

There Is No Irish Veto On Global Agricultural Trade Deals.

During the current Lisbon referendum campaign, numerous politicians, business and think-tank leaders and spokespersons have repeatedly asserted that EU Member States, including Ireland, have a veto on whether or not the EU signs up to a WTO free-trade deal on agricultural goods. This is not true. An international free-trade agreement that consists *exclusively* of agricultural and other ‘manufactured’ goods, cannot be vetoed. It can only be decided on by a ‘qualified majority’ vote by the EU Council of Ministers. Additionally, the automatic veto on free-trade agreements in essential public services, which Member States currently enjoy, is removed under the proposed Lisbon treaty, writes **Barry Finnegan**.*

Currently, as EU law stands (which this article outlines in detail below quoting European law books, European Court of Justice rulings, EU Commission white papers, the treaty of Lisbon and the existing EU treaties), pre-Lisbon, there are only five special areas on which a Member State can veto an international trade deal - none of them is agriculture. This veto is an automatic, a no-quibble right in law as outlined in detail in the Treaty of Nice. The Lisbon treaty removes this automatic veto.

To Briefly Summarise:

1. There is no current provision for vetoing an international trade agreement with *just* agricultural goods in it.
2. The only reason an international trade deal in agricultural goods *could* be vetoed is if it were bundled up in a package of free-trade measures that involved one or more of Educational services, Health services, Social services, and, Cultural and Audiovisual services. Now, pre-Lisbon, EU Member States have an automatic, no-quibble veto on entering these five remaining special services areas into the global free-trade system. Thereby could reject an entire WTO deal.
3. The proposed Lisbon treaty, if adopted, will remove the automatic veto on international trade agreement in these five special areas of: Educational services, Health services, Social services, and, Cultural and Audiovisual services. In its place would be put an undefined and very difficult to imagine awkward set of circumstances, where a Member State *could* argue at the European Court of Justice that they should be allowed to retain a veto in one or more of these five special services areas.

Later this article tackles these “undefined and very difficult to imagine awkward set of circumstances” showing how European Court of Justice (ECJ) rulings, EU Commission statements and the text of the Lisbon treaty make it almost impossible to retain a veto on international free-trade deals on Educational services, Health services, Social services, and, Cultural and Audiovisual services. For now it will show in detail how there is no veto on an international trade deal which involves *just* goods, including agricultural goods.

But first, why would one want to object to putting Educational services, Health services, Social services, and, Cultural and Audiovisual services into the World Trade Organisation (WTO) global free-trade system? Perhaps because under the WTO law there are five guiding principles as follows:

1. Transparency: Every government must regularly publish full details of measures and regulations that may affect trade. Other countries can sue at the WTO court if they feel this list is not detailed enough or published regularly enough.

2. Unnecessary and burdensome: Both the WTO and other countries can sue if they feel these rules and regulations over trade create ‘unnecessary barriers to trade in services’ or if they feel the government rules and regulations are ‘more burdensome than necessary to ensure the quality of the service’.
3. Most Favoured Nation: No government can give favour to one country over another. For example, one cannot give more favourable treatment to poor countries over rich ones.
4. National Treatment: It is illegal under WTO international free-trade law to give benefits or privileges to domestic service providers above foreign providers.
5. Market Access: Governments cannot design rules or quotas that restrict foreign service providers from entering the market place.

The Law: No Agricultural Veto

In their ‘Constitutional Law of the European Union, 2nd Edition’ of 2005¹, Koen Lenaerts (who at the time was Professor of European Law at Katholieke Universiteit Leuven, and Judge of the Court of Justice of the European Communities), and Piet Van Nuffel (who at the time was Legal secretary at the Court of Justice of the European Communities, and professor at the College of Europe, Natolin), clearly state the current (pre-Lisbon) legal position as to the ‘exclusive competence’ of the EU in regard to conclusion of international trade deals in manufactured goods, i.e. no Member State veto on global agricultural free-trade deals as follows:

“²The definition of the common commercial policy is of great importance for the external policy of the Community institutions and the Member States. This is because the Council is entitled to adopt autonomous and contractual commercial policy measures by a qualified majority vote (EC Treaty, Art. 133(4)). What is more, the common commercial policy - at least as regards goods - constitutes an area of competence which is vested exclusively in the Community and therefore excludes in principle any national measures from the outset.³”

So therefore when it comes to commercial policy, “at least as regards goods”, for example *agricultural* goods, it “constitutes an area of competence which is vested exclusively in the Community” and decisions on “external policy” are reached “by a qualified majority vote”. Lenaerts and Van Nuffel are very clear.

1997: The Treaty of Amsterdam

The ‘**Common Commercial Policy**’ of the Treaty of Amsterdam on 1997 is also very clear on this issue:

“**Article 133 (ex Article 113)**⁴:

¹ Lenaerts, Koen & Piet Van Nuffel, 2005. Constitutional Law of the European Union. 2nd Edition. London: Sweet & Maxwell.

² Lenaerts, Koen & Piet Van Nuffel, 2005. Constitutional Law of the European Union. 2nd Edition. London: Sweet & Maxwell. Page: 831.

³ Lenaerts & Van Nuffel, 2005: “The Treaty of Nice added as safeguards that the Commission must report regularly to the special committee on the progress of negotiations and that the Council and the Commission are responsible for ensuring that the agreements negotiated are compatible with internal Community policies and rules (EC Treaty, Art. 133(3), first and second subparas). [The committee referred to here is the ‘Article 133 Committee’.]”

⁴ EU, 1997. ‘Treaty Of Amsterdam Amending The Treaty On European Union, The Treaties Establishing The European Communities And Related Acts’. Available at: <http://eur-lex.europa.eu/en/treaties/dat/11997D/htm/11997D.html> Taken on: 18-05-08 [To see the entire article, click the link and type 133 into the ‘Find’ function.]

1. The common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies.

[...] [...]

3. Where agreements with one or more States or international organisations need to be negotiated, the Commission shall make recommendations to the Council, which shall authorise the Commission to open the necessary negotiations.

[...] [...]

4. In exercising the powers conferred upon it by this Article, the Council shall act by a qualified majority.

5. The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may extend the application of paragraphs 1 to 4 to international negotiations and agreements on services and intellectual property insofar as they are not covered by these paragraphs.”

Back in 1997 the law was created (EC Amsterdam, 133(5) above), that intellectual property and *all* services were special areas when it came to international trade deals with ‘international organisations’ (e.g.; the WTO) and Member States had veto control over them; while trade deals in other aspects of trade, i.e. goods (including agriculture), were now to be decided by a qualified majority vote at the Council of Ministers: i.e. no veto’s.

2001: The Treaty of Nice

Writing about the Amsterdam and Nice treaties, Lenaerts and Van Nuffel (2005) say that:

“The Treaty of Amsterdam empowered the Council, acting unanimously, to extend the application of Article 133 to international negotiations and agreements on services and intellectual property in so far as they were not already covered thereby. Its scope was not extended until the amendments made by the Treaty of Nice, which provide that provisions relating to the common commercial policy are also applicable to the negotiation and conclusion of agreements in the fields of trade in services - regardless of whether or not the provider or the recipient move - and the commercial aspects of intellectual property (EC Treaty, Art. 133(5))”⁵

Thus did time move on and the EU become ‘more efficient’. i.e. As Lenaerts and Van Nuffel point out above, the EU, with the power of the Nice treaty, could now sign up to international trade deals in goods, in services and in the commercial aspects of intellectual property, all by qualified majority voting (with no Member State veto’s) - except for the five special services areas as we shall see now in text of the ‘common commercial policy’ of the Treaty of Nice.

⁵ Lenaerts, Koen & Piet Van Nuffel, 2005. Constitutional Law of the European Union. 2nd Edition. London: Sweet & Maxwell. Page: 830

“Article 133 shall be replaced by the following⁶:

Article 133

[...] [...]

4. In exercising the powers conferred upon it by this Article, the Council shall act by a qualified majority.

5. Paragraphs 1 to 4 shall also apply to the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, insofar as those agreements are not covered by the said paragraphs and without prejudice to paragraph 6.

[...] [...]

6. [...] [...]

In this regard, by way of derogation from the first subparagraph of paragraph 5, agreements relating to trade in cultural and audiovisual services, educational services, and social and human health services, shall fall within the shared competence of the Community and its Member States. Consequently, in addition to a Community decision taken in accordance with the relevant provisions of Article 300, the negotiation of such agreements shall require the common accord of the Member States. Agreements thus negotiated shall be concluded jointly by the Community and the Member States.

[...] [...]

7. Without prejudice to the first subparagraph of paragraph 6, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may extend the application of paragraphs 1 to 4 to international negotiations and agreements on intellectual property insofar as they are not covered by paragraph 5.

Article 133 point 5 above of Nice takes “services and the commercial aspects of intellectual property” out of the special protection they had under Amsterdam and moves them to being on a par with goods, i.e. no veto’s, and into qualified majority voting. ‘Services’ that Member States cannot now veto international free-trade deals on, include things like: water, electricity, gas, refuse collection, waste management, banking, finance, engineering, auctioneering, planning, management of amenity areas - the list goes on and on, think of things one could potentially pay money for but that can’t be put in a box and delivered to your door.

However, to advance the interests of ‘social Europe’, that paragraph of Article 133 point 6 of the 2001 Nice treaty above shows that special provisions were made for some essential public services. i.e.: The five special areas of our societies and economies which are referred to at the top of this article. Services that in 2001 it was felt should perhaps be left outside the global free-trade system, namely: Educational services, Health services, Social services, and, Cultural and Audiovisual services. And if not left outside of the free-trade system, that at least that people could still elect a government who could say Yes or No to putting them into the international free-trade system.

⁶ EU, 2001. ‘Treaty Of Nice Amending The Treaty On European Union, The Treaties Establishing The European Communities And Certain Related Acts’. Available at: http://eur-lex.europa.eu/en/treaties/dat/12001C/pdf/12001C_EN.pdf Taken on: 18-05-08 [To see the entire article, click the link and type 133 into the ‘Find’ function of the pdf.]

In summary, after Nice (the current legal situation is that,) international free-trade “agreements relating to trade in **cultural** and **audiovisual** services, **educational** services, and **social** and human **health** services, shall fall within the **shared competence** of the Community and its Member States” and “the negotiation of such agreements shall require the **common accord** of the Member States” and “be **concluded jointly** by the Community and the Member States.” An automatic, quibble-free veto.

Now let’s go back to Lenaerts and Van Nuffel’s ‘Constitutional Law of the European Union, 2nd Edition’ of 2005 where they very clearly outline this current, pre-Lisbon position:

“⁷In addition, as far as trade in cultural and audiovisual services, educational services, and social and human health services is concerned, Art. 133(6) expressly declares that agreements relating thereto fall within the shared competence of the Community and its Member States. Where a field falls within the competence of both the Community and the Member States, the Community’s external action is categorised as mixed. This means that an agreement may come about only where it is concluded jointly by the Community and the Members States. Consequently, in addition to a Community decision (whether or not taken by a unanimous vote in the Council), the consent of all Members States is required.⁸”

The Lisbon Treaty: All Automatic Veto’s Gone

Having established that existing EU law, rules out the ability of Member States to veto and say no to international free-trade deals in goods, commercial aspects of intellectual property and all but five special services, what changes are proposed in the Lisbon treaty and now does it remove our existing no-quibble veto on international free-trade deals in Educational services, Health services, Social services, and, Cultural and Audiovisual services?

In Lisbon, that entire public services protection paragraph of the Nice treaty quoted above (Article 133(6)) starting “In this regard ...”, is deleted. Gone is the ‘shared competence’, gone is the ‘common accord’ and gone is the ‘concluded jointly’. Indeed, if Lisbon is accepted, things could get ‘*much* more efficient’ for the EU’s ability to sign global free-trade agreements. The Lisbon treaty not only drops the automatic veto on the five special services areas, it changes the name of Article 133⁹ as follows:

“TITLES WHICH ARE TO BE MOVED”¹⁰

Title IX "COMMON COMMERCIAL POLICY" shall become Title II in Part Five on the Union's external action and Articles 131 and 133 shall become Articles 188b and 188c

⁷ Lenaerts, Koen & Piet Van Nuffel, 2005. Constitutional Law of the European Union. 2nd Edition. London: Sweet & Maxwell. Pages: 832-833.

⁸ Lenaerts & Van Nuffel, 2005: “Art. 133(6), second subpara., confirms these principles in the case of agreements relating to trade in cultural and audiovisual services, educational services, and social and human health services and, as far as the Community decision-making procedure is concerned, refers to Art. 300 of the EC treaty.” Page: 833

⁹ As a mildly humorous aside: this writer would like to ask the EU Commission and Council are they going to change the name of the ‘Article 133 Committee’ to the ‘Article 188c Committee’? This is the ‘Committee’, referred to in the treaties, which negotiates these WTO trade deals in private, behind closed doors, on our behalf. See for example:

Ó Caoimh, Conall, 2008. ‘Lisbon Treaty likely to widen democratic gap on trade rules’. Dublin: Irish Times, May 13th. Available at: http://web.lexis-nexis.com/professional/?_m=3e6ee2986b33ff5b23cdb5668d945060&wchp=dGLbVzz-zSkSt&md5=70c16daa304876c07c271ae8c826f709 Taken on: 15-05-08

¹⁰ EU, 2007. ‘Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007’. Available at: http://bookshop.europa.eu/eubookshop/FileCache/PUBPDF/FXAC07306ENC/FXAC07306ENC_002.pdf Taken on: 15-05-08

respectively. Article 131 shall be amended as set out below in point 157 and Article 133 shall be replaced by Article 188c.”¹¹

[...] [...]

158) An Article 188c shall be inserted, replacing Article 133:

Article 188c

[...] [...]

4. For the negotiation and conclusion of the agreements referred to in paragraph 3, the Council shall act by a qualified majority.

For the negotiation and conclusion of agreements in the fields of trade in services and commercial aspects of intellectual property, as well as foreign direct investment, the Council shall act unanimously where such agreements include provisions for which unanimity is required for the adoption of internal rules.

The Council shall also act unanimously for the negotiation and conclusion of agreements:

(a) in the field of trade in cultural and audiovisual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity;

(b) in the field of trade in social, education and health services, where these agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them.

5. The negotiation and conclusion of international agreements in the field of transport shall be subject to Section 7 of Chapter III of Title III and to Article 188n.

6. The exercise of the competences conferred by this Article in the field of the common commercial policy shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonisation of legislative or regulatory provisions of the Member States insofar as the Treaties exclude such harmonisation..”

To deal first with 4(b): Educational services, Health services and Social services

The Yes side in this Lisbon referendum campaign claims that this provision (188c, 4(b)) of the Lisbon treaty would protect public services. This is extremely unlikely and no hard evidence has been produced to back up this claim. In relation to the text, it would be difficult to see how much more “seriously disturbing” our national health system could get. And as for “prejudicing the responsibility” of the government to deliver these Educational services, Health services and Social services - the current government is charging fees for almost all aspects of the health service and contracting out services to the private sector in many areas. (In

¹¹ EU, 2007. ‘Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon’. Available at: http://bookshop.europa.eu/eubookshop/FileCache/PUBPDF/FXAC07306ENC/FXAC07306ENC_002.pdf Taken on: 18-05-08 [To find this paragraph, click the link and type 133 into the ‘Find’ function of the pdf, 12 pages later you’ll find the new 188b and the new 188c.]

EU law, charging a fee changes the nature of the legal definition of a service and removes its special public service protection.)

If the current Irish government were trying to retain a veto to stop Educational services, Health services and Social services from entering the WTO free-trade system, then it would be futile for the government to argue at the European Court of Justice (ECJ) that more free-trade and privatisation, thanks to a WTO free-trade deal, would “prejudice” their responsibility to deliver them.

Private companies are making profits building primary and secondary school extensions, private companies print the children’s school books, private companies build ‘social housing’ (sic), private companies carry out medical operations on public patients through the ‘National Treatment Purchase Fund’ and private companies successfully provide secondary school services and third level college places and courses. So in these circumstances, how can one envisage a WTO free-trade deal that would “risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them”? ‘Them’ being: Social, Education and Health services.

According to EU Commission:

“In its rulings, the [European] Court [of Justice] made clear that when health services are provided for remuneration [i.e. a fee or a charge], they must be regarded as services within the meaning of Treaty and thus relevant provisions on free movement of services apply.”¹²

In other words, once a fee is charged, any special protection from the free-market that a service gets is gone and EU free-trade law applies.

Additionally, the Commission went on to say:

“Two clarifications were provided by the *Watts judgment* on 16 May 2006¹³. First, some Member States with systems based on integrated public funding and provision of health services had argued that the Treaty provisions on the **freedom to provide services** did not apply to them; the *Watts* judgement confirmed that they do. Second, some Member States have argued that the requirement in Article 152, paragraph five of the Treaty to “*fully respect the responsibilities of the Member States for the organisation and delivery of health services and medical care*” prevented binding obligations under Community law regarding health systems. In the judgement, the Court stated that this provision does not exclude the possibility that the Member States may be required under other Treaty provisions, such as Article 49 EC, or Community measures adopted on the basis of other Treaty provisions, such as Article 22 of Regulation (EC) 1408/71, to make adjustments to their national systems of social security.”¹⁴

¹² EU Commission, 2006. ‘Communication From The Commission: Consultation regarding Community action on health services’. Brussels, 26 September 2006. Available at: http://ec.europa.eu/health/ph_overview/co_operation/mobility/docs/comm_health_services_comm2006_en.pdf. Taken On: 17-05-08. Page: 3.

¹³ ECJ ‘Watts case’, 2006. ‘JUDGMENT OF THE COURT (Grand Chamber); In Case C-372/04; The Queen, on the application of: Yvonne Watts v Bedford Primary Care Trust, Secretary of State for Health’. Available at: <http://curia.europa.eu/juris/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-372/04>. Taken on: 21-05-08

¹⁴ EU Commission, 2006. ‘Communication From The Commission: Consultation regarding Community action on health services’. Brussels, 26 September 2006. Available at: http://ec.europa.eu/health/ph_overview/co_operation/mobility/docs/comm_health_services_comm2006_en.pdf. Taken On: 17-05-08. Page: 4.

So the European Court of Justice ruling in the Watts¹⁵ case of 2006 means that the free-trade provisions and the freedom to provide services provisions of the EU treaties¹⁶ still applies to ‘health services’ even though Article 152 of the existing treaties states the EU will “fully respect the responsibilities of the Member States for the organisation and delivery of health services and medical care”.

Similarly, from a legal standpoint, the Watts ruling must also negate Article 149 of the existing EU treaties¹⁷ as well. This article of EU law says that the EU will be “fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity”. Presumably up to the point that it interferes with the free-trade objectives of the EU as outlined in the treaties and as are advanced in the Lisbon treaty.

One of the purposes of setting all this out here is to show that the arguments made by the Yes side as regards the Lisbon treaty protecting Irish public services from insertion into the international free-trade system are false. To further clarify this point about putting these vital public services into international free-trade agreements, let us turn again to the book, ‘Constitutional Law of the European Union’, written by Lenaerts (the ex-Judge of the Court of Justice of the European Communities), and Van Nuffel (the ex-Legal secretary at the Court of Justice of the European Communities)¹⁸:

“In addition, the Court of Justice has held that ‘authority to enter into international commitments may not only arise from an express attribution by the Treaty, but may also flow implicitly from its provisions. The Court [has] concluded, in particular, that whenever Community law created for the institutions for the Community powers within its internal system for the purpose of attaining a specific objective, **the Community [has] authority** to enter into the international commitments necessary for the attainment of that objective even in the absence of an express provision in that connection’.¹⁹

In any event, such external authority flows by implication from measures adopted by the institutions in so far as it is necessary to secure the effectiveness of those measures.²⁰ The Court of justice held accordingly in the AETR judgement that the Community was empowered to accede to an international agreement on working conditions in international road transport on the grounds that the Council had adopted a regulation internally on the harmonisation of certain social legislation relating to road transport.²¹ In addition, where a power cannot be effectively exercised without involving non-

¹⁵ ECJ ‘Watts case’, 2006. ‘JUDGMENT OF THE COURT (Grand Chamber); In Case C-372/04; The Queen, on the application of: Yvonne Watts v Bedford Primary Care Trust, Secretary of State for Health’. Available at:

<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-372/04>. Taken on: 21-05-08

¹⁶ EU Consolidated Treaties, 2007. ‘European Union, Consolidated Versions Of The Treaty On European Union And Of The Treaty Establishing The European Community’. December 2007. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:321E:0001:0331:EN:pdf> Taken On: 17-05-08

¹⁷ EU Consolidated Treaties, 2007. ‘European Union, Consolidated Versions Of The Treaty On European Union And Of The Treaty Establishing The European Community’. December 2007. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:321E:0001:0331:EN:pdf> Taken On: 17-05-08

¹⁸ Lenaerts, Koen & Piet Van Nuffel, 2005. Constitutional Law of the European Union. 2nd Edition. London: Sweet & Maxwell. Pages: 857-858.

¹⁹ Lenaerts & Van Nuffel, 2005: “ECJ, Opinion 2/91 *Convention No. 170 of the International Labour Organisation concerning safety in the use of chemicals at work* [1993] E.C.R. I-1061, para. 7; ECJ, Opinion 2/04 *Accession by the Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] I-1759, para. 26.”

²⁰ Lenaerts & Van Nuffel, 2005: “Opinion 2/92, *idib.*, para. 7; ECJ, Joined Cases 3, 4 and 6/76 *Kramer* [1976] E.C.R. 1270, para. 19.20.” Page 857.

²¹ Lenaerts & Van Nuffel, 2005: “See the AETR judgement of March 31, 1971, Case 22/70 *Commission v Council* [1071] E.C.R. 263, paras 16-29. For later examples of international competence implicitly arising out of existing Community legislation, see ... ECJ, Opinion 1/94 *Agreement Establishing the World Trade Organisation* [1994] E.C.R. I-5267, para. 77. ...” Page: 858

member countries, the Community is entitled *ipso facto* to act externally, **even if the first use made of the power is to conclude and implement an international agreement.**^{22,}

Note that Lenaerts and Van Nuffel there footnoted the European Court of Justice opinion on the case ‘*Agreement Establishing the World Trade Organisation*’. This was the case that allowed the EU to sign up the WTO in the first place and to make commitments for the whole EU on manufactured goods.

In order to further dispel the misinterpretations of EU law and the Lisbon treaty being propagated by public figures on the Yes side in this referendum campaign, that the Lisbon treaty has nothing to do with the WTO; and to further highlight the genuine concerns being raised by the socially progressive No side²³ as to the threat to vital public services being entered into the WTO global free-trade system as a result of an acceptance of the Lisbon treaty - a quote from the Lisbon treaty is required:

Article 2

[...] [...]

“ARTICLE 2 B [...] 2. The Union shall also have exclusive competence for the conclusion of 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 188 L.

“1. The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union’s policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.

2. Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.”

So Under the Lisbon treaty, **the Union may conclude international agreements** not only in those cases where the treaty so provides (i.e.: environment, research and technological development, associations, common commercial policy,²⁴ development co-operation, economic, financial and technical co-operation with third countries, humanitarian aid and monetary policy), but also “**where the conclusion of an agreement is necessary in order to achieve ... one of the objectives referred to in the Treaties ... or is likely to affect common rules or alter their scope**”. According to Lenaerts and Van Nuffel, our EU law

²² Lenaerts & Van Nuffel, 2005: “ECJ, Opinion 1/94 *Agreement Establishing the World Trade Organisation* [1994] E.C.R. I-5267, paras 82-85.” Page: 858.

²³ i.e. the Campaign Against the EU Constitution - Vote No to Lisbon. Available at: <http://www.SayNo.ie>. Taken On: 22-05-08

²⁴ For those interested, it might also be worth taking a look now, in this context, at the new objectives of the ‘Common Commercial Policy’ as outlined in the Lisbon treaty:

EU, 2007. ‘Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon’. Available at:

http://bookshop.europa.eu/eubookshop/FileCache/PUBPDF/FXAC07306ENC/FXAC07306ENC_002.pdf Taken on: 18-05-08 [To find this paragraph, click the link and type 133 into the ‘Find’ function of the pdf, 12 pages later you’ll find the new 188b and the new 188c.]

experts, this text “codifies the external powers which - according to the case law of the Court of Justice - flow implicitly from the Community Treaties and secondary Community law.”²⁵

As this piece asserted at the start, it would be a “very difficult to imagine awkward set of circumstances” where the government would be able to retain a veto on a trade deal involving Social, Education and Health services. Remember, the purpose of the WTO is to create a more efficient global free-trade system - this means it stops governments from ‘distorting’ the market. In other words, once “Social, Education and Health services” go into the WTO system, when it comes to financing, grants and tendering it would be illegal to discriminate between a private and a public provider.

Why not just retain the automatic veto on international trade deals in “Social, Education and Health services”? In the current Lisbon debate, no one on the Yes side has given an answer to this question. This Lisbon treaty Article 188c 4(b) played a significant part in the French 55% ‘No’ and the Dutch 65% ‘No’ to the EU Constitution back in 1995 - the people wanting to protect their democratic right to protect their “Educational services, Health services and Social services” from total free-trade.

To deal next with 4(a): Cultural and Audiovisual services

[See Article 188c, 4(a) above in the Lisbon treaty.] Once you put “cultural and audiovisual services” into the WTO global free-trade system it is illegal under international law for a government to make any distinction between a local, community, public service provider, and a private commercial provider, when distributing money, grants and benefits. So when trying to establish whether the contents of a trade deal as it regards “cultural and audiovisual services” would allow a Member State to retain a veto, one has to ask: would the deal “risk prejudicing the Union's cultural and linguistic diversity”? This is the only way a Member State could retain a veto over putting these services into the WTO or not.

Let’s see. Would giving government licences, money and grants to a private radio or television station instead of say, Castlebar Community Radio, or Dublin’s NEAR FM, or TG4 “risk prejudicing the Union's cultural and linguistic diversity”? Would forcing the financing for delivery of a community art project to go to a global fast food company instead of a local community group “risk prejudicing the Union's cultural and linguistic diversity”? These are realistic questions and people all over the world are dealing with these issues as their governments either voluntarily or enforced through the WTO, implement these privatisation and liberalisation measures.

One must also remember that under WTO law, you cannot make a distinction between *who* delivers a service or *how* it is delivered - the main criteria must be: which potential provider would give the best return on investment for the government.

Why not just retain the automatic veto on international trade deals in “cultural and audiovisual services”? In the current Lisbon debate, no one on the Yes side has given an answer to this question. Again, it has to be said, this Article 188c 4(a) played a significant part in the French 55% ‘No’ and the Dutch 65% No to the EU Constitution back in 1995 - the people wanting to protect their democratic right to protect their “cultural and audiovisual services” from total free-trade.

Now to Article 188c(6):

²⁵ Lenaerts, Koen & Piet Van Nuffel, 2005. Constitutional Law of the European Union. 2nd Edition. London: Sweet & Maxwell. Page:860.

This Article offers no substantive protection against the five special services from entering the free-trade system and losing democratic control of them. The EU Commission opinion papers, the Watts ruling and the quotes from Lenaerts & Van Nuffel's European law book in the section above on health, education and social services, are more than enough to dispel any hope of relying on this subsection.

And finally to the tricky one: Article 188c (4) 2nd subparagraph:

Business lobby groups,²⁶ journalists,²⁷ and politicians have made the mistake of misquoting this following paragraph from the Common Commercial Policy of Lisbon, as if it protects something, as if it keeps a veto. It is in fact nothing new and a version of it has been in operation from Nice. It's tricky and in fairness, it *is* easy to misinterpret.

Lisbon Article 188c(4), 2nd subparagraph says:

“For the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, as well as foreign direct investment, the Council shall act unanimously where such agreements include provisions for which unanimity is required for the adoption of internal rules.”

And the Treaty of Nice Article 133(5) 2nd subparagraph put it like this:

“By way of derogation from paragraph 4, the Council shall act unanimously when negotiating and concluding an agreement in one of the fields referred to in the first subparagraph, where that agreement includes provisions for which unanimity is required for the adoption of internal rules or where it relates to a field in which the Community has not yet exercised the powers conferred upon it by this Treaty by adopting internal rules.”

Meaning that elected governments keep a veto on entering “services”, “the commercial aspects of intellectual property” and “foreign direct investment” into an international free-trade deal *if* (a) they have veto rights over those things when it comes to implementing law internally in the EU and (b) if the EU hasn't yet exercised its powers in that area.

As we have seen above from the court cases²⁸, from the disregard for Article 149, from the application of EU law, from the pronouncements of the EU Commission, from the analysis in the Lenaerts and Van Nuffel European law book - when it comes to Educational services, Health services, Social services, and, Cultural

²⁶ For example: Croughan, David, 2008. 'Key Policies II - Economic Governance', in Tony Brown, 2008. Lisbon: What The Reform Treaty Means. Dublin: Institute of International and European Affairs. Page 38. He says: “The Council will continue to act by QMV in most areas but it will act unanimously in the fields of trade in services, the commercial aspects of Intellectual Property and Foreign Direct Investment.” By misquoting, Croughan totally alters the meaning of the treaty. He leaves out this second part of the sentence: “... where such agreements include provisions for which unanimity is required for the adoption of internal rules”. David Croughan is Head of Economics and Taxation at the Irish Business and Employers Confederation (IBEC) and serves as Chairman of the Economic and Financial Affairs Committee of the EU employers' umbrella organisation BUSINESSEUROPE.

²⁷ Similar mistakes of selective quoting, and in this case ignoring ECJ rulings, are made by Jamie Smyth, the European Correspondent with the Irish Times: Smyth, Jamie, 2008. 'Giving a free hand to the market?' Dublin: The Irish Times, May 20th.

²⁸ ECJ, Opinion 2/91 Convention No. 170 of the *International Labour Organisation concerning safety in the use of chemicals at work* [1993] E.C.R. I-1061, para. 7;

ECJ, Opinion 2/04 *Accession by the Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] I-1759, para. 26;

The AETR judgement of March 31, 1971, Case 22/70 *Commission v Council* [1071] E.C.R. 263, paras 16-29; and,

ECJ, Opinion 1/94 *Agreement Establishing the World Trade Organisation* [1994] E.C.R. I-5267, para. 77 and paras 82-85.

and Audiovisual services, Member States certainly can not find “provisions for which unanimity is required for the adoption of internal rules” which could stop the EU Commission and the qualified majority of the EU Council driving ahead and inserting vital public services into the WTO global free-trade system.

Wrong: Micheál Martin TD says public services protected

On Friday 16th May, the Minister for Foreign Affairs, Mr. Micheál Martin T.D. misquoted the Lisbon treaty claiming that public services were protected from privatisation and the global free-trade system. He asserted that a new protocol of the Lisbon treaty “affirms that the provisions of the Treaties do not in any way affect the competence of the Member States to provide, commission and organise services of general interest, e.g., health and education.”²⁹ He has questions to answer as a result.³⁰

The Minister is referring to the ‘Protocol On Services of General Interest, Article 2’, which contrary to the Ministers words, *actually* states: “The provisions of the Treaties do not affect in any way the competence of Member States to provide, commission and organise **non-economic services** of general interest.”

‘Non-economic services of general interest’ *are not the same thing*, as ‘services of general interest’: in free-trade talks and at the European Court of Justice, these little things *really* matter.

The European Commission³¹ and the European Court of Justice (ECJ)³² are very clear on this. ‘Non-economic services of general interest’ are only those services for which no fee is ever paid, and additionally, where no private company currently provides these services, i.e. no market. In other words, to be covered under the protocol the Minister relies on to back up his claim, that public services are protected from privatisation, the state would have to be operating a fee-free total monopoly. The ECJ has ruled that in any instance where a fee or a charge is involved, a service must be regarded as an ‘economic activity’ like any other and so come under the EU laws on the free-market, free-competition, freedom to provide services, etc, i.e. no special protections from the free market.

The Commission put it as follows:

“In the area of competition law, according to the Court of Justice, it is not the sector or the status of an entity carrying out a service (e.g. whether the body is a public undertaking, private undertaking, association of undertakings or part of the administration of the State), nor the way in which it is funded, which determines whether its activities are deemed economic or non-economic; it is the nature of the activity itself. To make the distinction, the Court relies on a set of criteria related to the conditions of functioning of the service under consideration, such as the existence of a market, state prerogatives or obligations of solidarity.” [...]

“For a given service to qualify as an economic activity under the internal market rules (free movement of services and freedom of establishment), the essential characteristic of a service

²⁹ DFA, 2008. ‘Public services such as Health and Education will remain under Irish control - Minister Martin.’ Department of Foreign Affairs, May 16th. Available at: <http://www.foreignaffairs.gov.ie/home/index.aspx?id=48540>. Taken on: 17-05-8

³⁰ Finnegan, Barry, 2008. ‘Five Easy Questions For Micheál Martin’. CAEUC, 17th May. Available at: <http://www.caeuc.org/index.php?q=node/226>. Taken on: 22-05-08

³¹ EU Commission, 2007. ‘Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions, Accompanying the Communication on “A single market for 21st century Europe”: Services of general interest, including social services’. Brussels, 20.11.2007. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0725:FIN:EN:PDF>. Taken On: 17-05-08.

³² ECJ ‘Watts case’, 2006. ‘Judgment Of The Court (Grand Chamber); In Case C-372/04; The Queen, on the application of: Yvonne Watts v Bedford Primary Care Trust, Secretary of State for Health’. Available at: <http://curia.europa.eu/juris/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-372/04>. Taken on: 21-05-08

is that it must be provided for remuneration. The service does not, however, necessarily have to be paid by those benefiting from it. The economic nature of a service does not depend on the legal status of the service provider (such as a non-profit making body) or on the nature of service, but rather on the way a given activity is actually provided, organised and financed. In practice, apart from activities in relation to the exercise of public authority, to which internal market rules do not apply by virtue of Article 45 [i.e. ‘Provisions On Enhanced Cooperation’] of the EC Treaty, it follows that the vast majority of services can be considered as "economic activities" within the meaning of EC Treaty rules on the internal market (Articles 43 and 49).”³³

Fairly clear there then: the Commission opinion here *and* the protocol the Minister (incorrectly) quotes means that if you charge any type of fee for a service then the protocol doesn’t apply and public services are not protected from privatisation and entry into the EU and international free-trade system.

IBEC Are Right

According to the Irish Business and Employers Confederation (IBEC), in their submission to the Forum On Europe: “Through our membership of the EU many markets have been subject to liberalisation and through this process new business opportunities have been created for Irish companies. The Lisbon Reform Treaty creates the legal basis for the liberalisation of services of general economic interest (Art. 106). A yes vote for the Lisbon Treaty creates the potential for increased opportunities for Irish business particularly in areas subject to increasing liberalisation such as Health, Education, Transport, Energy and the Environment.”³⁴

One has to agree with IBEC’s interpretation of the Lisbon treaty: it creates profitable business opportunities from public services, including health and education. As explained in detail above, Lisbon would remove the automatic veto that EU countries currently have on whether or not to put vital public services into the global free-trade system. Once inside the WTO, its free-trade system law, locks these services into maintaining current levels of privatisation and liberalisation so that future governments can’t change them. Additionally, once inside, WTO law requires proof of ‘progressive liberalisation’ i.e. it is illegal not to increasingly take measures for further privatisation and liberalisation. That is the purpose of the WTO - an efficient global trading system.

One Small Improvement

There is however, one small improvement in Lisbon. It’s Point 3 of Article 188c which adds the new text:

“The Commission shall report regularly to the special committee and to the European Parliament on the progress of negotiations.”

If Lisbon is accepted, the EU Commission might have to report to the European Parliament about international trade agreements all right, but there is no legal obligation here to tell the parliamentarians any

³³ EU Commission, 2007. ‘Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions, Accompanying the Communication on “A single market for 21st century Europe”: Services of general interest, including social services’. Brussels, 20.11.2007. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0725:FIN:EN:PDF>. Taken On: 17-05-08. Page: 5.

³⁴ Forum On Europe, 2008. ‘IBEC strongly supports the adoption of the Treaty in the forthcoming referendum in Ireland’. Irish Business and Employers’ Confederation submission to the National Forum on Europe, April. Available at: <http://www.forumoneurope.ie/index.asp?locID=113&docID=1650>. Taken on: 18-05-08

details of the deal. After all, some parliamentarians might not understand the need for ‘privacy’ to promote ‘efficiency’ in trade negotiations. Indeed, if they could, some MEPs may inform their constituents of the *details* of a free-trade deal. The people too may not understand the subtleties of the need for ‘privacy’ to promote ‘efficiency’ in the EU and in the market. One thing the current Irish government seems determined to do, is to keep the details of current WTO free-trade deal under wraps until well after the Lisbon vote on June 12th.

But finally ...

There are additional major changes to the common commercial policy³⁵ contained in the Lisbon treaty which, it is predicted by the NGO development and global justice community around the world³⁶, will exacerbate the already majorly negative impact that EU trade deals have on the lives of people in poor countries. That discussion is for another article. In the meantime reading on the topic can be found at this footnote:³⁷,

Awkward questions that must be answered by the current government, the Labour Party, Minister Eamon Ryan and Minister John Gormley:

As explained above, if the government³⁸ can prove as they are claiming, despite the “difficult to imagine awkward set of circumstances” required, that there actually is a veto on the current WTO free-trade deal which is annoying Irish farmers so much, then it MUST involve a package of measures additional to agriculture and include one or more of the special five: Educational services, Health services, Social services, and, Cultural and Audiovisual services.

Questions: are the government going to inform the electorate as to *any* of the details of these public services included in the current WTO free-trade talks? Perhaps the details are ‘commercially sensitive’? If there’s to

³⁵ i.e. Article 133 of the existing treaties as proposed to be amended by the new Article 188b in the Lisbon treaty.

³⁶ If you are one of these people and would like Irish people to ‘Vote No’ on your behalf, then you may be interested in this: ‘Irish Friends Vote No For Me!’ at : <http://www.irish-friends-vote-no-for-me.org/>.

³⁷ See for example: Ó Caoimh, Conall, 2008. ‘Lisbon Treaty likely to widen democratic gap on trade rules’. Dublin: Irish Times, May 13th. Available at: http://web.lexis-nexis.com/professional/?_m=3e6ee2986b33ff5b23cdb5668d945060&wchp=dGLbVzz-zSkSt&_md5=70c16daa304876c07c271ae8c826f709 Taken on: 15-05-08. Or see:

Oxfam, 2008. ‘Oxfam: ‘Rethink Unfair EU Trade Deals Before It’s Too Late’. April 21st. Available at:

http://www.oxfam.org.uk/applications/blogs/pressoffice/2008/04/oxfam_rethink_unfair_eu_trade.html. Taken on: 20-05-08. Or see:

Oxfam, 2007. ‘EU Trade Agreements Pose Huge Threat to Development, Campaigners warn’. December 20th. Available at: http://www.oxfam.org.uk/applications/blogs/pressoffice/2007/12/eu_trade_agreements_pose_huge.html. Taken on: 20-05-08. Or see:

Seattle to Brussels Network, 2008. ‘Statement of the Seattle to Brussels Network for the WSF Global Day of Action - 26 January 2008’. Available at: http://www.bilaterals.org/article.php3?id_article=11033. Taken on: 20-05-08. To quote them: “The Lisbon Treaty: the wrong solution to an undemocratic and unsocial Europe: ... We condemn the so-called EU Reform Treaty (Lisbon Treaty) which reinforces the power of the EC in matters of trade and development and further reduces the capacity of citizens to influence democratically its policies. The new treaty is deepening the neoliberal policies and the democratic deficit of the EU, perpetuating the power of transnational corporations and serving the interests of European capital, increasing the militarisation of Europe, strengthening “fortress Europe” and bringing no substantive protection to European citizens against the downward spiral in social and environmental standards. ... In the next months, we will use moments in the political calendar to link with the global justice movement: ... [and] The campaigns calling for referendums on (or against) the Lisbon Treaty”. For a full list of the all the EU Development NGOs that form this Network, see: (Full list of members available here): <http://www.s2bnetwork.org/index.jsp?id=9&random=941040039966367>

³⁸ With the sole exception it has to be said of one Green Party Senator. According to the Irish Times: “Deirdre de Búrca said ... Ireland did not have a veto on agricultural negotiations at present.” Walsh, Jimmy, 2008. ‘Senators ill-informed on Lisbon - Doherty’. Dublin: Irish Times, May 15th. Available at: http://web.lexis-nexis.com/professional/?_m=3e6ee2986b33ff5b23cdb5668d945060&wchp=dGLbVzz-zSkSt&_md5=70c16daa304876c07c271ae8c826f709 Taken on: 15-05-08

be no release of details, then perhaps: which one or more of these special five services areas are included in the current WTO deal that allows them to veto it?

Additionally, it's important to remember that back in February 2004, four Irish MEPs and 17 TDs, including the current Minister for Communications, Energy and Natural Resources, Mr. **Eamon Ryan** TD, the current Minister for Environment, Heritage and Local Government, Mr. **John Gormley** TD and current Labour Party President and Spokesperson for Foreign Affairs, Mr. **Michael D. Higgins** TD signed a letter³⁹ asking the government to give them the details as to what public services the government were negotiating into the WTO free-trade system at the time. This letter was rejected along with 31 of the 32 'Freedom of Information' requests that were put in at the time asking for details about Education and other public services being put into the WTO free-trade system.

They were told, no, we can't give you this information because it is "commercially sensitive". Obviously these "commercially sensitive" WTO free-trade talks in public services and agriculture are ongoing since 2004.⁴⁰

So two more questions: did Ministers Ryan and Gormley bring up the issues raised in their February 2004 letter with their party colleagues during their Lisbon debate? And, have they discussed it since with their colleagues in the Green Parliamentary Party who are so far campaigning for a Yes?

Finally, have Minister Ryan, Minister Gormley and Mr. Higgins had a change of heart? Do they now believe that it's acceptable to put Educational services, Health services, Social services, and, Cultural and Audiovisual services into the global free-trade system without citizens or parliamentarians having access to the details? Without democratically elected governments being able to reject the insertion of these services into the global free-trade system?

And In summary:

1. There is no current provision for vetoing an international trade agreement with *just* agricultural goods in it.
2. The only reason an international trade deal in agricultural goods *could* be vetoed is if it were bundled up in a package of free-trade measures that involved one or more of Educational services, Health services, Social services, and, Cultural and Audiovisual services. Now, pre-Lisbon, EU Member States have an automatic, no-quibble veto on entering these five remaining special services areas into the global free-trade system. Thereby could reject an entire WTO deal.
3. The proposed Lisbon treaty, if adopted, will remove the automatic veto on international trade agreement in these five special areas of: Educational services, Health services, Social services, and, Cultural and Audiovisual services. In its place would be put an undefined and very difficult to imagine awkward set of circumstances, where a Member State *could* argue at the European Court of Justice that they should be allowed to retain a veto in one or more of these five special services areas.

³⁹ DAPSE, 2004. 'Of particular concern is that the deliberations of the Article 133 Committee are not made public.' Indymedia.ie: Democracy and Public Services in Europe. Available at: <http://www.indymedia.ie/article/63459> Taken on: 18-05-08

⁴⁰ Hoedeman, Olivier, 2004. 'EU-US summit: free trade talks ahead?' Indymedia.ie: Corporate Europe Observatory. June 11th. Available at: <http://www.indymedia.ie/article/65472> Taken on: 18-05-08

- Barry Finnegan, May 23rd, 2008.

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