

Lisbon – The End of European Integration?

Jens M. Schubert and Tim Torsten Schwithal***

On the 12th June 2008, the Irish, through a nationwide referendum voted on the Lisbon Treaty. Based on a turnout figure of 53%, 53.4% of the Irish voters rejected the Treaty. This paper examines the circumstances surrounding the decision and proposes a general legal framework aimed at facilitating possible means whereby a solution can be found.

I. Background to the Decision

The reasons for the Treaty's rejection are manifold. Three recurring principal reasons are as follows:

- The fear of exertion of influence by the EU over tax system
- The fear of legalisation of abortion - through the Lisbon Treaty's incorporation of the Charter of Fundamental Human Rights into EU Law
- Fear of losing Irish neutrality in matters related to security and defence – the desire to protect Irish neutrality in matters involving foreign politics

In addition to these reasons, further arguments which had already been revealed¹ during the break down of the negotiation process of the “Treaty for a European Constitution”² include the incomprehensibility of the Treaty, too much concentration of power in Brussels with the consequence of a loss of democracy or participation, as much as the fear of further Eastern European expansion. Voting against a treaty has simply and possibly become a “trend” and means of “punishing” one's government.³ The Treaty was rejected principally by workers, farmers, young people (aged between 18 and 24), women (56%) and the unemployed whilst executives, the self-employed and professional groups with higher educational achievements rather, had voted in favour of the Treaty.⁴

II. What does the Lisbon Treaty aim to govern?

As a consequence of the failed European Constitution⁵, the Lisbon Treaty⁶ is restricted to an amendment of the Treaty on the European Union and the Treaty Establishing the

* Prof. Dr. Jens M. Schubert is Jean Monnet Professor of European Business Law at the Carl von Ossietzky University of Oldenburg. A detailed version of this paper can be found in *Neue Justiz* 2008, 337 ff.

** Tim Torsten Schwithal works as a research assistant at the Carl von Ossietzky University of Oldenburg. He is also coordinator of the Hanse Law School Oldenburg.

¹ Terhechte, Jörg Philipp, ‘Der Vertrag von Lissabon: Grundlegende Verfassungsurkunde der europäischen Rechtsgemeinschaft oder technischer Änderungsvertrag?’, [2008] *EuR* 143, 145.

² ABI. EU 2004 Nr. C 310/01

³ See Bittner, Jochen, ‘Stimmung gegen Brüssel’, *Zeit online* 20.6.2008, p. 6; Leithäuser, Johannes, ‘Irland sagt „Ich weiß nicht“ zu Europa’, *Frankfurter Allgemeine Zeitung (FAZ)* of 14.6.2008, p. 2

⁴ See the survey undertaken by the Gallup-Institute for the EU Commission at http://ec.europa.eu/public_opinion/flash/fl_245_en.pdf; Koydl, SZ v. 14/15.6.2008, p. 2

⁵ Concerning this, cf. Scholz, Rupert, ‘Die Verfassung der Europäischen Union’, [2002] *ZG* 2 1 ff.; Mayer, Franz, ‘Die Rückkehr der Europäischen Verfassung? Ein Leitfaden zum Vertrag von Lissabon’, [2007] *ZaöRV* 1141 ff.; Rabe, Hans-Jürgen, ‘Zur Metamorphose des Europäischen Verfassungsvertrags’, [2007] *NJW* 3153 ff.; Weber, Albrecht, ‘Vom Verfassungsvertrag zum Vertrag von Lissabon’, [2008] *EuZW* 7 ff.

European Community, without attempting to replace these – as did the Constitution. The Lisbon Treaty will omit references to the word “Constitution” as well as dropping all references to national symbols namely: anthems, flags, or coat of arms.⁷ Nonetheless, the Treaty contains important and required structural changes which are necessary to improve the functioning between the 27 Member States of the EU.

Focal points include the strengthening of the European Parliament and national parliaments along with a retreat from the long criticised democratic deficit, stronger fundamental rights protection as well as the improvement of foreign representation of the EU in matters of security and a globalised economy.

In particular:

1) Concepts and Structures

So far, EU Law has been based on the so-called “three pillar model”. The EU Treaty represents the roof of EU Law, the Economic Community, a pillar. In addition, there are two further pillars, Common Foreign and Security Policy and, Police and Judicial Cooperation in Criminal Matters.⁸

The Lisbon Treaty eliminates this three pillar system. Moreover, the Treaty on the European Union (TEU) and the Treaty establishing the European Community (renamed Treaty on the Functioning of the European Union - TFEU) rank on an equal level. In particular, this new structure would be contingent upon:

- The assignment of a distinct legal personality to the EU [Article 47 EU Treaty (TEU Lisbon)- this was transferred from the European Community to the EU]
- The fact that the EU is a subject of international law and also, the legal successor to the EC⁹
- The introduction of a High Representative for foreign affairs for the EU in matters of foreign and security policies with its own European External Action Service (Article 27 TEU Lisbon)¹⁰

The present and existing structure of the EU has an organ, the European Council. The remaining known organs derive from the European Community. It has now been established under Article 13 TEU (Lisbon) that organs of the Union, the European Parliament, the European Council, the Council (= Council of Ministers), the European Commission, the European Court of Justice, the European Central Bank and the Court of Auditors, are organs of the Union.

In addition to these core organs of the Union the Committee of the Regions and the European Economic and Social Committee support the work of the EU. Apart from this and conceptually, regulations and directives remain the most important forms of secondary

⁶ ABI. EU 2007 Nr. C 306/01. A consolidated version of the Treaty can be found at www.europa.eu. The European Parliament, in the plenary session of 20.2.2008, voted in favour of the Lisbon Treaty.

⁷ Hatje, Armin and Kindt, Anne, ‘Der Vertrag von Lissabon - Europa endlich in guter Verfassung?’, [2008] *NJW* 1761, 1768; Bergmann, Jan, ‘Bericht aus Europa: Vertrag von Lissabon und aktuelle Rechtsprechung’, [2008] *DÖV* 305.

⁸ See Streinz, Rudolf, *Europarecht* (Müller, Heidelberg, 2008), Rn. 85.

⁹ See Weber, Albrecht, ‘Vom Verfassungsvertrag zum Vertrag von Lissabon’, [2008] *EuZW* 7.

¹⁰ Fischer, Klemens, *The Treaty of Lisbon* (Beck, München 2008), 82, which considers a change from intergovernmental to a supranational structure.

community law. Those ideas of “European laws” and “framework laws” which are used in the European Constitution could not prevail.

2) Strengthening of democratic elements

Since the beginning of European integration, the reduced involvement of the European Parliament in the decision making process, in comparison to that of the Council of Ministers, has been criticised. In addition, the flawed competences in the establishment of the budgets and the control of the executives have been criticised.

This acknowledged democratic deficit phenomenon has already been addressed in the Treaties of Amsterdam and Nice through an extension of the scope of the procedures of co-decision (Article 251 EC Treaty) and new control powers.

The Treaty of Lisbon aims to bolster efforts whereby it again extends those cases in which the procedures of co-decision are required for the application (in such situations, the European Parliament could block a legislation) by increasing the involvement of the European Parliament in the legislative process through extended co-decision with the EU Council.¹¹

Additionally, various appointments would require the consultation and consent of the European Parliament (for example, in relation to the flexibility clause in Article 352 TFEU).¹² Recently, the European Parliament has been accorded greater powers in relation to the establishment of the yearly budget plan (Article 314 TFEU).¹³

The need to have a basis of authority and the principle of subsidiarity, remain the same. It has been consolidated recently through according to national parliaments, new rights and as a result, possibilities to exert their influence.¹⁴ The most important standard is Article 12 TEU (Lisbon). Subsequently, national parliaments have information rights over drafts of EU legislation and instructions relating to applications for EU membership – in particular, the rule on general instructions through the organs.

The national parliaments are furthermore, obliged to give effect to the principle of subsidiarity.¹⁵ This could lead to a solution being found for the so-called subsidiarity complaint. Two new elements to the consolidation of the democratic basis are as follows: If a million citizens from various member states organize themselves, the Commission could call for new political proposals to be submitted. The Lisbon Treaty introduces nearly as

¹¹ See Weber, Albrecht, ‘Vom Verfassungsvertrag zum Vertrag von Lissabon’, [2008] *EuZW* 7, 9.

¹² This flexibility clause is of a *Kompetenz-Kompetenz* nature. The norm has been criticised because it has a greater scope of application than its predecessor rules in Article 308 EC. However, the requirement for consent of the Parliament now involves greater credentials as provided for by Article 352 section 4 AEUV. See Hatje, Armin and Kindt, Anne, ‘Der Vertrag von Lissabon - Europa endlich in guter Verfassung?’, [2008] *NJW* 1761, 1762; Weber, Albrecht, ‘Vom Verfassungsvertrag zum Vertrag von Lissabon’, [2008] *EuZW* 7, 12.

¹³ Pache, Eckhard and Rösch, Franziska, ‘Der Vertrag von Lissabon’, [2008] *NVwZ* 473, 475 f.; Terhechte, Jörg Philipp, ‘Der Vertrag von Lissabon: Grundlegende Verfassungsurkunde der europäischen Rechtsgemeinschaft oder technischer Änderungsvertrag?’, [2008] *EuR* 143, 163.

¹⁴ Cf. Hofmann, Andreas and Wessels, Wolfgang, ‘Der Vertrag von Lissabon – eine tragfähige und abschließende Antwort auf konstitutionelle Grundfragen?’ [2008] *integration*, 3, 16 f.; criticisms of Mayer, Franz, ‘Die Rückkehr der Europäischen Verfassung? Ein Leitfaden zum Vertrag von Lissabon’, [2007] *ZaöRV* 1141, 1174.

¹⁵ Cf. Schiffauer, Peter, ‘Zum Verfassungszustand der Europäischen Union nach Unterzeichnung des Vertrages von Lissabon’, [2008] *EuGRZ* 1, 5; criticisms of Terhechte, Jörg Philipp, ‘Der Vertrag von Lissabon: Grundlegende Verfassungsurkunde der europäischen Rechtsgemeinschaft oder technischer Änderungsvertrag?’, [2008] *EuR* 143, 158.

negative freedom, the possibility of a member state from the Union withdrawing from the EU (withdrawal clause, Article 50 section 1 TEU (Lisbon)).¹⁶

3) Strengthening of Human Rights Protection

The area relating to Human Rights should experience a clear consolidation through the Treaty of Lisbon – by giving to the Charter of Fundamental Rights legal force, thereby making it legally binding. Even up till now, the value of the European Convention on Human Rights (ECHR) has been acknowledged (Article 6 section 2 TEU) as well as an extensive jurisdiction of the European Court of Human Rights to the basic laws and principles,¹⁷ which derive above all, from general legal principles and the common constitutional traditions of EU Member States. In addition to this, the European Human Rights Charter was enacted in 2000, but up till now, it is non binding even though it may help to resolve questions of interpretation, and even though the organs have committed themselves to these rights.¹⁸

The legal position following Lisbon would nevertheless be clearly far-reaching.¹⁹ As a result of the new individual legal personality of the EU, it (EU) aims firstly in the future, not only to acknowledge the principles of the ECHR, but also join this Convention. Furthermore Article 2 TEU (Lisbon) recognises the worth of attributes such as human values, freedom, democracy, equality, solidarity etc.²⁰

Of greater significance still, is however, the established elevation of the Fundamental Charter of Human Rights²¹ under Article 6 section 1 TEU, to the position of a primary law – also ranked higher than the national legal sources. The Charter binds institutions of the Union as well as member states of the EU through the implementation of European Law.

4) Changes within the Economic Constitution?

Besides the desire to ensure peace, the basis of European integration was economic cooperation. Since the Maastricht Treaty, there has been a retreat from this focus.

The provisions on labour market (Article 125 EC Treaty), on environment protection (Article 152 EC Treaty) or on social welfare (Article 16, 86 section 2 EC Treaty) prove that

¹⁶ For information on this, see Weber, Albrecht, 'Vom Verfassungsvertrag zum Vertrag von Lissabon', [2008] *EuZW* 7, 13; Schiffauer, Peter, 'Zum Verfassungszustand der Europäischen Union nach Unterzeichnung des Vertrages von Lissabon', [2008] *EuGRZ* 1, 5; Bruha, Thomas and Nowak, Carsten, 'Recht auf Austritt aus der Europäischen Union? Anmerkungen zu Artikel I-59 des Entwurfs eines Vertrages über eine Verfassung für Europa, in: Archiv des Völkerrechts', [2004] *Archive of International law (AVR)* 1 ff.; Terhechte, Jörg Philipp, 'Der Vertrag von Lissabon: Grundlegende Verfassungsurkunde der europäischen Rechtsgemeinschaft oder technischer Änderungsvertrag?', [2008] *EuR* 143, 151.

¹⁷ See the schedule provided by Streinz, Rudolf, *Europarecht* (Müller, Heidelberg, 2005), Rn. 412 ff. and 773 ff.; ECJ decisions for example on property law, C- 44/79, E.C.R. 1979,3727 (*Hauer*).

¹⁸ See closing remarks of Advocate General Damaso Ruiz-Jarabo Colomer of 11.7.2002, C-466/99 (*Arben Kaba*); closing remarks of Advocate General Alber of 1.2.2001, C-340/99 (*Universaldienst*); Borowsky, Martin, 'Grundrechte in Europa' in Meyer, Jürgen (ed), *Kommentar zur Charta der Grundrechte der Europäischen Union* (Nomos, Baden-Baden, 2006), Kap.VII, Vorb. Rn. 3.

¹⁹ See Oppermann, Thomas, 'Die Europäische Union von Lissabon', [2008] *DVBf*. 473 ff.

²⁰ On „Werteunion“ see Calliess, Christian, 'Europa als Wertegemeinschaft - Integration und Identität durch europäisches Verfassungsrecht', [2004] *JZ* 1033 ff.; Terhechte, Jörg Philipp, 'Der Vertrag von Lissabon: Grundlegende Verfassungsurkunde der europäischen Rechtsgemeinschaft oder technischer Änderungsvertrag?', [2008] *EuR* 143, 153.

²¹ ABI. EU 2007 Nr C 303/01 of 12.12.2007 (original version).

the Community did not have purely capitalism in mind. However, up till now, there has existed a clear acknowledgement of the single market with the theme “open market economy” with the consequence of a rule exception based conditions of competition in relation to market and state concepts. It is the expression of a desired mix of liberal (market based liberalist) and dirigistic (interventionist) elements with emphasis on the liberal element, for which it is acknowledged that special legitimation is required.²²

The Treaty of Lisbon now considers “social market economy”. Whether this conceptual change is without meaning because, it was simply a political concession to France because other positions still use the clause “open market economy” is discussed.²³

Moreover the Treaty contains (under Article 3 section 3 TEU (Lisbon)) the “social clause” which is to be considered through the establishment and implementation of all political measures. It contains the requirement of a high level of involvement, the guarantee of adequate social protection and the fight against social exclusion.²⁴

5) Institutional improvement

The Lisbon Treaty is also concerned with the establishment of more efficient structures. As a result, the unanimity principle of the EU Council through a taking of decisions will be replaced with more qualified majority. The concept of qualified majority is defined under Article 16 TEU (Lisbon) and 236 TFEU. A double majority will prove decisive. This is composed of the allocated votes from individual member states plus a population factor. Under Article 16 section 4 TEU (Lisbon), qualified majority will apply as from 1/11/2014 as at least 55% of the votes of members of the Council, composed of at least 15 members, in so far as the votes from these member states add up/amount to at least 65% of the EU’s population.²⁵ Further modalities can be found in Article 236 TFEU.

As from 1/11/2014, pursuant to Article 17 section 5 TEU (Lisbon), Article 244 TFEU the commission should be based on a number of members which corresponds to two thirds of the number of member states (18 commissioners); hence a smaller European Commission. The choice will follow from a system of rotation which considers demographic factors and circumstances.

The Commission has a president, and a vice president who is at the same time the High Representative for foreign affairs and security matters. This should guarantee the urgent and required uniform foreign politics effects in collaboration with the president of the European Council. From this, a consideration of military conflicts is not only required, but also a consideration of for example, a combined approach in economy, energy and climate matters. On the whole, the Commission should be fortified as a purely European organ

²² See Oppermann, Thomas, *Europarecht: Ein Studienbuch* (Beck, München, 2005), § 13 Rn. 3; Schwarze, Jürgen, *Europäisches Wirtschaftsrecht: Grundlagen, Gestaltungsformen, Grenzen* (Nomos, Baden-Baden, 2007), Rn. 28.

²³ See Mayer, Franz, ‘Die Rückkehr der Europäischen Verfassung? Ein Leitfaden zum Vertrag von Lissabon’, [2007] *ZaöRV* 1141, 1164, furthermore Basedow, Jürgen, ‘Das Sozialmodell von Lissabon: Solidarität statt Wettbewerb?’, [2008] *EuZW* 225; Behrens, Peter, ‘Der Wettbewerb im Vertrag von Lissabon’, [2008] *EuZW* 193; Terhechte, Jörg Philipp, ‘Der Vertrag von Lissabon: Grundlegende Verfassungsurkunde der europäischen Rechtsgemeinschaft oder technischer Änderungsvertrag?’, [2008] *EuR* 143, 177.

²⁴ See also Schiffauer, Peter, ‘Zum Verfassungszustand der Europäischen Union nach Unterzeichnung des Vertrages von Lissabon’, [2008] *EuGRZ* 1, 9.

²⁵ Terhechte, Jörg Philipp, ‘Der Vertrag von Lissabon: Grundlegende Verfassungsurkunde der europäischen Rechtsgemeinschaft oder technischer Änderungsvertrag?’, [2008] *EuR* 143, 166; Weber, Albrecht, ‘Vom Verfassungsvertrag zum Vertrag von Lissabon’, [2008] *EuZW* 7,10.

which represents European interests and which is also contrasting the individual interests of member states.

With regard to the choice of the Presidents of the Commission, the principle of democracy has again been bolstered. The EU Council proposes a candidate to the European Parliament and subsequently, this candidate's selection would be determined by the European Parliament. If the candidate is not selected, then another would be presented (Article 17 section 7 TEU(Lisbon)). On the whole, the Commission remains the "guardian of the treaties" having been accorded with the corresponding powers of control. Furthermore, the Commission could be authorized to enact decrees, regulations, guidelines, resolutions without legal character to amend non essential regulations (Article 290 TFEU).

From the perspective of heads of states and regions, a president for the European Council should be chosen every two and a half years as this would ensure continuity. The present term of six months is frequently considered to be too quick. In relation to the different Councils of ministers the term of six months will remain before a change takes place.

III. Justified Criticism?

With respect to the adaptation of institutions to an expanded Europe and in relation to an improvement of democratic structures (inclusive of fundamental rights protection), the Treaty undeniably, provides the means whereby progress can be achieved. At the same time, it also benefits from the fact that it does not impose a constitution on member states – which unfortunately was not considered adequate by the critics. In relation to this sole criticism: A general interaction of national tax laws through Community Law (under Article 110 ff TFEU), it appears, was not provided for by the Lisbon Treaty. A transfer of sovereignty does not take place.²⁶ The enabling principle in Article 113 TFEU besides that, provides for a unanimity requirement within the Council. Furthermore, it is restricted to certain types of taxes and additionally, bears reference to the single market.²⁷ The tax increase remains in principle, with the member states. Harmonisation measures through direct taxes²⁸ could similarly as is the case till now (under Article 114 section TFEU; Article 95 section 2 EC) or Article 352 TFEU (Article 308 EC) be supported. However, unanimity from the Council and even additional consent of the European Parliament is now again required for the latter norm.

The considerations in respect of a negative influence on the Irish tax system ought not be strictly applicable to every case, as presented by opponents of the Treaty. On the whole, Ireland has benefited immensely from EU accession since 1973. Since then, Ireland has been transformed from an important agriculturally characterised community to a modern, technical and highly developed economy, "the Celtic Tiger".²⁹

²⁶ See *FAZ* of 14.6.2008, p. 2.

²⁷ For discussion of rules in Article 93 EC see Eilers, Stephan; Bahns, Jochen and Sedlaczek, Markus in von der Groeben, Hans and Schwarze, Jürgen (eds), *Kommentar zum Vertrag über die Europäische Union und zur Gründung der Europäischen Gemeinschaft* (Nomos, Baden-Baden, 2003), Art. 93 EC Rn. 28 ff.

²⁸ Cf. Weber-Grellet, Heinrich, *Europäisches Steuerrecht* (Beck, München, 2005), 139 ff.

²⁹ The purchasing power per head of the Irish population is about 33% higher than the EU average. Aggregated over the years, Ireland has received the highest demand of all EU member states from Brussels, see Delhey, Jan, 'Die Entwicklung der Lebensqualität nach dem EU-Beitritt. Lehren für die Beitrittskandidaten aus früheren Erweiterungen', [2002] *Aus Politik und Zeitgeschichte* 31, 36.

In view of the attitude of the Irish to abortion (Article 40, section 3 of the Irish Constitution), the danger of “forced liberalisation” likewise, is not foreseeable. The Fundamental Rights Charter itself does not permit such. Moreover, it is given effect only through the implementation of EU Law and does not generate any new responsibilities (Article 51 of the Charter). Harmonised rules on abortion do not exist at the moment, it lacks legal authority.³⁰ Furthermore, the Charter neither accords a right of self-determination to mothers as regards nor the protection of unborn lives.

The final main criticism concerns the foreign politic dimension – in this situation, clarification before another possible referendum would be helpful. Firstly, the Lisbon Treaty does not intend to impose a general European obligation in matters of defence. However, it is to be established that Article 42 TEU (Lisbon) addresses all member states with its duty to cooperate in the area of security and defence politics.

For a non Nato member Ireland, this is a difficult duty despite not only the “Nato Clause” in the norm, but also the provisions under Article 42 section 6 TEU (Lisbon) and the Protocol on “Constant Structured Collaboration.”

IV. Consequence of Ireland’s rejection of the Treaty

Pursuant to Article 6 of the Treaty of Lisbon (which is the framework Treaty for making amendments to the EU and EC Treaty), ratification is required from all contracting parties. The Article on this refers expressly to the national constitutional regulations.

As regards Ireland, a referendum is required in contrast to the other member states, according to the Irish Constitution.³¹ If one member state failed to ratify the Treaty, this would not only affect the Treaty in the remaining member states, it could prevent it on the whole, from entering into force. This is not the consequence of general rules of international treaty laws (a ratification clause with qualified majority could be derived from here), but results from the nature and goals of community treaties. The substantially changing relationships between member states and the fact that this sovereign right is given up creates gaps in this system.³²

The original plan – bringing into force the Treaty before the vote by the European Parliament in June 2009, is independent of complete options for a solution. And consequently could not be binding. It was and is incomprehensible as to why no alternative plan was provided for in the case where the reform Treaty (Treaty of Lisbon) was rejected. The Treaty of Nice remains in the first instance, the deciding European Law source of primary law. This has consequences for the structure of the Commission. Pursuant to Article 213 EC the Protocol of 26.2.2001 on the expansion of the Union with the accession of the 27 member states, the regulation Article 4 section 2 of the stated protocol applies.

For the first Commission following the accession of the 27 member states, this means that not every member state will be represented by a Commissioner. However, the number of commissioners that are to be appointed is unclear. Besides, the principle of equally entitled

³⁰ Pernice, Ingolf and Mayer, Franz in Grabitz, Eberhard and Hilf, Meinhard (eds), *Das Recht der Europäischen Union, Loseblattsammlung* (Beck, München, 1999-2008), nach Art.6 EUV Rn. 61.

³¹ In the authors’ view, a referendum would not be fair given the underlying complexities.

³² See Weber, Christoph in von der Groeben, Hans and Schwarze, Jürgen (eds), *Kommentar zum Vertrag über die Europäische Union und zur Gründung der Europäischen Gemeinschaft* (Nomos, Baden-Baden, 2003), Art. 52 EU Rn. 2; Schweitzer, Michael in Grabitz, Eberhard and Hilf, Meinhard (eds), *Das Recht der Europäischen Union, Loseblattsammlung* (Beck, München, 1999-2008), Art. 52 EUV Rn. 2 ff.

rotation will be carried into effect – whose coordination will be the responsibility of the European Council.³³ Conflicts are predicted in this area.

A further consequence has already been hinted at. The President of the European Parliament, Hans-Gert Pöttering clarified that in this unclear situation, no further expansion of the EU should take place. The 27 member states in the first instance, have to rectify the present constitutional crisis. A similar opinion has been expressed by the French president and President of the European Council, Nicolas Sarkozy. Legally the Treaty of Nice is focused on 27 member states but this presents no absolute upper limit and could be overcome through unanimous voting.

V. Options for achieving a solution

A large majority are advocates in the first instance that the ratification process should continue.³⁴ If 26 Member States were to ratify, this being the ulterior motive, the political pressure on Ireland to hold a second referendum would be very strong.

The following options could be considered:

1) The Treaty of Nice remains in force

This option is the plain consequence of the Irish rejection of the Lisbon Treaty. The member states are not prevented from continuing with the ratification process and leaving it at the stage attained by the Treaty of Nice.

The unanimous opinion regarding this is that the EU does not fall apart. However, it would require considerable efforts to achieve the goals which one had hoped to attain with the Lisbon Treaty through the Treaty of Nice.³⁵ In particular, the foreign politics requirements above all, in matters of business (in relation to Russia, China and the USA) should increase the need for quick voting procedures. A divided opinion as regards the approach to foreign politics would reflect the weakness of Europe, from a global perspective.

2) Negotiating a new treaty

This option is also worth considering – however, less probable. The Treaty of Lisbon already presents the smallest common denominator – following the failure of the European Constitution. Even if one resorted to this means, the procedure would surely again take some years and would entail again, risks of a member state not ratifying the Treaty. If such a new Treaty required ratification (or part of it), through referenda throughout Europe, this option would encounter many obstacles because:

- i) Some member states do not provide for such referenda in their constitution
- ii) EU Law is silent on this matter and therefore has to be amended

³³ See Hatje, Armin, 'Die institutionelle Reform der Europäischen Union - der Vertrag von Nizza auf dem Prüfstand', [2001] *EuR* 150; Schmitt von Sydow, Helmut in von der Groeben, Hans and Schwarze, Jürgen (eds), *Kommentar zum Vertrag über die Europäische Union und zur Gründung der Europäischen Gemeinschaft* (Nomos, Baden-Baden, 2003), Art. 213 EC Rn 8; Oppermann, Thomas, *Europarecht: Ein Studienbuch* (Beck, München, 2005), § 5 Rn 77.

³⁴ See also Merkel, Angela, 'Soziale Marktwirtschaft ermöglicht den Aufstieg' *FAZ* of 20.6.2008, p. 13

³⁵ See Bittner, Jochen, 'Stimmung gegen Brüssel', *Zeit online* of 20.6.2008; Leithäuser, Johannes, 'Irland sagt „Ich weiß nicht“ zu Europa', *FAZ* of 14.6.2008, p. 2

- iii) For such a referendum, no basic rules exist (minimum quorum, simple counts or special codes for smaller member states)

The same applies for the proposal that it should be left directly to the EU population to vote for the European President, independently of the question of what consequences these would have for the balance between the EU, member states and the European institutions. Such a chosen EU president would have the strongest form of democratic legitimacy on his side and could demand corresponding powers.

3) The exclusion of Ireland from the EU

According to European law an exclusion is hardly possible³⁶ Furthermore, Article 7 TEU and 309 EC contain a list of ultimate sanctions, and an exclusion is not provided for at all.³⁷ To be distinguished from this is the fact that Ireland has not acted in violation of Article 6 TEU at all.³⁸ From a democratic-theoretical point of view, it is democratically accepted, that in an election the result “No” is a possible one.³⁹ Politically, the exclusion of a country after 35 years of membership is rather inconceivable.⁴⁰ Further, an exclusion from the EU - as mentioned - till now, has not been provided for.⁴¹ This makes it difficult to adopt the option of an exclusion. There is one purpose that Ireland could withdraw from EU membership for a “logical second”, not only to enable the Treaty of Lisbon take effect in the other 26 member states, but also to provide Ireland with the opportunity under certain conditions, to resume immediately, its membership.

4) The formation of a core group of EU member states

This idea is relatively new and comprises the acceptance of a Europe which operates according to two different velocities. Besides this, its individual themes (Euro, Schengen, Fundamental Rights Charter) have already come into existence and still exist. From this, a core group (core union) should be established who give effect to the Lisbon Treaty and who with the other member states should be committed to the Treaty of Nice and newly concluded treaties. It is problematic that a new core group of European member states will have to be established which would imply new ratifications as the member states till now, have not voted on a core group. In a second stage, the relation to the present existing

³⁶ However, see Puttler, Adelheid, ‘Sind die Mitgliedstaaten noch Herren der EU? - Stellung und Einfluss der Mitgliedstaaten nach dem Entwurf des Verfassungsvertrages der Regierungskonferenz’, [2004] *EuR* 669, 678 f., on the question of whether a right of exclusion could result from a right of withdrawal.

³⁷ See Schorkopf, Frank in Grabitz, Eberhard and Hilf, Meinhard (eds), *Das Recht der Europäischen Union, Loseblattausgabe* (Beck, München, 1999-2008), Art. 7 EU Rn. 40 and 45 f.

³⁸ In relation to the case of Austria, which does not actually fall within the scope of Article 7, see Schmitt von Sydow, Helmut in von der Groeben, Hans and Schwarze, Jürgen (eds), *Kommentar zum Vertrag über die Europäische Union und zur Gründung der Europäischen Gemeinschaft* (Nomos, Baden-Baden, 2003-2004), Art. 7 EU Rn 103 ff.

³⁹ Similarly Schweitzer, Michael in Grabitz, Eberhard and Hilf, Meinhard (eds), *Das Recht der Europäischen Union, Loseblattausgabe* (Beck, München, 1999-2008), Art. 52 EU Rn. 3.

⁴⁰ See on the contrary Terhechte, Jörg Philipp, ‘Der Vertrag von Lissabon: Grundlegende Verfassungsurkunde der europäischen Rechtsgemeinschaft oder technischer Änderungsvertrag?’, [2008] *EuR* 143, 153.

⁴¹ Only the conclusion of a dismissal agreement as a special form of the Treaty amendment, under Article 48 TEU, is conceivable, see Schorkopf, Frank in Grabitz, Eberhard and Hilf, Meinhard (eds), *Das Recht der Europäischen Union, Loseblattausgabe* (Beck, München, 1999-2008), Art. 7 EU Rn. 46.

member states would have to be negotiated. This takes time, however it is legally conceivable even though it is exposed to the reproach of the “cherry picking” procedure.

5) Second referendum following concessions to Ireland

This should be the most likely option having already acquired experiences from the ratification processes of Maastricht and Nice.⁴² The arrangement of a special status for Ireland, by means of corresponding protocols or considerations of declarations could clear up the Irish worries and objections. In any case, a second referendum should be carried out. As a result, the Irish Prime Minister, Brian Cowen, has requested that the European Council inform as to what Ireland requires in order to participate in the integration process. It is problematic that the negotiation of the Lisbon Treaty has already consumed so much effort. If one were to guarantee to Ireland a special status, other member states are sure to be covetous of the status. If an amendment to the text were not required (for example, change to the voting rules), then the Treaty should once again, be ratified by all member states. If this referendum were also to lead to a break down of the negotiation of the Treaty, it would mean that the Treaty of Nice would be the most recent consensual step towards integration. From this, the newly arranged exclusion rules for the Irish government could even serve as an argument for a positive decision – possibly through a second referendum – and to a certain degree, through the back door.⁴³

VI. Chances for Europe

It is perhaps to be accepted, that there is a weighted percentage of Europe’s population who do not want further intensification of the integration process. This could result to a significant move whereby focus is dedicated to the field of politics, which nonetheless is possible with the Treaty of Nice and which could again stimulate an acceptance of Europe. For example, to name but a few: energy, subsidies or grants, and politics relating to the environment. If the member states could arrive at a common approach, success even if it is of a smaller degree – without the Treaty of Lisbon, would be conceivable. Furthermore and ultimately, the breakdown of negotiations of the Lisbon Treaty, could serve as a reason not only for greater transparency in European politics, but better communication of such. The success of the EU requires the ability of respective national governments to trade, and not because of reasons relating to domestic issues, or the other way round: controversial points on Europe should be delayed even one had voted for this in the EU Council (for example anti discrimination laws).

It would also be necessary to send identified experts to the European institutions. The significance of EU Law for national legal systems is still being under estimated. Ultimately, the good ideas from the Lisbon Treaty - whether overwhelming, or of small proportion, could find a way into EU Law. This concerns particularly the fortification of European and the national parliaments and considerations of subsidiarity.

⁴² See Weber, Christoph in von der Groeben, Hans and Schwarze, Jürgen (eds), *Kommentar zum Vertrag über die Europäische Union und zur Gründung der Europäischen Gemeinschaft* (Nomos, Baden-Baden, 2003), Art. 52 EU Rn. 2; see also Schweitzer, Michael in Grabitz, Eberhard and Hilf, Meinhard (eds), *Das Recht der Europäischen Union, Loseblattausgabe* (Beck, München, 1999-2008), Art. 52 EUV Rn. 3.

⁴³ Similarly Mayer, Franz, ‘Die Rückkehr der Europäischen Verfassung? Ein Leitfadens zum Vertrag von Lissabon’, [2007] *ZaöRV* 1141, 1190.