

In the wake of the Irish no-vote on the Treaty of Lisbon, numerous scenarios are currently being debated.<sup>1</sup> This paper critically assesses the legality and political feasibility of the principal proposals and then puts forward an alternative ‘Plan B’, which we believe would amply satisfy both criteria.

## I. An assessment of the options currently under debate

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

At first sight, this approach appears to be the easy way out. There would certainly be no legal obstacles to simply continue on the basis of the current treaties, and the experience of the last four years has shown that the EU institutions would not break down. Some adaptations would have to be made in order to comply with a protocol to the Treaty of Nice that stipulates that the next Commission needs to have fewer members than there are EU member states. Moreover, if a new member state were to join the Union (e.g. Croatia), its voting weight in the Council of Ministers and its number of MEPs would have to be determined.

From a political perspective, however, to dispose of the treaty with a simple ‘funeral’ would be highly problematic for the credibility of the European Union. It would offer further evidence to those who believe that the EU-27 is incapable of reforming its institutions and it would shelve all ambitions to construct a Union that can act efficiently on critical policy issues such as energy, police cooperation and criminal justice or foreign and defence policy.

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<sup>1</sup> See for example Dominik Hierlemann, *Irish Vote, Europe’s Future: Four options after the “No”*, Spotlight Europe Special Edition, Bertelsmann Stiftung, June 2008.

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## What next? How to save the Treaty of Lisbon

**Daniel Gros & Sebastian Kurpas**

This ‘standstill’ scenario might come about by default since the ratification process has rather skewed incentives: While failed ratification can often be politically costly for individual governments at the national level, a delay (or even a halt) to the whole ratification process imposes most of the cost on the EU and the other member states that wish to proceed. For example, following the Irish ‘no’ vote, the governments in both the Czech Republic and Poland will have to expend even more of their political capital to overcome the resistance to ratification by their eurosceptic presidents.

### 2. *Reopening negotiations on a new Treaty*

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

Sinn Fein (the only political party in the Irish Parliament that campaigned for a ‘no’) has clearly stated that a re-opening of the institutional package deal would be necessary to satisfy their demands: Ireland’s voting weight in the Council would have to remain the same as under the Treaty of Nice and there would have to be an Irish Commissioner at all times. If such issues were to be re-opened, other countries would also make additional demands, which means that a full round of re-negotiations would have to start after what has

already been a decade of institutional haggling and navel-gazing. It is thus much more likely that EU leaders would simply refrain from launching another effort, especially since any new text would again have to be ratified and could thus also again fail to secure the necessary support. However, negotiations of a new Treaty may start after a couple of years if the Treaty of Lisbon is not adopted. It is likely that this new treaty would then contain a provision allowing it to enter into force even if it is not ratified by all member countries (i.e. with the consequence that those not ratifying would leave the Union) in order to avoid the current situation.

### **3. Increased efforts on flexible integration**

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

Legally many options are possible, but ‘flexible integration’ cannot achieve key institutional reforms (e.g. the extension of qualified majority voting or the ‘double majority’-voting mechanism). From a political perspective, flexibility inevitably comes at the price of increased incoherence, complexity and a lack of transparency. If flexible integration is not matched with efforts to consolidate the overall framework, aspirations for a European community of values will eventually be replaced by a thicket of multilateral treaties and agreements that would mark the relations between member states. Common standards would be replaced by first class and second class members and democratic accountability would become even more difficult. In a worst-case-scenario, the Treaty of Nice would prove too weak a basis for the mounting centrifugal powers that result from the various ‘clubs’, so that even the community *acquis* (e.g. the single market) may be called into question over time.

### **4. Implementation of those elements in the ToL that do not require ratification**

This approach could only contribute in a very limited way to a solution, because – as also for the ‘flexible integration’ option – voluntary cooperation cannot achieve the key institutional reforms. It would certainly be legally possible to pick some elements from the treaty, but the vast majority of innovations require ratification. Politically, such an approach would also send the wrong message, as it is likely to be seen as an example of “bureaucratic arrogance from Brussels”.

For example, even if the post of the High Representative in the Council and the Commissioner for External Relations could be brought together through an inter-institutional agreement, it is likely to be regarded as ‘sneaking in’ the Treaty of Lisbon by the back door against the will of the Irish people.

### **5. Temporary withdrawal of Ireland from the EU**

This idea was put forward by the German Foreign Minister Steinmeier, but was immediately dismissed by the Irish government and the German Chancellor.

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

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

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

By default this seems to be the most likely option to be chosen by the European Council. The calculation seems to be that a second referendum would have a higher chance of succeeding once all other 26 member states have ratified. The Irish Prime Minister has not excluded the possibility of a second referendum, probably not least because other European leaders are pressing him hard to present a possible solution. Indeed, the only proposal that would save the Treaty of Lisbon *and* guarantee that Ireland would remain a member of the EU requires Irish ratification.

A second referendum on exactly the same matter would, however, be problematic for legal and political reasons. The relatively high turnout of more than 50% and the clear lead of the no-vote (53.7% ‘no’ vs. 46.3% ‘yes’) imparted a strong legitimacy to the result. Although Ireland has a tradition of repeated referenda on the same issue (not only on the Treaty of Nice, but also on divorce and abortion, for example),<sup>2</sup> it would seem rather unlikely that such a clear result could be overturned with a second vote. Thus one cannot dismiss the possibility that asking exactly the same question twice could lead to an act of defiance from the Irish people.

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<sup>2</sup> See Cathryn Costello, “Peoples’ Vengeances – Ireland’s Nice Referenda”, *European Constitutional Law Review*, Vol. 1, 2005, pp. 357–382.

The main problem with this scenario is that it remains a high-risk strategy. In the case of a second ‘no’, the EU would still be in a legal impasse as the Irish vote would continue to function as an efficient veto, even if all other countries had ratified. The Treaty of Lisbon would effectively be dead, unless some other method is found that would allow the Union to proceed even without Ireland. A simple way to do so is suggested in the next section.

## II. A politically feasible, legal and fair way ahead

The foregoing overview of six possible scenarios illustrates the political and legal shortcomings of proposals currently put forward. Most would be legally feasible, but would entail considerable political costs. In contrast, the following scenario would satisfy both legal and political concerns. It would give the Irish another say, but whatever the result, they would not be able to prevent the other countries that have ratified from moving on.

### *Plan B: Ratifying the consolidated treaties as amended by the Treaty of Lisbon*

If the other member states are really determined to go ahead, the solution to the ‘Irish crisis’ could be relatively simple: All member states could just sign the consolidated version of the treaties as amended by the Treaty of Lisbon. This text has recently been published in the Official Journal of the EU.<sup>3</sup>

The Irish government could not put its signature to such a Treaty at this time, since its population has just voted against it, but it would be important not to give the impression that the other members are trying to exclude a country that has been a successful member of the EU for 35 years and has not shown signs of having turned Eurosceptic in general. Hence, the Irish government should be invited by the European Council to submit within a reasonable time period a set of protocols, or opt-outs, which would allow it to sign the treaty and have reasonable certainty that the next referendum would have a different outcome.

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<sup>3</sup> See Official Journal of the European Union, C 115, Volume 51, 9 May 2008, at: <http://eur-lex.europa.eu/JOhtml.do?uri=OJ:C:2008:115:SOM:EN:HTML>. The EU’s fundamental law is the “Treaties”, i.e. the Treaty of Rome (officially, Treaty establishing the European Community) and the Maastricht Treaty (officially, Treaty on European Union) as modified by the many Treaties adopted since 1958. New treaties, like the Lisbon Treaty, are a list of amendments and deletions that apply to the existing Treaties –which is why they are so hard to read. A ‘consolidated text’, which is a re-writing of the treaties with all the amendments inserted, makes it much easier to understand what the law says.

In the meantime, the consolidated version would be thus be signed by 26 (or perhaps 25, if the Czech government judges that ratification is difficult). This consolidated text would represent a new coherent treaty and it could enter into force once it is ratified by all the 26 member countries that have signed it.<sup>4</sup> Ratification of the consolidated text should be possible to achieve within a short period of time as no further referenda would be necessary and all 26 (or possibly 25) member states are committed to ratify the Lisbon Treaty using parliamentary procedures (with 18 having already done so).

In those 18 countries that have already ratified the Lisbon Treaty, it should actually be possible to use an accelerated procedure to (re-)ratify the consolidated text, as it contains after all *exactly* the substance of the Lisbon Treaty. The only difference is that this substance has been consolidated into one coherent and readable text with the existing treaties and that the new treaty would have one (or possibly two) member states less.

In those member states where the ratification process is still ongoing, the government could inform its Parliament(s) that it is now able to present them with the consolidated text that results from the incorporation of the amending Treaty already under consideration. This should not delay ratification unduly. Once all 26 have ratified the consolidated text, it would be ready to enter into force.<sup>5</sup> Using fast-track (re-) ratification procedures, this might even be possible in time for the next elections of the European Parliament.

Once (re-)ratification has been completed in the 26, it would be entirely appropriate for the Irish government to call a second referendum. This referendum would be about a different question: Does Ireland wish to join the EU(-26) with the Lisbon Treaty in force? At this point, another ‘no’ would effectively mean that Ireland would leave the EU. Faced with this prospect it is highly likely that the Irish would choose to remain in the EU even if this meant accepting the essence of the Lisbon Treaty – possibly with some additional protocols that would clarify guarantees for Ireland on tax policy,

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<sup>4</sup> To minimise further risks it would be desirable that the consolidated version be augmented by only one article which would state that this (new) Treaty will enter into force (among those which have ratified) once it has been ratified by an overwhelming majority of the present members of the EU (e.g. 9/10 member states representing at least 90 % of its total population of over 500 million). However, this would not be necessary at this point, since all 26 have committed to ratifying the Lisbon Treaty and this change would represent an important departure from the present text, thus possibly delaying ratification.

<sup>5</sup> Technically all 26 would then renounce their membership of the ‘old’ EU, which they can do anytime since all international treaties can be denounced by its signatories.

neutrality and abortion (i.e. policy issues that played a prominent role in the 'no' campaign).

To put the choice in such stark terms to the Irish electorate is entirely appropriate since the requirement of unanimity creates a giant external effect: A 'no' vote imposes a high cost on all EU members. Hence the electorate in any one country, especially a small one, is entirely rational to vote no. They can thus punish at a low cost to themselves their own political class. The overwhelming costs in terms of a badly functioning Union are borne by the other members. No political system can survive for long under such a misaligned incentive structure.

The ratification of the consolidated Treaties is thus the only scenario that is both legally and politically feasible. With the content of the Treaty remaining exactly the same, no further negotiations would be necessary. Ratification by the 26 could be fast and would lead to a situation in which an Irish 'no' would not prevent them from advancing. Finally, a second referendum would confront the Irish with two very concrete and easily understandable alternatives: in or out.

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