

Ireland's Future in Europe: Scenarios and Implications

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by Gavin Barrett, Brigid Laffan, Rodney Thom,
Daniel C. Thomas, Ben Tonra

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Commissioned by the Oireachtas
Sub-Committee on Ireland's Future in the
European Union

12 November 2008

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Executive Summary

This report was prepared at the request of the Oireachtas Sub-Committee on Ireland's Future in the European Union. Its purpose is to identify the range of options available to the Government regarding Ireland's relationship with the European Union and, in particular, the Lisbon Treaty. It discusses the nature and foreseeable implications of each option, but does not make recommendations. Discussion of particular scenarios does not constitute their recommendation.

Ireland is at a critical juncture in its membership of the European Union (EU) and its relations with the other Member States. The defeat of the Lisbon Treaty referendum in June 2008 has brought Ireland's relationship with the Union sharply into focus at home and more widely in Europe. The choices that Ireland and the other Member States make in relation to the Treaty are likely to have a major impact on the character of Ireland's engagement with the EU and on the future dynamic of European integration and governance.

Ireland's decision to join the EU in 1973 provided a critical foundation for the subsequent growth of the Irish economy, whose unprecedented success would have been impossible without membership in the Single Market. Nonetheless, the Irish electorate has now twice proven reluctant to embrace negotiated changes in the treaties that govern the Union. By the end of 2008 or soon thereafter, it is likely that most (if not all) the other 26 Member States will all have ratified the Lisbon Treaty. Ireland's outlier status has undermined its reputation with other Member States and thus poses a real challenge to the Irish government's ability to advance Ireland's interests at the EU level.

As a small state that has benefited considerably from EU membership and yet lacks the voting weight of a 'big' Member State, Ireland has a particular interest in maintaining its standing as 'good' EU citizen whose needs should be accommodated regardless of its size. It is therefore in Ireland's interest that any domestic discussion of European options (including but not limited to the Lisbon Treaty) take into account both Irish interests and preferences and those of other Member States.

With respect to the 'big picture' of Ireland's future relationship to the EU, the State has three major options: (1) continued membership with limitations in several policy areas, (2) economic engagement through the common currency and the European Economic Area but withdrawal from the EU's political or decision-making structures, and (3) membership in a yet-to-be-constructed two-tier Europe. A hypothetical fourth option – total disengagement – is neither economically feasible nor demanded by any major political or social group, so it is not discussed in this report.

With respect to the narrower but thorny issue of the Lisbon Treaty, the Government has a wide range of options. The first three are premised upon a renewed attempt to seek ratification of the Treaty. The next three are premised upon the other Member States working with Ireland in the event of an Irish decision not to attempt to secure

ratification of the Treaty or a failure of this attempt. The remaining four are premised upon Ireland not ratifying the Treaty and the other Member States pursuing a path that does not require Irish involvement.

I. Introduction: Ireland's Experience of EU Membership

Ireland's membership in the European Union since 1973 has transformed the Irish state, government, economy and society. Membership has meant both engaging in policy making at the European level and absorbing the consequences of membership at the domestic level. It has required the development of an Irish policy on the future of the EU as a political and economic order and on its geographical reach. But the world is changing: the particular set of European options available to Ireland in 2008 is not that of 1973 or even that of 1993, when Economic and Monetary Union (EMU) and the Common Foreign and Security Policy (CFSP) were in their infancy.

Today, Ireland is at a critical juncture in its EU membership and its relations with the other Member States. The defeat of the Lisbon Treaty referendum in June 2008 has brought Ireland's relationship with the Union sharply into focus at home and more widely in Europe. It has exposed a gap between the main political parties and the electorate, and a gap between the Irish public's generally favourable views of membership and its limited understanding of how the Union actually works, notwithstanding 35 years of membership. The defeat of the referendum has also underlined the interdependence between developments in Ireland and those in other Member States and the EU more generally. Put simply, Ireland's future position in Europe is likely to be determined not just by the choices of the Irish Government and its people, but by the individual and collective decisions of other Member States.

A discussion of Ireland's future in Europe must therefore be situated in the context of Ireland's experience of EU membership, both politically and economically, as well as the manner in which Ireland positioned itself within the EU and played the 'Brussels game' with other Member States. We start, though, with a brief review of the nature of membership in the EU.

A. The Nature of EU Membership

The EU is a complex multi-level system of governance involving supranational and intergovernmental institutions. Certain roles (both rights and responsibilities) are shared by all Member States, while others are available only to those Member States that choose them. Since different Member States have made different choices, the Union is often described as having 'variable geometry' or multiple 'speeds.'

A seat at the table where decisions are taken is one of the fundamental properties of EU membership. All Member States participate in the Union's chief intergovernmental bodies -- the European Council, where Heads of State and/or Government decide on major issues facing the Union, and the Council of Ministers, which shares legislative decision-making power with the Parliament and has executive powers in more intergovernmental policy areas. All Member States also nominate members of the European Commission, which proposes new EU legislation and oversees its implementation. All Member States hold elections in which their citizens and EU residents vote directly for representatives to the EU's other co-legislator, the European Parliament.

As the Member States have opted to expand the membership and responsibilities of the Union, they have repeatedly had to revise the treaties that govern it. The Lisbon Treaty is the fifth round of treaty reform in just over two decades, including the 1986 Single European Act, the 1992 (Maastricht) Treaty on European Union, the 1999 Treaty of Amsterdam, and the 2001 Treaty of Nice. Each revision is negotiated in an Intergovernmental Conference (IGC) at which each Member State weighs its veto rights against its commitment to achieving a mutually-satisfactory outcome for the Union as a whole. All Member States must then ratify, according to their own constitutional procedures, whatever changes are agreed by the IGC. Member States thus have considerable influence over the general direction of the Union and the specific legislation that it adopts.

At the same time, the EU is a community based on the rule of law. All Member States are subject to the treaties they have ratified, the full *acquis communautaire* (the accumulated body of EU legislation), and to the judgments of the European Court of Justice (ECJ) and the control of the European Court of Auditors. The constantly growing jurisprudence of EU courts, the system of preliminary rulings, and the obligation to transpose and comply with European law thus have a major impact on every Member State's legal and constitutional order.

The informal rules of EU membership are also important, though not legally binding. Whenever possible, Member States are expected to pursue their national interests in a manner that does not prejudice the interests of their EU partners or the viability of the institutions that they have collectively established. When national interests clash, Member States are expected to communicate openly with their partners in an effort to achieve mutually-acceptable solutions.

On the other hand, some privileges and responsibilities are accorded only to those Member States that choose to participate in particular EU activities or satisfy the preconditions for participation. For example, Denmark and the United Kingdom opted out of the Economic and Monetary Union established by the Treaty of Maastricht, while ten other Member States have not yet satisfied the requirements for EMU. On the other hand, the fifteen Member States (including Ireland) that participate in EMU have ministerial representation in the 'Euro-Group' of finance ministers and on the committees of the European Central Bank. Similarly, Member States may choose whether or not participate in other policy areas or agencies such as the European Security and Defence Policy (ESDP), the European Defence Agency, and the Schengen agreement on cross-border mobility. Those that opt-out in this way have no role in shaping policy in these domains.

Finally EU membership also establishes rights and obligations for private entities and individuals. For example, citizens are guaranteed mobility and, with several exceptions, equal treatment within the Union's 27 Member States. Students may participate in Erasmus exchanges with other universities across the Union. Farmers are eligible for assistance under the Common Agricultural Policy. Corporations are protected against discrimination when they operate in other Member States and are subject to EU regulations on workplace safety and environmental protection. Membership in the European Union thus has a direct impact not only on the rhythm of government and politics in Member States, but also on the lives and choices of individuals and other private entities.

B. Ireland and the Politics of EU Membership

Ireland joined the EU in 1973 as a comparatively small and poor state constrained by a high level of economic dependence on its nearest neighbour, the United Kingdom. By joining the EU, it exchanged a measure of formal sovereignty and independence for the pooling of sovereignty and a deeper relationship with other Member States. This commitment was not taken lightly. In the early 1960s, there was some discussion about pursuing 'Associate' status, which the Labour Party preferred at that time over full membership. Nonetheless, by signing the treaty of accession in January 1972, the government set Ireland on the path to full membership. Later that year, a popular referendum changed the Irish Constitution to enable Ireland to assume the obligations of membership.

Although the political dimension of European integration was flagged by Sean Lemass in the 1960s and again in the Green and White Papers on membership in 1970 and 1972, for most Irish citizens and a sizeable number of politicians, Brussels represented economic modernisation and financial transfers. The consequences of the Second World War and the resulting imperative of inter-state reconciliation did not resonate powerfully in Ireland. Nor were the Irish motivated by pressing security concerns given Ireland's peripheral geographical location and the absence of an external threat. The first twenty years of membership were thus perceived as a 'catch-up' process whereby Ireland sought to converge with the living standards of richer Member States. This was a difficult and challenging process as Irish economic actors learnt to live with the consequences of internationalisation and an open market.

Accession to the EU added a layer to Ireland's constitutional framework and opened up Ireland's legal order to European law and legal institutions. For example, ECJ rulings have required the Government to revise legislation, to reallocate resources or to act on individual rights in order to comply with EU law. The rights and obligations of membership have increased with the progressive framing of European laws and policies and with the iterative process of EU treaty reform mentioned above.

EU membership has also a powerful impact on the official identity of the Irish state and on how it is perceived internationally. For example, the number of states that established embassies in Dublin increased significantly after membership and internationally Irish embassies are embedded in important networks of EU Member States. Non-EU states now view Ireland not only as a dynamic small state in its own right, but also and significantly as a potential shaper of the EU's collective presence on the world stage.

The main lines of Irish policy on the EU were remarkably stable from the outset. They were promotion and protection of the common agricultural policy, the development within the EU of a set of policies and instruments to promote economic cohesion, and the use of EU regulation to enhance domestic regulation in the areas of social and environmental protection. This was accompanied by considerable vigilance concerning regulation and EU economic governance, as well as a focus on ensuring the voice and representation of small states. Maintaining domestic head-room, for example in relation to taxation, and ensuring that the costs of European regulation could be lived with at home was central to the management of European policies.

Irish neutrality defined as non-membership of NATO made Ireland an outlier in relation to EU security policy. The maintenance of the Common Travel Area with the UK was also a constraint with regard to developments in Justice and Home Affairs (JHA). On the constitutional and institutional development of the EU, Ireland was not to the fore in pressing for treaty or institutional change. Moreover, Ireland has never favoured a variable-geometry Europe and has always opposed proposals for a 'core Europe'. Hence Ireland's position could be categorised as 'conditionally integrationist' -- that is, neither 'maximalist' nor 'minimalist' in relation to the development of the EU.

Recent years have seen the beginning of a debate, muted at first, about Ireland's relations with the EU and just what kind of Europe the Irish electorate had endorsed. This was partly a consequence of economic convergence and the weakening of dependence on the EU budget. It was also a reaction to the iterative processes of treaty change since the Single European Act (SEA) and experience of the depth and significance of developing European regulation. Ireland was not alone in this; the deepening and widening of European integration since the mid-1980s led to a growing politicisation and contestation within and about the EU. The Supreme Court's 1987 judgement in the Crotty case, which prevented parliamentary ratification of the SEA, led to the practice of holding a referendum on all European treaties. This meant that the Irish electorate was periodically confronted with a major decision on the Union's treaty framework. Until June 2001, a majority of the electorate favoured the ratification of a succession of European treaties. The initial rejection of the Nice Treaty posed challenges to the Irish Government and to Ireland's partners in Europe, but they were resolved by the positive vote in the second Nice referendum.

The question of Ireland's relationship to Europe has been posed anew by the Irish electorate's rejection of the Lisbon Treaty in June 2008. At the October European Council 2008, the Council Conclusions committed the Heads of State and Government to return to the issue in December 2008 to agree 'elements of a solution and a common path to be followed' (European Council, 15-16 October, 2008). The emphasis on a 'solution' in the Council Conclusions is characteristic of the way in which the EU deals with political difficulties in any of its member states. The system goes into problem-solving mode in the search for ways out of a political and institutional impasse. Reference to a 'common path' reflects the desire to keep all of the member states, including Ireland, on board.

C. Ireland and the Economics of EU Membership

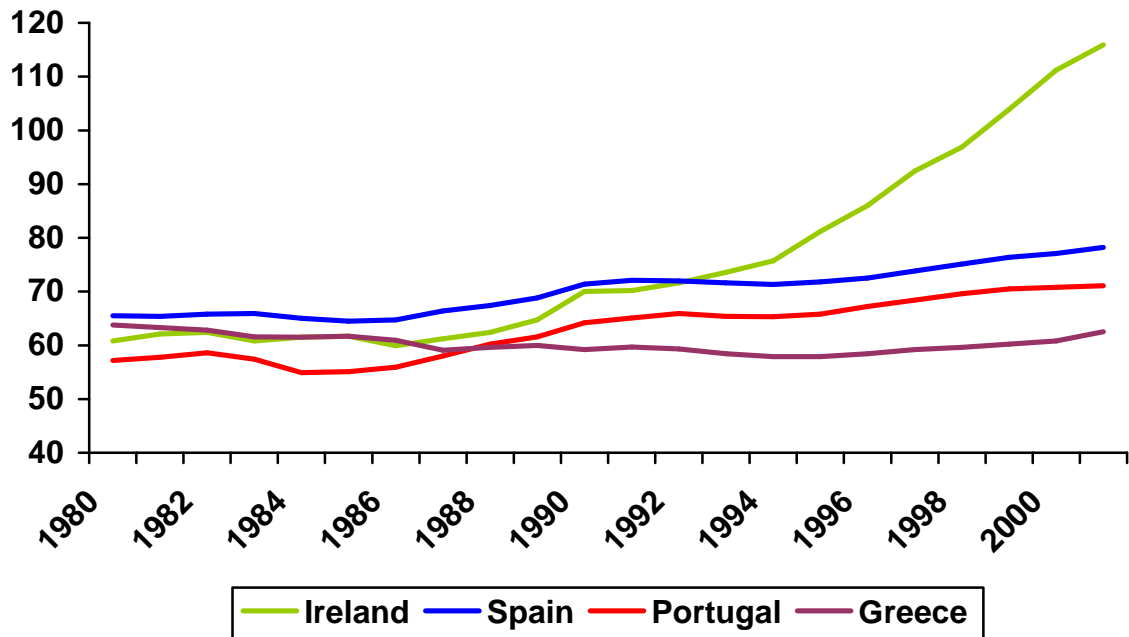
Notwithstanding the complex politics of Ireland's role in the EU, membership has been the fundamental precondition for the country's remarkable economic success since the early 1990s. Various factors contributed to the high economic growth that Ireland experienced from the early 1990s through 2007, including long-term economic and educational policies, an attractive corporate tax regime, an English-speaking population, foreign (especially US) direct investment, and professional marketing of Ireland by state agencies. Yet without Ireland's full membership in the EU, these factors would have been far less consequential. The most frequently-cited EU contribution to Irish economic growth is the resource transfer under the Union's Common Agricultural Policy and the Structural and Cohesion Funds. However,

Ireland has arguably benefited more from the introduction of the Single Market in 1993 and Economic and Monetary Union in 1999.

Consider the details. Figure 1 shows real *per capita* GDP as a percentage of the EU average for the four cohesion economies, Ireland, Greece, Portugal and Spain. While relative Irish *per capita* GDP starts to rise from the mid 1980s onwards the real ‘take-off’ point comes with the introduction of the Single Market in 1993. At that point Irish *per capita* GDP was just over 70 percent of the EU average but increased to well over 100 percent by the end of the century. Completion of the Single Market eliminated non-tariff barriers to trade within the EU and transformed Europe from a customs union with no internal tariffs to a nearly fully integrated market which enables the free movement of goods, services, labour and capital. As such it provided a strong incentive for large multinational enterprises, many American based, to establish significant production, distribution, and research and development facilities in the EU and Ireland managed to secure a disproportionate share of this inward investment.

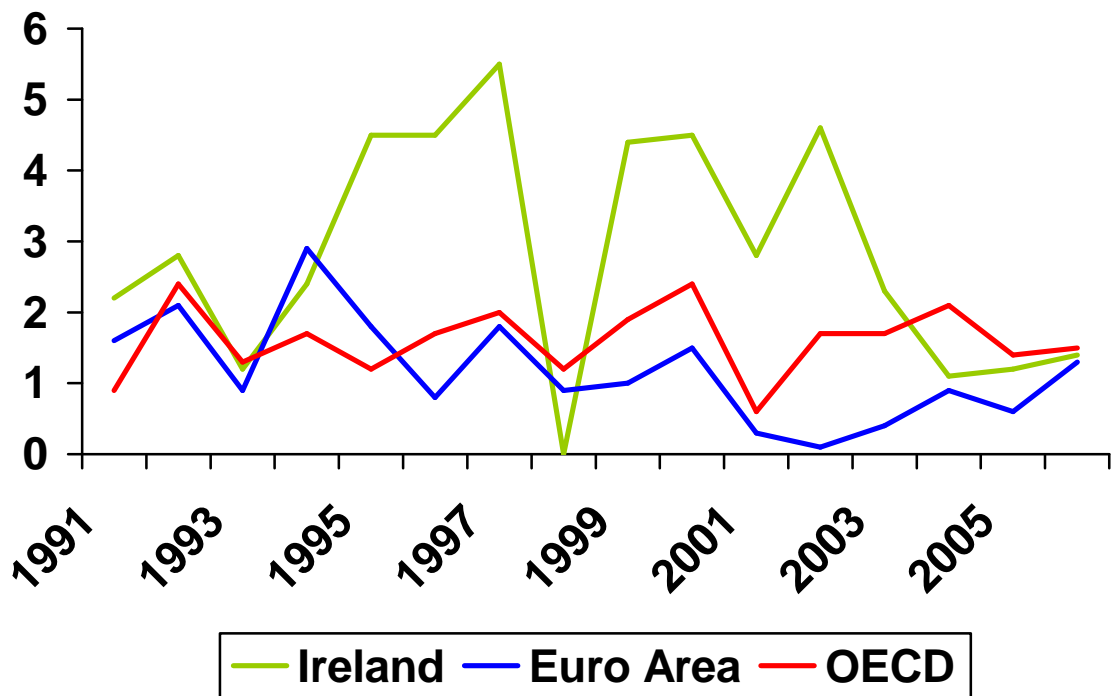
The importance of this investment is not just the number of jobs created but the type of jobs and the skills it brought to the Irish economy. Labour productivity and technology are a key driving forces in explaining economic growth and because multinationals investing in Ireland brought new technologies and management skills the inflow of FDI dramatically increased the productivity of the domestic labour force leading to the high growth rates experienced in the late 1990s and the early years of the 21st century. This is illustrated by Figure 2 which compares Irish labour productivity growth to that in the Euro Area and the OECD as a whole. Apart from 1998 the productivity of the Irish labour force grew at a much higher rate than that in other industrial countries inside and outside the EU. Growth in labour productivity is the key factor in driving economic growth and would not have happened without full membership of the Single Market.

Figure 1. Real GDP Per Person (% of EU Average)



Source: The Conference Board and Groningen Growth and Development Centre
<http://www.conference-board.org/economics>

Figure 2. Labour Productivity (Annual Growth Rates (%))



Source: OECD, *Economic Outlook*, June 2008. www.oecd.org

Adoption of the EU's common currency, the euro, has also proven beneficial for Ireland. The most obvious benefit has been to ease travel for Irish citizens and to

increase transparency in the pricing of consumer goods. More importantly, by reducing transaction costs and currency risks, the euro may have provided additional incentives, beyond the Single Market, for foreign investors to locate in Ireland. Euro membership also shields Ireland from the risk of having to defend against currency speculation should the national economy ever plunge deep into crisis. A 2007 ESRI paper concludes, “[t]he macroeconomic performance of the Irish economy in the EMU until now has been successful, primarily due to favourable domestic supply factors and external conditions as well as the reduction of the risk premium.”¹

On the other hand, having to live with interest rates attuned to European, rather than specifically Irish, conditions is the downside of euro membership, and there have been periods when the euro’s value against sterling and the dollar have been less than optimal from an Irish perspective. Low interest rates under EMU fueled the rapid economic expansion of the late 1990s, which helped Ireland to reach (and arguably surpass) its growth potential, but they also contributed to the property bubble that has recently burst. The challenge for Ireland is to maximise the benefits of euro membership by enhancing the flexibility of the domestic economy and to ensure that it can respond to asymmetries stemming from the single monetary policy.²

Overall, Ireland has made a success of membership and demonstrated that it was possible for a comparatively small poor state to prosper in the Union. The coincidence of Ireland’s growth and the European aspirations of the post-communist states meant that Ireland was soon regarded as a model by many of the states of East-Central Europe.

D. Ireland’s relations with the other Member States

As a union of states and their peoples, the EU alters the quality and intensity of bilateral relations among its Member States. The other 26 are not just foreign states but partners in a collective enterprise. Member State governments meet on a continuous basis in Council working parties, in meetings of the Council of Ministers and at the European Council. The EU system works on the basis of ‘give and take’ and compromise in pursuit of consensus. Even when the treaty provides for the use of Qualified majority Voting (QMV), Member States generally pursue their negotiations until consensus is achieved. Day to day and week to week engagement with the other Member States is the glue that holds the EU together and the lubricant that allows for decision to be made. As a result, when a Member State has serious reservations about an aspect of EU policy, there is a strong tendency to try to accommodate its concerns.

That said all Member States need good will and support if they want to achieve their goals and protect their interests in the Union. Good will is built up by nurturing a range of strong bilateral relations, by taking EU responsibilities, such as the Presidency, seriously and by ensuring that the interests of other Member States are not damaged by one’s actions. In short, there is a delicate balance between furthering one’s own interests and sensitivity to the interests of others. Ireland’s conduct of the EU Presidency in the first half of 2004 was widely regarded as skilful in this regard,

¹ Iulia Traistaru-Siedschlag, “Macroeconomic Adjustment in Ireland under EMU,” *Quarterly Economic Commentary* (Spring 2007), p.89.

² John Fitzgerald, “Managing an economy under EMU: The case of Ireland,” Dublin: Economic and Social Research Institute, May 2004.

which raised the Republic's status in the eyes of its partners. But such credit does not last forever.

As such, Ireland's future relations with the EU cannot be separated from its relations with the other Member States, which are obviously far more complex in a Union of 27 than they were in the Union of 9 that Ireland joined in 1973. As a small state that has benefited considerably from EU membership and yet has limited power over the many issues subject to Qualified Majority Voting (as well as over those that remain under others' national jurisdiction), Ireland has a particular interest in maintaining its standing as 'good' EU citizen whose needs should be accommodated regardless of its size. It is therefore in Ireland's interests that any domestic discussion of European options (including but not limited to the Lisbon Treaty) take into account both Irish interests and preferences and those of other Member States.

II: Ireland's Future Relationship with the EU

This section analyses three possible scenarios for Ireland's future relationship with the European Union: (1) continued membership, (2) economic engagement without membership, and (3) two-tier Europe.

All three scenarios reflect the established fact that there are differing degrees of EU engagement among Member States and their neighbours. The policy reach of European integration may thus be likened to a series of concentric circles. At the core are a group of Member States that are fully engaged with all dimensions of European integration. The second circle consists of Member States that have opt-outs or are not yet ready for engagement with all aspect of integration. The third circle involves members of the European Economic Area (Iceland, Lichtenstein, and Norway) plus Switzerland that have institutionalised their economic engagement with the EU but do not belong to it. Finally, nearly two dozen other states have other sorts of association agreements with the EU.

Given the aforementioned evidence that EU membership has been overwhelmingly positive for Ireland, one would have to conclude that withdrawing from or significantly limiting Irish participation in European economic integration could be disastrous for the Irish economy. The same applies to scenarios that would reduce Ireland's influence over future economic policy-making at the EU level, either by denying it a seat at the table or by reducing other Member States' sympathy for Irish positions. We therefore do not consider the possibility that Ireland might decline EEA membership in favour of a simple association agreement. We also do not consider the even more extreme scenario of an across-the-board withdrawal from all EU relationships, as this option, while technically feasible, is not proposed by any major political forces or social groups in Ireland.

Scenario 1: Continued Membership with Limits (Conditions, Declarations, and/or Opt-Outs)

This scenario involves potential variations on the status quo. A number of Member States participate in all EU activities, but most (including Ireland) have limited participation in certain areas. At present, Ireland's membership is limited principally with respect to Justice and Home Affairs (JHA) and to a lesser degree, the European Security and Defence Policy (ESDP). Ireland could drop, maintain, revise or even multiply these limits without affecting the core rights and obligations (see Part I-A above) that attach to its status as an EU Member State.

At present, Ireland's JHA arrangements represent the most significant limitation agreed at European level on the extent and nature of the Republic's relations with the EU. The Amsterdam Treaty (1999) and the Tampere European Council established very ambitious goals in the JHA area. Rather than participate in the full JHA *acquis*, Ireland (together with the United Kingdom) chose to buy into it on a selective basis. This wish was acceded to first by virtue of provisions included in the Protocol Integrating the Schengen *Acquis* Into the Framework of the European Union annexed to the existing Treaties at Amsterdam. Under the terms of this Protocol,³ Ireland may request to take part in some or all of the provisions of the existing Schengen *acquis*, or in provisions building on that *acquis* - although there is no guarantee that it will be acceded to since the grant of such a request must be unanimously agreed to by the EU member states which are in the Schengen system.

Ireland and the UK also negotiated at Amsterdam another set of special arrangements. Hence, the Amsterdam accord also annexed to existing Treaties⁴ a 'Protocol on the position of the United Kingdom and Ireland'. This Protocol excluded the UK and Ireland from participation in the adoption of proposed measures under the then-new Title IV of the Treaty Establishing the European Community (relating to immigration, asylum and free movement).⁵ However, the Protocol also created an opt-in possibility in relation to such proposals made within a specified time-frame.⁶ Ireland distinguished its position from that of the UK by stating in a Declaration⁷ that it intended to take part in Title IV measures 'to the maximum extent compatible' with the maintenance of the Common Travel Area with the United Kingdom. In the Declaration, Ireland thus signalled that it wanted to engage with this area of EU endeavour to the maximum extent possible given the special arrangements between Ireland and the UK and the border on the island of Ireland.

A third Protocol – the Protocol on the Application of Certain Aspects of Article 14 of the Treaty Establishing the European Community to the United Kingdom and to Ireland – ensured the continued legality under EU and EC law of the operation of the Common Travel Area between the United Kingdom and Ireland. Overall, the JHA arrangements represent the most significant limitation agreed at European level on the extent and nature of Ireland's relations with the EU.

Ireland's distinctive position with regard to the ESDP, based upon a combination of domestic constitutional change and declarations announced at the Seville European Council in June 2002, is better described as legally-conditioned than opt-out. At

³ Note that the provisions of Protocols are equivalent in effect to Treaty provisions.

⁴ *Viz.*, the Treaty on European Union and the Treaty Establishing the European Community.

⁵ See Article 1 of the Protocol.

⁶ See Article 3 of the Protocol.

⁷ Declaration 4 on Article 3 of the Protocol on the Position of the United Kingdom and Ireland

Seville, Ireland and its EU partners declared that ‘the Treaty on European Union does not impose any binding mutual defence commitments. Nor does the development of the Union’s capacity to conduct humanitarian and crisis management tasks involve the establishment of a European army’. This was accompanied by a Declaration by Ireland which outlined the ‘triple lock’ on its deployment of military forces overseas and confirmed that Ireland’s ‘participation in the European Union’s common foreign and security policy does not prejudice its traditional policy of military neutrality’. The Constitution was also amended to exclude Irish membership of a common European defence. Within these parameters, Ireland is fully engaged in the formulation of policy under ESDP, participates in the European Defence Agency (EDA), and contributes about one hundred soldiers to one of the EU’s eighteen battle-groups, the Nordic Battle Group.

The key question is whether Ireland should adopt a broader spectrum of opt-outs. For example, Denmark has opted fully out of ESDP and JHA, as well as Union citizenship and Economic and Monetary Union, making it formally the least-engaged of EU Member States. In November 2007, the *Folketing* (Denmark’s parliament) commissioned the Danish Institute for International Studies (DIIS) to report on the consequences of all four opt-outs, which were adopted in 1993 in response to a referendum vote rejecting the Treaty on European Union. The DIIS report found that the four opt-outs have had vastly different consequences for Denmark, ranging from inconsequential to politically-disabling (see Table I.) The Danish government reportedly prefers to re-visit the opt-outs, but it has yet to call a referendum on this contentious issue.

Table I: DIIS Report on the Consequences of Denmark's 4 EU Opt-Outs

<p>Security and Defense Policy</p> <ul style="list-style-type: none"> • Non participation in EU-led operations • Non-participation in related policy formulation • Confusion re: what the Danish Parliament wants to pursue on the border line between civilian and military matters • 'The Danish opt-out is judged to limit Danish freedom of action rather than protect Danish autonomy.' 	<p>Economic and Monetary Union</p> <ul style="list-style-type: none"> • Continuation of Danish Krone but tied into the Euro through the ERM • Exchange expenses and slightly higher interest rates • No influence in the Euro-Group • Absence from the ECB Governing Council notwithstanding the influence of ECB decisions on Danish interest rates
<p>Justice and Home Affairs</p> <ul style="list-style-type: none"> • Loss of influence – no right to vote and a significantly reduced opportunity to influence the development of these areas at EU level • Retains some capacity to have a more independent policy 	<p>Union Citizenship</p> <ul style="list-style-type: none"> • 'The Danish opt-out on citizenship is of no significance.'

Source: [www.eu-oplysningen.dk/upload/application/pdf/97ca9e4c/EU08_Executive_Summary\(en\).pdf](http://www.eu-oplysningen.dk/upload/application/pdf/97ca9e4c/EU08_Executive_Summary(en).pdf)

In principle, Ireland could increase its number of opt-outs and other limitations on participation in a range of EU initiatives, including (but not limited to) EMU, ESDP, or Euratom. An Irish opt-out from EMU appears unlikely, given that membership of the Eurozone has broad support in Ireland and the uncertain signals this action would send to financial markets. If anything, recent financial turmoil has spurred several other European states to accelerate their preparations to join the Eurozone.

If Ireland were to consider an opt-out in ESDP, it could still choose between a blanket opt-out *à la* Denmark or a more limited one. Under a blanket opt-out, Ireland would no longer be a member of an EU battle group, could not participate in discussions on the framing of EU policy under ESDP, and would not participate in the European Defence Agency. Non-membership of battle groups would have major implications for the Defence Forces and their tradition of peace-keeping, both because of the loss of joint training opportunities and because the UN relies increasingly upon regional organisations like the EU to carry out UN-mandated peacekeeping and humanitarian assistance operations. A blanket opt-out would thus limit Ireland's ability to engage in security commitments that characterise its foreign policy tradition and would limit one of the key international contributions of its armed forces. This in turn may limit Ireland's international standing and the credibility of its foreign policy within the broader Common Foreign and Security Policy.

A more limited opt-out might entail disengagement from the emerging European Defence Agency, which is designed to streamline and modernise European defence industries and to improve Member States' capacity to engage in peacekeeping, crisis management, and peacemaking operations. Since Ireland is not a major producer of arms, such an opt-out would not significantly affect the Irish economy. However, an EDA opt-out could disadvantage the Defence Forces by depriving them of access to the development of new military equipment and joint procurement opportunities. It would also put an end to Irish participation in EDA decision-making.

An opt-out from the European Atomic Energy Community ('Euratom') would involve withdrawal from this semi-independent EU body, which is responsible for the management of nuclear power and nuclear fuel markets and contributes to the development of the international fusion reactor ITER. This opt-out would be of little direct consequence to Ireland, given the absence of a nuclear power industry in the Republic. It would however eliminate an Irish voice, vote and veto from this policy area.

Some of our EU partners might see the withdrawal of Irish politicians, diplomats, and parliamentarians from decision-making in certain areas as advantageous in that it would eliminate the need to accommodate Irish interests and values. From an Irish perspective, though, this may be problematic, as Ireland would lose the capacity to shape or block further policy developments in those areas from which it withdraws. Alternatively, any move to reduce (rather than extend) Ireland's existing limitations could raise constitutional issues and thus require approval by referendum.

Scenario 2: Economic Engagement

This scenario involves a far more radical change: withdrawing from EU membership and replacing it with some form of economic engagement. If Ireland were to pursue this path, it would become one of Europe's 'outsider-insiders' – that is, states that are not members of the EU but nonetheless have access to the single market and flanking policies. This status can take two forms: membership of the European Economic Area (EEA) or a negotiated bilateral relationship with the Union. Either could involve retaining the Euro as Ireland's currency, albeit at the cost of losing Ireland's membership in the European Central Bank and the Euro-Group of finance ministers.

The EEA Agreement was initially seen as a means of providing members of the European Free Trade Agreement (EFTA) access to the EU's single market without asking them to accept EU membership. However, Sweden, Finland, Austria and Norway subsequently applied for EU membership and three of them joined in 1996. As a result, EEA membership is now limited to Norway (where the EU accession treaty was rejected by the electorate), and two other EFTA states, Iceland and Liechtenstein. The EEA allows these states access to the internal market, flanking policies and ancillary programmes on the condition that they implement all relevant internal market legislation on a continuous basis without having had any influence over their development. Over three thousand European laws have thus been extended to cover the three states. Disputes between the EU and EEA are resolved on the basis of agreed procedures and there are two institutional mechanisms, a surveillance authority and a court. In addition, EEA states must contribute to a fund to assist in

overcoming disparities across the EU. For example, Norway pays 220 million Euro to the EU each year.

In place of EU or EEA membership, Ireland could also negotiate bilateral agreements with the Union, as Switzerland has done. After Swiss voters rejected EEA membership in a 1992 referendum, Switzerland and the EU negotiated ten sectoral agreements covering the free movement of people, goods, services and capital. Unlike in the EEA states, though, new EU single market legislation does not take effect automatically in Switzerland. Instead, new legislation becomes effective only after approval by a bilateral EU-Swiss commission. Like an EEA state, Switzerland has no formal input into the design of EU legislation and is required to contribute to the EU budget (approximately 125 million Euro annually to fund projects in the new Member States).

These arrangements provide these states on the borders of the EU with legally secure access to the internal market, which is vital for their economies. The principal price they pay, apart from contributions to the EU budget, is that they must implement EU laws without a say in the making of those laws. They are takers rather than shapers of internal market and related legislation. Given that changes in EU legislation could have a negative impact on the economic welfare or social values of these states, the significance of this lack of voice should not be under-estimated.

Even if Ireland retained the euro while shifting to the EEA, the economic costs of losing EU membership are potentially very significant. First, the Irish economy has benefited enormously from foreign direct investment. Multi-national companies invest in Ireland for a number of reasons but central to their calculations is Ireland's full engagement with the EU. A transition from full membership to EEA status would mark a fundamental shift in Ireland's place in the system and would send a very negative signal to international companies that always place a premium on the stability of the investment climate. Second, EEA members do not have access to the Common Agricultural Policy or Cohesion Funds. The Irish budget for thus would have to carry the entire burden of subventing agriculture, and replace the lost infrastructure funds, with potentially dramatic consequences for public finances.

European states in this situation have sometimes been permitted to join other EU initiatives that they find desirable. For example, Norway and Switzerland have both joined the EU's Schengen agreements on cross-border travel, while the former participates in the EU's Nordic Battlegroup alongside Ireland and three other Member States. However, it is difficult to envisage the circumstances under which Ireland would voluntarily relinquish the advantages of EU membership and then rejoin a broad range of EU activities over which it no longer has decision-making power.

Finally, it bears noting that all four European states that have chosen economic engagement over EU membership differ from Ireland in critical respects. Two are significantly less dependent on foreign investment than is Ireland – Norway because of its oil supplies and Switzerland because of its banks, luxury goods and pharmaceutical industries. EU membership is difficult to imagine for Liechtenstein, given its size and dependence on non-member Switzerland. Finally, unlike the case in Ireland, neither Iceland's public nor its political elites has shown much interest in EU

membership, though this may change in the aftermath of the island's recent economic collapse.

It is thus difficult to envisage the circumstances in which the Irish state would wish to downgrade its relationship with the EU in this manner. A fundamental shift of this nature is far more likely to evolve as a consequence of systemic changes in the system.

<i>Scenario 3: Two-Tier Europe</i>

This scenario would involve a restructured system of European governance in which some states build institutions for deepened integration while others remain in a 'Europe-lite' that ensures greater national autonomy. This scenario is more hypothetical than the previous two, simply because while the idea of a two-tier Europe has been proposed by academic commentators and politicians unhappy with the pace of integration in the current EU (either because it's going too fast or too slow), it does not yet exist 'on the ground.'

At present, the Union's constitutional architecture reflects the norm of Member State equality. The dominant form of 'variable geometry' in today's EU is the phenomenon of 'multiple speeds,' by which some Member States accept aspects of integration that others reject or are not ready to join (such as EMU, ESDP, etc.). But this does not involve the sort of structured institutional or formal distinction among Member States implied by proposals for a two-tier Europe. There are provisions on 'enhanced co-operation' in the treaties from Amsterdam onwards that could enable a restricted group of states to engage in cooperative arrangements under specified rules, but these provisions have never been activated.

An institutionalised two-tier Europe seems most likely to emerge in the context of failed treaty change. That is, if the opt-out mechanism and enhanced co-operation provisions prove incapable of accommodating a significant sub-set of Member States committed to broader co-operation or institutional deepening, and no treaty revision were possible, there may be sufficient political support for a radical redesign of European institutions. (Note that a similar group committed to 'less' Europe could easily avail of the economic engagement options discussed above.) Given the increased diversity among Member States due to successive rounds of enlargement, this situation is not unimaginable.

If it becomes clear that the unanimous ratification of all treaties becomes nearly impossible, there is likely to be a systemic response which might take one of two directions. One possibility is that EU Member States would accept that unanimity is not required for treaty change and that a treaty would come into force after an enhanced majority of Member States had ratified. 'Non-ratifiers' would then have to accept the new treaty or leave the Union. The other possibility is that the EU could develop two tiers with differentiated membership and institutions. In sum, a two-tier EU will only emerge as a solution of last resort, but it should not be entirely ruled out.

The consequences for Ireland of a two-tier Europe would depend on which tier Ireland belonged to. If Ireland were to occupy the outer tier, with diluted membership or as a state that was left behind, the economic consequences may be serious.

Ireland's full engagement with the EU has been an important badge of state identity and how Ireland positions itself in the world. It would send a potentially dangerous signal to the many multi-national corporations that locate in Ireland. It would weaken Ireland's influence in the European system and undermine its ability to mould the dynamic of integration in a manner that suits Irish interests and values. On the other hand, Irish voters and politicians might conclude that the greater political autonomy is worth the economic price.

To conclude this section, it is important to point out that these three 'big-picture' scenarios for Ireland's relationship with the EU are not an abstract academic exercise. Instead, they provide a context for strategic thinking about Ireland's future and a reference for discussions of particular scenarios for dealing with the Lisbon Treaty.

III. Ireland and the Lisbon Treaty

It has always been theoretically possible that the Member States could choose to abandon any hope of reforming the present Treaties and to continue indefinitely to operate on the basis of the present rules. That said, it seems highly unlikely that the other Member States will give up on any hope of reforming a Union which serves as a guarantor of peace, the framework of the single market, and a system of collective European organisation in a world dominated by economic and political giants such as China, Russia, and the United States. Considerable time, effort and political capital have thus been invested in the eight-year reform process which has led to the Treaty of Lisbon. The perceived weaknesses and inadequacies of the Union have only been further accentuated in the minds of Member State Governments by the events in international markets over the last three months.

The Member States thus remain anxious to reform the rules and institutions of the EU, despite the set-back imposed by Ireland's June referendum on the Treaty of Lisbon. According to the Conclusions of the European Council meeting of 15-16 October, the Irish Government is continuing "its consultations with a view to contributing to finding a way to resolve the situation." On that basis, the European Council agreed to return to the issue at its December 2008 meeting with a view to defining the elements of a solution and a common path to be followed. At this point in time, therefore, the initiative rests largely with the Irish state, and with the decisions that the Irish Government and/or people choose to make.

This section of the report analyses a wide range of scenarios without advocating any particular idea. We begin by examining (Part I) scenarios involving Ireland taking the main initiative in putting an end to the current impasse by making a renewed effort to renew the Treaty of Lisbon. We then examine those scenarios which might pertain in the event of Ireland not ratifying the Lisbon Treaty. These could arise in the event of Ireland either (a) declining for any reason to make any renewed effort to ratify, including for fear of a second defeat, or (b) attempting to make such a renewed effort and failing. These can be divided into scenarios (Part II) where the other Member States seek to move forward as a 27-member group and scenarios (Part III) where the Member States who are united both in their desire for reform and in relation to the

nature of the reform press ahead with the integration process, leaving any unwilling State behind.

All three sets of scenario are examined below, in order of their estimated likelihood of each set. It must be borne in mind however that declining or failing to ratify the Lisbon Treaty would leave Ireland with little control over what the other Member States may choose to do next. Although Article 48 of the Treaty on European Union provides that amendments to the Treaties only enter into force after being ratified by all the Member States, the options open to our EU partners (which are discussed below) are not limited to the pursuit of amendments to the existing Treaties. Considerable uncertainty thus reigns in relation to how the other Member States will react. The EU has never before been in a situation in which one Member State permanently blocks a major new Treaty wanted by all of the other Member States.

A. SCENARIOS INVOLVING A RENEWED ATTEMPT AT RATIFICATION

Introduction

Should a renewed attempt at ratification be made, and in particular, any new referendum held, it is likely to take place in an altered legislative context at both national and European level (where declarations and decisions at least, if not protocols, are likely to be adopted to address concerns expressed in the last referendum campaign).

In this situation, it would be expected that the Government make an attempt to respond at both domestic and international level (in the latter case, in consultation and in cooperation with its EU counterparts) to a range of the criticisms and concerns expressed during the first referendum campaign. Clearly some effort has been invested in trying to determine precisely the grounds upon which the June 12 referendum failed – and quite a wide variety of issues have been highlighted. Some such matters might be addressed by Oireachtas legislation or even, should it be felt necessary, by constitutional amendments (just as certain concerns were sought to be addressed between the first and second Nice referendums by the adoption of the European Union (Scrutiny) Act, 2002 and changes made regarding the Constitutional position related to common defence.⁸ Others would be addressed by the adoption of declarations, legally-binding decisions and perhaps (although this might encounter reluctance on the part of other Member States) protocols to the Treaty of Lisbon. The Government might then argue, as it did at the time of the second Nice referendum, that there was now a changed international environment for reconsideration of the Lisbon Treaty.

In particular, the Government would have a range of options at its disposal to address any number of the specific concerns expressed during the referendum campaign.

⁸ See Article 29.4.9 ° of the Constitution.

- Opt-Outs – Following the Danish Example?

It would be possible to supplement the provisions of the Treaty of Lisbon with non-binding declarations and to effect opt-outs using decisions (in the sense of the term used in negotiating the Danish opt-outs) and protocols. All such declarations (excepting unilateral ones), decisions and protocols would have to be negotiated and agreed with all of the other member states, however. Protocols would in addition have to be ratified in any member state in which the original ratification of the Lisbon Treaty was not deemed wide enough to include them). To some extent this would follow the approach taken by Denmark following the failure of its initial 1992 referendum on the Maastricht Treaty. The Danish precedent in this regard was confined to decisions and declarations rather than agreement on any protocol (the terms of which would have had equal status with Treaty provisions).

Protocols: Provisions of protocols have the same status as treaty provisions. There is some precedent for Ireland having negotiated protocol provisions, as in the case of the protocol annexed at the time of the Maastricht negotiations to the Treaty on European Union and to the Treaties Establishing the European Communities which provided that nothing in the Treaties would affect the application in Ireland of Article 40.3.3° of the Irish Constitution. Any protocol or set of protocols providing for specific Irish opt-outs from the European Union system envisaged under the Lisbon Treaty would have to be ratified by all other Member States (except in states which could argue that their original ratification of the Treaty of Lisbon was broad enough to cover any such protocol).

The strongly-felt wish of other Member States to secure ratification of the Lisbon Treaty might lead to a broadly favourable approach being taken to permitting Irish protocols. However, there are limits to a protocol-based approach. First, it is clear that there are critical provisions in the Treaty of Lisbon which it would not be possible for a state to opt out of on a unilateral basis – *e.g.*, the provisions relating to the reweighting of votes in the Council of Ministers or the right to nominate a Commissioner. Furthermore, a protocol-based approach might be resisted by those states where the initial ratification process was a difficult one to begin with. More broadly, such an approach might also be rejected where such protocols would generate comparable demands in other Member States for unique treatment and might thus lead to a wider unraveling of the Lisbon Treaty.

Declarations: Declarations are not legally binding, and should best be regarded as akin to political statements of intent.⁹ Declarations have been used extensively by Member States to address issues of significance which are not appropriate for a legally binding text. Declarations can be made by all of the Member States, by a lesser number, or by a single Member State. In the past, such declarations have been used to clarify a Member State's position on a particular issue, to set out a Member State's interpretation of a treaty provision and to underscore the meaning or intent of a treaty provision. Ireland has already availed of declarations in the past – for example, the 2002 Seville Declarations were essential to getting the Nice Treaty ratified. (See also Section II-1 above.)

⁹ Although it has been argued that they may have indirect legal effects.

In the Lisbon Treaty context, one might envisage clarifying statements in any of a number of fields, designed to underline the position of the Irish State and its EU partners with respect to specific concerns expressed by the Irish electorate during the referendum. Thus such declarations might address issues related to neutrality, to workers' rights, taxation issues, social and moral matters etc.

Decisions: A 'decision' also formed part of the settlement agreed after the initial 'no' Danish referendum vote concerning the Treaty of Maastricht. Agreed by the heads of state and government meeting within the European Council, this 'decision' constituted something of a new departure in Community law. Clearly intended to be legally binding, the decision reached appeared to meet the standards laid down in Article 11 of the Vienna Convention on the Law of Treaties as a treaty and was subsequently registered as such by Denmark with the United Nations. The terms of the decision were subsequently incorporated in the EU's own treaty framework as the Protocol on the Position of Denmark agreed at the Treaty of Amsterdam to be annexed to the Treaty on European Union and the Treaty Establishing the European Community, thereby rendering the decision itself obsolete. This history would appear to suggest that in the present context protocols and legally binding decisions are likely to be alternatives to each other, rather than both being agreed.

- Domestic Level Reforms

Apart from negotiating decisions, declarations and (possibly) protocols at European level, it is possible that a second attempt at ratification could be accompanied - like the second referendum concerning the Nice Treaty in 2002 - by changes to domestic practices, national legislation or the Constitution. Reforms which have been suggested include those involving a greater role for the Oireachtas than it enjoys at present in controlling the activities of the Irish state at European Union level, such as requiring a legislative super-majority to authorise Irish participation in international peacekeeping operations.

Having described the probable elements of the likely changed context of a renewed ratification attempt, we now examine scenarios by which ratification might now be attempted. Under all of these scenarios, ratification would ultimately involve incorporation of the Treaty of Lisbon in domestic law by Act of the Oireachtas. See respectively Article 29.5.2 ° according to which “the State shall not be bound by any international agreement involving a charge upon public funds unless the terms of the agreement shall have been approved by Dáil Éireann” and Article 29.6 according to which “no international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas.”

<i>Scenario 1: Second Referendum on Ratification of Treaty of Lisbon</i>
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The first scenario is one in which ratification of the entirety of the Treaty of Lisbon is again put to a referendum. No legal obstacle appears to exist to having a referendum either on precisely the same issue as that held on June 12 or some variation thereof. Constitutionally it is a matter for the Oireachtas to determine whether such a

referendum question would be placed before the people.¹⁰ The core element of any such future referendum would obviously concern amending the Constitution in such a way as to facilitate ratification of the Treaty of Lisbon.

Scenario 2: Ratification of Lisbon Treaty to Some Extent by Dáil Vote Rather Than Referendum

Parliamentary authorisation (rather than authorisation in a referendum) has been suggested by some as the appropriate approach to be used in any renewed attempt to ratify the Treaty of Lisbon. The main judicial authority relating to the need to use a constitutional referendum in the process of the ratification of this form of Treaty is the ruling of the Supreme Court in *Crotty v. An Taoiseach*.¹¹ The approach taken in this case hinged largely on the question of whether a new Treaty alters the essential scope or objectives of the existing Treaties. If it does, then neither the existing constitutional authorisation to join the Union found in Article 29.4.4° of the Irish Constitution nor the Article 29.4.5° and 7° authorisations to ratify the Treaties of Amsterdam and Nice will extend to permitting the ratification of the Treaty of Lisbon.¹² This means that the Article 29.4.10° shield of constitutional immunity will not extend (beyond its current reach) to the laws enacted, acts done or measures adopted by the State which are necessitated by the obligations of membership of the post-Lisbon European Union. Nor will it cover (beyond its current reach) the laws enacted, acts done or measures adopted by the post-Lisbon European Union or by institutions thereof, or by bodies competent under the Treaties.

Since *Crotty* is the only case to have been decided on the point, it is extremely difficult to determine when an amending Treaty goes beyond the essential scope or objectives of the existing Treaties. Referendums have been held as part of the ratification process of all of the subsequent Treaties – the Treaty on European Union, the Treaty of Amsterdam, the Treaty of Nice and now the Treaty of Lisbon. Governments have sought legal advice from the Attorney General as to whether or not the ratification of EU treaties required approval through referendum, but this advice is not published.

The legal situation has certainly contributed to – if not created – a public expectation that any significant EU treaty change will entail an amendment to the Constitution and thereby a popular referendum (since, unlike other EU Member States, the Irish Constitution provides for no means of amendment other than by way of a referendum). Thus there is an incentive to base decisions on whether or not to have a referendum not only on legal but also political considerations.

¹⁰ Article 46(2) of the Constitution requires merely that every proposal for an amendment of the Constitution is required to be initiated in Dáil Éireann as a Bill, and having been passed or deemed to have been passed by both Houses of the Oireachtas, be submitted by referendum to the decision of the people.

¹¹ [1987] IR 713.

¹² Should such permission be constitutionally necessary by virtue of what would otherwise be an unconstitutionality inherent in its ratification.

In the first part of its judgment in *Crotty* (which related to the constitutionality of legislation designed to incorporate the provisions of the Single European Act into Irish law¹³), the Supreme Court held that there was no unconstitutionality involved because, *inter alia*, the amendments effected by the SEA did not go beyond the essential scope or objectives of the original treaties. However, in relation to Title III of the SEA, the Court found that existing Constitutional immunities in respect of Community Treaties did not apply. This was because Title III (providing for cooperation in the field of foreign policy) did not amend or constitute an addition to the existing Treaties, and further was not necessitated by them. Rather, it was outside their scope and in effect, a new treaty agreement. This new treaty agreement was then held by the Supreme Court majority to infringe the Constitution because of its supposed implications for the sovereignty of the State.

The question of whether and to what extent parliamentary ratification of the Treaty of Lisbon is possible is therefore shrouded in uncertainty and is impossible to answer definitively in the absence of a Supreme Court ruling. It has been *suggested* however that specific provisions of the Treaty of Lisbon *might* go beyond ‘the scope of objectives of the existing Treaties’ test. These examples include: (i) the giving of legal effect to the provisions of the Charter of Fundamental Rights of the European Union; (ii) the ending of the situation whereby the European Community has a separate identity; (iii) the extension of qualified majority voting in the criminal justice field; (iv) the role of the proposed High Representative of the Union for Foreign Affairs and Security Policy.

Certainty in relation to any of these issues would only be provided by an Article 26 reference to the Supreme Court by the President of legislation purporting to incorporate the terms of the Lisbon Treaty into Irish law, or by a challenge by a private party to (a) the constitutionality of legislation incorporating the Treaty into Irish law and/or (b) any attempt by the Government to ratify the Treaty of Lisbon without a referendum.

We now turn to the various mooted possibilities according to which ratification of Lisbon Treaty might be effected to a greater or lesser extent by Dáil vote alone in accordance with Articles 29.5.2° and Article 29.6 of the Constitution and accompanied by incorporation in domestic law by act of the Oireachtas.

A. Holding a Referendum Only Regarding Those Parts Of The Lisbon Treaty Which It Is Considered Might Raise Constitutional Difficulties

In principle, if the State were to hold a referendum only on aspects of the Treaty which might raise constitutional difficulties and the vote were positive, the Government could then proceed to ratification. But there is a complication here. It is difficult in advance of a Supreme Court ruling to be certain which aspects of the Treaty raise constitutional difficulties.¹⁴ Both the fact and the extent to which ratification was effected without authorisation in a referendum would likely be the subject of a constitutional challenge before the courts.

¹³ *Viz.*, the European Communities (Amendment) Act, 1986

¹⁴ See in this regard, however, the observations concerning Choice (C) below.

Should the referendum vote be negative, it does not appear possible for the State to ratify some but not all of the Treaty, as it does not provide for ratification of anything less than the entirety of the text by any Member State. The relevant provision is Article 6 of the Treaty of Lisbon. Article 6(1) provides that the Treaty shall be ratified by the Member States in accordance with their respective constitutional requirements, with the instruments of ratification to be deposited with the Italian Government. Article 6(2) provides that the Treaty is to enter into force on 1 January 2009, provided that all the instruments of ratification have been deposited or failing that, on the first day of the month following the deposit of the instrument of ratification by the last signatory State to take this step.

However, in the event of a negative vote, it may be possible for the State to ratify the Treaty as a whole, subject to a Protocol or Protocols providing for opt-outs in relation to those parts of the Treaty objected to by the electorate. These opt-outs however would have to be agreed with the other Member States. Such Protocols would in turn have to be ratified by each of the other Member States in accordance with their own constitutional requirements (except in states which could argue that their original ratification was sufficiently broad enough to be deemed to apply to any such Protocol).

B. Holding a Referendum Relating Only to Those Parts of the Treaty Which Have Raised Political Difficulties

This raises similar issues to those discussed above, except that the scope of the provisions of the Treaty of Lisbon in relation to which a referendum would be held would be broader. What has been noted in the text above concerning the unsuitability of certain provisions to be dealt with by protocols (*e.g.*, the reweighting of votes) should be borne in mind here, however.

C. Parliamentary Ratification of the Entirety of the Treaty of Lisbon

Beyond what has been said above, it may be added that it is not clear that parliamentary ratification of the entirety of the Treaty of Lisbon would be constitutional since, as has been pointed out above, it may be that the ratification/incorporation into Irish law of certain provisions of the Treaty of Lisbon might go beyond the terms of the existing constitutional order and therefore require a referendum.

In addition, the question of the democratic appropriateness and political acceptability of attempting parliamentary ratification of the entirety of the Treaty of Lisbon in the wake of the June 12 referendum in which such ratification was rejected would obviously have to be considered by both the Government and the Oireachtas in this situation.

Should the Government wish to avail of Choice (A), then, perhaps curiously, Choice (C) may be the best means for finding out with anything close to certainty in advance of ratification which terms of the Treaty of Lisbon would go beyond the terms of the existing constitutional order and therefore require a referendum, since such legislation would almost certainly either be referred to the Supreme Court by the President under

Article 26 of the Constitution or to be subjected to challenge in the Courts.¹⁵ This is not to say that Choice (C) would be a necessary first step before availing of Choice (A) however. The Government in availing of Choice (A) could alternatively put any aspects of the Lisbon Treaty even suspected of raising a constitutionality issue to referendum. Obviously, this would broaden the scope of such a referendum.

Scenario 3: All or Nothing Style Referendum Regarding Membership of the European Union As That Union is Envisaged in the Treaty of Lisbon

Another possible scenario would involve the Government organising a referendum on support for the Lisbon Treaty-version of the EU with the explicit commitment that in the event of a 'no' vote, the Government would then negotiate Ireland's withdrawal from the Union and pursue either membership of the European Economic Area (alongside Norway, Liechtenstein and Iceland) or some other special relationship with the Union (along the lines of that of Switzerland).

This would be a high-stakes strategy, gambling that voters who are not firmly opposed to the Lisbon Treaty would vote 'yes' in order to ensure Ireland's continued membership in the EU. But it could have the opposite result, stiffening the resolve of 'no' voters and thus leaving the government to deal with the consequences of its commitment to withdraw from the EU.

B. SCENARIOS WHEREBY IRELAND DOES NOT RATIFY THE TREATY OF LISBON AND THE OTHER MEMBER STATES NONETHELESS OPT TO RETAIN A UNIFORM 27-STATE APPROACH

Introduction

The above scenarios are all predicated on a decision on the part of the Irish State to alter its position regarding the ratification the Treaty of Lisbon. The Government may arrive at a final decision, however, that this State is unable to ratify the Treaty of Lisbon. This might happen in either of two circumstances – either (a) because there is insufficient prospect of success in a Constitutional referendum and the Government takes the view that parliamentary ratification is inappropriate or unconstitutional; or (b) because it attempts ratification of the Lisbon Treaty a second time and is also unsuccessful on this occasion (*e.g.*, because it fails to secure the amendment of the Constitution).

If this occurs, the other member states will be confronted for the first time in the history of the Union with the blockage (probably by one state only) of a Treaty which the vast majority of states want to see adopted. How the other states would react to this collectively is unclear. Broadly speaking, there are two possible scenarios. The other member states may seek to proceed with a uniform approach between all 27 States. This scenario is considered first, in the perhaps hopeful assumption that the

¹⁵ This is not to say that Choice (C) would be a necessary first step before availing of Choice (A) however. The Government in availing of Choice (A) could simply put any aspects of the Lisbon Treaty even suspected of raising a constitutionality issue to referendum.

other member states will adopt this approach as a first option. The second alternative scenario – less preferable from an Irish point of view – is that those states in agreement on the need for the Lisbon reforms may proceed with reform as a group, leaving recalcitrant states like Ireland behind in some manner or form. This is the final option considered. It may be that this latter option would be more likely in the event of a second 12 June-style referendum defeat. One way or another, it should be clearly understood that if Ireland does decline to ratify the Lisbon Treaty, this country does not possess a veto over everything the other Member States may choose to do next. It is true that Article 48 of the existing Treaty on European Union provides that amendments to the Treaties only enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements. However, the options open to our fellow member states (which are discussed below) are not limited to the pursuit of amendments to the existing Treaties.

Scenario 4: Agreed Disaggregation of the Treaty of Lisbon by the Member States and the Adoption by Other Means of as Many of its Provisions as Possible

Some of the provisions of the Treaty of Lisbon may be capable of being unbundled once more and adopted through the combined use of the Treaty's enhanced cooperation procedures, the 'flexibility clause' laid down in Article 308 of the EC Treaty, inter-institutional agreements, political commitments (similar in nature to the 1965 Luxembourg Compromise), measures agreed entirely outside the framework of the Treaties (along the lines of the Treaty of Prüm) and use of the Croatian Accession Treaty which will have to be ratified by the Member States so as to provide for Croatian membership of the Union. The result would be a complex, opaque web of legal and non-legal rules against which the complexity of the Treaty of Lisbon would pale in comparison, and which would be inferior in many respects (such as transparency and the rule of law) to the coming into force of the Treaty of Lisbon. Although forcing the other Member States to avail of this option is hardly likely to win Ireland much good will, they may nonetheless consider it the least-worst option if Ireland is unwilling or unable to ratify the Treaty of Lisbon.

From an Irish perspective this option would arguably be preferable to the other Member States seeking to proceed entirely without us (although it would involve the other member states doing this to whatever extent the enhanced cooperation procedure was used without Irish participation). Obviously, Member States would have to factor into their analysis of this option, the fact that Irish parliamentary ratification of certain measures through the Croatian Accession Treaty might fail to pass constitutional muster if challenged before the Irish courts.

Scenario 5: The Suggestion of a 'Mini-Treaty'

If ratification of the Lisbon Treaty fails or is ruled out, it might be nonetheless be considered as in the interests of this State (if only to avoid the charge of obstructiveness) to offer to ratify by parliamentary vote those aspects of the Treaty of Lisbon which do not appear to require a Constitutional referendum in this State and yet are considered highly important to other Member States. Examples of provisions in the Treaty of Lisbon which could be considered for such treatment might be those involving the reweighting of votes for the purposes of calculating a qualified majority in Council or the provisions laying down the numbers of members of the European

Parliament which each Member State is to have (neither of which appear to require a referendum, given that reweightings and alterations of Parliament seat numbers previously carried out in the event of successive enlargement treaties have never been held to require a referendum). Such an option is to be distinguished from renegotiation in that it would involve taking elements of the Treaty of Lisbon without renegotiation, agreeing them as a new mini-treaty and ratifying them.

The advantage of this strategy, even the offer if ultimately rejected, is that it would constitute proof of the State's *bona fides vis-à-vis* its EU partners. On the other hand, it would be seen by some in Ireland as a deliberate attempt to circumvent the expressed will of the people and could thus provoke a legal challenge whose treatment by the Supreme Court is unpredictable. In any case, it is not entirely clear that any such offer would be of any interest to our fellow Member States, given that its acceptance would require the signature and ratification of a mini-treaty by all of the other Member States who – given that concessions were made to some of them to accept the institutional arrangements – might refuse to ratify a Treaty involving revised institutional arrangements without these concessions.

<i>Scenario 6: Renegotiation</i>

There is at present no indication from any other government that they might be willing to recommence negotiations on the existing Treaties.¹⁶ Eight years of negotiation rest behind the Treaty of Lisbon (involving the sometimes difficult process of securing the agreement of all Member State Governments and the ratification to date by 24 of the 27 Member States). It represents a complex compromise. There is real fear on the part of other Member States that re-opening negotiations again would be opening a Pandora's box. Further, even were such a renegotiation to succeed, there is no reason to expect it would result in a treaty strikingly different to the Treaty of Lisbon, or, for that matter, a better deal for Ireland. The negotiators, the issues to be addressed, the constellation of interests involved and the range of politically possible compromises are all largely the same now as they were several years ago. It is notable that following the rejection of the EU Constitutional Treaty in referendums in France and the Netherlands, and following several subsequent years of 'reflection', the substance of the Lisbon Treaty nonetheless closely reflected that of the earlier rejected treaty.

It may also be noted that there is little or no incentive for the other Member States to renegotiate with the Irish Government. They are acutely aware that Irish Governments – despite the substantial support of opposition parties and most of the formal social partners – have twice failed to win referendum votes on EU treaty ratifications. Given that any further treaty negotiated with this State is likely to have to be put to a referendum there is no guarantee that such a referendum will be capable of being passed. Even were it possible to fashion a 'national compromise' comparable to the Danish example at Maastricht (a daunting prospect due to the variety and intensity of perspectives represented in the opposition to the Lisbon Treaty), the terms of Supreme

¹⁶ It will be recalled that under Article 48 of the Treaty on European Union, an IGC can only be convened by the President of the Council if the Council, after consulting the European Parliament and the Commission (where this is appropriate) – and additionally the European Central Bank, in relation to institutional changes in the monetary area – delivers an opinion (determined by a simple majority vote of the Member States representatives) in favour of calling an IGC.

Court case-law makes it clear that opponents of such any such compromise – however organised and whatever their numerical strength – would be entitled in significant respects to equal voice and treatment within the subsequent referendum campaign.

Finally, any new Treaty would have to be ratified in all Member States. Since the UK's Conservative Party has insisted that no new Treaty will be ratified by a Conservative Government, and it may well come to power in 2010, such a Treaty would have very limited prospects of ever entering into force.

In sum, there is no interest at present on the part of the other Member States in renegotiation of the Treaty of Lisbon, and this seems most unlikely to change.

C. SCENARIOS IN WHICH THE OTHER MEMBER STATES SEEK TO MAKE PROGRESS WITH EUROPEAN INTEGRATION AND WHICH DO NOT NECESSARILY REQUIRE IRISH INVOLVEMENT

Introduction

As noted above, it is impossible to predict how the other Member States would react should non-ratification of the Lisbon Treaty become Ireland's permanent position. Among other factors, their response may vary depending on whether any others fail to ratify. If Ireland ends up as the only non-ratifying Member State, there may be more scope for the other 26 to define the problem as pertaining only to this country and thus to look more favourably at solutions which involve their proceeding further with European integration and leaving Ireland behind to catch up if and when it wishes to do so. The following four scenarios portray different ways in which this might play out. Although none seem likely at present, they cannot be entirely ruled out in the event of permanent Irish non-ratification.

Scenario 7: Replacement of Treaty of Lisbon by a Similar Treaty with an Altered Ratification Process

One possibility might be the presentation of another Treaty for ratification that effectively re-establishes the Union (rather than amending the existing Treaties under Article 48) on terms similar to those contained in the Treaty of Lisbon but providing simply that this new Treaty would come into force after a certain minimum number of states have ratified it – and only for those states.

This would represent an approach similar to that originally used in securing the adoption of the United States Constitution. There is also precedent for such an approach at European level, since under Article 34(2) of the Treaty on European Union, conventions in the field of police and judicial cooperation in criminal matters (under Title VI of the present Treaty on European Union), once adopted by at least half of the Member States, enter into force for those Member States that have ratified them.

Such an approach would avoid substantive renegotiation of the Treaty of Lisbon apart from Article 6 thereof. It would however be a sea-change in the nature of the Union,

for although it would avoid any non-ratifying state being compelled to accept Treaty arrangements which they did not like, it would simultaneously end the right of each Member State to block the entry into force of a new Treaty. And of course it would also raise issues related to the status of states that for any reason did not ratify this new treaty. It might therefore be unappealing to States who might fear the loss of control over the future evolution of the Union which this might involve. On the other hand, it might present an appealing alternative to the possible long-term stagnation which might otherwise threaten the Union. Such a scenario, it will also be noted, would not necessarily result in Irish exclusion. But it would require Ireland to consider whether to sign such a Treaty and then whether to ratify it.

This scenario – like the two next scenarios - would effectively involve refoundation of the European Union, although it has been kept distinct here since refoundation might involve a redesign of the Union.

Scenario 8: Denunciation of Existing EU Treaties and the Adoption of a New Treaty Framework

Although not specifically provided for in the Treaties, denunciation of the Treaties has arguably always been regarded by the Member States as a legal right, a point exemplified by the referendum held in the United Kingdom in 1975, which was conducted on the basis of a belief of all concerned that that State retained the right to leave the then European Economic Community.

It would therefore be possible, at least in principle, for the other Member States to denounce the existing Treaties and then adopt a revised set of Treaties with reference to Ireland deleted and/or with whatever other changes are desired by the other Member States. This scenario could thus involve movement toward the ‘two-tier Europe’ discussed above in section II-3. On the other hand, at least two factors militate against this option. First, for a variety of reasons, it is likely that some Member States would be loath to see Ireland excluded from the Union. And second, such ‘hardball’ tactics have always been seen as inconsistent with the Union’s norm of achieving consensus through mutual compromise.

Scenario 9: Leaving the EU as an Empty Shell and Establishing a New EU Without Ireland.

This scenario is similar to scenario 8 except that the existing Treaties would not be denounced, merely left to founder in neglect. There is a rough precedent for such a development in the 1954 Modified Brussels Treaty establishing the Western European Union (WEU). The WEU remains ‘on the books’, while almost all of its primary functions (with the exception of its Article V security guarantee) have been taken over by the European Union.

Scenario 10: Ireland Leaving the European Union in Favour of the European Economic Agreement Area or Some Other Special Relationship

This scenario is discussed above in section II-2. In the wake of the 12 June referendum, leaving the EU in favour of the EEA was proposed by a number of

sources. On the other hand, the Millward Brown survey has demonstrated that this option is of little popular interest in this country. However unlikely, it could emerge in the circumstance of the other Member States presenting Ireland with alternatives which were even less palatable (such as scenarios 8 and 9 above).

IV. Conclusion

This report has identified a wide range of scenarios regarding Ireland's future relationship with the European Union and regarding the Lisbon Treaty. The different scenarios have distinctive political, legal and economic characteristics. It is up to the Government and the Oireachtas, in consultation with Ireland's EU partners, to chart a path through these complex issues.