



**HOUSE OF LORDS
CONSTITUTION COMMITTEE**

SESSION 2007-08: 6TH REPORT

**EUROPEAN UNION (AMENDMENT)
BILL AND THE TREATY OF LISBON:
IMPLICATIONS FOR THE UK CONSTITUTION**



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**Presented to Parliament
by the Secretary of State for Foreign
and Commonwealth Affairs
by Command of Her Majesty
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HOUSE OF LORDS CONSTITUTION COMMITTEE

SESSION 2007-08: 6TH REPORT

EUROPEAN UNION (AMENDMENT) BILL AND THE TREATY OF LISBON: IMPLICATIONS FOR THE UK CONSTITUTION

The Government welcomes the Committee's report on the implications of the Lisbon Treaty for the UK Constitution. The Government welcomed the opportunity to contribute written evidence to the Committee's inquiry in order to inform the report. The content of that evidence is not for the most part repeated in the Government's response.

The Government would like to offer the following comments on the Committee's recommendations and conclusions.

Introduction

125. Our approach to the Lisbon Treaty is different to that of other committees: we are concerned exclusively with the changes that may be brought about to the workings of the UK constitution rather than the operation of the EU's institutions and processes. We also make comments and recommendations on Parliament's control over amendments to the treaties governing the EU.

126. There has been considerable debate over how different the Lisbon Treaty is compared to the abandoned Constitutional Treaty. We do not enter into that debate. Our focus in this report is on the changes that the Lisbon Treaty would make to the arrangements currently in force.

Parliamentary Control of Future Alterations to the European Union Treaties

127. We welcome the requirement created by clause 5 of the Bill that the Government must seek parliamentary approval before ratifying any future amendments to the founding Treaties made under the "ordinary revision procedure". However, we call upon the Government to explain and resolve the relationship between the new requirement created by clause 5 and the existing requirement under section 12 of the European Parliamentary Elections Act 2002 for parliamentary approval of treaty amendments which enlarge the powers of the European Parliament.

Section 12 of the European Parliamentary Elections Act 2002 was originally introduced as section 6 of the European Parliamentary Elections Act 1978. This Act was passed in order to implement arrangements for direct elections to the European Parliament. The provisions of Section 12 reflected, in particular, Parliament's concern to exercise control over any future treaty increasing the power of the European Parliament and provided for Parliamentary approval of any new treaty which extended the powers of the European Parliament.

Clause 5 of the EU (Amendment) Bill provides for Parliamentary control over **any** future EU amending treaties (even if these do not provide for an increase in the powers of the European Parliament). Its scope is therefore much wider than the section 12 of the European Parliamentary Elections Act and is intended to give Parliament direct control over the conclusion of all treaties negotiated by means of an Intergovernmental Conference (IGC), the process by which all previous EU amending treaties have been agreed.

It is correct that the circumstances in which section 12 of the 2002 Act applies are also likely to entail the application of clause 5 of the current Bill. However, this does not create any legal or procedural difficulty; nor does it impede the application of the requirements of either provision.

128. We welcome the specific requirement contained in the Bill for parliamentary approval prior to Government agreement to amendments made under the simplified revision procedure. These provisions of national law would reinforce the controls contained in the Treaty on European Union itself.

The Government welcomes the Committee's endorsement of the decision to reinforce the controls in the Lisbon Treaty and give Parliament prior control over any use of the two general passerelles (the simplified revision procedure).

129. We broadly welcome the provisions in the European Union (Amendment) Bill which would establish parliamentary control over Government decisions to agree to changes under the *passerelle* mechanisms. There are, however, two ways in which the procedure could be strengthened so as to ensure proper scrutiny. We recommend that the Government lay an explanatory memorandum or make a written statement when tabling a motion seeking approval for support of a specified draft decision; and we further recommend that the Bill be amended to ensure that Parliament is given sufficient time to scrutinise the proposals in respect of *passerelles*.

The EU (Amendment) Bill makes clear that no UK Minister can vote in favour or otherwise support a decision regarding any of the listed passerelles unless Parliamentary approval has already been given. The Government confirms that it will table an Explanatory Memorandum in relation to any proposal to use these passerelles. The Government will also ensure that Parliament will have sufficient time to debate and decide on any use of a listed passerelle.

130. Whilst we accept that some *passerelle* mechanisms have existed in earlier EU Treaties, we are not convinced that this fact alone provides a cogent justification for the Bill's omission of a comprehensive list of *passerelle* and similar enabling provisions both in the Lisbon Treaty and in previous treaties. We call on the Government to provide a list enumerating all these provisions in order to allow Parliament to consider during the passage of the Bill whether each one should or should not be subject to parliamentary control under clause 6.

The Bill does not purport to cover all provisions which could be considered to be passerelles. The Government has included in clause 6 of the Bill provisions for prior Parliamentary control over the simplified revision procedures (Article 48 (6) and (7) TEU) and over all provisions which allow decision-making in a policy area to be moved from unanimity to QMV or co-decision. The Prime Minister set out this commitment in his Post European Council Statement to the House of Commons on 17 December 2007.

There is no legal definition of ‘passerelles’; it is not a term which is used either in the current EU Treaties or in the Lisbon Treaty. The Government would however identify the following additional (ie not included in the EU (Amendment) Bill) provisions in the Treaties which also allow the Treaties to be changed without the need for a full Intergovernmental Conference:

- a) Article 17(5), 1st paragraph TEU allowing the European Council, by unanimity, to amend the number of Commissioners. This has existed since the Treaty of Rome in 1957. For this passerelle to be used, every Member State must agree;
- b) Article 25, 2nd paragraph TFEU allowing the Council to strengthen or add to citizens’ rights. This was introduced by the Maastricht Treaty. For this passerelle to be used, not only must every Member State agree, but the European Parliament must also consent and the change must be adopted in every Member State in accordance with their national constitutional requirements;
- c) Article 262 TFEU allowing the Council to confer on the European Court of Justice jurisdiction in disputes relating to legal Acts creating EU Intellectual Property Rights. This was introduced by the Treaty of Nice. For this passerelle to be used, not only must every Member State agree, but the change must also be adopted in every Member State in accordance with their national constitutional requirements;
- d) Article 83(1), 3rd sub-paragraph TFEU allowing the Council to add to the list of criminal offences defined at EU level. For this passerelle to be used, not only must every Member State agree, but the European Parliament must also consent;
- e) Article 82(2), 2nd sub-paragraph TFEU allowing the Council to add to matters for which Directives can be made on criminal procedural law. For this passerelle to be used, not only must every Member State agree, but the European Parliament must also consent; and
- f) Article 86(4) TFEU allowing the European Council to extend the EPP’s powers to include serious crime having a cross-border dimension. For this passerelle to be used, not only must every Member State agree, but the European Parliament must also consent. It is also contingent on the EPP actually being established; a decision which is also subject to unanimity.

Each of these passerelles is limited to specific and clearly demarcated policy changes. They do not provide for a specific move from unanimity to QMV or co-decision.

131. Clearly, Parliament will wish to pay particular attention to initiatives brought under Article 352 of the Treaty on the Functioning of the European Union in its role of scrutinising compliance with the principles of subsidiarity and proportionality.

Every Explanatory Memorandum submitted to the Committees for a proposal with Article 308 as the sole legal base contains an explanation for the justification of the use of the Article. This will continue to be the case for Lisbon Treaty Article 352.

The Lisbon Treaty and the UK Constitution

A lasting settlement?

132. Constitutional stability is a desirable characteristic. We note that the Government view the reforms that would be brought about by the Lisbon Treaty as providing a lasting settlement. We therefore hope that, if ratified, the Treaty will provide a period of stability in the institutional framework of the EU and we urge the Government to use their influence to ensure that this is the case. This, in turn, will enable the UK constitution to develop further the procedures needed to ensure that the Government are properly accountable for the exercise of their powers in the sphere of the European Union, with effective roles for the United Kingdom Parliament and the governments and legislatures of Northern Ireland, Scotland and Wales.

The Government agrees with the Committee on the desirability of providing a period of stability in the institutional framework of the EU. Ratification of the Lisbon Treaty will allow the EU to move on from debates about institutions to creating the outward-facing, flexible Europe needed to meet the fundamental challenges of globalisation.

The preamble to the Lisbon Treaty states that the Treaty will “complete the process started by the Treaty of Amsterdam and by the Treaty of Nice”. And at the time of signing the Treaty in December 2007 the European Council agreed that:

“the Lisbon Treaty provides the Union with a stable and lasting institutional framework. We expect no change in the foreseeable future, so that the Union will be able to fully concentrate on addressing the concrete challenges ahead, including globalisation and climate change”.

Defining the European Union’s competences

133. Questions of distribution of power are inherently complex. In the United Kingdom, devolution and membership of the European Union have the combined consequence that the United Kingdom Government and Parliament operate in a system of multi-level governance: for practical purposes they have such powers as have not been conferred on the devolved administrations and legislatures or the European Union. With this in mind, we welcome the Lisbon Treaty’s attempt to set out with greater clarity the demarcations of responsibility between Member States and the European Union. These demarcations will continue to be open to interpretation by the European Court of Justice.

134. The articulation of categories of competence in the Treaty on the Functioning of the European Union would be a useful step in clarifying the distribution of powers between the European Union and the Member States.

The Government agrees with the Committee's assessment that the Lisbon Treaty sets out with greater clarity the division of competences between the EU and the Member States.

While the definition of competences reflects existing law and is not a change of substance these definitions provide greater clarity than before. The Lisbon Treaty also explicitly underlines the limits on the competence of the European Union and in particular that competences not conferred on the EU remain with the Member States.

The Government welcomes the greater clarity that the Lisbon Treaty provides in identifying when the EU can and cannot act.

People's rights and responsibilities

135. We conclude that the change in status of the Charter from political document to having the force of a treaty would be less of a radical step than at first it may appear. This is because the Charter is declaratory of rights already recognised as existing in law by the courts and therefore currently available to the UK citizen.

136. We agree with the European Union Committee that Protocol 7 clarifies the application of the Charter rather than operating as an opt-out.

137. In our view, the European Union's accession to the European Convention on Human Rights should have no impact on national law, and therefore no constitutional implications.

The Government agrees with the Committee's conclusions regarding the Charter of Fundamental Rights and ECHR accession.

[The Government has provided a detailed response to the House of Lords EU Select Committee's report: "The Treaty of Lisbon: an impact assessment" – this includes a comprehensive response to that Committee's conclusions on the Charter of Fundamental Rights and ECHR accession.]

Citizenship

138. We conclude that the continued existence of citizenship of the European Union in and of itself has no constitutional implications for British citizenship. Although it remains to be seen whether the new formal procedures for citizens' initiatives at European Union level will have any significant practical impact (in addition to their symbolic aspirations), they can be seen as complementing proposals contained in the Government's *Governance of Britain* programme for citizens' "calls for action" at local authority level and the development of online petitions on the Number 10 Downing Street website.

The Government agrees with the Committee's conclusions regarding EU citizenship.

139. We urge the Government to clarify whether they envisage taking a formal or informal position on any such citizens' initiative, and whether this would entail making representations at the European Union level. If the Government do expect to play such a role, they must explain how they intend to keep Parliament informed and how they envisage remaining accountable to Parliament in the exercise of this function.

The Government believes that citizens' initiatives provide an important opportunity for citizens to raise concerns directly at the EU level. The Government will not take a position on citizens' initiatives in the abstract but will look at any resulting Commission proposal on its merits. Normal parliamentary scrutiny procedures would then apply.

The United Kingdom Parliament and parliamentary supremacy

140. We welcome the enhanced role for national parliaments proposed by the Lisbon Treaty. In order to make the most of these new opportunities, it is essential that both Houses should work together to develop complementary scrutiny procedures, particularly in respect of the role of select committees. It would also be desirable for Parliament informally to seek the earliest possible involvement in the policy-making processes at the European level.

The Government looks forward to working with Parliament as it develops its own approach in regard to the functioning of the yellow and orange cards.

141. We agree with the House of Lords European Union Committee that the Treaty of Lisbon does not subject the United Kingdom Parliament to legal duties.

The Government agrees with the Committee that the Lisbon Treaty does not subject the UK Parliament to legal duties.

142. We conclude that the *Lisbon Treaty* would make no alteration to the current relationship between the principles of primacy of European Union law and parliamentary sovereignty. The introduction of a provision explicitly confirming Member States' right to withdraw from the European Union underlines the point that the United Kingdom only remains bound by European Union law as long as Parliament chooses to remain in the Union.

The Government agrees with the Committee's assessment that the Lisbon Treaty makes no alteration to the current relationship between the principles of primacy of EU law and parliamentary sovereignty.

The Government agrees that the Lisbon Treaty provision confirming Member States' right to withdraw from the EU underlines that the UK only remains bound by EU law as long as the UK remains in the EU.

Nations and regions

- 143. There is a clear need to develop and enhance cooperation between the United Kingdom Government and the devolved administrations on those aspects of European Union policy that are devolved or have implications for the devolution settlement. Frequent meetings of the Joint Ministerial Committee (JMC) on Europe are essential in this regard. Moreover, cooperation between the different administrations ought to be undertaken in as open and transparent manner as possible. We therefore recommend that information relating to meetings of the JMC on Europe should be made much more widely available.**

The Government agrees with the Committee that there is a clear need to develop and enhance co-operation between the United Kingdom Government and the devolved administrations on those aspect of EU policy that are devolved or have implications for the devolution settlement.

JMC(E) is held four times per year ahead of the Spring, June, Informal, and December Councils. The agenda is agreed in advance between the UK Government, Scottish Executive, the Welsh Assembly Government and the Northern Ireland Executive – individual administrations are responsible to the UK Parliament, the Scottish Parliament, the Welsh Assembly and the Northern Ireland Assembly respectively for their conduct of EU business.

- 144. There is a clear need for cooperation between the United Kingdom Parliament and the devolved legislatures on European Union matters, particularly the ‘yellow card’ procedure for policing the principle of subsidiarity. We therefore suggest that the respective legislatures give further consideration to a formal mechanism for improved cooperation on these issues.**

The Government agrees on the desirability of co-operation between the UK Parliament and the devolved legislatures. The arrangements for such co-operation are a matter for the Westminster Parliament and the devolved legislatures.

The Area of Freedom, Security and Justice

- 145. We conclude that the importance of how the opt-ins and opt-outs are used is such that Parliament must be fully involved in their use. We therefore recommend that the European Union (Amendment) Bill be amended so as to require the Government to obtain approval from both Houses of Parliament before using opt-ins or opt-outs in any policy area. This would be consistent with the Bill’s policy to require parliamentary approval of the use of the Simplified Revision Procedure and passerelles.**

The Government values the analysis carried out by Committees of individual JHA proposals. We find the Scrutiny Committees’ views on the substance of JHA proposals particularly helpful. We would also welcome greater Parliamentary input into the strategic direction of JHA policy under the Lisbon Treaty: a thematic

approach, linked to Presidency work programmes or to areas of JHA policy (such as legal migration or police co-operation) can be more effective than piecemeal examination of opt-in decisions, as individual measures often have linkages which need to be considered within the bigger picture of JHA co-operation.

We are also very keen to discuss what might be done to enhance Parliament's scrutiny of JHA generally and JHA opt-in policy in particular, in ways that do not hinder the UK's ability to opt in to individual measures or negatively affect the UK's negotiating ability. The Government is considering options for improving scrutiny; the Leader of the House of Lords gave evidence on 13 May to the EU Select Committee, which is also considering this issue, and the Government is discussing options with all the interested Committees.

Courts and the judiciary

- 146. Many of the issues we have examined in this report – including the competences of the EU, the interpretation and application of the Charter, and the detailed working-out of the consequences of the UK's opt-outs and opt-ins (particularly in relation to the area of freedom, security and justice) – will be shaped by the European Court of Justice's adjudications in the years to come. Insofar as the European Union is an organisation based on the rule of law, there can be no complaint that this is so, even if from time to time the developments introduced have taken Member States by surprise.**
- 147. In order for Parliament to be fully informed of the European Court of Justice's interpretation and application of the Lisbon Treaty provisions, we recommend that the Government lay before Parliament an annual report on their assessment of the impact of the Court's rulings on the United Kingdom. In interpreting and applying the Charter, the European Court of Justice will increasingly refer to the case law of the European Court of Human Rights and so the relevant rulings of that Court ought also to be covered in the Government's annual report.**
- 148. The provision of such an annual report would complement Parliament's efforts in recent years to seek greater information about the operation of the United Kingdom courts through, for example, the requirement of the Constitutional Reform Act 2005 for the Supreme Court to make an annual report and the Lord Chief Justice's proposed regular reports on the courts system in England and Wales.**

The Government agrees with the Committee in relation to the importance of the role of the Court of Justice in an organisation based on the rule of law. The United Kingdom has been a strong supporter of ensuring that the Court is able to operate effectively in areas on which jurisdiction has been conferred on it by the Treaties.

Details of all the Court's judgments are readily available on its website at www.curia.eu and key developments are presented in the Court's annual report and also published on its website.

In response to the Committee's request for additional information, the Government proposes ensuring that a copy of the Court's annual report is deposited in the libraries of both the House of Commons and House of Lords together with a Memorandum reporting on all judgments during the preceding year in which the United Kingdom was a party, intervened or submitted observations.

The judgments of the European Court of Human Rights are similarly available on the website of the Court (at www.coe.int.eu) together with the Court's annual report summarising its key judgments and decisions. As the Committee notes, the Charter of Fundamental Rights enshrines existing rights and the Government does not therefore consider that the case-law of the Strasbourg Court will become more relevant than at present to developments within the European Union.



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