

The Future of the European Constitutional Evolution

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Europe and the world have changed. The 21st century brings new challenges and new opportunities. The interaction of economies and peoples worldwide – whether by communication, trade, migration, shared security, concerns or cultural exchange – is in constant evolution.

European Union needs a unitary and coherent action in many fields (energy security, foreign policy, fight against terrorism and drugs, climate change, etc).

The Treaty of Lisbon must fulfill these goals.

In the last two years, much less attention has been given to the practical implementation of new institutional proposals included in the Treaty of Lisbon. Even a cursory examination indicates that the implementation of some of these proposals is likely to be uneasy, and in some cases could be a source of future problems or difficulties.

Many voices said that there are only cosmetic differences between the former European Constitution and the Treaty of Lisbon.

The European political context has changed after the recent elections for the European Parliament.

The Treaty of Lisbon's failure will have negative effects for the future of European continent.

The aim of this paper is to highlight, and to clarify potential problems.

Key words: Treaty of Lisbon, European Union, European Constitution, referendum, institutions

JEL classification: K 1, K 19

I. Main New Aspects (Changes)

The Reform Treaty of the European Union, which will replace the Constitutional Treaty, has been approved in the Lisbon summit and signed by the state and government chiefs on December 13th 2007.

The Lisbon Treaty comes with a few reforming elements for the European institutions. The European Union gets *unique legal personality* and has representation capacity for all its 27 members. After this treaty, the competencies of the European Parliament will extend.

The treaty, conceived to be ratified without needing to organize a referendum, retains many of the new elements which figured in the European Constitution. However, it avoids the word “Constitution” and suppresses everything which appears to grant the European Union the prerogatives of a federal structure (anthem and flag, especially). Ireland is the only country which will organize a popular consultancy regarding this text.

The public opinion of the member states appeared skeptic regarding the legitimacy of the decisions of the European Union in the last years, especially in the context of the blockage of the constitutional process. By introducing the population criteria in the voting system, most probably an increase of the legitimacy of the decisions of the European Union regarding the European citizens will be obtained. Also, one million of signatures from the citizens of the member states may determine the European Commission to initiate a legislative project which the signatories consider necessary.

In the field of the foreign policy of the European Union, the new treaty advances in creating commune strategies. The European leaders drew the attention many times over the fact that the European Union does not have a common voice in the world and over the negative effect over the credibility of the European Union, which results from the lack of certain positions and actions coordinated in the field. The function of high official for security problems will be created and European common policies for defense and security will be created,

which settle the means of help between the member states in case of aggression, calamities, etc.

The new treaty introduces the function of President of the European Union, with a mandate of two years and a half, which may be renewed only once.

The objectives of the European Union are defined in very general terms (social market economy, fighting against social exclusion and discrimination, social justice, solidarity between generations, territorial cohesion, promoting the technical and scientific progress, respecting the cultural and linguistic diversity, saving and developing the cultural patrimony, the protection of the citizens of the European Union, durable development, solidarity between people, free and equitable commerce, eliminating poverty and protecting human rights).

A procedure of **voluntary retreat from the European Union** (art. 35) is introduced, emphasizing the fact that the European Union is funded on the freedom of will of the member states. The retreat is not submitted to conditions, except the existence of a transitory period of two years, period in which the member state wanting to retreat may negotiate an agreement with the European Union.

A. Institutional changes

The Lisbon treaty brings important changes in the institutional field.

1. The competencies of the European Parliament are extended.

Its legislative role will sensitively grow, by generalizing the co-decision procedure (with a limited number of exceptions), procedure within which the European Parliament has the same powers as the Council. The European Parliament has been assigned, without the necessity of special dispositions, co-decision power in justice and internal business

matters, common commercial policy, legislation in the agricultural field;

The budgetary competencies grew together with the elimination of the “*compulsory expenses*” (this part of the budget containing especially expenses in agriculture, which cannot be practically amended, in the present by the European Parliament). The European Council and Parliament are now equal in the budgetary procedure. The budget is decided by the Council, unanimously, and approved by the Parliament.

The European Council is recognized as an institution of the European Union. The European quarterly presidency will be given up. The president of the European Council will be chosen with qualified majority, for a period of two and a half years. The president cannot exert a national mandate as well.

The voting rules within the Council have been modified. The vote with qualified majority is extended to a fifth of the additional legal base; it is especially about the biggest part of the documents of the justice and internal business field, as well as for the new competencies attributed to the European Union.

In the same time, the definition of the qualified majority changes. When the Council takes a decision regarding a proposal of the European Union, it is constituted of 55% of its members, including at least 15 of them and representing at least 65% of the population of the European Union. Anyway, the blocking minority must include at least 4 members of the Council. Otherwise, the qualified majority is considered met. When it does not take a decision regarding a proposal of the Commission, the qualified majority is settled on at least 72% of the member states representing at least 65% of the population of the Union. This new rule will be applied beginning with November 1st 2014.

The composition of the European Commission is modified. The member states are, in all cases, treated as equal, through the presence of a national representative within the Commission.

Beginning with November 1st 2014, the European Commission will be formed of a number of members, including the President and the High Representative of the Union for Foreign Affairs and Security Policy, which corresponds to two thirds of the number of member states, as long as the European Council does not decide to modify this number, unanimously.

The mean of choosing the President of the Commission is the object of a new approach, insisting more on the role of the European Parliament. Thus, considering the elections for the European Parliament and after proceeding to the necessary consultancies, the European Council, deciding with qualified majority, proposes the European Parliament a candidate to the function of President of the European Commission. This candidate is chosen by the European Parliament with the majority of its members. In case this candidate does not meet the majority, the European Council, deciding with qualified majority, within one month, proposes a new candidate, which is chosen by the European Parliament according to the same procedure.

Among others, the powers of the President of the Commission are strengthened: he may request the resignation of a member of the Commission or of the High Representative of the Union for Foreign Affairs and Security Policy, without needing the authorization from the college of commissioners.

The powers of the European Commission of applying the legislation of the European Union are, also, strengthened. The European Commission may modify a directive or a regulation in its essential parts, under the control of the European Parliament and of the Council.

The High Representative of the Union for Foreign Affairs and Security Policy, named by the European Council, with the agreement of the President of the Commission, replaces the Representative for Common Foreign and Security Policy (PESC-CFSP), as well as the European Commissioner for external relations. His competencies are ex-

tended in the same measure in the field of security policy and common defense. He presides the Council of External Relations.

The High Representative is one of the vice-presidents of the European Commission. This insures the coherence of the external action of the Union. Within the European Commission, he has responsibilities of this institution in the field of external relations and coordination of other aspects of the external action.

He will dispose of “*an European service for external activities*”, composed of clerks of the European Commission, of the Council and of the member states.

The role of the Court of Justice has been extended a lot, together with the receipt of a general competence in the field of justice and internal (home) affairs. It has been provided, among others, that the number of advocates-generals grows from eight to eleven, so that it allows the designation of six general attorneys by six countries (among which Poland), and the other five will be named by other countries, by rotation.

The Committee of the Regions has the possibility to intimate the Court of Justice in two cases (to contest a document which breaches the principle of subsidiarity and to insure the observance of its own prerogatives)

The Lisbon treaty extends the competencies of the European Union and, especially, profoundly modifies their exertion conditions.

2. The elimination of the “pillars”

The structure in three pillars, introduced by the Maastricht Treaty, is eliminated. Actually, the European Community (as the first pillar) disappears. The general competence of the European Union remains, with a decision procedure of common law and the special procedure for certain fields (mainly the external policy and defense problems).

The European Union gets *legal personality* (presently only the European Community disposes of it). Thus, it may concluded treaties in the ensemble of the competencies field (the international agreements concluded by the member states must bet compatible to the one concluded by the European Union).

The treaty distinguishes three great categories of competencies of the Union:

- *the exclusive competencies*: in which the member states only have the role to apply the documents of the European Union, at least where they do not receive the ability to adopt certain documents;
- *parted (shared) competencies*: in which the member states have competencies for everything that the European Union did not decide to regulate itself;
- *coordination competencies*: in which the European Union cannot intervene except to sustain, coordinate and complete actions of the member states, without being allowed to exert its legislative role nor limiting their competencies;

In two special cases the European Union has an intermediary competence, between the parted and the coordination ones (the coordination of the economic and labour policies and the foreign and security policy, whose regime is entirely specified).

3. Strengthening the role of the European Union in certain fields

a) Area of freedom, security and justice

The treaty extends the legal cooperation field in civil matter, as well as in criminal matter, strengthens the role of the Europol and Eurojust, and provides the progressive introduction of an “*integrated system of administration of the external frontiers*”. The Council may decide, unanimous-

ly, the incorporation of an European Parquet (District-Attorney or Prosecutors Office).

If until now the freedom, security and justice space was regulated by inter-governmental procedures, from now on, it will be, without exception, regulated by the common law procedure, where the Council votes with qualified majority, the European Parliament disposes the co-decision procedure and the documents are submitted for control of the Court of Justice. Altogether, for all the texts regarding the criminal harmonization a state may seize the European Council, in which case the fundamental aspects of its legal system are injured.

The treaty makes the mutual recognition of the decisions the basic principle of the legal cooperation, in civil as well as in criminal matters.

b) External (Foreign) and defense policy

The common commercial policy will be the exclusive competence of the European Union and here the qualified majority vote is generalized, except two fields: cultural and audio-visual services and the social, education and health services.

The measures taken for cooperation policies, development and humanitarian aid are from now on adopted within the common law procedure, in co-decision with the European Parliament.

The Common Foreign and Security Policy (CFSP) is profoundly reformed, by introducing a stable presidency of the European Council, by creating a High Representative of the Union and by attributing legal personality to the European Union.

The Treaty provides an important development of the common foreign and security policy, by extending the missions (current missions will be added disarmament, the council in military matter, insuring the stability after the termination of the conflicts, the fight against the terrorism, including on the territory of the third countries), by a mutual defense clause and an anti-terrorist solidarity clause, and by launching

a “*structured permanent cooperation*” between the states which submitted to certain engagements (the participation to the programs of insuring equipments, making the forces available).

In the same time, it is created an European Defense Agency (already incorporated).

c) Economic and Social Governing

The evolutions in this field refer especially to attribute new competencies to the European Union in matters of public health, research, energy, civil protection, tourism, sport, to the introduction an organism specific to the Euro area (the “Ecofin” Council remaining the only place where decision regarding the economic and monetary union may be taken, but, for the coordination measures of the budgetary discipline and the economic policies of the member states whose currency is the Euro, the representatives of these states will take part to vote), to the general interest service: an European law which settles the principles and conditions, especially the economic and financial ones, which lead to the fulfillment of the mission, and to the introduction of a general social clause regarding the policy of the European Union and the institutionalization of a “*tri-party summit*” with social partners.

As a matter of fact, *The Charter of the Fundamental Human Rights*, which from now on is part of the Treaty, contains numerous dispositions regarding the social rights.

4. The role of the national parliaments

The Lisbon Treaty introduces three new forms of intervention of the national parliaments within the functioning of the European Union.

1. The control of the subsidiarity

The mechanism includes three stages:

- within eight weeks since the transmission of a legislative project, all the national parliaments chambers may address the institutions of the European Union for “a motivated notification” in which they express reasons for which they consider the text does not respect the principles of subsidiary. The institutions of the European Union will consider this notification. If one third of the national parliaments addressed a motivated notification, the project must be reexamined (for all the text regarding the police and the juridical cooperation in criminal matter the negative notifications of only a quarter of the member countries are necessary). For the application of this rule, each national parliament disposes of two votes, so that, where the bi-chamber parliaments exist, each chamber has one vote.

- if a legislative document project is contested with simple majority of the votes attributed to the national parliaments, but the European Commission decides to maintain the project, the European Council and Parliament must express themselves over the compatibility of this project with the principle of subsidiarity; of the Council (with the majority of 55% of the members) or the European Parliament (with the simple majority) give a negative answer, the project is eliminated;

- after adopting a text, a member state may seize the European Court of Justice regarding the violation of the principle of subsidiary. The appeal is always presented formally by the government. The protocol give the possibility for this to be transmitted by the government, the true author of the appeal being the national parliament or one of its chambers.

2. The procedure of simple revision

- The Treaty Dispositions regarding the “internal policies” may be modified without conveying an intergovernmental Conference. The decision is taken by the European Council, unanimously, but comes into force after each member state approves it, according to the con-

stitutional regulations of the states and with the approval from each national parliament.

- Among others, each national parliament disposes of an opposition right in the case of using a “transitory clause”.

3. The common area of freedom, security and justice space

Several dispositions regarding the national parliaments refer to the common area of freedom, security and justice.

It is provided that:

- „*each national parliament will be informed about the content and the results*” of the evaluation of the application, by the authorities of the member states, of the policies of the European union in matter of freedom, security and justice space;

- „*the national parliaments will be informed regarding the activities*” of the permanent committee charged with the improvement of the coordination between the authorities of the member states in the matter of internal security.

Among others, the national parliaments have the right to oppose (like in the case of “*transitory clause*” when the Council settles the list of aspects from the family law with trans-frontal incidence (and o over which the European Union may legislate).

The two protocols introduced by the Amsterdam Treaty on the role of national Parliaments in the decision-making process and on the application of the principles of subsidiarity and proportionality are repealed and replaced by two new protocols increasing the role of national Parliaments

It should be noted however that the new procedures also impacts on the internal constitutional order of Member States, including the sharing of powers. Some Member States (France) may have to modify

their constitution because their parliament would receive powers which they do not possess under their national constitution.

II. OPTIONS AFTER IRISH REFERENDUM

There are four options to deal with (for Ireland), after the failure of referendum.

First Option - Ignore the referendum result and proceed to ratify the Lisbon Treaty by statute of the Oireachtas (Irish Government).

Whilst it is not unusual for member state governments to hold consultative (non-binding) referendums on EU issues, it is quite a different matter for a government to declare a referendum merely consultative after the event.

Second Option - Ratify parts of the Lisbon Treaty by legislation with a further referendum to follow on defined issue areas.

This option for securing ratification revolves around the idea of breaking up the Lisbon Treaty into different parts. The Oireachtas would then implement those parts of the document that do not involve any substantive change in the Irish constitutional order and this would be followed in autumn 2009 by a second referendum on the parts of the Treaty that are still deemed to require popular consent.

Third Option - A second referendum with assurances on tax, Common Foreign and Security Policy, abortion and Ireland's institutional position attached as declarations to the Lisbon Treaty or with new opt-out protocols attached.

The third option is to hold a second referendum on the Lisbon Treaty in a context where the proposition put to the people is substantially different from that of 12 June 2008, and where clarification has been provided on a range of issues deemed to be at the core of citizens' concerns during the Lisbon campaign.

Fourth Option - A second referendum on the substantive issue of whether to remain a member of the EU or to leave.

The final option might easily be termed the 'nuclear option' or the 'all or nothing' approach, in that the question put to the people in a second referendum would be whether Ireland should remain a member state of the European Union or leave. The implicit assumption here is that in opting to remain inside the EU Ireland categorically accepts the Lisbon Treaty as the rulebook of the re-constituted EU.

In some ways Ireland is faced with the dilemma faced by the British Labour government of the 1970s.

The United Kingdom entered the then EEC along with Ireland and Denmark on 1 January 1973. But the decision to enter the Community was perceived to lack democratic legitimacy in that ratification was achieved in parliament rather than through a popular referendum. The Labour government ultimately decided to face down its critics by offering a referendum on whether the UK should remain in the Community or depart. The referendum produced a large majority in favour of remaining inside the European Economic Community, despite the fact that the Cabinet was divided on the issue (the Yes side gained with a vote of 67.2% against 32.8% for the No side, on an exceptionally high turnout of 64.6%).

Another problem to be taken into consideration is an eventual negative British referendum.

In such a case, there are ten alternatives.

- No change: the other countries decide to live with the existing treaties;
- Another inter-governmental conference (IGC), to attempt a renegotiation of the constitutional treaty;
- A second British referendum, on essentially the same treaty, but possibly with the addition of explanatory declarations or protocols;

- An effort to implement parts of the constitutional treaty, under the legal base of the existing treaties;
- An attempt to use the ‘enhanced co-operation’ provisions of the existing treaties, which allow a group of member-states to move ahead in a particular policy area; or to set up an *avant-garde* group or groups outside the framework of the treaties;
- A mini-IGC to put one or two key provisions of the constitutional treaty into a new treaty to be signed by all EU member-states. Because the changes concerned would be relatively minor, these could be ratified without further referendums, at least in most countries;
- The other member-states go ahead with the constitutional treaty, despite the British No, obliging Britain to negotiate special arrangements that would leave it less than a full member of the EU;
- France, Germany and other countries that favour a more integrated Europe set up a ‘hard core’. This would be a new organisation with its own institutions and perhaps its own treaty, co-existing with the EU.
- The French and German governments announce plans for ‘Franco-German union’, involving a partial merger of the two countries’ political institutions;
- The integrationist countries implement parts of the constitutional treaty, they use the enhanced co-operation provisions of the existing treaties, they set up *avant-garde* groups in specific areas outside the treaties, and they strengthen the institutions of the Euro Group (which brings together the countries in the euro). The end result is a ‘messy core’, with the countries involved in every group emerging as the Union’s de facto leadership. Britain is outside this leading group.

III. TREATY OF LISBON'S FUTURE

The Constitutional Treaty was the EU's 'Plan A' for Treaty changes, and the Treaty of Lisbon can be considered 'Plan B' (since it incorporated a large majority of the text of the Constitutional Treaty).

The analysis does not assess the political merits of any of these solutions, or the likely political response to them, although it is obvious that some of these options are likely to have greater appeal to Irish voters, the Irish government and the governments of other Member States than other options would.

1. Abandon the Treaty of Lisbon and continue with the Treaty of Nice.

This perspective seems to be the easy way out. There would be no legal obstacles to simply continue on the basis of the current treaties, and the experience of the last four years has shown that the EU institutions would not break down. Some adaptations would have to be made in order to comply with a protocol to the Treaty of Nice that stipulates that the next Commission needs to have fewer members than there are EU member states. If a new member state were to join the Union, its voting weight in the Council of Ministers and its number of deputies would have to be determined.

There are voices saying that the EU is incapable of reforming its institutions and it would shelve all ambitions to construct a Union that can act efficiently on critical policy issues such as energy, police cooperation and criminal justice or foreign and defence policy.

This scenario might come about by default since the ratification process has rather skewed incentives: While failed ratification can often be politically costly for individual governments at the national level, a delay (or even a halt) to the whole ratification process imposes most of the cost on the EU and the other member states that wish to proceed. After the Irish negative vote, the governments in both the

Czech Republic and Poland will have to expend even more of their political capital to overcome the resistance to ratification by their eurosceptic presidents.

2. Reopening negotiations on a new Treaty.

While this would be legally feasible, it is politically the least likely of all options, at least in the short run. The Treaty of Lisbon is already the result of a protracted negotiation process after the failure of the Constitutional Treaty. Agreement on the Treaty of Lisbon was only possible because European leaders did not open the complex and carefully crafted compromise on institutions and preserved almost everything from the Constitutional Treaty.

Sinn Fein (the only political party in the Irish Parliament that campaigned for a 'no') has clearly stated that a re-opening of the institutional package deal would be necessary to satisfy their demands (Ireland's voting weight in the Council would have to remain the same as under the Treaty of Nice and an Irish Commissioner at all times). If such issues were to be re-opened, other countries would also make additional demands, which means that a full round of re-negotiations would have to start after what has already been a decade of institutional haggling and navel-gazing. It is thus much more likely that EU leaders would simply refrain from launching another effort, especially since any new text would again have to be ratified and could thus also again fail to secure the necessary support. Negotiations of a new Treaty may start after some years if the Treaty of Lisbon is not adopted. It is likely that this new treaty would then contain a provision allowing it to enter into force even if it is not ratified by all member countries (with the consequence that those not ratifying would leave the Union) in order to avoid the current situation.

3. Increased efforts on flexible integration.

Ideas on flexible integration include all kinds of scenarios ranging from the establishment of a ‘core Europe’ composed of a fixed set of countries to a ‘Europe à la carte’ in which various groupings of countries cooperate on a case-by-case basis on different policy issues. Flexible integration could happen inside the framework of the existing treaties (according to the provisions on ‘enhanced cooperation’), but it could also be initiated entirely outside the EU. The latter is more likely, as it gives countries complete freedom to design the initial rules for cooperation.

4. Implementation of those elements in the Treaty of Lisbon that do not require ratification.

This approach could only contribute in a very limited way to a solution, because – as also for the ‘flexible

integration’ option – voluntary cooperation cannot achieve the key institutional reforms. It would certainly be legally possible to pick some elements from the treaty, but the vast majority of innovations require ratification. Politically, such an approach would also send the wrong message, as it is likely to be seen as an example of “bureaucratic arrogance from Brussels”.

5. Temporary withdrawal of Ireland from the EU.

Under this scenario, Ireland would withdraw from the EU temporarily, with an association agreement that retains much or all of its existing rights and obligations.

As a result, it would be open to the other 26 Member States to ratify the Treaty of Lisbon. There would be a political commitment, though, that Ireland would *rejoin* the EU within a short time, after negotiations

to the Treaty that would provide for some form of special status for Ireland.

From a political perspective such an approach is not acceptable to the EU as a matter of principle. It would also set a precedent for other temporary secessions, thus weakening the EU institutions.

From a legal perspective, Ireland clearly cannot be forced to withdraw and it remains unclear how the institutions should function for that period of withdrawal (e.g. the status of Ireland in the internal market, the eurozone or the EU institutions would raise a host of complicated questions).

6. Continuing the ratification process followed by a second Irish referendum on the Treaty of Lisbon.

This appears to be the most likely option to be chosen. The calculation seems to be that a second referendum would have a higher chance of succeeding once all other 26 member states have ratified. The Irish Prime Minister has not excluded the possibility of a second referendum.

A second referendum on exactly the same matter would, however, be problematic for legal and political reasons.

Although Ireland has a tradition of repeated referenda on the same issue (not only on the Treaty of Nice, but also on divorce and abortion), it would seem rather unlikely that such a clear result could be overturned with a second vote. Thus one cannot dismiss the possibility that asking exactly the same question twice could lead to an act of defiance from the Irish people.

The main problem with this scenario is that it remains a high-risk strategy. In the case of a second 'no', the EU would still be in a legal impasse as the Irish vote would continue to function as an efficient veto, even if all other countries had ratified. The Treaty of Lisbon

would effectively be dead, unless some other method is found that would allow the Union to proceed even without Ireland.

7. Expel Ireland from the EU (directly or indirectly).

This would obviously leave the remaining 26 Member States free to ratify the Treaty of Lisbon. Legally it is simply impossible to expel a Member State from the Union, because there is no legal provision in the Treaties allowing for it.

Article 7 of the TEU does permit a Member State to be *suspended*, rather than expelled, from the EU, if it is judged guilty by *all* the other Member States of a ‘serious and persistent breach’ of ‘the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law’. But obviously this is not the case in Ireland today.

Due to the fact that it is legally impossible to expel a Member State from the EU *directly*, it would be legally possible to expel a Member State *indirectly*. This could be achieved if all of the Member States *except* Ireland denounced the existing Treaties and simultaneously re-ratified them, as amended by the Treaty of Lisbon, taking out all references to Ireland from the Treaties. As a consequence, the Treaties would in effect continue in force, as amended by the Treaty of Lisbon, in 26 Member States only. Presumably Ireland would join some form of association with the EU instead.

8. Ireland withdraws from the EU.

If Ireland withdrew from the EU, it would obviously be open to the other Member States to ratify the Treaty of Lisbon..

The remaining Member States might offer Ireland some form of association with the EU that would replicate, or very nearly replicate, Ireland’s membership of the EU. It is possible to ask the Court of Justice

to answer such questions under a special procedure provided for in the existing Treaty and the Court would almost certainly be willing to deal with the case on an accelerated basis and give its answer within a few months.

9. Ireland votes again, without any EU action.

Under this scenario, Ireland would be asked to vote again, without the EU taking any form of action at all to address the issues that concerned Irish 'No' voters. It might be questioned, however, whether a vote on exactly the same issue would be legal as a matter of domestic Irish law – an issue outside the scope of this legal analysis.

10. Ireland votes again, in the event of a Decision by EU Member States.

Under this scenario, Ireland would vote on exactly the same Treaty, but the EU Member States would in the meantime adopt a Decision, meeting in the framework of the European Council (the formal name for EU summits), concerning specific issues that they believed to be of particular concern to Irish voters as regards the Treaty of Lisbon. This would be similar to the process that was followed when Danish voters first voted 'No' to the Treaty of Maastricht.

The Decision could address the following issues:

- confirming Ireland's facility to opt-out from EU legislation concerning civil and criminal law issues, perhaps with reference in particular to specific topics like divorce;
- confirming that Ireland would retain a veto on all matters relating to any form of taxation;
- confirming that nothing in the Treaties, or the Charter of Rights, can impact upon Irish law concerning abortion (there is already a Protocol

confirming that nothing in the Treaties can affect a specific provision of the Irish Constitution concerning abortion);

- confirming that nothing in the Treaties affects Irish neutrality, and confirming that Ireland retains a veto over all substantive decisions relating to security or defence.

It would also be possible (as was the case with Denmark) to include within this Decision the decision by Ireland not to participate in certain EU measures, for example in the 'structured cooperation' regarding defence which the Treaty of Lisbon provided for. Furthermore, it would be possible (again, as in the Danish case) for the European Council and Ireland to adopt connected Declarations relating to the Decision.

11. Ireland votes again, in the event of a Decision by EU Member States, with a package of further measures.

Under this scenario, Ireland would vote on exactly the same Treaty, but the EU Member States would in the meantime adopt a Decision concerning specific issues, along with a package of further measures that they believed would address issues of particular concern to Irish voters. This would be identical to the process that was followed when Danish voters first voted 'No' to the Treaty of Maastricht.

Such a package could include measures on democracy, openness and transparency in the EU (a particularly important part of the Danish package). There are in any event strong arguments for improving the level of democracy, openness and transparency in the EU, regardless of whether or not further attempts are made to ratify the Treaty of Lisbon.

Secondly, the package could address the issue of reducing the number of Commissioners. The Treaty of Lisbon provides that starting in 2014, the number of Commissioners will be cut from one per Member State to two-thirds of the number of Member States. However, the

new Treaty provision also permits the European Council, acting unanimously, to alter the number of Commissioners. The European Council could therefore decide in principle in advance either to delay cutting the number of Commissioners, or even to leave the number of Commissioners at one per Member State indefinitely.

Thirdly, the package could address the issue of a possible agreement for trade liberalisation within the World Trade Organisation. The agreement could include specific commitments relating to developing countries.

Fourth, the package could address the balance between social protection and economic freedoms within the EU. There could be a commitment to adopt outstanding and upcoming social law proposals (concerning working time, temporary workers, works councils, non-discrimination, pregnancy and parental leave) and to draw up and adopt legislation strengthening social protection as regards 'posted workers' within a short time frame.

Fifth, the package could address the status of the full-time President of the European Council, as provided for in the Lisbon Treaty. There could be agreement in advance on the rules of procedure of the European Council (which are already under discussion), assuming that they regulate the role of the President, and making the text of those rules available to the public. If those rules do not regulate the role of the President, then some other form of advance agreement on the status of the President could be agreed.

In either case, in order to ensure that the President has only a limited role, the following basic principles should be set out:

- the President cannot vote within the European Council or the Council;
- the President cannot veto any EU measures;
- the President cannot propose any EU measures, or exercise any law-making power;

- the President cannot issue binding instructions to the European Council, the Council, the Commission, the European Parliament or individual Member States;

- when acting at international level (ie when meeting with the US President), the President shall act on the basis of guidelines and mandates adopted in accordance with the Treaties by the other EU institutions (ie by the ministers within the Council, by EU leaders in the European Council, in accordance with legislation as jointly adopted by the EP and the Council and in conformity with the Commission's powers to represent and negotiate for the EU, on a mandate from the Council, regarding matters other than foreign policy)

Sixth, to address the comprehensibility of the Treaty, the European Council could agree to draw up an objective and readable summary of what the Treaty provisions mean.

Seventh, a package could address the issue of the Euratom Treaty, which concerns nuclear energy. The Treaty of Lisbon makes no substantive amendments to the Euratom Treaty. In a Declaration to the Treaty of Lisbon, a group of Member States have called for a renegotiation of the Euratom Treaty.

Eighth, as regards public services, it could be confirmed that the EU's new explicit power to regulate public services in the Treaty of Lisbon could not be used to require Member States to privatise public services. This is in any event implicit already due to Article 295 of the current TEC (which would be retained by the Treaty of Lisbon), which states that nothing in the Treaty shall affect Member States' rules regarding the system of property ownership.

12. Ireland votes again, in the event of a Protocol added to the Treaty of Lisbon concerning 'Irish issues'

Since Protocols have the same legal force as the Treaties, this would avoid all the questions concerning the legal effect of Decisions of

Member States. The Treaties would *not* take precedence over a Protocol, since the Protocol would form a part of the Treaties.

In this case, in a second referendum, Irish voters would *not* be voting on the same text.

Some or all of the other Member States might not find it necessary to ratify this new Protocol by means of a new national parliamentary procedure, since it would apply only to Ireland. Other Member States could simply confirm to the Treaty depositary that they consider the new Protocol to be ratified, in accordance with their national law.

13. Ireland votes again, in the event of a Protocol added to the Treaty of Lisbon concerning 'Irish issues', with a package of further measures.

This would combine a protocol, with a package of further measures.

This Plan would reach the limit of what the EU could do legally without making amendments to the main provisions of the Treaty of Lisbon, affecting all Member States.

14. The EU makes substantive amendments to the general provisions of the Treaty of Lisbon

This would really amount to a 'Plan D'. It could be combined with a Protocol concerning Irish issues and a further package of measures. In this scenario some of the further package of measures could be included in the text of the revised Treaty itself. The amendments could take the form of a further Protocol added to the Treaty. A further ratification process would be required in all Member States.

15. The EU inserts some or all provisions of the Treaty of Lisbon as part of the accession Treaty with Croatia

The accession treaty is likely to be signed in 2009 or 2010, and enter into force in 2010 or 2011. In the past, accession treaties have all made essentially mechanical changes to the institutional rules in the Treaties. It might be questionable whether legally an accession treaty could include provisions amending the basic institutional framework, and even more questionable whether it could include rules altering the EU's competence and decision-making rules. While the Court of Justice does not have the jurisdiction to rule on the validity of accession treaties, there might be challenges to such a 'super-accession' treaty before national courts.

Legally, as a matter of Irish domestic law, a fresh Treaty referendum would likely be required. The process of ratifying the accession Treaty might be legally complicated in other Member States.

We have to take into consideration the impact of non-ratification of the Treaty upon the EU.

First of all, there would be no legal impediment to the continued functioning of the EU if the Treaty of Lisbon is not ratified. There would be a severe legal problem if the number of Commissioners were not reduced in 2009, as the current Treaties require.

Secondly, it would still be legally possible to continue with further EU enlargement.

Although the Treaty of Nice makes a specific reference to 27 Member States in the particular context of changing the rules on the number of Commissioners, there is no provision of the current Treaties which expressly sets any limit on the number of Member States.

Thirdly, the size of the Commission would have to be cut from November 2009.

The Members of the Commission shall be chosen on the grounds of their general competence and their independence shall be beyond doubt (unclear and interpretable words).

The number of Members of the Commission shall be less than the number of Member States. The Members of the Commission shall be chosen according to a rotation system based on the principle of equality, the implementing arrangements for which shall be adopted by the Council, acting unanimously.

The number of Members of the Commission shall be set by the Council, acting unanimously.

There is no provision, unlike in the Treaty of Lisbon, which would permit the Council or the European Council to maintain one Commissioner per Member State. The obligation to cut the number of Commissioners would only apply from 2014.

The number of Commissioners and the details of the rotation system would be set by the Council acting unanimously.

Moreover, the rotation system would have to treat all Member States equally, so no Member State could insist that it retain a Commissioner indefinitely, while *other* Member States rotate theirs.

If the Council cannot decide on the number of Commissioners to appoint, then a Commission cannot validly be appointed. Therefore any actions taken by such a purported Commission would be legally non-existent. So this non-existent Commission could not take action against breaches of competition or state aid rules, and the Council and the European Parliament could not adopt any measures proposed by this Commission.

It could even be argued that the EP and the Council could not, in at least some cases, adopt measures which were validly proposed by the previous Commission, because they would be tainted by the non-existent Commission's subsequent involvement in the procedure. The non-existent Commission could not validly represent the European

Community in negotiations regarding international treaties or at international conferences, for example as regards climate change issues.

There would be legal actions challenging the validity or existence of measures adopted or proposed (if they were later adopted) by this non-existent Commission.

The Council and the purported Commission, the European Parliament or the Member States might be sued for damages incurred as a result of their legally nonexistent acts. The Court of Justice might conceivably permit the non-existent Commission to function in office on an emergency basis in order to maintain legal certainty, but this is far from certain. Such a judgment would be highly questionable and might be challenged in the national courts.

In short, there would be legal and political chaos.

It would be open to the Member States to amend the current Treaties solely as regards this obligation to cut the number of Commissioners from 2009 – but time is quickly running out to negotiate and ratify such an amendment before November 2009.

As regards decision-making, the current rules would remain in force. The retention of current voting rules would particularly impact upon the JHA area, where legal migration, criminal law and policing measures would still be adopted by unanimity in Council and consultation of the EP. This will mean greater difficulty in adopting legal migration measures in particular. On the other hand, qualified majority voting already applies to measures relating to visas, borders, asylum, and civil law (except for family law).

The lower house of the Czech Parliament has approved the Treaty of Lisbon in February 2009 and the upper house (Senate) in May. The ratification process will only be completed when President Klaus (an eurosceptic) has signed it. President Klaus was threatened recently with the impeachment (suspension) for his refusal to sign the Treaty.

President, Václav Klaus opposes ratifying the Lisbon Treaty and has called the process to be brought to an end. He has also stated that he would not sign the treaty unless Ireland had ratified before.

Under the Czech Constitution ratification requires a presidential signature, though some believe it is unlikely to be withheld should both houses of parliament approve the treaty.

Ratification in Poland was stalled while awaiting presidential signature (so-called "ratification act"). The President, by that point, did sign the bill which allows him to ratify the treaty (in that bill the procedure for granting consent to ratification was chosen according to Article 90.4 of the Polish constitution). It did not mean that he finished the ratification of the treaty. The President is not obliged to ratify the treaty.

The president, Lech Kaczyński, has yet to give his final signature and has cited that it would be pointless to do so before a solution to the Irish no vote is found. His signature is expected to take place in October or November this year.

On the most recent EU summit (19 June), European leaders granted Ireland legal guarantees on national sovereignty, clearing the way for a second Irish ballot on the Lisbon treaty in October 2009.

EU leaders granted Ireland legal guarantees in the areas of taxation, military neutrality and abortion. These guarantees are foreseen to reassure Irish national sovereignty in these domains.

In Germany, while parliamentary ratification has been completed, formal ratification requires the signature of the President, which has been withheld pending a ruling from the Constitutional Court on its compatibility with the Basic Law, Germany's constitution, following some challenges (lawsuits).

In October 2008 Germany's president Horst Köhler has signed the German law which prepares the implementation of the treaty on a national level and has agreed to sign the instruments of ratification of the treaty, but will wait to sign and deposit it in Rome until the Constitutional Court has given its approval.

In 1993, the court analysed a challenge to the constitutionality of the Maastricht Treaty (a case very similar to the Lisbon Treaty challenge). In that case, the court ruled that the Maastricht Treaty was compatible with the German Constitution (Basic Law).

The German Constitutional Court ruled on June 30, 2009, that the European Union reform treaty, also known as the Lisbon Treaty is compatible with the German Basic Law, but requires parliamentary reforms before it can be ratified.

In practice, the Court has suspended the process of ratification of the Lisbon Treaty, calling for a law guaranteeing the rights of the German Parliament. The Court has confirmed that the Treaty was compatible with the Basic Law (the German Constitution), but some parameters were still lacking.

The court says that while the Basic Law is constitutional, the accompanying law is unconstitutional to the extent that legislative bodies have not been accorded sufficient rights of participation.

After the announcement of this decision, the coalition partners, the conservatives and social democrats that are in power in Germany have decided to convene the Bundestag for a special session scheduled on August 26.

It is useful to see the main ideas of the Court's ruling.

In the Court's opinion, the primary responsibility for integration is in the hands of the national constitutional bodies which act on behalf of the peoples.

The further development of the competences of the European Parliament can reduce, but not completely fill, the gap between the ex-

tent of the decision-making power of the Union's institutions and the citizens' democratic power of action in the Member States.

The Act Approving the Treaty of Lisbon is considered to be against the standard of the right to vote.

IV. CONCLUSIONS

The concept of Europe is quite imprecise.

Nevertheless, the historical emergence of this notion of Europe ('united in diversity') has not been exactly a simple task, either in the identification of its geographical limits, or in the historical means of achieving it. In fact, the historical manifestations of this European ideal of 'union in diversity' have not been very promising in practice.

The process of European integration initiated in the early 50s in Paris had a clear difference with respect to previous attempts. For the first time, it was not based on integration by absorption or on military dominance. These were sovereign States that voluntarily gave up a substantial portion of their competences in order to attribute them to a superior entity, which would carry them autonomously and with no possibility of adducing national norms that would oppose the acts undertaken by this superior entity. It is, then, an eminently legal process that underlies current European construction. It is the reason behind the norm substituting the force of cannons and bonfires. And this, no doubt, is the greatest historical merit of the EU, having managed to live in peaceful coexistence for over half a century through a framework of progressive voluntary integration which, aside from peace, democracy and stability, has brought with it economic development and unequalled social well-being.

We can criticise the Lisbon Treaty because the agreement, aside from being minimal for the sake of the securing the necessary consensus, comes in exchange for accepting new exceptions in matters as capital

as human rights, which carries a very serious risk of desegregation within the Union.

But there are some motives for optimism.

Firstly, the Lisbon Treaty has the unquestionable merit of extracting the Union from a long period of crisis and giving it a certain 'psychological impulse' and even a moderate optimism to face the future.

Secondly, the Lisbon Treaty contains in substance practically all the novel aspects of the Constitutional Treaty. It maintains, thereby, instruments and mechanisms that enhance the efficiency and also the democracy of the EU. The stable presidency, the figure of high representative as vice president of the Commission, the reduction of the number of commissioners, the noteworthy increase of assumptions whose decision in the Council will be done by qualified majority instead of unanimity, the generalisation of the procedure of co-decision as an ordinary legislative procedure, the single legal personality, the popular initiative, or a more efficient Foreign Policy are some good examples.

Thirdly, it also introduces new competential titles in areas such as energy or climatic change that connect directly with some of the main concerns of European citizens. One case in point is that the national and international press of 14 December contained more media echoes and backing of the firm position held by the EU as opposed to the US in the Bali summit on climate change than mention of the grey signing of the Lisbon Treaty. The exception being, of course, the 'outcry' about one President who announced he would arrive late to the signing.

Fourthly, it can also not be denied that, under the rough crust of the Lisbon Treaty, indisputably complex as it is, there lies a future tandem of EUT (European Union Treaty) and DTEU (Draft Treaty on European Union, replacing ECT-European Community Treaty) that prove technically more adequate and simplified than the current constituent treaties. And to some extent, they are also more coherent than the

Constitutional Treaty itself, whose part III was by any standards out of proportion and inappropriate for a legal text that aspires to be called a Constitution. Now we will have a basic treaty, the EUT, whose contents contain the norms of constitutional character of the Union, and a treaty of development, the DTEU, which concretely and precisely outlines the judicial system, the institutional system and the competential system of the Union.

The 2009 European elections present European decision-makers with two main messages.

First, the turnout was the lowest in the history of the EU. Forty-three percent it sounds like an alarm bell.

Second, elections remain confined to national contexts and are won and lost by national political actors.

Third, the elections underlined the popular anti-EU feeling in Britain. Over 50 per cent of the British vote went to eurosceptics. The Conservative party and UKIP, both staunch opponents of the Lisbon treaty and of further EU integration, gained seats, while the ruling Labour party received an historically low share of the vote. That means a future British government will take into consideration new calls for a referendum on Britain's place in Europe, whether linked to the Lisbon treaty or not.

The Treaty of Lisbon must be fundamentally different from the former European Constitution.

Europe must understand that a future european federation can not be similar with United States of America.

The Treaty must solve the problems of democratic deficit, together with the gap between the citizens and the european political class, institutions and bureaucracy.

Finally, it must ensure a single European voice in the field of global challenges ahead.

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