



TWENTY-EIGHTH AMENDMENT OF THE CONSTITUTION (TREATY OF LISBON) BILL 2009

EXPLANATORY MEMORANDUM

Purpose of Bill

The Twenty-Eighth Amendment of the Constitution Bill 2009 is necessary to enable the State to ratify the *Treaty amending the Treaty on European Union and the Treaty establishing the European Community*. This Treaty is also known as the Treaty of Lisbon.

As its title suggests, the Treaty of Lisbon amends the two treaties upon which the Union is founded. The Treaty on European Union (TEU) retains its name. The Treaty establishing the European Community, on the other hand, is renamed the Treaty on the Functioning of the European Union (TFEU).

The Treaty of Lisbon aims to provide for the more effective functioning of a European Union which has grown from six to 27 Member States. The Treaty has its origins in a process of reform set in train by the Declaration by European Union Heads of State or Government in December 2001 which stressed the need for the Union to become closer to its citizens and more responsive to their needs and expectations. This process concluded in December 2007, with the signature by the 27 Member States of the Treaty of Lisbon.

To enter into force, the Treaty of Lisbon must be ratified by all EU Member States. The target date for entry into force is 1 November 2009. Ratification by Ireland requires amendment of the Constitution, which in turn requires a referendum. Ireland is the only Member State which must hold a referendum in order to be able to ratify the Treaty.

To date, all but four Member States (Germany, the Czech Republic, Poland and Ireland) have completed their ratification procedures. The national parliaments of the other three Member States have ratified the Treaty.

Among the main features of the Treaty are:

- the enhanced role for national parliaments;
- the enhanced role for the European Parliament through increasing the areas in which it will share the task of law-making with the Council of Ministers;

- the equal right for all Member States to nominate Commissioners;
- the citizens' initiative, whereby citizens of the Union will have a more direct say on European Union matters;
- the Charter of Fundamental Rights is made legally-binding on the Union's institutions and on the Member States when they are implementing European Union law;
- the provision, for the first time, of a reference to combating climate change;
- the double majority voting system in the Council of Ministers;
- the retention of unanimous voting in the Council of Ministers in policy areas such as taxation and defence; and
- the appointment of a High Representative for Foreign Affairs and Security Policy, whose responsibility will be to give the Union a clearer voice in international affairs.

Following the people's decision last June not to ratify the Treaty of Lisbon, the Government secured agreement in principle from the other EU Member States in December 2008 to a number of guarantees and assurances to meet the people's concerns. These were finalised at the June 2009 European Council.

They consist of:

- agreement that, if the Treaty of Lisbon enters into force, each Member State will retain the right to nominate a Commissioner;
- legal guarantees on the right to life, family and education, taxation and security and defence; and
- confirmation of the high importance the Union attaches to workers' rights and social policy.

On this basis, the Government has agreed to put the matter to the people later this year.

Content of Bill

The Bill provides for the deletion of part of the current subsection 3°, and the entirety of the current subsections 4°, 5°, 6°, 7°, 8°, 9°, 10° and 11° of Article 29.4 of the Constitution. The proposed deletions from subsections 3° to 8° will remove provisions from the Constitution which will become obsolete if the Treaty of Lisbon enters into force.

The provisions to be deleted from subsection 3° relate to membership of the European Coal and Steel Community, the European Economic Community, and to the Single European Act.

The current subsection 4° relates to ratification of the Treaty of Maastricht.

The current subsection 5° relates to ratification of the Treaty of Amsterdam.

The current subsection 6° permits the exercise of certain options and discretions in the Treaty of Amsterdam.

The current subsection 7° relates to ratification of the Treaty of Nice.

The current subsection 8° permits the exercise of certain options and discretions in the Treaty of Nice.

The current subsection 9° prohibits the State from adopting a decision of the European Council to establish a common defence under the Treaty of Nice. This prohibition is carried forward by the new subsection 9°.

The current subsection 10° ensures legal compatibility between the treaties and the Irish Constitution, providing constitutional cover for laws, acts and measures “necessitated by the obligations” of membership of the EU and the European Communities. This constitutional cover is carried forward in the new subsection 6°.

The current subsection 11° relates to the Luxembourg Patents Convention, which was agreed in 1989 but which did not enter into force.

The Bill inserts new subsections 4°, 5°, 6°, 7°, 8° and 9° to Article 29.4.

The new subsection 4° recalls the principles motivating Ireland’s membership of the Union, confirming Ireland’s commitment to playing a part in a European Union within which Member States work together to promote peace, shared values and the well-being of their peoples.

The new subsection 5° would allow the State to ratify the Treaty of Lisbon and to be a member of the European Union as established by it.

The new subsection 6°, modelled on the current Article 29.4.10°, which has essentially been in place since Ireland’s accession to the European Communities in 1973, would ensure legal compatibility between EU law and the Irish Constitution, and would carry forward constitutional cover for laws, acts and measures “necessitated by the obligations” of EU membership, before and after the Treaty of Lisbon enters into force.

The new subsection 7° provides for the State to avail of certain options and discretions under the Treaty, subject to the prior approval of both Houses of the Oireachtas. This subsection ensures that the prior approval of both Houses of the Oireachtas is required for the exercise of options and discretions referred to therein. The options and discretions are as follows:

- A decision to participate in “enhanced cooperation” as provided for by Article 20 TEU. Enhanced cooperation allows a group of nine or more Member States to choose to cooperate on a specific matter in areas in which the Union has non-exclusive competence. Enhanced cooperation cannot expand the Union’s competence.

— Action taken in the area of “Area of Freedom, Security and Justice” (AFSJ), covered either by Protocol No. 19 on the Schengen *acquis* (a body of rules and agreements covering the gradual abolition of checks at common borders), or Protocol No. 21, which provides for the participation of Ireland and the UK in the AFSJ only on an opt-in basis. These are as follows:

- General provisions for cooperation in the area of freedom, security and justice (Articles 67-76 TFEU);
- Policies on border checks, asylum and immigration (Articles 77-80 TFEU);
- Judicial cooperation in civil matters (Article 81 TFEU);
- Judicial cooperation in criminal matters (Articles 82-86 TFEU);
- Police cooperation (Articles 87-89 TFEU).

Subsection 7° makes specific provision for the possibility of withdrawing, in whole or in part, from the opt-out provided for in the Protocol on the Area of Freedom, Security and Justice. Any such withdrawal would require the prior approval of both Houses of the Oireachtas.

The new subsection 8° states that prior approval by the Houses of the Oireachtas would be a condition for action under a small number of other Articles. This provides for an enhanced role for the Houses of the Oireachtas in respect of the relevant issues.

Paragraphs (i) and (ii) of subsection 8° refer to a situation where the European Council, acting unanimously, seeks to change the decision-making process in certain areas defined in the Treaty. This is the so-called “passerelle” mechanism. It may be applied in the following areas, subject to the approval of both Houses of the Oireachtas:

- (a) the adoption of qualified majority voting or the ordinary legislative procedure, subject to a right of veto of each national parliament. (This provision is also known as the “general passerelle”, and is contained at Article 48(7) TEU);
- (b) the Common Foreign and Security Policy, but not to “decisions having military or defence implications” (Article 31(3) TEU);
- (c) judicial cooperation in regard to family law (Article 81(3) TFEU);
- (d) social policy (employment law) (Article 153(2) TFEU);
- (e) fiscal measures relating to the environment (Article 192(2) TFEU);
- (f) the adoption of the multiannual financial framework (Article 312(2) TFEU); and
- (g) within enhanced cooperation (Article 333 TFEU).

Paragraph (iii) of subsection 8° covers certain decisions in the Area of Freedom, Security and Justice. These are:

- The extension of the scope of judicial cooperation in aspects of criminal procedure in specific areas with a cross-border dimension which the Council has identified in advance, apart from those described in paragraphs (a)-(c) of Article 82.2 TFEU (subparagraph (d) of Article 82.2 TFEU);
- The identification of areas of particularly serious crime with a cross-border dimension beyond those identified in the second subparagraph of Article 83.1 TFEU (the third subparagraph of Article 83.1 TFEU);
- The establishment of a European Public Prosecutor (EPP) dealing with crimes affecting the Union's financial interests under Article 86.1 TFEU or expansion of the role of the EPP to include serious crime having a cross-border dimension under Article 86.4 TFEU (paragraphs 1 and 4 of Article 86 TFEU).

By enumerating these provisions in paragraph (iii), the Amendment would ensure that, in respect of these sensitive provisions, the requirement of the prior approval of both Houses of the Oireachtas would survive any possible future decision to withdraw, in whole or in part, from the opt-out provided for in the Protocol on the Area of Freedom, Security and Justice.

The prohibition on Irish participation in an EU common defence is carried forward in the new subsection 9°, following the modification by the Treaty of Lisbon of the existing EU Treaty provision, introduced by the Treaty of Nice, on the possibility of the development of an EU common defence.

*An Roinn Gnóthaí Eachtracha,
Iúil 2009*

