



## The Lisbon Treaty: the European Council and prospects for Irish ratification

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This Note looks at the discussions in Ireland, the European Union Institutions and other Member States about the prospects for Irish ratification of the *Treaty of Lisbon*. It considers the declarations on concessions agreed by the European Council on 11-12 December 2008 which are intended to facilitate Irish ratification in 2009.

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## 1 Introduction

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, threw 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.

In August 2008 the *Irish Times* reported that senior Irish officials from the Department of Foreign Affairs and the Attorney General's office had met their Danish counterparts in Copenhagen for advice on how Ireland could opt out of certain provisions of the Lisbon Treaty in order to resolve the impasse created by the negative referendum outcome.<sup>1</sup>

The Irish Government was asked to report to the European Council in mid-October on its plans with regard to the Lisbon Treaty. However, the Irish Foreign Minister, Micheal Martin, indicated to the Commission that it would be December before the Government was in a position to give an idea of its intentions.<sup>2</sup> Mr Martin told the European Parliament (EP) Constitutional Affairs Committee on 6 October what his Government was doing about the Lisbon stalemate. He analysed research on the reasons for the no-vote, summarising it as follows:

- 70% of the Irish population still favoured EU membership (8% against)
- The main reasons for voting no or abstaining was the lack of information, the composition of the European Commission, corporate tax rates, neutrality and abortion.
- the profile of voters against showed that younger voters, lower socio-economic groups and women were more opposed to the Treaty.

Mr Martin said the Government's strategy was to find a way forward in the light of an analysis of the survey result. He assured the Committee of Ireland's commitment to finding a political consensus and the right solution, but did not promise that this would be before the EP elections in June 2009. He emphasised that the Government expected to have a clear roadmap in December, which was being prepared in discussions with the French Presidency. The Taoiseach, Brian Cowen, told the European Council on 15 October that he aimed to have identified the "necessary steps" to be taken in 2009 on the best way to move ahead with the stalled Lisbon treaty.

The 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 on several occasions, with a view to Ireland presenting a "roadmap" for a way forward at the European Council summit on 11-12 December. Other Member States continued with their ratification processes, although the

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<sup>1</sup> *Irish Times* 28 August 2008 at <http://www.irishtimes.com/newspaper/frontpage/2008/0828/1219875155770.html>

<sup>2</sup> *EUobserver* 9 October 2008 at <http://euobserver.com/9/26899/?rk=1>

Czech Republic decided in early December to postpone the parliamentary ratification process until 3 February 2009.<sup>3</sup>

Among the options discussed informally were:

- 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).

## 2 A mixed ratification method?

In early October it was suggested that Ireland might ratify Lisbon partly by a parliamentary method<sup>4</sup> and partly by means of a referendum, the referendum being only on modifications or concessions agreed by all Member States as declarations or statements annexed to the Treaty. The Irish Government would then put these to a referendum and all 27 Member States would ratify them as part of the next accession treaty.

The *Daily Telegraph* reported on 10 October 2008:

One document, seen by The Daily Telegraph, cites Irish sources predicting that Ireland will be offered an "opt-out" on EU defence and security cooperation alongside plans to ratify parts of the Treaty in the country's parliament.

A second vote would then be held on "sensitive" aspects of the EU Treaty with "diverse declarations" presented as major concessions to Irish concerns.<sup>5</sup>

Article 48 TEU does not specify how a Member State should ratify an EU Treaty - only that it is "in accordance with its constitutional requirements". International law specifies that a treaty must be ratified in its entirety unless it provides for partial ratification (which Lisbon does not),<sup>6</sup> but does not preclude the use of different methods of ratification for one

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<sup>3</sup> *Prague Daily Monitor* 9 December 2008 at <http://praguemonitor.com/2008/12/10/czech-mps-adjourn-lisbon-treaty-ratification-until-february>

<sup>4</sup> In Ireland a binding referendum is required for any transfer of power because that requires a constitutional amendment. Under Articles 46 and 47 of the Irish Constitution the approval of a constitutional amendment requires a majority from both chambers as well as a binding referendum. The approval of a transfer of sovereignty without the effect of constitutional amendment requires a majority from both chambers (Article 29(5) and (6) of the Constitution of Ireland). The Dáil passed Lisbon on 29 April 2008 and the Seanad passed it on 9 May 2008, so parliamentary opposition is presumably not envisaged.

<sup>5</sup> *Telegraph.co.uk* 10 October 2008 at <http://www.telegraph.co.uk/news/newstoppers/eureferendum/3173967/EU-steps-up-pressure-on-Ireland-to-hold-second-Lisbon-Treaty-referendum.html>

<sup>6</sup> Article 17 "Consent to be bound by part of a treaty and choice of differing provisions", 1969 *Vienna Convention on the Law of Treaties* at [http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf)

instrument. Many Member States use a parliamentary procedure which leads to the ratification of international treaties while others proceed by a referendum. Sometimes both are used. Spain, for example, held a non-binding public vote on the *Treaty Establishing a Constitution for Europe* but formal ratification, the signature of the King, followed a parliamentary procedure.

Under the UK's dualist system a treaty which purports to change existing domestic law has no legal effect in the UK unless and until the treaty obligations are incorporated or transformed into domestic law by the enactment of domestic legislation. When the UK ratifies an EC treaty, legislation is required to amend the *European Communities Act 1972* (ECA) for those elements of the treaty that are in the First Pillar. However, amendments to the ECA do not concern the intergovernmental Articles in Pillars 2 and 3 (CFSP and JHA). In short, the whole Treaty is ratified by prerogative powers, while only parts of it are also enshrined in domestic law.

The following Open Europe blog on this scenario was sceptical:

The Government won't have another referendum on the same text because they would lose by an [even bigger margin](#).

They probably can't hold the pro-treaty coalition together to just overtly push it through parliament with no referendum. Labour and FG would get hammered by their own voters.

So they will explore the legal edges of the [Crotty case](#), and find out which elements in Lisbon are clearly constitutional changes. Remember that Crotty lost on every point except one, so on that restrictive reading, the list might not be long: perhaps just Defence, the Charter and the Justice and Home Affairs provisions.

In October (or afterwards) Ireland will be offered opt outs from these elements, and EU leaders will stuff everything else in Lisbon into the Croatian accession treaty, and put that through the Dail.

The EU Constitution / Lisbon Treaty will then apply as planned to the whole EU, and Ireland will be offered a referendum only on those opt outs.

That way, even if the Irish referendum on the opt outs returns a no vote, the Constitution / Treaty will still come into effect for everyone else.

The advantages for the political elite are several. They will have given people a referendum, but stopped them actually changing anything. Indeed there will be greater pressure to say yes in that referendum, because you are no longer talking about what should happen, only whether Ireland should be part of it. Not voting on behalf of the millions of Europeans who were denied a vote, but only on whether Ireland should "exclude itself" (you can hear them saying it now).<sup>7</sup>

### 3 The Danish solution

In 1992 Danish concerns about the *Treaty on European Union* (TEU, Maastricht Treaty) were met by the adoption of opt-outs set out in the "Edinburgh Agreement"<sup>8</sup> on the main issues

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<sup>7</sup> 28 August 2008 at <http://openeuropeblog.blogspot.com/2008/08/this-is-what-is-going-to-happen-in.html>

<sup>8</sup> See [http://www.euo.dk/emner\\_en/forbehold/edinburgh/](http://www.euo.dk/emner_en/forbehold/edinburgh/)

believed to be at the root of the Danish electorate's concerns.<sup>9</sup> The "Edinburgh Agreement", which subsequently allowed Denmark to ratify the TEU, was adopted as a "Decision" of the Heads of State and Government. It was not the subject of a formal Treaty amendment process, but was published in the Official Journal of the European Communities<sup>10</sup> and later annexed to the TEU.

The then Prime Minister, John Major, said on his return from Edinburgh:

we agreed a solution to the issues raised by the Danish Government following their referendum. The solution is binding in international law. It does not in any way change the Maastricht treaty or require a new round of ratification in member states. It provides an interpretation of the treaty which Prime Minister Schlüter believes will enable him to hold a second referendum in Denmark in the spring. It has been welcomed by all seven parties that drafted the original Danish document.<sup>11</sup>

The Foreign Office Minister, Alistair Goodlad, said of the decision:

The decision concerning certain problems raised by Denmark is an international agreement binding on the parties to the Treaty on European Union. The decision does not require ratification and there is therefore no depositary state. The authentic text is held by the Council Secretariat.<sup>12</sup>

Mr Goodlad added, in response to further questioning from Nigel Spearing:

The decision [...] was not taken by the Edinburgh European Council but by the Heads of State and Government meeting within the European Council. It is an agreement binding in international law between the parties to the Treaty on European Union. It constitutes an agreement, in the sense of Article 31 of the Vienna Convention on the Law of Treaties, for the purposes of interpretation of the Treaty on European Union.<sup>13</sup>

Although the Edinburgh Agreement was presented to the Danish electorate as containing significant concessions that would enable voters to reconsider their opposition to the TEU, many commentators and other EU governments saw it rather as a way of interpreting or clarifying the TEU on the issues of concern to Danish citizens, but legally binding nevertheless. With regard to Economic and Monetary Union, the agreement confirmed a right that had already been agreed in the TEU. Camilla Hersom wrote in 2004:

It was clearly indicated by the Member States that the decision *is* meant to be legally binding, even if it is remarkable that the consent of the Member States was not to be expressed by means of ratification insofar as signature was found sufficient.<sup>14</sup>

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<sup>9</sup> See [http://www.euo.dk/emner\\_en/forbehold/](http://www.euo.dk/emner_en/forbehold/)

<sup>10</sup> "Denmark and the Treaty on European Union", OJC 348, 31 December 1992 at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:41992X1231:EN:HTML>

<sup>11</sup> HC Deb 14 December 1992 cc 23-4 at <http://hansard.millbanksystems.com/commons/1992/dec/14/european-council-edinburgh>

<sup>12</sup> HC Deb 17 December 1992 c 356.

<sup>13</sup> Ibid

<sup>14</sup> *Who are the Europeans Now?* Edited by Edward Moxon-Browne, "European citizenship and the search for legitimacy: the paradox of the Danish case", Camilla Hersom, 2004.

The status of the decision was also raised in the debate on the TEU in January 1993. Bill Cash asked whether the Decision was binding or not, as there had been conflicting views, and wanted clarification of the status of the Decision.

It is no good Governments and others going round, in the belief that they can cobble together decisions on pieces of paper, picking a little bit from one pigeon hole of international law and a little bit from another, nesting here and nesting there. We must know the precise impact of the treaty.<sup>15</sup>

Nigel Spearing was also sceptical about the effect of the Decision on the TEU:

If the Prime Minister is to be believed, they effectively changed the nature of the treaty, which is not to be ratified by the House or any other assembly of the people of the member states. If the Prime Minister is right and the nature of the change is justiciable, the treaty was changed —changed overnight by a group of people sitting in Edinburgh and deciding the way that the treaty should be changed.<sup>16</sup>

## 4 Irish talks in Europe

In mid-October 2008 the *Irish Times* reported that the Taoiseach, Brian Cowen, had agreed to a French Presidency proposal to consult the Council of Ministers' legal services<sup>17</sup> on the drafting of possible declarations on Lisbon that would have the effect of allowing Ireland to opt out of certain matters, and that he was looking at the structure of the Commission, EU military integration, taxation and civil rights as the "likely areas of concern".<sup>18</sup>

In November Micheal Martin talked to other EU leaders about the possibility of retaining one Commissioner per Member States. Subjects such as abortion, neutrality and taxation were also raised, but it was the loss of a Commissioner that polls indicated was the major concern. According to an *Irish Times* survey on 17 November 2008, asked how they would vote if Lisbon were modified to allow Ireland to retain a Commissioner and if other Irish concerns on neutrality, abortion and taxation were clarified in special declarations, 43% said they would now vote 'Yes', with 39% voting No and 18% undecided.<sup>19</sup>

The anti-Lisbon campaign argued that voters' concerns went well beyond those outlined by the Government and that declarations agreed by the 27 Member States alongside the same Treaty text would not change minds. The *Irish Times* reported the views of Sinn Fein and Declan Ganley, the chairman of the anti-Lisbon think-tank, Libertas:

"I am confident that the Irish people would reject Lisbon again should the Irish Government be so spineless as to allow themselves to be bullied into asking us a second time," said Mr Ganley.

Libertas insisted that if the treaty text is tinkered with, the resulting "Frankenstein version of Lisbon" would not win majority support from voters.

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<sup>15</sup> 13 HC Deb 13 January 1993 cc935–1011 at <http://hansard.millbanksystems.com/commons/1993/jan/13/treaty-on-european-union-1>

<sup>16</sup> 13 HC Deb 13 January 1993 cc935–1011

<sup>17</sup> The Council legal service has provided legal formulas allowing States to opt out of parts of EC Treaties.

<sup>18</sup> *Irish Times* 17 October 2008 at <http://www.irishtimes.com/newspaper/frontpage/2008/10/17/1224108326408.html>

<sup>19</sup> Irish Times/TNS mrbi poll, *Irish Times* 17 November 2008 at <http://www.irishtimes.com/newspaper/frontpage/2008/11/17/1226700659487.html?via=rel>. The poll was conducted among a representative sample of 1,000 voters in face-to-face interviews at 100 sampling points in all 43 constituencies. The margin of error is 3%.

"We believe that in any referendum, here or abroad, our message of democracy, accountability, transparency, and a prosperous, strong Europe, will trump the scaremongering and personal attacks of a vociferous minority who continue to hold democracy in contempt," added Mr Ganley.

Sinn Féin claimed the Government was ignoring the will of the people "in an effort to ensure an easy life with its European peers".

"The Government needs to go to December's summit with the firm intent of negotiating a better deal that includes a social progress clause for workers, strengthening of key vetoes on public services, taxation and international trade, the removal of all self amending clauses including Article 48, secure vetoes on all aspects of common foreign and defence policies, and the retention of Ireland's permanent Commissioner," said Sinn Féin's Lisbon campaign director Pádraig Mac Lochlainn.

"Obtaining declarations on a small number of issues that the Government alone perceives as central to the No vote will not be enough," he added.

Chair of the anti-Lisbon campaign group the People's Movement, Patricia McKenna, said declarations on tax, abortion and neutrality were "a devious ploy designed to dupe Irish voters into believing that our Government have somehow obtained concessions from other EU States on the Lisbon Treaty".

She said "nothing could be further from the truth".

"Declarations, unlike protocols are not a legal part of a treaty and thus holding a second referendum on Lisbon will in legal terms mean voting on the exact same treaty rejected by the voters in June."<sup>20</sup>

Under international law protocols have the same legal status as the treaty itself and are part of the treaty, whereas declarations are not. Ganley said: "There will be no Protocols for Ireland over Lisbon, for that would be to reopen the Lisbon Treaty and would require all 27 EU States to ratify the new protocol, which would in effect be a new treaty."<sup>21</sup>

Mr Martin said the Government would decide on a second referendum before the December European Council, to which they would bring the "elements of a solution". Doing nothing was not an option, as it would leave Ireland on the margins of the EU.<sup>22</sup>

## **5 Committee Report on Ireland's Future in Europe**

In October 2008 a special sub-committee of the Joint Committee on European Affairs was established with the aim of building consensus between all parties on Ireland's future in Europe. It had 12 members, including five from the Senate and both supporters and opponents of Lisbon. The sub-committee sat three days a week for four weeks and reported at the end of November.

The report did not recommend any particular action, but concluded that for ratification, the main option for Ireland would be a second referendum on a Lisbon Treaty modified by a joint

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<sup>20</sup> The results are analysed in the *Irish Times* 17 November 2008 at <http://www.irishtimes.com/newspaper/breaking/2008/1117/breaking40.htm> and <http://www.irishtimes.com/newspaper/ireland/2008/1117/1226700658973.html?via=rel>

<sup>21</sup> *EUObserver* 18 November 2008 at <http://euobserver.com/9/27130/?rk=1>

<sup>22</sup> <http://www.irishtimes.com/newspaper/ireland/2008/1117/1226700658961.html?via=rel>

declaration by Member States attached to the Treaty. The report stated that if the Government decided on a renewed attempt at ratification:

In this situation, it would be expected that the Government make an attempt to respond at both domestic and international level (in the latter case, in consultation and in cooperation with its EU counterparts) to a range of the criticisms and concerns expressed during the first referendum campaign.<sup>23</sup>

The Sinn Fein members of the sub-committee published their own opinion and the *Irish Times* reported that Sinn Fein MEP, Mary Lou McDonald, thought the subcommittee report was "simply a re-articulation of the Yes argument".<sup>24</sup>

In early December the Irish internal market Commissioner, Charlie McCreevy, argued that the Irish 'no' on Lisbon ought to be respected, since the anti-Lisbon campaign had won the argument against "the might" of media and most politicians. In an interview with *Hot Press* magazine he admitted that "the Irish people listened to him [Declan Ganley] more than anybody else".<sup>25</sup> Mr McCreevy had been blamed by some for contributing to the Lisbon defeat in Ireland, when he remarked before the June referendum on the complexity of the Treaty and admitted to only having read a simplified version of the text.

Just ahead of the December European Council meeting the Foreign Minister had still not clarified the Irish position on ratification. He told a meeting hosted by the European Policy Centre (EPC) on 8 December that the Government had not decided to hold a referendum, but that other ways of ratification were "fraught with risks".<sup>26</sup> He emphasised that "the concerns of the Irish people will have to be addressed in a clear and convincing manner by means of legally binding assurances".<sup>27</sup> There were rumours that the Taoiseach would announce an April or October 2009 referendum at the European Council.

It was also reported that the Commission President, Jose Manuel Barroso backed the Irish demand of one Commissioner per Member State. This was surprising, given the lengths to which Member States have gone since the Laeken Declaration in 2000 to agree firstly on the principle of reducing the size of the Commission and secondly on the means to achieve this reduction. Under Lisbon the Commission would be reduced from 2014 to representatives from two-thirds of Member States. However, Barroso said there was "empirical evidence it is possible for a commission to work with 27 members"<sup>28</sup> and indicated that on balance he would rather end the Lisbon impasse than insist on the new Commission arrangements. This view was expected to be opposed by the governments of Belgium, Germany and the Netherlands, who had insisted on a slimmed down executive, but to be supported by Italy and France and the more recent Members who view Commission representation as vital to their interests.<sup>29</sup>

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<sup>23</sup> "Ireland's Future in Europe: Scenarios and Implications" Gavin Barrett, Brigid Laffan, Rodney Thom, Daniel C. Thomas, Ben Tonra, UCD Dublin European Institute, by 12 November 2008 p 18 at [http://www.oireachtas.ie/documents/committees30thdail/j-europeanaffairs/sub\\_cttee\\_eu\\_12112008.pdf](http://www.oireachtas.ie/documents/committees30thdail/j-europeanaffairs/sub_cttee_eu_12112008.pdf)

<sup>24</sup> "Sinn Féin launches 'Majority View - Minority Report'" 27 November 2008 at <http://www.sfguengl.com/news/entry/966>

<sup>25</sup> Reported in *EUObserver* 5 December 2008 at <http://euobserver.com/9/27241/?rk=1>

<sup>26</sup> *EUObserver* 9 December 2008 at <http://euobserver.com/9/27264/?rk=1>

<sup>27</sup> *Ibid*

<sup>28</sup> *EUObserver* 9 December 2008 at <http://euobserver.com/9/27265/?rk=1>

<sup>29</sup> The Commission is supposed to act as a collegiate body, but Member States have never really abandoned the view that having a national Commissioner is important to support national interests.

## 6 The December European Council

### 6.1 “Legal guarantees” in exchange for “seeking ratification”

An agreement in the form of declarations was reached at the summit on 11-12 December, by which, in return for “legal guarantees” to remedy those matters of concern to the Irish electorate, the Irish Government would “seek ratification” of the Lisbon Treaty by the end of the Commission term (i.e. end October 2009). Ireland thereby effectively agrees to hold a second referendum on Lisbon in exchange for receiving concessions from the other EU Member States, with a view to implementation in 2010. However, there is no guarantee that Ireland will be in a position to ratify if there is a second no-vote.

Most significantly, the concessions included a guarantee in the form of a “decision” that will be taken “in accordance with the necessary legal procedures” that each Member State will keep a commissioner. There was also a pledge that the EU would not impose rules on Ireland concerning taxation, “ethical issues” (e.g. abortion, euthanasia and gay marriages) or interfere with its traditional neutrality.

The European Council Presidency Conclusions state:

1. The European Council re-affirms that the Treaty of Lisbon is considered necessary in order to help the enlarged Union to function more efficiently, more democratically and more effectively including in international affairs. With a view to enabling the Treaty to enter into force by the end of 2009, the European Council, while respecting the aims and objectives of the Treaties, has defined the following path.
2. On the composition of the Commission, the European Council recalls that the Treaties currently in force require that the number of Commissioners be reduced in 2009. The European Council agrees that provided the Treaty of Lisbon enters into force, a decision will be taken, in accordance with the necessary legal procedures, to the effect that the Commission shall continue to include one national of each Member State.
3. The European Council has carefully noted the other concerns of the Irish people presented by the Taoiseach as set out in Annex 1 relating to taxation policy, family, social and ethical issues, and Common Security and Defence Policy (CSDP) with regard to Ireland's traditional policy of neutrality. The European Council agrees that, provided Ireland makes the commitment in paragraph 4, all of the concerns set out in the said statement shall be addressed to the mutual satisfaction of Ireland and the other Member States.

The necessary legal guarantees will be given on the following three points:

- nothing in the Treaty of Lisbon makes any change of any kind, for any Member State, to the extent or operation of the Union's competences in relation to taxation;
- the Treaty of Lisbon does not prejudice the security and defence policy of Member States, including Ireland's traditional policy of neutrality, and the obligations of most other Member States;
- a guarantee that the provisions of the Irish Constitution in relation to the right to life, education and the family are not in any way affected by the fact that the Treaty of Lisbon attributes legal status to the EU Charter of Fundamental Rights or by the justice and home affairs provisions of the said Treaty.

In addition, the high importance attached to the issues, including workers' rights, set out in paragraph (d) of Annex 1 will be confirmed.

4. In the light of the above commitments by the European Council, and conditional on the satisfactory completion of the detailed follow-on work by mid-2009 and on presumption of their satisfactory implementation, the Irish Government is committed to seeking ratification of the Treaty of Lisbon by the end of the term of the current Commission.<sup>30</sup>

The Taoiseach was reported as saying:

On the basis of the agreement today, and on condition of our being able to satisfactory put guarantees in place ... I would be prepared to return to the public to put to them a new package and to seek their approval of it".<sup>31</sup>

Mr Cowen was "convinced that we are on the right path. [...] The views of the Irish people are being respected".<sup>32</sup> He also stressed that there was still "a lot of detailed work to be carried out in the months ahead" to clarify how exactly Ireland would get its guarantees, but he was hopeful that Irish citizens would eventually be satisfied with the outcome of the negotiations and support the Lisbon Treaty.

The former EP President, Pat Cox, pointed out in the *Irish Times* that the concession on Commissioners was one of principle rather than one of substance:

A key concession is the European Council's unanimous agreement to allow each member state to nominate a commissioner in perpetuity. This concession does not require a change to the Lisbon Treaty, which already provides the European Council with the right to decide the number of commissioners, subject to unanimity.<sup>33</sup>

Cox also emphasised the significance of the compromise in view of future EU enlargement:

The intention is that eventually all the states of the western Balkans will join the EU. These include Croatia, Serbia, Montenegro, Bosnia and Herzegovina, and the Former Yugoslav Republic of Macedonia, Kosovo and Albania. Their accession would under the Irish compromise bring the size of a future commission to 34. What has been agreed to satisfy Irish preferences is a significant compromise, with important implications for the commission.<sup>34</sup>

## 6.2 Transitional provisions

Institutional reform was one of the key areas identified by the EU institutions and many Member States. Transitional institutional provisions are set out in the form of Declarations in Annex 1 of the Presidency Conclusions.

### **Council Presidency**

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<sup>30</sup> Presidency Conclusions, 11-12 December 2008, at [http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/ec/104692.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/104692.pdf)

<sup>31</sup> *EUObserver* 12 December 2008 <http://euobserver.com/9/27295/?rk=1>

<sup>32</sup> *Ibid*

<sup>33</sup> *Irish Times* 12 December 2008 at <http://www.irishtimes.com/newspaper/opinion/2008/12/12/1228864714775.html?via=rel>

<sup>34</sup> *Ibid*

One declaration concerned the Presidency of the European Council and the Foreign Affairs Council, which under Lisbon would be a full-time post of up to five years:

In the event that the Treaty of Lisbon enters into force at a date when a six-monthly Presidency of the Council has already begun, the European Council agrees that, as a matter of transition, in order to take into account the preparatory work and ensure harmonious continuity of work:

– the competent authorities of the Member State holding the six-monthly Presidency of the Council at that time will continue to chair all the remaining meetings of the Council and the European Council, as well as third-country meetings, until the end of the period of office;

– the following six-monthly Presidency of the Council will be in charge of taking the necessary specific measures relating to the organisational and material aspects of the Presidency of the European Council and of the Foreign Affairs Council during its period of office, in conformity with the Treaty. On these issues, close consultation will be established between this Presidency and the President (elect) of the European Council and the High Representative (designate) of the Union for Foreign Affairs and Security Policy.<sup>35</sup>

### **Commission**

The transitional provision on the Commission stated that the process of appointing the next Commission would start immediately after the June 2009 EP elections.

### **European Parliament**

Article 14 of the consolidated *Treaty on European Union*<sup>36</sup> is based on present Article 190 TEC and the Nice *Protocol on the Enlargement of the European Union*. It retains the formula adopted in the *Treaty Establishing a Constitution for Europe* for the allocation of European Parliament (EP) seats on the basis of 'degressive proportionality'.<sup>37</sup> The total number of EP seats shall not exceed 750 (it is currently set at 732 under Article 189 TEC).<sup>38</sup> The maximum number of seats for a Member State is capped at 96 and the minimum threshold is six. The final composition is fixed by a unanimous European Council decision on a proposal from the EP (Article 14(2) TEU).

The EP Constitutional Affairs Committee agreed a proposal on 2 October 2007 on the distribution of seats,<sup>39</sup> which was adopted on 11 October 2007 by the EP in plenary. This sets out the distribution of seats from the next EP elections in 2009 as follows:

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<sup>35</sup> Presidency Conclusions, 11-12 December 2008

<sup>36</sup> OJC 115, 9 May 2008, p.22 at <http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2008:115:SOM:en:HTML>.

<sup>37</sup> The principle of allocating to the smaller states a greater per-head representation than the large ones with a proportionate distribution of votes for countries in between.

<sup>38</sup> The actual current number of EP seats is 785 including a temporary raised ceiling from the previous 736 to accommodate the membership of Bulgaria and Romania.

<sup>39</sup> Co-rapporteurs Alain Lamassoure (EPP-ED, FR) and Adrian Severin (PES, RO), A6-0351/2007, approved in committee by 17 votes in favour, five against and three abstentions. See procedure file at <http://www.europarl.europa.eu/oeil/file.jsp?id=5511632>

Member State	Population (1) (in millions)	% of EU-27 Population	Seats until 2009	"Nice" (2) 2009-2014	Report in plenary (3) 2009 - 2014	Proposal rapp (4)
Germany	82,438	16,73%	99	99	96	-3
France	62,886	12,76%	78	72	74	2
<b>United Kingdom</b>	<b>60,422</b>	<b>12,26%</b>	<b>78</b>	<b>72</b>	<b>73</b>	<b>1</b>
Italy	58,752	11,92%	78	72	72	
Spain	43,758	8,88%	54	50	54	4
Poland	38,157	7,74%	54	50	51	1
Romania	21,61	4,38%	35	33	33	
Netherlands	16,334	3,31%	27	25	26	1
Greece	11,125	2,26%	24	22	22	
Portugal	10,57	2,14%	24	22	22	
Belgium	10,511	2,13%	24	22	22	
Czech Rep.	10,251	2,08%	24	22	22	
Hungary	10,077	2,04%	24	22	22	
Sweden	9,048	1,84%	19	18	20	2
Austria	8,266	1,68%	18	17	19	2
Bulgaria	7,719	1,57%	18	17	18	1
Denmark	5,428	1,10%	14	13	13	
Slovakia	5,389	1,09%	14	13	13	
Finland	5,256	1,07%	14	13	13	
Ireland	4,209	0,85%	13	12	12	
Lithuania	3,403	0,69%	13	12	12	
Latvia	2,295	0,47%	9	8	9	1
Slovenia	2,003	0,41%	7	7	8	1
Estonia	1,344	0,27%	6	6	6	
Cyprus	0,766	0,16%	6	6	6	
Luxembourg	0,46	0,09%	6	6	6	
Malta	0,404	0,08%	5	5	6	1
<b>EU-27</b>	<b>492,881</b>	<b>100,00%</b>	<b>785</b>	<b>736</b>	<b>750</b>	
(1) Population figures as officially established on 7 November 2006 by the Commission in Doc. 15124/06 on the basis of Eurostat figures.						
(2) "Nice": Distribution of Seats according to Art. 189 TEC as modified by Art. 9 of the BG/RO - Act of Accession.						
(3) "New": New Proposal on the basis of Art. 9A TEU new ( I-20).						
(4) The new figures concerning Germany and Malta derive automatically from the draft reform treaty provisions. <sup>40</sup>						

Following Italy's demand for an extra EP seat to bring it into line with the UK, the ceiling of 750 is now followed by "plus the President".<sup>41</sup> A Declaration on the composition of the EP specifies that: "The additional seat in the European Parliament will be attributed to Italy", which will therefore have 73 rather than 72.<sup>42</sup> This was agreed by the European Council in October 2007 and is appended to the Lisbon Treaty.

The EP resolution will only enter into force as and when Lisbon is implemented. It was envisaged in the Lisbon Treaty that it would come into force in time for EP elections in June 2009 to be held under the new Treaty provisions. Protocol No. 36 on Transitional Provisions states in Article 2:

<sup>40</sup> EP briefing 4 October 2007, "Distribution of EP seats: Constitutional Affairs Committee approves proposal" at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+IM-PRESS+20070927BRI10862+ITEM-002-EN+DOC+XML+V0//EN&language=EN>

<sup>41</sup> DS 869/07, 19 October 2007 at <http://www.consilium.europa.eu/uedocs/cmsUpload/ds00869.en07.pdf> and Article 14(2) TEU

<sup>42</sup> Declaration No. 4, OJC115, 9 May 2008, p.337

In accordance with the second subparagraph of Article 14(2) of the Treaty on European Union, the European Council shall adopt a decision determining the composition of the European Parliament in good time for the 2009 European Parliament elections.<sup>43</sup>

The next EP is highly likely to be elected under the current Nice Treaty provisions, with a different distribution of seats. There will be 736 instead of 751 MEPs, with fewer seats for 12 Member States, including the UK. The UK will have 72 seats under the Nice provisions, but would have 73 under Lisbon.

The Irish Senator, Eugene Regan, said in a debate in October 2008 that the EP elections should be held in line with Lisbon regardless of its implementation:

The institutional arrangements for the European Parliament were never an issue in the referendum. No constitutional issue arises. It is a problem we have created and there are no objections to the European Parliament elections being held on the basis of a change in the number of MEPs, as envisaged by the Lisbon treaty. It is incumbent on the Irish Government to contribute to a solution to this immediate problem. I accept that the rejection of the treaty will not be easily resolved but we have an immediate problem with the alienation of many people in Europe in respect of the effect on the European Parliament elections. Ireland should come up with a proposal on how this could be resolved. This could be done before the European Council meeting in December. The Seanad can play a role in this. We have an interest in good relations with the European Parliament and in fostering good relations throughout Europe. This will have a negative effect on this country and it is an immediate problem to which we can contribute a solution.<sup>44</sup>

The European Council Declaration on the EP provides that, if Lisbon has not been ratified by the time of the EP elections, it will elect 736 members. Following ratification, the 12 Member States due to gain extra seats will obtain them, while Germany will temporarily keep the three extra seats it would have lost had Lisbon been ratified before the elections. The Declaration of the European Council on Lisbon and the composition of the EP stated:

In the event that the Treaty of Lisbon enters into force after the European elections of June 2009, transitional measures will be adopted as soon as possible, in accordance with the necessary legal procedures, in order to increase, until the end of the 2009-2014 legislative period, in conformity with the numbers provided for in the framework of the IGC which approved the Treaty of Lisbon, the number of MEPs of the twelve Member States for which the number of MEPs was set to increase. Therefore, the total number of MEPs will rise from 736 to 754 until the end of the 2009-2014 legislative period. The objective is that this modification should enter into force, if possible, during the year 2010.<sup>45</sup>

### **6.3 The legal status of Conclusions**

Council Conclusions are not legally binding but they constitute a political commitment by Member States. The following analysis of the legal status of Conclusions implies that there might, as in 1992, be some ambiguity about the status of promises made on 12 December:

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<sup>43</sup> OJC 115, 9 May 2008 p.322

<sup>44</sup> Seanad debate, 16 October 2008 at <http://debates.oireachtas.ie/Xml/30/SEN20081016.PDF>

<sup>45</sup> Presidency Conclusions, 11-12 December 2008

## **Presidency Conclusions**

3. Presidency Conclusions are the least formal of all the “Conclusions”, are not legally binding and can be on any subject. Their only role is to serve as a public summary of a discussion that has taken place between Ministers. As such they are sometimes used by the Presidency as an output from informal meetings of Ministers (often called “Informal Councils” although they do not have Council status). Whilst broad themes of informals will be part of the Presidency programme the actual focus of the topic for discussion may not be determined until just before the meeting. Outcomes will vary according to the wishes of the Presidency— who may or may not choose to prepare Presidency conclusions.

4. They are rarely negotiated with delegations, or agreed by them. Instead their content is solely the responsibility of the Presidency (though the Commission is often consulted, and sometimes the Presidency Troika). They are normally only shown to delegations on the day of the Council meeting and often only at the end of the meeting, when they are made public.

5. Presidencies will often use their Conclusions to highlight what they see as particular aspects of a discussion for example, to bring out a particular theme of their Presidency or in the case of “informals” to place the discussion in the context of more formal deliberations going on elsewhere. However Presidency Conclusions do not represent a position of the Member States or the Council, and if the Presidency seeks to portray them as such Member States routinely object, particularly where there are substantive differences in view.

[...]

## **European Council Conclusions**

9. The European Council is not a legislative body and does not take legally binding decisions. Its Conclusions are a particular form of Presidency Conclusions. But they have a special status, consistent with the European Council’s role, set out in Article 4 TEU, in shaping the EU’s internal and external policy agenda; “...The European Council shall submit to the European Parliament a report after each of its meetings and a yearly written report on the progress achieved by the Union”. The endorsement of European Council Conclusions by Heads of State and Government gives them a particular political resonance. Many of the highest profile decisions the Union takes (for example on future financing or enlargement strategy) are set out in European Council Conclusions. Any European Council Conclusion which needs to be implemented through a legal measure must be followed up through the appropriate normal decision making procedures under the Treaties or by Member States themselves. The rules governing the preparation of the European Council Conclusions were regularised in the Annex to the Seville European Council Conclusions.

The established practice, building on those rules, is as follows:

— The Presidency produces a draft annotated agenda giving the headline topics for discussion approximately six weeks ahead of the European Council. This draft is discussed at COREPER and then adopted by consensus at a General Affairs and External Relations Council (GAERC) about four weeks ahead of the European Council. Normally the Presidency draft is changed to take into account the priorities of other Member States. The draft-annotated agenda is classified as a LIMITE document, but the final agenda is made public at the GAERC. The General Secretariat has described LIMITE documents as:

“Documents whose distribution is internal to the Council, its members, the Commission and certain other EU institutions and bodies.”

— The Presidency then produces successive drafts of the European Council Conclusions (ie about three to four weeks before a European Council) aiming to narrow the differences between Member State views. These are discussed at successive COREPER meetings before being put to the GAERC which meets at the beginning of the week in which the European Council is held. These drafts are all classified LIMITE.

— Taking into account the debate amongst Foreign and Europe Ministers at the GAERC, the Presidency produces a final draft of the European Council Conclusions at the European Council itself. These are discussed in detail by Heads of State and Government. Foreign Ministers are present and contribute to the debate. The final text is adopted by consensus and normally published on the Council Secretariat website the same day. Presidencies are increasingly determined to ensure that only subjects actually discussed by Heads of State and Government feature in the Conclusions themselves.<sup>46</sup>

The Presidency Conclusions themselves are thus not legally binding, but it is understood that the declarations will be written into legally binding protocols attached to the next EU accession treaty (Croatia).<sup>47</sup> In an interesting development on 17 December, Slovenia said it would block further accession talks with EU candidate Croatia due to a long-running border dispute between the two countries.<sup>48</sup>

## 7 Reactions

On 15 December 2008 the Prime Minister, Gordon Brown, made a statement in the House on the outcome of the European Council:

At the European Council, agreement was also reached on measures to answer concerns expressed to us by Ireland. All countries were agreed that there could be no change or amendment to the Lisbon treaty and that we should proceed to ratification, with the Irish agreeing to hold a referendum within the next year. At the same time, to meet Irish concerns, it was agreed: that the Lisbon treaty, as we have always made clear, in no way affects the rights of member states to make taxation decisions; that the treaty in no way affects the individual defence policies of member states, including our obligations to NATO's and Ireland's traditional neutrality; and that because, as we have been clear, the charter of fundamental rights creates no new rights at a European Union level, the Irish constitution provisions on the right to life, education and family are not affected by its incorporation into the treaty—nor are they affected by the justice and home affairs provisions of the treaty from which Ireland has an opt-out. The Lisbon treaty allows for the Council, by a unanimous decision, to agree to

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<sup>46</sup> Memorandum submitted by Rt Hon Margaret Beckett, European Scrutiny Committee Inquiry into Preparation of European Council Conclusions and Conclusions of the Council of Ministers, “The Conclusions of the European Council and the Council of Ministers” 10<sup>th</sup> Report Session 2007–08, HC 86 at <http://www.parliament.the-stationery-office.com/pa/cm200708/cmselect/cmeuleg/86/86.pdf>

<sup>47</sup> *EUObserver* 12 December 2008 at <http://euobserver.com/9/27295/?rk=1>. Croatia has been a candidate state since 2004 and opened EU accession talks in 2005. In November the Commission said it could conclude accession negotiations if the remaining conditions are met.

<sup>48</sup> See *EUObserver* 18 December 2008 at <http://euobserver.com/9/27314/?rk=1>

ensure that each member state retains a Commissioner—and this, we stated, we would be prepared to agree to.<sup>49</sup>

In the following exchange Bill Cash asked the Prime Minister how he could “justify his endorsement of the deceitful bullying of the Irish people in these conclusions with his claim to be a democrat?” to which Gordon Brown replied:

The Irish brought to the EU concerns that they had expressed about the interpretation of the treaty and the treaty. We agreed that there would be an extra Commissioner, but that is within the power of the Lisbon treaty. We also agreed to reiterate what is important to us in Britain as well: the Lisbon treaty in no way affects the right of members on taxation decisions and in no way affects our defence policy. As we have a protocol on the charter of fundamental rights, it was right that the Irish be given assurances on that as well. That is what has happened. I would have thought that people in the House would support it.<sup>50</sup>

In the Lords, Lord Strathclyde questioned the agreement to retain one Commissioner per Member State:

Was not one purpose of the Lisbon treaty to slim the number of commissioners from one national of each member state? Can she confirm that the conclusions say that the EU will take legal action to ensure that the number will stay the same? The statement says that no legal change is required. If the text means what it says, Ireland has won concessions on tax policy, security and defence, education and social policy. However, the Prime Minister says that nothing has changed. Those statements cannot both be right. Perhaps the noble Baroness can explain.<sup>51</sup>

For the Government, Baroness Royall of Blaisdon replied:

Whether there will be another referendum—and I think that there will—is entirely a matter for the Irish. It is for them to decide. It is not for the other European member states to say that they must have a referendum; it is up to the Irish Government and, ultimately, the Irish people. The EU agreed a package of measures to offer Ireland the reassurance that it needs on the Lisbon treaty, and those reassurances cover taxation, defence, social issues and the size of the Commission. The Taoiseach is now content to go back to Ireland with those assurances. However, these measures do not change the Lisbon treaty, and the legal guarantees are in line with the red lines that we in the UK secured in negotiation on the treaty. We have always said that the EU must listen to the concerns of the Irish people, and that is exactly what is happening.

As for whether the number of Commissioners can be changed without reopening the treaty, yes it can. The Lisbon treaty provides for a reduction in the size of the Commission to two-thirds of the number of member states from

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<sup>49</sup> HC Deb 15 December 2008 c 815 at <http://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm081215/debtext/81215-0004.htm#0812153000142>

<sup>50</sup> c 829

<sup>51</sup> HL Deb 15 December 2008 c 663 at <http://www.publications.parliament.uk/pa/ld200809/ldhansrd/text/81215-0004.htm>

2014, but the same article allows the European Council by unanimity to vary the number of Commissioners. I believe that that is exactly what will be done.<sup>52</sup>

Richard Corbett, the UK MEP and Socialist Group spokesman on EU reform, commented:

First, the Irish government can claim a notable diplomatic victory. The summit agreed that, provided the Lisbon Treaty is successfully ratified, the Commission will again be composed of one member per Member State. [...]

All governments had agreed that the size of the European Commission should be cut down, as successive enlargements of the European Union turned the Commission from a compact executive into a miniature assembly, and several governments were reported as being reluctant to give up on this reform. This is a major coup for the Irish.

[...]

In the absence of a ratified treaty, the six month rotating presidency of the European Council will continue. The Czech presidency will take place, while the following presidency in the second half of 2009 will be responsible for making the arrangements of the new permanent presidency and the proposed External Action Service and Foreign Affairs Council.

Of course, this summit is not the end of the road for the treaty - the parliamentary ratification in the Czech Republic has been delayed until February next year, while a second Irish referendum campaign will be a challenge for a struggling Fianna Fail government.

More vigorous Yes campaign

Certainly, the "Yes" campaign will have to be far more vigorous and energetic in communicating the benefits of the treaty's reforms and speedily rebutting the myths and distortions that marked the "No" campaign led by Declan Ganley. But it is a continuation of the EU tradition that, when there is a divergence of opinion between countries, negotiation takes place and a compromise is sought.

This tradition began fifteen years ago, when Denmark rejected the Maastricht treaty. The Danes said to the rest of Europe that they didn't want to blow up the whole edifice, but would come back with proposals to find a way out.

Denmark identified four items in the Maastricht package that it didn't like; the other member states were able to meet its concerns and Denmark then approved the treaty by a comfortable majority in a new referendum. Ireland itself went through a similar process with the Treaty of Nice.

Similarly, on this occasion, Ireland would have been perfectly entitled not to reconsider.

In law, that would have been the end of the Lisbon treaty. But such an attitude would have dismayed Ireland's European partners.

In the EU, the give-and-take co-operation of all member countries is fundamental to the continued success of the EU. Had Ireland refused to seek a compromise it would have found itself losing some of goodwill and status it has always enjoyed across Europe.

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<sup>52</sup> HL Deb 15 December 2008 c 667 at <http://www.publications.parliament.uk/pa/ld200809/ldhansrd/text/81215-0005.htm>

Several months ago, I said that the issues raised by the "No" campaign needed to be given a respectful answer, that the Irish had to articulate a list of demands and their EU partners needed to listen.

I was not alone in saying this. Indeed, Mr Ganley said that the referendum result was "a mandate to the Irish government to seek a better deal". Any objective analysis of this summit shows that the Irish government has done just that.<sup>53</sup>

In his article in the *Irish Times* Pat Cox discussed the legal force of guarantees offered to the Irish electorate:

Protocols which carry the same force in law as articles in a treaty could offer legal guarantees but there is no precedent for adding these after the close of an intergovernmental conference and after almost all states have completed ratification. Political declarations agreed by all member states and annexed to the treaty could provide an alternative route to clarify issues and reassure Irish public opinion.

Declarations, however solemn their political intent, risk being dismissed as inadequate, so it is important to understand that options and precedents exist for legally guaranteeing such declarations. If we are going to have this debate again, better that we get our facts right at the outset and not fool ourselves before we talk of fooling the people.

Here the precedent of the Danish opt-outs from the Maastricht Treaty is instructive. The Edinburgh Agreement (1992) between Denmark and the then 11 other EC member states was lodged with the UN in New York. Formally speaking this was a text neither of the EU nor of the European Council but rather was agreed by the heads of state and government as the high contracting parties in law. It constitutes an international agreement and as such is justiciable in international law.

It is not merely a set of politically expedient, if solemn, expressions of intent. This or some such formula is likely to be the negotiating target of the Government.

An alternative could be a retrospective vote to legally recognise any new Irish-oriented declarations made in the coming months at an early future date, for example the next round of member state ratifications of an accession treaty for an acceding state such as Croatia.

By either of these means the process would seek to offer legally binding reassurances to the Irish electorate on a range of sensitive issues as a prelude to any future referendum.<sup>54</sup>

Tony Barber,<sup>55</sup> writing in the *Financial Times* Europe blog, was sceptical about incorporating the Irish concessions into the Croatian accession treaty:

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<sup>53</sup> *EUObserver* 12 December 2008 at <http://euobserver.com/9/27296/?rk=1>

<sup>54</sup> 12 December 2008 at <http://www.irishtimes.com/newspaper/opinion/2008/12/12/1228864714775.html?via=rel>

<sup>55</sup> Tony Barber has been the FT's Brussels bureau chief since September 2007.

[...] if the concessions to Ireland were wrapped into [Croatia's EU accession treaty](#) (Croatia is aiming to conclude its membership negotiations by the end of 2009), that may be no good, either.

That's because all other EU countries will have to approve Croatia's accession treaty, probably during 2010. If this document included extra language on concessions to Ireland, it would look as if the EU was trying to sneak changes to the Lisbon treaty through a back door.

In the UK, but possibly in other countries, too, cries would go up for a fresh look at the Lisbon treaty as a whole. And you can imagine the mayhem if all this were happening in mid-2010 and the fiercely anti-Lisbon Tories had by then replaced the ruling Labour party in the UK after winning an election. To the horror of the UK's EU partners, the [Tories might find a way to scupper the Lisbon treaty](#).<sup>56</sup>

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<sup>56</sup> [ft.com/brusselsblog](http://blogs.ft.com/brusselsblog/2008/12/is-it-sneaky-to-sneak-a-treaty-through-a-croatian-back-door/) 12 December 2008 at <http://blogs.ft.com/brusselsblog/2008/12/is-it-sneaky-to-sneak-a-treaty-through-a-croatian-back-door/>