

1. A Lawyer's look at the Lisbon Treaty

By Joe Noonan.

[Joe Noonan is a partner in Noonan Linehan Carroll Coffey, Solicitors, Cork. He was an expert witness on foreign and security policy in the landmark Crotty case (1987) in which the Supreme Court decided that the Single European Act should be put to the Irish people by way of referendum. The Crotty judgement is the reason Ireland is holding a referendum on the Lisbon treaty on June 12th.]

Introduction

The Treaty of Lisbon if ratified by all member states will transform the legal structure and operation of the European Union. At present there are two bodies, the European Community and the European Union. After Lisbon only one body will remain. Lisbon consolidates and amends the existing treaties – we will be left with two linked treaties, the *Treaty on European Union* (TEU) and the *Treaty on the Functioning of the Union*.

Lisbon contains over 90 percent of the *Treaty establishing a Constitution for Europe*, rejected by voters in France and the Netherlands in 2005. Following further negotiations the Lisbon treaty emerged in December 2007. None of the member states, except Ireland, now seek approval for ratification by referendum. This has attracted some comment.

"The most striking change [between the Lisbon treaty and the Constitution treaty] is perhaps that in order to enable some governments to reassure their electorates that the changes will have no constitutional implications, the idea of a new and simpler treaty containing all the provisions governing the Union has now been dropped in favour of a huge series of individual amendments to two existing treaties. Virtual incomprehensibility has thus replaced simplicity as the key approach to EU reform. As for the changes now proposed to be made to the constitutional treaty, most are presentational changes that have no practical effect. They have simply been designed to enable certain heads of government to sell to their people the idea of ratification by parliamentary action rather than by referendum."

[Dr Garret FitzGerald, Irish Times, 30 June 2007.]

Given the implications of Lisbon for our legal landscape, the lack of public debate among Irish lawyers is remarkable. In this article it is possible only to sketch some of the proposed changes. Nothing is a substitute for reading the treaty text. On its own it is virtually impenetrable. Fortunately, an excellent document showing the effect of the Lisbon changes on the existing treaties has been compiled by Peadar Ó Broin (google 'peadar o broin annotated treaties'). The changes are colour coded, with new text shown in yellow or blue. Deleted text remains, struck through in red.

Scope of the Union

The Lisbon treaty is an important legal document. It proposes the abolition of the European Community and the reconstruction of the European Union as a new single body with its own legal identity separate from its member states. Lisbon will change the legal relationship between this new Union and the member states. Some changes have attracted public interest, such as the reduced number of Commissioners, changes in qualified majority voting, and the removal of various national vetoes. Of particular constitutional significance in Ireland however will be the changes to the objectives of the Union and its increased scope.

At present, the stated Tasks of the European Community focus on the promotion of economic development, social progress and economic and social cohesion and solidarity among member states (Article 2, Treaty establishing the European Community). The stated Task of the present European Union is the organisation of relations between the member states and between their peoples:

The Union shall be founded on the European Communities, supplemented by the policies and forms of cooperation established by this Treaty. Its task shall be to organise, in a manner demonstrating consistency and solidarity, relations between the Member states and between their peoples. (Article 1, TEU pre Lisbon)

These tasks render the present European Community and European Union the servants of the member states and of their citizens. This will change under Lisbon which removes these tasks, and provides no equivalent replacement tasks. Lisbon abolishes the European Community, folding its operations into the new Union. Instead of organising relations between member states and between their peoples, the new Union's aims and objectives will focus on identifying and asserting the Union's own interests and the '*wellbeing of its peoples*' (Article 3, TEU post Lisbon).

The aims and objectives of the new Union are elaborated in that Article 3. This should be read in full as it is too long to reproduce here. Article 3 reflects the fact that the new Union will have more scope than the existing bodies. For example, Lisbon gives the Union greater competence in the justice and home affairs area. Ireland, along with the UK has opted out of this part of the treaty but will review the opt-out in three years. If Lisbon is ratified by Ireland, despite their initial opt-out, the government will have authority to opt in to these areas if and when it sees fit in the future.

Citizenship

Under Lisbon we are no longer referred to as '*the peoples of the member states*' and are instead referred to for the first time as '*its peoples*', ie the peoples of the new Union. Similarly, post Lisbon the Union will refer to us as '*its citizens*'; a subtle change from present references to us as citizens of member states. EU citizenship as a concept came into existence with Maastricht, which provided that EU citizenship '*shall complement national citizenship and not replace it*'. This changes with Lisbon which says that EU citizenship shall be '*additional*' to national citizenship but shall not replace it. The full implications of this change for Irish citizens remain to be seen.

Similarly Members of the European Parliament, currently described as *'representatives of the peoples of the member states brought together in the Community'*, will become *'representatives of the Union's citizens'* in the new Union.

Charter of Fundamental Rights

Article 6 of the new TEU makes reference to a Charter of Fundamental Rights of the EU, which it says *'shall have the same legal value as the Treaties'*. The Guide to the Treaty issued through the Government Publications Office by the National Forum on Europe says that the Treaty status conferred on the Charter will *'significantly increase the jurisdiction'* of the European Court of Justice.

The practical consequences for human rights law in Ireland are unclear. Gerard Hogan SC suggests that the Charter could amount to *'the most profound change'* in relation to judicial review and the protection of fundamental rights since the adoption of the Constitution. [Irish Times. 24 April 2008. *Charter 'could eclipse' Supreme Court.* Dr Carol Coulter]

Ireland and the Wider World

The freedom to manage relations with other countries is a hallmark of statehood. That was at the heart of the Crotty judgement. The Supreme Court found that the Single European Act would be unconstitutional without a referendum, because it would commit the government to endeavour to coordinate foreign policy with other member states. Even though the commitments were expressed in soft language, the Court found that as a matter of international law, these commitments would bind the government. Lisbon similarly is a treaty written in the language of international law. It is important to remember this when considering the Lisbon Articles which impose new commitments on Ireland in the areas of EU common foreign and security policy (CFSP), including common security and defence policy (CSDP).

Commission President Barroso has acknowledged the significance of these changes: *‘The new Treaty will turn the European Union into a full external political actor by giving the Union legal personality.....It will allow the emergence of a true common European defence. It will introduce a mutual defence clause and a solidarity clause.’* (4 December 2007 speaking at the European Parliament)

Military and Security Commitments

Among the new commitments are Art 28A.7 of the TEU (post Lisbon) which is a mutual defence clause, obliging all member states to come to the aid of any member state that is the victim of armed aggression in its territory. This resembles the defence pact in Article V of the NATO treaty. In the NATO pact, as in the new Lisbon defence clause, each country reserves a discretion as to the precise manner in which it may respond. Some have argued that the existence of a reservation of this kind in Lisbon allows Ireland to deny that it is a defence pact. By that logic NATO itself would not be a defence pact either.

Lisbon will also give proper treaty status to the European Defence Agency. The Agency was established by the EU Heads in 2004. Ireland was among the first to join when the government committed us to Agency membership which includes financial commitments. The Agency has a range of military and security goals that are not confined to the territory of the EU. Article 14 of the existing TEU, which relates to CFSP, allows the European Council to adopt *‘joint actions which shall address specific situations where operational action by the Union is deemed to be required’*. A citizen would be unlikely to have understood Article 14 as providing for the establishment of the Agency, but this became the purported treaty authority for the Agency in 2004.

Lisbon will oblige member states for the first time to *‘progressively improve’* their military

capabilities. The Agency will monitor whether countries are making the necessary improvements.

Lisbon weakens the current limitation on EU military action, which in general terms confines such actions to humanitarian or peacekeeping operations. Lisbon will give the Union scope to deploy military force for such purposes, at such locations and in such circumstances as it sees fit. There is no obligation at present on the EU to seek UN sanction before deploying EU forces outside the Union. This will not change.

Law is ultimately about power and how it is to be exercised. The Lisbon referendum is about the redistribution of power between Irish citizen and the Irish government, between big and small states in the EU, and between member states and the EU. Lisbon will reshape the European Union with implications that will last for a long time. We cannot afford to underestimate the significance of this referendum.

End.