

Analysis

Lisbon Treaty guarantees for Ireland

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Introduction

On 19 June 2009, EU leaders agreed on the 'guarantees' requested by the Irish government following the first 'no' vote in the Irish referendum on the Treaty of Lisbon, held in June 2008. The Irish government's intention is to hold a second referendum in light of these guarantees.

The 'guarantees' consist of:

- a) a Decision (not a declaration) of EU Heads of State and Government, relating to three specific issues: the right to life, family and education; tax issues; and defence;
- b) a Declaration of the European Council relating to workers' rights, social policy and public services; and
- c) a declaration by Ireland relating to defence issues.

There were also further statements in the European Council conclusions about the guarantees, in particular a commitment to transform the Decision into a Protocol and add it to the Treaties once the Treaty of Lisbon is ratified, upon the occasion of the next treaty concerning the accession of a new Member State. At the moment it is not known when the next accession treaty will be drawn up.

In addition, the European Council reaffirmed its prior commitment (dating to December 2008) to take a decision once the Treaty of Lisbon entered into force (if it enters into force) so that each Member State will be entitled to one Commissioner in the European Commission. (Legally it is not possible to take this decision until the Treaty of Lisbon enters into force, because there is no power under the current Treaties to alter the rules relating to the number of Commissioners).

At the moment, under the current Treaties, each Member State is entitled to one Commissioner. However, this would alter as from 1 November 2009 under the current rules so that there would be fewer Commissioners than the number of Member States. This interpretation of the current Treaty was confirmed by EU leaders when they met in December 2008. It has not yet been decided how many Commissioners there would be if the current rules are applied, and which Member States would lose their Commissioners from this November. The EU Member States would have to agree on these issues unanimously.

The following analysis looks at the legal status of the newly agreed guarantees. A later analysis will look in more detail at the substance of those guarantees.

Legal nature of the Decision of Heads of State and Government

There is only one previous example of a Decision of EU Heads of State and Government. This was a measure adopted at the Edinburgh European Council in 1992, in a similar political situation: the Danish public had voted 'no' to the Maastricht Treaty and the Decision was part of a package of measures intended to convince the Danish public to vote 'yes' in a second referendum. In the event the Danish public did vote 'yes' in a second referendum.

The 2009 Decision has been drafted in a similar way to the 1992 Decision. In fact in 1992 there were also separate declarations by the European Council and unilateral Declarations by Denmark, as in 2009 in the Irish case. (To see the text of the 1992 Decision and associated declarations, see the link to 'further documents' below).

One important difference is that there was no commitment made in 1992 to turn the Decision into a Protocol at any future point, whereas Ireland has secured this commitment in 2009. Also, the summit conclusions of 2009 confirm that the Decision is legally binding, whereas the summit conclusions of 1992 did not.

Furthermore, in 1992 Denmark obtained side agreements relating to transparency in the EU and the 'subsidiarity' principle (the idea that decisions in the EU should only be made at EU level when that adds value), whereas in 2009 Ireland has obtained a side agreement relating to the number of Commissioners.

What is the legal status of the Decision? Legal authors agreed at the time that the 1992 agreement was legally binding; that it formed a type of simplified international treaty; that it did not amend the main Treaties (since it was not adopted in the form of a Treaty amendment); and that therefore in the event of conflict between the Treaties and the Decision, the main Treaties would take precedence.

As for the 2009 Decision, there is no reason to doubt that this interpretation is equally valid again. In fact, this time around, the EU leaders have explicitly accepted that the Decision is legally binding. Furthermore they have explicitly stated that it does not amend the main Treaty. It must follow that in the event of conflict between the Treaties and the Decision, the main treaties would take precedence.

The crucial question is then whether there *is* a conflict between the Decision and the Treaties. The quick answer is that there is no conflict. This will be explained in detail in the second analysis of the guarantees.

Legal nature of a Protocol

According to the Treaties, a Protocol is as equally valid as a form of primary EU law as all the Treaty Articles. It cannot be struck down by the EU's Court of Justice. (In

any event, it should be recalled that the EU Court has no jurisdiction over defence matters, and would not have such jurisdiction under the Lisbon Treaty either).

So, if the Decision is added to the EU Treaties in the form of a Protocol, it has the same legal value as the rest of the Treaties, and cannot be struck down as being in conflict with the rest of the Treaties. In the event of a conflict between a Protocol and the rest of the Treaties, then neither automatically takes precedence.

Of course, the issue of conflict between the future Protocol and the Treaties should not arise in any case, because there would be no conflict between them.

Legal nature of the Declarations

Declarations are generally assumed not to be legally binding. This is true regardless of whether the declarations are made by all Member States, in the form of European Council (summit) conclusions, or unilateral declarations by a single Member State (such as Ireland), regardless of whether (as in this case) they are associated with that Member State's ratification of a Treaty, or are officially recognised by other Member States.

However, there is some case law of the EU courts which at least interprets the Treaties and secondary measures in light of declarations made by some or all Member States attached to amending Treaties or accession Treaties. It is not clear whether this case law would also apply to the declarations of June 2009 made in connection with the Irish guarantees.

However, the position would be clearer if these new declarations were attached to the future Protocol which will entrench the new guarantees in the primary law of the EU (there is no legal reason why they could not be). In that case, then the declarations will certainly provide a useful aid to interpretation of the Protocol and the rest of the Treaties, as in the case of declarations attached to prior amending treaties and accession treaties.

It should be noted that when the Irish public voted again on the Treaty of Nice, the only legal guarantees at that time were a declaration by the European Council and a unilateral declaration by Ireland, both adopted June 2002 and relating to defence issues.

Conclusions

The 2009 Decision is legally binding but is subordinate to the Treaties in the event of conflict. However, there does not appear to be any conflict between the Treaties and the Decision.

If the 2009 Decision is turned, as promised, into a Protocol to the Treaties, it will be as binding as the rest of the Treaties and cannot be struck down by the EU courts in the event of any conflict with the rest of the Treaties (or for any other reason).

The 2009 Declarations are not legally binding, but can probably be used as an aid to interpret the Treaties. This will certainly be the case if they are attached to a future protocol to the Treaties.

The commitment of December 2008 to adopt a decision on the number of Commissioners will be legally binding once adopted. It cannot be adopted before the Treaty of Lisbon is ratified. However, if the Treaty of Lisbon is not ratified, there must already be fewer Commissioners than the number of Member States, starting from November 2009.

Further documents:

June 2009 European Council conclusions – relating to Ireland’s guarantees

<http://www.statewatch.org/news/2009/jun/ireland-june-2009.pdf>

December 2008 European Council conclusions:

<http://www.statewatch.org/news/2009/jun/eu-council-dec-2008.pdf>

June 2002 European Council conclusions:

<http://www.statewatch.org/news/2009/jun/eu-council-june-2002.pdf>

December 1992 measures relating to Denmark

<http://www.statewatch.org/news/2009/jun/denmark-1992-decision.pdf>