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Essential Steps for the European Union after the "No" Votes in France, the Netherlands & Ireland

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We have created Europe.
Now we have to create Europeans.
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Introduction

In the referendum on the Treaty of Lisbon in June 2008, Irish voters who voted against the Treaty gave several specific reasons as well as a variety of vague or general reasons that were unrelated to anything that was in the Treaty. These vague or general reasons are important because they probably were also significant influences in the "no" votes in France and the Netherlands. Moreover, they may be shared by a substantial but unknown number of people in other EU member states who did not get an opportunity to vote in a referendum on the Lisbon Treaty or the Treaty for a Constitution. There were positive referendum results in Luxembourg and Spain. Other countries promised referenda, but did not hold them.

These vague or general reasons for voting "no" can best be described as a distrust of the EU and a dislike of changes or anticipated changes associated, correctly or incorrectly, with the EU. Some of these reasons are imaginary, others are entirely unrelated to the EU and many of them could be refuted by any well-informed observer of the EU. But they cannot be simply dismissed or ignored by any of the governments.

This distrust of the EU and the various reasons that are given for it in public opinion polls are not confined to Irish voters or to voters in France and the Netherlands. What seems to be a similar distrust, and apparently at least some broadly similar reasons for it, exists to a greater or lesser degree throughout the EU.

It is now clear that this distrust is widespread and serious enough to concern all 27 heads of State and government. The absence of referenda in most member states that have ratified or still intend to ratify the Lisbon Treaty should not reassure them. This distrust cannot be assuaged by a short-term crash course informing the public about the EU or about a treaty on which they might be asked to vote. The lack of adequate knowledge of the EU makes it possible for those opposed to the EU or to the treaty in question to make statements that are patently untrue. And while it is impossible to believe these statements were made honestly, they have, nevertheless, influenced significant numbers of voters.

This problem must be tackled. If it is not, the EU will continue to be distrusted and will not have the support that it needs.

The Laeken Declaration

The heads of State and government themselves identified the problem in the Declaration of Laeken on 14-15 December 2001, and pointed to a solution. They said that changes had to be made that would bring citizens closer to the European design and European institutions. The Convention on the future of Europe, set up at Laeken, was instructed to propose measures to increase the democracy, transparency and efficiency of the EU, but it shelved any serious efforts at transparency to concentrate on efficiency.

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At the end of its deliberations, the Convention submitted a draft treaty establishing a Constitution for Europe to the European Council in 2003. This led to two proposed treaties which, whatever their other merits, were extremely complicated and difficult to understand. There seem to have been several reasons for this:

- There was no committee on institutional questions during the Convention. As a result, the institutional plans of Mr. Giscard d'Estaing were not adequately discussed, and their implications were not understood clearly, in particular by the representatives of the smaller member states.
- Almost all those attending the subsequent intergovernmental conferences followed the Convention draft and primarily discussed institutional measures to make the EU a more effective political force.
- The changes to strengthen the EU's political role did not bring foreign policy and security policy issues under the existing decision-making process, the 'Community method'. Instead they confirmed the distinct intergovernmental method of decision-making, for foreign and security policy, and introduced a version of that method in which the Commission has no role. The EU would be the only international body in the world with two entirely different decision-making procedures. This basic dichotomy makes the whole structure far more complicated and far less transparent and democratic.
- This complexity might not have mattered if the new Treaty arrangements had been based on a clear and intelligible concept or set of principles and if the reasons for them had been explained clearly. They were not.
- The added complexity is not because the Lisbon Treaty has been drafted as an amendment to the existing Treaties, rather than replacing them, but is inherent in the institutional structure that emerged from the Convention. The complexity therefore cannot be resolved by having a consolidated version of the Treaties.

As a result, although under the Lisbon Treaty the powers of national parliaments and of the European Parliament would be increased and, therefore, in some respects the new institutional arrangements seem more democratic, the aims of the Laeken Declaration have not been fulfilled. The real or supposed gains in efficiency and democratic control are not enough to offset the institutional complexity that would result from an illogical compromise that combines two different decision-making processes in the same institutions. The other improvements are insufficient and of too little interest to the general public to outweigh the complex arrangements for foreign policy and security. The intergovernmental decision-making process is essentially undemocratic.

Unfortunately the aims of the Laeken Declaration are not optional extras or unnecessary luxuries for the EU. They are essential for public understanding of the EU and for public support for it.

Before considering what now needs to be done, some longer-term factors deserve mention:

- The original Treaty of Rome was never explained by any document corresponding to the Federalist Papers, which explained with great clarity the reasons for the design of the US Constitution. There were 84 Federalist Papers, discussing a Constitution of (then) seven Articles. A comparable explanation of the EU institutions would be longer, because the EU, even without the complications added by the Lisbon Treaty, is much more complex. An EU policy Declaration, setting out the EU objectives of peace, prosperity, and human rights in Europe, environmental conservation, and generous aid to developing countries would be valuable as a job description, but would not be a substitute for carrying out the tasks that were agreed in Laeken, and then put aside and never carried out.
- The Community method of decision-making comes from mediation theory.[1] It says, in short, that to make majority voting acceptable to a heterogeneous group it is necessary to have all proposals made by an autonomous body that is representative of the group as a whole. Its proposals may be adopted by a majority vote (in the EU, a qualified or weighted majority). But the interests of minorities are safeguarded because of the impartiality of the autonomous body and because its proposals may be amended only by unanimity. The Community method also involves democratic control by the European Parliament, and judicial control by the Court of Justice. Once explained, this is not hard to understand, but surprisingly it has never been officially explained anywhere. So even the reasons for the well-established Community method were not well or widely understood. This is remarkable, because this method and the role of the Commission are the foundation stones on which the Community

[1] See John Temple Lang and Eamonn Gallagher, *The Role of the Commission and Qualified Majority Voting*, Institute of European Affairs Occasional Paper No. 7, 1995; John Temple Lang and Eamonn Gallagher, "What sort of European Commission does the European Union need?", *Europarättslig Tidskrift*, 1, 2002, pp. 81-98; John Temple Lang and Eamonn Gallagher, "The Commission, the 'Community Method' and the smaller Member States", *Fordham International Law Journal*, 29, 2006, pp. 1009-1033; J. Temple Lang, *The Commission and the European Parliament after Nice*, Oxford: Europaeum, 2001.

was built in 1958, and they are the reasons why it has been accepted as the best available way of managing European economic affairs. If the method had been better understood, there would have been greater unwillingness to depart from it. (In the Convention there was a group of smaller states called the "Friends of the Community Method", but they did not stick to their position.) Because the Community method means that the Commission must have the exclusive right to propose new measures, the European Parliament is not entitled to propose them. MEPs who are not aware of the reasons for the method resent this. It is not surprising, therefore, that many people are easily misled on this issue. Even if everyone understood it, that would not explain the procedures for foreign policy decisions under the recent draft treaties which are based on the wholly different intergovernmental method.

- In all member states, governments have blamed 'Brussels' for unpopular decisions that they have been associated with and that, in many cases, they have voted for. This inevitably leads to incomprehension, dislike and distrust of the EU. The governments have denigrated the institutions that they have helped to set up and which they operate.
- In terms of democracy, the Lisbon Treaty would take several steps in one direction and several steps in the opposite direction. In the long-standing economic and social sphere of the 'First Pillar',[2] the Lisbon Treaty would introduce greater powers for the national parliaments and the European Parliament. But in the area of common foreign and security policy, no democratic safeguards apply and there is no judicial control. Foreign policy measures would not involve national parliaments, the European Parliament or the Commission. It is not intended that the Commission be given any right of proposal in relation to foreign policy measures. The two separate decision-making processes that result from the Lisbon Treaty would give rise to repeated controversy and litigation over which procedure is legally appropriate for particular measures.[3] Such an institutional structure, whatever its merits, is extremely complicated, and the opposite of what was called for in Laeken. Since it is clear that the intergovernmental approach will apply to foreign policy for the foreseeable future, it is crucially important that in all other respects the EU institutions are as rational and intelligible as possible.

What should be done?

Non-treaty measures

It is clear that all EU governments need to take a number of measures to give effect to the Laeken objectives. Fortunately there are many things that are clearly desirable and uncontroversial and that can be done quickly without any change in the existing treaties. They should be done as soon as possible. Cumulatively they would make the EU institutions much more easily understood, more acceptable and more interesting to the public. These measures need to be taken by all the member states, not only by France, the Netherlands and Ireland.

The first and most important of these changes would be to hold discussions in the European Council and the Councils of Ministers much more frequently in public. This was envisaged in the Treaty for a Constitution and in the Lisbon Treaty, so it already has the agreement of the governments of all the member states. It would make a great difference for the public to know what was said and done during Council meetings and for the media to be able to report on them. The Council is, in effect, one chamber of a bicameral legislature (the other 'chamber' is the Parliament) and legislatures should meet and debate in public. This simple change would also enable national parliaments to see what their Ministers were saying and how they were voting. Everyone would understand better whatever difficulties there might be in obtaining agreement.[4]

A second simple, clearly desirable and non-controversial step would be to establish a practice by which members of the Commission (not only the Commissioner nominated by the country in question) would routinely visit each national capital at regular intervals to discuss current EU policies and Commission proposals in public with members of national parliaments. This should not be done only when an especially difficult or controversial issue arises.

A third desirable and non-controversial step would be to have regular meetings, in public, between MEPs (not

[2] Formally, the pillars would be abolished by the Lisbon Treaty, but since the three areas will continue to be subject to different procedures, it is convenient to refer to them in this way.

[3] J. Temple Lang, "Checks and Balances in the European Union: The Institutional Structure and the 'Community Method'", *European Public Law*, 12, 2006, pp. 127-154; J. Temple Lang, "The Commission: The key to the Constitutional Treaty for Europe", *Fordham International Law Journal*, 26, 2003, pp. 1598-1618.

[4] J. Temple Lang, "Ensuring Democratic Scrutiny of European Union Affairs – Prior to Treaty Amendments", in Barrett (ed.), *National Parliaments and the European Union: The Constitutional Challenge for the Oireachtas and Other Member State Legislatures*, Dublin: Clarus Press and Institute of European Affairs, 2008, pp. 105-118.

only MEPs of the country concerned) and members of the national parliament. Again, this should be done regularly as a matter of routine, and not only when controversies have broken out.

A fourth measure would be for the Commission to publish papers on long-term EU policies and strategies explaining the arguments for and against each possible policy or course of action. This would help to inform public opinion before individual issues arose on which Commission proposals are needed.

The combined effect of these steps would be very great even if their influence on public understanding and opinion might not be fully clear for some time. But if, as seems clear, Ireland can expect to have referendums again in future, it is obvious that the Irish government needs to do more than most other governments to inform public opinion. In this respect, the Irish government is, perhaps, in a unique position.

More generally, the members of the national parliaments and, in particular, e.g. the members of committees of the Irish Parliament (Oireachtas) concerned with EU affairs, need to be much more active and to spend more time discussing and explaining the reasons for particular EU proposals and policies, as well as explaining the views of the government and the Oireachtas on them. When more Council discussions are open to the public and national parliaments are discussing the issues, there would be much more interest in the views expressed and they would receive much more attention from the media than they do at present.

All this would lead, and in Ireland could certainly be expected to lead, to greater use of modern information technology. Individuals would start to participate, either online or by talking to their TD (a member of the lower house of the Irish Parliament, the Dail), in discussions. The European Commission's offices in the member states could have websites or weblogs on which individuals throughout the country could make known their views or ask their questions. Politicians and Commission officials would become aware, more clearly than they seem to have been in recent years, of the questions and concerns of the average citizen. Phone-in radio programmes and letters to the editor have a similar effect but their capacity is limited by the time or space available. It is worth pointing out to city-dwellers that this would have a tremendous effect in towns and villages far from capitals, and even further from Brussels, from which farmers and fishermen could email views, questions and criticisms. The democratic potential of online communication is enormous, but it can only be exploited if the people know what is going on and why.

If all this were done quickly, it would show that all governments of all the EU member states have listened to what the "no" voters in France, the Netherlands and Ireland were saying, however confusingly.

These are the concerns that governments should be dealing with rather than issues wholly unaffected by the Treaty of Lisbon. Even if some additional guarantees were given to Ireland on issues like abortion, neutrality or taxation, the problem of distrust would be unresolved and such guarantees would leave the underlying problem untouched.

It is only after distrust of the EU has been properly addressed that EU governments could expect to have popular support for the EU or for their own policies in the EU, or could ask for popular approval of any new EU Treaty in a referendum.

These suggestions are necessary but not sufficient conditions for popular understanding of the EU. When the Laeken Declaration has been implemented as far as it can without Treaty amendment, the next stage is to see what else should be done to make the EU more democratic, more transparent and more efficient.

Maintaining a representative Commission

Since the Nice Treaty, it has been proposed that the Commission should no longer be composed of nominees of all the member states. Under the Lisbon Treaty, the Commission would be made up of nominees of only two-thirds of the member states, "unless the European Council, acting unanimously decides to alter this number". The full significance of this reduction in size has not been widely or clearly understood in any of the member states. It means that there would always be, for five years at a time, one-third of the member states without a nominee in the EU's policy-proposing institution, which is also the body that ensures that the obligations of member states are carried out. Since there are six large member states, there would always be two large states without nominees, and those states at least (and no doubt others) would be likely to say that they would not accept proposals or decisions of a body on which they were not, in any sense, represented. This would inevitably and seriously weaken the Commission, and make it at all times less able to deal with whichever states were without nominees.

One measure that would greatly help to overcome public distrust of the Union is both important enough and conspicuous enough to make a substantial contribution. That measure is to restore the representative nature and integrity of the Commission. As explained above, the rationale for having a Commission is that the EU needs an autonomous body, equally independent of all the member states and representative of the whole Union, to propose EU measures and policies so as to make majority voting acceptable. For this purpose the Commission must be composed at all times of nominees (not representatives,

because they must be independent) of all of the member states, not just some of them. In addition, none of the members of the Commission must be subject to instructions from any other institution, whether the Council, the Parliament or national governments of any of the Member States. In short, the provisions in the Nice Treaty which deprive member states of the right to nominate a Commissioner at all times should be repealed and the Community method, which worked so well for so long, should be applied to all economic, social and police 'First Pillar' and 'Third Pillar' matters.

There are a number of reasons why this is now essential:

- The reduction in the size of the Commission is probably the most important single reason for objecting to the Lisbon Treaty. (The Nice Treaty had envisaged a reduction but did not specify what the reduction should be, so it did not arouse the same depth of opposition.)
- Restoring each state's right to nominate a Commissioner at all times would help to obtain or improve public support for the EU in all member states and not only in France, the Netherlands and Ireland.
- Restoring the right to nominate a Commissioner from each state would avoid a situation that would certainly erode public support for the EU in every state that finds itself, for five years at a time, without a nominee. No surer way of provoking public antagonism could be devised than to deprive member states of their nominees.
- Restoring the full Commission would represent a genuine and substantial improvement in the future institutional arrangements, which have given rise to such widespread distrust.
- This would maintain the proven Community method that has worked well for 50 years, which is based on a fully representative Commission.
- It would ensure that the Commission can at all times stay in touch with public opinion in all the member states.
- It would be the best, clearest and simplest single change that could be made to convince voters that governments, not the Commission, had really understood what voters are saying to them. It was governments, not the Commission, that were responsible for creating the Nice and Lisbon Treaties.
- It is a change that will be increasingly strongly demanded anyway as the date for reducing the size of the Commission comes nearer, and nine member states realise that they will have no nominee on the Commission for five years.
- Only a Commission composed of nominees of all the member states would be capable of fulfilling the Commission's increased role and responsibility, which must be to ensure that the EU and its policies are properly explained to, and understood by, the peoples. It is now clear that much more needs to be done to explain the EU to national parliaments. This needs to be done by Commissioners. The argument that there is not enough work for 27 Commissioners is now clearly wrong; there is more than enough work for all of them.
- It would avoid undignified and controversial wrangling over which nine member states would be the first to lose their nominees as Commissioners for five years.
- It would displease only those who want to reduce the influence of the Commission, which is the guardian of the treaties and of the legitimate interests of small states and states in a minority on particular issues.
- Restoring the size of the Commission confers the same benefits on all member states. It would not be a 'concession' to Ireland, nor would it mean 'cherry picking' among the provisions of the Lisbon Treaty. It is a change that would be widely welcomed in all member states, and would avoid weakening the Commission. (It is true that small states would benefit more than big states, which need a Commissioner less.)
- As more countries join, as they must, the EU will become more heterogeneous, and the need for an impartial policy-proposing mediator to reconcile all the competing interests will be even greater than in the past.
- Europe today needs leadership. An independent-minded policy-proposing think-tank is more needed than ever.
- Restoring the Commission to its normal strength also balances the re-weighting of votes in the Council in favour of the large member states, in particular Germany, and makes it more widely acceptable. This is discussed below.
- If the principle that each member state may nominate a Commissioner was maintained, no referendum in Ireland would be needed on this issue.

A decision to maintain one nominee from each member state would involve a change from the Nice Treaty, but would not involve an amendment of the Lisbon Treaty because, as mentioned above, the Lisbon Treaty empowers the Council by unanimity to alter the size of the Commission. If therefore it was expected that the Lisbon Treaty would come into force, the Council could decide that each member state should always

have the right to nominate a Commissioner, and this decision would come into force at the same time as the Lisbon Treaty itself.

Maintaining the independence of the Commission

As already mentioned, the Community method requires the Commission to be representative of the Union as a whole, and equally independent from all the member states. The independence of the individual Commissioners is essential for the role, and indeed the *raison d'être*, of the Commission. That is why the treaties have always stipulated that Commissions may not accept instructions from any government or other body. If they did, they would be unable to carry out their responsibility to propose policies and measures in the interests of the Union as a whole, including as far as possible any member state that may be in a minority on any particular issue. It is also the reason why Commissioners cannot be elected, just as judges should not be elected.

Unfortunately, some provisions of the Lisbon Treaty are inconsistent with this basic requirement. They provide for a high representative for foreign policy who would be appointed by (and therefore responsible to) the Council, and who would be simultaneously vice-president of the Commission and chairman of the foreign affairs council.

The effect of this would be, and was intended to be, to reduce the independence of the Commission in foreign commercial and economic policy,[5] to place a key member of the Commission under the direct control of the Council and to take foreign economic policy away from the existing institutional system, and make it essentially intergovernmental.[6]

So the Lisbon Treaty not only envisages two entirely different decision-making processes, but it also would introduce a hybrid system involving mutually incompatible roles for the foreign policy representative. The integrity and independence of the Commission will not be restored only by ensuring that all member states can have their nominees as Commissioners at all times. It also requires that the role of the foreign policy representative should be completely separate from the Commission. Otherwise the Lisbon Treaty would involve, in this important respect, a big step away from the Community method and the loss of all the safeguards that the Community method provides.

In short, the proposals for a double-hatted foreign policy representative are undemocratic, inefficient (because they create conflicts), confusing and difficult to understand. They are also incompatible with the Community method, which until now has applied fully to the common commercial policy of the Community and the Union. These proposals are one of the worst features of the Lisbon Treaty.

It might be said, in the defence of the dual capacity of the foreign policy representative, that there could be no objection to the Council appointing a representative (which is true) and that it is necessary that he or she is a member of the Commission, to coordinate the work of the two bodies (which is not true). The Commission, under the Community method, proposes policy to the Council. If the views of the two bodies are inconsistent, the Council can solve the problem, either by altering the Commission's proposal by unanimity or by inviting the Commission to modify its proposal to solve the problem. There is no need for the president of the foreign policy council to be a member of the Commission, or to be a member of the Commission with special powers. A foreign policy representative who was not also a Commissioner could be appointed by the Council without a change in the treaties. The only purpose of the dual role is to take away from the Commission and the Community method, with all its safeguards, the responsibility for proposing foreign commercial and economic policy measures, and to enable them to be managed by the Council, by an intergovernmental procedure in which the large member states will have overwhelming influence, if they choose to exercise it.

The mutually incompatible roles of Commission vice president and president of the foreign policy council do not distort only the relations between the institutions in connection with foreign economic policy. As a member of the Commission, the individual concerned should not be subject to the instructions of any other body. And in particular he or she should not be subject to the instructions of one of the institutions to which the Commission may be obliged to make proposals that may not be readily acceptable to some of the member states in the Council. The likelihood of a conflict of interest arising, and the possibility of influence that is inconsistent with the independence required of Commissioners, are contrary to the Community method, whose formula has made the European Union successful and acceptable. The use of the intergovernmental method in foreign policy matters is regrettable, but it is not new, and one day it may perhaps be abandoned. The mutually inconsistent roles

[5] The way the high representative is intended to operate is not clear: See Articles 18(4), 42(4) of the consolidated version of the Treaty, Council document 6655/08.

[6] J. Temple Lang, "The main issues after the Convention on the Constitutional Treaty for Europe", *Fordham International Law Journal*, 27, 2004, pp. 574-580; J. Temple Lang and E. Gallagher, "The Commission, the 'Community Method', and the smaller Member States", *Fordham International Law Journal*, 29, 2006, pp. 1024-1027; J. Temple Lang, "Checks and Balances in the European Union: The institutional structure and the 'Community Method'", *European Public Law*, 12, 2006, pp. 137-144.

suggested for the foreign representative are new, and damaging to the existing institutional system. It is profoundly worrying that the dangers of this suggestion have not been more widely understood.

This is a serious defect. It is not merely an undesirable and unnecessary complication, although it is certainly that. To correct this defect, it would be necessary to amend the Lisbon Treaty, to keep the Council and the Commission separate, so that their respective roles are clear and understandable. To see the role of the foreign policy representative in context, it is necessary to look at the other new post, the president of the Council.

The President of the Council

At present, the Presidency of the Council is held by each member state in rotation for a six-month period. Under the Lisbon Treaty, a long-term and full-time President would be elected by the Council. This is said to be desirable for efficiency and continuity, although the role and tasks of the President are not defined. What is clear is that the President will not be elected or subject to democratic control. Unless he is a mere figurehead, he is almost certain, like the foreign policy representative, to work closely in practice with the three largest and most influential member states, Germany, France and the UK. So the Lisbon Treaty would establish two new posts, clearly important although their powers are undefined, in addition to the post of President of the Commission. Such an arrangement, whatever its other merits, is the opposite of the democracy and simplicity called for by the Laeken Declaration and seems destined to lead to rivalry and demarcation disputes between the three individuals concerned, and their respective officials. It is certainly impossible to explain clearly to the peoples of Europe, and indeed the only explanations offered have been superficial and unconvincing. If the President were to be elected by all the peoples of the EU, the post would be intelligible even if his powers were unclear, but that is not suggested.

Treaty amendments that would not require an Irish referendum

There seems to be a widely held impression that any amendment of the EU Treaties necessitates a referendum in Ireland. This is incorrect, for several reasons.

The first reason is that the Irish people in several referendums have allowed Ireland to ratify treaties that clearly envisage changes that affect, or might be thought to affect, the national sovereignty of all member states. Such changes are envisaged when new member states join the EU. The accession of any new member state means that the proportion of the votes in the Council exercised by each of the existing member states is reduced, and this of course involves treaty changes. Other Treaty provisions envisage that police and judicial cooperation matters ('Third Pillar' issues) can be transferred from the former intergovernmental procedures, requiring unanimity, to qualified majority voting under the Community method. The treaties have always included a provision under which, by unanimity, measures could be adopted for purposes for which no mechanism was expressly provided by the treaties (Article 235 of the Treaty of Rome, now Article 308). So the Constitution of Ireland, as amended by successive referendums expressly approving a series of Community Treaties, authorises substantial changes in the terms and operation of the EU treaties without any need for further referendums. These changes, of course, can be made only with Ireland's consent: the point made here is that they are already envisaged, and do not require a referendum.

The second reason why Ireland is free to ratify some changes in the EU treaties without a referendum concerns the *Crotty* judgment. In short, that judgment said that Treaty changes not approved by previous referenda would require a further referendum if they significantly restricted Ireland's freedom of action and national sovereignty in foreign policy. In retrospect, the language of all three judges seems exaggerated. But, as is well known, the Irish people by referendum approved the Single European Act, including Title III, and since then have approved, by referenda, the Maastricht, Amsterdam and Nice Treaties, which provided for cooperation on foreign policy matters, and which therefore restricted, to a limited extent, Ireland's freedom of action in foreign policy. It follows that only a very substantial reduction in Ireland's sovereignty or in its influence in the EU, not already envisaged by any of the treaties approved by referendum, would require a new referendum. If treaty amendments do not alter the essential scope of objectives of the EU, no new referendum is needed.

The re-weighting of the votes in the Council

The Lisbon Treaty provides for re-weighting of votes in the Council. Where the Council is acting on a Commission proposal, a qualified majority of the Council shall be " … at least 55% of the members of the Council, comprising at least fifteen of them and representing Member States comprising at least 65% of the population of the Union." This is the 'double majority' rule, which is intended to replace the present system of weighted votes, in particular to give Germany the additional voting weight to which its size entitles it.

This is not to come into force until 2014, even if the Lisbon Treaty were to come into operation soon. The effect, when it comes into force, would be to alter Ireland's weighted vote under the population

requirement from 7 votes out of 345 (just over 2%) to 4.2 million out of 497 million (a ratio of just under 1%, but this does not allow for the increase in the total EU population due to further accessions or otherwise in the future).

The question may arise whether it would be permissible under the Constitution of Ireland for Ireland to ratify a new Treaty providing only for the adoption of the 'double majority', in the same terms as Article 191 of the Lisbon Treaty. The question is important because the large member states, in particular Germany, are unwilling to agree to new states joining the EU until the votes in the Council have been re-weighted, since at present the smaller states collectively have more power than their populations would justify.

In 1972 the Constitution was amended to allow Ireland to join the European Community, and on some issues to be outvoted by a qualified majority calculated in accordance with the weightings set out in the Treaty at that time. These weightings were repeatedly adjusted without controversy in Ireland on the accession of a total of 18 more countries (and by the Treaty of Nice), and the question may now arise as to whether they could be re-adjusted by a clause of the kind included in the Lisbon Treaty without a referendum.

The effect, as already indicated, would be to reduce the weight of Ireland's vote from about 2% to about 1%. This would be part of a rationalisation of the voting strengths to make voting in the Council correspond to population size. Although clearly reasonable, and indeed more democratic if the EU population is looked at as a whole, small member states had previously been given somewhat more voting weight (in Luxembourg's case, much more) than their populations suggested. However, at no time was there ever an explicit formula or rationale for the weightings, and they were always subject to pragmatic arguments about the relative sizes of particular pairs or groupings of member states. There would, therefore, be no basis for saying that Ireland had a right to expect a vote of any particular percentage of the whole, or to insist on the application of any particular formula.

This is clear when one simple and obvious fact is taken into account. When Ireland joined the Community in 1973, it was one of nine member states and had 3 votes out of a total of 58 votes (5.2% approximately). But the treaties envisaged the accession of additional member states, and every time a new member state joined, Ireland's vote, as a percentage of the total votes, was automatically reduced. Therefore, it is clear that Ireland had no assurance that its vote, as a percentage of the total, would remain at any particular level. Similarly, when Germany was reunited, what had previously been a separate state became a part of the Community, and it was certainly appropriate to alter Germany's voting strength accordingly, although this was not done until later.

The question therefore is whether the suggested reduction of Ireland's voting weight from 2% to 1% as part of a re-weighting of all member state's voting rights, should be regarded as such a significant reduction of Ireland's influence in the Council that it would require formal approval in a referendum. To answer that question, it must also be kept in mind that the Council rarely takes a decision by voting, and when it does, there must always be two sets of member states under the double majority rule, in both of which Ireland would always have a small proportion of the votes available. The only circumstance in which the difference between 2% and 1% could matter would be if the two voting groups were so evenly matched that there was only about 1% between them. Such a scenario is mathematically possible but so extremely unlikely as to be discounted. A reasonable conclusion is that the proposed change, apart from being a democratic rationalisation and a simplification of the voting rules, would not involve any significant reduction in Ireland's voting influence in the Council and so would not require a referendum.

This conclusion is confirmed by the Supreme Court's finding in the *Crotty* case that the change from unanimity to qualified majority voting for certain issues did not require a referendum. The Court was careful to say that its finding did not imply that a change from unanimity could never require a referendum. But a change from unanimity to qualified majority voting is much more significant than a relatively small re-weighting of Ireland's vote in the Council.

The re-weighting of the votes in the Council could be done on the accession of the next state to join. It does not need to be done before then, and the Lisbon Treaty is not necessary to do this.

Conclusion

This paper points to a number of things that need to be done to make the EU more comprehensible and acceptable to all its peoples – not only the peoples of France, the Netherlands and Ireland. The paper also points to steps that could be taken to implement uncontroversial parts of the Lisbon Treaty by actions not requiring treaty change, or by treaty changes that would not need a referendum in Ireland. There are other matters that can be similarly treated. In particular, we point out that there are very strong arguments for maintaining the right of each member state to nominate a Commissioner at all times. This could be arranged by a simple amendment to the existing Treaty of Nice. If the Lisbon Treaty is to be adopted, no treaty change would be needed to maintain a fully representative Commission. We also call attention to the fact that the re-weighting of the votes in the Council, which is

regarded as a prerequisite for further enlargement of the EU, could be done by a simple treaty change without a referendum in Ireland. Re-weighting would also make acceptable the change from unanimity to qualified majority voting on a number of matters.

The French and Dutch governments avoided the risks of second referenda on the Treaty for a Constitution which was not significantly different from the institutional provisions of the Lisbon text. For good or ill, the Irish government has not got that freedom of manoeuvre.

The postponement of the Lisbon Treaty is hardly the disaster for the EU that some of its advocates claim. The Union has worked for 50 years with an autonomous Commission and a six-monthly rotation of the Presidency, and without a double-hatted foreign policy representative. There is no good reason to believe that work cannot proceed on new issues, including further enlargement if Council votes are re-weighted, with the same success as in the past. It certainly seems unnecessary and undesirable to make changes whose main effect would be to upset the institutional balance and make the EU more complicated and harder to understand, and so less acceptable to its citizens.

We believe that the EU will not be understood or accepted by its peoples until Council discussions are made public, much greater efforts are made by Commissioners to explain policies, and one Commissioner for each member state is permanently assured. We accept that for the foreseeable future foreign policy and security will be intergovernmental, and will not provide the safeguards for small member states given by the Community method for other EU measures. Having two entirely different decision-making procedures is inevitably complex. Therefore, to make the EU more intelligible, governments should now first do what was agreed in Laeken, and make the institutional system simpler and more open. That would mean revising the Lisbon Treaty before it is ratified by any more countries, in particular to get rid of the anomalous position of foreign policy Representative in both the Commission and the Council. When those simplifications have been carried out, it should be possible either to have all member states ratify the revised and improved treaty, or to have the elements of the improved treaty adopted as a series of amendments to the existing treaties, for example at the time of the accession of the next new member state.

It is said that governments do not want to renegotiate the Lisbon Treaty. But governments should not, merely for their own convenience, or because they think they know best, be unwilling to do what is needed to make the EU understood and accepted by its peoples.

It is also said that the Irish people should not be able to veto the Lisbon Treaty. But the French and the Dutch also voted against essentially the same thing, and some other peoples would do likewise. Even more important, the French constitution is now being amended deliberately to give the French people a veto on enlargement of the EU, the Union's most important and most successful policy. This development may have much more serious consequences for the EU than the French, Dutch and Irish votes against the Constitutional and Lisbon Treaties. If this is not to obstruct dangerously the expansion of the Union, the French government will have to do much to inform the French people.

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