



LEGAL ANALYSIS OF SELECT PROVISIONS OF THE LISBON TREATY

This analysis was prepared in anticipation of the popular referendum on the Lisbon Treaty in Ireland, scheduled for June 12, 2008.

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Introduction

"The most striking change [between the EU Constitution in its older and newer version] is perhaps that in order to enable some governments to reassure their electorates that the changes will have no constitutional implications, the idea of a new and simpler treaty containing all the provisions governing the Union has now been dropped in favour of a huge series of individual amendments to two existing treaties. Virtual incomprehensibility has thus replaced simplicity as the key approach to EU reform. As for the changes now proposed to be made to the constitutional treaty, most are presentational changes that have no practical effect. They have simply been designed to enable certain heads of government to sell to their people the idea of ratification by parliamentary action rather than by referendum."

- Dr Garret FitzGerald, former Irish Prime Minister (Taoiseach), Irish Times, 30 June 2007

The European Centre for Law and Justice (ECLJ) has a strong interest in the Irish referendum, and the fate of the Lisbon Treaty, as adoption of the Treaty would appear to create a dramatically different European Union, one with its own international personality, that would seize much of the powers of legislation and judicial review from the current EU Member States. As this new European Union would also create new EU citizenship duties and obligations on all of the people of Europe, it is extremely problematic that only the Irish people will have the opportunity to voice their opinion on the Lisbon Treaty. This reinforces the validity of claims of a "democracy deficit" in the structures and administration of the European Community.¹

As this memo is focused on the Irish Referendum of June 12, most of the analysis will be devoted to the specific issues and potential problems of the Lisbon Treaty vis-à-vis Ireland, the Irish Constitution, and the Irish people. However, these issues are not unique to the Irish people, and the fact remains that the Lisbon Treaty will radically change the nature of the European Union, and the rights and duties of citizens of all other EU Member States, despite their not having a say in the matter.

¹ See Appendix 1 for a sampling of public statements by European officials that illustrate this "democracy deficit"

Background

The Treaty of Lisbon was originally called the "Reform Treaty", but changed its name when it was amended and signed in Lisbon, Portugal, by the prime ministers and foreign ministers of the 27 EU Member States on December 13, 2007.² Lisbon contains virtually all of the provisions of the original EU Constitution which was rejected in the French and Dutch referendums in 2005.³ In fact, Irish Taoiseach Bertie Ahern estimated that 90% of the Constitution is preserved in the Lisbon Treaty.⁴ The Lisbon Treaty amends two previous treaties that are the basis for the current European Community: the Treaty on European Union (TEU), commonly referred to as the Maastricht Treaty, and the Treaty establishing the European Community (TEC), also known as the Rome Treaty, which is renamed "Treaty on the Functioning of the European Union" (TFEU).

The biggest problem with the Lisbon Treaty might be its designed incomprehensibility.⁵ The official consolidated versions of the aforementioned treaties, as amended by Lisbon, runs to almost 400 pages. Even more problematic is the fact that this official consolidated version does not indicate what amendments to the treaties are made by Lisbon. Because of this, ECLJ in preparing this analysis relied on the "Consolidated Reader-Friendly Edition" of the Lisbon treaty

² The full version of the Lisbon Treaty can be viewed at <http://www.consilium.europa.eu/showPage.asp?lang=en&id=1296&mode=g&name=>

³ *"The substance of the constitution is preserved. That is a fact."* - German Chancellor Angela Merkel, speech in the European Parliament, 27 June 2007

⁴ *"90 per cent of it is still there...These changes haven't made any dramatic change to the substance of what was agreed back in 2004."* - Irish Taoiseach Bertie Ahern, *Irish Independent*, 24 June 2007

⁵ *"The aim of the Constitutional Treaty was to be more readable; the aim of this treaty is to be unreadable ... The Constitution aimed to be clear, whereas this treaty had to be unclear. It is a success."* - Karel de Gucht, Belgian Foreign Minister, *Flandreinfo*, 23 June 2007

compiled by the Foundation for EU Democracy.⁶ This version highlights in bold the new amendments proposed by Lisbon in the TEU and TFEU.

The publicly stated goal for the Lisbon treaty is to obtain parliamentary ratification of the Lisbon Treaty by all Member States by the end of 2008, and to have the Treaty come into force on January 1, 2009. Whereas the EU Constitution was to be committed to a referendum in ten Member States, only Ireland is holding a referendum on the Lisbon Treaty. This is because of all the current EU Member States, only Ireland has a constitutional requirement to subject the a treaty to a popular referendum, while any other EU Member State would, at most, only subject a new constitution to a referendum.

The Treaty of Lisbon contains 11 new protocols (which have the force of binding law) in addition to the original protocols for a total of 37 protocols. One of the most important and controversial provisions of the treaty is its incorporation of the Charter of Fundamental Rights in Article Six as binding law. This Charter, despite claims to the contrary in the Lisbon Treaty, appears to create the potential for new “rights”, and could create considerable confusion as to interpretation of human rights in Europe. This is underscored by the fact that both Poland and the United Kingdom have opted out of compliance with the Charter in Protocol 30, an option that has not been offered to the Irish people in this referendum.

I. The Irish Referendum: The language of the constitutional amendment

The constitutional referendum in Ireland on June 12, 2008 formally proposes a two-sentence amendment to the constitution of Ireland concerning the Lisbon Treaty:

⁶ This reader-friendly edition can be viewed at [http://www.euinfo.ie/uploads/file/Consolidated LISBON TREATY 3.pdf](http://www.euinfo.ie/uploads/file/Consolidated_LISBON_TREATY_3.pdf)

The State may ratify the Treaty of Lisbon signed at Lisbon on the 13th day of December 2007, and may be a member of the European Union established by virtue of that Treaty. No provision of this (Irish) Constitution invalidates laws enacted, acts done or measures adopted by the State that are necessitated by membership of the European Union referred to, or prevents laws enacted, acts done or measures adopted by the said European Union or by institutions thereof, or by bodies competent under the treaties referred to in this section, from having the force of law in the State.

The first sentence is fairly straightforward and allows for the adoption of the Lisbon Treaty by the Irish government, thereby making Ireland a member of the new European Union. The second sentence is breathtaking in its sweep, as it subjugates the Irish Constitution and Irish law not only to the provisions of the Lisbon Treaty, but also seemingly to any subsequent law or measure of the new European Union or its institutions. Effectively, this is a blank cheque from the Irish people to the EU bureaucracy, for it appears that the Irish people (and their government) would be giving up their right to any future approval of EU laws that would conflict with the Irish constitution.

The broad and ambiguous language of the first clause of the second sentence centres on the interpretation of what is necessitated by membership of the EU, an interpretation that will more likely be decided by the EU than by the Irish government. Further, the second clause of the second sentence clearly states that any properly enacted law, act or measure of the EU or its institutions cannot be prevented from having the force of law in Ireland, *even where it is in direct conflict with the Irish Constitution*.

This raises serious questions as to the breadth and scope of central power under the new EU, and seems to contradict the many public statements that a “YES” vote to the Irish referendum could not jeopardize Ireland’s unique constitutional provisions, including protections on unborn life, marriage, and the family. These issues will be examined more closely below.

II. Creation of a new EU legal personality and citizenship

The Lisbon Treaty unambiguously creates an international legal personality for the new European Union.⁷ Lisbon would give the post-Lisbon Union full legal personality separate from and superior to its Member States, so that it could act as a sovereign state in the international community of states, sign treaties with other nations in all areas of its powers, have its own political president, foreign minister (High Representative), diplomatic service, embassies and public prosecutor. Recently, the *Daily Telegraph* reported on secret negotiations to establish full EU embassies to take the place of existing EU offices around the world.⁸

Article 10 of Lisbon establishes EU Citizenship for all nationals of Member States.⁹ Up to this point, the citizens of Ireland and all other EU Member States were essentially honorary or notional citizens of the EU. The Lisbon Treaty, however, as it creates a new international legal personality for the EU that did not exist before, also creates a new type of EU citizenship. It should be noted that, although this new EU citizenship creates legal obligations for all of the citizens of the EU, only in Ireland do citizens get to vote on whether they agree to these obligations. These new EU citizenship obligations would include, *inter alia*, abiding by the Charter of Fundamental Rights and potentially serving on an EU common defence force or peacekeeping operation.

The Lisbon Treaty essentially creates a Federal State with dual citizenship, a system that has been compared by some commentators to the federal systems of the United States of America, Germany, Switzerland and Canada. This is how the original EU Constitution was viewed, as the Belgian Prime Minister Guy Verhostadt observed, "The Constitution is the

⁷ TFEU Article 47: "The Union shall have legal personality."

⁸ Bruno Waterfield, "EU plans international embassies", *Daily Telegraph*, May 3, 2008, <http://www.telegraph.co.uk/news/worldnews/europe/1922140/EU-plans-international-embassies.html>

⁹ "Every national of a member state shall be a citizen of the Union. Citizenship of the Union shall be additional to national citizenship and shall not replace it."

capstone of a European Federal State."¹⁰ Just as in these federal systems, there are two levels of citizenship, but in most cases, the federal citizenship entails more obligations and is superior state citizenship.

III. Irish National Sovereignty

The Lisbon Treaty, like the European Constitution, has been created with the purpose of forming “an ever closer union of among the peoples of Europe.”¹¹ While many aspects of the Lisbon Treaty discuss areas of power already granted to the EU, such as a centralized European economy and the Court of Justice of the European Union, the ambiguous language of the Lisbon Treaty dramatically expands the scope and power of the EU as it currently exists. This expansion comes at the cost of national sovereignty of Member States.

While Article 6 of the TEU assures Member States the EU will not exceed its competences granted to it by Member States, when read with the broad provisions of both the TEU and TFEU, as amended by the Lisbon Treaty, one must speculate as to which powers are actually reserved to Member States.

Article Two of TFEU, as amended by the Lisbon Treaty, sets forth two levels of competence that make EU law and policy superior to national law. The first is what is called “exclusive competence”, which means that the EU alone has the power to “legislate and adopt legally binding acts”, unless the EU empowers Member States to legislate in the area.¹² Areas

¹⁰ Guy Verhofstadt, Belgian Prime Minister, *Financial Times*, 21 June 2004

¹¹ TFEU Preamble

¹² TFEU, Article 2, Para. 1

designated for exclusive competence of the EU include customs, internal market competition rules, monetary policy, marine resources and fisheries policy, and common commercial policy.¹³

The second level of competence is “shared competence”, which seems to presume an equal role for the EU and Member States in legislation. However, Member States “shall exercise their competence to the extent that the Union has not exercised its competence”. This means that in any defined area of shared competence that the EU decides to act, that EU legislation overrides any legislation of a Member State. The areas of shared competence in the Lisbon Treaty include the internal market; social policy; “economic, social and territorial cohesion”; agriculture and fisheries; environment; consumer protection; transport; trans-European networks; energy; “area of freedom, security, and justice”; common safety; and public health matters.¹⁴ This is a non-exhaustive list, as new competencies can also be added if adopted under Treaty provisions.

IV. EU Common Defence and Irish Neutrality

One of the primary areas of exclusive competence given to a more centralized version of the European Union is the area of foreign policy and defence. The Preamble to the TEU notes one of its key purposes is to “implement a common foreign and security policy including the progressive framing of a common defence policy, which might lead to a common defence.” Article 24 of the Treaty gives the EU competence in all areas of foreign policy and includes the competence to form a common defence. While Member States would be called upon for their opinion in forming a foreign policy, the new structure of the majority will greatly lessen the power a single Member State has within the Union. The Treaty does not limit the Union’s ability

¹³ TFEU Article 3, Para. 1

¹⁴ TFEU Article 4, Para. 2

to act in foreign policy, but rather gives legislators the broad power to progressively frame a common defence policy, under Article 24(1) of the TEU.

However, Article 24(3) imposes upon Member States the duty to “support the Union's external and security policy actively...unreservedly in a spirit of loyalty and mutual solidarity and shall comply with the Union's action in this area.” Decisions would be made by the European Council under Article 26(1) and High Representative of the Union for Foreign Affairs and Security would also have significant influence on foreign policy Article 26(2).

The most significant aspect of the Lisbon Treaty as it relates to common defence is conspicuously disguised under Article 26(3) of the TEU which states the decisions made by the Council will be implemented using national and Union resources. This implies Ireland would be expected to contribute Irish resources, including the possibility of Irish forces, lead by non-Irish leaders. Article 42(3) further imposes upon Member States to strengthen their military capabilities and contribute further to a common defence. A Member State may abstain from a military action or refrain for a certain aspect of foreign policy, but it must first consult with the European Council and the wording of the Treaty frowns upon unilateral decisions undertaken by sovereign Member States.

Ireland has maintained a consistent policy of neutrality since obtaining its independence in 1922. Although Ireland's conception of neutrality might differ slightly from the more traditional view held by countries like Sweden or Switzerland, neutrality in Ireland is generally taken to mean non-participation in a conflict unless approved by the so called “triple-lock”. The triple-lock consists of the Government, Dáil Éireann (House of Representatives), and the UN Security Council. This strong preference for neutrality was recently reinforced by the original rejection by the Irish people of the Nice Treaty in the 2001 referendum, which was partly a result

of fears that Ireland's neutrality would be compromised. To address these concerns, Ireland obtained approval from the Council of Europe of the Seville Declaration in 2002, which declared Ireland's policy of military neutrality would continue if it became a signatory to the Nice Treaty.¹⁵ It is clear that the Lisbon Treaty could fundamentally alter Ireland's traditional military neutrality, and force it to commit troops and resources to conflicts within the EU and internationally. The Irish people will have to decide whether they want to abandon the "triple-lock" system with its heavy checks and balances, for a policy that is largely decided by EU bureaucrats.

V. Social Policy

1. Abortion

The Constitution of Ireland explicitly protects the life of the unborn and prohibits abortion according to Article 40.3.3, which was passed by constitutional amendment in 1983.¹⁶ Periodically, with each new proposed EU treaty or constitution, there has been considerable public debate as to whether Ireland's constitutional protections for the unborn will be protected as the EU becomes more centralized. In the case of the Lisbon Treaty, pro-Lisbon forces have pointed to Protocol 35 as foreclosing any possibility that a post-Lisbon EU could impose the legalization of abortion in Ireland. Protocol 35 states,

Nothing in the Treaties, or in the Treaty establishing the European Atomic Energy Community, or in the Treaties or Acts modifying or supplementing those Treaties, shall affect the application in Ireland of Article 40.3.3 of the Constitution of Ireland.

This does seem to foreclose the possibility that the Lisbon Treaty or subsequent amendments to it could supersede Article 40.3.3. However, it does not rule out other

¹⁵ The Seville Declaration can be accessed at <http://www.taoiseach.gov.ie/index.asp?docID=874>.

¹⁶ Article 40.3.3 reads, "The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right."

possibilities to override the Irish Constitution that would not include Treaty law. The most likely scenario would be legislation, or even more probably, a court decision, that would declare abortion to be a fundamental human right. This is not a remote possibility; in fact, given the recent history of the European institutions, this is more probable than not to happen. Witness the fact that in May of 2008, the Parliamentary Assembly of the Council of Europe (PACE) passed a resolution calling for all 47 member states to decriminalize abortion.¹⁷ Additionally, only 3 of the 27 current EU Member States have laws with significant restrictions on abortion (Ireland, Poland, and Malta).

If the European Court of Justice were to decide that abortion is a “right” in interpreting the Charter of Fundamental Rights, it appears that this decision, (in the absence of an opt-out clause similar to that for Poland and the UK) would be binding on Ireland, Protocol 35 notwithstanding.

It should also be noted that following the recent decision of PACE that declared abortion to be a human right, Council of Europe Commissioner for Human Rights Thomas Hammarberg released a report on his recent visit to Ireland in which he criticized Ireland for failing to legislate for abortion and also for failing to adequately protect children under state care.¹⁸

2. Marriage and the Family

The family has a special place at the heart of the Irish constitution, which describes it “as the natural primary and fundamental unit group of Society”.¹⁹ According to Article 41, the “State pledges itself to guard with special care the institution of Marriage, on which the Family is

¹⁷ The PACE resolution can be viewed at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta08/ERES1607.htm>

¹⁸ “European Human Rights chief hits out at lack of abortion laws here”, Irish Independent, May 1, 2008, <http://www.independent.ie/national-news/eu-chief-hits-out-at-lack-of-abortion-laws-here-1363521.html>

¹⁹ Irish Constitution, Article 41

founded, and to protect it against attack.” No court in Ireland has ever interpreted marriage to mean anything other than the union of a man and a woman. This interpretation, though, may not withstand a challenge under the Charter of Fundamental Rights, which is fully incorporated into national law when the Lisbon Treaty is adopted.

Article 21 of the Charter explicitly prohibits discrimination based on the grounds of sexual orientation.²⁰ The language of “sexual orientation”, when applied to non-discriminatory laws, creates a strong presumption for a violation where same-sex marriage or partnerships are prohibited by national law. The aforementioned PACE recently drafted a resolution on same-sex partnerships that argues that European countries cannot discriminate against same-sex couples in the areas of unions, marriage, and/or benefits.²¹

²⁰ A copy of the Charter of Fundamental Rights can be viewed at http://www.europarl.europa.eu/charter/pdf/text_en.pdf

²¹ See, Maciej Golubiewski, “Council of Europe May Approve Homosexual Marriage”, C-Fam, May 22, 2008. http://www.c-fam.org/index.php?option=com_content&task=view&id=751&Itemid=102

Appendix 1

Public Statements by European officials that exhibit a “democracy deficit” in the adoption process of the Lisbon Treaty

"The difference between the original Constitution and the present Lisbon Treaty is one of approach, rather than content ... The proposals in the original constitutional treaty are practically unchanged. They have simply been dispersed through the old treaties in the form of amendments. Why this subtle change? Above all, to head off any threat of referenda by avoiding any form of constitutional vocabulary ... But lift the lid and look in the toolbox: all the same innovative and effective tools are there, just as they were carefully crafted by the European Convention."

- V.Giscard D'Estaing, former French President and Chairman of the Convention which drew up the EU Constitution, *The Independent*, London, 30 October 2007

"France was just ahead of all the other countries in voting No. It would happen in all Member States if they have a referendum. There is a cleavage between people and governments ... There will be no Treaty if we had a referendum in France, which would again be followed by a referendum in the UK."

- French President Nicolas Sarkozy, at meeting of senior MEPs, *EUobserver*, 14 November 2007

"The good thing about not calling it a Constitution is that no one can ask for a referendum on it."

- Giuliano Amato, speech at London School of Economics, 21 February 2007

"Sometimes I like to compare the EU as a creation to the organisation of empires. We have the dimension of Empire but there is a great difference. Empires were usually made with force with a centre imposing diktat, a will on the others. Now what we have is the first non-imperial empire."

- Commission President J-M Barroso, *The Brussels Journal*, 11 July 2007

"If it's a Yes, we will say 'On we go', and if it's a No we will say 'We continue.'"

- Jean-Claude Juncker, Luxembourg Prime Minister and holder of the EU Presidency, *Daily Telegraph*, 26 May 2005