

The European Union Bill

A Federal Trust Briefing

Overview of the Bill

The European Union Bill currently before Parliament is divided into three parts.

The title of Part 1, 'Restrictions on Treaties and Decisions Relating to EU', provides that, in future, a referendum would be held before the UK could agree to an amendment of the Treaty on the European Union ('TEU') or of the Treaty on the Functioning of the European Union ('TFEU'); or before the UK could agree to certain decisions already provided for by TEU and TFEU if these would "transfer 'power or competence' from the UK to the EU."

Part 1 also deals with other subsidiary issues: who would be entitled to vote in referendums; the questions that would be asked; and public education programmes to be organised by the Electoral Commission in the event of a referendum.

It stipulates that an Act of Parliament would be required before the UK could agree to a number of other specified decisions, either in the European Council or in the Council of the European Union; and that yet other decisions would require a motion – rather than a full Bill – to be agreed without amendment in both Houses of Parliament before the UK could vote in favour of them in either the European Council or the Council.

Part 2 of the Bill provides for UK approval for the Transitional Protocol on MEPs agreed at an Inter-Governmental Conference held on 23 June 2010. This Protocol would lead to the UK gaining an additional MEP. The means of returning this MEP is provided for by Part 2 as well.

The most significant clause in Part 3, Clause 18, seeks to place on a statutory footing the common law principle of Parliamentary sovereignty with respect to directly applicable or directly effective EU law. It is intended to provide that directly applicable and directly effective EU law is given effect in the law of the UK only by virtue of an Act of Parliament. As will be discussed later, this clause, with its impact only upon applicable and directly effective EU law, is circumscribed in its scope and has failed to satisfy many of those within the Conservative Party it is most intended to please.

Background and political context

The two features of this Bill which have rightly attracted most attention are the stipulation that referendums are required for an increased sharing of UK sovereignty within the EU; and the so-called 'parliamentary sovereignty clause', Clause 18, in Part 3.

Both provisions have their origins in Conservative Party General Election commitments. The 2010 Conservative manifesto stated that:

In future, the British people must have their say on any transfer of powers to the European Union. We will amend the 1972 European Communities Act so that any proposed future treaty that transferred areas of power, or competences, would be subject to a referendum.

The image conveyed by these formulations was noticeably that of a zero-sum game, in which power could only be kept absolutely within the UK, or lost to an outside entity, the EU. The manifesto described this provision as a 'referendum lock', making it clear that the idea of the referendum stipulation would be to impede the sharing of responsibilities at EU level. It went on to note that:

A Conservative government would never take the UK into the euro. Our amendment to the 1972 act will prevent any future government from doing so without a referendum.

The Conservative manifesto also stated that:

The Lisbon treaty contains a number of so-called 'ratchet clauses', which allow the powers of the EU to expand in the future without a new treaty. We do not believe that any of these 'ratchet clauses' should be used to hand over more powers from Britain to the EU...We will change the 1972 act so that an act of Parliament would be required before any 'ratchet clause' could be used. Additionally, the use of a major 'ratchet clause' which amounted to the transfer of an area of power to the EU would be subject to a referendum.

A second pledge influential upon the EU Bill was expressed in the following terms:

Unlike other European countries, the UK does not have a written constitution. We will introduce a United Kingdom Sovereignty Bill to make it clear that ultimate authority stays in this country, in our Parliament.

In negotiations with the Liberal Democrats following the inconclusive General Election of May 2010, the Conservative Party leadership agreed to drop certain components of its European policy, in particular the commitment to a substantial renegotiation of UK terms of membership of the EU. But in the Coalition agreement a firm commitment was made to:

amend the 1972 European Communities Act so that any proposed future treaty that transferred areas of power, or competences, would be subject to a referendum on that treaty – a 'referendum lock'

There was also a more equivocal statement that:

We will examine the case for a United Kingdom Sovereignty Bill to make it clear that ultimate authority remains with Parliament.

This qualified commitment to a UK 'Sovereignty Bill' did not suggest that it was inevitable that the idea would be proceeded with. However, perhaps partly based on the political calculation that Conservative backbenchers, discontented as a result of the dilution of certain components of Conservative EU policy, might be to some extent pacified by such a move, the 'sovereignty' clause was included in the European Union Bill alongside the restrictions on decisions about further integration.

Before the formation of the Coalition, the issue of Europe was believed to be a major barrier to any potential arrangement between the Conservatives and Liberal Democrats. In this sense, the European Union Bill can be seen as embodying concessions made by the Liberal Democrats to the Conservatives as part of the Coalition agreement (an equivalent concession in the opposite direction is the agreement to hold a referendum on the introduction of the Alternative Vote). The package is clearly eurosceptic in tone and intent. The intent is discussed below. In overall tone, it approaches the pooling of sovereignty by the UK at EU level exclusively as though it amounts to the transfer of power to an alien body, rather than the sharing of responsibilities with partners in an organisation within which the UK is an influential participant. Furthermore, it is targeted only at restraining the extension of UK participation in the EU. Withdrawal from the EU Social Chapter could be effected without the need for a referendum. Indeed it would remain legally possible that the UK could withdraw from the EU altogether without the need for a referendum, while the Bill requires referendums on decisions that would, relative to such a major act, be distinctly minor in character. Finally, the Bill applies a standard of popular approval to decisions over the EU that do not regulate other decisions that might be considered of a comparable nature, either in international relations (such as the membership of other supranational organisations) or constitutional issues (for instance the introduction of fixed-term parliaments).

If the contents of the European Union Bill are seen as a concession by the Liberal Democrats to Conservative euroscepticism, it might be argued that the Liberal Democrats obtained a good price for agreeing to the European Union Bill, since the Conservatives dropped their policy of a negotiation of terms of membership – in particular the Social Chapter – in return. It could further be held that, since the Coalition has no plans to engage in any acts of integration that would require referendums or invoke the other restrictions included in the Bill, it will make no practical difference; and nor will the 'sovereignty' clause (see below).

An opposing argument that the Liberal Democrats have not been successful in bargaining for a less anti-EU policy from the Coalition is that the EU Bill is primarily concerned not with the next five years, but the period beyond that, and in particular when another party may come to power. The Coalition agreement stipulates that it will effect no extension of UK participation in the EU that would require a referendum; and as William Hague told the House at the Second Reading of the Bill:

the Labour Party will be asked before future general elections what its approach would be. It will be asked to give the commitment to maintain the referendum lock; otherwise people will know that it would propose in office to do exactly what it has done before-give away the rights and powers of the British people without the consent of the British people. If the Labour Party wants to go into a general election on that basis, let it do so, but it would be wiser for it to adopt this framework for the future.

A plain objective of the EU Bill, then, is to act in the long-term as a brake on European integration as a whole, or UK participation in it.

It may be that the Liberal Democrat Party – or at least those representatives of it who negotiated with the Conservative Party in May 2010 – is today more pro-European on a rhetorical than on a substantial level. It might also be held that some at senior level in the Conservative Party – and in particular the Leader, David Cameron – are for their part less firmly committed to 'eurosceptic' principles than the official stance of their party suggested.

The overall Coalition arrangement on Europe – of which the EU Bill is an integral part – could consequently be seen as enabling both sets of negotiators to modify principles or policies of which they were not personally convinced, while at the same time providing them with the basis for claiming to the more ideologically committed members of their respective parties that negotiating successes had been secured. In this sense, it might be held that the desire to form a Coalition was in May, 2010 the overriding concern for the negotiators, with apparent divisions over Europe to be minimised, rather than genuinely grappled with.

An example of a Liberal Democrat attempt to justify support for the EU Bill was provided by the Party's MP, Tim Farron, who told the Commons that:

Despite our differing traditional outlooks on the EU, the coalition has come together, found common ground and drawn a line – obviously - under the European constitutional question once and for all, we hope, by ensuring that the public and Parliament have the final say on the big questions that will determine how UK and EU relations evolve in the future. The Bill should also give the British public a new sense of ownership, enshrined in law, over the future evolution of UK relations with the European Union.

Those within the Conservative Party who first advocated the referendum requirement and sovereignty clause did not have in mind affording 'the British public a new sense of ownership' of UK relations with the EU, as Farron put it. Their starting point was that true 'ownership' was only possible at national level. They would not be able to subscribe to a package that accorded with Farron's outlook that 'British national interests are best served by playing an active and leading role in the European Union.'

How effective the Coalition arrangement over Europe will prove in pacifying the respective parties involved is open to question, particularly where the Conservative backbenches are concerned. When the European Union Bill was first debated in the Commons last December, the Conservative MP James Clappison complained that:

the last Conservative manifesto saw fit to promise to work to bring back key powers over legal rights and criminal justice...the

Government have not just not sought to repatriate these powers, but have actually given additional powers to the European Union, as they did just last Friday when they chose to opt in to a criminal justice directive over which there was an opt-out, not only without a referendum but without even a vote in this House of Commons?

The remainder of this paper focuses on and analyses those parts of the Bill providing for referendums and seeking to clarify the role of the UK Parliament in legislative processes.

Analysis of the Bill

Restrictions on Treaties and Decisions Relating to EU

This part of the Act would require decisions involving the “transfer” of ‘power and competence’ to the EU to require both an Act of Parliament and a ‘yes’ vote in a referendum, but with some limited exemptions on grounds of triviality. (While ‘competence’ is defined in the EU Treaties, ‘power’ is not, with a definition contained in the Bill.)

The Explanatory Notes to the Bill state that

A referendum would only be required if the Government of the day wanted to support the change...in question. If the Government of the day did not want to support the change in question, it would block the proposal at the negotiations stage. As all of the types of treaty change that are to be subject to the referendum provisions will have to be agreed by unanimity at the EU level, the proposal could not form part of a new treaty or a treaty change - and there would then be no need for a referendum - if the Government did not support such a change.

The statement reflects the undoubted reality that the EU Bill would have implications not only for UK participation in the EU, but for the development of the EU as a whole. Treaty changes involving the UK and requiring a UK referendum will only be possible if UK governments are willing to fight and able to win referendums. If not, the possible outcomes are:

- a) European integration is significantly slowed down
- b) European integration proceeds through more informal channels that do not require referendums in the UK
- c) European integration proceeds without the UK.

While it is conceivable that circumstances may one day change, it seems unlikely for some time that the political and media environment will become conducive to the pursuit of extended UK participation in the EU. Consequently even a more European-minded government would be unlikely to enter into agreements that would require a referendum under the Bill when it becomes an Act.

William Hague has said:

I hope that the Bill becomes part of the accepted constitutional framework of this country, for which, over time, it will have to receive widespread public support and the acceptance of parties from all parts of the House. The Opposition, as we have said, will have some time to think about it...I hope that the Bill becomes part of our permanent constitutional framework.

Strictly speaking, though it may be of a constitutional character, this legislation – like any other enactment in the UK, which lacks a codified constitutional basis – would enjoy only practical, political entrenchment. It could be amended or repealed on simple majority votes in Parliament. In the words of the House of Commons European Scrutiny Committee when assessing the EU Bill:

as the UK does not have a single codified constitutional document from which legislative power is derived, there are no unambiguously constitutional ‘higher’ laws. All Parliaments legislate for the future. Laws passed by one Parliament do not contain a sunset clause at the Dissolution.

The Committee went on ‘The real point is whether a government can, in law, make it difficult for a future Parliament to amend or repeal the legislation it has passed; in our view it cannot.’

Yet in practice it can be made politically difficult for a future government to amend or repeal a piece of legislation – such is clearly Mr. Hague’s precise objective. He aspires to achieve practical entrenchment for a future

EU Act similar to that attached to the legislation providing for the UK devolution settlements (although the EU Bill will not be underpinned by the holding of referendums as they are).

It is ironic that in the same Bill there is an attempt both to assert the doctrine of parliamentary sovereignty and to introduce a restraint on Parliament in the form of referendum requirements. While this Bill cannot enjoy any special constitutional status, its introduction could serve to promote the idea that there should be higher constitutional rules in the UK that apply even to Parliament. If at some point a means of formally establishing this principle is sought, then parliamentary sovereignty might be abandoned as the supposed governing doctrine of the UK settlement.

Some decisions about transfers can be exempted from the referendum requirement: if they fall outside a series of specified areas, and in particular if they involve the codification of existing practice; the making of a treaty that does not apply to the UK; or the accession of a new member state; and (in some cases) if they are judged not to be significant.

It is noteworthy, if one of the purposes of this Bill is to give the UK population a greater role in decisions about the EU, that a decision as important as the accession of a new member state – which will share in those powers which have already been pooled by the UK at EU level – is exempt from the referendum requirement. Gisela Stuart MP has asked:

how the accession of Turkey, which by that stage would probably have a larger population than Germany, would not amount to a considerable loss of influence for the United Kingdom, given the system of qualified majority voting? Why is it therefore exempt from a referendum? I just do not get it.

Judgements about whether or not a referendum is required will inevitably be to some extent subjective. There is provision for ministers to give a statement as to whether or not a treaty change requires a referendum, and give reasons. The Explanatory Notes state that:

As with all Ministerial decisions, it would be possible for a member of the public to challenge the decisions of the Minister in such a statement.

The purpose behind this statement in the Explanatory Notes would seem to be to reassure those who fear that ministers might in future seek to 'abuse' the exemption, by reassuring them that judicial review is possible. The Conservative MP Charlie Elphicke has said that:

If a future Government or bunch of politicians get together to cheat people out of a referendum, a little guy could come along and put a stop to that through the court system.

Aside from the possibility of querying the definition of someone able to finance a major judicial review exercise being defined as a 'little guy', once again, certain tensions in the EU Bill are highlighted here. It is perverse that the explanatory notes to a bill one of the supposed objectives of which is to assert parliamentary sovereignty seem to invite quasi-constitutional judicial review in this way.

Moreover, it is not clear how this process could work in practice. Would it be possible for a treaty change to come into force while judicial review was ongoing? Would a court be able to force a government to hold a referendum? If this referendum yielded a 'no' vote, would the UK then be forced to break previous commitments? What would be the consequences for the EU and the place of the UK within it? If the answer to these questions is that such scenarios are in practice implausible, then the judicial review safeguard appears less meaningful.

The 'sovereignty' clause

Parliamentary sovereignty is a complex and contested doctrine. In so far as it ever did, it no longer exists in the pure form identified by A. V. Dicey in the late nineteenth century. Various constitutional developments, including the introduction of devolution, the *Human Rights Act 1998* and the judicial review it facilitates, and not least UK membership of the EU, have served in practice to qualify parliamentary sovereignty. While the UK is a member of the EU, EU law is effective in the UK and will be treated as such by UK courts, who will also take into account European jurisprudence. Parliamentary sovereignty survives in these extreme senses that Parliament retains the ability to withdraw altogether from the EU; and if it passes legislation expressly overruling existing EU law, then it is widely believed that the courts will accept the will of Parliament – although there would be

significant negative consequences for UK membership of the EU.

Those in the Conservative Party who have advocated a sovereignty bill seem to view it as a means by which the UK could select those features of EU law to which it did and did not wish to adhere; and that UK courts would be required to uphold such an approach and would not allow European case law to interfere with it. This manner of operation is presumably seen by its advocates as a means by which the UK could force the EU to accept a new relationship between it and the UK, with the latter enjoying a kind of associated membership; or perhaps as a prelude to UK exit from the EU.

Against this background Clause 18 of the Bill states that:

It is only by virtue of an Act of Parliament that directly applicable or directly effective EU law (that is, the rights, powers, liabilities, obligations, restrictions, remedies and procedures referred to in section 2(1) of the European Communities Act 1972) falls to be recognised and available in law in the United Kingdom.

In October 2010 the government issued an account of this clause stating that:

The Government have explored how to ensure that this fundamental principle of parliamentary sovereignty is upheld in relation to EU law. We have assessed whether the common law provides sufficient ongoing and unassailable protection for that principle. Our assessment is that to date, case law has upheld that principle. But we have decided to put the matter beyond speculation by placing this principle on a statutory footing.

When the Bill was introduced the following month, the Minister for Europe, David Lidington, said that while:

the Common Law is clear that the doctrine of Parliamentary sovereignty has not been affected by Britain's membership of the EU, it cannot be denied that the issue has been the subject of legal and political speculation and arguments to the contrary have been seriously advanced in a court of law. So we believe there is great merit in putting the matter beyond speculation by

affirming the Common Law position in statute, which will reinforce the rebuttal of contrary arguments in the future.

In its assessment of this Clause, the House of Commons European Scrutiny Committee recently concluded that:

- It is a reaffirmation of the role of a sovereign Parliament in a dualist state (that is, a state in which external agreements are not self-enacting in domestic law). This principle is neither controversial nor in danger of erosion by the courts; and 'did not need declaring in statute.'
- It does not address the competing primacies of EU and national law. These two spheres of law coexist, usually peacefully, clashing occasionally, with neither giving way.
- The Committee also recorded that 'The Explanatory Notes present as fact what the evidence we have received tells us is disputed, viewed from any perspective. We are concerned about the precedent this sets for future Explanatory Notes.'

Furthermore, in the words of Prof. Adam Tomkins in evidence to the Committee:

European Union law is far from being the only contemporary challenge to the doctrine of parliamentary sovereignty. Human rights law and, indeed, the common law itself, also pose potent challenges. For Parliament to assert its legislative supremacy fully, it would have to deal with these challenges as well as with that posed by EU law. Clause 18 is silent as to these challenges. If anything, this may make the situation more fluid rather than less. Parliament addressing but one of the contemporary challenges to its sovereignty may be taken in some quarters as representing parliamentary acceptance (or even approval) of the other such challenges...Even within the context of parliamentary sovereignty and EU law, the scope of clause 18 is severely limited. This is because it does nothing to stem the further growth of competence creep. While other provisions in the Bill address legislative transfers of competence and/or power, there is nothing in the Bill—and certainly nothing in clause 18—which addresses

the problem of the further development of EU law at the hands of the European Courts. Let us not forget that many of the doctrines of EU law that have posed the greatest challenge for parliamentary sovereignty find their origin not in the articles of the Treaties, nor even in European legislation, but in the case law of the ECJ.

future, and what will be the implications for intra-Coalition relationships between the Conservatives and the Liberal Democrats, remains to be seen.

Clause 18 of the EU Bill, as drafted, does nothing to achieve the objectives of those who originally advocated a sovereignty clause and may serve, from their perspective, to worsen the position. Consequently, far from appeasing those who may have been displeased by Conservative compromises over Coalition EU policy, it may have served simply to aggravate their concerns, while reassuring no-one else.

**Dr. Andrew Blick
March 2011**

Conclusion

The main portions of the EU Bill considered in detail here fall into two parts.

The first, the referendum requirements, are clearly aimed at having a long term impact upon the UK approach to European integration, acting as a brake upon it, with possible implications for the EU as a whole. Questions can be raised about the apparent Liberal Democrat interpretation of these provisions, and how far they can be reconciled both with the Conservative outlook and reality. There are some tensions between the aspiration of this Bill to achieve quasi-entrenched constitutional status and a commitment to parliamentary sovereignty. But it is entirely plausible that the part of the EU Bill relating to the holding of referendums will achieve its objectives.

The sovereignty clause in the EU Bill will make little practical difference beyond clarification of certain principles. However, it has widely been judged that it describes a position that did not require stating in statute, and may possibly have unintended, negative consequences for the parliamentary sovereignty it sets out to solidify.

Furthermore, it has caused greater consternation amongst those it was intended to appease. When asked in Parliament by the Labour MP Kevan Jones whether he was 'disappointed that the Government have binned' the Conservative commitment to a sovereignty bill as initially conceived, Bill Cash MP replied 'Not disappointed-absolutely appalled'. How precisely those of Mr. Cash's outlook within the Conservative Party will act to influence their leaders in