



*The People's Movement campaigns against any measures that further develop the EU into a federal state and to defend and enhance popular sovereignty, democracy and social justice in Ireland.*

## **We are being asked to vote on exactly the same text of the Lisbon Treaty**

### **The EU and Referendum Commission admit that nothing has changed**

EU leaders have agreed on a “declaration” that seeks to address what they perceive to be Irish concerns while reiterating an agreement reached in December to postpone a reduction in the size of the Commission, as laid down in the Lisbon Treaty. They also agreed to attach the declarations as a protocol to the Treaty **after the Irish referendum and once it is already in force**; but the text of the summit conclusions states that **“the Protocol will clarify but *not change* either the content or the application of the Treaty of Lisbon”<sup>1</sup>**; and the EU Presidency later confirmed that **“the text of the guarantees explicitly states that *the Lisbon Treaty is not changed thereby*.”<sup>2</sup>** None of the statements made are therefore binding in EU law.

### **Protocols and declarations**

“Declarations” are not legally binding. They are merely political statements or promises, made by one state unilaterally or by several states collectively. There are several such declarations already appended to the Lisbon Treaty. These are *not* legally binding on the states that are party to the treaty. There are also several protocols attached to the Lisbon Treaty. These *are* legally binding, in the same way as the main text of that Treaty.

The EU Court of Justice interprets EU treaties; an EU treaty means what the EU Court of Justice says it means in relation to any issue in dispute. Political declarations cannot override the provisions of a treaty that the ECJ would interpret if called upon. They therefore cannot bind the ECJ. A protocol, on the other hand, would in effect be a new treaty, which would require ratification by all the states signing it before it could come into force.

### **What has been agreed?**

- Irish voters will be voting on exactly the same text a second time. EU leaders have agreed a list of statements that do not change the Lisbon Treaty in any way but reiterate what the treaty already says. They are not legally binding under EU law; and even if they did become legally binding in the form of a protocol in the future, as planned, EU leaders have confirmed

---

1. [www.consilium.europa.eu/uedocs/cms\\_Data/docs/pressdata/en/ec/108622.pdf](http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/108622.pdf), page 18.

2. [news.xinhuanet.com/english/2009-06/19/content\\_11569853.htm](http://news.xinhuanet.com/english/2009-06/19/content_11569853.htm).

that these will still not change the substance of the treaty. This means that Irish voters will be asked to vote on exactly the same text of the Lisbon Treaty a second time, despite having already rejected it—and despite promises from the Government that it would not present the same text again.

- Concerns about neutrality remain unaddressed. The declaration agreed by EU leaders—even if it did become legally binding at some future date—does nothing to address the concerns of Irish voters about the effect of the treaty on the country’s neutrality, because it provides no exemption for Ireland from the “mutual defence” clause in article 42 (7). Experts argue that this is the only way to guarantee that the treaty does not threaten Ireland’s neutrality.

- There is no guarantee that Ireland can keep its EU Commissioner indefinitely. The “guarantee” that Ireland will get to keep its Commissioner is no such thing. EU leaders have agreed that, **once the Lisbon Treaty is in force**, they will vote unanimously to change the default Lisbon arrangement, which reduces the size of the Commission by a third. However, there is no legal obligation on member-states to stick to their word, and the present EU governments cannot guarantee that their successors will deliver on the pledge. **A parliament cannot bind its successors; otherwise there would be little point in electing new governments!** Furthermore, there is no guarantee that this arrangement, if agreed, would prevail in the future.

The status quo seems far safer for Ireland. Under the current (Nice Treaty) arrangements EU leaders have the option of reducing the size of the Commission by one member, meaning that Ireland would be without a Commissioner for only 5 years in every 135. In contrast, under the Lisbon Treaty member-states could potentially be without a Commissioner for 5 out of every 15 years.

## **The declarations do nothing to address concerns about the broader issue of threats to Irish neutrality**

Research published in September 2008 by the Department of Foreign Affairs showed that neutrality was a most divisive issue in the Lisbon Treaty referendum campaign.<sup>3</sup> 88 per cent of those who voted No said that neutrality was an important issue for Ireland within the European Union.

In the *Irish Times* last year Dr Karen Devine, a researcher at Dublin City University and expert on Irish neutrality, warned that “*a neutral state cannot legally or politically sign up to the Lisbon Treaty mutual assistance clause because it violates neutrality.*”<sup>4</sup> The declaration from the European Council states: “The Lisbon Treaty does not affect or prejudice Ireland’s traditional policy of military neutrality.” However, before the final conclusions of the summit meeting Dr Devine commented that the proposed declaration on security and defence “*does not exempt Ireland from the mutual defence clause in Article 42 (7) and the obligation contained in the clause to provide assistance to a member-state that is subject to armed aggression on its territory. This obligation means that Ireland has ceded the ability to adhere to the international customary law of neutrality.*” She further argued that “*in order to safeguard ‘neutrality,’ the only solution is (1) to have a legally binding protocol providing for Ireland’s opt out of Article 42(7), or (2) to have the proposed wording of the declaration amended to specify that Ireland is not under any obligation to provide assistance under Article 42(7).*”

---

3. [www.irishtimes.com/newspaper/opinion/2008/1126/1227486578655.html](http://www.irishtimes.com/newspaper/opinion/2008/1126/1227486578655.html), 26 November 2008.

4. [www.irishtimes.com/newspaper/opinion/2008/1224/1229728523303.html](http://www.irishtimes.com/newspaper/opinion/2008/1224/1229728523303.html), 24 December 2008.

Indeed the Irish Government's own White Paper on Foreign Policy (1996) asserted that "*provisions committing the parties to collective action in the event of armed attack against one or more of them . . . would not be compatible with an intention to remain neutral.*" Therefore the proposed declaration does not address one of the concerns of the Irish people who voted against the Lisbon Treaty because of the loss of neutrality.

The only conclusion to be drawn is that a protocol excluding Ireland from all military obligations under the Lisbon Treaty is the only means of providing legal certainty in this instance.

Concerns regarding military spending, allied to Ireland's membership of the European Defence Agency, have been fudged and left in the hands of the Government. "It is also a matter for each Member State to decide, in accordance with the provisions of the Lisbon Treaty and any domestic legal requirements, whether to participate in permanent structured co-operation or the European Defence Agency."<sup>5</sup> States that wish to "do their own thing" in relation to military affairs could do so under the treaty's provisions for "permanent structured co-operation." Articles 28A.6 and 28E, as well as a specific protocol on the issue, provide for sub-sets of EU countries (including those that wish to undertake actions consistent with their membership of NATO) to pursue their own agenda for military integration and co-operation within the European Union Military Staff (in which Irish army officers participate), without necessarily involving all other member-states.

Crucially, there is provision to "**establish permanent structured cooperation within the Union framework**" (article 28A.6), and **this can be undertaken on the strength of a qualified majority vote within the EU Council.**

As the "assurance" states, Ireland may choose not to participate *directly* in such initiatives; but by virtue of its participation in the general business of the European Union Military Staff, and in all the other aspects of EU military co-operation (*including the financing thereof*), the argument can be made that Ireland would help lay the basis for other states to engage in such co-operation, and that such co-operation would be perceived (not without justification) as an EU undertaking, even if not all EU members were directly involved.

The Lisbon Treaty makes no reference to the requirement of a UN mandate for an EU intervention, and the Irish Government continues to insist that its own forces would never be deployed without such a mandate; but there is nothing to prevent forces from other countries (unavoidably backed up by Irish planning and financial resources) drawing on the support of the EU infrastructure to launch such an intervention.

In contrast to the lip service to the United Nations,<sup>6</sup> the protocol on "structured co-operation" declares that "**a more assertive union [EU] role . . . will contribute to the vitality of a renewed Atlantic Alliance [NATO].**" Many commentators have concerns about enhancing the vitality of an alliance that, among other regressive features, retains a commitment to the "first use" of nuclear weapons and that has pursued an aggressive policy in Afghanistan, involving substantial civilian casualties.<sup>7</sup> Unfortunately, we depend on the will and independence of present and future Governments to prevent us being mired in or supporting such conflicts; and once again, legal certainty could be provided only through a protocol to the treaty.

---

5. [www.consilium.europa.eu/uedocs/cms\\_Data/docs/pressdata/en/ec/108622.pdf](http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/108622.pdf).

6. Save for "a number of more or less vague formulations about acting in accordance with principles of the UN Charter and the important role of the Security Council"—Jonas Sjöstedt, *The Lisbon Treaty: Centralization and Neoliberalism* (2008), page 13.

7. See, for example, Carlota Gall and David E. Sanger, "Afghan civilian deaths damaging NATO," *International Herald Tribune*, 13 May 2007.

## **There is no guarantee that Ireland would not lose its Commissioner**

One of the main aspects of the “deal” being offered to Ireland is a “promise” that it will get to keep its EU Commissioner. The declaration states: “Having carefully noted the concerns of the Irish people as set out by the Taoiseach, the European Council, at its meeting of 11-12 December 2008, agreed that, provided the Treaty of Lisbon enters into force, a decision would be taken, in accordance with the necessary legal procedures, to the effect that the Commission shall continue to include one national of each Member State.”

However, this is not a legally binding guarantee but a political commitment. It is not a guarantee because it does not bind future heads of government, who would be free to go back on it. With no guarantee that Ireland would get to keep its Commissioner indefinitely, this is a worse solution than keeping the status quo.

Under existing arrangements the number of Commissioners is due to be reduced from when the next Commission takes up its duties, which is in November this year. The Nice Treaty states that “when the Union consists of 27 Member States . . . The number of Members of the Commission shall be less than the number of Member States.”<sup>8</sup> However, it does not specify how many Commissioners there must be, beyond stipulating that there must be fewer than twenty-seven. “The Members of the Commission shall be chosen according to a rotation system based on the principle of equality, the implementing arrangements for which shall be adopted by the Council, acting unanimously. The number of Members of the Commission shall be set by the Council, acting unanimously.”

This means that under the present (Nice Treaty) rules, and without the Lisbon Treaty, the Council is free to decide that there should be one fewer Commissioner than there are member-states. With a system of equal rotation, Commission terms of five years, and twenty-seven member-states, this would mean that each state would be without a Commissioner for only 5 out of every 135 years. Importantly, Ireland at present wields a veto over decisions on the number of Commissioners and therefore could insist that the Commission be reduced by only one member. In contrast, under the system proposed by the Lisbon Treaty the size of the Commission would be reduced by a third from 2014, meaning that Ireland (and every other member-state) would be without a Commissioner for 5 out of every 15 years. The Treaty also states that the European Council, acting unanimously, may decide to alter this number.

The political agreement reached at the European Council is nothing more than a loose commitment that in 2014 the EU heads of state and government (who will mostly be different from those in office today) will take a decision to keep one Commissioner per member-state. This is something that could be done anyway if the Lisbon Treaty were in force and in no way binds future governments to deliver on it.

In holding a second referendum on the Lisbon Treaty, Ireland is relying on a political commitment and trusting that all the other member-states, at some unspecified future date, will decide to trump the legal status quo and move back to a system of one Commissioner per country. As noted by the (very pro-Lisbon) Dáil Sub-Committee on European Affairs, “this option is not without its difficulties and may prove to be politically unachievable. It presupposes a willingness on the part of the other Member States to abandon the decision to reduce the size of the Commission in the interests of solving the predicament created by the referendum result.”<sup>9</sup>

---

8. Treaty of Nice, Protocol on the Enlargement of the European Union, article 4, [eurlex.europa.eu/en/treaties/dat/12002E/pdf/12002E\\_EN.pdf](http://eurlex.europa.eu/en/treaties/dat/12002E/pdf/12002E_EN.pdf), page 166.

9. [www.oireachtas.ie/documents/committees/30thdail/europeanaffairs/](http://www.oireachtas.ie/documents/committees/30thdail/europeanaffairs/)

It also does not state for how long this would continue to be the case, opening up the possibility that Ireland would eventually lose its Commissioner in any case. While not perfect, the status quo of the Nice Treaty arrangements is better for Ireland than the Lisbon Treaty. The only way to ensure that Ireland keeps a Commissioner indefinitely would be to change the actual text of the Lisbon Treaty to make this explicit.

### **What some commentators have said**

- “Since the referendum on the treaty in June of last year, the treaty itself has not changed.”—Mr Justice Frank Clarke, chairperson of the Referendum Commission, *Irish Times*, 30 July 2009.

- Following the December EU summit meeting, at which the “guarantees” were first formulated, the Minister for Foreign Affairs, Mícheál Martin, promised: “We will not be asking people to vote on the same proposition.”<sup>10</sup> In May this year the Minister for European Affairs, Dick Roche, reiterated this, saying: “Our partners understand, I believe, that we cannot and will not put the same package to our people later this year.”<sup>11</sup> They both lied.

- The British Prime Minister, Gordon Brown, confirmed that Irish voters will be voting on exactly the same text. “The protocol clarifies but does not change the content and application of the Treaty . . . The Treaty assurances have made explicit what was implicit in the Treaty already.”<sup>12</sup>

- A statement from the EU Presidency confirmed that “the guarantees must be sufficient in the light of the concerns of Irish citizens, yet they must not lead to the re-opening of the ratification process of the Lisbon Treaty in other Member States. Thus, the text of the guarantees explicitly states that the Lisbon Treaty is not changed thereby.”<sup>13</sup>

- This was also confirmed in the Dáil by Lucinda Creighton, Fine Gael’s spokesperson on European affairs, on 8 July 2009: “Nothing has changed in the Lisbon Treaty, and it would be dishonest to suggest otherwise.”

- Paddy Smyth, Brussels correspondent of the *Irish Times*, told an Open Europe meeting on 18 June: “Nothing in the declarations materially affects the treaty text. If there was a material difference, then the Treaty would have to be re-ratified in all the other member states.” He confirmed that “the difference to the Danish case is that Denmark got an opt-out, which was a material change in effect.”

- The Prime Minister of Sweden, Fredrik Reinfeldt, said at the concluding summit press conference that “the legal guarantees are only valid for Ireland and will not change anything in the treaty itself.”<sup>14</sup>

- Glenys Kinnock, British Minister of State for Europe and a former MEP, confirmed in the House of Lords that Ireland will be voting on exactly the same text a second time. “Those guarantees do not change the Lisbon treaty; the European Council conclusions are very clear on them . . . Nothing in the treaty will change, and nothing in the

---

[sub\\_cttee\\_eu\\_01122008-3.pdf](#).

10. *Irish Times*, 9 January 2009.

11. *Irish Times*, 5 May 2009.

12. Press Association, 19 June.

13. [news.xinhuanet.com/english/2009-06/19/content\\_11569853.htm](http://news.xinhuanet.com/english/2009-06/19/content_11569853.htm).

14. *Svenska Dagbladet* (Stockholm).

guarantees will change the treaty as your lordships agreed it.”

- EU leaders have agreed that the declarations will eventually be written into EU law as a protocol attached to the Croatian accession treaty, expected in 2010 or 2011. However, there is no guarantee that the treaty would be ratified, as it needs formal approval in all EU states. Even if it did become law the protocol would do nothing to change the text of the treaty.

- The conclusions of the summit clearly state that “the Protocol will clarify but not change either the content or the application of the Treaty of Lisbon.”<sup>15</sup>

- Following the December summit, at which the declarations were first discussed, Mark Malloch Brown, a Minister of State in the Foreign and Commonwealth Office, confirmed that “Ireland sought and has received guarantees, but the treaty has not been reopened. In that regard, it is a referendum on the same treaty as before.”<sup>16</sup>

- Later the British Minister of State for Europe, Caroline Flint, stated that “at the European Council on 11–12 December 2008, all countries agreed that there could be no change or amendment to the Lisbon Treaty,”<sup>17</sup>

- Andrew Duff, a British Liberal Democrat MEP who helped draft the Lisbon Treaty, is remarkably candid in expressing doubts about the legal feasibility of attaching protocols to the Croatian accession treaty. He said: “Adding this protocol to the Croatian accession treaty would leave the treaty wide open to attack in the courts.”<sup>18</sup> According to the Irish Times, he added that “rules in the EU treaties governing accession treaties only allow issues pertaining to a state’s accession to be dealt with.”

Several commentators and EU leaders have compared the Irish situation to the situation of Denmark after it voted No to the Maastricht Treaty in 1992. Following the No vote the Danish government negotiated opt-outs from important parts of the treaty, such as the euro. The text was put to the people in a second referendum, and they voted Yes. However, the deal to be offered to Ireland is significantly different: whereas Denmark secured opt-outs from the Maastricht Treaty, the Irish Government is not seeking to opt out of any part of the Lisbon Treaty other than a temporary opt-out in the area of justice and home affairs. Indeed in November 2008 the Dáil Sub-Committee on European Affairs warned against pursuing opt-outs from EU policy along the lines of the Danish arrangements.<sup>19</sup>

**People’s Movement** · 25 Shanowen Crescent · Dublin 9  
087 2308330 · [post@people.ie](mailto:post@people.ie)

---

15. [www.consilium.europa.eu/uedocs/cms\\_Data/docs/pressdata/en/ec/108622.pdf](http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/108622.pdf).

16. Hansard, 13 January 2009.

17. 14 May 2009, ref. 71998, Letter to Cheryl Gillan MP, who then used it in a reply to a constituent.

18. [www.irishtimes.com/newspaper/world/2009/0402/1224243854498.html](http://www.irishtimes.com/newspaper/world/2009/0402/1224243854498.html).

19. [www.oireachtas.ie/documents/committees30thdail/jeuropeanaffairs/sub\\_cttee\\_eu\\_01122008-3.pdf](http://www.oireachtas.ie/documents/committees30thdail/jeuropeanaffairs/sub_cttee_eu_01122008-3.pdf).