

## Piotr Maciej Kaczyński; Sebastian Kurpas; Peadar ó Broin, Ratification of the Lisbon Treaty — Ireland is not the only problem

**Caption:** On 13 December 2007, the Member States of the European Union sign the Treaty of Lisbon, meaning that the ratification process can begin. This article, published by the European Policy Institutes Network (EPIN) in September 2008, offers a general overview of the difficulties in ratifying the treaty encountered across the European Union and presents a detailed analysis of the situation, particularly the national debate that took place in four countries: Ireland, Germany, the Czech Republic and Poland.

**Source:** EPIN - European Policy Institutes Network. Ratification of the Lisbon Treaty Ireland is not the only problem. MACIEJ KACZYNSKI, Piotr ; KURPAS, Sebastian ; O BROIN, Peadar. [EN LIGNE]: [01.10.2013]. Working Paper No. 18 / September 2008. <http://www.ceps.eu/files/book/1716.pdf>.

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**Publication date:** 13/01/2014



# Working Paper

No. 18 / September 2008

## Ratification of the Lisbon Treaty Ireland is not the only problem

**Piotr Maciej Kaczyński, Sebastian Kurpas  
& Peadar ó Broin**

After the Irish voters rejected the Treaty of Lisbon in a public referendum on 12 June 2008, European Union leaders decided nevertheless to continue the ratification process, with the aim of achieving 26 ratifications by mid-October 2008. This plan failed, however, due to rising political and legal problems in a number of countries. Apart from its rejection in Ireland, the Treaty of Lisbon's ratification is now being contested in the Constitutional Courts of Germany and the Czech Republic and it faces political challenges in the Czech Republic and Poland. This paper presents the state of play of the ratification process and the national debates in the four countries where the treaty's future is most called into question: Ireland, Germany, the Czech Republic and Poland.

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ISBN-13: 978-92-9079-820-0

Available for free downloading from the CEPS (<http://www.ceps.eu>) and EPIN (<http://www.epin.org>) websites

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# RATIFICATION OF THE LISBON TREATY

## IRELAND IS NOT THE ONLY PROBLEM

*EPIN WORKING PAPER NO. 18/SEPTEMBER 2008*

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& PEADAR Ó BROIN\*

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### Introduction

In December 2007, it was thought that the ratification process of the Lisbon Treaty would be completed by the end of 2008. Despite Ireland's rejection of the treaty in a referendum on 12 June 2008, the decision was taken by EU leaders to speed up the process, with the objective of achieving ratification in 26 states by 15 October 2008. This paper offers a general overview of the ratification difficulties experienced across the European Union and presents a detailed analysis of the national situation and debate in four countries. The first country considered is Ireland, where the discussion now turns to what to do next, following the no-vote. The German case brings us back to well-known debates on who should exercise ultimate judicial control over EU law, while the Czech case is also complemented by political struggles. Lastly, the Polish ratification has been mainly hijacked by internal political fights, as the competences have not been clearly delimited between the co-habiting President and the government.

### 1. State of Play

The Treaty of Lisbon was signed on 13 December 2007, and was supposed to enter into force on 1 January 2009. This was a very ambitious agenda; the only EU treaty that was ratified in less than 13 months was the original Treaty of Rome in 1957. But that treaty required ratification in only six countries, whereas the Lisbon Treaty must be approved by 27 countries.

The smooth ratification process ended with the Irish referendum on 12 June 2008. The negative result of the vote put the Treaty in jeopardy and prevented a timely entrance into force. The date envisaged for its entry into force, 1 January 2009, has become impossible to maintain in light of the set of events following the European Council meeting on 19-20 June 2008. This meeting had served the clear purpose of avoiding decisions by other member states to suspend ratification, as had been the case with the Constitutional Treaty. After the French and Dutch no-votes in 2005, a number of countries decided not to pursue the ratification process until the French and Dutch had tabled a solution, effectively ending ratification of that treaty. The June 2008 European Council saved the Lisbon Treaty from this fate, as all countries confirmed the will to pursue the process in a timely manner.

The initial idea of European leaders was to allow Ireland the time it needs to reflect on its referendum result, with a view to taking the appropriate decisions during the European Council in October. By this point, it was expected that 26 member states would have completed ratification, meaning that all attention would be focused on Ireland.

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This plan turned out to be unrealistic, not least because it was even tighter than the original deadline of 31 December 2008. Sweden refused to speed up ratification in the Riksdag, which is scheduled to vote on the treaty on 20 November, although for the moment nothing suggests that there may be difficulties in adopting the document. Almost simultaneously, other problems of a legal and political nature appeared. There are legal challenges pending in Germany and the Czech Republic and there was a challenge to the ratification method in the United Kingdom. Challenges of a political nature are also arising in the Czech Republic and Poland, whose presidents – for different reasons – objected to fast ratification over the summer.

The domestic debate in Ireland began during the summer with some interesting ideas of how to address the results of the Irish vote. Various Irish and continental politicians have indicated that the decisions concerning the Treaty of Lisbon's entry into force will now only be taken during the December 2008 European Council, as opposed to during the meeting in October. Leaders hope that by that time the legal cases will be settled, the Polish President will have signed the document and Czech politicians will prefer to begin their EU Presidency with domestic political peace on that issue.

The conflict in Georgia has provoked a new series of comments at EU level connecting the EU's response to the war in the Caucasus to the Treaty of Lisbon. President Nicolas Sarkozy stated that the document would have helped the EU to act more efficiently during the Georgia crisis,<sup>1</sup> but so far, this kind of argument has been absent or marginal in the domestic public debates in Ireland, the Czech Republic and Poland.

An altogether new challenge arises from the fact that the treaty will most likely not enter into force before 1 November 2009, by which date a new European Commission should have taken up office.

## **2. Ireland: Still reflecting, but decisions will soon be required**

### ***Peadar Ó Broin***

By the end of 2008, Ireland is likely to be the only member state to have failed to ratify the Lisbon Treaty. This situation, arising from the referendum result of 12 June 2008 (when 53.4% of the voting electorate rejected the Bill amending the Constitution allowing ratification of the Lisbon Treaty)<sup>2</sup> and the decision by the other member states to advance their own ratification procedures,<sup>3</sup> means that Ireland will probably be isolated as the sole naysayer in the European Union.

Although the Irish government declined to offer any immediate judgement, alternative sources of post-referendum analysis and ideas have steadily emerged over the summer of 2008. A Flash Eurobarometer opinion poll<sup>4</sup> conducted in the days immediately following the referendum revealed that much of the electorate voted 'no' due to a widespread lack of understanding as to what ratification of the Lisbon Treaty would entail for Ireland, coupled with a "very convincing" campaign by advocates of a no-vote. Further analysis of the referendum result has

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<sup>1</sup> "Lisbon treaty would have helped in Georgia crisis, says France", EUobserver.com, 18 Aug 2008.

<sup>2</sup> Twenty-eighth Amendment of the Constitution Bill, 2008, available at: [www.reformtreaty.ie/eutreaty/Twenty-eighth-Amendment-of-the-Constitution-Bill-2008.pdf](http://www.reformtreaty.ie/eutreaty/Twenty-eighth-Amendment-of-the-Constitution-Bill-2008.pdf)

<sup>3</sup> Paragraph 4, Presidency Conclusions, European Council, 19/20 June 2008, available at: [http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/ec/101346.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/101346.pdf)

<sup>4</sup> 'Post-referendum survey in Ireland: Analytical Report', conducted from 13-15 June 2008, available at: [http://ec.europa.eu/public\\_opinion/flash/fl\\_245\\_full\\_en.pdf](http://ec.europa.eu/public_opinion/flash/fl_245_full_en.pdf)

continued in the national media over the summer period. The *Irish Independent* newspaper, for instance, criticised what it perceived as critical inertia by the Irish government in the months preceding the vote: “The Government lost the referendum because it left its campaign – for what it was worth – too late, leaving the field open to disparate ‘No’ campaigns with their various agendas.”<sup>5</sup>

## 2.1 Domestic reaction

Among the initial political responses to the referendum result is a unanimous view that the outcome of the vote should be respected. There is no common consensus, however, on the fate of the Lisbon Treaty. While those on the no-side call for the Treaty to be scrapped or renegotiated, the ‘yes’ groups are left to ponder ways in which a compromise agreement may be reached at the national and European levels. Although the visit of President Nicolas Sarkozy allowed an early opportunity for the parliamentary political parties and prominent campaign groups to meet<sup>6</sup> face-to-face, there has been no attempt thus far to enter into national roundtable talks between representatives of the ‘no’ and ‘yes’ groups.

The Irish Prime Minister, Brian Cowen (Fianna Fáil, UEN), stated during a press conference on 13 June 2008 that the referendum result was a “personal disappointment”,<sup>7</sup> but declined to hypothesise about the possible options available to Ireland. The Minister for Foreign Affairs, Mícheál Martin (Fianna Fáil, UEN), was equally silent as to the status of the Treaty during the meeting of the General Affairs and External Relations Council on 16-17 July 2008, stating that it was “far too early” to consider future scenarios or options. Minister Martin reiterated this point on 10 September 2008, considering that it remained “far too early to be prescriptive about the future”. Addressing the Irish National Assembly on 25 June 2008, Prime Minister Cowen stated that his government would create a period of reflection in order to “analyse and consult so that we can properly understand the underlying factors that shaped the outcome of the referendum”.<sup>8</sup> In this regard, the Irish government commissioned a “research project” to investigate voting attitudes in the Lisbon Treaty referendum.<sup>9</sup> This project consisted of public research conducted by consultancy firm Millward Brown IMS. The research combined quantitative and qualitative methods, based on a survey of 2,100 members of the electorate.<sup>10</sup> The report was delivered to government on 10 September 2008.<sup>11</sup> Prime Minister Cowen is expected to include a summary of the principal findings in his report to the European Council on 15-16 October 2008.

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<sup>5</sup> Editorial, *Irish Independent*, 28 August 2008.

<sup>6</sup> See *The Irish Times*, 21 July 2008, available at: <http://www.irishtimes.com/newspaper/breaking/2008/0721/breaking8.htm>

<sup>7</sup> ‘Statement by the Taoiseach, Mr Brian Cowen T.D. following the announcement of the result of the Lisbon Treaty Referendum’, available at: <http://www.taoiseach.gov.ie/index.asp?locID=582&docID=3919>

<sup>8</sup> ‘Statement by the Taoiseach, Mr Brian Cowen T.D. to Dáil Éireann on the outcome of the June European Council’, available at: <http://www.taoiseach.gov.ie/index.asp?locID=582&docID=3932>

<sup>9</sup> ‘Minister [Mícheál] Martin announces comprehensive analysis on the Lisbon Treaty referendum and public attitudes toward the European Union’, available at: <http://foreignaffairs.gov.ie/home/index.aspx?id=51879>

<sup>10</sup> As reported in *The Irish Times*, available at: <http://www.irishtimes.com/newspaper/ireland/2008/0716/1216073118378.html>

<sup>11</sup> The report, prepared by Milward Brown IMS, is available at <http://www.irishtimes.com/focus/2008/postlisbon/index.pdf>

The two junior coalition partners in government, the Green Party<sup>12</sup> (Greens-EFA) and the Progressive Democrats (ALDE) have reiterated official government policy regarding the need for further analysis before any decisions may be taken.

The opposition political parties in the Irish Parliament have hardened their positions following the referendum result. On the ‘yes’ side of the debate, only Fine Gael (EPP-ED) continues to support the Lisbon Treaty. However, the party’s spokesperson on European Affairs, Lucinda Creighton, stated that “[i]t is clear that the Irish people said ‘No’ and that verdict must be respected. The Government must clearly make changes in order for any progress to be made [...] The fundamental concerns of the Irish people cannot be brazenly ignored”.<sup>13</sup> Although the Labour Party (PES) supported ratification of the Lisbon Treaty prior to the referendum, the party’s leader, Éamon Gilmore, declared on 13 June 2008 that “the Lisbon Treaty is now dead”, but subsequently stated that a further referendum on the “European issue” would be needed.<sup>14</sup>

Such a polarisation of views may be explained by two factors. First, the fact that local and European Parliament elections will take place in nine months time means that political parties will seek to differentiate their policies (and distance themselves from failures) in order to win votes. Secondly, post-referendum analysis indicates that the electorate that traditionally votes for Fine Gael or the Labour Party during national elections voted against the Lisbon Treaty, so there may be an attempt by both of these parties to recover some lost ground among the electorate. Such heightened partisanship is likely to have contributed to the decision of Fine Gael and the Labour Party not to endorse the establishment of a special parliamentary cross-party commission to examine the outcome of the Lisbon Treaty referendum.

On the ‘no’ side, Sinn Féin (GUE/NGL; the only political party with representation in the Irish Parliament that campaigned against the Treaty) has called for a substantive renegotiation and has presented an amended and annotated version of the Lisbon Treaty,<sup>15</sup> which represents what Sinn Féin considers would represent a “better deal” for Ireland and the European Union. Nascent political group Libertas has declared the Treaty dead.<sup>16</sup> Its chairman, Declan Ganley, believes that the Lisbon Treaty should be replaced with a simpler document, drafted in similarly broad terms as the Constitution of the United States that would be intelligible to all citizens.<sup>17</sup>

Due to the summer hiatus in political activities, there have been few opportunities to engage in meaningful public debate on the consequences of the referendum result. The General Humbert Summer School, which took place in August 2008, provided a rare exception. During a debate, Minister of State for European Affairs, Dick Roche (Fianna Fáil, AEN), suggested that a second

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<sup>12</sup> Only the parliamentary wing of the Green Party supports the Lisbon Treaty. In an internal vote held on 19 January 2008, the Green Party failed to reach the two-thirds majority threshold required for the adoption of an official party line on the Lisbon Treaty (although it fell just short, with 63% of votes in favour of a pro-Lisbon policy). As a result, only the Green Party’s deputies and senators in the Irish Parliament supported ratification, with individual party members being allowed to campaign either way.

<sup>13</sup> ‘Roche must realise same question on Lisbon CANNOT be put to the people’, Fine Gael National Press Office press release, available at:

<http://www.finegaele.ie/news/index.cfm/type/details/nkey/35151/pkey/653>

<sup>14</sup> Available at: <http://www.irishtimes.com/newspaper/ireland/2008/0912/1221138437135.html>

<sup>15</sup> Available at: [http://www.no2lisbon.ie/media/SFsubmission\\_a\\_better\\_deal.pdf](http://www.no2lisbon.ie/media/SFsubmission_a_better_deal.pdf)

<sup>16</sup> ‘Ganley tells Sarkozy that the Lisbon Treaty is dead’, press release, 21 July 2008, available at: <http://www.libertas.org/content/view/308/1/>

<sup>17</sup> See, for instance, Declan Ganley’s keynote speeches to US-based think tanks NDN and The Heritage Foundation, available respectively at <http://ndn.org/transcripts/071708.html> and at <http://multimedia.heritage.org/content/wm/Lehrman-071508a.wvx>

referendum would be required if Ireland was to ratify the Lisbon Treaty.<sup>18</sup> Prime Minister Cowen stated that while the government could not discount the possibility of a second referendum, it is still too early to commit to any particular course of action.<sup>19</sup>

## 2.2 European Union reaction

Following the referendum result, the response from the governments of the member states was to allow Ireland time to investigate the reasons as to why roughly half of the voting electorate (on a turnout of 53.1%) voted ‘no’. The European Council of 19-20 June 2008 agreed to give the Irish government time to “analyse the situation” and “actively consult, both internally and with the other Member States”, with a view to finding a “common way forward”.<sup>20</sup> The President of the Commission, José Manuel Durão Barroso, during a joint press conference held with Prime Minister Cowen on 19 June 2008, pledged to “fully endorse” this agreement.

Despite undertakings by the member states to respect the domestic consultative process, it is clear that Ireland will not be granted an indefinite period of reflection. While the Irish government is adamant that it will present only interim findings during the October European Council and not offer any ‘roadmap’ or ‘privileged solutions’, others may be anxious to lend greater impetus towards reaching a compromise on the way forward sooner rather than later. President Nicolas Sarkozy, during his visit to Dublin on 21 July 2008, seemed to nuance the idea that Ireland would produce an indigenous solution by suggesting that it would be the French Presidency that would “produce a method and [perhaps] a solution in either October or in December.”<sup>21</sup> Such comments seem to suggest that if the Irish government is not forthcoming in producing a roadmap (possibly as early as mid-October), it may find itself compelled to follow a particular course of action decided during the French Presidency. Given that allegations of “bullying” by larger member states proved influential during the referendum campaign, such a course of action may prove counter-productive. It also seems to contradict the decision of the June European Council to reach a “common way forward”. However, it will be necessary to respect the fact that a substantial majority of member states have approved the Lisbon Treaty and many member states will be anxious to expedite reform of the European Union in order to tackle future challenges.<sup>22</sup>

## 2.3 If Ireland is to ratify the Lisbon Treaty

If Ireland is to ratify the treaty, it must take into account the referendum result of 12 June 2008. An initial obstacle resides in the fact that a majority of the voting electorate rejected the proposal, “The State may ratify the Treaty of Lisbon”.<sup>23</sup> While Ireland’s second referendum on

<sup>18</sup> See article in *The Irish Times*, available at:

<http://www.irishtimes.com/newspaper/ireland/2008/0825/1219613973015.html>

<sup>19</sup> As reported on RTÉ, available at: <http://www.rte.ie/news/2008/0827/eul Lisbon.html>

<sup>20</sup> Paragraph 3, Presidency Conclusions, European Council, 19/20 June 2008 (*supra*, note 2)

<sup>21</sup> As reported in *The Irish Times*, available at:

<http://www.irishtimes.com/newspaper/breaking/2008/0710/breaking30.htm>

<sup>22</sup> An early instance of the Irish ‘No’ being presented as weakening the Union’s ability to act can be found in the article written by President Nicolas Sarkozy in *Le Figaro* of 17 August 2008. President Sarkozy wrote that “If the Lisbon Treaty, currently being ratified, had been in force [at the time of the Georgia-Russia conflict], the European Union would have had the institutions it needs in order to face an international crisis”. The article is available at: <http://www.lefigaro.fr/politique/2008/08/17/01002-20080817ARTFIG00202-la-russie-doit-se-retirer-sans-delai-de-georgie.php>

<sup>23</sup> Terms contained in the 28<sup>th</sup> Amendment of the Constitution Bill, *supra*, note 1.



the Nice Treaty may have set a precedent for voting again on an unaltered text, the political conditions present at the time of the first referendum on the Nice Treaty were very different to those during the referendum on the Lisbon Treaty (particularly as far as voter turnout and the economic climate are concerned).

The most likely option to be considered is for Ireland to negotiate ‘special arrangements’ that would accompany ratification of the Lisbon Treaty. Such a package may consist of political declarations<sup>24</sup> or possibly further opt-outs from specific provisions in the treaty. The difficulty in such an approach lies in the fact that protocols are considered integral parts of a treaty, which may force other member states to re-open their ratification processes in order for the new protocol to become legally binding. A second obstacle resides in the subject matter that such a protocol would treat. The government-commissioned research found that 42% of respondents voted ‘no’ due to a lack of information or understanding of the treaty and neither that research nor the Flash Eurobarometer survey indicated one singular issue of predominant interest to voters during the referendum campaign that would require a special interpretation of the Lisbon Treaty.<sup>25</sup> The issue of a possible opt-out from some aspect of European security and defence policy was mooted by Minister for Foreign Affairs Mícheál Martin during the extraordinary Gymnich held in Avignon on 8 September 2008. This suggestion may have been provoked by the surprising statistic included in the government-commissioned research that 33% of respondents thought that the Lisbon Treaty would have allowed for conscription into a European army. However, the fact that Ireland already contains a strong reference in its Constitution (Article 29.4.9) regarding European defence renders this area an improbable candidate for an opt-out.

Another option examines the possibility of drafting a stand-alone protocol, perhaps with a similar status to the current Charter of Fundamental Rights of the European Union or the Community Charter of Fundamental Social Rights for Workers, which would remain separate from the Lisbon Treaty itself but would form part of the Union’s *acquis*. The stand-alone protocol may consider, *inter alia*, national tax sovereignty and social rights of workers (two areas that Sinn Féin considers require particular safeguards<sup>26</sup>). However, such specificities would require further analysis into the subject matter and would have to take into account the views of all member states.

The idea of ‘special arrangements’ was however mitigated by Joe Costello, spokesperson for the Labour Party on European Affairs, in a letter to *The Irish Times* newspaper on 10 September 2008. Mr Costello is of the view that “a concoction of opt-outs, declarations and constitutional amendments will not resolve the situation created by the rejection of the treaty”.

During the debates that took place as part of the General Humbert Summer School, it was the *modus operandi* of the ratification process as opposed to the ‘special arrangements’ that dominated discussions.<sup>27</sup> Two proposals have emerged so far in the domestic debate. The first centres on the perceived need for a second referendum if the Lisbon Treaty is to enter into force in Ireland. Minister of State for European Affairs, Dick Roche, and former Irish Ambassador to

<sup>24</sup> See ‘What if Ireland Votes No?’, Gavin Barrett, 7 June 2008, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1157059](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1157059)

<sup>25</sup> As is the case, for example, in relation to the position of abortion laws in Ireland or Malta, or the applicability of legislative instruments in the area of Justice and Home Affairs for Ireland and the United Kingdom. Such ‘special interpretations’ are commonly referred to as ‘opt-outs’.

<sup>26</sup> Sinn Féin held a political strategy meeting on 2-3 September 2008, a report on which is available at: <http://www.irishtimes.com/newspaper/ireland/2008/0904/1220372097997.html>

<sup>27</sup> See for instance ‘The Lisbon Treaty – Does Ireland Need a Referendum’, Benoît Keane, *Irish Law Times* (2008) 26 ILT 108.

the United Nations, Noel Dorr, both stated that a second referendum seemed inevitable. Minister Roche emphasised that he was speaking in a personal capacity and that government policy remained committed to considering all possible options. Mr Dorr mentioned that “[t]he wording put to the people on the June 12<sup>th</sup> said, among other things, “The State may ratify the Treaty of Lisbon”; the people said no. If they say no and refuse to give permission to ratify, I don’t think the Government could now go ahead and ratify it, or bits of it.” Former President of the European Parliament, Pat Cox (Progressive Democrats, ALDE) considers a second referendum the “least bad option facing us”.<sup>28</sup> The second proposal includes using the Irish Parliament as a means by which to ratify parts of the Lisbon Treaty. The initial idea appeared in *The Irish Times*,<sup>29</sup> but was advanced by Senator Eugene Regan (Fine Gael, EPP-ED) during the General Humbert Summer School: “What might be considered is this: if the Oireachtas [Irish Parliament] were ultimately to ratify a Treaty like Lisbon, that any aspect of that Treaty which raises a constitutional issue must first be approved by the people in a Referendum. Any element which might raise a constitutional issue should be put as a discrete proposition to the people and if that proposition were not passed then Ireland would then endeavour to secure an opt-out.”<sup>30</sup>

Prime Minister Cowen stated that both options are plausible,<sup>31</sup> but no roadmap has yet been decided upon. It appears that the Irish government remains committed to considering all possible scenarios, but none (as of yet) have been significantly debated in the public domain. This situation is likely to change as the new parliamentary term begins in September 2008.

### 3. Germany: The Federal Constitutional Court as a third chamber?

#### *Sebastian Kurpas*

Concerning ratification of the Treaty of Lisbon, the German government finds itself in a déjà-vu situation. As in 2005 with the Constitutional Treaty, both the Bundestag and the Bundesrat voted with huge majorities in favour of the Treaty of Lisbon. On 24 April 2008, 515 MPs approved the text, while only 58 disapproved in the Bundestag. In the Bundesrat 15 out of 16 Länder gave it the green light, while only the city-state of Berlin had to abstain due to the opposition of one of the coalition partners (Die Linke). However, again exactly like in 2005, individual MPs (and this time also the parliamentary group Die Linke<sup>32</sup>) subsequently called upon the Federal Constitutional Court to declare the ratification law unconstitutional. Both Die Linke and the MP Peter Gauweiler (of the Bavarian CSU) also made injunctions (*Eilanträge*) to the Court to stop the Federal President Horst Köhler from signing the ratification law before the Court had issued its verdict.<sup>33</sup> As in 2005, the Court then asked the president to wait with his signature and on 30 June 2008, Horst Köhler again agreed to that request. After the no-votes to

<sup>28</sup> As reported in *The Irish Times*, available at <http://www.irishtimes.com/newspaper/opinion/2008/0826/1219679947277.html>

<sup>29</sup> See Stephen Collins in *The Irish Times*, available at: <http://www.irishtimes.com/newspaper/opinion/2008/0719/1216398978843.html>

<sup>30</sup> Full speech available at: <http://www.finegaele.ie/news/index.cfm/type/details/nkey/35141/pkey/653/> Senator Regan expanded further on his suggestion in *The Irish Times*: <http://www.irishtimes.com/newspaper/opinion/2008/0910/1220919677389.html>

<sup>31</sup> For comments on a second referendum, see note 17, *supra*; for reaction to proposal to ratify some parts of the Lisbon Treaty via the Parliament, see the *Irish Independent*: <http://www.independent.ie/national-news/cowen-says-dail-can-pass-parts-of-treaty-without-a-referendum-1467353.html>

<sup>32</sup> See: <http://dokumente.linksfraktion.net/pdfdownloads/7796389968.pdf>  
<http://dokumente.linksfraktion.net/pdfdownloads/7751661884.pdf>

<sup>33</sup> <http://dokumente.linksfraktion.net/pdfdownloads/7730237115.pdf>

the Constitutional Treaty, the Federal Court then never ruled, waiting for a clarification of the situation in France and the Netherlands. From a legal perspective, therefore, Germany never ratified the Constitutional Treaty. In the current situation, however, the Court is expected to give its verdict by the end of 2008.

As for the motivations of the plaintiffs, MP Peter Gauweiler states that the Treaty of Lisbon would put an end to the German national state, and in particular the power of the national parliament and the Constitutional Court. Gauweiler – whose objections have the judicial support of two highly reputable public law professors, Dietrich Murswiek and Karl-Albrecht Schachtschneider – claims that the Treaty of Lisbon would de facto establish a European federal state, but would lack the necessary public (*Unionsvolk*) in order to constitute and legitimise such a state.<sup>34</sup> He also rejects Article 311 (3) of the amended TEU, as it would allow the EU to raise taxes, Article 48 (6), as it would allow for treaty changes without parliamentary control and Article 352, as it would allow the Union to extend its powers indefinitely. He also denounces the treaty on grounds that it would enhance the democratic deficit in that the number of MEPs would not equally reflect the number of citizens in each country. Die Linke sees the Treaty of Lisbon as an instrument to abolish the German social state and to oblige member states to increase military spending and become engaged in unlawful military missions outside the EU's borders.

While in many European countries, it appears unthinkable that a Court would challenge the decision of both chambers of Parliament, the position of the Federal Constitution is very strong and it enjoys high esteem in German public opinion. The German Constitution (*Grundgesetz*) contains a so-called 'eternity clause' (*Ewigkeitsklausel*) in Article 79 (3) that forbids any legislature to infringe on human dignity as well as a number of state principles. Among the latter are the principles of democracy (*Demokratieprinzip*) and the social state (*Sozialstaatsprinzip*), which the plaintiffs assert are being violated. They also claim that the German federal and social state would be undermined, not least due to an overly powerful European Court of Justice. Die Linke cites the ECJ rulings "Laval", "Viking" and "Rüpert" as an illustration of their argument.

The argument of an overly powerful ECJ falls in line with a long-standing nervousness of the Federal Constitutional Court. This nervousness is reflected in three of its rulings confirming that ultimate control has to remain at the national level. In its 1974 "Solange I" ruling the Court stated that "as long as" the Community would not provide for a similar protection of fundamental rights as does the German Constitution, the Federal Constitutional Court would continue to rule on the compatibility of European legislation with fundamental rights.<sup>35</sup> Only when the Court determined that the level of protection at the European level was sufficiently robust some 12 years later did it agree not to exercise this power any longer. It did however not give it up altogether and insisted that it would refrain from its use only "as long as" it believed that the level of protection was sufficiently high.<sup>36</sup> In its 1993 'Maastricht ruling', the Court revisited to the issue of national sovereignty. While it approved of the German ratification law, it defined important red lines for national sovereignty. Among others, the Court demanded that the German Bundestag must retain functions and competences of "substantial weight",<sup>37</sup> which the plaintiffs allege is no longer the case.

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<sup>34</sup> <http://www.peter-gauweiler.de/pdf/Vertrag%20von%20Lissabon%20kurz.pdf>

<sup>35</sup> See <http://www.servat.unibe.ch/dfr/bv037271.html>

<sup>36</sup> See <http://www.servat.unibe.ch/dfr/bv073339.html>

<sup>37</sup> <http://www.servat.unibe.ch/dfr/bv089155.html>

At this moment it is difficult to predict how the Court will rule. A number of judges have the reputation of being EU critics, which has been validated in the ruling on the European Arrest Warrant.<sup>38</sup> It is difficult to imagine, however, that the Court will find the ratification law unconstitutional without leaving open doors and formulating conditions under which Germany would still be able to ratify. The ruling will probably hint at additional national safeguards (e.g. obligatory involvement of the national parliament in any kind of treaty change or activation of *passarelle* clauses) that may be needed for ratification. Given the overwhelming majorities in both chambers, amendments of this nature should not be problematic or stand in the way of Germany's eventual ratification of the Treaty of Lisbon. The main problem is thus that the current situation undermines the strategy of the German government, which wishes to isolate 'the Irish case' and put pressure on other countries, namely the Czech Republic and Poland, to pursue ratification.

#### **4. The Czech Republic: Political hurdles between the Courts, Parliamentary Chambers and the President**

*Piotr Maciej Kaczyński*

The Czech Republic is among the two last countries in the European Union whose parliaments still have not voted on the ratification of the Treaty of Lisbon. Sweden is expected to vote in late November, but the calendar in the Czech Republic is unclear. The Czech Senate decided on 24 April 2008 to refer the question of ratification to the Constitutional Court. Until the Court issues a ruling, the ratification process has been suspended in both the Senate and the Chamber of Deputies. The Senate has expressed concerns on *inter alia* 1) the interrelationship between the EU Charter of Fundamental Rights with the Czech Charter of Fundamental Rights and Basic Freedoms, 2) the transfer of competences under the new treaty and the *passarelle* clause and 3) the principle of sovereignty.

The Constitutional Court does not have a deadline for delivering its ruling on the treaty. As the hearings have already begun, the optimists expect the verdict to come as early as September. Pessimists believe that the ruling will come only at the end of the year just before the country assumes Presidency of the European Union.<sup>39</sup> This is partially linked to the fact that the Czech Constitutional Court could review the treaty as a whole and not confine itself to the Senate's questions. On the one hand, such an approach would take more time. On the other hand, if the treaty is found to be in accordance with the Czech Constitution, it could have an eventual positive impact on the political deliberations.

However, the question of whether the Treaty of Lisbon is in accordance with the Czech Constitution remains open. In the eyes of the Czech government, the treaty does not violate the Constitution, yet the country's president is of the opposite opinion.<sup>40</sup> The Court split over a 2006 case concerning the constitutionality of the European Arrest Warrant (10 in favour, 3 opposed). However, some Czech experts point out that the court has been more equally divided

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<sup>38</sup> The German law that would transpose the framework directive on the European arrest warrant into national law was ruled unconstitutional by the Federal Constitutional Court (see [http://www.bundesverfassungsgericht.de/entscheidungen/rs20050718\\_2bvr223604.html](http://www.bundesverfassungsgericht.de/entscheidungen/rs20050718_2bvr223604.html)). A second law had to be adopted by the Bundestag that leaves substantial control with German authorities and courts.

<sup>39</sup> View expressed by P. Sobotka, speaker of the Senate; see: <http://domaci.ihned.cz/c1-24256560-senat-poslal-lisabonskou-smlouvu-pred-ustavni-soud>.

<sup>40</sup> For the full text of President Klaus' opinion see <http://www.klaus.cz/klaus2/asp/clanek.asp?id=fvoc2FzYaecj>.

in more recent decisions on economic issues. Among the most ‘contagious’ questions for the Court to address will be, therefore, the sovereignty principle and, more concretely, the application of the *passarelle* clause.

In the event that the constitutional questions are addressed and the treaty faces no more legal challenges, another set of challenges will need to be confronted. Those will be primarily political. In order for the Lisbon Treaty to be ratified under the Czech system, the document needs to be accepted by 3/5 of the members of both the Chamber of Deputies and the Senate. And after their consent, the treaty needs to be signed by the President. In each of those steps, the treaty faces some difficulties.

The situation is probably the easiest in the Chamber, where the government led by ODS Prime Minister Miroslav Topolánek has a slim majority (102 members against 98 in the opposition). Since the premier controls the ODS party in the Chamber in combination with the fact that the junior coalition parties and a major opposition one (the Czech Social Democratic Party, ČSSD, with 70 MPs) also support ratification of the treaty, the chamber mathematics seem overwhelmingly positive for the Lisbon Treaty. Yet, the problem might be the stability of the government. With a slim majority in the chamber, Mr Topolánek’s government relies heavily on its coalition parties, Christian Democrats and the Green Party. A recent crisis involving a Christian Democratic vice prime minister showed how fragile the government’s majority is. Should this or a new political crisis emerge (e.g. in the course of the Green Party congress in September, a new corruption scandal or a scramble for control over the ODS, etc.), the worst case scenario for the government is to lose a majority in the Chamber, or even earlier elections might be held. In any case, the fragile Topolánek government is vulnerable to political attacks coming from the opposition or the anti-Lisbon Treaty fraction of ODS.

The situation in the Senate is more complex. Here the ODS holds a comfortable majority of 41 out of 80 senators, but Mr Topolánek has limited influence over the senators, as they are directly elected by their constituencies. The ODS senators are internally split over the treaty; President Václav Klaus’ position (who also politically originates from ODS) has more supporters in this chamber than in the Chamber of Deputies. Other parties are also internally split over the Lisbon Treaty’s ratification. In short, the Czech Senate is probably the most Euro-sceptic parliamentary chamber in the EU and getting 60% of senators to vote in favour of the treaty seems difficult today. The situation might evolve with new elections of 1/3 of the Senate scheduled for 15 November 2008. Elections also mean that the likelihood of accepting the treaty before that deadline is reduced. On the other hand, should the Constitutional Court ruling find that the treaty is compatible with the Czech Constitution, it will be more difficult for the senators to reject the Court’s opinion, although some senior senators have already indicated they would vote against the treaty regardless of the Court’s ruling.<sup>41</sup> What could further enhance the chances of ratification is to link the process with acceptance of the agreement with the US government on the radar installation in Czech Republic: the ‘Klausite’ members of the ODS are supportive of this document while the ČSSD is in opposition to this proposal.

Eventually, if and when both chambers express their views on the Lisbon Treaty, there is the ultimate obstacle for the document in the person of Václav Klaus, President of the Czech Republic. Mr Klaus is well known for his views on European integration. He also proclaimed the treaty dead after the Irish referendum. The president has at least two options: he can either sign the document or send it (again) to the Constitutional Court for examination. The latter seems more likely as first indications suggest that the Court will scrutinise the treaty only in the context of the Senate’s questions. The president has already raised a number of additional points

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<sup>41</sup> For example, Senator J. Kubera, chairman of the Committee on Legal and Constitutional Affairs.

concerning the Lisbon Treaty's relationship to the Czech Constitution, i.e. on the direct application of EU legislation and the ratification method (hinting at the need for a referendum).<sup>42</sup> It is unclear whether the Head of State has veto power: should this problem arise, another ruling would be necessary. A final option is the postponing of the signing ceremony, perhaps even indefinitely. There was already a similar case in the Czech Republic with the appointment of judges. President Klaus refused to nominate judicial candidates and was forced to do so only by the Supreme Administrative Court ruling.<sup>43</sup> The entire process took two years.

## 5. Poland: Powers of the President

### *Piotr Maciej Kaczyński*

Both chambers of the Polish parliament, the Sejm and the Senate, voted in favour of the Lisbon Treaty on the 1<sup>st</sup> and 2<sup>nd</sup> of April, respectively. The public debate, however, mainly focused on the voting behaviour of the main opposition party, the conservative Law and Justice (PiS), and the position of President Lech Kaczyński. The reasons for this focus were twofold. On the one hand, PiS and President Kaczyński were among the lead actors in the negotiations over the text when it was provisionally adopted at the June 2007 European Council meeting. On the other hand, ratification of the Lisbon Treaty by the Polish parliament requires approval by a 2/3 majority in both chambers. The government led by Prime Minister Donald Tusk and the liberal-conservative Civic Platform (PO) does not have this kind of majority; PiS therefore has a blocking minority on the ratification process of international treaties.

Eventually the President and the PiS in majority supported the act of parliament allowing the ratification of the Lisbon Treaty. In the Sejm, 384 MPs, including 89 PiS MPs, supported the document, yet all 56 MPs who voted against the treaty or abstained were PiS MPs. In the Senate there was a similar outcome.<sup>44</sup> The party was clearly divided over the issue, as large parts of its electorate are Euro-skeptic. President Kaczyński signed the Act of Parliament (which allows him to ratify), but not the Ratification Act itself. This was supposed to be a temporary solution, as Mr Kaczyński supports the contents of the Treaty of Lisbon. Domestic politics were the primary reason why the president did not ratify the treaty before the referendum in Ireland. Mr Kaczyński stated he would wait with the formal ratification until the Act of Competences (which regulates the competences in EU matters) is revised. The President and the PiS have demanded more powers for the President in EU affairs in return for support of the treaty.

As the President laid out in his televised address on 17 March 2008, the following elements of the Lisbon Treaty are of special importance:

- continuation of the Nice voting method in the Council until 2017;
- the Ioannina compromise;
- the energy solidarity clause;
- the primacy of Polish law over EU law; and
- the opt-out from the Charter on Fundamental Rights, because the Charter could lead to unpredictable ECJ rulings on:

<sup>42</sup> Full list is available here: <http://www.klaus.cz/klaus2/asp/clanek.asp?id=fvoc2FzYaecj>.

<sup>43</sup> For more information on the case see <http://www.abcp Prague.com/2008/05/26/vaclav-klaus-loses-a-trial>.

<sup>44</sup> 74 senators were in favour and 17 opposed the treaty. All those who voted against or abstained were PiS senators (see <http://www.senat.pl/k7/dok/sten/008/08sten.pdf>).



- a massive increase in claims by German citizens against Polish citizens for property restitution and
- the definition of ‘marriage’, which could eventually force Poland to introduce institutions that are incompatible with the moral convictions of the majority of Polish citizens.<sup>45</sup>

Therefore, any decision to change any of those provisions in the Lisbon Treaty should be taken jointly by the President, the Government and both chambers of the Parliament.

The situation changed after the Irish referendum. Early in July, President Kaczyński stated that signing the treaty was “pointless”.<sup>46</sup> His position evolved over the next few days when he explained his views more clearly. After meeting President Sarkozy, Mr Kaczyński stated “that Poland will not be an obstacle for the Lisbon Treaty ratification process”.<sup>47</sup> He even went to Prague to try to convince President Klaus to change his view on the treaty.

There are still two sets of questions, legal and political, that remain largely unanswered. The most important legal question is whether the President is obliged to ratify an international treaty when the required parliamentary consent has been given to him. Most lawyers agree that the President is under an obligation, yet there is no ruling on this question by the Constitutional Tribunal. Moreover, there is little political tradition in Poland to seek a solution to disputes over constitutional powers by the Tribunal. In the case of the Lisbon Treaty ratification, in the Sejm – so far – there is a proposal calling for the President to “reconsider” his position, but no plans for legal steps are envisaged at this stage.<sup>48</sup> The pressure on the President to reconsider comes also from the general public (52% of the population think the President should sign; 14% think otherwise) and from outside of the country.<sup>49</sup>

The political issues to be addressed are both domestic and external. The domestic issue is the revision of the Act of Competences – the disputing factions have not yet reached a compromise on the actual wording of the legal text. The external issue is how to approach the result of the Irish referendum. The Irish government has sent various signals over the summer that a proposal will be forthcoming at the European Union summit in December to hold another referendum in the autumn of 2009, which should be sufficient to persuade President Kaczyński to reconsider the “pointlessness” of the treaty. Mr Kaczyński’s signature on the Polish Ratification Act of the Treaty of Lisbon should therefore be expected only after the December 2008 European Council meeting.<sup>50</sup>

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<sup>45</sup> <http://www.prezydent.pl/x.node?id=1011848&eventId=16527897>. The video of his address is available at <http://pl.youtube.com/watch?v=ZQx44LYqObw>.

<sup>46</sup> 1 July 2008, [http://www.dziennik.pl/polityka/article200983/Prezydent\\_Traktat\\_jest\\_martwy\\_Nie\\_podpisze\\_go.html](http://www.dziennik.pl/polityka/article200983/Prezydent_Traktat_jest_martwy_Nie_podpisze_go.html).

<sup>47</sup> <http://www.prezydent.pl/x.node?id=1011848&eventId=17527949>.

<sup>48</sup> The draft Sejm resolution is available here: <http://orka.sejm.gov.pl/Druki6ka.nsf/wgdruku/732>.

<sup>49</sup> See <http://wiadomosci.onet.pl/1796572,,,,,1266752,8447.itemspec.html> on the poll and [http://www.ue2008.fr/PFUE/lang/fr/accueil/PFUE-07\\_2008/PFUE-10.07.2008/intervention\\_du\\_president\\_du\\_conseil\\_europeen\\_devant\\_le\\_parlement\\_europeen](http://www.ue2008.fr/PFUE/lang/fr/accueil/PFUE-07_2008/PFUE-10.07.2008/intervention_du_president_du_conseil_europeen_devant_le_parlement_europeen) for the President Sarkozy speech in the European Parliament on 10 July 2008.

<sup>50</sup> See <http://www.examiner.ie/irishexaminer/pages/story.aspx-qqqg=ireland-qqqm=EUaffairs-qqqa=ireland-qqqid=68025-qqqx=1.asp> on Irish MFA statement and <http://euobserver.com/18/26565> on the idea of fall 2009 second referendum.