

## **Statement for the Event: “The European Union after the Irish Referendum – No Way Forward, No Way Back?”**

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### **A possible way forward**

The Irish referendum should remind us of the high risk that amendments of EU Treaties are voted down in the ratification process. One reason is the use of referenda by member states. My focus is on another reason. As long as Treaty amendments require unanimity of all member states, each single state has veto power, and this makes change rather difficult.

As a result, the EU is in a paradoxical situation: While the Treaty of Lisbon, like the proposed draft of a Constitutional Treaty elaborated by the Convention, is determined to improve transparency of decision making, includes elements of democratisation, and provides for better control of subsidiarity, it is blocked by a majority of citizens in a few member states. This does not signify a crisis of the EU, but the blockade of important reforms of the EU should lead us to search for ways out of this situation.

The failure of the Treaty of Lisbon is only the last in a series of ratification failures. How the European Council reacted to these events so far, has not helped to solve the problems. The history of the draft for a Constitutional Treaty is revealing. After a period of “reflection” following the negative referenda in France and the Netherlands, the European Council started negotiations which finally led to the Treaty of Lisbon. Some substantial and some symbolic changes as well as an accelerated ratification process were designed to save the Convention project. While negotiations in the Convention included elected representatives from the European parliament and national parliaments, the Lisbon Treaty was, as all Treaties, a result of intergovernmental negotiations. Apparently, such a shift between two quite different procedures for a decision on the same issue hardly contributes to legitimacy of Treaty amendments. It appears as an attempt to circumvent explicit votes of citizens, which is likely to cause negative reactions among citizens. I do not claim that the change from a supranational constitutional process to intergovernmental negotiations explains the outcome of the Irish referendum. From a normative point of view, it is at any rate problematic. To continue this practice by renegotiating the Treaty among governments will only further lead European integration into a dead end.

But what should be done in the current situation, if the option of a renegotiation of the Lisbon Treaty is no longer available. A number of strategies are debated, most of them going back to suggestions following earlier ratification problems:

- The first option is an opt-out of Ireland from certain provisions of the Treaty, which might have caused negative opinions among Irish citizens. However, important changes like decision rules and legislative procedures do not allow opt-outs. Moreover, nobody really can know which provisions are rejected by a majority of the people. Even if the Treaty of Lisbon would be partially applied to Ireland, this may go against the will of citizens in this country. Therefore this strategy bears significant risks.
- A second strategy would come close to the way Canada solved its constitutional problems after the failure of constitutional reforms. Based on a broad majority of parliaments in member states in favour of the new Treaty, the amendments could be implemented through “implicit change”. New rules could be applied in practice or implemented by inter-institutional or intergovernmental agreements. Such a process would be possible for competence allocation, for instance by applying the rules of enhanced cooperation if individual member states rebut EU competence. Implicit change may be acceptable for legislative procedures, too. But they are obviously no way to change decision rules in the Council or for significant institutional changes like the introduction of an EU president.

Even for those rules that could be adjusted implicitly, an explicit negative vote on a proposed amendment should prevent the Council and the EP from change. This would go against the will of a minority which according to amendment rules has the power to veto. Under the current conditions, the legitimacy of a policy of implicit change is dubious.

- A pragmatic way to save the Treaty of Lisbon seems to be to ask the Irish people again, after some time has passed. Apparently this may be the simplest and best solution of the current deadlock. However, it does only make sense under the condition that the question submitted to citizens is changed or that the conditions of a new referendum have changed. Otherwise, a referendum would not be applied in a serious way.

Even if these strategies would work, the repeated ratification failures should lead to discuss procedures of Treaty amendments. What experience with Treaty amendments since the early 1990s can tell us is that usually a clear majority of member states ratifies whereas only one or two do not. Therefore, blockades of necessary reforms could be avoided if Treaty amendments would be ratified without unanimity.

But is this possible? Given the character of the EU as a union of states, there seem to be no normative reasons that justify to ignore a veto of a single member state. Otherwise

the power of member states on their constitution could be constrained by a European Treaty. The consequence would be, for instance, that powers could be transferred from the member states to the EU against the will of the national parliaments or citizens. To allow this would imply that constitutional power shifted to the European level. Is it debatable whether the necessary societal basis exists for such a constitutional transformation in the EU, where citizens still identify more with their nation than with a community of Europeans. A deviation from unanimity rule would also require changing the existing amendment rules. To expect this to occur is far from realistic.

So, this reasoning seems to lead us into a dead end. Ratification by all member states is inevitable, as long as the Treaties are not revised in a kind of “constitutional moment”. But as we all know, it was the discussion on the constitutionalisation of Europe that has blocked the development of the EU some years ago. Treaties in general and the Treaty rules in force in particular require the consent of all partners. So there seems to be no alternative to unanimity among member states.

However, at least a de-facto and moderate deviation from the unanimity rule is possible, under the condition that member states voluntarily and by an explicit decision accept to be outvoted in the ratification process. A procedure which may allow this was proposed by the so called “Penelope” group, a group of experts who drafted a Constitutional Treaty for the then President of the Commission. The idea was to introduce a qualified majority rule by an additional treaty ratified with the substantial treaty. This procedure can be justified by the argument that actors may accept rules that reallocate decision power if they act in a “veil of ignorance”, i.e. have no information about how they are affected, or if their decisions are guided exclusively by general norms. But in reality, these conditions rarely apply among individual actors, not to speak of relations among governments of member states. Therefore, it is not likely that member states will agree ex-ante on a majority rule, in particular if those who reject an amendment are finally confronted with the alternative to leave the Union.

However, there is another way to come to majority decisions without depriving the individual member states of their right to decide on the Treaties. In contrast to the “Peneople proposal”, which requires all member states to conditionally surrender their veto without knowing the result of the ratification process, it is possible to give those member states in which ratification failed the opportunity to declare their position under the condition that they know the decision of other states. This would lead to the following procedure: If, let’s say, four fifths of the member states (which should represent a qualified majority of the EU population) have ratified a Treaty amendment, those member states that have voted negatively should organise a second decision according to their national constitutional provisions. In consideration of the majority achieved in the EU, they should decide on whether they will accept a majority decision or not. In this second decision, it is probable that the weak solidarity among European citizens can turn a negative into a positive decision. Only if the parliament or citizens in a referendum vote

negatively at this second stage, the European Council should decide on the consequences in consideration of the substance of the amendment and the outcome of the ratification process. It can come to the conclusion that the amendment process should be finished without a change, but in case that a single state blocks amendments and all other states explicitly have accepted, the Council has good reasons to require the state to decide on secession. In view of the consequences of secession, it is not very likely that a member state opts for it. A negative vote on secession in the respective member state would give the EU strong legitimacy for implicit change.

This solution requires neither to change nor to bend the Treaty law. And it avoids playing political games with parliaments or citizens of member states. What is necessary is an implicit, but legal change of the ratification rules so that a majority decision on a particular amendment is accepted by all member states.