



## Statewatch

# The UK's European Union Bill

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### 1) Introduction

In November 2010, the UK government tabled a Bill which would provide for a referendum in the UK in many cases before the EU treaties could be amended in future. The Bill would also enhance parliamentary control of UK government decisions in relation to the UK in many other respects.

The following analysis explains this complex bill and comments on the underlying principles underlying it.

### 2) Background

Before explaining and analyzing the Bill, it is first of all necessary to set out:

- a) the background to the 'primary law' of the European Union (ie the rules which take precedence over the adoption of secondary legislative or non-legislative acts by the EU's institutions); and
- b) the current rules applying to the UK's approval of amendments to the EU's primary law.

#### 2.1 *EU rules on Treaty amendments*

At present there are three Treaties making up the foundations of the primary law of the European Union (EU). The main two treaties are called, since the entry into force of the Treaty of Lisbon, the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), which are referred to as 'the Treaties' (see the consolidated texts at OJ 2008 C 115). The third treaty, the European Atomic Energy Treaty, is known in practice as the 'Euratom Treaty' (see the consolidated text at OJ 2010 C 84).

There are also 37 protocols attached to the two main Treaties, six of which are also attached to the Euratom Treaty. Furthermore, there are two Annexes to the TFEU, and four Annexes to the Euratom Treaty. The Protocols and Annexes are an 'integral part' of the three Treaties, ie they have the same validity as primary law (so they cannot be ruled invalid for breach of the Treaties) and are subject in principle to the same rules on Treaty amendment (Article 51 TEU and Article 207 Euratom).

The EU's Charter of Rights, while a separate document, is described as having the 'same legal value' as the Treaties (see Article 6(1) TEU), so presumably must be treated also as a primary law document

The Treaty of Lisbon made certain changes to the rules for amending the Treaties. Following the entry into force of that Treaty, Article 48(1) of the TEU provides that the Treaties can be amended either by an 'ordinary revision procedure' set out in Article 48(2) to (5) TEU, or by two types of 'simplified revision procedures' set out in Article 48(6) TEU and 48(7) TEU.

Under the **ordinary revision procedure**, which applies to the whole of the TEU, the TFEU and the Euratom Treaty, EU leaders (meeting in the 'European Council') must first of all decide, by simple majority of Member States, that they want to consider proposed Treaty amendments. Then there must normally be a special 'Convention' including members of national parliaments, members of the European Parliament (MEPs), representatives of Member State governments and the Commission. However, the European Council can decide (by a simple majority) not to hold a Convention 'should this not be justified by the extent of the proposed amendments', if the Treaty amendments are not considered very far-reaching. The European Parliament (EP) must approve the decision not to hold a Convention. If a Convention is held, it must adopt 'recommendations' on proposed Treaty amendments by 'consensus'.

Following the conclusion of the Convention, or if no Convention is held, an Inter-governmental Conference is then held to agree on Treaty amendments by 'common accord' of the Member States. The Treaty amendments must then be 'ratified' by all the Member States in accordance with their constitutional requirements, in order to come into force. It is up to each Member State to decide exactly what those requirements are (on the UK's current requirements, see below).

In practice, the ordinary revision procedure, which was amended by the Treaty of Lisbon, has been used once already (in its amended form) since the entry into force of that Treaty. This was to agree, in June 2010, a new Protocol to the Treaties which amends the Protocol on transitional rules which was part of the Treaty of Lisbon (OJ 2010 C 263/1). The purpose of the Protocol is to increase the number of MEPs from to 751. This increase had already been provided for by the Treaty of Lisbon, but the MEPs in question could not be elected at the last EP elections in June 2009 because the Treaty of Lisbon was not yet in force. So far, this Protocol has been ratified by only three Member States.

The European Council has also promised two further Treaty amendments. First, it promised Ireland in December 2008 that a Protocol addressing certain of its citizens' concerns about the Treaty of Lisbon would be attached to the Treaties at the time of the next accession to the EU. Second, it promised the Czech Republic that a Protocol which would extend to that Member State the existing Protocol which limits the legal effect of the EU's Charter of Fundamental Rights in the UK and Poland would also be attached to the Treaties at the time of the next accession to the EU. The next accession Treaty is likely to be with Croatia, and will probably be signed in 2011 and ratified in 2012, depending upon the success of the final stages of the accession negotiations now underway with that State and of the following ratification process. It is not clear whether these two Protocols will simply be included as part of the accession Treaty itself (in which case they will be subject to a separate procedure for accession Treaties, referred to below), or will be drawn up as separate (but perhaps linked) Treaties and ratified at the same time as the accession Treaty. In the latter case, the Protocols will presumably be subject to the ordinary Treaty revision procedure.

As for the **first simplified revision procedure**, set out in Article 48(6) TEU, it can only apply to changes relating to Part Three of the TFEU, ie the internal policies of the EU (Articles 26-197 TFEU). So it cannot apply to the TEU, the Euratom Treaty, or presumably to any of the Protocols or Annexes attached to the Treaties. Nor can it apply to the other six parts of the TFEU (Articles 1-25 and 198-358). Moreover, this process cannot be used to 'increase the competences conferred on the Union' by the Treaties. Since the Treaties describe the competences conferred on the EU separately from the rules on *decision-making* concerning those powers (ie whether Member States have a veto or not on particular decisions),<sup>1</sup> this limitation probably does not prevent amendments to the decision-making rules in Part Three being adopted by use of this first simplified revision procedure. However, as described below, many decision-making rules in the Treaties could anyway be amended by means of the *second* simplified revision procedure.

The first simplified revision procedure skips the process of having a Convention or an inter-governmental conference. Furthermore, the text resulting from the process is a Decision of the European Council, not a treaty or protocol drawn up by Member States. Nevertheless, any amendments must still be agreed by 'common accord' of the Member States, and must be 'approved' (not 'ratified') by all the Member States in accordance with their constitutional requirements, before they can come into force. Again, it is up to each Member State to decide exactly what those requirements are (on the UK's current requirements, see below).

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<sup>1</sup> See Art. 2(6) TFEU: 'The scope of and *arrangements for exercising* the Union's competences shall be determined by the provisions of the Treaties relating to each area' (emphasis added).

In practice, this procedure has not been used yet, since it was newly introduced by the Treaty of Lisbon. It is possible that it might be used in the near future, in order to adopt Treaty amendments relating to economic and monetary union which the European Council in October 2010 agreed should be considered. Alternatively, the ordinary revision procedure would have to be used.

Next, the **second simplified procedure** is set out in Article 48(7) TEU. It solely concerns decision-making, and allows for a decision either a) to change from a unanimous vote of the Council to a vote by qualified majority vote (QMV) in Council, as regards the TFEU or the foreign policy rules in the TEU; or b) to change from the use of a 'special legislative procedure' by the Council to the 'ordinary legislative procedure'. The first option is limited to cases of Council unanimity which appear in either the TFEU or the foreign policy Title of the TEU, and cannot apply to 'decisions with military implications or those in the area of defence.' Furthermore, Article 353 TFEU provides for several further cases where this second simplified revision procedure does not apply: these concern decisions on EU 'own resources', the EU's multi-annual financial (spending) framework, the use of EU powers where no other powers exist in the Treaty, and decisions to sanction a Member State for serious and persistent breaches of human rights. In all of these cases, only a Treaty amendment under the ordinary revision procedure could abolish the unanimous voting requirement in Council, except for decisions on the EU's multi-annual financial (spending) framework, where an alternative special procedure could be used to change the voting rules (see further below).

A 'special legislative procedure' means that the EU adopts legislation other than by means of the 'ordinary legislative procedure'. This procedure was previously known as the 'co-decision procedure' and entails the joint legislative power of the Council and the EP. The ordinary legislative procedure provides in every case for QMV in Council. There are 34 special legislative procedures provided for in the TEU; most entail unanimous voting in the Council with consultation of the EP, but a few provide for unanimous voting with EP consent, or for QMV in Council with EP consultation. Three provide for the *EP* to adopt legislation with a lesser involvement of the Council. A list of these procedures is attached to this analysis.

It should be noted that Article 48(7) does *not* apply to: the Euratom Treaty; the TEU, other than the foreign policy title of that Treaty; to decision-making by the *European Council* (ie EU leaders) as distinct from the Council; to decision-making by 'common accord' of the Member States, as distinct from the Council; or to the three cases where the EP adopts legislation with a lesser involvement of the Council. The decision-making rules in these cases could only be changed by means of the ordinary Treaty revision procedure.

In practice, Article 48(7) has not been used yet. It was only introduced by the Treaty of Lisbon.

In addition to these provisions, there are other specific provisions of the Treaties which de facto provide for amendments to those specific provisions by means of special procedures. They are referred to in this analysis as **'alternative special procedures'**. In particular, there are alternative special procedures that permit a change from unanimity to majority voting in the Council, along with (in most cases) the ordinary legislative procedure, as regards foreign policy, the EU's multi-annual financial (spending) framework, family law, aspects of employment law and aspects of environmental law. (It should be noted that aspects of foreign policy, employment law and environmental law are already subject to QMV and, as regards employment law and environmental law, the ordinary legislative procedure). These special rules mostly overlap with Article 48(7) TEU, except that Article 48(7) TEU does not apply to the EU's multi-annual financial framework. All of the alternative special procedures require a unanimous vote of Member States' governments before they can be applied, but the main difference with Article 48(7) TEU is that most of the alternative special procedures do *not* require consent of the EP or control by national parliaments. The exception is the special procedure concerning family law, where the national parliaments can control the draft decision in the same way they can control draft decisions to be made pursuant to Article 48(7) TEU. However, it is open to Member States to give national parliaments a controlling power if they wish to.

In practice, the current alternative special procedures have not been used, although a previous such procedure was used in 2004, in order to move to QMV and co-decision on aspects of immigration law from the start of 2005.

There is also an alternative special procedure which can apply after a group of Member States has triggered the use of the general rules on **enhanced cooperation**, ie the possibility of a group of Member States (at least nine) going ahead and adopting EU legislation without the participation of the other Member States. This process should be distinguished from the British (and Irish and Danish) opt-outs in specific cases (ie, Justice and Home Affairs, as well as monetary union for the UK and Denmark). In such a case, Article 333 TFEU provides that the Member States *participating* in enhanced cooperation can decide, by a unanimous vote of *those* Member States, to abolish a unanimity requirement or to change a special legislative procedure into the ordinary legislative procedure. The difference with Article 48(7) TEU is that there is no obligatory control by national parliaments or consent requirement by the EP - and moreover, there is no role for the non-participating Member States. Again, it is open to (participating) Member States to give national parliaments a controlling power if they wished to.

To date, enhanced cooperation has only been authorized once (as regards conflict of laws rules for divorce, in July 2010; the UK does not participate), and the participating Member States have shown no interest in changing the decision-making rules so far.

Another Treaty provision allowing for a special rule on Treaty amendment is Article 49 TEU, on accession of new Member States. This Treaty article

specifies that accession treaties include 'adjustments to the Treaties on which the Union is founded'. However, accession treaties are agreed unanimously by Member States (along with the new Member State(s)) and then ratified by national parliaments, so there is no difference from the usual Treaty revision procedure, as far as Member States are concerned, except for the absence of an inter-governmental conference or Convention.

In contrast, Article 50 TEU, which provides for a special procedure for Member States to leave the EU, does *not* mention that the agreements which can be concluded with a departing Member State can include Treaty amendments. The point is significant because unlike Article 49, such agreements must be agreed by QMV and there is no requirement of ratification by national parliaments. In any event, Article 50 specifies that a Member State can leave the EU unilaterally even without such an agreement. A departure of a Member State would necessarily entail at least technical amendments to the Treaties, to delete references to that Member State.

Furthermore, some (but only a minority) of the protocols attached to the Treaties can be amended by special rules, other than by the ordinary Treaty revision procedure. Most of the Protocol setting out the Statute of the EU's Court of Justice can be revised by means of the ordinary legislative procedure (Article 281 TFEU), as can part of the Statute of the European Central Bank (Article 129(3) TFEU; there is another simplified amendment procedure for this Statute set out in Article 40.2 of the Statute). The entire Statute of the European Investment Bank can be amended by a special legislative procedure (unanimity in Council and consultation of the EP - Article 308 TFEU), as can the protocol concerning the excessive deficit procedure (Article 126(14) TFEU). The protocol on the convergence criteria for monetary union can also be amended by unanimity in Council and consultation of the EP (Article 6 of the protocol). The remaining 32 protocols can only be amended by the ordinary Treaty revision procedure, although Ireland and Denmark can unilaterally decide to amend the special Justice and Home Affairs protocols relevant to them, and Denmark and the UK could, in effect, agree to waive the protocols giving them an opt-out from monetary union (if they meet the criteria to adopt the euro).

It is also possible to amend Annexes I, II and IV to the Euratom Treaty by QMV in Council (Arts. 4(2), 41 and 92, Euratom Treaty). Furthermore, Annex II to the TFEU can be amended by the European Council, acting unanimously (see Article 355(6) TFEU), in order to change the status of associated territories or overseas departments of France, Denmark and the Netherlands (but *not* the UK).

It should also be noted that in several places the Treaties require national ratification of EU secondary acts: the decision to extend EU citizenship rights, the amendment of the EP electoral procedure, changes to the 'own resources' rules (the laws setting out how the EU obtains its revenue), the grant of extra jurisdiction for the EU's Court of Justice over intellectual

property disputes and the ratification of the treaty providing for the EU's accession to the ECHR (which is currently being negotiated).

It should be noted that the UK, Ireland and Denmark have an opt-out on Justice and Home Affairs (JHA) law matters, although (in the case of the UK and Ireland) they may opt in to individual proposals in this area (and often do so). The UK and Denmark also have an opt-out from adopting the euro. Therefore any changes to the EU's primary law in these areas have a differential effect on these Member States.

It should in particular be pointed out that in the areas of JHA law still subject to unanimous voting (rules on passports, family law, the European Public Prosecutor and police cooperation, as well the special rules allowing for simplified extensions of competence or amendment of decision-making rules in this area), the UK and Ireland do not really have a fully-fledged veto, since if they opt-in to such proposals and then 'veto' them, the proposal is not fully blocked but rather the other Member States can just go ahead without the UK and Ireland.

In certain areas of criminal law, as well as in the areas of foreign policy and social security for migrants, the TFEU provides for a special procedure known in practice as an 'emergency brake', which allows any Member State dissatisfied with a proposal on certain specified grounds to block decision-making even though QMV applies.

## *2.2. Current UK rules on Treaty amendments*

Since 1978, successive versions of the *European Parliamentary Elections Act* have explicitly required an Act of Parliament to increase the powers of the European Parliament. Furthermore, the *European Communities Act 1972*, which sets out the basic rules for the reception of EU law within the UK's legal order, in practice has to be amended by a fresh Act of Parliament every time there is a new treaty amendment, accession agreement or change to the rules governing EP elections or own resources, in order for such new measure to have effect in the UK (note, however, that this Act does not apply to the foreign policy provisions of the Treaties).

The *European Union (Amendment) Act 2008* explicitly requires that any amendment to the Treaties needs to be approved by an Act of Parliament, if that Treaty amendment results from the ordinary Treaty revision procedure (section 5). The use of either form of simplified revision procedure, or any of the alternative special procedures for moving to QMV or the ordinary legislative procedure (including in the framework of enhanced cooperation) is instead subject to a form of parliamentary control, ie both houses of parliament must support a motion approving the government's decision (section 6).

Other legislation requires an Act of Parliament before the UK can participate in the euro. In practice, the previous government promised that a referendum would have to be held before any such decision was taken,

but this promise was never enshrined as a legally binding rule in an Act of Parliament.

### 3) Summary of the Bill

The Bill provides for three things:

- a) revised rules on approving amendments to the Treaties (but *not* the Euratom Treaty) and to certain secondary EU measures (Part 1: sections 1-14 and schedule 1);
- b) the approval of the latest amendment to the Treaties, which is a Protocol amending the Protocol on transitional rules (Part 2: sections 15-17 and schedule 2); and
- c) an explicit rule concerning UK sovereignty in relation to the EU (Part 3: s. 18).

Part 3 also contains general rules (sections 19-22), concerning financial provisions, the territorial scope of the Bill, its entry into force and its title.

The main focus of this analysis is Part 1 of the Bill, given that Part 2 only concerns the election of a small number of extra MEPs (only one from the UK) and the explanatory notes to the Bill state that Part 3 is intended only to give statutory effect to the common law rule that the legal effect of EU law in the UK stems from UK legislation.

#### 3.1 *Referendums*

The rules in the Bill regarding approval of amendments to the Treaties and certain secondary EU measures are quite complex.

First of all, a referendum would have to be called in relation to certain (but not all) Treaty amendments, where:

- a) the **ordinary revision procedure** applies (section 2);
- b) the **first simplified revision procedure** set out in Article 48(6) TEU applies (section 3);
- c) the **second simplified revision procedure** set out in Article 48(7) applies (section 6); or
- d) several **alternative special procedures** apply (also section 6).

A referendum would also have to be called as regards UK participation in other **fundamental EU policies** (again section 6).

More specifically, a referendum would have to be called where:

- a) as regards EU competences, any new competence is conferred upon the EU or extended, or an EU body is given new or extended power to impose requirements, obligations or sanctions upon the UK, or the EU's objectives are amended;



- b) as regards **EU decision-making**, where a veto of any sort is removed as regards any of the decisions listed in schedule 1 to the Act (see further below), where any 'emergency brake' is removed or where most of the alternative special procedures which permitting a shift to QMV are applied; or
- c) as regards UK participation in other **fundamental EU policies**, where the EU decided to establish a common defence policy, or where the UK planned to join the euro, to participate in the creation of a European Public Prosecutor, to extend the powers of that Prosecutor (if the UK participated in it) or to give up its border controls with other Member States.

There is an exception in section 4(4) for cases where a Treaty amendment under the ordinary revision procedure or the first simplified procedure only concerns the following:

- (a) the codification of practice under TEU or TFEU in relation to the previous exercise of an existing competence;
- (b) the making of any provision that applies only to member States other than the United Kingdom;
- (c) in the case of a treaty, the accession of a new member State.

The explanatory memorandum to the Bill states (at para. 55) that this is *not* an exhaustive list of cases where a change to the Treaties does not transfer competence or power to the EU.

There is another exception, where a Treaty amendment adopted pursuant to the first simplified revision procedure concerns only the grant to an EU body of new or extended power to impose requirements, obligations or sanctions upon the UK, and 'the effect of that provision in relation to the United Kingdom is not significant' (section 3(4)). The Bill refers to this as the 'significance requirement'. It does not apply to Treaty amendments adopted pursuant to the ordinary revision procedure.

It is further specified (section 4(2)) that any reference to extension of a competence includes the removal of a limitation upon that competence. The explanatory memorandum to the Bill states that this would mean a referendum would have to be called if the special Protocol giving the UK and opt-out from JHA matters were to be repealed. This is the only example given, but presumably this clause would apply in other cases as well, for example if the limitation on EU power over economic migration in Article 79(5) TFEU were removed (this clause prevents the EU from adopting legislation on the volumes of third-country national economic migrants coming from third countries).

The Bill would establish a process (section 5) whereby after agreement on Treaty amendments under the ordinary revision procedure or the first simplified revision procedure, a minister would have to state whether the

Treaty or European Council decision complied with the rules in the Bill requiring a referendum or was exempt from the referendum requirement because it did not meet the criteria for holding a referendum, including the 'significance requirement'. The explanatory memorandum to the Bill explains that this statement could then be subject to judicial review.

Taken together, a referendum would be required for a large majority of possible changes from unanimous voting to qualified majority voting. Comparing section 6(4) and Schedule I to the Bill with the list of cases where vetoes still apply in EU law (see Annexes I and II), it can be seen that the referendum obligation will apply *except* where vetoes would be removed in the following cases:

TEU:

Art. 31(2) resolution of CFSP deadlocks

TFEU:

Art. 64(3) restrictions on capital movement

Art. 65(4) derogation, capital taxation

Art. 81(3) family law (including removal of unanimity as regards the *passerelle*)

Art. 92 derogation, transport

Art. 108(3) derogation, state aids

Art. 118 EU IP rights: language provisions

Art. 140(3) exchange rate, euro participation

Art. 207(4) certain trade policy treaties

Art. 219 exchange rate treaty

Art. 223(2) taxation of MEPs

Art. 246 Commissioner non-replacement

Art. 252 extra Advocates-General

Art. 257 appointment of judges, specialist courts

Art. 262 IP court

Art. 293 amendment of Commission proposals

Art. 294(9) ditto

Art. 301 composition, Economic and Social Committee

Art. 305 composition, Committee of the Regions

Art. 308 amendment of EIB statute

Art. 329(2) authorization, CFSP enhanced cooperation

Art. 331(2) later participation, CFSP enhanced cooperation

Art. 342 language rules

So there would be 23 cases where a referendum would not be required before a veto was abolished, as compared to a total of 58 cases where a referendum would be required: 18 of the 23 cases where unanimity could be abolished pursuant to Article 48(7) TEU; the five exceptions to Article 48(7) set out in Article 353 TFEU; 15 cases of Council non-legislative decision-making subject to unanimity; 13 cases of unanimity in the European Council;

four cases of decision-making by common accord of the Member States; and three cases related to security and defence.

A referendum would be required *if* the UK participated in an enhanced cooperation measure *and if* there were a proposal to abolish unanimous voting in that area, *if* that area was listed in Schedule I.

### 3.2 *Parliamentary control*

The Bill also provides for a number of cases where an Acts of Parliament is required before the UK government can take a position regarding an EU measure.

First of all, an Act of Parliament is required to amend the TEU or the TFEU, including the use of the simplified Treaty revision rules, in cases where a referendum is not required according to the Bill. This would include EU accession treaties and amendment to the Euratom treaty. This is partly an extension of parliamentary powers (as far as the use of the simplified Treaty revision procedures is concerned).

Next, section 7(2) provides for an Act of Parliament in order to approve UK ratification of EU legislation, in the four cases where the Treaties require national ratification before an EU legislative act can come into force (measures on EU own resources, the creation of an EU intellectual property court, the creation of new rights for EU citizens and the amendment of the rules on an EU electoral procedure). This reflects the status quo as regards amendments to the *European Communities Act*, as discussed above.

Next, an Act of Parliament is also required (section 7(4)) in order to: agree to an amendment of the number of Commissioners; authorize a step back in liberalization of external capital movements; replace the protocol on the excessive deficit procedure; and to shift to QMV where the UK participates in an enhanced cooperation measure which is not on the list in Schedule 1 of the Bill. These are all *extensions* of national parliamentary power as compared to the status quo.

There are also three cases where parliamentary control of UK decisions, ie a positive vote by both Houses of Parliament on a government motion (but not an Act of Parliament) is required:

- a) where the UK seeks to take part in a measure to be adopted pursuant to the special 'residual powers' clause of the TFEU (Article 352) - subject to many exceptions (section 8);
- b) where the UK seeks to take part in a JHA measure in several cases where the decision-making rules have changed (as regards family law) or competence has been extended (as regards criminal law) - but note that there is no requirement of parliamentary control as regards the government's decisions to opt in or out of JHA measures generally (section 9); and

- c) certain other decisions - most of which are actually subject to *QMV* except for the changes to the statute of the European Investment Bank and an increase in the numbers of Advocates-General (advisory judges in the Court of Justice) (section 10). Where *QMV* applies, the UK's vote against or abstention from a proposal would obviously *not* block it, unless sufficient other Member States also vote against or abstain to secure a 'blocking minority'.

## Analysis

The starting point for any discussion of which rules should apply to the approval of Treaty amendments is where to 'draw the line' as far as a public referendum is concerned. Should a referendum be held as regards *any* Treaty amendment; as regards *no* Treaty amendments; as regards *significant* Treaty amendments; or as regards *fundamental* Treaty amendments? The first and second options are clear enough, but the precise application of the third and fourth options is inevitably open to debate.

To date the UK has not held a referendum on any Treaty amendments, although a referendum was held after the fact on the obviously fundamental question of the UK's membership of the EU, and has long been promised if the UK were to take the fundamental step of joining the euro. It is notable that the Bill does not require a referendum before taking the fundamental step to *leave* the EU.

In light of the UK's constitutional history (ie parliamentary, not direct, democracy) the best approach would be to hold a referendum only where changes to the UK's relationship with the EU were genuinely fundamental, although it would be preferable to specify the application of this concept precisely in legislation rather than to rely on the ad hoc judgment of politicians as to when this criterion is reached. The extreme alternative approach of holding a referendum for *any* change is not followed by any Member State (the Irish constitution, as interpreted by the Irish supreme court, requires a referendum in the event of 'essential' changes to the country's relationship with the EU, in particular as regards foreign policy) or advocated by the government.

The more moderate alternative of holding a referendum for significant Treaty amendments, while perhaps appealing at first glance, is not consistent with the constitutional history of the UK. It would perhaps make sense to introduce this rule if the government also accepted a referendum requirement for significant changes in *national* government policy, or at least for such changes which did not have the support of the public via a general election (ie because the party or parties holding the majority of seats had announced the policy as part of their election platform). While it might be argued that the distinction between significant changes in national government policy and significant changes in the UK's relationship with the EU is that the latter are virtually irreversible, many changes in national government policy are irreversible (ie the war in Iraq) or, for practical

reasons, only reversible for the future (ie large increases in student tuition fees could not easily be refunded to students that had already paid them) - and the latter sort of changes are often hard to reverse even for the future.

The government policy enshrined in the Bill is to hold a referendum whenever there is a transfer of power or competence (ie a power to adopt binding rules in particular area) by the EU. As set out in the Bill this policy falls in between holding a referendum on *all* Treaty changes and holding a referendum on *significant* Treaty changes. Given that Ireland, the only country which has held a referendum on the last five major Treaty amendments, is governed by a requirement to hold a referendum only as regards *essential* changes, it is clear that the threshold for holding a referendum in the UK would be lower than that of any other Member State. In particular the Irish constitution expressly rules out any need for a referendum where the second simplified revision procedure would be used - whereas the Bill would require a referendum in the UK in a large number of such cases.

The following are cases where a change to the Treaties could not seriously be regarded as significant, never mind fundamental, but where a referendum would be required:

- a) a change to the voting rules regarding the Justice and Home Affairs provisions of the Treaties -where, as explained above, the UK has an opt-out, not a veto;
- b) a change to the voting rules on the time limit for negotiations on a treaty of withdrawal from the EU - given that such treaties are not anyway necessary before a Member State withdraws;
- c) the extension of a competence to 'support, coordinate or supplement' national actions or the creation of a new competence of this type, given that such EU measures do not 'supersede' national 'competence in these areas' and that 'acts of the Union adopted on the basis of the provisions of the Treaties relating to these areas shall not entail harmonisation of Member States' laws or regulations' (Article 2(5) TFEU); or
- d) a Treaty amendment adopted under the ordinary revision procedure includes new powers to impose requirements, sanctions, et al upon Member States, and this new power is not significant (the Bill only imposes a significance test where such a measure is adopted by means of a simplified revision procedure, but this is inconsistent).

To return to the comparison with national government policies, the Bill would create the remarkable situation where a referendum would be required if the EU wished to extend its purely supporting competence over education, ie not entailing any harmonization of national law, while the government has no plans to call a referendum over changes in university financing - even though one of the two government coalition parties expressly supported a diametrically opposed policy to the time of the election.

It is notable that the Bill (particularly if read with the explanatory memorandum) encourages judicial review of draft government decisions. Whatever the merits of direct democracy as opposed to representative democracy, it is not possible to defend on 'democratic' grounds the decision to transfer some key aspects of the determination of whether to call a referendum or not to unelected judges.

Finally, it should be noted that the Bill, if it became an Act, could always be overridden expressly or implicitly by another Act of Parliament - since the UK has no system of 'basic laws' or 'organic laws' that take precedence over ordinary acts of parliament.

## Full texts

European Union Bill:

<http://www.statewatch.org/news/2010/nov/uk-eu-bill.pdf>

European Union Bill - explanatory memorandum:

<http://www.statewatch.org/news/2010/nov/uk-eu-bill-explan-notes.pdf>

Treaty on European Union - Articles 48 and 49:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0013:0046:EN:PDF>

Protocol amending the Protocol setting out transitional provisions: See: p83:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0201:0328:EN:PDF>

## Annex I

### List of special legislative procedures

#### a) covered by Article 48(7) TEU

*legislation adopted by Council:*

Art. 19(1)	non-discrimination	consent of EP
Art. 21(3)	social security, social protection	
Art. 22(1)	municipal elections	
Art. 22(2)	EP elections	
Art. 23	consular protection	QMV in Council
Art. 25	new citizenship rights	EP consent; national
	ratification	
Art. 64(3)	restrictions on capital movement	
Art. 77(3)	passports, et al	
Art. 81(3)	family law	
Art. 86(1)	European Public Prosecutor	EP consent
Art. 87(3)	police operational cooperation	
Art. 89	cross-border police operations	
Art. 113	indirect taxation	
Art. 115	internal market exceptions	
Art. 118	EU IP rights: language provisions	

Art. 126(14)	amendment, deficit protocol	
Art. 127(6)	European Central Bank powers	
Art. 153(2)	aspects of social policy	
Art. 182(4)	specific research programmes	QMV in Council
Art. 192(2)	aspects of environmental policy	
Art. 194(3)	energy taxation	
Art. 203	overseas countries & territories	
Art. 223(1)	EP election procedure	EP consent; national
	ratification	
Art. 262	IP court	national ratification
Art. 308	amendment of EIB statute	
Art. 314	annual budget	QMV in Council; sui
	generis	
Art. 349	overseas departments	QMV in Council

*Notes:* All these procedures provide for unanimity in Council and consultation of the EP, except where noted. Cases where legislation requires national ratification are also noted.

Art. 83(2) refers to the use of a special legislative procedure to adopt substantive criminal law measures, where the underlying power relating to harmonization of law is already subject to a special legislative procedure

There are also special procedures available to move to QMV pursuant to Arts. 81(3), 153(2) (in part) and 192(2)

#### **b) not covered by Article 48(7) TEU**

*legislation adopted by EP:*

Art. 223(2)	MEP statute	
Art. 226	rights of inquiry	
Art. 228(4)	EU ombudsman	

*excluded by Art. 353 TFEU:*

Art. 311	own resources	national ratification
Art. 311	own resources implementing	EP consent
Art. 312(2)	financial framework	
Art. 352	residual powers	EP consent

*Note:* there is a special procedure available to move to QMV pursuant to Art. 312(2)

## Annex II

### List of unanimous voting requirements

#### a) covered by Article 48(7) TEU

Council decisions:

*TEU:*

- Art. 24(1) CFSP general rule
- Art. 31(1) CFSP general rule
- Art. 41(2) CFSP expenses
- Art. 41(2) CFSP expenses
- Art. 49 accession

*TFEU:*

- Art. 65(4) derogation, capital taxation
- Art. 81(3) family law *passerelle*
- Art. 82(2)(d) criminal procedure, new powers
- Art. 83(1) criminal law, new powers
- Art. 92 derogation, transport
- Art. 108(3) derogation, state aids
- Art. 140(3) exchange rate, euro participation
- Art. 153(2) social policy *passerelle*
- Art. 155 some social partners' decisions
- Art. 192(2) environmental *passerelle*
- Art. 203 overseas countries and territories (non-legislative)
- Art. 207(4) certain trade policy treaties
- Art. 218(8) certain international treaties
- Art. 219 exchange rate treaty
- Art. 223(2) taxation of MEPs
- Art. 246 Commissioner non-replacement
- Art. 252 extra Advocates-General
- Art. 257 appointment of judges, specialist courts
- Art. 293 amendment of Commission proposals
- Art. 294(9) ditto
- Art. 301 composition, Economic and Social Committee
- Art. 305 composition, Committee of the Regions
- Art. 329(2) authorization, CFSP enhanced cooperation
- Art. 331(2) later participation, CFSP enhanced cooperation
- Art. 332 costs, CFSP enhanced cooperation
- Art. 333(1) enhanced cooperation, *passerelle*
- Art. 333(2) enhanced cooperation, *passerelle*
- Art. 342 language rules
- Art. 346(2) exceptions for arms trade

*Notes:* Art. 48(7) TEU presumably also allows for a switch to QMV as regards the 27 special legislative procedures listed Annex I, part (a) above, except



(obviously) for those four special legislative procedures where QMV already applies.

Art. 31(3) TEU provides for a special amendment procedure as regards CFSP voting.

### **b) not covered by Article 48(7) TEU**

*excluded by Article 353 TFEU:*

Art. 311 own resources  
Art. 311 own resources implementing  
Art. 312(2) financial framework  
Art. 352 residual powers (incl. non-legislative)  
Art. 354 sanctions against Member States

*European Council decisions:*

Art. 7(2) sanctions against Member States  
Art. 14(2) composition of EP  
Art. 17(5) number of Commissioners  
Art. 17(5) Commission rotation  
Art. 22(1) foreign policy guidelines  
Art. 31(2) resolution of CFSP deadlocks  
Art. 42(2) common defence  
Art. 48(4) revision procedure  
Art. 48(6) revision procedure  
Art. 48(7) revision procedure  
Art. 50 extension of time, withdrawal  
  
Art. 86(4) EPP, extension of powers  
Art. 244 Commission rotation  
Art. 312(2) financial framework, *passerelle*  
Art. 355(6) status of overseas depts, countries and territories

common accord of Member States:

Art. 19(2) TEU ECJ appointment  
Art. 48 TEU Treaty amendment  
Art. 49 TEU accession treaties

Art. 253 TFEU judicial appointment  
Art. 254 TFEU judicial appointment  
Art. 341 TFEU seat of the institutions

Security and defence:

Art. 42(4) TEU  
Art. 46(6) TEU  
Art. 222(3) TFEU

*Note:* the default requirement for the European Council to act by 'consensus' is also outside the scope of Article 48(7) TEU.

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