

Introduction

The rejection of the Lisbon Treaty by the electorate on 12 June 2008 has presented the Irish government with the most serious crisis in external relations since the Second World War. This was the third such referendum on Europe held in Ireland since the millennium and the second plebiscite in three to result in a rejection of an EU Treaty following the failed Nice poll in 2001. There is no obvious solution to the dilemma the government faces and no obvious pathway to achieve ratification. There is however a clear consensus amongst the political parties that ratification constitutes both a clear political priority and a fundamental national interest. At the October European Council summit in Brussels, Taoiseach Brian Cowen promised to come back to the December meeting “with a view to our defining together the elements of a solution and a common path to follow”.¹ But the external context is now clear – EU leaders indicated an unwillingness to re-negotiate any part of the Treaty: it will be up to Ireland to find an Irish solution to this European problem. Thus the opportunity cost of the No vote has become somewhat clearer: Ireland faces marginalisation and isolation in Europe if a solution to the Lisbon dilemma is not found. The domestic context is also somewhat clearer now that we have access to extensive data that sheds light on the reasons for the No vote in the 12 June poll. In assessing the options for ratification this paper draws upon that data, presented in among other sources, the post-referendum Eurobarometer survey

¹ “Ireland promises Lisbon clarity in December”, *EU Observer.com*, 15 October 2008 (<http://euobserver.com/9/26942>).

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Ireland & the Lisbon Treaty: *Quo Vadis?*

John O’ Brennan

and the government-commissioned Millward Brown IMS research findings.²

Any course of action that involves another referendum campaign implies significant risks for the Irish government and for Ireland’s position within the European Union. The principal danger here lies in the continuing knowledge deficit regarding EU affairs: fully 42% of respondents polled by Millward Brown cited a “lack of knowledge/information/understanding” as their reason for voting No to Lisbon.³ But the threat to Ireland’s national interests, to the country’s long-term economic prosperity and international relations are very grave and now necessitate the most substantive engagement by political actors. This paper seeks to contribute to the debate on ratification and to provide policy-makers with an assessment of the options before them. Before proceeding to outline those options it sets out four key assumptions upon which the arguments made are based. It also outlines the importance of securing a clarification of the constitutional position via a Supreme Court ruling on the constitutionality of the Lisbon Treaty and the desirability of finding EU agreement on the right of all 27 member states to permanent representation on the European Commission.

² European Commission, “Post-referendum Survey in Ireland”, *Flash Eurobarometer* 245, 18 June 2008; Millward Brown IMS, “Post-Lisbon Treaty referendum research findings September 2008”, p.i

³ Millward Brown IMS, *ibid.*

Key Assumptions

Assumption 1: The Irish government's clear aim is to remain a full member of the European Union with all the rights that membership conveys and the responsibilities it entails. Ireland's fundamental national interest demands that any tendency toward drift or to some sort of detached relationship with the EU should be resisted. The fact that almost 90% of the elected representatives in the Dáil support the ratification of the Lisbon Treaty and are opposed to any development that would leave Ireland marginalised and isolated in Europe is a significant plus as options for ratification are considered. But there have been some worrying signs that, in the aftermath of the referendum, both Fine Gael and the Labour party have begun to move away from the well-established consensus on Europe that has been an enduring feature of the Irish party system. The recent turmoil in global financial markets underlines the vital importance of EU membership as an anchor of Ireland's economic and geopolitical relations. Thus the threat to Ireland's national interests represented by a failure to ratify Lisbon demands unity of purpose amongst the main political parties and no second referendum could be contemplated without this.

Assumption 2: The other 26 member states of the European Union proceed to ratify the Lisbon Treaty according to their domestic constitutional procedures by early 2009. This will leave Ireland as the only state not to have ratified the Treaty and thus the only state then blocking ratification. Once we reach a point where all other 26 member states have actually ratified the Treaty the political pressure on Ireland will increase significantly. Although in a small number of member states there are pending constitutional challenges, this paper takes as a point of departure the certain ratification of Lisbon by all the other 26 member states of the Union.⁴

Assumption 3: The other 26 member states of the EU will not open up the Lisbon process to re-negotiation. Already many member state governments, as well as the current French Presidency of the EU, have gone on record to note

⁴ Ratification has now been completed in 22 member states. In the Czech Republic the Constitutional Court will deliver a ruling sometime in October 2008. In Sweden the parliament will vote in the autumn. The Polish case is more complicated as ratification has been approved by both government and parliament but the bill awaits the President's signature. Similarly in Germany President Kohler awaits a decision of the Constitutional Court. See Piotr Maciej Kacynski, Sebastian Kurpas and Peadar O'Broin, *Ratification of the Lisbon Treaty: Ireland is not the only problem*, EPIN Working Paper No. 18, CEPS, Brussels, September 2008.

their absolute opposition to the idea of any re-negotiation. That opposition is based on the view that once one aspect of the Treaty is opened up for re-negotiation all other parts of the agreement become open to contestation, re-interpretation and protracted disputes. This is even more true of a Union of 27 sovereign states than was the case in previous inter-governmental negotiation contexts. We can safely assume that this means that the present crisis will require (in political terms) *a specifically Irish solution to a European problem*. Although opponents of Lisbon argue that, in formal procedural terms, the Irish No vote cannot be ignored (the unanimity stipulation attached to treaty change to be found in Article 48 of the Treaty on European Union), the practical politics that characterise this impasse in EU affairs is that too much negotiating blood was spilt on Lisbon and its predecessors and there is no stomach for even a partial repeat of that process. Whilst there may be similarities to the situation Denmark found itself in after the rejection there by its electorate of the Maastricht Treaty in 1992, we have to recognise that the wider political context in Europe is significantly different now (the EU is both *deeper* and *wider*) and there is much less goodwill in evidence towards Ireland than was the case previously.

Assumption 4: The Nice Treaty is unsuitable as a vehicle for achieving both institutional efficiency and constitutional balance as the EU goes forward. Although recent academic analysis suggests that the 2004 and 2007 enlargements have not significantly reduced the efficiency of EU decision-making, it is equally clear that the policy-making agenda is much less ambitious than has been the case in the past: the European Commission as a rational political actor has adjusted for the new environment and scaled back its ambitions in a number of core policy areas.⁵ The irony here is that opinion polls throughout Europe (including Ireland) clearly demonstrate a demand for EU action in important policy areas such as energy security, financial regulation, policing, asylum and immigration, and even in foreign and security policy.

Moreover the prospect of further enlargement to the Western Balkans (anticipated during the Lisbon negotiations) means that the Nice Treaty

⁵ See, for example, Sara Hagemann and Julia de Clerk-Sachsse, *Old Rules, New Game: Decision-Making in the Council of Ministers after the 2004 Enlargement*, CEPS Special Report, Centre for European Policy Studies, Brussels, March 2007; Sebastian Kurpas, Caroline Gron and Piotr Maciej Kacynski, *The European Commission after Enlargement: Does More add up to less?*, CEPS Special Report, Centre for European Policy Studies, Brussels, February 2008.

arrangements already begin to look sup-optimal and institutionally outmoded for a Union of up to 34 member states circa 2015 (not including Turkey).⁶ The recent improvement in EU-Serbia relations after the capture and transfer to the International Criminal Tribunal for the former Yugoslavia (ICTY) of Radovan Karadžić means that an important impasse in the enlargement process has largely been resolved and a period of more or less normal negotiations should now follow. But Ireland's No to Lisbon has had a predictably negative impact on the enlargement framework, ironically just at a time when the situation in the Western Balkans has begun to improve. Germany and France have been particularly emphatic in stating that further enlargement cannot happen without ratification of Lisbon – as Bernard Kouchner put it at the EU foreign ministers meeting in Avignon: “No Lisbon, no enlargement”. In 2001, after the rejection of the Nice Treaty by the Irish electorate, the EU's eastern enlargement was thrown into considerable doubt for a period. Now once again it is Ireland that is – rightly or wrongly – perceived to be the single greatest threat to the EU's expansion into South-eastern Europe. In this sense, as in many others, the rejection of Lisbon has been very damaging to Ireland's reputation in Europe, especially among states that view the Irish positively because of the way the country has made a success of EU membership.⁷ To sum up, the imperative of achieving a balanced constitutional order in the context of the ‘deepening’ and ‘widening’ impulses presents the EU with no option but to look beyond Nice for an efficient, equitable and workable institutional system.

Finally, the recent conflagration between Georgia and Russia over South Ossetia and Abkhazia and the uncertain EU response also underlined for many the need to quickly adopt the new provisions in foreign and security policy envisaged by Lisbon as a means to achieve a more effective EU foreign policy.⁸ Russia has clearly been emboldened by recent events and there will be significant challenges to

⁶ The EU is currently at different stages of negotiation with seven different states in the western Balkans region: Albania, Bosnia-Herzegovina, Croatia, Kosovo, FYR Macedonia, Montenegro, and Serbia. For the purposes of clarity I include Kosovo as an individual state entity though its statehood has yet to be formally recognised by the EU.

⁷ See Croatian Foreign Minister Goran Jandrokovic's interview with Jamie Smyth: “Croatia fears Ireland's No to Lisbon is blocking accession”, *The Irish Times*, 8 September 2008.

⁸ See Jamie Smyth, “Lack of Lisbon Treaty hinders EU response to Russian Action”, *The Irish Times*, 2 September 2008.

confront on the Union's eastern borders in years to come; the Nice provisions on foreign and security policy patently provide neither the institutional weight nor the political muscle necessary to allow the EU to punch its weight in the international arena. The sense of crisis engendered by the meltdown in global financial markets has also led to renewed calls for a speedy resolution to the Lisbon dilemma, most recently from Commission President José Manuel Barroso and French European Affairs Minister, Jean-Pierre Jouyet.⁹ MEPs were also emphatic on this point subsequent to the address to the Parliament's Constitutional Affairs Committee by Minister for Foreign Affairs, Micheál Martin, on 6 October 2008. For all these reasons we can safely assume that the EU will not seek to fall back on the Nice arrangements in the years ahead.

The Lisbon Treaty and the Irish Constitution

Before any of the options for ratification are considered it is imperative that a Supreme Court determination on the constitutionality of the Lisbon Treaty be sought under Article 26 of Bunreacht na hÉireann, the Irish Constitution. A clarification of the constitutional position should have been sought in advance of (and, in my view, in preference to) the more risky route of a popular referendum on the Lisbon Treaty. Even in the aftermath of the referendum's decisive result, a Supreme Court judgement would be of considerable benefit to the Irish government as it assesses the options (outlined below) for ratification.

It is worth recalling that the 1972 amendment to Bunreacht na hÉireann, approved overwhelmingly by referendum, authorised the transfer of certain legislative, executive and judicial powers to the then European Economic Community. The amendment provided that Ireland could join the Communities and that “no provision of this Constitution invalidates laws enacted, acts done or measures adopted by the state necessitated by the obligations of membership of the Communities or prevent laws enacted, acts done or measures adopted by the Communities, or institutions thereof, from having the force of law in the state”.¹⁰ It is unfortunate that the Supreme Court has not been asked to clarify the relationship between executive action on EU affairs and the domestic constitutional order since the celebrated Crotty case of 1987.¹¹ Because of this

⁹ See “Tackling of EU crisis needs Lisbon Treaty, says Barroso”, *The Irish Times*, 9 October 2008.

¹⁰ Oireachtas, European Communities Act, No. 27/1972, 16 December 1972.

¹¹ *Crotty v An Taoiseach* (1987) IR 713.

much of the discussion surrounding options for ratification of the Lisbon Treaty has been taking place in a legal-constitutional vacuum. As Gavin Barrett puts it: “It is far from clear that the application of *Crotty* would invalidate the ratification even of the *entirety* of the Lisbon Treaty without a referendum....(and) It is even unclear whether the present Supreme Court would even follow all of its own reasoning in *Crotty*...”.¹² Therefore a Supreme Court hearing, brought under Article 26 of the Constitution, promises to bring much-needed clarity to the debate on how to proceed.

Such a judgement would help clarify the nature of Ireland’s constitutional relationship with the EU, in a context where there have been significant economic and political developments beyond those which the Supreme Court justices of 1987 dealt with (or indeed envisaged) in the *Crotty* judgement (again, *deepening* and *widening*). Second, it would define precisely the position of the state in regard to the 1972 European Communities Act and thus specify whether the competence to ratify EU treaty changes lies with the Oireachtas (Parliament) or the people. Finally, it could significantly aid the government in choosing between some of the options for ratification listed below, depending on the stance the Supreme Court takes in interpreting the Lisbon Treaty.

Should the Court identify parts of the Treaty that it deems to be at odds with the Irish Constitution, these might be put to a referendum in precisely defined amendments. If the option is to hold a second referendum it could thus greatly aid the process of deciding the *nature* and *content* of that referendum, helping to clarify whether parts of the Treaty could be implemented by the Oireachtas, or whether every part of the Lisbon Treaty required popular consent. Should the government decide to ratify the Treaty without a referendum it would run the risk, according to Barrett, of “having its knuckles rapped” by the Supreme Court. Such a course of action could also cause chaos throughout the EU “were the Supreme Court to find ratification without a referendum invalid only after the relevant Treaty purportedly came into force”.¹³ Thus it can safely be concluded that whatever option the Irish government decides on for moving forward, the Supreme Court will play an important, if not decisive role, in determining the outcome of Ireland’s Lisbon problem.

¹² Gavin Barrett, “Is a Second Referendum Appropriate in order to allow Ireland to ratify the Treaty of Lisbon?”, *Sunday Business Post*, 31 August 2008.

¹³ *Ibid.*

Securing a Permanent Representative on the European Commission

The data presented by Eurobarometer and Millward Brown IMS demonstrate that one of the key reasons Irish voters rejected the Lisbon Treaty lay in concerns that Ireland’s voice and representation within the EU institutions would be eroded. Of crucial importance here was the sense that the loss of a permanent Irish Commissioner would deal a blow to Irish interests and influence, or even, as the Millward Brown IMS research puts it, to Ireland “having no voice in Europe at all”.¹⁴ Irrespective of the fact that the Nice Treaty already provides for the loss of Commission representation as early as 2009, this is clearly an issue that can be resolved by collective action at EU level: although the Lisbon Treaty also mandates a Commission made up of nominees of only two thirds of the member states in any five year period it also references a potential recalibration of numbers (“...unless the European Council, acting unanimously, decides to alter this number”). The collective utilisation of such a Treaty-defined ‘escape clause’ would provide the Irish government with some leverage as it contemplates a second referendum.

John Temple Lang and Eamon Gallagher demonstrate in a recent CEPS Policy Brief that the full significance of the reduction in size of the Commission under the Nice Treaty has not been widely or clearly understood. It means that there would always be, for five years at a time, one-third of the member states without a nominee in the EU’s policy-initiating and policy-implementing institution. They point out that amongst the six largest member states (France, Germany, Italy, Poland, Spain and the UK) there would always be at least *two* large states without nominees, and it would be unlikely that those states would uncontroversially accept proposals or decisions emanating from a body on which they were not, in any sense, represented.¹⁵ It is very difficult, for example, to envisage a future David Cameron-led Conservative government in the UK settling for the Nice status quo whilst continually coming under attack from the UK’s rabidly Euro-sceptic press for agreeing to proposals emerging from a Commission without UK representation. Equally, one has to ask whether there would develop significantly deeper negative perceptions of the EU in Ireland in a

¹⁴ Millward Brown IMS, *op. cit.*

¹⁵ John Temple Lang and Eamon Gallagher, *Essential Steps for the European Union after the No votes in France, the Netherlands and Ireland*, CEPS Policy Brief No. 166, Centre for European Policy Studies, Brussels, August 2008, p. 4.

context where the country was without representation on the Commission and yet had to negotiate, approve and implement laws proposed by that same Commission.

It seems clear that the Yes side underestimated the significance of this issue during the Lisbon campaign in Ireland. The rationale for having a Commission is that the EU needs an autonomous body, independent of the member states, yet – crucially – representative of the whole Union, to propose policies and implement legislation agreed by the Council of Ministers and European Parliament.¹⁶ The representative function demands that we now revisit the Nice arrangements and unequivocally invoke the clause of Lisbon that allows for an increase in the number of members of the Commission so as to grant each member state the right to permanent representation. It seems clear that the preponderance of opinion across the EU now favours the idea of permanent representation and thus the issue would seem to present much less difficulty for the EU as a body than anything that would involve opt-outs for Ireland or substantial re-negotiation of Lisbon. For this reason it would seem prudent for the Irish government to secure EU agreement on full and permanent Commission representation for all as a crucial first step in trying to break the domestic impasse created by the referendum result. If opinion polls are to be believed it would make the task of selling a second referendum to the Irish people – whatever the precise nature of the proposition – that much easier. Therefore this course of action should be pursued independent of (and in addition to) any of the suggested options outlined below.

Four Options for Achieving Ratification

Option One: Ignore the referendum result and proceed to ratify the Lisbon Treaty by statute of the Oireachtas.

In two opinion pieces during the summer, published in *The Irish Times*, Stephen Collins, one of Ireland's most respected political commentators, argued that the government should take the radical step of ignoring or disregarding the will of the people, as expressed on 12 June 2008, and proceed to ratify the Lisbon Treaty by statute of the Oireachtas.¹⁷ Whilst it is not unusual for member state governments to hold consultative (non-binding) referendums on EU

¹⁶ Ibid.

¹⁷ Stephen Collins, "Legislative route may be best way to get around Lisbon", *The Irish Times*, 19 July 2008; Stephen Collins, "Ratify Lisbon Treaty regardless of referendum result", *The Irish Times*, 2 August 2008.

issues, it is quite a different matter for a government to declare a referendum merely consultative after the event. The starting point for Collins (and many other commentators who support this position) is the grave threat to the Irish national interest presented by the failure to ratify Lisbon and the desire to ensure that Ireland remains inside the core decision-making structures of the EU. He points explicitly to the reasoning of the justices of the Supreme Court in the Crotty judgement, especially that of Chief Justice Tom Finlay, who pointed out that in securing the consent of the people via the accession referendum in 1972, the government also received a rolling mandate to approve amendments to the EC Treaties "so long as such amendments did not alter the essential scope or objectives of the communities". Similarly, Mr Justice Barrington noted in his judgement that the founders of the European Community had in mind "a growing dynamic Community gradually achieving its objectives over a period of time".¹⁸ The mandate for parliamentary approval of Lisbon could thus be traced back to the licence granted by the 1972 Third Amendment to the Irish Constitution.

It could also be argued that Article 29.4.2 of Bunreacht na hÉireann provides the government with another possible 'escape clause'. It states that 'in connection with (the State's) external relations, the Government may adopt...any method of procedure used...by the members of any group...of nations with which the State is...associated' for the purpose of international co-operation'. Broadly interpreted this could mean that because all 26 other member states have ratified (or will ratify) the Lisbon Treaty by parliamentary instruments, Ireland could also do so. Again, a comprehensive hearing by the Supreme Court would provide clarification on this important point of constitutional law.

The dominant interpretation of the Crotty judgement was (and remains) that any further change in the EU constitutional order with implications for Irish sovereignty would have to be legitimated through referendum rather than parliamentary statute.¹⁹ No Irish government has been prepared to challenge the constitutionality of an EU treaty before the Supreme Court since that time and no such action was

¹⁸ See John Temple Lang, "The Irish Court Case which delayed the Single European Act" (1987) 24 CMLRev 709.

¹⁹ On the nature and significance of the Crotty judgment see, for example, Gerard W. Hogan, *The Supreme Court and the Single European Act* (1987) Ir Jur 55; John Temple Lang, *op. cit.* 1987; and James Casey, *Crotty v An Taoiseach: A Comparative Perspective*, in O'Reilly (ed.), *Human Rights and Constitutional Law: Essays in Honour of Brian Walsh*, Dublin, 1992.

contemplated in respect of the Lisbon Treaty. This is despite the fact that Crotty *expressly authorises* the ratification of EU treaties by statute, provided that “such amendments do not alter the essential scope or objectives” of the existing European Union. The only aspect of the Single European Act (SEA) that the Court felt required constitutional amendment, and this only by a 3 to 2 majority, was Title III, which pertained to European security and foreign policy. It is absolutely clear that all other institutional and procedural innovations contained in the Single European Act could as easily have been introduced by statute of the Oireachtas. Indeed, as Ruth Barrington points out, successive enlargements of the EU have been ratified by the Oireachtas rather than by referendum, and it is at least arguable that these have altered the essential scope and/or objectives of the EU far more than actual treaty change. Similarly, Temple Lang and Gallagher show that each successive enlargement has changed the dynamics of Irish influence and voice in EU decision-making procedures because each accession has seen changes to the weighting of each member state’s voting strength in the Council, as well as changes to key EU policies, which have moved from a strictly intergovernmental domain (requiring unanimity) to that of supranationalism (where QMV applies) over time.²⁰ Viewed from this perspective the government would have been perfectly justified in incorporating the very modest institutional changes attached to the Lisbon Treaty into Irish law by statute rather than constitutional amendment. Given that the Lisbon Treaty contained little or no movement towards further substantive ‘deepening’ of foreign and security policy, and leaves intact each member state’s absolute sovereignty in foreign affairs, it might have seemed to some as inherently sensible for the government to opt for parliamentary ratification or at least to test the constitutionality of the Lisbon Treaty before the Supreme Court in advance of, or in preference to, the much more risky route of a popular referendum.

This is the point where one encounters the real world political problem presented by embracing Stephen Collins’ idea. The Irish government’s decision to proceed cautiously with the Lisbon Treaty and avoid a confrontation with the Supreme Court was based presumably on a strategic recognition that if the action failed it would have been presented by the No side as a deliberate effort to exclude the Irish people from the decision-making process and thus prove a significant weapon in the anti-integrationist armoury in the course of a referendum campaign. The impression of a so-called ‘Euro-elite’ going over the heads of the people,

²⁰ Temple Lang and Gallagher, *op. cit.*, p. 7.

already popularly embedded (and now deployed regularly in the unashamedly Euro-hostile ‘*Irish Mail*, the ‘*Irish Sun*, the *Sunday Times* and other newspapers), would no doubt be reinforced by such a turn of events.²¹ Thus for the Irish government calling a referendum on Lisbon represented the only sensible response to the Supreme Court’s 1987 decision which, in Barrett’s opinion, should have long ago been overruled or modified by the court itself.²² If, in the aftermath of the referendum defeat the government were now to proceed exclusively down the legislative track and discard the democratically-expressed will of the people, this might well achieve the short-term objective of achieving a solution to the Lisbon conundrum. A Supreme Court ruling might well deem this to be perfectly consistent with the Irish constitution and the sovereignty provisions therein. And this option would undoubtedly prove less messy than other participatory routes to ratification whilst providing the most efficient means of bolstering confidence in our partner states about Irish attitudes to EU membership.

The longer-term price to be paid, however, would be considerable: it would further alienate Irish citizens from the EU policy-making process; entrench the idea of EU and Irish elites engaging in a full-scale conspiracy to deny Irish citizens their say in the decision-making process; provide more ‘evidence’ of an EU bent on introducing policies at odds with Irish identity and values; and bestow much more legitimacy on the dubious range of actors loosely aligned in the No camp. All of this would only serve to deepen the chasm between elected representatives and citizens and potentially inflict significant damage on the fabric of Irish democracy. In a context where there has been considerable damage done to the architecture of public institutions by the banking crisis it would further reduce citizens’ trust in elected representatives. For all these reasons this option should be categorically rejected.

²¹ The European Commission has recently produced a report documenting how the Irish media has become more Eurosceptic and tabloid in recent years. The ‘changing media landscape’ between 2002 and 2008 is identified as an important determinant of changes in public opinion which influenced the Lisbon referendum. See “Irish media more Eurosceptic, warns EC report”, *The Irish Times*, 2 September 2008.

²² Gavin Barrett, “Lisbon vote is not buck-passing by politicians”, *The Irish Times*, 24 April 2008

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

The second 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. At the Humbert Summer School in Ballina, Mary O' Rourke TD (Member of Parliament) became the most prominent exponent of just such a course of action, although she seemed unclear as to both the modalities and the timetable for another referendum.²³ Senator Eugene Regan of Fine Gael has also developed ideas that merit close inspection. The benefit of such a process would be to *clearly demarcate responsibility*: the people could be asked to revisit certain clearly defined aspects of the Treaty whilst the Oireachtas enacted legislation to deal with the less controversial parts of the Treaty. The No side would be much less able to sow confusion because the proposed constitutional amendments would be much more clearly defined. Additional declarations on such issues as tax and foreign policy could accompany such amendments and the second referendum would take place in a context where EU-wide agreement had been secured on maintaining a permanent representative on the European Commission. But the question remains: how would the government decide exactly *which* parts of Lisbon could be adopted by the Oireachtas without controversy?

The obvious starting point for adopting this approach would be for the government to carefully analyse the post-referendum surveys conducted by Eurobarometer and Millward Brown IMS into the causes of the referendum defeat. That way the most important concerns of the electorate could be isolated and decisions taken as to what measures could be appropriately adopted by parliamentary statute and what would be necessary to place before the people in a second referendum. The Millward Brown IMS research, for example, suggests that although lack of knowledge/information/understanding emerges from the data as the most significant reason for voting No, specific concerns about neutrality, EU security and defence cooperation, and conscription into a putative EU 'army' all featured strongly in the perceptions of No voters. These issues could be the subject of a

precisely-defined constitutional amendment in a second referendum whilst the Oireachtas would be free to adopt the remainder of the Lisbon arrangements independent of the referendum.

Such an amendment could effectively decide whether Ireland opts in or out of EU defence arrangements but allow the government to bring much greater coherence to the referendum campaign, focusing exclusively on this core issue. In these circumstances many of the red herrings laid by the No campaign in 2008 could not re-appear and the Yes campaign would also be much more effectively able to demonstrate both how the so-called 'triple lock' mechanism would function and how Irish sovereignty in foreign affairs remains absolutely protected under the Lisbon intergovernmental arrangements.²⁴ The precisely-focused amendment could also be accompanied by a number of declarations clarifying the position on abortion, corporation tax and any other issues deemed of significance to the electorate. In effect an appropriate formula for mixing parliamentary and popular approval could be arrived at based on the analysis of the data.

But this approach still leaves the Irish government with a significant problem. Wouldn't even a limited move in this direction attract a Supreme Court challenge from one or other element of the No side, or indeed any individual citizen of the Republic *à la* Raymond Crotty in late 1986? In the general atmosphere of apathy and confusion that characterises Irish referendums on Europe – confirmed by the Millward Brown IMS data – it might prove difficult for the Yes side to demonstrate that important elements of Lisbon had not been conspiratorially removed from public scrutiny. Much would depend on what emerged from a Supreme Court judgement on the 'fit' between Lisbon and the Irish constitution.

It seems possible that, following the Crotty decision, all provisions related to foreign and security policy would have to go to a second referendum. Similarly one could envisage that some elements of the Charter of Fundamental Rights that carry implications for sovereignty might also require popular approval, although the Supreme Court would have to put on a speculative hat in anticipating future European Court of Justice (ECJ) rulings flowing from the Charter. If this option were to be pursued it seems clear that the Supreme Court

²³ "O'Rourke supports Oireachtas vote on parts of Lisbon", *The Irish Times*, 23 August 2008.

²⁴ The Irish 'triple lock' mechanism requires a specific decision by the Security Council of the United Nations, a decision by the Irish Government and approval by Dáil Éireann before Irish troops can participate in any mission abroad.

would become one of the primary actors in the ratification process. And whilst it should be acknowledged that a Supreme Court determination on the constitutionality of Lisbon would prove very useful it might lead to a longer (and somewhat messier) timeframe for achieving ratification. Neither is there any guarantee that a referendum would approve the constitutional elements identified in a Supreme Court judgement as requiring consent by referendum. This is especially the case with regard to EU foreign policy and how voters perceive the impact on Irish neutrality, which is still widely viewed through emotive lenses. Even if the option is to hold a referendum specifically on foreign and security arrangements the No side would still have some traction in exploiting the attachment to neutrality and the ambiguous language that characterises the CFSP/ESDP Treaty articles. Should any part of the constitutional amendment fail to be passed, there would have to follow a further negotiation of specific opt-outs, which might prove difficult to secure from the European Union. For all these reasons this option should also be ruled out.

Option Three: A second referendum with assurances on tax, CFSP, abortion and Ireland's institutional position attached as declarations to the Lisbon Treaty or with new opt-out protocols attached.

The third option before the Irish government 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. There are precedents for this course of action, not just in Ireland but in the wider EU arena. A second referendum could be instituted in either of two specific contexts. The first is where legally-binding opt-outs could be attained from the EU and then put to the people in a second referendum on the Lisbon Treaty in the form of a single amendment. Alternatively the government could proceed to a second referendum without securing opt-outs but having received clarifications on some of the key issues of concern to the electorate identified by the Millward Brown IMS survey, such as taxation, neutrality and institutional representation.

The first of these two potential paths to ratification would be through legal opt-outs being secured on certain aspects of Lisbon. In the past where individual member states have experienced difficulties (or anticipated such) with popular ratification of EU Treaties, the EU impulse has been toward providing 'help' in the form of legally-binding opt-outs in specifically-defined areas. This

was the case in respect of the UK, Denmark and Ireland during the Maastricht Treaty negotiations, and, subsequently, for some countries, for membership of the eurozone also. It is clear that Dublin has already given this option serious thought. Indeed it sent a senior diplomatic mission to Copenhagen in August to engage with Danish officials and explore the technical legal parameters of an opt-out strategy.²⁵ The Irish government could conceivably ask for a series of protocols to be inserted into the Lisbon Treaty, modelled on the Danish approach in 1992-93, to meet the concerns expressed by the public during the Lisbon debate.

The type of clauses covered by this category of amendments to the Lisbon Treaty includes a comprehensive reiteration of Irish neutrality, and possible opt-outs for Ireland from the European Defence Agency, Euroatom, or even from the entire structure of EU defence arrangements *per se*. This approach could also extend to a clear legally-defined guarantee of Irish sovereignty over direct taxation. A referendum campaign revolving around one or other of these specifically-defined amendments would make it much more difficult for the No side to obfuscate and misrepresent the Treaty in a second campaign. It would focus attention on a much narrower range of concerns than was the case during the 2008 referendum by providing a bounded legal context for the proposed constitutional amendment.

Such protocols, because they are legally binding, however, present both legal and political problems for the European Union. There is now a strong opposition to this 'pick and mix' approach to legal approximation and it is quite uncertain whether Ireland will be offered legally binding opt-outs. This is not least because it might require, if not re-negotiation of the entire Treaty, then re-ratification of the Lisbon Treaty in each of the other 26 national parliaments. There is no mood for this in EU capitals (especially where re-negotiation would open up the Lisbon process to domestic constitutional challenges or where it would trigger renewed political conflict) and for this reason it may prove an unrewarding course of action. It is increasingly clear that this option would also cause difficulties *within* the Irish government.²⁶ Minister of Defence Willie O'Dea, for one, has gone on record to voice opposition to the idea of opt-outs as damaging Ireland's interests.²⁷ Specifically in regard to

²⁵ "Irish officials meet Danes for advice on Lisbon opt outs", *The Irish Times*, 28 August 2008.

²⁶ "State may consider EU defence opt out to pass Lisbon Treaty", *The Irish Times*, 8 September 2008.

²⁷ "O'Dea opposes any talk of EU Defence Opt Outs", *The Irish Times*, 12 September 2008.

defence policy he argues that a withdrawal from all EU military cooperation would present serious consequences for Ireland's future UN role as the UN is increasingly subcontracting peacekeeping operations to regional bodies such as the EU. O'Dea asserts that the current Irish deployment to Chad would not be possible if Ireland were to exercise an opt-out from EU defence structures.²⁸

Nor should one ignore the experience of Denmark within the EU. Policy-makers have realised that the price to be paid for the opt-outs they secured in the past – being excluded from crucial decision-making processes – has increasingly damaged Danish interests in Europe. Indeed one of the ironies of the current situation is that prior to the Irish referendum the Danish government was preparing the ground for a new referendum asking Danish people for consent to *opt back into* key EU policies such as Economic and Monetary Union. So whilst the idea of opt-outs is appealing in respect of the short term need to find a solution to the current impasse, in the longer term it might well prove very damaging to Irish interests. For this reason it should also be rejected.

A second option for the government in this category is to proceed to a second referendum on the Lisbon Treaty on the basis of new (non legally-binding) declarations to be added to the Treaty that deal exclusively with Irish voters' concerns. These might include any number of reassuring declarations, consistent with Ireland's interpretation of the Lisbon Treaty, including a reaffirmation of the existence of national vetos on direct taxation instruments and WTO-related international trade agreements, along with further assurances about neutrality including explicit references to the co-called 'triple lock' mechanism and reiteration of the existing legal position on abortion. A second referendum undertaken with such declarations attached would not necessitate any change to the legal framework of the Lisbon Treaty. It would thus not require re-negotiation or re-ratification in any of the other 26 EU member states. Unsurprisingly this option is the one most favoured by many of Ireland's partner states, as it presents the least difficulty for the European Union as a whole.

It is worth recalling here that in 2001, after the rejection of the Nice Treaty, the government's strategy for resolving the ratification problem revolved around providing the public with

assurances about neutrality in particular as well as clarifications about other issues of concern. The Seville Declaration (June 2002) affirmed that Irish neutrality was in no way threatened by the Nice Treaty. And although it was not legally binding, for the government, Seville represented a symbolically important collective EU recognition of the Irish position on security and defence.

In many respects the format of such a second referendum on Lisbon would resemble that of 2002. A collective EU response to Irish concerns in the form of additional declarations and assurances would again provide the government with a vehicle to tackle the specific set of issues related to neutrality, sovereignty and identity in particular. The government could argue that it had taken seriously the reservations expressed by Irish citizens about some aspects of the European integration process and acted to protect Irish interests. It would go into a second referendum campaign on the back of securing EU agreement on maintaining permanent representation for all member states on the Commission. It would strongly emphasise the opportunity cost of exclusion from key EU decision-making structures that would be the inevitable consequence of a second No vote. And it would presumably seek to address the information and communications deficit as it did successfully in 2002.

On the other hand the fact that these declarations would be merely *declaratory* rather than legally-binding would present a headache for the government in that any second referendum would see the No side presenting such declarations, at best as completely lacking in transparent value, and, at worst, as a device designed to pull the wool over the eyes of the electorate. Other risks attached to this option include: resentment at having to vote again on something that seemed to have been unequivocally decided by the people; the reality that the core No vote has increased significantly over time (from 18% in 2002 to 28% in 2008); the likely hostility of the Euro-hostile media; the disconnect between political representatives and citizens on Europe and the lack of obvious instruments to bridge the gap. What is important here is to understand that Irish public opinion on Lisbon may have shifted decisively, rendering this option undesirable. Even if there was a manifest knowledge vacuum during the Lisbon referendum and many voters simply did not have enough information or knowledge to make an informed decision, opinion seems to have *hardened* in the four months since: any second referendum is thus fraught with risk for the government. Whilst there would be much less risk attached to going to the people with Danish-style opt-outs included in a constitutional

²⁸ Ireland has a long history of active participation in international peacekeeping operations whether under UN or EU auspices. More than 400 Irish soldiers are involved in the UN-mandated, EU-led peacekeeping mission to Chad and the Central African Republic.

amendment, a second No vote would provoke a paradigmatic break with Ireland's post-independence foreign policy. It could well mean that the country would be asked to voluntarily exit the European Union. For this reason it should be rejected.

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

The final option available to the Irish government 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 UK Labour government of the 1970s. The UK 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 EEC, despite the fact that the Cabinet was divided on the issue: the Yes side triumphed with a vote of 67.2% against 32.8% for the No side, on an exceptionally high turnout of 64.6%. The extraordinary success of the referendum gamble is reflected in the fact that the winning majority attained was greater than any received by a British government in the history of general elections. There are a number of grounds for arguing in favour of something like this type of referendum proposition as Ireland faces a crucial juncture in its EU membership.

For one thing opinion polls continue to demonstrate that the Irish people remain strongly attached to the European Union: 73% continue to believe that EU membership is a good thing for Ireland.²⁹ The Millward Brown IMS research similarly found that 60% of Irish voters believe that Irish interests are best pursued by remaining fully involved in the EU. Fewer than one in five of the electorate (18%) believe Ireland's interests are best served by opting

to be less involved.³⁰ This data helps to underline the extraordinary gap between the continuing high levels of support for EU membership (70%) and the vote against the Lisbon Treaty (28%). Thus a second referendum that focuses on the macro costs and benefits of Irish membership of the EU rather than the much narrower range of concerns associated with a 'Lisbon only' referendum is much more likely to succeed. Discussion and debate would much more likely focus on 'nuts and bolts' issues familiar from domestic politics rather than arcane disputes about EU institutional procedures. A number of other factors also point strongly in favour of a 'winner-takes-all' approach.

First, in a context where each of the other 26 member states will have ratified the Lisbon Treaty, those states will have demonstrated that they accept the rules and procedures of the 'club'. If that is the case then a 'winner takes all' referendum will implicitly acknowledge that to remain a member state of the EU Ireland must also agree to the rules and procedures ratified by the other 26 member states. It would be very helpful to have a Supreme Court ruling on the constitutionality of Lisbon: it is more than probable that without a request from the government for a Supreme Court ruling on the constitutionality of an In versus Out referendum, a challenge would materialise before the Supreme Court from one of the anti-integrationist groups prominent during the Lisbon campaign.

Second, a referendum proposition focused on whether Ireland remains a member or exits the EU would remove the issue of so-called 'moral hazard' from a second referendum. This phenomenon allegedly influenced voters to vote against Lisbon because they perceived (wrongly as it turned out) that there would be no negative consequences attached to voting No. In other words there simply wasn't enough at stake for Irish citizens to adequately weigh up the costs and benefits of saying Yes or No to something that many people professed not to understand or to care about sufficiently so as to motivate themselves, to inform themselves, or to get out and vote. An 'all or nothing' decision changes the dynamics of the referendum campaign entirely by concentrating the minds of voters on the real consequences of a Yes or No vote in a way that is not sufficiently clear during a 'conventional' constitutional referendum such as Lisbon. It would prevent the No side from arguing that another No vote would invite no serious consequences for Ireland. Equally it would mean a much more fully engaged effort by the political parties with a full scale replication of the sort of campaign one takes

²⁹ Eurobarometer, National Report: Ireland, No. 69, 2, spring 2008.

³⁰ Millward Brown IMS, op. cit., p. i.

for granted during general election contests.³¹ An ‘all or nothing’ referendum would thus much more likely resemble the original 1972 accession referendum where the opportunity cost of non-membership was spelt out very starkly for Irish citizens. It is worth pointing out that that first referendum on Europe produced an overwhelming 83.1% Yes vote on a very high turnout of 71%. An ‘all or nothing’ referendum would almost certainly boost turnout significantly beyond the 55% achieved in 2008 (itself a considerable improvement on 2001 and 2002) and it is very likely that such an increase would favour the Yes side.

Third, such a referendum proposition would bring back into play the significant economic dimension to Irish membership of the European Union, which has been marginalised in the three referendums held in 2001, 2002 and 2008. Ireland has received net receipts of approximately €40 billion since 1973 and in 2007 Ireland was still receiving a net amount of €500 million from the EU budget. When voters are reminded of this and the potentially catastrophic cost of being excluded not just from core Irish markets in the Single Market area but from the vital decision-making structures in the Council of Ministers and the European Central Bank to name just two of the most important, it reinforces what is at stake in a substantive decision to either remain or leave.³² In a sense one might argue that this would help to remove the scales that have been lingering around Irish eyes in recent referendums. The extraordinary implosion of global financial markets will almost certainly result in Ireland experiencing a more serious recession than envisaged even three months ago. Perversely this may work to the advantage of the Yes side in an ‘all or nothing’ referendum in that Ireland’s economic future cannot be contemplated seriously outside of EU structures. Indeed at the October European Council summit Michael Martin, the Irish Minister for Foreign Affairs explicitly stated his belief that Ireland would have gone the way of Iceland in recent weeks were it not for Irish membership of the EU and the eurozone.³³ Similarly Taoiseach Brian Cowen has

³¹ All three main political parties that advocated a Yes vote in the June 2008 referendum (Fianna Fáil, Fine Gael and Labour) were criticised for lacklustre campaigns. Individual politicians were also criticised for using the Lisbon campaign to promote their own candidacies in the local and European elections of 2009. These efforts at self-promotion manifested themselves particularly in Yes posters characterised by images of the candidates rather than any messages about the Lisbon Treaty.

³² See “Ireland to contribute €500m per year to EU by 2013”, *The Irish Times*, 22 February 2008.

³³ See “The Linkage to Lisbon”, *The Irish Times*, 16 October 2008.

identified access to the European Central Bank as critical to the resolution of the financial crisis in Ireland. EU leaders have reinforced the point by making explicit linkages between the financial crisis and the Lisbon Treaty: French Prime Minister Francois Fillon, for example: “We need strong institutions that can react to events.....It is up to the Irish to make up their minds on what role Europe can play in the economic crisis and draw the consequences from that”.³⁴ Thus the fragility of the European and global economy and the increasingly precarious Irish fiscal position have combined to considerably strengthen the government’s hand in a potential second referendum: the ‘return’ of the economic dimension is a potential ‘game-changer’ as the government contemplates how to move forward.

Whilst there would still be a risk that voters would react badly to being faced with such a landmark proposition it is much more likely that this approach could secure a solid Yes majority than any attempt to simply re-run the Lisbon referendum with added declarations and clarifications on individual policy areas. If an opt-out approach is also to be rejected on the grounds of potentially damaging Irish national interests in the medium to long term then this option of a ‘winner-takes-all’ referendum is the only one that can be seriously attempted with confidence.

Conclusions

The failure of the Lisbon referendum in Ireland dramatically and decisively confirmed the paradigmatic change in Ireland’s relationship with the European Union announced by the No to Nice vote in 2001. At the same time it presented the European Union with the latest and perhaps most potent challenge to its ability to achieve a balanced and settled European constitutional order against a backdrop of global economic retrenchment and geopolitical uncertainty. The rejection of the Lisbon Treaty plunged Ireland into a profound political crisis, not least because EU leaders indicated an unwillingness to re-negotiate any part of the Treaty: it would be up to Ireland to find an Irish solution to this European problem. Coinciding with this impasse in Irish-EU relations an economic recession began to present serious difficulties as the public finances deteriorated to their worst state in 25 years, thus presenting Brian Cowen’s government with the most challenging set of circumstances in which to think about moving forward.

This paper set out four possible routes to ratification. Although there has been limited

³⁴ Quoted in “Importance of EU unity underlined in talks on treaty”, *The Irish Times*, 16 October 2008.

discussion of these options in public they have been the subject of considerable diplomatic activity behind the scenes as the timeframe for ratification becomes more pressing. Taoiseach Brian Cowen has promised to bring concrete proposals to the European Council in December. President Sarkozy has none too subtly hinted that he will bring his own ideas to the table if Dublin is found wanting. For Cowen and his government there is a considerable degree of risk attached to holding a second referendum, irrespective of its nature and content. Some of the factors to be considered include: resentment amongst Irish citizens at having to vote again on something that seemed to have been clearly decided by the people on 12 June; the fact that the core No vote has increased significantly over time through successive EU referendums (from 18% in 2002 to 28% in 2008); the likely hostility of the Euro-hostile media; the disconnect between political representatives and citizens on Europe and the lack of obvious instruments to bridge the gap.

Perhaps the least difficult route to ratification would be for the government to discard the referendum result and go down the parliamentary route. This offers the advantage of a speedy and efficient resolution to the problem and has been touted by a range of commentators as the best means of securing Ireland's national interests. It is simply inconceivable, however, that the Irish government would plump for this option: it would further alienate Irish citizens from the EU policy-making process; entrench the idea of the European Union as an anti-democratic elitist club, and bestow much more legitimacy on the dubious range of actors loosely aligned in the No camp. All of this would only serve to deepen the chasm between elected representatives and citizens and potentially inflict significant damage on the fabric of Irish democracy. For these reasons this option should be rejected.

The paper also considered a series of options that revolve around the idea of a second Irish referendum on Lisbon. The precedent for such a course of action was established with the re-vote on the Nice Treaty in 2002. If the government were to opt for this route then it would seek new assurances from its EU partners on a range of issues considered to be at the core of voters' concerns in the No vote of 2008 (neutrality and taxation especially). If the significant knowledge and information deficit evident in the 2008 campaign can be addressed then such a referendum might very well succeed. But there is now a real consciousness in government circles that merely to secure new declarations and clarifications on such issues may not be enough to reverse the result. A more attractive option might be to hold a second referendum with Danish-style opt-outs having been secured on key issues such as

defence. It seems clear that the Irish government has been actively considering such a route and has now (belatedly) established close contact with the legal service of the Council of Ministers with a view to establishing the nature and possible shape of such legal measures. But whilst this approach might provide the government with a more 'fireproofed' amendment to place before the people, it also presents significant difficulties, both at EU level and domestically. There is significantly less goodwill in evidence toward Ireland now than there was previously and many member states deplore the idea of any further extension of the 'pick and mix' opt-out culture. The Danish experience also suggests that opt-outs can prove damaging to the national interest in the medium to long term: exclusion from core decision-making institutions can lead to a member state's being marginalised in some crucial policy areas.

The paper argues that the only viable option open to the Irish government is to hold a second referendum on the substantive question of whether or not Ireland remains a member state of the EU. The first argument in favour of such an option is one of equity. Like it or not one cannot ignore the fact that on two occasions out of the last three Irish voters have said No to an EU Treaty. Assuming that ratification is completed by the end of 2008 in the 26 other member states it is simply inconceivable that Ireland, with a population of less than 5 million EU citizens, can continue to block the introduction of a constitutional and institutional framework accepted by representatives of 495 million EU citizens. Once ratification is complete in the Czech Republic, Germany, Poland and Sweden, the pressure on Ireland to provide a solution to the Lisbon impasse will increase significantly as every other member state will have signalled that they accept the Lisbon rulebook. Simply put, to remain a member of the European Union Ireland will have to accept the Lisbon Treaty. In asking voters to endorse Ireland's continued membership of the EU the proposition would also categorically imply an endorsement of Lisbon as the EU's normative-institutional bedrock.

Irish public opinion remains uneducated about and indifferent to EU affairs and this is not likely to change anytime soon. Thus the problem of 'moral hazard' is unlikely to disappear in a second vote narrowly focused on the Lisbon Treaty, even if the government and its allies on the pro-European side were to run a more coherent and persuasive campaign. Irish citizens need to understand that there are serious consequences attached to voting behaviour. And the best way of bringing clarity to the referendum is to ensure that the question posed

is one which concentrates voters' minds in the most substantive way.

The most crucial factor in justifying such an 'all or nothing' referendum question, however, is that it brings back into play the significant economic dimension to Irish membership of the European Union, which has been marginalised in the three most recent referendums. It is not a coincidence that Irish citizens continue to be amongst the most supportive of the European Union: membership has delivered structural funds and market access, modernisation and prosperity, and, irrespective of current difficulties, most rational citizens understand that Ireland's economic future is simply inconceivable outside of EU structures. By re-focusing the question on Ireland's economic well-being and appealing to the more material instincts of Irish citizens, such a referendum stands the best chance of producing a solution to the EU's protracted constitutional imbroglio.