

# The Irish “No” to the Lisbon Treaty: Ireland’s Voice and Europe’s Exit?

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*The “no” of the Irish electorate against the Treaty of Lisbon has hit the European elite hard. However, it was not directed against support for the EU as such but rather against a deliberately unintelligible Treaty. Lack of knowledge seems to have played a pivotal role in the voting behaviour, as those who know little about the content of the Treaty turned out to be more likely to vote “no” than those who had good knowledge about it. After some initial reluctance, the European Council adopted a “European solution” to the problem in December 2008, providing some concessions to the Irish concerns as articulated by the Irish government. This will now be worked out in the form of a legally binding protocol to the Treaty of Lisbon that will “piggy-back” on the next accession Treaty. In addition, Ireland succeeded in extracting the major concession from the European Council that each Member State would retain its “own” Commissioner, provided the Treaty of Lisbon enters into force.*

*Das Nein der irischen Wähler zum Vertrag von Lissabon hat die europäische Elite schwer getroffen. Es richtete sich jedoch nicht gegen die EU als solche, sondern gegen einen bewusst unverständlichen Vertrag. Fehlendes Wissen war offenbar ein ausschlaggebender Grund für das Abstimmungsverhalten, da Wähler mit geringen Kenntnissen über den Inhalt des Vertrages eher mit Nein stimmten als solche mit guten Kenntnissen. Nach anfänglichem Zögern verabschiedete der Europäische Rat im Dezember 2008 eine „euro-päische Lösung“, die den von der irischen Regierung vorgebrachten Bedenken entgegen-kam. Diese wird nun in ein rechtlich bindendes Protokoll zum Vertrag von Lissabon eingearbeitet, das in einem „Huckepack-Verfahren“ zusammen mit dem nächsten Bei-trittsvertrag ratifiziert werden soll. Zudem erhielt Irland insofern eine weitreichende Konzession, als im Fall des Inkrafttretens des Vertrages von Lissabon jeder Mitgliedstaat sein „eigenes“ Kommissionsmitglied stellen wird.*

## I. Introduction

One of the striking features of the initial responses to the Irish “no” to the Lisbon Treaty in June 2008 was the expression of incredulity that a 53% majority of the 53% voting electorate of a population of 4.4 million could single-handedly bring to a halt a process involving 27 countries with a combined population of almost

500 million.<sup>1</sup> This suggested undemocratic consequences for the whole of the European Union if the Lisbon Treaty could be halted by direct democracy in one rather small Member State. Europe's political leaders were quick to note the outcome and regret it and emphasise that ratification would nonetheless proceed. For example, in a joint statement of German Chancellor *Angela Merkel* and French President *Nicolas Sarkozy* it was stated that “the heads of state and government of all 27 member states have signed the Treaty of Lisbon, and in 18 member states the ratification has already been completed. We therefore expect that the other member states will continue with their domestic ratification processes.”<sup>2</sup> In other words, there was a widespread assumption that ratification of the Lisbon Treaty could and should proceed and that the “Irish problem” would have to be dealt with and solved by the Irish in their own national context. There were only two solutions: for the Irish to vote again or for an as yet undefined legal mechanism to bind Ireland to EU institutions if Ireland does not ratify the Treaty – the exit option.<sup>3</sup>

The facts of the matter were however a bit different to the wishful thinking by the political and policy-making elite: the Irish “no” was always a European problem, not just an Irish one. The rules of the game in terms of treaty amendment and ratification are quite clear and contradict at least the initial “political” responses. Thus, in accordance with Art. 48 TEU, no matter how many of the other Member States have actually ratified the Lisbon Treaty cannot enter into force if there is not complete unanimity among all existing 27 Member States. Article 48 TEU explicitly provides that “the amendments shall enter into force after being ratified by *all the Member States* in accordance with their respective constitutional requirements” (author’s emphasis). Furthermore, there is no provision made at the moment for amending Treaties to enter into force in a provisional manner. Ireland’s constitutional requirements mandated the holding of a referendum where there was an issue of transfer of sovereignty involved. The view was

- 1 It was actually stated this bluntly by the Italian President, *Giorgio Napolitano*, and Foreign Minister, *Franco Frattini*. See *La Repubblica* of 14.06. 2008 and 17.06. 2008; *Irish Times* of 14.06. 2008; *Agnew, P.:* Mixed Response from Political Elite to Irish Rejection of Treaty, in: *Irish Times* of 16.06. 2008. See further *Cahill, M.:* Ireland’s Constitutional Amendability and Europe’s Constitutional Ambition: the Lisbon Referendum in Context, in: *German Law Journal*, 9/10 (2008), 1191–1218, here 1191.
- 2 “EU Reform Treaty Thrown into Turmoil as Irish Reject Treaty”, *CNN* online of 13.06. 2008, <http://edition.cnn.com/2008/WORLD/europe/06/13/ireland.eu/index.html>.
- 3 “Sarkozy, Merkel, Pressuring Ireland to Accept EU Integration”, *The John Birch Society*, 26.06. 2008, <http://www.jbs.org/index.php/news-feed-archive/1877-sarkozy-merkel-pressuring-ireland-to-accept-eu-integration>.

taken that in the specific Irish constitutional context there was not the option of achieving ratification by means of parliamentary approval only – also not after the initial “no”. So there still was an *electorate* that had to be convinced of the substantive merits of the specific – and highly convoluted – provisions of the Lisbon Treaty. Ireland stands alone only in this respect – even if in early 2009 there are still several other Member States that have not completed ratification processes.<sup>4</sup> Moreover, a fact that often gets overlooked outside of Ireland, the hands of the Irish government are firmly tied in the manner in which it can organise any referendum campaign as well as the funds it can spend on getting it through. This is because of case law by the Irish Supreme Court interpreting the Irish Constitution in a highly restrictive fashion in this regard with the result that a systemic imbalance is built into the holding of a referendum in the Irish context<sup>5</sup> with well-known results in terms of new-style “political entrepreneurs” (see below).

Reality seems to have hit the European elite hard and they responded – ultimately – with serious intent. The European Council conclusions of 11 and 12 December 2008 make it very clear that the “Irish problem” requires a *European* solution – and that is precisely what has been devised with a measure of legal and institutional ingenuity. There were some “precedents” of course – both the Danish “decision” prior to the second Danish vote on the Maastricht Treaty and the Seville “declarations” prior to the second Irish vote on the Nice Treaty – but what is proposed to ensure a positive vote in Ireland second time around on the Lisbon Treaty actually goes further in legal terms and is in that sense unprecedented.

- 4 The Czech Republic and Poland also have yet to complete ratification of the Lisbon Treaty. Their respective presidents will only sign the relevant acts of parliament if the outcome of the Irish referendum is positive; see EU Observer of 21.01.2009, online at <http://euobserver.com/18/27446> and Irish Times of 08.01.2009, online at: <http://www.irishtimes.com/newspaper/world/2009/0108/1230936761694.html>. In addition, the German *Bundesverfassungsgericht* is examining whether the Lisbon Treaty is compatible with the *Grundgesetz*, with several judges reported to have expressed scepticism about the constitutional effects of further European integration. In addition they are examining whether Article 146 GG could enable the court to ask for a referendum in the German context because of a putative proposed change in the current constitutional order. See EU Observer, of 11.02.2009, online at <http://euobserver.com/9/27586/?rk=1>. See also the *Documentation* in this issue.
- 5 This has to do with a number of judgments of the Irish Supreme Court. See further, *Pech, L.*: National Report for Ireland: Preparing the EU for the Future? Necessary Revisions of Primary Law after the Non-Ratification of the Treaty Establishing a Constitution for Europe, 2008, online at SSRN: <http://ssrn.com/abstract=1123935>.

As a European lawyer and someone informed about the broader Irish context, I will explore first the more general questions of understanding what happened and why in the Irish context. What solutions did the Irish themselves discuss and agree to in the Irish constitutional and political context? And what (legally binding) European solutions were ultimately offered to Ireland: is this already clear or must we wait until the next European Council in June 2009 to see the precise shape and form the “legal guarantees” will take? Are there any more general messages that follow from the latest negative outcome of a referendum on further integration that Europe’s leaders anxious for “ever further and deeper” economic and political integration would do well to listen actively and responsively to?

## II. The Irish “Problem”

### 1. Different Responses

The nature of the initial reactions to the Irish “No” stands in sharp contrast to those some years earlier when both France and the Netherlands voted down the substantively very similar treaty to the Treaty of Lisbon – the Treaty establishing a Constitution for Europe. After the French and Dutch votes in 2005, there was an immediate sense of a Europe-wide crisis, one that involved the EU as a whole, for which the Union collectively would have to take responsibility and to which it would have to respond.<sup>6</sup> Within two weeks of the Dutch and French results a “period of reflection” was called for, which implied a period of time during which everyone – meaning *all Member States*, including those which had already ratified the Constitutional Treaty (hereafter: CT) as well as those which had not – would have to consider what would be the best way forward out of the impasse.<sup>7</sup> It is also true that France and the Netherlands and their respective populations were not, generally speaking, chastised in the media or by political commentators, and were not presented as having failed the EU or let down the other Member States.<sup>8</sup> On the contrary, it was generally recognised that the Union as a

6 See the Joint Statement of the President of the European Parliament, the President of the European Council, and the President of the European Commission on the results of the referendum in the Netherlands on the Treaty establishing a Constitution for Europe of 01.06. 2005, online at [http://www.deljpn.ec.europa.eu/home/news\\_en\\_newsobj1214.php](http://www.deljpn.ec.europa.eu/home/news_en_newsobj1214.php).

7 *European Council (Brussels, 16./17. 06. 2005): Presidency Conclusions, 10255/1/05 of 15.07. 2005.*

8 See further *De Burca, G.: The Lisbon Treaty No-Vote: An Irish Problem or a European Problem?, Paper presented to the UCD European Law Forum 2009, 23.01. 2009*, online at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1352498](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1352498).

whole had a problem on its hands and that a solution would have to be collectively devised.

What were the reasons for treating the Irish "no" to the Lisbon Treaty differently? Was it purely Ireland's size: after all an Irish "no" is not a French "no" (and the Dutch were coupled to the French in their rejection). Was Ireland peculiarly and distinctively "ungrateful" given the manner in which it is widely perceived to have benefited from membership of the EU? Or was it just the final straw given the extremely lengthy convention and treaty negotiation exercises over an eight-year time frame that had led to this point in the ratification process? After all the ultimate text of the Lisbon Treaty contains reforms which were first discussed and drafted during the early stages of the Convention on the Future of Europe, which then led to the CT. A substantial degree of political consensus at the highest level had eventually been won on many of quite novel reforms (such as reducing the number of commissioners, doing away with the three "pillar" structure and agreeing to accession to the European Convention on Human Rights). By the time of the Irish no-vote, these reforms had been officially discussed and negotiated at least three times, in the Convention on the Future of Europe, in the subsequent inter-governmental conference (IGC) as well as in the shorter and more secretive Lisbon IGC. For many political leaders who had struggled already to resuscitate the CT in the form of the Lisbon Treaty – and to disguise that this is what they were doing (especially in the Dutch context where this would amount to ignoring the first "no" and not allowing the people to vote again second time around on what some might regard as a stratagem) this was a bitter pill indeed from the only Member State to hold a referendum.<sup>9</sup>

Referendums are of course unpredictable and many would argue unsuitable ways of ratifying complex international treaties – this is *a fortiori* the case with regard to the Lisbon Treaty where the alleged unintelligibility was of major benefit to the "no" side. At the same time the holding of referendums are expressions of direct democracy and thus confer accentuated democratic legitimacy on the ratification and acceptance processes, if successful. The public debate inherent in such processes may in addition have therapeutic effects in the longer term for the political system as a whole. Be that as it may, there may quite simply be no way round holding them in certain Member States, as a matter of national constitutional law. This was not the case in either France or the Netherlands – referendums could and were avoided second time round; it was however the case for

9 See *ibid.*

Ireland, there was no serious possibility to replace what had been perceived as the compulsory referendum result with a parliamentary ratification.

## 2. Different Attitudes to Referendums

To understand what happened with the Lisbon referendum one has to understand the attitudinal background against which a referendum traditionally takes place in Ireland. If we look at the first Nice referendum, two thirds of the electorate abstained from voting. The “no” side won the first Nice referendum because of the huge rate of abstention. Yet overall the proportion of people voting “no” actually went down between the Amsterdam and Nice referenda.<sup>10</sup>

This is not what happened with regard to the Lisbon Treaty.<sup>11</sup> Turnout went up a fraction and only 47 % of the electorate abstained. This was a considerably lower abstention rate than in the first Nice referendum in Ireland. It was precisely the big increase in the “no” vote – it went up 10 percentage points compared to the previous referendum – that differentiates the Lisbon referendum from other referenda. Prior to this from Maastricht to the second Nice referendum there was little movement in the “no” vote. This turned out not to be a stable situation and one that was successfully exploited by a very focussed, articulate “no” campaign that managed to set the agenda also in terms of substantive issues under public discussion.

A detailed survey was carried out in the Irish context in 2008 to try to find out *why* there was such a significant increase in the number of those voting “no”.<sup>12</sup> The results were quite informative. The top line is recognition that the country has benefited considerably from membership. Support for membership is probably about 50 % – that is quite high also in comparative terms as results from various *Eurobarometer* surveys. Conventional wisdom suggests that Irish people tend to be very positive about the EU.<sup>13</sup> This is of course not the same thing as

10 This draws on evidence given by *Richard Sinnott*, a leading expert on electoral behaviour also in the EU context, to the *Oireachtas Joint Committee on European Affairs*: Ireland’s future in the European Union: Challenges, Issues and Options, November 2008, online at <http://debates.oireachtas.ie/DDebate.aspx?F=CNJ20081125.xml&Node=H2#H2>.

11 See further *Milward Brown IMS*: Post Lisbon Treaty Referendum Research Findings, 2008, online at [http://www.dfa.ie/uploads/documents/Publications/Post%20Lisbon%20Treaty%20Referendum%20Research%20Findings/post%20lisbon%20treaty%20referendum%20research%20findings\\_sept08.pdf](http://www.dfa.ie/uploads/documents/Publications/Post%20Lisbon%20Treaty%20Referendum%20Research%20Findings/post%20lisbon%20treaty%20referendum%20research%20findings_sept08.pdf).

12 See *ibid.*

13 See however, *Kennedy, F./Sinnott, R.*: Irish Public Opinion toward European Integration, in: *Irish Political Studies*, 22/1 (2007), 61–80, who suggest that the reality of Irish opinion is in any event more nuanced.

saying the government will win a referendum process on a specific treaty. The same thing happened in the Netherlands: there is a high level of support for membership of the EU; yet the referendum on the Constitutional Treaty was not successful. The "no" vote in Ireland on the Lisbon Treaty was not a "no" vote to further European integration. This is a very crucial finding.

Why did those who abstained abstain? Why did people vote "no"? Probably the overwhelming reason was *lack of knowledge* of what it was about. There seems to be a clear link between knowledge of the EU and positive attitudes to it. In the Irish survey of those with little knowledge 58 % were likely to believe their country's membership of Europe was a good thing compared to 81 % of those who had very good knowledge. For example up to 65 % believed the loss of an Irish Commissioner for five out of every 15 years was part of the treaty. At the other end of the scale 33 % believed conscription to a European army was part of the treaty. Among those who said the treaty involved an end to control over abortion policy 67 % voted "no" while among those who said it did not 64 % voted yes.<sup>14</sup>

What emerges in the analysis done thus far is indeed the crucial role of knowledge in the whole process – not just that knowledge was important but that it had a large bearing on whether people turned out to vote and also how they voted. It seemed that in the Irish Lisbon referendum that knowledge – and its lack – played a bigger role than in previous referenda. The degree of knowledge was linked to the nature of the campaigns on both sides. These campaigns, and in particular the highly successful and vocal "no" campaign (and its exploitation by a new-style "political entrepreneur"), created perceptions and misperceptions regarding what was in the treaty and what the referendum was about. Moreover, such campaigns contributed to the imbalance between reliable and unreliable information and the degree to which unreliable information took hold among a segment of the population, leading ultimately to the 10 % increase in the "no" vote.

With the Lisbon Treaty, at least part of the responsibility for an ill-informed and confused electorate lies with the EU itself. It is well known that the Treaty was deliberately drafted in a technical, legalistic and inaccessible manner, as part of the effort to distinguish it from the CT.<sup>15</sup> The idea was that if it was unreadable,

14 See for details *Milward Brown IMS*, op. cit., note 9.

15 Cf. also *De Burca, G.*, op. cit.

it was not constitutional and so calls for other referendums could be avoided (for example, in the Netherlands).<sup>16</sup> The shift from the constitutional aspirations of the CT to the substantively similar text of the Lisbon Treaty has been aptly described as a move from “fetish to farce”.<sup>17</sup> Moreover, it was not only the “average voter” that was ill-informed. The Irish prime minister admitted that he had not read the Lisbon Treaty and Ireland’s EU Commissioner, *Charlie McCreevy*, added that “no sane person would”. Not only the average voter but also the average member of a national parliament would find that parts of the text are difficult to understand. Even in national elections it is *rational* for the average voter *not* to become fully knowledgeable about public affairs.<sup>18</sup>

The fact is that this time round the “sleeping giant” of a European Union already ripe for “politicisation”<sup>19</sup> was prodded into at least partially wakening up. It had always been only a matter of time before “policy entrepreneurs” seized the opportunity to differentiate themselves from other political parties in EU terms. *Declan Ganley*, the Director of *Libertas*,<sup>20</sup> one of the main elements in the success of the Irish “no” campaign, fits the category of a political entrepreneur who seized the opportunity to differentiate himself and his movement (perhaps soon to be a European-wide party) from other political parties in specifically EU terms. And he did so successfully in a context where the political and economic establishment very largely supported treaty ratification. He could differentiate the “no” campaign rather easily and rather substantively from the “yes” campaign and with its “largely one-dimensional approach based on the conviction that ratification of the Treaty was in Ireland’s best interest”<sup>21</sup>. *Libertas* was able to position itself sufficiently in substantive terms to be able to launch a pan-European campaign for the 2009 European Parliament election; indeed it now

16 See for example the comments by *Giuliano Amato*, cited by *De Burca*, G., op. cit.

17 See, *Weiler*, J.: A Rapid Snapshot of Constitution and Constitutionalism in the EU: Between Farce and Fetish, Temple Law School Symposium on Ruling the World, Constitutionalism, International Law and Global Governance, December 2007.

18 See further, on this point, *Majone*, G.: The “Referendum Threat”, the Rationally Ignorant Voter and the Political Culture of the EU, Paper presented at the Twelfth Annual Conference of the Irish European Law Forum, Responses to the Lisbon Referendum: EU and National Perspectives, Dublin, 23.01. 2009, online soon at <http://www.ssrn.com/link/UC-Dublin-LEG.html>.

19 See, *van der Eijk*, C./*Franklin*, M. N.: Potential for Contestation on European Matters at National Elections in Europe, in: *Marks*, G./*Steenbergen*, M. R. (eds.): European Integration and Political Conflict, Cambridge, 2004, 33–50.

20 See further <http://www.libertas.eu/>.

21 *Institute of International and European Affairs*: Ireland’s Future after Lisbon. Issues, Options, Implications, Dublin, 2008, online at <http://www.iiea.com/files/Lisbon.pdf>, para. XXI.

proclaims itself holier than the Pope, claiming that its mission is to "bring more democracy, accountability and transparency to European governance"<sup>22</sup>.

### 3. Differences on Substantive Issues

The "no" campaign raised a wide range of substantive issues – almost 30 headings were covered in a detailed analysis carried out as to what they were.<sup>23</sup> They ranged from taxation to neutrality, conscription and abortion – and a lot more in between. However it is possible to group them into two broad categories – those related to Irish "sovereignty" and those touching on Irish identity. The first category covers concerns relating to the alleged creation of a federal "super state"; the danger of Ireland losing influence in a much larger Union; over-regulation and interference from Brussels; the loss of a permanent seat in the Commission; the scope and calculation of qualified majority voting; the perception of a self-amending Treaty; changes in the Council Presidency; the new position of High Representative for Foreign and Security Policy, the roles of the European and national parliaments and finally threats to Ireland's corporation tax regime. With the exception of the last reason relating to Ireland's very favourable corporation tax regime, all the other reasons can be considered not Ireland specific and of potential relevance and concern in other countries as well.

On the other hand, a much more inward focussed set of concerns relate to the so called protection of the "Irish identity" with the list including matters such as opposition to abortion and same sex marriage; concerns about the implications of the incorporation of the Charter of Fundamental Rights on the values inherent in the Irish Constitution; the policy neutrality and concerns about workers rights. Of these the latter and the point relating to the Charter of Fundamental Rights reflect concerns that have been raised in other jurisdictions.

One of the major issues confronting initially the Irish government was to isolate the specific substantive issues that were regarded as particularly salient in the Irish electoral context and then to decide on what legal and institutional form guarantees of a sufficient level would be sought. In substantive terms a distinction was made between those guarantees to be given to the Irish electorate as to

22 *Libertas* initially won formal status as a European political party only to see the decision rescinded a few hours later when serious questions began to be raised about the legitimacy of its political backers: see further *Smyth, J.*: Contradictions in *Libertas* stance may prove its undoing, in: *Irish Times*, 10.02. 2009.

23 *Institute of International and European Affairs*, op. cit.

effect the substantive provisions of the Treaty of Lisbon would have on Ireland/Irish legal and political context that would not involve any modification of the Lisbon Treaty provisions themselves and those measures that would involve implementation in some fashion – and across the board for all Member States – of general provisions of the Treaty of Lisbon itself (see further below).

### III. The European “Solution”

#### 1. A Precedent: the Danish “Decision”

In terms of “special arrangements” being made for a Member State that has not managed to secure ratification in a referendum process, so that a second referendum can be held, the salient precedent is that of Denmark in relation to the Maastricht Treaty. There are however two not insignificant differences between the position of Denmark in the aftermath of the negative referendum vote in 1992 and the position that Ireland now finds itself in, 17 years later. The first difference relates to the reasons why the different electorates said “no”. The second relates to the legal-institutional arrangements that had already been made in the disputed Treaty itself regarding a “special position” for the country in question (the Treaty of Maastricht for Denmark; the Treaty of Lisbon for Ireland).

In terms of the reasons why the Danish voted down the Maastricht Treaty first time round the subsequent surveys were relatively unequivocal. The politically uncomfortable fact was that the vote by the Danish electorate was a genuine vote against the expansion of the EC (at that time) into foreign and defence policy and against the idea of the “European Union” as such. This is different to the evidence that is now emerging in Ireland, also on the basis of surveys: the negative vote is not capable of straightforward equation of a vote “against” the EU as such – or even its further “deepening” in certain specific respects – but rather relates very substantially to a lack of knowledge on the part of the electorate as well as to the actual content of the provisions of the Lisbon Treaty.

In terms of the legal and institutional arrangements already secured by the individual Member State during the negotiation processes of the Treaty itself, there are differences that proved of significance in terms of the preferred way forward. Denmark, at the time the Maastricht Treaty was negotiated, secured the inclusion of a number of specific protocols (relating in particular to participation in the Euro zone and giving Denmark specifically an exemption upon notification that it did not wish to participate in the third stage of EMU) already in the Treaty of

Maastricht itself. This meant that it was relatively easy to put together a “package” of measures that included what can be termed “interpretative declarations” in a form that seemed legally binding on all the Member States but did not (seem to) require separate ratification by other Member States (see further discussion on the “Danish decision” below).

The Danish precedent amounts in substance to a *subsequent agreement* between the parties to a treaty (the Maastricht Treaty) regarding the interpretation of the application of the provisions of the Treaty. This was termed a “decision” of the Heads of State and Government meeting within the European Council and was considered in large part the “solution” to the “Danish problem” after the negative outcome of the first Danish referendum on ratification of the Maastricht Treaty.<sup>24</sup> This “framework decision” was included in the conclusions of the European Council summit meeting in Edinburgh and was subsequently published in the Official Journal of the EC.<sup>25</sup> Moreover, the Presidency at the time (the UK government) deposited the decision (as an international agreement/“treaty”) with the Secretary General of the United Nations. An interpretative “agreement” may be deposited as such with the Secretary General of the United Nations (as happened in the case of the Danish decision). In general the interpretation given and clearly accepted by all Member States will be considered binding as a matter of general international law if the wording used clearly indicates the intention to create legally binding effects. To remove any doubt on this point, the terms of this decision were in any event subsequently included in a Protocol to the Treaty on European Union as amended in the Amsterdam Treaty and so form part of primary European law.

The declarations that were included in the Edinburgh summit conclusions (post-Maastricht) are of two kinds: “declarations” by the Member States as whole and “unilateral” declarations by Denmark alone. The “declarations” of the European Council as such are “interpretative” in nature and simply reiterate what it stated already in the provisions of the Maastricht Treaty and “takes note” of the unilateral decisions of Denmark (e.g. regarding the exercise by Denmark of its Presidency in cases involving defence implications). Interpretative declarations enable a state to seek to adjust the way in which a treaty will apply to it. The purpose is often to establish an interpretation of the treaty that is consistent with the domes-

24 See further Schuster, G.: Der Sonderstatus Dänemarks im Vertrag über die Europäische Union, in: Zeitschrift für Europäisches Wirtschaftsrecht, 4/6 (1993), 177–180.

25 See European Council (Edinburgh, 11./12. 12. 1992): Presidency Conclusions, SN 456/92.

tic law of the state concerned. Interpretative declarations will normally under public international law become “an element in the interpretation of a treaty”<sup>26</sup>. They may be taken into account but are not “binding” as such in the interpretation given. This is also in effect the scope of the Irish declarations included in the Seville European Council conclusions.

The unilateral “declarations” by Denmark were of a different nature. They were unilateral statements “to be associated to the Danish Act of ratification of the Treaty on European Union and of which the 11 other Member States will take cognizance”. They too clarify what is said in the provisions of the Maastricht Treaty (EU citizenship) and also state what will happen in the event of certain eventualities provided for in the Treaty of Maastricht in the Danish constitutional context (e.g. in the case of a further expansion of the citizenship provisions or Justice and Home Affairs a supermajority of the Danish members of parliament or also with a majority of voters in a referendum). The right to make unilateral declarations to treaties is not challenged. The unilateral declarations by Denmark inform the other contracting parties as to how the declarant state will implement the treaty as a matter of national constitutional law. As such they pose no problem. They do not constitute a “reservation” as defined in Article 2 (1) d) of the Vienna Convention on the Law of Treaties, as they do not purport to “exclude or to modify the legal effect of certain provisions of the treaty in their application to that state”.

The legally ingenious element of the Edinburgh solution lies in the fact that it very largely constituted a window-dressing exercise that even in terms of Denmark’s rights and obligations did not alter the legal position as laid down in the Treaty of Maastricht itself (and in particular the special protocols already contained on the special position of Denmark). The subsequent “decision” and associated penumbra of “declarations” merely drew out certain implications, informed the partners of certain facts (already possible under the Maastricht Treaty) and clarified certain ambiguities. The unilateral “declarations” by Denmark itself contained its own commitments *vis-à-vis* its own constitutional system as to how it would proceed in certain circumstances.<sup>27</sup>

26 See *Aust, A.:* Modern Treaty Law and Practice, 2<sup>nd</sup> ed., Cambridge, 2007, 127.

27 For an analysis of the Danish decision see, *Curtin, D./van Ooik, R.:* Denmark and the Edinburgh Summit: Maastricht without Tears: A Legal Analysis, in: O’Keeffe, D./Twomey, P. (eds.): Legal Issues of the Maastricht Treaty, London, 1994, 349–366.

This is in legal terms a different route to what is now proposed for Ireland – an amending protocol to the Lisbon Treaty to be included in a convenient accession treaty.

## 2. Adding a Protocol to Lisbon

There are two leading contenders in terms of labelling for the treaty/simplified international agreement that will be agreed to by the Member States (inevitably by June 2009, although national ratification procedures will certainly take a lot longer). The first is a specific protocol to be added either to the Treaty of Lisbon or to some future accession treaty (Croatia, or if too convoluted, Iceland potentially). The second alternative would be a “decision” of the Member States “acting in the framework of the European Council” (along the lines of the Danish precedent). It is still not completely clear which options will be preferred although the indications so far are that there will be a specific protocol to an as yet undetermined Treaty.

At the end of the day the choice of a specific legal instrument (a protocol or “decision of the representatives of the Member States within the European Council”) depends on the substance of the “special position” Ireland wishes to obtain from the other Member States. If the substance involves an amendment to the Treaty in one form or another (e.g. with regard to the number of Commissioners, in another way than what is specifically envisaged in the terms of the Lisbon Treaty itself), then a revision treaty or protocol (and national ratification) is necessary. If Ireland seeks to clarify as part of the interpretative context what is in the Lisbon Treaty and what the implications are in terms of application in Ireland, then a “subsequent agreement” as per Article 31 of the Vienna Convention on the Law of the Treaties (hereafter: VCLT) may be sufficient. If the latter route is followed an argument can be made that no national ratification is required, as it does not constitute as such an *amendment* of the existing Treaties. The “Danish decision” in these circumstances can be considered a relevant precedent in terms of EU institutional practice.

Some stand-alone treaties have been called protocols, nowadays the name “protocol” is generally used for supplementary treaties or amending treaties.<sup>28</sup> It is also used in the context of EU treaty practice for specific provisions that are annexed to a treaty and are an integral part of it also in terms of legal effects.

28 See *Aust, A.*, op. cit., 94.

There is no precedent at the level of EU practice that entails adding a Protocol to a Treaty that has been signed but not yet ratified by all the Member States. There is nothing however as a matter of public international law to prevent the Member States from adopting a subsequent Treaty or Protocol (that will on adoption become an integral part of the EU Treaty) amending the terms of the earlier Treaty (even only with regard to Ireland – or more generally).

Article 48 TEU provides that the Treaty will only enter into force after all Member States (contracting states) have expressed their “consent to be bound” by virtue of their national constitutional provisions. In other words, national ratification in one form or another (parliamentary process with normal or “super” majorities or referendums) is required. Given that *protocols* are considered an “integral part” of the original treaty it seems that they too are bound by the provisions of Article 48 to obtain national ratification as well as the agreement at the international level, if the protocols are added subsequent to the signing of the treaty as such.

The clever point about the European solution for Ireland (as agreed in the December 2008 European Council conclusions) is that there will not be a *separate* ratification process for the Irish protocol but rather the Irish protocol will piggy-back on whatever accession treaty is most timely (Croatia or Iceland) and moreover (with the exception of Slovenia for Croatia as it now appears) will in all likelihood not require ratification other than by parliamentary procedure. This could have been different if it had been agreed to have new ratification procedures for the Irish protocol to the Lisbon Treaty on its own; then the risk that other Member States would want to lift the lid on the “Pandora’s Box” of other Member State specific demands would have been greatly increased and politically arguably more difficult to resist.

### 3. Ireland’s “Roadmap” of “Legal Guarantees”

What legal and institutional form will the “legal guarantees” take that have been promised to Ireland in order to commit itself to holding a second referendum by a specific date? It is obviously difficult at this (early) stage to give an authoritative analysis of the scope and legal effect of the precise legal guarantees as the final texts do not yet exist and much will depend on the specific wording used. In this sense the “decision” of the European Council comparable to that of Denmark (prior to its second referendum on the Treaty of Maastricht) is not yet there which makes a legal analysis difficult. The Irish need *legally binding* guarantees

about which there could be no doubt in the subsequent referendum campaign. Having gone through this exercise then it seems that the Irish will get a legally binding protocol in which the three points spelt out in paragraph 3 of the European Council conclusions will be explicitly and expressly shaped in a manner that is intended to have legally binding effect. Once this result is achieved then the need for a national ratification process – at some point and in some institutional form – becomes salient.

The roadmap laid out in the European Council conclusions of December 2008 is thin on the details and precise wording. The Irish Government has basically confirmed that a second referendum will be held but would only decide on a specific date (strongly predicted to be in the first half of October 2009) when “certain conditions were finalised to their satisfaction”<sup>29</sup>. In other words, the agreed roadmap is that the “legal guarantees” will be worked out in full and very explicitly and agreed at (or before) the next European Council meeting in June 2009. Then the Irish government will be able to include these “legal guarantees” alongside the text of the Treaty of Lisbon itself and put the entire package again before the Irish voters in autumn 2009. It was very important for the Irish government to have been seen to “extract” genuine concessions from its European partners at European level and in a legally binding form. The latter point in particular was perceived within the Irish government of critical importance and indeed all the facts point to its success in this regard.

Annex 1 to the Presidency Conclusions of the European Council meeting of 11 and 12 December in Brussels contains a “statement of the concerns of the Irish people on the Treaty of Lisbon as set out by the *Taoiseach*”. These include reference to Ireland’s traditional policy of neutrality, concerns on Union competence on taxation and ensuring that “the terms of the Treaty of Lisbon will not affect the continued application of the provisions of the Irish Constitution in relation to the right to life, education and the family”. With regard to these three specific concerns paragraph 3 of the presidency conclusions states that the “necessary legal guarantees” will be given.

The guarantee with regard to taxation is the most general: it will be guaranteed in a legally binding fashion that “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 competence in relation to taxation”. This was a point of some considerable con-

29 See RTE News of 12.12.2008, online at <http://www.rte.ie/news/2008/1212/eulisbon.html>.

troversy during the referendum campaign with the “no” campaign making sustained and detailed allegations that implementation of the Treaty of Lisbon could ultimately lead to the dismantling of Irelands favourable corporation tax rate – a point that the “yes” side had been unable to rebut sufficiently authoritatively or convincingly.<sup>30</sup>

With regard to the second “legal guarantee” that Irelands traditional policy of neutrality would not be affected, nor its – and most other Member States’ – security and defence policy prejudiced. Finally, and this may prove the most complex in legal terms – and may also result *de facto* in an amendment to the Treaty of Lisbon, Ireland would receive a “legal” 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”. This seems to be a rather broad guarantee that might in certain circumstances be considered almost as coming close to constituting an “opt-out”, at the very least it may, depending on the precise wording used, constitute an amendment of the existing legal situation as opposed to a mere “interpretation”.

Finally, one of the most remarkable paragraphs of the European Council conclusions concerns the composition of the Commission. As a small Member State, this issue did play a role in the referendum campaign and it was stressed in particular by the “no” campaign how disadvantageous it was for a small Member State to lose its voice within the Commission periodically for a number of years. This was a core part of the negotiation compromise ultimately reached in the Lisbon Treaty in the interests of a more efficient Commission in the light of enlargement.

The European Council in its conclusions agrees “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”. In other words, the Irish succeeded in negotiating with all the other Member States in advance of the Treaty entering into force an agreement that, provided the Treaty of Lisbon enters into force, the number of Commissioners will not be reduced as in accordance with the explicit provisions of the Treaty. However this could arguably be seen not as an amendment as such of the Lisbon Treaty but as an

<sup>30</sup> This point was subsequently authoritatively rebutted in *Institute of International and European Affairs*, op. cit.; and *Oireachtas Joint Committee on European Affairs*, op.cit.

"activation" of a possibility already explicitly present in the text of Article 244 of the Lisbon Treaty, albeit operationalised pre-emptively and in an arguably binding fashion in advance of the Treaty entering into force.<sup>31</sup>

This goes far in legal terms, further than the Danish "decision" and the Seville "declarations". Rather, it also included a commitment to change back the rules on the composition of the Commission to what they would have been even before the Treaty of Nice: one national from each Member State. For small Member States in particular this can be considered a victory that removes some concerns about a lack of influence in the Commission where crucial decisions are (seen to be) taken. In this sense the commitments made to Ireland in the European Council meeting and conclusions of 11 and 12 December 2008 can be seen to go well beyond particular concerns of individual Member States in terms of national ratification processes and amount in a sense to a pre-emptive renegotiation in advance of the Treaty of Lisbon entering into force, albeit along the lines of what is explicitly permitted in the Treaty itself.

It seems likely that in addition in the next European Council conclusions (June 2009) declarations will also be included on the high importance attached to *other issues* listed in Annex 1 of the European Council conclusions of December 2008 – these include in any event the "high importance" attached to workers rights, public services, the responsibility of Member States for the delivery of education and health services and national discretion in non-economic services of general interest. These will have to constitute declarations by the European Council as a whole (all Member States) as Ireland alone is not able to "confirm" the high importance that the Union as such attaches to these matters. It seems unlikely that there will be "unilateral" declarations by Ireland on the model of the Danish ones as the Irish have now negotiated a stronger deal: these issues will in principle be included in the legally binding protocol to the Lisbon Treaty (to be ratified in due course).

So the Irish, despite all the initial appearances to the contrary, scored some strategic concessions from their partners, going beyond purely legal and institutional "window-dressing". Yet at the same time the spectre of a separate national ratifi-

31 Article 1.18 of the Lisbon Treaty provides that "as and from 1 November 2014, the Commission shall consist of a number of members [...] corresponding to two-thirds of the number of Member States, *unless the European Council, acting unanimously, decides to alter this number*" (author's emphasis). The current provision that applies if the Treaty of Lisbon does not enter into force is Article 213 (1) EC, as amended by the Nice Treaty, provides categorically that "the number of Members of the Commission shall be less than the number of Member States."

cation process dealing with the Irish “demands” was cleverly circumvented, at least in anticipation of the eventual adoption of at least one other accession treaty in the short to medium term. This was to avoid what the other Member States found unacceptable – the re-opening of the ratification of the Lisbon Treaty itself. And at the same time the European Council had kept some “stick” that could be used if necessary. It is explicitly stated in the December conclusions that in the event that the Treaty of Lisbon does not enter into force (i.e., that a second Irish referendum is not successful) then the Irish will *de facto* definitively lose their Commissioner (because then the mandatory rules of the Treaty of Nice will continue to apply and no pre-emptive decision to the contrary will be taken). In other words only by ratifying the Treaty of Lisbon can the Irish (and all the other Member States) keep a Commissioner of their own nationality indefinitely.

#### IV. Ireland's Voice and Europe's Exit?

The initial EU response reflected not only political opportunism but also wishful thinking, driven by a sense that eight years down the road from the start up of the Constitutional Convention Ireland would just have to toe the line ultimately. If not it could leave the EU as such in one way or another. Alternatively all the other Member States could “exit” and leave Ireland behind with an “empty shell” of institutions, as was suggested in the past with regard to Denmark. A more moderate approach entails including a clause in future treaties that for example if a Member State rejects the amendments and no accommodation can be found, the Member State will be obliged to join the EEA and leave the Union.<sup>32</sup>

This peculiar political culture of the EU includes the strategy of the *fait accompli*, the accomplished fact that makes opposition and public debate useless.<sup>33</sup> The Lisbon Treaty was the accomplished fact that could eventually be tinkered with at the extreme fringes (in terms of declarations and perhaps an Irish protocol) but after that was achieved the Irish electorate had to knuckle down and accept it. There was no room for real political opposition nor radical renewal or change.

32 See, for example, *Editorial*: The Second Second Irish Referendum: Finally a Fair Choice, in: Legal Issues of European Integration, 36/2 (2009), forthcoming. Of course even “softer” options also exist, for example, that explicit provisions be made in the future that treaties can enter into force provisionally once a certain threshold has been reached in terms of numbers of ratifications. This concept of “provisional application” is already in practice for certain types of treaties, also in the EU context.

33 See further *Majone, G.*, op. cit.

One should moreover not lose sight of the bigger picture just by focusing on the "problems" of one individual Member State and their (partially) "European" solution. The concerns voiced in Ireland and even the manner in which the referendum campaign was conducted and the internal political responses (including the rise of "new-style" political entrepreneurs seeking explicit politicisation of the issues at stake) reflect more general problems with ongoing processes of European integration. In particular they give substance to the fear that if no political opposition is possible *within* the EU as such then the risk is that the opposition becomes *to* the EU – especially in a context where the electorate is given a direct voice. This is what happened not only in Ireland but also in France and the Netherlands and probably would happen in many other Member States if the citizenry were to be given a direct voice over further processes of European integration. The question is how long can the political elite ignore the fact that the era of the permissive consensus is well and truly over and that a new era of a more politicised European Union has begun (with still a long way to evolve)? How long can they seek to respond to a recalcitrant electorate with a cry to "throw them out" (in a parody of the normal democratic procedure)?

There is clearly growing opposition to Europe in terms of public opinion, evidenced both in the previous three referendum results (Ireland, France and the Netherlands) as well as the July 2005 referendum in the traditionally pro-European Luxembourg, where so many EU institutions are located, when of the 90 % of the electorate voting only a surprisingly muted 57 % were in favour.<sup>34</sup> What happened in Ireland, whether we like it or not, was that voice was given to the political opposition in terms of political entrepreneurs outside of the established political parties (who were virtually all – with minor exceptions – in favour of the Lisbon Treaty). For too many citizens, the results of European policy have remained largely invisible. They feel inadequately represented and may have major doubts about the way in which "Europe" renders account for its policy choices.<sup>35</sup> Once political opposition cannot be organised in the EU since votes cannot be appealed for against a government in elections or in parliament, the risk is indeed that opposition becomes to the EU as such.<sup>36</sup>

34 Survey evidence tells the same story. See further *Mair, P.*, op. cit.

35 See too in the Dutch context the *Scientific Council for Government Policy: Rediscovering Europe in the Netherlands*, Amsterdam, 2007, online at <http://www.wrr.nl/english/dsc?c=getobject&s=obj&!sessionid=1cnlb9oWM9x@GwuyBPegM35YuUCWRZ1zySvofxauyo3150uVxzYXp1K38HdWziQW&objectid=4265&!dsname=default&isapidir=/gvisapi/>.

36 See *Mair, P.*, op. cit.

What is in any event needed is a better embedding of European decision-making in the *national* political – and constitutional – process. Making European issues more political in a national context could contribute significantly to the much-required further politicisation of European issues in general. In my view, this is the next – and crucial – stage of the European integration process. Here too the proposed adaptation of the national parliamentary scrutiny procedures to make them more rigorous and more focussed in the Irish political and constitutional context can also be considered as a necessary way forward in order to ensure better symbiosis between European decisions and national responsibilities.<sup>37</sup> What is needed at all levels is more voice and more of a listening ear by national and EU executives, not behaviour and off-the-cuff responses more suited to a Machiavellian Prince in a different epoch.

<sup>37</sup> See the recommendations made in *Oireachtas Joint Committee on European Affairs*, op. cit. See in general, Barrett, G.: *Oireachtas Control over Government Activity at European Union Level: Reflections on the Historical Context and the Legal Framework*, in: id. (ed.): *National Parliaments and the European Union – The Constitutional Challenge for the Oireachtas and Other Member State Legislatures*, Dublin, 2007, 145–178.