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## **How the Irish government lost out in negotiations on the Lisbon Treaty**

With just weeks to go before the second Irish referendum on the Lisbon Treaty, new research from the Open Europe think-tank shows that during negotiations on the original text, the Irish government objected to many of the Treaty's most important elements.

The government failed in the overwhelming majority of the amendments it tried to make to the original text during negotiations in Brussels in 2002 to 2004.

Dick Roche, the Irish government's representative to the European Convention, made 149 proposed amendments to the text, of which only 36 resulted in changes to the Treaty. 113 were unsuccessful, giving a success rate of only 24%.

Roche objected to some of the key elements of the Treaty, such as:

- **The appointment of a permanent EU President.** This will replace the current, rotating EU presidency which allows Ireland to set the agenda in Europe for six months at a time and on an equal basis with all the other member states. Roche wanted to stick to this arrangement, but was unsuccessful. The new President will be appointed by ministers acting by majority vote and with no input from national parliaments.
- **The new voting weights, which dilute Ireland's influence.** The controversial new rules will reduce Ireland's ability to block EU laws it disagrees with by 40%, according to academics. Dick Roche wanted to stick to the current, Nice Treaty arrangements, but was forced to give in.
- **The loss of the national veto in many important areas of policy.** The Lisbon Treaty will abolish the national veto in 60 areas of policy, making it far more likely that individual countries like Ireland will be outvoted and forced to accept policies they disagree with. Dick Roche opposed many of these moves, including the loss of the veto on social security policy, on EU definitions of criminal offences and sanctions, on decisions relating to the new 'foreign policy fund' and the European Defence Agency, and on the role of Europol and Eurojust, for example.
- **The creation of a European Public Prosecutor.** The Lisbon Treaty allows for the creation of a European Public Prosecutor, even though the Irish government said there was "no convincing or compelling case" for one, and that the proposed arrangements "do not respect the different legal traditions of Member States."

The government also failed in several attempts to improve democracy in the EU, for instance by proposing to let national parliaments have a say in the election of the Commission President, or by inserting an obligation on the EU institutions to act “openly” and with “good administration”.

Despite this, the Irish government claims that the Lisbon Treaty represents a good deal for Ireland.

According to Brian Cowen, "All of our major requirements have been accommodated. It is a balanced treaty... We don't need a better deal because we have got everything that we wanted in the negotiations." <sup>1</sup>

Dick Roche says: “this is a balanced treaty that represents a particularly good deal for the small and medium-sized member states.”<sup>2</sup>

He said: “The distance that are EU partners have travelled to meet the concerns of the Irish people demonstrate the remarkable solidarity that exists within the Union. It demonstrates also the respect that the Union has for this nation and for its citizens.”<sup>3</sup>

#### **Open Europe Director Lorraine Mullally said:**

“The Lisbon Treaty is a bad deal for Europe, and a bad deal for Ireland. During negotiations on the Treaty, the Irish government rightly had major concerns about the loss of powers to the EU and the dilution of democracy which the Treaty will bring. It tried on many occasions to make important changes to the text, but for the overwhelming majority, it was unsuccessful.”

“Why should Irish voters feel comfortable with this Treaty, when not so long ago, the government itself had such important reservations?”

“The Irish government didn’t want a permanent EU President. It didn’t want a change to the voting system, which will see Ireland lose 40 percent of its power to block EU laws it disagrees with. And it didn’t want to lose its national veto on some of the most sensitive areas of policy. But its objections, on these and many more, were ignored.”

Below are just 25 of the 113 amendments the Irish government wanted to see, but failed:

- 1. No permanent EU President.** The Irish government wanted to keep the existing system of rotating EU presidencies among member states, instead of the appointment of a permanent President.
- 2. No new voting system, diluting Ireland’s influence.** The government wanted to keep the existing, Nice Treaty arrangements for voting, which give Ireland far more influence over EU decisions than the arrangements proposed by Lisbon.
- 3. Giving national parliaments a say in the election of the Commission President.** The government argued that giving national parliaments a say would

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<sup>1</sup> Irish Times, 7 June 2008

<http://www.irishtimes.com/newspaper/ireland/2008/0607/1212769882179.html?via=rel>

<sup>2</sup> Irish Times, 4 April 2008 <http://www.dickroche.com/article.php?sid=1077>

<sup>3</sup> Speech, 9 July 2009 <http://www.fiannafail.ie/news/entry/speech-by-dick-roche-td-minister-for-european-affairs/>

- “bring greater transparency and openness, enhancing the President’s perceived democratic legitimacy and authority.” However, it was ignored.
4. **No obligation to move towards a common EU defence**
  5. **No obligation to support the EU’s foreign policy**
  6. **A watered down defence ‘solidarity clause’.** The government wanted to remove the obligation to provide military assistance to other member states, and to ensure any deployment of military capabilities be confined to EU territory.
  7. **A right to veto decisions on the European Defence Agency**
  8. **A right to veto decisions on EU foreign policy budget**
  9. **EU Foreign Minister should not lead meetings of national foreign ministers.** The government said that “on grounds of democratic accountability” the EU Foreign minister should not chair the Council, as he or she will be accountable to it.
  10. **More power for Ireland over important EU foreign policy decisions.** The government wanted to make it easier for member states to be able to stop foreign policy decisions being taken by majority vote.
  11. **No European Public Prosecutor.** The government said there was “No convincing or compelling case” for a European Public Prosecutor, and that the Lisbon arrangements “do not respect the different legal traditions of Member States”.
  12. **No new powers for the EU to define criminal offences and sanctions, no majority voting.** Dick Roche said that “given the sensitivity of the issues involved”, member states should retain their veto over EU decisions defining criminal offences and sanctions. He also wanted to prevent the EU gaining powers over “the prosecution, trial and punishment” of offenders.
  13. **No EU harmonisation of criminal procedure, no majority voting.** Dick Roche wanted to make it clear that the EU would not be able to harmonise aspects of member states’ criminal procedure, and said there should be no majority voting for the fundamental aspects of judicial cooperation “given the sensitivity of the matters involved”.
  14. **No powers for Eurojust to prosecute Irish citizens, no majority voting.** The Irish government said “Eurojust should not have a direct role in prosecutions”, and that the scope of action and tasks of Eurojust should be decided by unanimity.
  15. **No FBI-style powers for Europol, no majority voting.** The Irish government wanted to stop Europol from being able to carry out the “organisation and implementation” of “investigative action”, and said decisions on Europol’s operation, field of action and tasks should be decided by unanimity.
  16. **No new EU powers for common criminal investigation techniques.** The government argued the EU should only be able to establish measures to “exchange best practice” in investigative techniques in relation to serious and organised crime.
  17. **Less EU power in civil law.** Dick Roche argued that EU activity in civil law should only be allowed if it is necessary to ensure the proper functioning of the internal market, but the Lisbon Treaty goes much further.
  18. **An obligation on the EU to respect the “sovereignty” of member states**
  19. **An obligation on the EU to respect its “historic and legal diversity”**
  20. **An obligation on EU institutions to act “openly”**
  21. **An obligation to “ensure good financial management” of the EU budget**
  22. **No loss of Ireland’s veto in social security policy.** Dick Roche argued “It is very important to remember that Member States have different social policies

and different systems of social security... I therefore... cannot accept a move to the ordinary legislative procedure in these areas.”

**23. No single representation for eurozone countries in international organisations.** Dick Roche argued that “At the moment, the most that is acceptable is for member states to endeavour to coordinate actions.”

**24. No exclusive competence for the EU to agree international agreements.** Dick Roche said this Treaty provision “purports to summarise the jurisprudence of the Court of Justice regarding the implied external competences of the European Community and to extend it across the range of the Union’s competences. This is not acceptable.”

**25. No new powers over Foreign Direct Investment.** The government said this proposal should be deleted.

### **The proposed amendments in detail**

Dick Roche made 149 proposed amendments to the text, of which only 36 resulted in changes to the Treaty. 113 were unsuccessful, giving a success rate of only 24%.<sup>4</sup>

Below are the details behind some of the most important failed amendments – the top 25 changes the Irish government wanted to see in the Treaty, but failed.

#### **1. No permanent EU President**

The Irish government was opposed to the introduction of a permanent EU president, arguing instead for a continuation of the status quo, whereby EU member states take it in turns to be President of the EU for six months at a time. This system ensures that the smaller member states like Ireland get to set the agenda in Europe on an equal basis with the larger countries.

In a proposed amendment to the text of what became the Lisbon Treaty, Dick Roche said:

*“The European Council should be chaired by the Head of State or Government of the Member State holding the Presidency of the Council of Ministers. This should be included in Article 16 proper.”*

*As noted in relation to Article 17, some have argued that the current system, under which the Presidency is rotated on the basis of equality, will not be efficient in a Union of 25 or more Member States. We do not believe that the case has yet been made in a compelling way.”<sup>5</sup>*

He reiterated this in separate proposed amendment.<sup>6</sup>

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<sup>4</sup> This is a very conservative estimate. For some of the suggested amendments, it was not entirely clear whether or not the proposed changes were successful (the numbering of the articles has since changed, plus the fact that it was not always clear if the Government objected to the provision itself, or just to its position in the Treaty). Where there was any uncertainty, the government was given the benefit of the doubt and it was assumed to have been successful in its proposed amendment.

<sup>5</sup> See <http://european-convention.eu.int/Docs/Treaty/pdf/41699/16bisRoche%20EN.pdf>

<sup>6</sup> See <http://european-convention.eu.int/Docs/Treaty/pdf/416/16Roche%20EN.pdf>

However, his suggestion was ignored, and the Lisbon Treaty allows for the appointment of a permanent EU President, who will be appointed by the Heads of State of Government by a qualified majority vote and without consultation with national parliaments for a period of two and a half years at a time.

The post is likely to go to ex-presidents and prime ministers, such as former British Prime Minister Tony Blair, whose name has repeatedly cropped up in speculation about who might become the first EU President. The role of the President is not yet clear, and the detail of the post, including his or her salary and perks, will not be decided until after the Treaty has already been ratified. However, it is thought he or she will earn a salary equivalent to the President of the European Commission, who is on roughly the same basic salary as the democratically elected President of the United States.<sup>7</sup>

## **2. No new voting system, diluting Ireland's influence**

Ireland will be one of the big losers from the Lisbon Treaty's sweeping changes to the arrangements for voting in the Council of Ministers.

According to academics at the London School of Economics, Ireland stands to lose more than 40 percent of its power to block EU decisions it disagrees with.<sup>8</sup>

During negotiations on the Treaty, the Irish government opposed a change in the system in the European Council, and wanted instead to stick to the arrangements agreed with the Nice Treaty.

In a suggested amendment, Dick Roche and his colleagues said:

*“Arrangements for QMV, regarding the voting weights of Member States and the necessary thresholds of support, were, with considerable difficulty, agreed at Nice as part of a package which includes also arrangements for the Commission and for the European Parliament. These weighted arrangements strike an appropriate balance between demographic considerations and the interests of Member States. They have yet to be tested and should continue to apply. Because of their detail, they should be set out in a Part Two of the Treaty. It should be open to the European Council to decide unanimously to amend these arrangements to make appropriate provision for future enlargements of the Union.”<sup>9</sup>*

They also reiterated this in a separate amendment.<sup>10</sup>

## **3. Giving national parliaments a say in the election of Commission President**

Under the Lisbon Treaty, the President of the European Commission will be nominated by the European Council on the basis of QMV, and he or she will then have to win the approval of a simple majority of the European Parliament.

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<sup>7</sup> See <http://www.openeurope.org.uk/media-centre/pressrelease.aspx?pressreleaseid=102>

<sup>8</sup> See Felsenthal and Machover, June 2004: <http://eprints.lse.ac.uk/431/1/0406IGC.pdf>

<sup>9</sup> See <http://european-convention.eu.int/Docs/Treaty/pdf/417999/17terRoche%20EN.pdf>

<sup>10</sup> See <http://european-convention.eu.int/Docs/Treaty/pdf/32999/Art32bRocheEN.pdf>

The Irish government was against this and wanted to allow instead for the participation of national parliaments in the nomination of the Commission President.

Proposing to delete what became Article 17.7 TEU of the Lisbon Treaty, Dick Roche wanted to replace the text so that that the President of the Commission would be elected by the European Parliament and the national parliaments of member states, with the national parliaments collectively having the same number of votes as the European Parliament.

Dick Roche and his colleagues argued that:

*“Election of the President of the Commission in this way will help to bring greater transparency and openness, enhancing the President’s perceived democratic legitimacy and authority. This will tend to strengthen both the President and the Commission in the fulfilment of their roles. The process of election – a campaign period during which candidates can meet with national parliaments and with the European Parliament, and the casting of votes on a single day – offers a unique opportunity to create a greater sense of political interest and to bring the representatives of the peoples of Europe together with a common purpose and would create a sense of occasion. It would also allow candidates for the post to hear at first hand the concerns and aspirations of the people of Europe.”<sup>11</sup>*

In a separate attempt to change the arrangements, Dick Roche and his colleagues reiterated that:

*“While the European Parliament should have a key role, national Parliaments should also be involved.”<sup>12</sup>*

However, the idea was ignored.

#### **4. No obligation to move towards a common defence**

Article 42 TEU of the Lisbon Treaty states for the first time that the progressive framing of a common Union defence policy “*will* lead to a common defence, *when*” the European Council so decides, In the current treaties, the language used is that a common defence “*might*” lead to a common defence.

During negotiations on the Treaty, the Irish government wanted to change this language so that it read “*might* lead to a common defence, *should*” the European Council so decide.<sup>13</sup>

However, its attempt was unsuccessful.

#### **5. No obligation to support the EU’s foreign policy**

Article 24 TEU of the Lisbon Treaty states that the member states “shall support the Union’s external and security policy actively and unreservedly in a spirit of loyalty and

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<sup>11</sup> See <http://european-convention.eu.int/docs/treaty/pdf/41899/18bisRoche%20EN.pdf>

<sup>12</sup> See <http://european-convention.eu.int/Docs/Treaty/pdf/415/15Roche%20EN.pdf>

<sup>13</sup> See <http://european-convention.eu.int/Docs/Treaty/pdf/30/30Roche%20EN.pdf>

mutual solidarity and shall comply with the Union's actions in this area." It goes on to say that member states "shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations."

The Irish government wanted to delete this clause. It also wanted to insert a sentence which read "The exercise of competence in this area by the Union shall not result in Member States being prevented from exercising their competence."<sup>14</sup>

Dick Roche argued,

*"Respect for the respective constitutional requirements of Member States in this area is an important principle (currently in Article 17.1 TEU) and merits inclusion in Part One of the Treaty."*<sup>15</sup>

He added: "It is also necessary to clarify that Member States retain competence in this area".

However, all these amendments were ignored.

## **6. A watered down defence solidarity clause**

The Lisbon Treaty introduces an obligation on member states to "act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster." The article states that "The Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States." (Article 222 TFEU).

During negotiations on the Treaty, the Irish government wanted to make some important changes to the wording of this article.<sup>16</sup>

Dick Roche proposed inserting the line: "the other Member States shall provide such assistance as they each deem necessary and as would be consistent with international law." This would allow Ireland to respond using assistance other than military.

He also wanted to clarify that "such assistance *may* involve the deployment of all the instruments at the Union's deployment", instead of the more certain language that the "Union *shall* mobilise", as above.

Thirdly, the Irish government also wanted to insert a line which said: "Deployment of military capabilities for the purposes set out in this Article shall be limited to the territory of the Union."

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<sup>14</sup> See <http://european-convention.eu.int/Docs/Treaty/pdf/14/Art14Roche.pdf>

<sup>15</sup> Article 17 TEU of the current treaties states that "The policy of the Union in accordance with this Article shall not prejudice the specific character of the security and defence policy of certain Member States and shall respect the obligations of certain Member States, which see their common defence realised in the North Atlantic Treaty Organisation (NATO), under the North Atlantic Treaty and be compatible with the common security and defence policy established within that framework." See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:321E:0001:0331:EN:pdf>

<sup>16</sup> See <http://european-convention.eu.int/Docs/Treaty/pdf/9901/XRoche%20EN.pdf>

Dick Roche argued:

*“The deployment of military capabilities under the terms of this provision should be confined to the territory of the Union.”*

However, none of these suggestions made it to the final text.

## **7. A right to veto decisions on the European Defence Agency**

The Lisbon Treaty allows for decisions on the statute, seat and operational rules of the new European Defence Agency to be decided by qualified majority voting. The Irish government twice tried to amend this so that such decisions would be made using unanimity, but failed. Dick Roche argued: “The Agency should be created and operate on the basis of unanimity.”<sup>17</sup>

## **8. A right to veto decisions on EU foreign policy budget**

Article 41 TEU of the Lisbon Treaty creates a “start up fund” for foreign policy operations. This new fund is seen by many as the first step towards a common defence budget for the EU. Everything about the fund is to be decided by QMV – including the amounts paid by member states.

The Irish government twice demanded that decisions about the fund be taken by unanimity. However, it was ignored.<sup>18</sup>

## **9. EU Foreign Minister should not lead meetings of national foreign ministers**

Dick Roche made more than one attempt to stop the new EU Foreign Minister, a post to be created by the Treaty, from being able to chair the Foreign Affairs Council, as proposed.

He said, “on grounds of democratic accountability, the Union Minister for Foreign Affairs should not chair the Foreign Affairs Council to which he or she will be held to account.”<sup>19</sup> However, he failed.

## **10. More power for Ireland over important EU foreign policy decisions**

Article 31 TEU of the Lisbon Treaty states that the Council may act by qualified majority voting in several areas relating to foreign policy, including when deciding on a proposal from the EU Foreign Minister. In one proposed amendment on foreign policy, Dick Roche said he had “strong views” on where unanimity should continue to apply.<sup>20</sup>

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<sup>17</sup> See <http://european-convention.eu.int/Docs/Treaty/pdf/864/Art%20III%20207%20Roche%20EN.pdf> and <http://european-convention.eu.int/Docs/Treaty/pdf/864/Art19Roche%20EN.pdf>

<sup>18</sup> See <http://european-convention.eu.int/Docs/Treaty/pdf/865/Art%20III%20210%20Roche%20EN.pdf> and <http://european-convention.eu.int/Docs/Treaty/pdf/865/Art22Roche%20EN.pdf>

<sup>19</sup> See <http://european-convention.eu.int/Docs/Treaty/pdf/863/Art%20III%20192%20Roche%20EN.pdf> and <http://european-convention.eu.int/Docs/Treaty/pdf/863/Art5Roche%20EN.pdf>

<sup>20</sup> See <http://european-convention.eu.int/Docs/Treaty/pdf/872/Art33Roche%20EN.pdf>

The text also states that “If a member of the Council declares that, for **vital** and stated reasons of national policy, it intends to oppose the adoption of a decision to be taken by qualified majority, a vote shall not be taken.” The Irish government wanted to change the word “vital” to “important”, in order to lower the threshold for stopping such a decision being taken, in keeping with the wording in the current treaties.<sup>21</sup>

However, it failed.

## **11. No European Public Prosecutor**

Dick Roche was also firmly opposed to the clause in the Lisbon Treaty (Article 86 TFEU) which allows the EU to establish a European Public Prosecutor’s Office to combat crimes affecting the financial interests of the EU.

Proposing that the clause be deleted, he said:

*“It is quite clear that there was no consensus in this matter at the Convention and I do not support inclusion of this Article in the new Constitutional Treaty.”<sup>22</sup>*

In a separate attempt to delete the article, he said:

*“No convincing or compelling case has been made for the creation of a European Public Prosecutor. There was no consensus on the issue either in the relevant Working Group or in the Plenary debate in December. The proposed arrangements do not respect the different legal traditions of Member States. The Article should, therefore, be deleted.”<sup>23</sup>*

However, his proposed amendments were ignored. The Lisbon Treaty allows the EU to establish the EPP and also to extend its powers to include “serious crime having a cross-border dimension” – something Dick Roche was clearly against.

As confirmed by a confidential strategy paper drawn up under the Slovenian EU Presidency in 2008, the rules governing the European Public Prosecutor and its functions are among a long list of the ‘unanswered questions’ about the Lisbon Treaty and how it will actually be implemented once it has been ratified. This means it is difficult to predict how the EPP will look and what its powers will be.

Furthermore, the Lisbon Treaty goes even further than the original EU Constitution, and allows the EPP to be set up by a group of member states who wish to go ahead with it under the ‘enhanced cooperation’, even if Ireland objects. Originally, the Constitution said that it could only be set up by unanimous agreement, and Ireland had a veto.<sup>24</sup>

## **12. No new powers for the EU to define criminal offences and sanctions, no majority voting**

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<sup>21</sup> See <http://european-convention.eu.int/Docs/Treaty/pdf/863/Art%20III%20196%20Roche%20EN.pdf>

<sup>22</sup> See <http://european-convention.eu.int/Docs/Treaty/pdf/850/Art%20III%20170%20Roche%20EN.pdf>

<sup>23</sup> See <http://european-convention.eu.int/Docs/Treaty/pdf/850/20Roche.PDF>

<sup>24</sup> See Open Europe’s side-by-side comparison of the Lisbon Treaty and the original EU Constitution: <http://www.openeurope.org.uk/research/comparative.pdf>

One of the more controversial aspects of the Lisbon Treaty is the new provision for the EU to adopt laws establishing minimum rules concerning both the definition of criminal offences and sanctions for a whole host of crimes including terrorism, human trafficking, computer crime, and the vaguely-termed “organised crime” and “corruption”. (Article 83 TFEU) These are likely to enable the EU to rule over a wide variety of offences in the future.

The list of offences is also designed to be expanded over time, as a clause allows EU leaders to add to the list of crimes on which the EU can legislate.

The European Commission has already begun to propose EU-wide minimum standards. When he was EU Justice and Home Affairs Commissioner in January 2005, Franco Frattini called for minimum prison sentences of five years for gang members and a minimum of ten years for gang leaders.

During negotiations on the Treaty, the Irish Government raised several serious objections to these provisions. Dick Roche wanted to delete the reference to the “definition of incriminations and sanctions”, and he also said these decisions must be taken unanimously, not by majority voting, as proposed.

He said:

*“Given the sensitivity of the issues involved, this is an area where unanimity should be the general decision-making procedure. The Article should make it explicitly clear that mutual recognition is the principle underpinning the Union’s work in this area. The existing language of Article 31 TEU should be used.”<sup>25</sup>*

Dick Roche also wanted to delete the language in the Treaty which will allow the EU to add to the list of crimes covered by the article in future, but failed.

In yet another suggested amendment, he tried to insert a sentence in the Treaty which read:

*“The prosecution, trial and punishment of offenders is a matter within the exclusive competence of the Member States.”<sup>26</sup>*

Roche explained that the proposed change was “intended to reflect the fact that these fundamental aspects of criminal justice remain the responsibility of the Member States.”

However, all these important objections were ignored.

### **13. No EU harmonisation of criminal procedure, no majority voting**

Under the Lisbon Treaty, the EU would get new powers to harmonise civil and criminal laws and legal procedures. This could include questions such as the admissibility of evidence and the rights of criminal suspects in Court, and decisions would be taken by qualified majority voting. (Article 82 TFEU)

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<sup>25</sup> See <http://european-convention.eu.int/Docs/Treaty/pdf/850/17Roche.PDF>

<sup>26</sup> See <http://european-convention.eu.int/Docs/Treaty/pdf/31/Art31Roche.PDF>

One problem with this proposal is that it would no longer be possible for voters in individual member states to alter the balance of the legal system between the rights of victims and suspects' rights. For example, if EU rules were to set the balance in such a way as to favour protection for suspects, voters in any one member state would not be able to vote for a policy which would make it easier to secure convictions. The rules could only be changed subsequently if the majority of other EU members agreed.

During negotiations on the Treaty, the Irish government tried to make several changes to this article. In particular, it objected to such decisions being made by majority voting. In an attempt to amend the text, Dick Roche told the European Convention:

*“Because of the particularly sensitive nature of this area, unanimity is the appropriate decisionmaking procedure.”<sup>27</sup>*

In a separate proposed amendment, he reiterated:

*“In our view, unanimity is the appropriate decision-making procedure for the more fundamental aspects of judicial cooperation.”<sup>28</sup>*

In yet another attempt to change it, he said:

*“Given the sensitivity of the matters involved, and the diversity of Member States’ legal systems, unanimity is the appropriate decision-making procedure.”<sup>29</sup>*

Roche also objected to the power given to the EU to establish minimum rules for the mutual admissibility of evidence and the rights of individuals in criminal procedure. Concerned that the Treaty’s language suggested the EU is attempting to harmonise aspects of the criminal procedure of member states, he said:

*“The phrase ‘minimum standards’ is more appropriate than ‘minimum rules’ in the areas covered by paragraph 2 (to make it clear that the article is not attempting to harmonise aspects of the criminal procedure of Member States, but rather to establish the minimum necessary to facilitate mutual recognition).”<sup>30</sup>*

He also wanted to insert a phrase stating that the adoption of standards on the admissibility of evidence and the rights of individuals in criminal procedure “shall not prevent Member States from requiring higher standards.”

He said: “Member States must be free to require higher standards where they wish to do so.”

However, none of these suggestions made it into the final text.

#### **14. No powers for Eurojust to prosecute Irish citizens, no majority voting**

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<sup>27</sup> See <http://european-convention.eu.int/Docs/Treaty/pdf/850/16Roche.PDF>

<sup>28</sup> See <http://european-convention.eu.int/Docs/Treaty/pdf/850/15Roche.PDF>

<sup>29</sup> See <http://european-convention.eu.int/Docs/Treaty/pdf/850/Art%20III%20166%20Roche%20EN.pdf>

<sup>30</sup> See <http://european-convention.eu.int/Docs/Treaty/pdf/850/Art%20III%20166%20Roche%20EN.pdf>

The Lisbon Treaty gives the European prosecutors' network 'Eurojust' sweeping new powers. Article 85 TFEU states that the tasks of Eurojust, to be defined by qualified majority voting in the EU Council, "may include the initiation of criminal investigations".

This means Eurojust would gain the power to initiate investigations of Irish citizens, despite the fact that the Irish Government opposed this power during the negotiations on the Treaty.

In an attempt to delete this language from the Treaty, Dick Roche told the European Convention that "*Eurojust should not have a direct role in prosecutions*", arguing that Eurojust's role should be limited to "coordination".<sup>31</sup>

Dick Roche also objected to the introduction of majority voting for determining the tasks and scope of action of Eurojust, saying such decisions should instead be taken on the basis of unanimity in the Council. The new powers and operation of Eurojust remain to be decided, only after the Treaty has already been ratified.

He said:

*"While the legislative procedure may be used to determine Eurojust's structure and procedure, unanimity in the Council is the appropriate decision-making procedure in determining its tasks and scope of action."*<sup>32</sup>

He reiterated this in another suggested amendment.<sup>33</sup> However, these important suggestions were ignored.

## **15. No FBI-style powers for Europol, and no majority voting**

Under the Lisbon Treaty, the role and powers of Europol, the European Law Enforcement Organisation, would be extended to include "organisation and implementation of investigative and operational action". (Article 88 TFEU). This is despite the fact that Ireland opposed this controversial extension of powers during the negotiations.

Previous treaties have gradually expanded the role of Europol but its scope has remained limited to coordination of the work of national law enforcement authorities.

The new power to directly implement operational action could mean that Europol would be able to take part in police raids alongside national police, giving it a similar sort of role to America's FBI.

Europol has already acquired major new powers and a much enlarged budget since the Amsterdam Treaty. It now has a staff of 650. Europol has major problems which have not yet been addressed. In 2001, its offices were raided by Dutch police over fraud allegations. Europol has a very poor record on transparency, refusing to share information with the European Parliament and classifying a great deal of its material as

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<sup>31</sup> See <http://european-convention.eu.int/Docs/Treaty/pdf/850/Art%20III%20169%20Roche%20EN.pdf>

<sup>32</sup> See <http://european-convention.eu.int/Docs/Treaty/pdf/850/Art%20III%20169%20Roche%20EN.pdf>

<sup>33</sup> See <http://european-convention.eu.int/Docs/Treaty/pdf/850/19Roche.PDF>

confidential for the use of Europol officers only. Bodies appointed in order to supervise it formally have complained that they are being denied information.

Officers of Europol are not compelled to testify in Court, unlike members of national police forces, and are immune from prosecution for acts performed in the course of duties under the Europol convention.

The Irish government wanted to make several changes to the Lisbon Treaty's provisions on Europol.

In particular, Dick Roche wanted to stop Europol from being able to carry out the "organisation and implementation" of "investigative action", and wanted to make it clearer that any tasks would be carried out "**by** the Member States' competent authorities", rather than merely "with" them. He also wanted any decisions on Europol's operation, field of action and tasks to be decided by unanimity in the Council, and not be majority voting.

Dick Roche explained:

*"Europol acts in support of the services of Member States. While the legislative procedure may be used to determine Europol's structure, unanimity in the Council is the appropriate decision-making procedure for determining its tasks and field of action ."*<sup>34</sup>

He made the argument again in a separate amendment, where he also called for the insertion of the sentence to say: "Europol shall present an annual report on its activities to the European Parliament and National Parliaments."<sup>35</sup>

Roche argued: "There should be a positive requirement for Europol to send an annual account of its activities to the European Parliament and National Parliaments where it can be debated."

However, none of these changes were taken up.

## **16. No new EU powers for common criminal investigative techniques**

Article 87 TFEU of the Lisbon Treaty will allow the EU to decide on "common investigative techniques in relation to the detection of serious forms of organised crime". Dick Roche wanted to change this so that it would instead be able only to establish measures to "exchange best practice in investigative techniques."

Dick Roche argued:

*"The wording should make it clear that there is not intention to stipulate the manner in which Member States' police services investigate serious crime."*<sup>36</sup>

However, he was ignored.

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<sup>34</sup> See <http://european-convention.eu.int/Docs/Treaty/pdf/851/Art%20III%20172%20Roche%20EN.pdf>

<sup>35</sup> See <http://european-convention.eu.int/Docs/Treaty/pdf/851/22Roche.PDF>

<sup>36</sup> See <http://european-convention.eu.int/Docs/Treaty/pdf/851/Art%20III%20171%20Roche%20EN.pdf>

## 17. Less EU power in civil law

Article 81 TFEU states that “The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.”

The Irish government wanted to significantly reduce the scope of this article so that it referred only to judicial cooperation only “Insofar as necessary for the proper functioning of the internal market.”<sup>37</sup>

In separate suggested amendments, Dick Roche twice explained:

*“The Article should continue to situate the Union’s activities in the civil law area in the need to ensure the proper functioning of the internal market.”*

However, he was ignored.

## 18. An obligation on the EU to respect the “sovereignty” of the member states

Article 4 TEU of the Lisbon Treaty begins saying: “The Union shall respect the equality of Member States before the Treaties as well as their national identities...”

The Irish government wanted to insert the word ‘sovereignty’, in order “To clarify that national identity includes the sovereignty of Member States.”<sup>38</sup> However, it failed.

## 19. An obligation on the EU to respect its “historic and legal diversity”

Article 3 TEU of the Lisbon Treaty says the EU will respect its “rich cultural and linguistic diversity”, but the Irish government wanted to insert the words “historic and legal diversity”.

Dick Roche argued: “It is important in this area to recognise that diversity has a number of additional dimensions which are relevant here”<sup>39</sup>, but no reference to the EU respecting “historic” of “legal” diversity in the EU made it into the Treaty.

## 20. An obligation on EU institutions to act “openly”

The Irish government wanted to insert a paragraph into the Treaty which would have obliged the EU institutions to act “as openly as possible” and with “good administration”.

The proposed article read:

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<sup>37</sup> See <http://european-convention.eu.int/Docs/Treaty/pdf/849/Art%20III%20165%20Roche%20EN.pdf> and <http://european-convention.eu.int/Docs/Treaty/pdf/849/14Roche.PDF>

<sup>38</sup> See <http://european-convention.eu.int/Docs/Treaty/pdf/1/Art1-2Roche.pdf>

<sup>39</sup> See <http://european-convention.eu.int/Docs/Treaty/pdf/3/Art3-3Roche.pdf>

*“Each institution shall act as openly as possible and in accordance with fundamental principles of good administration the application of which shall be monitored by the Ombudsman.”<sup>40</sup>*

Dick Roche and his colleagues told the Convention:

*“The principles of openness and good administration should be placed in this Article with appropriate reference to the role of the Ombudsman. Detailed provision can be included elsewhere in the Treaty.”*

However, they were ignored, and no such obligation exists in the Treaty.

## **21. Obligation to “ensure good financial management” of EU budget**

The Irish government wanted to add a sentence to the Lisbon Treaty which said the European Court of Auditors “shall ensure good financial management” of the EU’s revenue and expenditure.<sup>41</sup>

However, it was ignored, and the relevant article merely states that the Court of Auditors “shall carry out the Union’s audit”. (Article 285 TFEU)

## **22. No loss of Ireland’s veto in social security policy**

The Lisbon Treaty will allow the EU to adopt laws in the field of social security to “provide freedom of movement for workers”. (Article 48 TFEU).

It authorises the EU to

*“make arrangements to secure for employed and self-employed migrant workers and their dependants: (a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the different countries;(b) payment of benefits to persons resident in the territories of Member States.”*

These decisions will be taken by majority vote, which the Irish government strongly opposed, insisting that governments must retain their national veto. Dick Roche even said he could not accept such a move.

He said:

*“It is very important to remember that Member States have different social policies and different systems of social security. Decisions in this area must recognise the different social, cultural and economic backgrounds in, and requirements of, the different Member States. I believe that unanimity in Council in the best way of ensuring recognition of this diversity. I therefore continue to favour the existing Treaty situation (unanimity in Council with co-decision) and cannot accept a move to the ordinary legislative procedure in these areas.”<sup>42</sup>*

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<sup>40</sup> See <http://european-convention.eu.int/Docs/Treaty/pdf/414/14Roche%20EN.pdf>

<sup>41</sup> See <http://european-convention.eu.int/Docs/Treaty/pdf/422/22Roche%20EN.pdf>

<sup>42</sup> See <http://european-convention.eu.int/Docs/Treaty/pdf/814/Art%20III%2018%20Roche%20EN.pdf>

Dick Roche made two attempts to get this changed.<sup>43</sup> However, unanimity was not reinserted back into the text.

The Treaty does provide for a so-called ‘emergency brake’ in this article, whereby a member of the Council may request that the matter be referred to the European Council if it feels a proposal “would affect important aspects of its social security system”.

However, this is not the same as keeping the veto.

This is because, elsewhere in the Treaty, the Court of Justice will be given new powers to ensure the equality of social security entitlements of EU migrants (and third-country migrants) – so the ‘emergency brake’ will effectively be directly circumvented by a judicial requirement.<sup>44</sup>

If the Irish government had wanted an ‘emergency brake’, they would have asked for one, instead of making a clear argument in favour of retaining unanimity.

### **23. No single representation for eurozone countries in international organisations**

Article 138 TFEU (paragraph 2 and 3) says that members of the eurozone “may adopt appropriate measures to ensure unified representation within the international financial institutions and conferences.”

Proposing to delete the paragraphs, Dick Roche told the European Convention:

*“I am opposed to paragraphs 2 and 3 of this article. Its extent is unclear and it is not obvious what international fora it does and doesn’t encompass. Single representation of the euro area in international institutions can, at best, be a long-term objective and there are a large number of practical issues which would have to be resolved first. At the moment, the most that is acceptable is for member States to endeavour to co-ordinate actions.”<sup>45</sup>*

However, both paragraphs remain.

### **24. No exclusive competence for the EU to agree international agreements**

The Lisbon Treaty will give the EU exclusive competence to agree an international agreement “when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or insofar as its conclusion may affect common rules or alter their scope.” (Article 3.2 TFEU)

During negotiations on the text, the Irish government said the article was unacceptable and proposed that it be deleted.

Dick Roche said the article:

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<sup>43</sup> See <http://european-convention.eu.int/Docs/Treaty/pdf/816/Art%20III%2018%20Roche%20EN.pdf>

<sup>44</sup> See page 73 here for more details: <http://www.openeurope.org.uk/research/guide.pdf>

<sup>45</sup> See <http://european-convention.eu.int/Docs/Treaty/pdf/832/Art%20III%2085c%20Roche%20EN.pdf>

*“purports to summarise the jurisprudence of the Court of Justice regarding the implied external competences of the European Community and to extend it across the range of the Union’s competences. This is not acceptable and the paragraph, if retained, will have to be amended to reflect the existing situation, whereby international agreements concluded under Articles 24 and 38 TEU and mandated by Member States do not imply any transfer of competences from the Member States to the Union. The wording of any such amendment will have to be carefully considered by legal experts.”<sup>46</sup>*

However, he was ignored, and the Article appears unamended in the Lisbon Treaty.

## **25. No new EU powers over Foreign Direct Investment**

Article 207 TFEU of the Lisbon Treaty brings foreign direct investment under the EU’s trade policy for the first time.

The Irish government twice proposed to remove the reference to foreign direct investment from the article.

Dick Roche said:

*“The purpose behind the inclusion of foreign direct investment at 24.1 is unclear and should, therefore, be deleted.”<sup>47</sup>*

However, it failed.

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<sup>46</sup> See <http://european-convention.eu.int/Docs/Treaty/pdf/11/Art11-2Roche.pdf>

<sup>47</sup> See <http://european-convention.eu.int/Docs/Treaty/pdf/866/Art24Roche%20EN.pdf> See also <http://european-convention.eu.int/Docs/Treaty/pdf/866/Art%20III%20212%20Roche%20EN.pdf>