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The Irish Challenge to the Data Retention Directive

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Draft/ THE IRISH CHALLENGE TO THE DATA RETENTION DIRECTIVE: ASSESSING THE ROLE OF IRELAND IN EU LAW LITIGATION

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ABSTRACT

This paper reflects on the background and merits of the forthcoming Irish challenge to the first pillar legal base of the Data Retention Directive in C-301/06 *Ireland v. Council and European Parliament*[1] and attempts to place the case in a wider context, that of the relationship between Ireland and Europe. The paper considers, in particular, the nature of Irish practice with regard to litigating at European level and considers the low number of preliminary references from Irish courts to the Court of Justice and the historically low level of intervention of Government in cases before Court of Justice, despite the extraordinary composition of the Irish Supreme Court. Issues as to States litigating at European level and the "repeat player factor" in European litigation are analysed. The role that competence or legal base challenges plays in the dynamic of European relations is reflected on. The caselaw of the Court of Justice on competence and legal base generally has evolved considerably in recent times and the changes wrought by the Treaty of Lisbon are discussed briefly. The paper suggests that legal scholarship benefits from considering the dynamic between States and institutional actors before the Court of Justice and seeks to outline how legal scholarship could be enriched by drawing on political science themes in analysing challenges to the legal base of secondary Community law by Member State challenges.

[1] OJ C 237 30.9.2006, p. 5.

1. THE DATA RETENTION CASE CHALLENGE: SETTING THE SCENE

Introduction

Ireland has initiated proceedings in Case C-301/06 *Ireland v. Council and European Parliament*[2] in order to challenge the validity of the use of Article 95 of the EC Treaty as the legal basis for the Data Retention Directive.[3] Ireland contends that the correct legal base for the Directive is in fact Title VI of the Treaty on the European Union.[4] This paper seeks to place this litigation in a wider context and reflect on Irish litigation relating to the EU legal order. There appears to be an increasing tendency for Ireland to adopt "Euro-sceptic" strategies in its dealings at European level, whereby it frequently follows the lead of the United Kingdom in European affairs, perhaps more so than in its initial years of membership of the EU and the decision in this challenge will follow shortly after the rejection by the Irish people of the Treaty of Lisbon. Low rates of preliminary references from the Irish courts, low participation rates as interveners in litigation before the Court of Justice by the Irish States and a relatively poor compliance rate by the State with implementation of internal market legislation until recently have cumulatively characterised Ireland as litigator at European level. It seems difficult to suggest that Ireland could ever be a "repeat player" at European level, a concept derived from US political science theory, denoting corporate bodies or associations who litigate frequently or the converse of a once-off litigator. [5] The case of *Ireland v. Council and European Parliament*, however, involves Ireland acting as antagonistic litigator, challenging legal norms within the EU legal order and indicates a new dynamic in Irish-European litigation. Thus the purpose of the paper is not to consider the substantive merits of the case but rather to reflect on its impact and consequences. The trends emerging from distinct time period are set out here and tentative reflections are drawn therefrom.

(a) Ireland and the Europe Union: A Changing Dynamic?

The Irish Government came under considerable pressure recently not to opt-out of the Charter of Fundamental Rights in the Treaty of Lisbon negotiations, now designated to have the same legal effect as the Treaties in the Treaty of Lisbon, not yet ratified. The Irish Government appeared likely to adopt a similar position to the UK as regards the Charter but relented at the last minute to pressure, particularly from Trade Union leaders. There are some suggestions

[2] OJ C 237 30.9.2006, p. 5.

[3] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC OJ C 237 30.9.2006, p. 5. Hereinafter the Data Retention Directive.

[4] The reasoning adopted by Ireland in its challenge to the Framework Decision appears to draw heavily upon the reasoning of the Court of Justice in its decision in 2006 (*European Parliament v Council of the European Union* (C-317/04) [2006] ECR I-4721) annulling the Commission adequacy decision in the Data Protection Directive Framework, which purported to recognise the US as providing an adequate level of protection for the transfer of Passenger Name Record (PNR) data Council Decision 2004/496/EC of 17 May 2004 on the conclusion of an Agreement between the European Community and the United States of America on the processing and transfer of PNR data by Air Carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection (OJ 2004 L 183, p. 83, and corrigendum at OJ 2005 L 255, p. 168).

[5] Galanter "Why the 'Haves' Come Out Ahead: Speculations of the limits of legal change" (1974) 9 *Law & Society* 95.

that a major obstacle to ratification of the Treaty of Lisbon other than by referendum would be hindered by the provisions of the Charter of Fundamental Rights. More controversially, pursuant to a Protocol attached to the Treaty of Lisbon, Ireland is not obliged to take part in, or be bound by the "Area of Freedom, Security and Justice."[6] Ireland and the UK may each decide to be involved in particular issues - they may opt in or opt out of particular decisions. This special arrangement for Ireland and the UK has been in existence since these areas came within the remit of the EU in 1999 in the Treaty of Amsterdam.[7] The Treaty provides for the opt-out for Ireland and the UK to continue. Ireland has issued a non-legally binding declaration that it proposes to opt in to decisions in this area to the maximum extent possible and to review the entire opt-out clause within three years. The Protocol as contained in the Treaty of Lisbon in this regard remains problematic in so far as it is reviewable 3 years from the date of ratification of the Treaty and may necessitate another referendum 3 years from the date of which the Treaty of Lisbon is ratified, if at all. Substantively, the continued policy of exclusion is adopted by Ireland on grounds of the sanctity of the common law legal system and the peculiarities of the borders of Ireland the UK. The recent rejection by the Irish people of the Treaty of Lisbon, discussed below in greater detail, in tandem with the Treaty negotiation stance recently adopted by Ireland has resulted in a particular dynamic to Irish- European relations and contextualises the challenge under discussion.

(b) Background to the Data Retention Directive and the Irish challenge

In 2004, France, Ireland, Sweden and the UK introduced a proposal for a draft framework decision under Title IV EU which would have harmonised data retention obligations of service providers. Directive 2006/24/EC was subsequently adopted which purported to harmonise the laws of the Member States with respect to data retention so as to ensure the data is available to investigate serious crime was adopted pursuant to Article 95 EC in response to terrorism concerns arising within the European Union, with its preamble specifically and explicitly referencing the London terrorist attacks of July 2005.[8] However, in the adoption of the instrument, both Ireland and Slovakia were both outvoted in the Council of Ministers and notably, the Directive benefited from an unusually speedy conception and publication.

The decision of Ireland to challenge the Directive's legal validity is closely associated with the former Minister for Justice, then aggrieved at being outvoted. Two Ministerial appointment have followed the said Minister in this position on account of domestic political changes[9] and the extent to which the approach of the State to these proceedings will have changed as a result

[6] Protocol on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice and Declaration by Ireland on Article 3 of the Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice.

[7] In practice, Ireland has opted in to a number of decisions, for example, in relation to asylum and judicial co-operation and has not exercised its right to opt in to others, for example, border controls. However, Case C-137/05 *United Kingdom of Great Britain and Northern Ireland v Council of the European Union* [2007] ECR 0000 entails that it may be increasingly difficult to "cherry pick" the State's involvement in this regard.

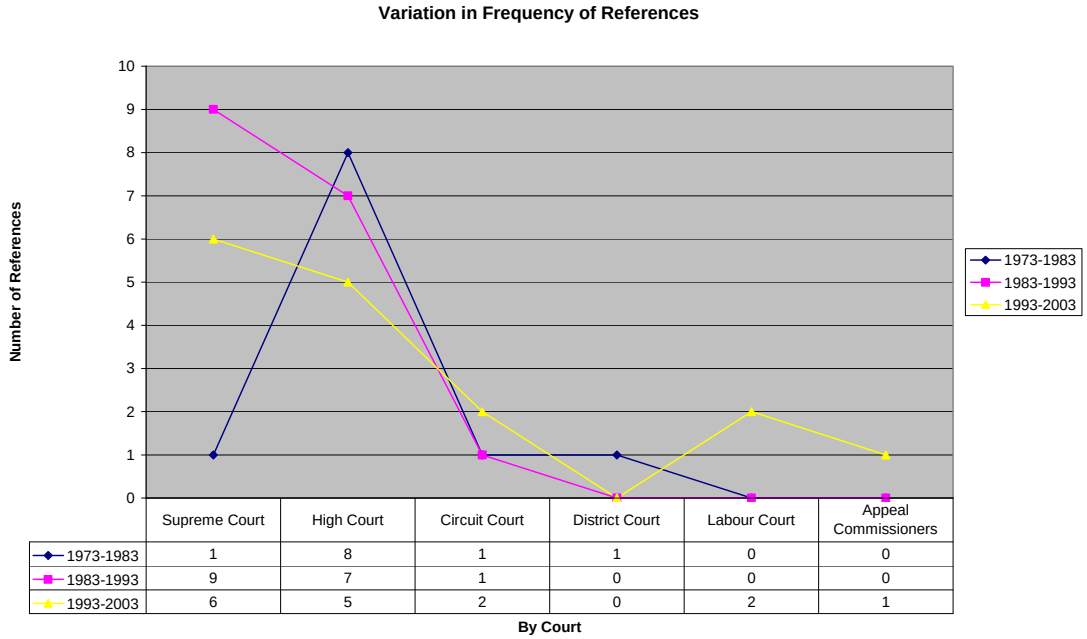
[8] The Directive now imposes far-reaching obligations on the States *inter alia,* to retain, trace and identify telephone and Internet data.

[9] Minister Michael McDowell T.D. who instigated the litigation at issue lost his seat in the General Election of 2007 and was succeeded by Minister Brian Lenihan T.D. and then Minister Dermot Ahern T.D. more recently in 2008.

remains a difficult question, in so far as the challenge is perceived as being closely associated with the former Minister only.[10]

2. IRELAND IN THE EUROPEAN LEGAL ORDER: TRENDS IN LITIGATION

(a) Ireland and Article 234 EC preliminary reference ruling data



	Supreme Court	High Court	Circuit Court	District Court	Labour Court	Appeal Commissioners
1973-1983	1	8	1	1	0	0
1983-1993	9	7	1	0	0	0
1993-2003	6	5	2	0	2	1

Source: Fahey *Practice and Procure in Preliminary References to Europe: 30 Years of Article 234 EC Case Law from the Irish Courts* (2007, Firstlaw).

Litigation from the Irish courts to the Court of Justice remains statistically low. In general terms, the numerical figures as to the number of preliminary references referred by Irish courts and quasi-judicial bodies to the European Court of Justice pursuant to Article 234 EC[11] are very disappointing. A total of 51 preliminary references have been made by the Irish courts to the European Court of Justice since Ireland first joined the European Union in 1973-2008.[12] In a thirty year study from the inception of Ireland's membership (from 1973-2003) a total of 44 references had been made.[13] This figure appears rather bleakly against a backdrop of roundly *communautaire* and integrationist judicial co-operation and significantly more references

[10] Ireland has not yet implemented the Directive. At domestic level a challenge has been initiated by Digital Rights Ireland, an interest group, against existing Irish data retention legislation on fundamental rights grounds and a preliminary reference may yet be forthcoming.

[11] Fahey *Practice and Procure in Preliminary References to Europe: 30 Years of Article 234 EC Case Law from the Irish Courts* (2007, Firstlaw).

[12] The High Court has made slightly more references than the Supreme Court. Accordingly, of the 49 references, 22 were made by the High Court, 20 by the Supreme Court and the remaining few by inferior courts or non-court tribunals. Therefore, for practical purposes, the High and Supreme Courts generate most of the references between them.

[13] Fahey *Practice and Procure in Preliminary References to Europe: 30 Years of Article 234 EC Case Law from the Irish Courts* (2007, Firstlaw).

numerically at least from nearly every other State.[14] The Irish courts refer the least number of cases per year across the Member States.[15] In certain subject areas, such as to the European arrest warrant, the Irish courts may not seek a preliminary reference ruling from the Court of Justice as the State has yet to make a declaration to accept the jurisdiction of the Court.[16]

If we compare the total of 51 preliminary references over a thirty year period emanating from the Irish courts to that of the other so-called small-sized EU states such as Denmark, Austria, Finland and Portugal having regard to the first table above,[17] we find the overall number of references from the Irish judiciary, from 1973 to the present day, to be relatively smaller than from any of these small-sized countries individually.[18] Then from 2003-2008, discounting again new accession States, the data for Irish preliminary references made in this period is still lesser than that from other Member States.

Using Denmark as a comparator (which acceded to the Community in 1973 along with Ireland), we see a significantly higher number of references in general from the Danish courts than their Irish counterparts. The contrast is all the more striking as to Austria, which while only recently acceding to membership of the EU, has gained notoriety for its courts keen usage of the Article 234 EC mechanism, with double the number of references from 1995-2001 that Denmark had referred from 1973 to 2001.

Extreme reluctance has been displayed by some of the courts of the newer Member States to engage in the preliminary reference dialogue with the Court of Justice.[19] On balance, "older" pre-Nice Enlargement Member States appear to be involved in significantly more in preliminary reference proceedings by way of observations before the Court of Justice than newer post-nice Enlargement States, with the exception of Poland.[20] "Older" or Founding EU States are also more likely to be engaged in extensive "defensive" behaviour before the Court of Justice in preliminary reference proceedings, rarely missing an opportunity to set out their stall.

Political science theory would suggest that a pro-*communautaire* judicial regime would generate many references, as would a fractious dynamic between lower and higher courts.[21]

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[14] There are 2 exceptions to this: Sweden and Finland, both of which acceded in the 1995 wave of accessions and thus have shorter periods of membership of the Union.

[15] Source: Stone Sweet & Brunell "The European Court and the National Courts: A Statistical Analysis of Preliminary References 1961-1995" (Jean Monnet Working Paper No. 14/1997), available at www.jeanmonnetprogram.org.

[16] Thus the Irish State has not accepted the jurisdiction of the Court of Justice in respect of Third Pillar matters pursuant to Article 35 EU. See OJ 2005 L 327 p. 19. See Fahey "*Being a Third Pillar Guardian of Fundamental Rights? The Irish Supreme Court and the European arrest warrant* (2008) 33 European Law Review 563

[17] Whose populations stand approximately respectively in 2004 (the figures on which the 30 year study are predicated, itself ranging from 1973-2003) at:- Austria: 8.1 million, Denmark: 5.4 million, Finland: 5.2 million and Portugal 10.4 million (Source: http://www.unicef.org/statistics/index.html). Even when we compare the Irish total to that of Greece with a population of 2 ¾ times that of Ireland at 11 million approximately, which joined in 1980 seven years after the Irish Republic joined, we see a noticeably larger number of references made by the Hellenic courts.

[18] This is with the exception of Finland but it must be taken into account that Finland only joined the EU in 1995.

[19] For example, in the case of Estonia this has been demonstrated to be the case: D'Sa & Lafranque "Getting to Know You: The Developing Relationship between National Courts of the "Newer" Member States and the European Court of Justice, with particular Reference to Estonia" (2008) 19 *European Business Law Review* 311.

[20] Kapko & Weslowski "One-Shotters of Repeat Players? New Member States before the European Court of Justice" (2007) 10 *European Judicial Review* 55; (2007) 11 *European Judicial Review* 52. See also L. Malferrari, The Functional Representation of the Individuals' Interests Before the EC Courts: The Evolution of the Remedies System and the Pluralistic Deficit in the EC (2005) 12 *Indiana Journal of Global Legal Studies* 667.

[21] Alter *Establishing the Supremacy of EC law* (Oxford, 2001).

Key doctrines such as supremacy and direct effect were already in existence upon Ireland joining the EU in 1973 and a tension between ranks of courts is not discernible in the caselaw generally. In so far as Article 234 is indicative of any trends, Ireland has a very low rate of litigation where EU law is pleaded generally over a thirty year period and the preliminary reference statistics reflect this general trend in turn.[22]

(b) Transposition Deficits, Article 226 EC Infringement Proceedings and Ireland

It has been contended that the demand for involvement of the Court of Justice in national litigation might also depend upon how governments implemented EC law[23] and so a high number of warning letters would correspond with a high number of references. Golub argues that States with poor implementation rates create situations where lawyers can easily question the conformity of national measures with EC secondary legislation.[24] The publication of the Internal Market Scoreboard is a recent phenomenon emanating from the European Commission since 1997 as a means of gauging in both statistical and analytical format, Member State compliance with State obligations as to implementing European legislation, i.e. Single Market Directives.

Transposition deficits decreased markedly over a period of a decade, from 1992 to 2002, corresponding closely to greater integration and economic prosperity achieved from the roll out of the single market. In 1992, approximately 1 in 5 directives had not been transposed by Member States.[25] Irish transposition compliance has ameliorated significantly in recent years, reducing from a 5.4% to slightly above the aspired target of 1.5% in 2006. It has now reached 1% in 2008, although all Member States have dramatically increased non compliance with Internal Market transposition recently and 18 States in fact in total have reached this 1% target now.[26] However, Ireland along with Austria, UK and Poland has the highest number of open infringement actions against it. In Environmental law cases, Ireland's compliance with EU legislation remains at its worst and from1998-2003, Ireland had the highest number of infringement actions against it, topped only by Spain.[27] The reasons for this lack of compliance are complex and multifarious but are frequently institutional or relate to the complexity of the planning law process in this jurisdiction or the financial cost of proactive Environmental management. Infringement actions involving Ireland thus potentially will decrease in the future and Golub's contentions are less than evident currently in the context of Irish European litigation outside of Environmental law.

(c) Interventions by Member States in preliminary reference proceedings- Irish observations

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[22] Fahey *Practice and Procure in Preliminary References to Europe: 30 Years of Article 234 EC Case Law from the Irish Courts* (2007, Firstlaw).

[23] See Golub "Modelling Judicial Dialogue in the European Community: The Quantitative Basis of Preliminary References to the ECJ" (EUI Robert Schumann Centre Working Paper No. 58/96).

[24] Golub *op.cit.*

[25] See www.europa.eu.int.

[26] Ibid.

[27] See www.europa.eu.int and the *Annual Report of the Court of Justice of the European Union*, available at http://curia.europa.eu/.

Granger's study of the number of observations made by national governments in preliminary reference proceedings originating in their own courts in the period from 1995-1999, the Irish government is shown to have made the lowest number of observations in such instances of all the Member States, demonstrating low State participation and little attempt on its part to influence EU policies at this level.[28] It has been shown that the Irish government makes a below average number of observations in the areas of free movement of goods, person, service, taxation, agriculture, approximation of laws, environment and consumers, competition, principles of EC law, company law and external relations. In the area of social policy, however, Ireland records an above average level of participation.[29] A substantial increase in the number of interventions made in preliminary references and direct actions not relating to Ireland, ie where Ireland was a party to the case, is evident in the last three years (2005-2008), considered below in further detail.[30]

In preliminary reference proceedings before the Court of Justice, Member States may submit written observations and make oral arguments at the hearing.[31] Older EU States (pre-Nice Enlargement) have tended to participate by way of observations in more preliminary reference cases than newer States (post-Nice Enlargement), albeit that the gap is closing and that the knowledge deficit must be overcome with time.[32] It has been suggested that Member States in submitting observations in preliminary reference proceedings only do so defensively and/ or limit their interventions to areas affecting the financial interests of their own States.[33] Others by contrast do not miss an opportunity to participate, tending to comprise older States, wealthier and larger States.

Ireland has been suggested to be a State that engages only in important domestic cases, but bolstered by the ability to engage in seminal cases emanating from other Member States, benefits from this cost-effective strategy.[34] From 1999-2003, Ireland made 18 observations in preliminary reference proceedings. From 2003-2007, Ireland made 42 observations in preliminary reference proceedings. Thus a multiple of interventions have been made in the most recent period. This also corresponds to a slight increase in the number of preliminary references emanating from Ireland in the same period. However, the increased figures in both instances do not necessarily correlate in that the Irish State is making observations in proceedings where the case does not emanate from the jurisdiction. The observations submitted by the Irish State have mostly been in finance-related areas, for example in VAT cases, and also in agriculture. Thus, the Irish State increasingly enters observations beyond those cases originating domestically and statistically the State is now engaging in a multiple of its previous intervention activities since 2003.

From this much it can be deduced that a "c-change" in attitude to European litigation on the part of the Irish State is apparent and a more proactive and aggressive stance is being adopted by the State.

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[28] Granger "When governments go to Luxembourg…: the influence of governments on the Court of Justice" (2004) 29 *European Law Review* 3, 8.

[29] Noticeably, however, Granger does not offer a more defined explanation of "social policy".

[30] The preliminary reference rate in this period did not change, although the most active referring body is now the Supreme Court. See Fahey *op.cit.*.

[31] Article 23 of the Statute of the Court and Article 104(4) of the Rules of Procedure.

[32] Kapko & Weslowski "One-Shotters of Repeat Players? New Member States before the European Court of Justice" (2007) 10 European Judicial Review 55; (2007) 11 *European Judicial Review* 52.

[33] Kapko & Weslowski "One-Shotters of Repeat Players? New Member States before the European Court of Justice" (2007) 10 European Judicial Review 55; (2007) 11 *European Judicial Review* 52.

[34] *Ibid.*

3. PARTICIPATORY DEMOCRACY AND THE IRISH REFERENDA ON EUROPEAN AFFAIRS

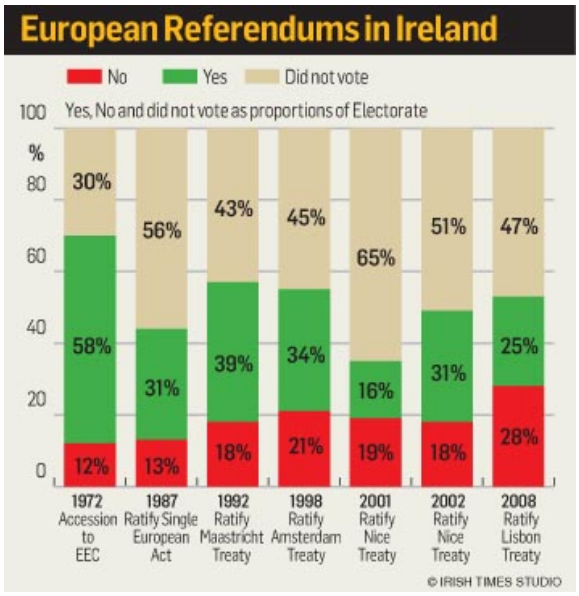

Table Source: *The Irish Times*

The Supreme Court decision in *Crotty v. An Taoiseach*[35] of 1986 has entailed that a referendum on European Treaty ratification has been held consistently since that decision, which decided that a Treaty had to be submitted by referendum to the people where a proposed Treaty altered the scope and objectives of the Union such that the initial popular consent to European Union membership had been exceeded. Conservative analysis of the decision of the split Supreme Court in *Crotty* has entailed that all Treaties subsequent to the Single European Act have been submitted by plebiscite to the Irish people. The Irish electorate has been broadly in favour of the European Union according to decades of Eurobarometer polls and membership thereof has entailed that a high turnout in European related referenda has been equated with the success thereof until recently.[36] The Third Amendment to the Constitution Bill was passed by plebiscite in 1972 by 1,041,890 votes (82.4% of the voting electorate) in favour of the amendment, 211,891 against.[37] The Maastricht Treaty was passed by 68.7% of the electorate) in 1993, the Amsterdam Treaty was passed by 61.7% of the voting electorate) (1993-1999), the Nice Treaty was passed on a 2nd successful (the first referendum being unsuccessful) by 63% of the voting electorate.[38]

The most recent Lisbon Treaty referendum was rejected by 53.4% of the population (862,415) where the turnout was 53.1% (1,614,866), thereby precipitating a constitutional crisis of sorts at national and European level. Evidence has tended to suggest that prior to the Lisbon Treaty, that turnout was critical and that the higher the proportion of the electorate that voted, the higher the likelihood of its success. This thesis would appear to have been disproven by the

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[35] [1987] IR 713.

[36] See http://ec.europa.eu/public_opinion/index_en.htm and Sinnott, Richard and Stephen Quinlan 'Soft Supporters of the EU need to be inspired to vote Yes to Lisbon Treaty' *The Irish Times,* Wednesday 30 January 2008.

[37] See Hogan & Whyte *Kelly: The Irish Constitution* (4th ed., Lexis-Nexis, 2003) para 5.3.45 *et seq.*

[38] See also Hourihane ed. *Ireland and the European Union: The First Thirty Years 1973-2002* (Lilliput, 2003) and Costello "Peoples' Vengeances: Ireland's Nice Referenda" (2005) 1 *European Constitutional Law Review* 357.

Lisbon referendum, which was held on a weekday arguably inconveniencing some of the working electorate or urban dwelling citizens or students residing away from their hometown (and rural) constituencies, thereby discouraging travel for voting purposes. Middle class voters tended to vote in favour of the Treaty, whereas working class voters tended to oppose the treaty. The heightened anti European sentiments evident from the Treaty vote outcome in 2008 clearly indicate a shift in public opinion away from previous trends and popular support for the Treaty rejection itself is apparent from recent opinion polls.[39]

4. PARLIAMENTARY SCRUTINY OF EUROPEAN UNION AFFAIRS IN IRELAND

A system of effectively organised domestic parliamentary scrutiny of European legislation is now a commonplace feature of the legal and often constitutional orders of all European Member States.[40] One of the most overdue yet fundamental legislative measures ever introduced by the Irish Oireachtas is surely the European Union (Scrutiny) Act, 2002, enacted to ensure greater scrutiny of EU legislation by the Houses of the Oireachtas.[41] However, the legislative history of the Act of 2002 has interesting origins, relating to the redress the anti-European electoral feeling after the first failed Treaty of Nice referendum and not any benevolent pro-European governmental sentiments.[42] Parliamentary scrutiny is not constitutionally based unlike other States and the measures subjected to scrutiny remain particularly limited in comparison with other jurisdictions.[43] The provisions of the Treaty of Lisbon would significantly ameliorate the current provisions in Irish law relating to parliamentary scrutiny of European-related legislation, should they take effect. The impact of a weak scrutiny regime on litigation is complex. On one level, litigation might be expected to be more prevalent in such an environment. This, however, need not necessarily be the case and the web of actors involved in European litigation relating to any State is diverse and not readily explicable. Nonetheless, major innovations in the relationship between States and the European Union have been wrought through the dynamic parliamentary action and analysis (for example in the UK, France and Germany), none of which are evident as to Ireland.[44]

CONCLUSION

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[39] See http://ec.europa.eu/public_opinion/index_en.htm

[40] See House of Lords Select Committee on the European Union *Review Of Scrutiny Of European Legislation* (First Report, 2002-2003, HL Paper 15, Appendix 4). See Fahey "Reflecting On The Scope Of The European Union (Scrutiny) Act, 2002 and Parliamentary Scrutiny in the Draft Constitutional Treaty as to European Integration and the Irish Legal Order" (2007) 13 *European Public Law* 66.

[41] Whilst a modest form of parliamentary legislative scrutiny had originally been in place at the inception of Community membership, in the form of the European Communities Act, 1972, it in turn was to be amended on the grounds on criticism as to its deficiencies: see Robinson "The Irish European Communities Act, 1972" (1973) 10 *Common Market Law Review* 352 and 467.

[42] See Travers "The Reception of Community Legislation into Irish Law and Related Issues Revisited" (2003) 37 *Irish Jurist* 58.

[43] Barrett "The king is dead, long live the king": the recasting by the Treaty of Lisbon of the provisions of the Constitutional Treaty concerning national parliaments (2008) 33 *European Law Review* 66 and
Barrett ed., *National Parliaments and the European Union: The Constitutional Challenge for the Oireachtas and Other Member State Legislatures* (Clarus Press, 2008).

[44] See Barrett ed., *National Parliaments and the European Union: The Constitutional Challenge for the Oireachtas and Other Member State Legislatures* (Clarus Press, 2008).

Ireland has yet to establish itself as a repeat player in European litigation but discernible trends in litigation are becoming more evident with the passage of time, trends that impact on the analysis of Ireland litigating European affairs. The variety of actors involved in the web of relationships making up such litigation before the Court of Justice entails that analysis is not uncomplicated. The recent rejection of the Treaty of Lisbon underscores the shifting dynamic. It seems likely that the Data Retention Case challenge indicates that the Irish State is asserting a new constitutional position. However, a cumulative picture is difficult to present in advance of an outcome to the Treaty of Lisbon ratification crisis.