

## **After Lisbon - Opprobrium or Opportunity?**

### **British Institute of International and Comparative Law Rapid Response Briefing**

Tuesday 1 July 2008

The aim of this Rapid Response Briefing was to explore the effects of Ireland's recent 'no' vote on both the Treaty of Lisbon and which elements in the Treaty could be moved forward without ratification.

Chaired by **Professor Margot Horspool** of the British Institute of International and Comparative Law, proceedings were opened by **Professor Dermot Cahill** of Bangor University who gave a clear contextual analysis of the Irish vote. Outlining how and why the 'no' campaign was so effective, Professor Cahill listed myriad factors that combined to produce the result, not least of which political scare-mongering by Sinn Fein and Libertas on issues such as conscription, abortion, the tax rate and the loss of a Commissioner. Furthermore, the recent ECJ judgments in *Viking* and *Laval* contributed to the Unions' distrust of Europe, while the popular yet misguided perception was that in Lisbon, Ireland was getting a bad deal which could be renegotiated following a 'no' vote. Official information on the Treaty was scant and drafted in such a way as to be inaccessible to the majority of voters. Professor Cahill stated that should Ireland go to a second referendum, these are issues that must be addressed if the 'correct' result is to be achieved.

**Michael Connarty**, Labour MP and Chairman of the European Scrutiny Committee of the House of Commons, picked up on some of the points made by Professor Cahill. He agreed that the 'no' campaign was run by playing to people's fears and by persuading them that by voting 'no' they could keep the benefits of Europe without having to give anything back. He also gave an 'insider's' account of how the political machinery in Brussels works, providing a fascinating insight into the frantic deals that were likely to be agreed in the weeks following the Irish vote. Mr Connarty also raised the point that we will have to see whether the European Court of Justice makes reference to the rights set out in the Treaty of Lisbon in future judgments.

He suggested that there were three possible avenues for the EU to follow. The first relies on the so-called *passerelle* provision which uses a system of qualified majority voting to pass the measure – in this case the Treaty. This option would leave Ireland out of the decision-making process altogether, though would rather negate the constitutional purpose of the referendum carried out there. The second would be a Treaty revision, although after seven years of negotiating the Lisbon Treaty and a series of ratifications, this was unlikely to prove popular. Finally, and the most likely of the suggestions, would be an attempt to find consensus among the nations of Europe on a way to move forward.

**Professor Alan Dashwood** of Cambridge University then gave a thorough examination of what might be lost should the ratification process fail. Of these, the two most important were the constitutional restructuring and 'de-pillarization' of the Union, and addressing the democratic deficit by increased use of the co-decision procedure, institutional reform, and enhanced subsidiarity. With regard to the second of these two aims, the point was made that similar ends could be achieved simply with recourse to legislation. While this was not

possible with the first Pillar, a large part of the Justice and Home Affairs Pillar could be brought under Title IV of the Treaty by means of legislation, which would have the desired effect of bringing the provisions within the jurisdiction of the ECJ. In short, should the Treaty be lost, similar aims can still be met by other means.

The discussion was brought to a conclusion by **Professor Steve Peers** who, following on from the point about bringing the current third pillar within the first, added that this would also mean that the UK, Ireland and Denmark opt-out of Title IV would consequently apply to the provisions on justice and home affairs, which would not have been the case under the Treaty of Lisbon. However, he stated, the transfer of third pillar provisions requires both unanimity and ratification. Considering the lack of Irish support, the only option available would be QMV through a *passerelle* provision. However, this would lead Member States to change Community competence in this area, a task for which the *passerelle* cannot be used. Hence the Treaty simply could not be changed without the consent of Ireland.

With regard to whether the Treaty of Lisbon could be salvaged, Professor Peers stated that there existed three means by which the Treaty may be 'amended'. A declaration could be made, or a decision by Member States, or a Protocol could be added. Should this latter apply to Ireland alone, there may be no reason why other Member States would need to re-ratify the Treaty. Furthermore, the provisions in the Treaty of Lisbon specifying a cut in the number of Commissioners could be delayed or cancelled by means of an agreement made before Treaty ratification. However the number of Commissioners is to be settled, the number must, as stated in the Treaty of Nice, be less than that of the Member States. Professor Peers went on to make the interesting point that should action fail to be taken, a Commission elected with 27 Commissioners would likely to be invalid for the reason it contravenes a Treaty provision. While Professor Dashwood later disagreed on this point, it remains to be seen whether this is a valid concern, and indeed what action could be taken to counter such indecision.

The evening's debate produced a thought provoking and valuable contribution to current debate surrounding the Treaty of Lisbon, and indeed the future of the European Union. Further follow-up events are to be planned at the Institute charting the progress of the Treaty and the continuing development of the Union.