

# Brexit or Britremain: What can the UK learn from the Irish experience of EU referendums?

## INTRODUCTION

Ireland's nine European Union-related referendums might provide some insight on how the UK's "Brexit" or "Britremain" referendum could turn out on 23 June 2016.

There is little UK precedent to help predict the outcome of the June referendum on whether the UK should remain a member of the EU. There has been just one UK-referendum on EU issues in almost 50 years. That was the 1975 referendum on whether the UK should remain a member of the then three European Communities: the European Economic Community (the "EEC"); the European Coal and Steel Community (the "ECSC"); and the European Atomic Energy Community (the "EAEC"). The vote was 67% in favour of remaining with 33% voting to leave - with the strongest support for continued membership being in the southern half of the UK with the support diminishing in Scotland and Northern Ireland. Mathematicians say that one cannot plot a pattern from just one point so one UK referendum 41 years ago is not necessarily a reliable guide as to what might happen today.

One possible source of inspiration - and it is nothing more than limited inspiration - is to see what has happened in the nine referendums on EU matters in Ireland. The lessons are helpful because Ireland - the only contiguous Member State to the UK - has had nine referendums on EU matters, has been a member of the EU for exactly the same length of time as the UK, has comparable political traditions and perspectives, a similar legal regime (for the most part) and very strong links across several dimensions. Indeed, some citizens of the Republic of Ireland will be eligible to vote in the June referendum and some UK subjects living in the Republic of Ireland will also be eligible to vote so the lessons which can be learned from the Irish referendums could be quite revealing.

## LEGAL BACKGROUND

Before considering the lessons from Ireland, it is worth asking why have there been so many Irish referendums.

The short answer is that acceding to the EEC, ECSC and EAEC and adopting some new EU treaties have meant that amendments to Ireland's written constitution (the *Bunreacht na hÉireann*) were needed. If any law is enacted by the Irish parliament (the *Oireachtas*) or action taken by Ireland or its Government which is incompatible with the Constitution then that law or action is invalid in so far as it breaches the Constitution so, on occasion, the Constitution had to be amended to ensure that the EU regime would not be incompatible with the Constitution.

There are two features of the Constitution which deserve mention. First, it provides that the law-making power of the Irish State is vested exclusively in the *Oireachtas*. Secondly, the Constitution also provides that the highest court is the Irish Supreme Court. Both provisions are incompatible with membership of the EU because, for example, the EU's Council, Parliament and Commission may make laws which would be superior to, and even incompatible with, the laws enacted by the *Oireachtas*. Equally, the Court of Justice of the European Union would be superior, albeit only in EU law matters, to the Irish Supreme Court thereby undermining the notion in the Constitution that the latter court is supreme.

A mechanism was needed therefore to immunize EU law from a challenge in the Irish courts that the laws adopted by the EU institutions or actions taken by Ireland in pursuance of EU membership would be invalid under the Irish Constitution.

The simplest mechanism was to provide in the Constitution that nothing in the document would invalidate any law or action adopted by the EU in so far as the law was incompatible with the Constitution. This required the Constitution to be amended. The Constitution may now be only amended by way of a referendum of the people hence any amendment of the Constitution to absorb EU changes requires a referendum. Therefore, for example, Ireland had a referendum in January 1972 on whether Ireland should join the European Communities (the "Accession Referendum") and, since then, whether Ireland should ratify EU-related treaties which could involve Ireland ceding some element of sovereignty. The Irish people voted in the Accession Referendum that nothing in the Constitution should, in practical terms, strike down or annul anything necessitated by Ireland's membership of the EU.

Given the passage of the Accession Referendum, one might be forgiven for thinking that no further referendum was needed in Ireland as the Accession Referendum had apparently immunized further developments at the EU level from challenge by virtue of the Irish Constitution. That was mistaken thinking according to the Irish Supreme Court in *Crotty v An Taoiseach*. The Supreme Court held in that seminal case that any EU treaty (including new ones) which would bind Ireland to concede part of its sovereignty would require prior authorisation under the Constitution. Since then, referendums on some EU matters have become more common in Ireland. If a new EU treaty does not involve ceding sovereignty then, at a simple level, there is no need for a referendum but, if there is a ceding of sovereignty then a referendum in Ireland is needed. So, what lessons can be learned from these referendums in Ireland?

## LESSONS

### Do Not See the 23 June 2016 as the Finishing Line

It is tempting for commentators to see the 23 June 2016 as the finishing line. It is unlikely to be so. Some propositions which were put to the Irish people in EU referendums and rejected were put to the people a second time and the second vote produced a different result. Whatever way the vote goes in June, there could be calls for a second vote (especially if the vote is narrow). Equally, if the vote is to leave, some of the remaining Member States could seek to retain the UK by putting a new package on the table to keep the UK in the EU. This is altogether separate from the post-membership negotiations, under Article 50 of the Treaty on the European Union, which would flow from a vote to leave. This notion that there could well be a second vote can give some comfort to voters intending to leave the EU (in the case of the June Referendum) or reject a proposal (in the case of the Irish referendums) because they sense that there could always be the "safety net" of a second vote. So do not assume that the 23 June 2016 referendum would be the end of the process.

## Turnout Matters

The level of turnout has been critical to the outcome of the Irish EU-related referendums. Post-referendum survey evidence showed that low turnout in some of the Irish EU-related referendums meant that the proposition was defeated. For example, in the 2001 referendum on possible accession to the Treaty of Nice, it was clear that abstention, rather than a swing from “yes” to “no”, was the key feature of the behaviour of the electorate in the referendum. Ironically, those who do not vote can have as much influence as those who do vote. It is also the case that if voters are largely indifferent about the outcome or believe the outcome is inevitable then the more “committed” voters are more likely to turnout and vote. Recent survey evidence in the UK shows that the younger voters are more likely to want to remain in the EU while older voters are more likely to want to leave but older voters are more likely to vote than their younger counterparts so the level of turnout could well be critical to the outcome. (Ireland tends to have votes on Fridays which tends to facilitate students to vote as they return to their own constituencies.)

## Do Not Assume that Voters are voting on the Issue in Front of Them: EU Polls can Generate Diverse Issues which are not Obviously Connected with the Issue in Hand

Voters in general elections are usually voting, to some extent, on the simple issue of who they want to elect to govern the country. By-elections are often more complex because voters can, for example, express disenchantment with the government of the day. Irish experience shows that referendums can have more in common with by-elections than general elections. Therefore extraneous issues can influence voting patterns in referendums. To borrow the terminology of political scientists, “second order” considerations can be relevant and it is not just “first order” considerations which matter in deciding voting intentions.

A survey of the Irish EU referendums shows that among the issues which have been prominent in Ireland’s “EU” referendums have included abortion; conscription; corporation tax; military neutrality; and workers’ rights. It is possible that some groups can have their overall long-term ambitions (positive or negative) for the EU distorted by virtue of seeking to take short-term advantage on a vote. These second order issues are, to a greater or lesser extent, not obvious EU issues but they can still be relevant to EU referendums because a link to the EU (however weak or strong) can be found so anyone seeking to influence the outcome of the June referendum needs to contemplate that “second order” issues can be as relevant as “first order” EU issues. These second order issues can be generated by, for example, pressure groups who see the referendum as a platform to ventilate their issues or by events which bring the issue into focus.

## National, rather than EU, Issues can be Material

Staying with the theme of extraneous issues being relevant, it is clear that some of the Irish EU-related referendums have involved voters taking into account national, rather than EU, issues. Some of these issues have involved Irish-centred issues which had some connection with the EU but the connection was not a strong one. Both sides of a campaign need to anticipate that some tangential issues or events (particularly, events close to voting day) could become centre stage and they have to deal with all issues rather than ignoring them because they are not obviously pertinent to the vote in hand.

## Campaigns Matter

The Irish EU-related referendums demonstrate that if either side of a campaign is not working at full tilt then it is possible that the other side can gain an advantage. Campaigns matter in terms of

informing voters about the issues at hand. In some referendums (e.g., the 2001 referendum on whether Ireland should ratify the Treaty of Nice), post-referendum surveys showed that late voters tended to vote “no” (i.e., against the proposition) because of a lack of understanding of the issues. Paradoxically, “yes” voters can be more uncertain about their decisions but sufficient knowledge helps voters to vote in favour of a change while a lack of knowledge (e.g., about the matter in hand or its consequences) can lead voters to vote against change.

## Parties Matter

Some voters in Irish referendums on EU matters have taken their lead from the political parties which they follow. Opposition parties have tended to be less enthusiastic about supporting the Government’s approach on referendums because a victory for the Government is seen as unhelpful to the progress of the opposition parties. Nonetheless the approach of political parties can influence the outcome.

## Mood and Feelings Matter

It is an old political cliché that people often vote not only on the basis of what you tell them but how you make them feel. So the mood of the electorate has been important in the Irish EU referendums. Giving voters detailed information can help them to understand the issues more closely. However, those seeking to influence voters may be better rewarded with seeking to influence the voters’ mood as well as their knowledge.

## Do not assume that Voters know a Great Deal about the EU

Some post-referendum surveys in Ireland have shown surprisingly low levels of hard knowledge about the EU among the electorate about the EU despite long membership and frequent discussion of EU issues in the media. So, any campaign needs to include some element of information and education about the EU so as to ensure that voters are informed fully. A survey after the 2001 Treaty of Nice referendum showed that 35% of those surveyed said they “did not know what the Treaty was about at all” and only 8% said they had a “good understanding” of what the Treaty was about. Indeed, some famous politicians around Europe have expressed their views on EU treaties only to later admit that they had never read the treaties in full despite being involved in the negotiation of the treaties so it may just be too much to expect voters to sit down and read EU laws in their spare time! Voters found that different sources of information had diverse levels of utility: television and radio programmes as well as newspapers were found useful by just over 40% of voters (and these were the most useful sources of information) but some other sources (e.g., posters and government publications) were found less useful.

## Court Cases and Legal Issues have been Common

There have been several cases before the Irish courts in the context of the EU referendums. These have turned on issues such as compatibility with the Irish Constitution but have also turned on specific issues during campaigns (e.g., government spending and statements). There has also been considerable debate, including some abstract debate, about the status in law of reassurances provided by the EU on issues relevant to Irish debates (e.g., after the electorate refused to ratify the Lisbon Treaty, the European Council issued various reassurances, which would later become binding as treaty commitments with the Croatian Accession Treaty but which in the interim, when the Irish people voted, were not treaty provisions).

## There are Differences between the UK and Ireland

It is interesting to speculate as to what lessons can be learned from EU-related referendums in Ireland but there are limitations on extrapolating too much from Ireland to the UK. First, there has been no anti-EU party (along the lines of the UK Independence Party (“UKIP”)) in the Irish Oireachtas or any political party or movement dedicated to the anti-EU cause which has attracted support on the same scale as UKIP. Instead, the anti-EU platform in Ireland has involved the formation of coalitions of diverse groups, individual politicians or smaller mainstream political parties which align themselves to the anti-EU coalition. Secondly, apart from the 1972 Accession Referendum, Ireland has never had an “In or Out” referendum. This is different from the UK’s 1975 Referendum or the referendum in June. Instead, the Irish EU referendums since 1972 have been about whether the EU project would move forward. This means that the voters in the Irish voters have had a somewhat less onerous burden than their UK counterparts – since 1972, Irish voters have only had to consider whether the EU project should go forward or not but the UK voter will have to decide whether their country should leave the EU altogether – indeed, the referendum should be called the “UKEXIT” referendum rather than the narrower “BREXIT” because it would not be just Britain but the whole UK which would leave the EU. The Irish experience will be interesting to those trying to anticipate what will happen in this critically important vote and, in due course, it will be interesting to compare and contrast the experiences in both jurisdictions. While the vote on 23 June is for the voters of only the UK and Gibraltar, the outcome will have an impact on the people of the entire EU but particularly its nearest and closest neighbour who joined what is now the EU at the same time as the UK.

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