

LAST CHANCE FOR LISBON: IRELAND'S EU REFERENDUM

By Hugo Brady

Ireland will hold a second referendum on the Treaty of Lisbon on October 2nd. Most opinion polls in the run-up to the vote show that a majority of Irish voters now back the EU treaty they rejected in June 2008. However, despite Ireland having subsequently won a special deal on the treaty, and despite the country's economic dependence on the Union, the result of the referendum is far from certain. The government is the most unpopular since Ireland won its independence, the public mood is volatile amidst a deep recession and many voters remain unconvinced and confused about the treaty's merits.

At stake is much more than the credibility of Ireland's already enfeebled government. A Yes vote would allow the EU to improve the way it makes decisions, particularly in foreign policy. A No vote would lead to recrimination, policy paralysis and probably a freeze on further EU enlargement. The EU's leaders – divided on what to do next – would be distracted from the many urgent tasks that face the Union, ranging from responding in an effective and co-ordinated manner to the economic crisis, to making a success of negotiations on climate change, to putting in place a new European Commission.

Not in the bag

Ireland's voters shocked EU governments on June 13th 2008 by rejecting the Lisbon treaty by 53 to 47 per cent.¹ Despite the fact that the country's businesses, media and political mainstream are almost uniformly

¹ See Annex, pages 5-7, for a breakdown of the treaty's principal reforms.

pro-European, the government failed to assuage the fears – mostly spurious – raised by the No campaign over the treaty's impact on corporation tax, neutrality, abortion and a loss of Irish influence in Brussels. On October 2nd the

Dublin government, the country's various pro-treaty campaigners and Ireland's 26 EU partners will hope that the Irish reverse that decision. The odds appear to be stacked in favour of a Yes, for several reasons.

First, the EU has added a set of quasi-legal guarantees to the treaty that address many of the more tangible concerns that turned Irish voters against the treaty the last time round. The guarantees state that nothing in the treaty will affect Irish law concerning family matters, corporate taxation, military neutrality or workers' rights. On top of this, the EU governments have also agreed not to implement a clause in the treaty that would shrink the number of European commissioners from 2014, so that each member-state would periodically forego the right to have a commissioner. Ireland, like many EU countries, feared that its voice in Brussels would be weakened during the periods when it lacked 'its own' commissioner there.

Second, Irish voters appear to be more favourably disposed towards the treaty than they were a year ago. Opinion polls in September indicate that a clear majority of voters back the treaty. One survey puts the share of Yes voters as high as 62 per cent, with 15 per cent still undecided.² Many voters have concluded that Ireland can ill-afford a confrontation with the rest of the EU at a time when its economy is reeling from a collapse in global demand, high unemployment and a burst property bubble.

² Pat Leahy, 'Poll shows Lisbon treaty support remains strong', *The Sunday Business Post*, September 13th 2009, <http://www.sbpost.ie>.

Third, the Yes campaign is now more motivated, united and organised than in the run-up to the first vote. All Irish political parties, big and small, are unanimous in their support for the treaty. The only exception is Sinn Féin, the hard-line nationalist party which has a handful of seats in Ireland's parliament. Industrialists, most trade unionists, farmers, and a plethora of civil society organisations are unambiguously and actively backing a Yes vote. Pro-treaty campaigners have enlisted the support of footballers, musicians, and other celebrities to appeal directly to voters for a Yes vote. Well-known businessmen, such as Michael O'Leary of Ryanair and Jim O'Hara, boss of Intel Ireland, are running their own highly visible Yes campaigns. And 'Ireland for Europe', the advocacy group that was important in winning Ireland's second referendum on the Nice treaty in 2002, has reformed under the leadership of Pat Cox, a respected former president of the European Parliament. Other groups are running slick PR campaigns intended to target young voters: most voters under the age of 30 opposed the treaty in 2008.³

³ *Examples include*
<http://www.generationyes.ie> and
<http://www.webelong.ie>.

Fourth, the No campaign – a colourful collection of Catholic conservatives, unreconstructed nationalists and the hard left – has lost a great deal of credibility and is strapped for cash. Most voters have realised that many of the claims advanced by the No campaign in 2008, such as the notion that the treaty would introduce military conscription in Ireland, were bogus. Voters are likely to treat new assertions – the No side now says that the treaty will reduce the Irish minimum wage to €1.84 an hour, which is of course a pure fiction – with fresh scepticism. Furthermore the No side may not be helped by the decision of the fervently eurosceptic UK Independence Party to send more than a million anti-treaty leaflets to Irish homes.

Last, and perhaps most importantly, turnout is likely to be high. Most voters know the vote is an important one for the country's future. A high turnout on its own will not be sufficient to secure a Yes vote: a respectable 53 per cent of the electorate voted in the last referendum. But most polls indicate that those already intending to vote Yes are more likely than No voters to turn out on the day.

Despite these advantages, the Yes campaign is unlikely to win the overwhelming majority that many polls predict and a victory for the No camp is far from inconceivable. First, Ireland's government is deeply unpopular. Voters – particularly supporters of opposition parties – may find it difficult to support any measure backed by the governing coalition of Fianna Fáil and the Green Party. Support for Fianna Fáil, a centrist conservative party and the largest in Ireland's parliament, has fallen to 14 per cent, its lowest score in living memory. Brian Cowen, Ireland's uncharismatic Taoiseach and leader of Fianna Fáil, has appealed to the Irish not to link their decision on the Lisbon treaty to a verdict on his government. However, many voters will find it hard to resist the temptation of using the referendum as an opportunity to tell the government what they think about some of the measures it has announced and is planning. These include further painful cuts to public services; tax rises that are likely to be included in December's budget; and an unpopular scheme to buy bad property loans from Ireland's troubled banks and give them to a National Asset Management Agency that would sell them once the property market recovers.

Second, a key reason for the No vote in 2008 was the Yes campaign's failure to explain to voters face-to-face why they should back the treaty. But no group from either side in the campaign currently has the resources to conduct such canvassing. Instead the government is conducting "a short campaign, high on rhetoric, low on explanation, and [based on] hope that fear of the unknown will induce a change of mind in the electorate".⁴ A campaign fought almost exclusively in the media, with bland messages such as "Vote Yes for recovery" may not be enough to secure a positive vote. In addition, Declan Ganley, a wealthy businessman and outspoken critic of the treaty, has unexpectedly returned to the No campaign. His money and media skills were instrumental in defeating the treaty in 2008. He may well succeed in luring some hesitant backers of the treaty back into the No camp.

⁴ *Maurice Hayes, 'Mistrusted leaders find it hard to get out the 'Yes' vote', Irish Independent, September 7th 2009.*

The main hurdle facing pro-Lisbon campaigners is that they cannot come up with a reason for voting Yes that is simple, credible and based on the actual treaty. This is not entirely a failure of their imagination or planning. The Lisbon treaty contains no grand project, such as the euro or enlargement to the east, to engage the public. It is mostly a set of bureaucratic reforms, except perhaps the Charter of Fundamental Rights that is annexed to its main text. One of the few concrete arguments that the government and pro-European activists can use – that a Yes vote would copper-plate Ireland's right to its own EU commissioner – has to some extent been undermined already. Frederik Reinfeldt, the prime minister of Sweden and holder of the EU presidency in the second half of 2009, has said publicly that all EU countries would keep 'their' commissioner irrespective of the plight of the treaty. (Reinfeldt was over-simplifying: the EU's current rulebook says the number of commissioners must be less than the number of member-states from now on.

⁵ Jamie Smyth, 'Keeping our commissioner without Lisbon', September 6th 2009, *Irish Times Online*, <http://www.irishtimes.com>.

But if the treaty falls, the member-states have since agreed to shrink the Commission by only one member and to give the job of EU High Representative for foreign policy to the remaining member-state.) This was a well-meaning effort to avoid appearing to bully Ireland into ratification, but it could weaken the Yes side's trump argument.⁵

What happens if Ireland says No

If Ireland votes No a second time, the EU's governments will have to abandon the Lisbon treaty. A decade of attempts to reform the EU's institutions – stretching from the Laeken declaration of December 2001 to the constitutional convention to the inter-governmental conference that produced the constitutional treaty to its transformation into the Lisbon treaty – will have ended. Vaclav Klaus, the Czech president, and his Polish counterpart, Lech Kaczynski – neither of whom has yet signed the treaty, although their parliaments have approved it – would feel no need to do so. It is virtually inconceivable that European leaders would make yet another attempt to revive the set of institutional reforms that French and Dutch voters said No to in 2005 and that Irish voters had twice rejected. Nor would EU governments start talking about a new treaty. Given the difficulties of getting 27 countries to ratify any new prospective treaty, even the most integrationist member-states would be reluctant to embark on yet another inter-governmental conference to revise the existing treaties.

The demise of the Lisbon treaty would have far-reaching implications. The French president, Nicolas Sarkozy, and the German chancellor, Angela Merkel, have made it clear that there can be no further EU enlargement unless and until the treaty is ratified. They have said that an exception can be made for Croatia – already well advanced in its accession talks – and Iceland, a long-standing member of the European Economic Area. However, other would-be members would probably have to set aside that aspiration, at least for the foreseeable future. Balkan countries such as Bosnia-Herzegovina, Macedonia or Serbia would lose a much-needed anchor for political and economic reform, and could even suffer from a return of political instability. Turkey – already frustrated by the slow pace of its membership talks – could turn away from the EU in anger. Ukraine, Moldova and other former Soviet states would probably discard all hopes of moving closer to the EU.

One could expect that some countries, led by Germany and France, would seek to salvage certain elements from the Lisbon treaty that they consider crucial for the smooth functioning of the Union, such as changes to the EU's voting rules and the streamlining of its foreign policy machinery. Since these changes require a new legal basis, Berlin and Paris could try to include them in the accession treaty of Croatia, which may be drawn up in 2011. However, Britain's Conservative Party, which looks set to return to office by mid-2010 and is strongly opposed to the Lisbon treaty, would almost certainly block such a move.

A more conservative option would be for EU countries to try to use provisions of the Nice treaty to bring about changes similar to those contained in the Lisbon text. For example, the Lisbon treaty abolishes national vetoes over EU action to tackle terrorism, organised crime and illegal immigration. But this radical step could also be taken by using a special clause in the Nice treaty that would allow the governments – if they all agree – to switch decision-making on policing, criminal justice and migration to majority voting. However, the application of that Nice treaty clause would be politically controversial and a legal minefield. The Lisbon treaty stipulates that such a move would be accompanied by an 'emergency brake' procedure that would allow any member-state to stop negotiations that might have an adverse impact on its criminal laws. If the member-states did use the Nice treaty to move to majority voting, they would do so without that safeguard. Britain and Ireland, the EU's two biggest common law countries, would be most likely to object to such an initiative.

If that kind of tinkering with the existing rules turns out to be exceedingly difficult, some capitals could rethink the long-standing principle that the EU should try to bring along all its members for big changes and new policies. The much-discussed idea of building a 'core Europe' around the eurozone is unlikely to come to fruition, because the countries that are in the euro are not necessarily the countries that one would want in an *avant-garde* group on, say, defence. In any case Ireland, in the euro but opposed to the Lisbon treaty, could hardly be expected to sign up to a new political project.

However, other forms of variable geometry, based on specific policy areas, are more likely to make headway. For example, there are clauses in the Nice treaty that would allow smaller groupings of member-states to pursue particular projects, under a procedure known as 'enhanced co-operation'. It is also possible that smaller groups of member-states could seek to move ahead by establishing groups – formal or informal – outside the framework of the EU treaties. Some member-states would object strongly to new *avant-garde*

groups, on the grounds that they would undermine the Union's unity and cohesion. The Commission, too, would be likely to take that line. But in Paris officials are thinking about reviving the idea once promoted by President Jacques Chirac of 'pioneer groups'. The most feasible areas for such experiments would be defence, justice and home affairs and, possibly, taxation.

In the long run, the EU might be able to agree on new treaties dealing with single policy issues, such as climate change or energy security. But the poisonous and febrile atmosphere that an Irish No would generate, combined with widespread disagreement on the EU's future direction, could mean that even that sort of treaty change would be difficult to agree upon.

In Ireland, a No vote would lead to Brian Cowen facing a vote of no confidence in the Dáil, Ireland's parliament. His struggling coalition government would probably start to fall to pieces. Ireland's borrowing costs would rise further if investors perceived the No vote as a sign of impending political instability. Since the government has to plug a €20 billion hole in the budget, higher borrowing costs would further undermine the chances of economic recovery. In legal terms Ireland's position in the EU would remain the same, but its influence in the Union would be seriously diminished.

Heads or tails?

Ireland's second referendum on the Lisbon treaty is winnable. That does not mean that it will be won. The Yes campaign has invested vastly more money, time and effort than in 2008 to convince and mobilise Ireland's instinctively pro-European majority. But the different groups on the Yes side have not been able to agree upon and communicate a single, positive message that would put the outcome beyond doubt. The Yes campaign's ineffectiveness has a lot to do with the complex and bureaucratic nature of the Lisbon treaty itself: any other EU government would also struggle to communicate its purpose to its electorate. Faced with blandness on one side and hysterical hyperbole on the other, Ireland's beleaguered electorate is likely to pick the option which they think best preserves the status quo, and vote accordingly. That toss of the coin will dictate the direction of EU politics for years to come.

If Ireland votes Yes on October 2nd, the EU will live with the Lisbon treaty for a very long time. And if it votes No the Europeans will have put up with the current Nice treaty for perhaps a generation. Now that the Union has 27 members, with more likely to join in the future, it has become immensely difficult for everyone to agree to the kind of complex and fragile compromises that a new treaty requires. The EU may one day adopt treaties on specific issues, such as climate change. But most European leaders now agree that the EU has more important things to do than to fiddle with its institutions and decision-making procedures. The main lesson that many of them will draw from this lengthy, and frustrating episode in treaty-making is that, yes or no, the era of the grand EU treaty is over.



See Annex pages 5-7.

Annex: The key reforms in the Lisbon treaty

If the Lisbon treaty enters into force as intended in January 2010, it will mark the end of a particularly arduous episode of EU treaty change. Ever since the governments agreed on the Nice treaty in 2000, they have wanted to make further changes to rule book in order to make the EU's institutions more efficient and accountable, to keep up with several rounds of enlargement, and to address new political priorities.

Although EU countries spent years negotiating a so-called constitutional treaty, the text was rejected in referendums in France and the Netherlands in mid-2005. Most member-states conceded that calling the treaty a 'constitution' was over-ambitious and misleading, but agreed that its central reforms were uncontroversial and worth keeping. After further diplomatic tinkering most of the institutional provisions of the constitutional treaty were redrafted as amendments to the EU's founding treaties, the Treaty of Rome (1958) and the Treaty of Maastricht (1992), and called the Treaty of Lisbon (2007). Most national parliaments in the EU have now approved the treaty, but ratification is still pending in Germany, Poland and the Czech Republic. Ireland has been the only member-state to hold a referendum on the text.

The treaty's key provisions are:

★ A full-time European Council president

The European Council, the forum in which EU leaders meet every three months, will have a full-time chairperson or 'president'. Now that the EU has 27 member-states, the current system of the presidency shifting from one country to another every six months has become unworkable. Some smaller countries struggle with the huge task of running the EU's complex agenda, while bigger ones sometimes mix up national priorities with the European interest. Moreover, rotation results in too little follow-up on summit decisions.

Under the new system, the EU governments will choose a full-time president who will chair their meetings for a term of two and a half years, renewable once. It will not be easy to find the right person for the job. He or she will need to be a consensual figure but also weighty enough to set the agenda and cajole EU governments into implementing their political promises. The council president will not chair the sectoral councils, where the EU ministers for transport, finance, agriculture and so on decide on more specific measures. For these, a modified system of the rotating presidency will remain, with a team of three countries working together to chair the various meetings.

★ A clearer, fairer voting system

The Council of Ministers currently takes decisions under the complex 'triple majority' voting system of the Nice treaty. The Lisbon treaty's 'double majority' voting system is both fairer – it gives countries with larger populations like Britain more weight – and more transparent. Under the new system, a measure will pass if it is supported by 55 per cent of the member-states (currently 15 out of 27), provided they represent at least 65 per cent of the EU's population. Formal votes are rare in the EU. Poland, which did particularly well from a quirk of the Nice treaty's voting rules, signed the Lisbon treaty under the condition that a new voting system should be phased in only between 2014 and 2017.

Even in areas of policy where decisions are supposed to be taken by majority voting, the member-states usually prefer to seek a consensus. But the new voting rules matter because the mere possibility of a vote often persuades a country that is blocking a decision to compromise. Another factor that is at least as important in determining how the Council takes decisions is the ability of particular governments to make friends and build coalitions in favour of a particular line.

★ A Commissioner for each EU member-state

Currently, each EU country nominates one national to serve as a member of the European Commission, the body which prepares and enforces EU legislation. As the EU has grown, this has made the Commission unwieldy and less effective. Each commissioner has to be given his or her own portfolio – which means that some commissioners currently have non-jobs like the promotion of multilingualism. The president of the Commission struggles to make his 26 colleagues behave like a coherent cabinet. The Nice treaty specifies that when the number of member-states reaches 27 – which happened with the accession of Bulgaria and Romania in 2007 – the number of commissioners must be brought down to

less than the number of countries in the Union. The Lisbon treaty goes further, with a provision that the number of commissioners should be capped at two-thirds of the number of member-states after 2014.

However, after Ireland's 2008 rejection of the treaty – partly because of fears that Ireland would lose 'its' commissioner – EU governments rethought their views on cutting the number of commissioners. Although commissioners are not supposed to act in the interest of the country that appoints them, Europeans usually feel represented by 'their' national envoy in Brussels. Each commissioner also plays an important role in helping to explain EU business to people in their home country. Furthermore, if at a particular time few big countries had commissioners, some leading member-states might be tempted not to respect Commission decisions. Fears that cutting the number of commissioners could undermine the EU's legitimacy seemed to be confirmed by the Irish No. Therefore, EU governments agreed to abandon the plan to slim the Commission down. Luckily for the Irish government, the provision in the Lisbon treaty that would shrink the Commission is vague enough to allow the reform to be delayed indefinitely, and for Ireland to veto any proposed change to this understanding.

★ A more useful European Parliament

Over the last 30 years, the member-states have gradually extended the powers of the European Parliament, the EU's only directly elected institution, in the hope of increasing the Union's democratic legitimacy. Though the Parliament has some significant powers – it can vet nominees to the European Commission, approve the EU's overall budget, and amend many EU laws – few would argue that the institution is either particularly popular or politically mature. The Lisbon treaty gives the Parliament new and real powers over policies where the EU has often been criticised as being either too spendthrift or not accountable enough. These include agriculture, fisheries, transport and structural funds – as well as the highly sensitive areas of policing and justice. The Parliament's MEPs will have new opportunities to drive reform and ensure accountability on behalf of ordinary citizens, as well as tighter control over expenditure. That could make it more visible and popular amongst voters.

★ A stronger foreign policy representative

Increasingly, the EU's big challenges lie outside its borders rather than within. The need for a global agreement on climate change, the prospect of a nuclear-armed Iran, a resurgent Russia and a renewed Middle East peace process are just some examples. However, the EU's machinery for co-ordinating foreign policy is ineffective. The Council's High Representative (currently Javier Solana, who will shortly retire) has the political clout that comes from speaking on the EU's behalf – provided the 27 member-states agree on what he should say. But he has few resources. The commissioner for external relations (currently Benita Ferrero-Waldner) has a substantial annual budget and a big team of specialists. But she has little diplomatic weight, partly because it is the Council of Ministers, rather than the Commission, that deals with many of the big questions of foreign and security policy. Co-operation between these two foreign policy figureheads and their respective bureaucracies is often difficult, and sometimes negligible. The Lisbon treaty therefore proposes the only sensible solution: a merger of the two posts. The combined post – originally styled as an 'EU foreign minister' – will be called the High Representative for Foreign Policy and Security.

The High Representative, rather than the rotating presidency, will chair the meetings of EU foreign ministers, and this will allow him or her to steer the Union's foreign policy agenda. Like Benita Ferrero-Waldner now, the High Representative will be in charge of the EU's external relations budget. And he or she will preside over the EU's new 'external action service', designed to provide administrative support and advice. The service will consist of the foreign affairs departments (including the overseas missions) of the Council and the Commission, as well as officials seconded by the member-states. So the new High Representative will have more clout and more resources than Solana does today. However, like Solana, he or she will only have a role to play if there is an agreed EU position to represent – and decision-making, as today, will remain subject to unanimity. A skilled High Representative would hopefully play a role in fostering the emergence of common EU positions.

★ Majority voting on internal security and migration

The new treaty scraps national vetoes in about 50 areas. Many of these are minor, and some are needed to allow the EU to implement its declared priorities, such as the swift disbursement of overseas aid. The most radical shift concerns decisions on EU action against terrorism, crime and illegal immigration, or what officials refer to as 'justice and home affairs' (JHA). In most policy areas, such as the single market or transport, the Commission drafts laws, the Council of Ministers and European Parliament decide on

them, and the European Court of Justice has the right to review whether the member-states comply with them. Decisions on JHA, on the other hand, currently require unanimity, and they are beyond jurisdiction of the ECJ. The need for painstaking consensus has resulted in frequent delays and watered-down compromises in this hugely important policy area. And the lack of ECJ involvement has raised concerns that EU legislation on, say, the extradition of suspected criminals, could infringe human rights. Under the Lisbon treaty most JHA issues will be dealt with like normal EU business. Since many of the issues at stake are sensitive, the EU has added an ‘emergency brake’ that allows each government to halt discussions on a JHA measure that could threaten its national legal system. If the country in question cannot reach a compromise with its EU partners, it is free to opt out of the measure. Despite the availability of this safeguard, the British government negotiated an opt-out from all JHA policies. Ireland, with which the UK has a common travel area, will also follow this arrangement.

★ Human rights apply to EU laws

The Lisbon treaty will make the EU’s charter of fundamental rights legally binding, but only on European legislation. The charter consists mainly of rights and freedoms that EU countries have signed up to in various other documents, such as the European Convention on Human Rights. It adds some aspirational ‘principles’, such as the right to job training and to health care, but specifies that these will only have meaning insofar as they are already applied and practised in the individual member-states. For example, the ‘right to strike’ will not create new worker entitlements beyond existing national labour laws. Nevertheless, some in the UK worried that such principles might serve as a loophole to undermine its liberal job market. So the treaty now includes a legally binding protocol (not, strictly speaking, an opt-out) which underlines that the charter does not create new social or labour rights and cannot be used to strike down British laws. The Polish government also signed up to this protocol but for different reasons: it worried that the charter’s individual freedoms could clash with the conservative and religious values upheld by many Poles.

★ Member-states can leave if they want to

For the first time, the EU treaties will contain a clear procedure for a member-state to leave the Union if it chooses. A country that wants to withdraw will negotiate a new treaty to cover its relations with the other member-states and will then no longer be subject to EU laws.

★ A stronger say for national parliaments

Under the principle of ‘subsidiarity’, the EU is only supposed to legislate if action cannot be taken more effectively at the national or local level. To enforce this principle, the Lisbon treaty will, for the first time, give national parliaments the right to challenge a piece of European legislation that they consider unnecessary. The Commission will in future send draft laws directly to national parliaments. If a third of them consider that the law would breach subsidiarity, the Commission is obliged to explain why the legislation is needed, or to submit a redrafted version. If half of the national parliaments remain unhappy, a majority of member-states or MEPs can then insist that the draft be dropped altogether. However, as in the past, the role that each national parliament plays in EU law-making will depend on how actively it wishes to be involved. For example, the Danish parliament has been extremely active in scrutinising EU laws and holding the government to account during negotiations in the Council of Ministers; other national parliaments much less so.

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