Executive summary

This is an explanation of the agreement reached between the Heads of State or Government of the 27 EU Member States on 19 June 2009 in Brussels, informally called ‘the Guarantees’. They consist of both legally binding agreements and political commitments.

Following the Irish ‘No’ vote in the referendum of 12 June 2008 on the Lisbon Treaty, the Member States began talks to investigate whether it was possible to reach a compromise that would respect both the Irish vote and the choices of other Member States in ratifying the Treaty.

The Guarantees respect the two key conditions identified by the Member States: (1) the Lisbon Treaty remains unaltered (as to amend it would require other Member States to re-ratify the Treaty, which could be politically difficult in certain countries); (2) that concerns voiced by Irish voters are directly addressed in the form of legally binding clarifications on sensitive areas of Irish sovereignty.

The Guarantees comprise three documents:

1. Decision of the Heads of State or Government of EU Member States acting in their capacity as sovereign states. The Decision is an international agreement, because the Member States have clearly stated their intention for the document to be binding upon them under international law, like a contract. For extra legal certainty, the provisions of this Decision will become a protocol to the EU treaties in the near future.

   The Decision contains 3 sections on Irish issues:

   • Section A is a clarification that specific articles in the Constitution of Ireland on the protection of the right to life, family and education will not be affected by the Charter of Fundamental Rights of the EU or the justice provisions in the Lisbon Treaty;

   • Section B is confirmation that the Lisbon Treaty does nothing to change the powers of the Member States regarding taxation;

   • Section C is a clarification that Ireland’s traditional policy of military neutrality will remain unchanged and unaffected by the Lisbon Treaty, and a reiteration of Irish sovereignty in relation to other areas of EU security and defence policy.

   The Decision will become legally binding at the same time as the Lisbon Treaty enters into force.

2. Solemn Declaration by the European Council on workers’ rights, social policy and other related issues;


In addition to the text, an important agreement was reached among the Member States that if the Lisbon Treaty enters into force, the European Commission shall continue to include one national of each Member State.
1. Background

On 12 June 2008, 53.4% of the Irish voting electorate, on a turnout of 53.1%, voted ‘No’ in the referendum on whether to amend the Constitution of Ireland to allow for ratification of the Lisbon Treaty.

The Taoiseach, Brian Cowen, stated in response to the referendum result that “[i]n a democracy, the will of the people as expressed at the ballot box is sovereign. The Government accepts and respects the verdict of the Irish people.” The Taoiseach also underlined that “Ireland has absolutely no wish to halt the progress of a Union, which has been the greatest force for peace and prosperity in the history of Europe”. His statement emphasised “the need to pause to absorb what has happened and why, and to consult widely at home and with our European partners”.

On this basis, the Department of Foreign Affairs commissioned independent research into the behaviour and attitudes of the electorate in the referendum of 12 June 2008. This research, carried out by Millward Brown IMS, identified trends and common opinions in the Irish electorate.

The principal findings of this research was elaborated on and debated in a specially created committee of the Oireachtas – the Sub-Committee on Ireland’s Future in the European Union – in order to identify the next steps following the referendum. The Sub-Committee presented its final report in November 2008.

The Taoiseach presented the Government’s conclusions to the other EU leaders at their meeting on 11-12 December 2008 during the French Presidency of the EU. Under the chairmanship of President Nicolas Sarkozy agreement was reached between all the Member States, consisting of a two-part approach: the need to respect and respond to the concerns of those who voted ‘No’ in the Irish referendum of 12 June 2008; and the need to reconcile these concerns with the decisions of other Member States in ratifying the Lisbon Treaty.

The European Council agreed that, provided the Lisbon Treaty entered into force, a decision would be taken in accordance with the necessary legal procedures to ensure that the European Commission continues to include one national of each Member State. It was further agreed that Ireland would be given legal guarantees clarifying aspects of the Lisbon Treaty.

Effectively, these undertakings constituted heads of an agreement that would be made legally binding at a future date.

On 19 June 2009, the 27 Member States agreed and signed off on the text of the Guarantees.
2. Legal status of the Irish Guarantees

The Irish Guarantees include a document called a Decision of the Heads of State or Government of the 27 Member States of the EU, meeting within the European Council, on the concerns of the Irish people on the Treaty of Lisbon. 6

The Decision closely follows the form and precedent used in the 1992 Edinburgh Agreement, which was negotiated among the then 12 Member States of the EEC to allow Denmark to hold a second referendum on the Maastricht Treaty.

EU Heads of State or Government agreed that the Decision is “legally binding and will take effect on the date of entry into force of the Treaty of Lisbon”. 7 If the second referendum on the Lisbon Treaty is passed, Ireland’s instrument of ratification which will also refer to the Decision, will be lodged in Rome with the Italian Government which acts as depositary for EU treaties. 8

In public international law, the crucial element in determining the legal effect of the document is the intention of the parties (i.e. the Heads of State or Government) to be legally bound under international law. This intention is evidenced in the express statement by the Member States at the 19 June 2009 European Council meeting that the “Decision gives legal guarantee” and “is legally binding”.

The Vienna Convention on the Law of Treaties (1969) gives Heads of State or Government full powers in international law to conclude international agreements, which may be termed treaties, protocols, decisions etc. 9 Such agreements are binding on the Member States by a variety of means, including “signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.” 10 In accordance with Article 29.5 of the Constitution of Ireland, the Decision, together with the Lisbon Treaty, will be laid before Dáil Éireann after they enter into force.

In compliance with Article 102 of the Charter of the United Nations, the Decision (like the Lisbon Treaty) will be registered in the Treaty Section of the UN Secretariat in New York after it enters into force. Registration is the prerequisite for an international agreement to be capable of being invoked before organs of the United Nations. States may register an instrument with the Treaty Section only if it constitutes an international agreement; accordingly, registration will be further clear evidence of the Decision’s legally binding character in international law. The Edinburgh Agreement was also registered with the United Nations.

The Decision agreed on 19 June, like the Edinburgh Decision on the Maastricht Treaty, constitutes an interpretative agreement that falls within the scope of Article 31 of the Vienna Convention on the Law of Treaties. This article states that all parties to a treaty must interpret its provisions in good faith in accordance with the ordinary meaning to be given to its terms in their context and must respect any agreement or instrument made in that context. The Decision constitutes such an agreement.

The Member States have undertaken to include the provisions of the Decision as a protocol to be attached to the two founding treaties of the EU at the time of the conclusion of the next accession treaty. This could take place as early as 2010, should Croatia be ready to join the EU at this time. Although the Protocol containing the provisions of the Decision will not be part of any future accession treaty, it will be subject to ratification in the Member States at the same time as that treaty.
The Decision, as a legally binding agreement in public international law, is in no way superior or inferior to the EU treaties, which are also international treaties subject to the same rules of public international law. Both are governed by the same rules in international law. The effect of putting the provisions of the Decision into a protocol is therefore an additional security measure, but the fact that the Decision has legally binding character in international law is sufficient to bind the governments of the Member States.

In accordance with Article 31 of the Vienna Convention on the Law of Treaties, the Member States and the EU institutions, which operate within the competence given to the Union by the Member States, will have an obligation to interpret the Lisbon Treaty in line with the Guarantees in accordance with the rules of public international law, such as good faith and respect for international treaties (referred to as *pacta sunt servanda*). The Decision is to be used for the purpose of clarifying the Lisbon Treaty and the European Court of Justice will interpret the Lisbon Treaty in light of their terms.
3. Content of the Decision

The three parts of the Guarantees with legal status are explained below. The text of the Guarantees is reproduced in the boxes followed by an explanation.

A. Guarantee on provisions of the Constitution of Ireland on the protection of the right to life, family and education

RIGHT TO LIFE, FAMILY AND EDUCATION

Nothing in the Treaty of Lisbon attributing legal status to the Charter of Fundamental Rights of the European Union, or in the provisions of that Treaty in the area of Freedom, Security and Justice affects in any way the scope and applicability of the protection of the right to life in Article 40.3.1, 40.3.2 and 40.3.3, the protection of the family in Article 41 and the protection of the rights in respect of education in Articles 42 and 44.2.4 and 44.2.5 provided by the Constitution of Ireland.

This guarantee clarifies concerns raised by Irish voters about social and ethical issues, such as abortion, divorce, the role of the family as the primary educator and the role of religion in education. It underlines that the Charter of Fundamental Rights does not alter the fundamental rights guaranteed in the Constitution of Ireland on these issues.

Furthermore, the Protocol to the EU treaties on Ireland’s abortion policy (Protocol on Article 40.3.3° of the Constitution of Ireland), which has been in force since 1993, is unaffected.

B. Guarantee on taxation

TAXATION

Nothing in the Treaty of Lisbon makes any change of any kind, for any Member State, to the extent or operation of the competence of the European Union in relation to taxation.

This guarantee is clear in stating that nothing in the Lisbon Treaty makes any change to the EU's competence with respect to taxation and in particular the right of Member States to set their own corporation tax rates.

Retention of unanimity in voting on taxation policy matters was a key Irish aim during negotiations on the Treaty. That aim was fully achieved, and unanimity in voting on tax matters remains unchanged.
C. Guarantee on security and defence

SECURITY AND DEFENCE

The Union’s action on the international scene is guided by the principles of democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

The Union’s common security and defence policy is an integral part of the common foreign and security policy and provides the Union with an operational capacity to undertake missions outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter.

It does not prejudice the security and defence policy of each Member State, including Ireland, or the obligations of any Member State.

The Treaty of Lisbon does not affect or prejudice Ireland’s traditional policy of military neutrality.

It will be for Member States – including Ireland, acting in a spirit of solidarity and without prejudice to its traditional policy of military neutrality – to determine the nature of aid or assistance to be provided to a Member State which is the object of a terrorist attack or the victim of armed aggression on its territory.

Any decision to move to a common defence will require a unanimous decision of the European Council. It would be a matter for the Member States, including Ireland, to decide, in accordance with the provisions of the Treaty of Lisbon and with their respective constitutional requirements, whether or not to adopt a common defence.

Nothing in this Section affects or prejudices the position or policy of any other Member State in security and defence.

It is also a matter for each Member State to decide, in accordance with the provisions of the Treaty of Lisbon and any domestic legal requirements, whether to participate in permanent structure cooperation or the European Defence Agency.

The Treaty of Lisbon does not provide for the creation of a European army or for conscription to any military formation.

It does not affect the right of Ireland or any other Member State to determine the nature and volume of its defence and security expenditure and the nature of its defence capabilities.

It will be a matter for Ireland or any other Member State, to decide, in accordance with any domestic legal requirements, whether or not to participate in any military operation.
The guarantee on the security and defence policy reiterates text used in the Lisbon Treaty on the EU’s values and principles that guide its action on the international scene. It also restates six specific areas of national sovereignty in EU security and defence policy. These areas include:

- deciding the type of aid or other form of assistance that a Member State will provide to another Member State in the event of a terrorist attack or an act of armed aggression against that country;
- creation of a common European defence;
- participation in permanent structured cooperation (a form of enhanced cooperation among a group of Member States whose military capabilities fulfil a higher criteria, but subject to the same rules on security and defence policy that apply to all Member States);
- participation in the European Defence Agency;
- deciding the nature and level of spending on defence; and
- participation in EU security and defence operations overseas where the mission requires the involvement of national defence forces.

Neutrality and protection of Irish security and defence policy have been recurring themes in every Irish referendum on EU treaties. The post-Lisbon Treaty referendum research findings point to concerns held by voters about the possibility of an erosion of Irish neutrality and conscription to a European army. In this survey, 33% of respondents (48% of ‘No’ voters and 26% of ‘Yes’ voters) believed that the Lisbon Treaty contained provision for the introduction of conscription. The ninth paragraph of the Guarantee on Security and Defence unambiguously states that the Lisbon Treaty does not provide for the creation of a European army or for conscription.

Furthermore, Article 29.4.9º of the Constitution of Ireland establishes a constitutional prohibition on Ireland joining a common European defence, in the event that one should be created. A referendum would be required to allow Ireland to participate in any proposed future common defence.
4. Political Declarations

In addition to the legal text, two declarations are part of the Irish Guarantees on the Lisbon Treaty.

Solemn Declaration on Workers’ Rights, Social Policy and Other Issues

SOLEMN DECLARATION ON WORKERS’ RIGHTS, SOCIAL POLICY AND OTHER ISSUES

The European Council confirms the high importance which the Union attaches to:

- social progress and the protection of workers’ rights;
- public services;
- the responsibility of Member States for the delivery of education and health services;
- the essential role and wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest.

In doing so, it underlines the importance of respecting the overall framework and provisions of the EU Treaties.

To underline this, it recalls that the Treaties as modified by the Treaty of Lisbon:

- establish an internal market and aim at working for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment;
- give expression to the Union’s values;
- recognise the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union in accordance with Article 6 of the Treaty on European Union;
- aim to combat social exclusion and discrimination, and to promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child;
- oblige the Union, when defining and implementing its policies and activities, to take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health;
- include, as a shared value of the Union, the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users;
- do not affect in any way the competence of Member States to provide, commission and organise non-economic services of general interest;
- provide that the Council, when acting in the area of common commercial policy, must act unanimously when negotiating and concluding international agreements in the field of trade in social, education and health services, where those agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them; and
- provide that the Union recognises and promotes the role of the social partners at the level of the European Union, and facilitates dialogue between them, taking account of the diversity of national systems and respecting the autonomy of social partners.
The ‘Solemn Declaration’ does not have legally binding value, but is a restatement of EU policies as set out in the Lisbon Treaty and the existing treaties.

While the post-referendum research indicated that voters considered the protection of workers’ rights very important, it is an area where the EU has limited powers to legislate. National governments retain large areas of sovereignty over their labour markets and public services. Instead, it provides supporting action, including the list of rights and guarantees provided for in the EU treaties and restated in the Solemn Declaration.

The Solemn Declaration sets out the EU’s actions in the field of social policy. These include the policies developed since the 1970s relating to equality between women and men; protecting the rights of the child; combating social exclusion; ensuring a high level of employment; and a guarantee of adequate social protection. Other key values and principles of the EU’s activities in the field of social policy are found in the Solemn Declaration.

It states explicitly that the EU does not in any way affect the authority of the Member States to organise their own public services. It also states that each Member State has a veto when it comes to international trade agreements where social, education or health services may be affected. Member States retain primary responsible for providing health, education or social services.

Finally, the Declaration reiterates the special role for social partners at EU level.
National Declaration by Ireland:

NATIONAL DECLARATION BY IRELAND

Ireland reaffirms its attachment to the aims and principles of the Charter of the United Nations, which confers primary responsibility for the maintenance of international peace and security upon the United Nations Security Council.

Ireland recalls its commitment to the common foreign and security policy of the European Union, as approved on several occasions by the Irish people through referendum.

Ireland confirms that its participation in the European Union’s common foreign and security policy does not prejudice its traditional policy of military neutrality. The Treaty on European Union makes clear that the Union’s security and defence policy shall not prejudice the specific character of the security and defence policy of certain Member States.

In line with its traditional policy of military neutrality, Ireland is not bound by any mutual defence commitment. The Treaty on European Union specifies that any decision by the Union to move to a common defence would have to be taken by unanimous decision of the Member States and adopted in accordance with their respective constitutional requirements. The Constitution of Ireland requires that a referendum be held on the adoption of any such decision applicable to Ireland and this requirement will not be affected should Ireland ratify the Treaty of Lisbon.

Ireland reiterates it commitment to the ideal of peace and friendly cooperation amongst nations and to the principle of the peaceful resolution of international disputes. It reaffirms its strong commitment to conflict prevention, resolution and peacekeeping, and recalls the record of achievement of its personnel, military and civilian, in this regard.

It reiterates that the participation of contingents of the Irish Defence Forces in overseas operations, including those carried out under the European common security and defence policy requires (a) the authorisation of the operation by the Security Council or the General Assembly of the United Nations, (b) the agreement of the Irish Government, and (c) the approval of Dáil Éireann, in accordance with Irish law.

Ireland notes that nothing obliges it to participate in permanent structured cooperation as provided for in the Treaty on European Union. Any decision enabling Ireland to participate will require the approval of Dáil Éireann in accordance with Irish law.

Ireland notes also that nothing obliges it to participate in the European Defence Agency, or in specific projects or programmes initiated under its auspices. Any decision to participate in such projects or programmes will be subject to national decision-making and the approval of Dáil Éireann in accordance with Irish law. Ireland declares that it will participate only in those projects or programmes that contribute to enhancing the capabilities required for participation in UN-mandated missions for peace-keeping, conflict prevention and strengthening international security, in accordance with the principles of the United Nations Charter.

The situation set out in this Declaration would be unaffected by the entry into force of the Treaty of Lisbon. In the event of Ireland’s ratification of the Treaty of Lisbon, this Declaration will be associated with Ireland’s instrument of ratification.
The National Declaration reaffirms Ireland’s commitment to the primary responsibility of the United Nations for peacekeeping and international security to the United Nations. It restates the ‘Triple Lock’: the three conditions that Ireland must meet before the Irish Defence Forces may be deployed in crisis management operations overseas.

The National Declaration recalls the constitutional prohibition on Ireland ever joining a common European defence should it be proposed. Irish voters endorsed this constitutional prohibition in the Nice Treaty in 2002. A further referendum will be required if Ireland ever wished to participate in a common European defence.

The Irish Government has announced that it will introduce legislation giving the Dáil power to scrutinise and authorise Irish any future participation in the European Defence Agency and permanent structured cooperation.

**Agreement on the composition of the European Commission**

Having carefully noted the concerns of the Irish people as set out by the Taoiseach, the European Council, at its meeting of 11-12 December 2008, agreed that, provided the Treaty of Lisbon enters into force, a decision would be taken, in accordance with the necessary legal procedures, to the effect that the Commission shall continue to include one national from each Member State.

This amendment to the Lisbon Treaty ensures that Ireland will retain a Commissioner.

The Lisbon Treaty amends the provision in the Nice Treaty that requires the EU to reduce the size of the Commission to include fewer Commissioners than the number of Member States (i.e. at most 26 in a Union of 27). The Lisbon Treaty introduces a new article¹¹ that would allow the European Council to alter the size of the Commission. The leaders of the EU Member States have already taken the political decision in December 2008. All that remains to be done is for a decision would be taken in accordance with the necessary legal procedures to give effect to this when the Lisbon Treaty enters into force.

**Effect on the European Parliament**

The elections to the European Parliament on 4-7 June 2009 were held under Nice Treaty rules, which capped the total number of Members of the European Parliament (MEPs) at 736. The Lisbon Treaty provides for 751 MEPs, as a result of which 12 Member States will be entitled to extra MEPS; one member State, Germany, stands to loose 3 MEPs under the new rules. As the Lisbon Treaty did not enter into force before the 2009 European Elections, twelve Member States were deprived of additional MEPs, whilst one elected three more MEPs than it would have been entitled to had the Lisbon Treaty been in force. Once the Treaty of Lisbon enters into force appropriate legal measures will be taken to temporarily exceed the ceiling of 751 MEPs to 754 MEPs. This will allow the Member States who would gain under the Lisbon Treaty to elect additional MEPs, whilst not depriving Germany of its additional MEPs for the 2009-2014 European Parliament.
Endnotes:


5 Promises and Counter-Promises: the Provisional Accord Designed to Facilitate a Renewed Attempt by Ireland to Ratify the Treaty of Lisbon’, Gavin Barrett


7 Paragraph 5, point (iii) of the Presidency Conclusions, supra note 6.

8 Paragraph 5, point (iii) of the Presidency Conclusions, supra note 6.

9 Article 7(2)(a) of the Vienna Convention.

10 Article 11 of the Vienna Convention.

11 Article 17(5) of the Treaty on European Union (based on the new numbering provided for under the terms of the Lisbon Treaty).