

Analysis

Can the Treaty of Lisbon be denounced after it enters into force?

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Introduction

Can the Treaty of Lisbon be denounced after it enters into force? That legal question becomes particularly acute after the President of the Czech Republic signed the Treaty of Lisbon on 3 November 2009, the Czech Republic being the last Member State to ratify the Treaty. Barring some extraordinary development, the Treaty of Lisbon will enter into force on 1 December 2009.

Some have argued that in the absence of a referendum in the United Kingdom on the Treaty of Lisbon, it would be desirable for the UK to denounce the Treaty even if it has already entered into force. But would this be legally possible?

The clear answer to this legal question is that, as a matter of international law, **the Lisbon Treaty cannot be denounced after it enters into force.**

This legal issue is distinct from the essentially political questions of whether the Treaty ought to have entered into force, ought to have been subject to a British referendum before it entered into force, or ought to be denounced by the United Kingdom even after its entry into force if that were legally possible.

Legal analysis

The Treaty of Lisbon does not contain any express provision permitting it to be denounced by a Member State after it enters into force. But that is not the end of the issue, as it is still possible under international law, under some circumstances, to denounce a treaty even if there is no provision of that treaty expressly permitting denunciation.

The rules of international law dealing with this issue are set out in Article 56 of the 1969 Vienna Convention on the Law of Treaties, which the United Kingdom and a majority of other EU Member States are party to:

1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:

(a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or

(b) a right of denunciation or withdrawal may be implied by the nature of the treaty.

2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1.

Article 56(2) is a procedural rule that would delay the date of withdrawal from the Lisbon Treaty, if it were indeed possible to denounce it. The key issue of substance is addressed in Article 56(1) of the Convention.

Is there any evidence that, first of all, the parties wished to provide for denunciation or withdrawal from the Lisbon Treaty? There is nothing in the text of the Treaty, of any of the declarations to the Treaty by all or some Member States, in the documents produced when the Treaty was being negotiated, or in any public statements made by any Member States during the process of negotiation or ratification of the Treaty, that indicates any such intention.

The same can be said of all of the four prior treaties which contained major amendments to the founding EC and EU Treaties, which can each be compared in principle to the Treaty of Lisbon.

Moreover, since the Treaty of Lisbon inserts a new clause into the EU Treaty expressly permitting a Member State to withdraw *from the EU as a whole*, this suggests by '*a contrario*' reasoning that the parties to the Lisbon Treaty did not intend to create a right for Member States to denounce *the Lisbon Treaty*.

Secondly, can a right of denunciation or withdrawal be implied by the nature of the Treaty of Lisbon? On this point, the Treaty of Lisbon amends the rules relating to the EU's institutions, including changes to the appointment and/or composition and/or functioning of the European Parliament, Council, European Council, Commission and the EU courts. It furthermore alters the decision-making rules and competence which apply to the adoption of many legal acts.

If a Member State could denounce the Treaty of Lisbon without leaving the European Union, it would necessarily still be covered by the old rules governing the institutions, decision-making, and competence of the European Union, while all of the other Member States would be covered by the new rules as introduced by the Treaty of Lisbon. This is clearly impossible as a matter of practice. To give just one example, it would mean that 26 Member States were governed by rules which established a 27-

member Commission, while the United Kingdom would be governed by rules which required a Commission of fewer than 27 members.

It can therefore be concluded that:

- a) the Treaty of Lisbon contains no express provision regarding its termination, denunciation or withdrawal;
- b) there is no proof that the parties to the Treaty intended to admit the possibility of denunciation or withdrawal; and
- c) no right of denunciation or withdrawal may be implied by the nature of the treaty.

It follows that the Treaty of Lisbon cannot be denounced after it enters into force, as a matter of international law.