening the EU and making it more efficient. Poland's *raison d'état* demands an efficient and effective EU. "Taking into account the Polish people's broad support for the treaty, the Sejm of the Republic of Poland hereby appeals to the president to ratify the Lisbon Treaty and to offer active support on the international arena for the process of the treaty's ratification."¹⁷⁴

President Lech Kaczynski held talks with President Sarkozy on 14 July 2008, at which the French leader allegedly insisted on a "moral obligation" to ratify and President Kaczynski is reported to have said Poland would not be an obstacle to ratification of Lisbon.¹⁷⁵ The two leaders allegedly agreed "certain reciprocal commitments",¹⁷⁶ while other reports alluded to a "joint plan",¹⁷⁷ but no details have been published.

¹⁷² *Telegraph.co.uk* 1 July 2008 at <http://www.telegraph.co.uk/news/worldnews/europe/2227494/Lisbon-treaty-now-pointless,-says-Polish-president.html>

¹⁷³ 2 July at <http://euobserver.com/9/26431/?rk=1>

¹⁷⁴ *The Warsaw Voice* 9 July 2008 at <http://www.warsawvoice.pl/view/18280>

¹⁷⁵ *EUObserver* 15 July 2008 at <http://euobserver.com/9/26489/?rk=1>

¹⁷⁶ *Telegraph.co.uk* 14 July 2008 at <http://www.telegraph.co.uk/news/worldnews/europe/poland/2301261/President-Lech-Kaczynski-of-Poland-I-will-not-block-EU-treaty.html>

¹⁷⁷ *EUObserver* 15 July 2008

20. Portugal

In early January 2008 the Portuguese Prime Minister, José Socrates, ruled out a referendum on Lisbon. On 23 April 2008 the Portuguese Assembly voted by 208 votes to 21 in favour of Lisbon and the President signed the ratification bill on 9 May 2008.

21. Romania

On 4 February 2008 the Romanian Parliament voted in favour of Lisbon by 387 to one and one abstention.

22. Slovakia

The Slovakian Parliament was due to vote on ratification of Lisbon on 30 January 2008, where majority support for the Treaty looked likely to give it an easy passage. However, Slovakia was forced to postpone the vote on the Treaty due to an internal dispute over a controversial media bill. A number of centre-right opposition MPs threatened to leave the Chamber during the ratification vote in protest against the bill, which meant that the Prime Minister Robert Fico's coalition Government might have been five MPs short of the constitutional two-thirds majority (90 votes) required to approve ratification. The opposition demanded that the media bill, which they believed would compromise press freedom,¹⁷⁸ be re-drafted. After a two-day stand off, the vote on ratification was delayed until 31 January. The failure to find a solution to the impasse resulted in further delays and the Parliament did not vote until 10 April 2008, when Lisbon was ratified by 103 votes to five, including votes from the opposition. The Christian Democrats opposed the Treaty. The President signed the ratification bill on 12 May 2008.

23. Slovenia

On 29 January 2008 74 out of 90 MPs in the Slovenian Parliament voted for the ratification of Lisbon. Six members of the Slovene National Party tabled a proposal for a referendum and voted against ratification. The Prime Minister, Janez Jansa, indicated to the Parliament ahead of the vote that the content of Lisbon was the same as the earlier EU Constitution, which the Parliament had supported.

24. Spain

On 26 June 2008 Spain's Congress of Deputies (Lower House) voted to ratify Lisbon by 322 votes to six and two abstentions. On 15 July the Senate approved Lisbon by 232 votes to six and 2 abstentions.

25. Sweden

The Swedish coalition Government started the parliamentary ratification process on 3 July 2008. The Swedish Parliament will vote on Lisbon in the autumn. A judicial panel advising the Government ruled that Lisbon is identical to EU Constitution.

¹⁷⁸ An argument supported by the Organisation for Security and Cooperation in Europe

26. UK

The UK completed the ratification process for the Lisbon Treaty on 16 July by depositing its instrument of ratification in Rome. The following section looks at the steps leading to ratification.

a. *Treaty ratification procedure*

UK ratification of treaties proceeds as follows:

- Treaties are ratified by the Foreign Secretary or his/her representative, acting on behalf of the Crown (the so-called Royal Prerogative). Parliament does not have a direct role in treaty ratification but there can be parliamentary activity relevant to it.
- Starting in the 1920s, and continuously since the 1930s, there has been a constitutional practice known as the Ponsonby Rule which requires that treaties subject to ratification should be laid before Parliament for 21 sitting days before ratification, for information and to give Parliament an opportunity (not always taken) to debate them. The formal submission of the treaty text to Parliament as a Command Paper, together with the debates on the related EC/EU bill, covers this requirement for EC/EU treaties.
- When new EC/EU treaties have been agreed, including treaties of accession, there has been new legislation in the UK to amend the *European Communities Act 1972* (ECA) so that those parts of the new treaties which are intended to have domestic legal effect are made applicable within the UK. New treaties are added to the list of Community Treaties in Section 1(2) of the ECA. The passage of the implementing legislation is not formally part of ratification, but it is necessary if ratification is to proceed smoothly. The bill must be approved by Parliament and given Royal Assent in order to be ratified.
- For EC/EU treaties the instruments of ratification have to be deposited with the Italian Government in Rome. They are drawn up by the Foreign and Commonwealth Office and sent to the Queen. The Queen signs the front page and a warrant authorising them. They are returned to the FCO and signed by the Foreign Secretary. They are then sent to the Crown Office in the House of Lords where the Great Seal is affixed. They are returned to the FCO, tied in blue ribbon and bound in blue leather.
- The documents are sent to the British Embassy in Rome and then to the Italian Ministry of Foreign Affairs. Ratification is then complete.

After the Irish no-vote some eurosceptic MPs sought to find out whether UK ratification of Lisbon could be revoked if the Treaty did not come into force. David Gauke asked “under what circumstances the Government can withdraw an instrument of ratification in respect of an international treaty once it has been deposited with the treaty depositary”, to which Jim Murphy replied:

The EU (Amendment) Bill received Royal Assent on 19 June. We are proceeding to ratification in the usual way; once prepared, the instrument of ratification will be deposited with the Italian Government in Rome. Once deposited, it will not be withdrawn.¹⁷⁹

David Miliband has maintained that “nothing will come into force until [...] the treaty is ratified by everybody”.¹⁸⁰

b. Referendums

There is no constitutional requirement to hold a referendum for any purpose in the UK. However, Parliament is free to legislate for a referendum on any question at any time. Parliament cannot be formally bound by the outcome of a referendum, but a referendum could be made to have other legal effects. For example, referendum legislation might stipulate that, depending on the outcome, a minister will lay before Parliament an Order in Council which would either bring into force or repeal an Act of Parliament.

The Government ruled out a referendum on the Lisbon Treaty, although it had agreed to one on the earlier EU Constitution.¹⁸¹ The Prime Minister, Gordon Brown, told the Commons in October 2007: “The decision for a referendum on European Union matters is a decision for this Parliament”.¹⁸² In other words, he did not rule out the possibility of ratification being linked to a referendum, if Parliament so decided.

In February 2008 the cross-party “I Want A Referendum” (IWAR) campaign¹⁸³ commissioned Electoral Reform Services (ERS) to conduct unofficial referendums in ten marginal UK constituencies (eight Labour and two Lib Dem, in total around half a million people),¹⁸⁴ including East Renfrewshire, the seat of the Minister for Europe. It asked whether there should be a national referendum on Lisbon and whether the UK should ratify it. With a turnout of 36.2%, 133,251 out of 152,520 voted for a referendum.¹⁸⁵ Four Labour MPs (Frank Field, Kate Hoey, Gisela Stuart and Graham Stringer) participated in the IWAR campaign.

c. The European Union (Amendment) Bill in Parliament

During the passage of the *European Union (Amendment) Bill* there was a lively debate in both Houses on the question of whether Lisbon merited a referendum. The arguments in favour were based mainly on Lisbon’s similarity with the 2004 EU Constitution and the

¹⁷⁹ HC De 15 July 2008 c 227W at <http://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm080715/text/80715w0003.htm#08071510600037>

¹⁸⁰ Uncorrected evidence to FAC 11 June 2008 at <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmcaff/uc713-i/uc71302.htm>

¹⁸¹ See also Standard Note SN/IA/4548, “Ratification of the Lisbon Treaty”, 18 December 2007

¹⁸² HC Deb 22 October 2007 c28 at <http://pubs1.tso.parliament.uk/pa/cm200607/cmhansrd/cm071022/debtext/71022-0005.htm>

¹⁸³ See website at <http://www.iwantareferendum.com/index.aspx>

¹⁸⁴ Aberconwy, Bolton West, Eastleigh, Gedling, Hammersmith, Harlow, Pudsey, Redditch, Renfrewshire East, Redditch and Somerton & Frome.

¹⁸⁵ The full results are on the IWAR website at <http://www.iwantareferendum.com/finalresults.pdf>

pledges of the three main political parties in their manifestos to support a referendum on a constitutional treaty.

1. House of Commons

The Bill was introduced in the Commons on 17 December 2007 and received a Second Reading on 21 January 2008. A group of 20 Labour MPs had tabled, unsuccessfully, a reasoned amendment to the motion for a Second Reading of the Bill, which also had Scottish National Party and Democratic Unionist Party backing, seeking to prevent progress to Second Reading, “as no provision for a referendum on the Treaty of Lisbon is made within it, despite the Labour, Conservative, Liberal Democrat, Scottish National and Plaid Cymru parties all having promised to make provision for a referendum on such a treaty in their manifestos and policy statements in 2005”.¹⁸⁶

A referendum was among the first matters to be discussed at Second Reading and many of the familiar arguments for and against were raised during the debate. In his opening remarks the Foreign Secretary, David Miliband, insisted there were salient differences between Lisbon and the EU Constitution:

The real issue is the content of the treaty; and in its structure and consequence, as well as its content, it is different from the constitution and does not meet the bar of whether it constitutes fundamental constitutional change”.¹⁸⁷

In response to a question from the former Conservative Chancellor, Kenneth Clarke, about the previous Blair Government’s decision to hold a referendum on the EU Constitution, Miliband also made clear that, in his view, a referendum need not have been offered on that Treaty either:

I can certainly confirm that it came as a surprise and a shock to me to learn of the new decision. I certainly agree that there was no way on the basis of its constitutional significance that it merited the decision that was taken.¹⁸⁸

The vote at Second Reading was 362 in favour of Lisbon and 224 against. Three Conservative MPs voted in favour of the Treaty, while 18 Labour MPs voted against it. The Bill went to a Committee of the Whole House on 9 January for 11 days.¹⁸⁹

On 26 February 2008 the Liberal Democrat leader, Nick Clegg, tabled an amendment on the holding of a referendum on UK membership, rather than on the Lisbon Treaty, which was held by the Speaker to be irrelevant to the debate.

On the last day in Committee, 5 March 2008, Conservative MPs put down Amendments to Clause 8 of the Bill on commencement.¹⁹⁰ Amendments 293, 296 and other

¹⁸⁶ <http://www.publications.parliament.uk/pa/cm200708/cmagenda/ob80121.htm>

¹⁸⁷ HC Deb 21 January 2008 c 1242 at

<http://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm080121/debtext/80121-0009.htm>

¹⁸⁸ HC Deb 21 January 2008 c 1246

¹⁸⁹ For full details of the passage of the Bill, see the Parliament website at <http://services.parliament.uk/bills/2007-08/europeanunionamendment.html#2007-08>

¹⁹⁰ The remaining proceedings on Clause 8 and New Clauses and New Schedules are at

amendments and New Clauses required a referendum and set out a procedure for holding one. However, in Division 117 on Amendment 293 the House voted by 311 votes to 248 against a referendum. 29 Labour MPs and 13 Liberal Democrats voted with the Conservatives in favour of a referendum, while three Conservatives voted against their party line.¹⁹¹ In Division 118 on Amendment 296, 247 voted in favour and 311 against. In Division 119 the Committee divided 355 to 218 in favour of Clause 8 standing unamended. Thus, the majority of MPs voted against making it necessary to hold a referendum before the Treaty of Lisbon could be inserted into the list of EU treaties in force in the *European Communities Act 1972*. There was a three-line Lib Dem whip to abstain in the referendum vote, which 15 Lib Dem MPs defied by voting in favour of a referendum, and three front bench spokesmen (Alistair Carmichael, Tim Farron and David Heath) resigned from their positions.

Other amendments tabled during the Commons committee stage of the Bill concerned Third Pillar matters (fighting cross-border crime; justice; policing; human trafficking and asylum and migration policy), energy, human rights, the single market, foreign, security and defence policy, international development, the effectiveness of the EU institutions and EU decision making, climate change and changes of terminology. Not all the amendments were debated in detail, which gave rise to criticism at Third Reading.¹⁹² One of the Conservative amendments required the Government to pass an Act of Parliament if it wanted to give the EU new powers using the “simplified revision procedure” (the so-called “ratchet clause”). Twenty Labour MPs, headed by Jon Trickett, tabled an amendment to remove the reference to “Title IV” of the Charter of Fundamental Rights (relating to the right to strike) from the Protocol exempting the UK from the Charter. This was an attempt to make the exemption clearly applicable to the whole Charter and not just Title IV, but the amendment was not put to a vote. At Third Reading the House divided Ayes 346, Noes 206, and the Bill went unamended to the Lords on 12 March 2008.

House of Lords

On 28 March, just before the EU Bill received its Second Reading in the House of Lords, the Lords EU Committee published a report on the implications for the UK Constitution of the EU Bill and the Lisbon Treaty.¹⁹³ The Committee concluded:

The Lisbon Treaty and the UK Constitution
A lasting settlement?

132. Constitutional stability is a desirable characteristic. We note that the Government view the reforms that would be brought about by the Lisbon Treaty as providing a lasting settlement. We therefore hope that, if ratified, the Treaty will provide a period of stability in the institutional framework of the EU and we urge the Government to use their influence to ensure that this is the case. This, in turn, will enable the UK constitution to develop further the procedures needed to ensure that the Government are properly accountable for the exercise of their

¹⁹¹ <http://www.publications.parliament.uk/pa/cm200708/cmbills/048/amend/pb0480503m.1429-1435.html>

For a party breakdown of the vote see *Telegraph.co.uk* 6 March 2008 at

<http://www.telegraph.co.uk/news/uknews/1580883/How-your-MP-voted-on-the-EU-Treaty.html>

¹⁹² See, for example, Marc Francois, HC Deb 11 March 2008 c 243 at

<http://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm080311/debtext/80311-0019.htm>

¹⁹³ 6th Report of Session 2007–08 HL Paper 84 at

<http://www.publications.parliament.uk/pa/ld200708/ldselect/ldconst/84/84.pdf>.

powers in the sphere of the European Union, with effective roles for the United Kingdom Parliament and the governments and legislatures of Northern Ireland, Scotland and Wales.

Defining the European Union's competences

133. Questions of distribution of power are inherently complex. In the United Kingdom, devolution and membership of the European Union have the combined consequence that the United Kingdom Government and Parliament operate in a system of multi-level governance: for practical purposes they have such powers as have not been conferred on the devolved administrations and legislatures or the European Union. With this in mind, we welcome the Lisbon Treaty's attempt to set out with greater clarity the demarcations of responsibility between Member States and the European Union. These demarcations will continue to be open to interpretation by the European Court of Justice.

134. The articulation of categories of competence in the Treaty on the Functioning of the European Union would be a useful step in clarifying the distribution of powers between the European Union and the Member States.

People's rights and responsibilities

135. We conclude that the change in status of the Charter from political document to having the force of a treaty would be less of a radical step than at first it may appear. This is because the Charter is declaratory of rights already recognised as existing in law by the courts and therefore currently available to the UK citizen.

136. We agree with the European Union Committee that Protocol 7 clarifies the application of the Charter rather than operating as an opt-out.

137. In our view, the European Union's accession to the European Convention on Human Rights should have no impact on national law, and therefore no constitutional implications.

Citizenship

138. We conclude that the continued existence of citizenship of the European Union in and of itself has no constitutional implications for British citizenship. Although it remains to be seen whether the new formal procedures for citizens' initiatives at European Union level will have any significant practical impact (in addition to their symbolic aspirations), they can be seen as complementing proposals contained in the Government's *Governance of Britain* programme for citizens' "calls for action" at local authority level and the development of online petitions on the Number 10 Downing Street website.

139. We urge the Government to clarify whether they envisage taking a formal or informal position on any such citizens' initiative, and whether this would entail making representations at the European Union level. If the Government do expect to play such a role, they must explain how they intend to keep Parliament informed and how they envisage remaining accountable to Parliament in the exercise of this function.

The United Kingdom Parliament and parliamentary supremacy

140. We welcome the enhanced role for national parliaments proposed by the Lisbon Treaty. In order to make the most of these new opportunities, it is essential that both Houses should work together to develop complementary scrutiny procedures, particularly in respect of the role of select committees. It would also be desirable for Parliament informally to seek the earliest possible involvement in the policy-making processes at the European level.

141. We agree with the House of Lords European Union Committee that the Treaty of Lisbon does not subject the United Kingdom Parliament to legal duties.

142. We conclude that the *Lisbon Treaty* would make no alteration to the current relationship between the principles of primacy of European Union law and parliamentary sovereignty. The introduction of a provision explicitly confirming Member States' right to withdraw from the European Union underlines the point

that the United Kingdom only remains bound by European Union law as long as Parliament chooses to remain in the Union.

Nations and regions

143. There is a clear need to develop and enhance cooperation between the United Kingdom Government and the devolved administrations on those aspects of European Union policy that are devolved or have implications for the devolution settlement. Frequent meetings of the Joint Ministerial Committee (JMC) on Europe are essential in this regard. Moreover, cooperation between the different administrations ought to be undertaken in as open and transparent manner as possible. We therefore recommend that information relating to meetings of the JMC on Europe should be made much more widely available.

144. There is a clear need for cooperation between the United Kingdom Parliament and the devolved legislatures on European Union matters, particularly the 'yellow card' procedure for policing the principle of subsidiarity. We therefore suggest that the respective legislatures give further consideration to a formal mechanism for improved cooperation on these issues.

The Area of Freedom, Security and Justice

145. We conclude that the importance of how the opt-ins and opt-outs are used is such that Parliament must be fully involved in their use. We therefore recommend that the European Union (Amendment) Bill be amended so as to require the Government to obtain approval from both Houses of Parliament before using opt-ins or opt-outs in any policy area. This would be consistent with the Bill's policy to require parliamentary approval of the use of the Simplified Revision Procedure and *passerelles*.

Courts and the judiciary

146. Many of the issues we have examined in this report—including the competences of the EU, the interpretation and application of the Charter, and the detailed working-out of the consequences of the UK's opt-outs and opt-ins (particularly in relation to the area of freedom, security and justice)—will be shaped by the European Court of Justice's adjudications in the years to come. Insofar as the European Union is an organisation based on the rule of law, there can be no complaint that this is so, even if from time to time the developments introduced have taken Member States by surprise.

147. In order for Parliament to be fully informed of the European Court of Justice's interpretation and application of the Lisbon Treaty provisions, we recommend that the Government lay before Parliament an annual report on their assessment of the impact of the Court's rulings on the United Kingdom. In interpreting and applying the Charter, the European Court of Justice will increasingly refer to the case law of the European Court of Human Rights and so the relevant rulings of that Court ought also to be covered in the Government's annual report.

148. The provision of such an annual report would complement Parliament's efforts in recent years to seek greater information about the operation of the United Kingdom courts through, for example, the requirement of the Constitutional Reform Act 2005 for the Supreme Court to make an annual report and the Lord Chief Justice's proposed regular reports on the courts system in England and Wales.¹⁹⁴

¹⁹⁴ Lords Constitution Committee 6th Report 2007-08, "European Union (Amendment) Bill and the Lisbon Treaty: Implications for the UK Constitution" 28 March 2008 at <http://www.publications.parliament.uk/pa/ld200708/ldselect/ldconst/84/84.pdf>

Many references were made to this Report during the Second Reading on 1 April and Committee stages of the Bill (22 April for seven days ending 20 May). Many commentators thought the chances of a referendum amendment succeeding in the Lords were higher than in the Commons, because the Government has no overall majority there and there are only a few more Labour Peers than the Conservatives. The calculation was that if the Conservatives were joined by crossbench Peers and if the Lib Dems abstained, as they had done in the Commons, a referendum amendment could be passed.

The referendum issue was raised in the opening Second Reading speeches by Lord Howell, the Opposition Foreign Affairs Spokesperson,¹⁹⁵ and was a major area of contention throughout the debate. However, the Lib Dem spokesman for Constitutional Affairs, Lord McNally, said the Lib Dem general election commitment to a referendum had been on a constitutional treaty, and had “died” when the EU Constitution was rejected by the French and the Dutch; Lib Dem Peers would therefore not abstain in a vote on a referendum.¹⁹⁶ There were no Lib Dem amendments to the Bill on the marshalled list.

In Committee Lord Howell’s amendments concerned the similarity between the Lisbon Treaty and the EU Constitution, the ‘constitutional’ aspects of the CFSP High Representative and the increase in the powers of the ECJ. There has been some support for the view that Lisbon is a constitutional treaty among senior political figures in Europe, including Valérie Giscard d’Estaing, Angela Merkel, José Luis Zapatero and Jean-Claude Juncker, but the British Government maintains that Lisbon is an amending treaty and would not alter the constitutional relationship between the UK and the EU.¹⁹⁷ Lord Howell also pointed out that the main UK opt-outs, which the Government had said made Lisbon different from the EU Constitution, were in fact almost exactly the same as those in the earlier Treaty, on which the Government had promised a referendum. He tabled an amendment to insert that Lisbon was a constitutional treaty which amended and altered constitutional arrangements between the EU and the UK.¹⁹⁸ On the last day in Committee (20 May 2008) Lord Howell sought to move a referendum amendment and the well-rehearsed arguments about the nature of the two EU Treaties and the pros and cons of referendums were debated vigorously. Lord Howell’s amendment was followed by one by Lord Pearson, who called for a referendum within six months of the Act receiving Royal Assent to determine whether it should continue in force. On 11 June the House of Lords voted by 280 votes to 218 against a referendum on the Lisbon Treaty. Eight Conservative Peers defied their party whip and voted against a referendum.¹⁹⁹

Other amendments and New Clauses in Committee concerned the jurisdiction of the ECJ in relation to foreign affairs, on which Baroness Ashton undertook to deposit

¹⁹⁵ HL Deb 1 April 2008 cc 863-8 at <http://www.publications.parliament.uk/pa/ld200708/ldhansrd/text/80401-0003.htm>

¹⁹⁶ Ibid c 871

¹⁹⁷ See for example HC Deb 3 July 2007 c 803

¹⁹⁸ HL Deb 22 April 2008 cc1390-93 at <http://www.publications.parliament.uk/pa/ld200708/ldhansrd/text/80422-0002.htm#08042261000002>

¹⁹⁹ HL Deb 11 June 2008 cc 635-9 at <http://www.publications.parliament.uk/pa/ld200708/ldhansrd/text/80611-0010.htm>

clarification; the Charter of Fundamental Rights, from which the UK has an exemption to the effect that the Charter “does not extend the ability of the Court of Justice of the European union... to find [UK law] inconsistent”,²⁰⁰ on which Baroness Ashton summarised the UK “safeguards”,²⁰¹ the EP’s budgetary powers, budgetary procedures and EU financial accounting, EU decision-making and weighted votes, the Commission’s right of initiative and the election of its president by the EP, fraud in the EP, CFSP policy and missions, personal data, a start-up fund for foreign policy operations, mutual assistance, permanent structured co-operation in defence, legal personality, withdrawal from the Union, categories of competence, the Common Fisheries Policy and the CAP, cooperation in civil matters, Eurojust, the primacy of EU law, a European gendarmerie, a parliamentary procedure for changes in terminology, the ‘passerelle’ (simplified Treaty revision procedures), parliamentary control of UK opt-ins, and a referendum on the euro.

The Bill received its Third Reading on 18 June. Lord Howell moved an amendment urging the Lords to delay ratifying the Treaty until October 2008 to allow for more parliamentary discussion and for more clarity about the Irish rejection of Lisbon. This was rejected by 277 to 184 votes and the Bill was passed unamended.

Overall, in the Lords the Government had fewer votes than the Conservatives, but support for the Government from the Liberal Democrats and Crossbenchers meant that all amendments were resisted.²⁰²

d. Legal challenges

1. Bill Cash

David Miliband announced in a statement on 16 June 2008 that the UK would continue with the ratification of Lisbon after the no-vote in the Irish referendum vote. In the debate that followed Bill Cash sought to link a question to the Foreign Secretary about the Irish outcome to the ratification situation in the UK:

Will the Foreign Secretary accept that his statement is really quite disreputable given that this is quite clearly a democratic vote taken by people with full knowledge of what was going on? Will he not accept that it does affect the United Kingdom? We salute the Irish people, but the vote affects the United Kingdom because the treaty is no longer valid as far as the United Kingdom is concerned precisely because it has been overtaken by the no vote, which cannot now be changed.²⁰³

On 17 June Mr Cash sought a judicial review in the High Court on the grounds that the Lisbon Treaty was “incapable of ratification” after the Irish vote. Mr Justice Collins refused permission. The basis of Mr Cash’s argument was as follows:

²⁰⁰ See Library Research Paper 08/09, 24 January 2008, for further information on issues raised by the legal status given to the Charter in the Lisbon Treaty.

²⁰¹ HL Deb 29 April 2008 cc 160-1 at <http://www.publications.parliament.uk/pa/ld200708/ldhansrd/text/80429-0007.htm>

²⁰² HL Deb 18 June 2008 c 1031 at <http://www.parliament.the-stationery-office.co.uk/pa/ld200708/ldhansrd/text/80618-0002.htm>

²⁰³ HC Deb 16 June 2008 c 714 at <http://pubs1.tso.parliament.uk/pa/cm200708/cmhansrd/cm080616/debtext/80616-0010.htm>

The claimant contends that the legal consequence for the United Kingdom of the 'No' vote on the Lisbon Treaty in the referendum held in the Republic of Ireland notified on Friday 13th June under Article 29 of the Constitution of Ireland 1937 (which is direct binding legislation) against the coming into force of the Treaty of Lisbon in the Republic of Ireland is that as from 13th June, the performance of the Treaty in relation to the UK (because of supervening impossibility and change of circumstances preventing the accomplishment of the original object or purpose and transforming the original consent of the parties to the terms of that Treaty) is now otiose, terminated and therefore no longer an available lawful use of the Prerogative in the UK. Furthermore, under the principles of customary international law the Treaty of Lisbon should be stayed (*Clausula Rebus Sic Stantibus*).²⁰⁴

In refusing permission Mr Justice Collins made the following order:

1. Since I am refusing permission to seek judicial review, it follows that I decline to make any interim order.
2. This claim is misconceived. There is no reason why the government should not ask Parliament to continue to deal with the European Union (Amendment) Bill despite the refusal of Ireland to ratify the Lisbon Treaty. It will be for Parliament, not the court, to decide whether the Bill should be passed having regard to the Irish decision. The assertion that the decision to continue the ratification process is an exercise of the prerogative power and so justiciable is not correct. In reality, this claim seeks to prevent the parliamentary process from reaching its conclusion and as such is not justiciable. In any event, there may well be a value in the government knowing that they Treaty in its present form has been ratified by Parliament or by a referendum is a matter of political not judicial decision.
3. It follows that this claim is not arguable. It is indeed totally without merit since it is an attempt to pursue a political agenda through the court.²⁰⁵

2. Stuart Wheeler

On 22 April 2008 the business tycoon, Stuart Wheeler, brought an action to the High Court against the Prime Minister and the Foreign Secretary, in which he sought a judicial review of the Government's refusal to hold a referendum on ratification of the Lisbon Treaty. In a judgment at the High Court on 2 May Mr Justice Owen granted Mr Wheeler permission to apply for judicial review.

Wheeler argued that the Government's promise in 2005 to hold a referendum on the EU Constitution "involved an implied representation that a referendum would be held in relation to any treaty having equivalent effect, giving rise to a legitimate expectation that such a referendum would be held".²⁰⁶ On 19 May the Speaker of the Commons, acting through the Attorney General, intervened to make submissions concerning parliamentary

²⁰⁴ *European Journal* July 2008 at <http://www.europeanfoundation.org/docs/July%202008.pdf>

²⁰⁵ *Ibid*

²⁰⁶ For the full text of the judgement and further information on the Stuart Wheeler case, see <http://www.stuartwheeler.co.uk/>

privilege and the *Bill of Rights 1689*. On 10 June there was a hearing of the judicial review by the Divisional Court. Initially, the Government said it would go ahead with ratification, but after directions from Lord Justice Richards to the effect that, pending the outcome of the judicial review, the Government should stay completion of the process, the Government decided not to press ahead with the final stage of ratification by depositing the instrument of ratification in Rome. Gordon Brown pointed out that the steps between Royal Assent and actual ratification could take weeks and that the expected date of the judgement fitted in with the Government's timetable.²⁰⁷ The High Court judgement of 25 June rejected Wheeler's claim, concluding:

57. For the reasons we have given, we are satisfied that the claim lacks substantive merit and should be dismissed. Even if we had taken a different view of the substance of the case, in the exercise of the court's discretion we would have declined to grant any relief, having regard in particular to the fact that Parliament has addressed the question whether there should be a referendum and, in passing the European Union (Amendment) Act 2008, has decided against one.

58. At a late stage in the proceedings, a few days before we expected to hand down judgment, we were informed by the Treasury Solicitor that, following Royal Assent to the European Union (Amendment) Act 2008, the government "is now proceeding to ratify the Treaty of Lisbon". We were concerned that the government might be intending to pre-judge or pre-empt the decision of the court by ratifying the treaty while the lawfulness of doing so without a referendum was still in issue before the court. The Prime Minister, however, acted promptly to remove our concern by making clear that ratification would not take place before the judgment was handed down.

59. In the event, the decision of the court is itself clear. We have found nothing in the claimant's case to cast doubt on the lawfulness of ratifying the Lisbon Treaty without a referendum.²⁰⁸

The FCO issued a press release in which Jim Murphy welcomed the conclusion, commenting that the judges had confirmed the Government's position that Lisbon was different "in both form and substance from the defunct Constitution". Murphy also thought the judges had "made a number of important points about the boundaries between Parliament, Government and the Courts".²⁰⁹

The Divisional Court refused permission to appeal to the Court of Appeal, but Mr Wheeler informed the Government of his intention to apply to the Court of Appeal for permission to appeal and he asked for an assurance that it would not meanwhile deposit the instruments of ratification in Rome. However, the Government deposited its instrument of ratification on 16 July 2008.

²⁰⁷ *BBC News* 20 June 2008

²⁰⁸ Case No: CO/1915/2008 <http://www.stuartwheeler.co.uk/Judgment.pdf>

²⁰⁹ FCO press release 25 June 2008

Appendix 1 Referendum results

The Times published detailed results of the referendum by constituency, comparing them with the vote on the *Treaty of Nice* in 2001.²¹⁰

	Yes	%	Nice 2001 (%)	No	%	Nice 2001	Turnout (%)
Carlow/Kilkenny	26,210	49.8	47.7	26,206	49.8	52.3	50.9
Cavan/Monaghan	22,346	45.0	48.1	27,113	54.6	51.9	53.4
Clare	20,982	51.7	48.7	19,490	48.0	51.3	52.5
Cork East	18,177	42.9	43.5	24,052	56.7	56.5	50.6
Cork North-Central	12,440	35.4	41.2	22,546	64.2	58.8	53.4
Cork North-West	16,253	46.0	45.4	18,991	53.7	54.6	55.6
Cork South-Central	22,112	44.7	45.4	27,166	54.9	54.6	55.0
Cork South-West	14,235	44.2	47.2	17,806	55.3	52.8	55.3
Donegal North-East	9,006	35.1	39.9	16,504	64.3	60.1	45.7
Donegal South-West	10,174	36.4	39.6	17,659	63.2	60.4	46.5
Dublin Central	12,328	43.6	40.9	15,816	56.0	59.1	48.8
Dublin Mid-West	12,577	39.5	41.9	19,182	60.3	58.1	51.7
Dublin North	22,696	50.3	48.0	22,194	49.2	52.0	55.3
Dublin North-Central	15,772	50.5	43.0	15,396	49.3	57.0	61.1
Dublin North-East	12,917	43.1	43.5	16,973	56.6	56.5	57.2

²¹⁰ *The Times* at <http://extras.timesonline.co.uk/irelandtable2008.html>

Dublin North-West	9,576	36.3	42.1	16,749	63.5	57.9	52.9
Dublin South	32,190	62.7	51.9	19,005	37.0	48.1	58.4
Dublin South-Central	16,410	38.9	43.2	25,624	60.8	56.8	51.6
Dublin South-East	17,111	61.4	49.3	10,644	38.2	50.7	49.6
Dublin South West	12,601	34.8	39.1	23,456	64.8	60.9	53.6
Dublin West	13,573	47.8	44.2	14,754	51.9	55.8	54.5
Dun Laoghaire	31,524	63.3	53.5	18,149	36.4	46.5	58.8
Galway East	18,728	46.7	47.0	21,230	52.9	53.0	49.8
Galway West	19,643	45.8	42.0	23,011	53.7	58.0	50.0
Kerry North	11,306	40.2	39.5	16,702	59.4	39.5	51.3
Kerry South	11,569	42.4	44.9	15,571	57.1	55.1	53.1
Kildare North	20,045	54.4	49.3	16,653	45.2	50.7	51.5
Kildare South	13,470	48.4	47.7	14,308	51.4	52.3	48.7
Laois/Offaly	31,786	55.8	48.6	24,963	43.8	51.4	54.3
Limerick East	18,085	45.8	46.6	21,191	53.7	53.4	51.4
Limerick West	13,318	44.5	49.1	16,511	55.1	50.9	51.8
Longford/Westmeath	19,371	46.1	45.8	22,502	53.5	54.2	51.4
Louth	18,586	41.7	46.6	25,811	57.9	53.4	53.4

Mayo	18,624	38.1	44.3	30,001	61.4	55.7	51.3
Meath East	17,340	50.8	48.0	16,703	48.9	52.0	50.6
Meath West	14,442	44.3	47.8	18,028	55.3	52.2	51.9
Roscommon/South Leitrim	15,429	45.4	46.7	18,402	54.2	53.3	56.9
Sligo/North Leitrim	12,602	43.1	44.8	16,496	56.4	55.2	52.6
Tipperary North	16,235	49.6	49.4	16,367	50.0	49.4	58.5
Tipperary South	13,853	46.6	48.6	15,755	52.9	51.4	55.4
Waterford	17,502	45.5	48.2	20,812	54.1	51.8	53.4
Wexford	23,371	43.8	48.7	29,793	55.8	51.3	52.8
Wicklow	25,936	49.6	46.2	26,130	50.0	53.8	60.8
Total	752,451	46.4	46.1	862,415	53.2	53.9	53.1

Appendix 2 Further reading

- Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OLC 306 17 December 2007 at <http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2007:306:SOM:en:HTML>
- Referendum Commission, Republic of Ireland, at <http://www.lisbontreaty2008.ie/>
- *Irish Times* “What is the Lisbon Treaty?: Lisbon explained”, in parts, starting with Part 1, 12 May 2008 at <http://www.irishtimes.com/newspaper/ireland/2008/0512/1210503983021.html>
- *The Law Society* “A guide to the Treaty of Lisbon: European Union insight”, January 2008 at http://www.lawsociety.org.uk/documents/downloads/guide_to_treaty_of_lisbon.pdf
- Lisbon Treaty page on FCO website at <http://www.fco.gov.uk/en/fco-in-action/institutions/britain-in-the-european-union/global-europe/eu-lisbon-treaty/>
- Robert Schuman Foundation factsheets on Lisbon at <http://www.robert-schuman.org/tout-comprendre-sur-le-traite-de-lisbonne.php?r=1> and <http://www.robert-schuman.eu/doc/divers/lisbonne/en/10fiches.pdf>
- Libertas (Irish anti-Lisbon organisation) at <http://www.libertas.org/>
- The Lisbon Report: An analysis of the Lisbon Treaty with specific amendments and briefings for the House of Lords, Bill Cash, MP James McConalogue, Margarida Vasconcelos, John Laughland, April 2008, at http://www.europeanfoundation.org/docs/4_The%20Lisbon%20Treaty%20Report.pdf
- German Institute for International and Security Affairs, Working Paper FG 1 2008/02, February 2008, “The UK and the Ratification of the Reform Treaty: from European Problem Child to Class Swot“, Roderick Parkes at http://www.swp-berlin.org/de/common/get_document.php?asset_id=4711
- *European Journal* July 2008, “What the Lisbon Treaty means”, Karl Albrecht Schachtschneider and “The Lisbon treaty: the EU democratic process in question”, Laurent Dauré and Dominique Guilleminat, and other articles at <http://www.europeanfoundation.org/docs/July%202008.pdf>
- “Campaign against the EU Constitution: Vote No to the Lisbon Treaty” at <http://www.caeuc.org/>
- Open Europe, “Background Briefing: The Lisbon Treaty and Ireland” at <http://www.openeurope.org.uk/research/irelandbriefing.pdf>
- Statewatch, “Can the Treaty of Lisbon be ratified or implemented? A legal analysis”, Professor Steve Peers, University of Essex, 19 June 2008 at <http://www.statewatch.org/news/2008/jun/analysis-lisbon-june-sp-2008.pdf>