

## **European Union Bill – A Brief**

- By Stephen Hoffman

### **CONTENTS PAGE**

<b>Chapter 1 - Background</b>	<b>2</b>
<b>Chapter 2 - The Sovereignty Clause</b>	
a) The Sovereignty Clause	2
b) Criticism of the Sovereignty Clause	3
<b>Chapter 3 - The Referendum Lock</b>	
a) The Referendum Lock	4
b) Lisbon Treaty Problems	5
c) Criticisms of the Referendum Lock	5
<b>Chapter 4 - Other Criticisms of the Bill</b>	<b>7</b>
<b>Chapter 5 - Silver Linings</b>	<b>7</b>
<b>Chapter 6 - Political Landscape</b>	<b>8</b>
<b>Chapter 7 - Conclusions</b>	<b>9</b>
<b>Chapter 8 - Latest Proposed Amendments</b>	<b>10</b>
<b>Bibliography</b>	<b>12</b>



## **CHAPTER 1**

### **BACKGROUND**

- The European Union bill will have its second reading on Tuesday 7<sup>th</sup> December in the afternoon in the main chamber of the House of Commons.
- It came out due to a commitment in the Conservative Party's manifesto to restore democratic control and introduce a referendum lock. It aims to bind future governments to stop them from authorising further transfers of power to the EU.
- The bill aims to increase UK citizens' confidence with the EU, which has been at an all time low according to recent polls. In opposition David Cameron said he would seek a change in Britain's relationship with the EU so that British people will be in charge of their future in Europe.
- The government believes the bill is the outcome of a decade of support on EU referendums by the Conservative Party and Liberal Democrats.
- When news about the bill first came out in August it was billed as the most significant piece of EU legislation since the 1972 Communities Act. However as the weeks have passed it seems not to be able to live up to these claims.
- The bill does not include anything about repatriation of powers. This is thought to be due to the work of Nick Clegg who has said that the issue of repatriation of powers will not be re-opened.
- This was despite a Conservative election manifesto commitment to renegotiate in areas such as employment and social legislation. It is also despite a commitment in the coalition agreement to examine the issue of EU power. Thus the bill is not concentrating on returning powers back as was initially thought.
- Bill Cash the Chairman of the European Scrutiny Committee is aiming to make an amendment to the bill although full details of the topic his amendment will cover have not been discussed. A suggestion for the amendment is it could be about an In/Out referendum.
- Stephen Booth of Open Europe has said that the upcoming EU Bill provides a perfect opportunity to insert an amendment within the bill to say that Britain will not take part in any further EU laws in relations to Justice, Home Affairs and Defence without parliamentary approval. If this was included in the Bill a situation like Britain signing up to the European Investigation Order without a parliamentary vote could not take place. Suggested amendments to the bill from backbenchers are likely to cover these areas.

## **CHAPTER 2**

### **a) SOVEREIGNTY CLAUSE**

- The sovereignty clause is clause 18 in the bill.
- The UK European Union Bill 2010 has been compared by supporters to the German Sovereignty Bill that aims to give a constitutional footing to the sovereignty of the UK parliament. The sovereignty of the UK parliament is supposedly now to be protected by a sovereignty clause in the bill.

- David Cameron said in 2009 that he wanted Britain's sovereignty to be highlighted in parliament. He believed this would put Britain on a par with Germany, where the German constitutional court has consistently upheld that ultimate authority lies with the bodies established by the German constitution.
- The government have said that clause 18 highlights that case law shows that the EU cannot do anything without parliament's approval. It aims to highlight how European laws only have primacy over Britain because parliament has agreed.
- However as decisions on CAP and the CFP and now the European Investigation Order highlight this is not actually the case. Often EU legislation is just pushed through by a ministerial statement or order. So the sovereignty clause that has clearly been watered down because of this is based on false assumptions.
- The sovereignty clause is merely confirming previous safeguards to stop EU power that have been ineffective as the Lisbon Treaty fiasco highlighted. It says that what parliament does can be undone. It might help in strengthening judges to stand up for Britain's judicial sovereignty.
- It is a statement of historical fact. Thus it does not give parliamentary sovereignty any practical effect or assert parliament's legal supremacy. It will not alter the existing UK legal order with EU law on a day-to-day basis. Many believe the clause is there for political reasons.
- The government has said that it is clear Britain has not lost sovereignty because Britain has joined the EU but due to doubts in this area wants to clear up confusion once and for all.

#### **b) CRITICISM OF THE SOVEREIGNTY CLAUSE**

- Some feel the sovereignty clause is pointless as there is no more sovereignty that can be given up to the EU and therefore we have already lost it and there is no point protecting something you've lost.
- The Sovereignty Bill by Christopher Chope MP seems much more robust than the government's attempt and perhaps some parts of his bill could be included as amendments etc to the sovereignty clause.
- The bill has been criticised by the Law and Lawyers blog as convoluted. Therefore there is a worry that it could make our relationship with the EU even murkier. They also believe that the sovereignty clause is unnecessary, as it achieves nothing in legal terms.
- The sovereignty clause may have little effect due to the Lisbon Treaty referring explicitly to the primacy of EU law over national law. Thus the EU is likely to ignore the UK's sovereignty clause if it came into being.
- The sovereignty clause could also have unintended consequences. The Head of Legal blog had expressed concerns that some sort of "sovereignty" clause might actually come to be interpreted as affecting Parliamentary sovereignty itself with the risk that it might be viewed as somehow limiting that sovereignty
- Lord Tebbit made a prescient point on this aspect of the bill saying that if a country has sovereignty there is no need to protect it through legislation. This suggests that we have already lost sovereignty and this bill closes the stable door after the horse has bolted.

- In a Letter to Lord Kilmuir in 1960 Edward Heath seemed to realise this. He said if we signed up to the Treaty of Rome there was no doubt that we would suffer from some loss of sovereignty. There would be a loss of parliamentary sovereignty, he believed, as some of its functions would be handed over to the European Community. The crown would lose some of its treaty making powers to the Community. The courts would lose some sovereignty, as in certain respects they would become subordinate to the ECJ. Edward Heath's thoughts some would argue have come to fruition and the sovereignty clause will not be able to change this.

### **CHAPTER 3**

#### **a) REFERENDUM LOCK**

- The Bill aims to protect the UK's sovereignty through a referendum lock and also set out in law that the government will not give any more transfers of power to the EU.
- The point of the referendum lock is to ensure that any proposed future treaty, or treaty amendment or loss of national veto that transferred competences or areas of power from the UK to the EU would be subject to a referendum as well as reaffirming the sovereignty of the UK Parliament over the EU. It means in theory that the government could not ratify a treaty or an amendment to a treaty without public endorsement.
- There is a similar mechanism in Ireland where the Supreme Court ruled in 1987 that any major transfer of power to the EU had to be approved by referendum. This has effectively meant that the Irish people have voted on every EU treaty amendment since 1987.
- The referendum lock would be a mechanism to endorse or reject Government support for a change and not a right to vote on any major EU Treaty change. This means that if the government disapproves of a new treaty or treaty change they will use their power of veto rather than referring the issue to the public. An amendment that could bolster this area is by making sure a referendum would take place where the government does have the power of veto but disagrees with a new treaty or treaty change.
- The referendum lock forms clause 7 of the EU bill and highlights in what situations it will be triggered.
- Examples of areas where the public would get a say on transfers of power from the EU would be if the government ever wanted to join the euro or if Brussels tried to create a common defence policy or an EU public prosecutor. Interestingly an example that isn't mentioned is the proposal to give the EU powers to set a EU-wide tax.
- The referendum lock is applicable to any further transfers of power being given to the EU in treaties or outside a treaty arrangement where there has been a large-scale transfer of power from the UK to the EU.
- The legislation included within the referendum lock clause also gives parliament more power. This is because in future, treaty changes that involve a transfer of power will have to be approved by an Act of Parliament, rather than a simple vote in the Commons and the Lords as at present. By doing this the government believes more time can be spent scrutinising EU legislation.

- The lock does not cover all treaty amendments as the government believes this would lead to referendums being held on minor treaty changes that have little or no consequences for the UK. Therefore there will not be a referendum on the size of the European Parliament being increased and the number of UK MEPs due to this being increased as it is seen as a minor treaty change.

### **b) LISBON TREATY PROBLEMS**

- The problem when it comes to the treaty requirement is that the Lisbon Treaty has a self-amending clause, meaning that the EU can award itself new powers without consulting with member states. That was why it was so important to hold a referendum on the Lisbon Treaty as after this it makes it a lot harder to reclaim sovereignty from the EU. There is no need for another treaty if the EU wants to grab further power for itself. This is due to Article 48(6) that allows treaty changes to be made without the necessity of a new, amending treaty and universal ratification
- Another area that causes problems is the 'passerelle' clause in the Lisbon Treaty. It allows the Council of Ministers to extend their power through a qualified majority vote. Whilst the UK has some say in how these votes turn out, it has no veto, and cannot block a vote alone. With this in mind once the Council of ministers agree on a matter as they did with the European Investigation Order there seems no way even with the referendum lock to stop it from being passed.
- The government has problems with dealing with the ratchet clauses in the Lisbon Treaty, as there is no agreed definition of a ratchet clause.
- Other parts of the referendum lock ensure that where there are areas where the national veto will be lost in a so-called minor area, whilst this is not important enough for a referendum there will have to be full parliamentary control on the matter.
- To try and deal with this problem the referendum lock will cover the controversial so-called 'ratchet clauses' in the Lisbon Treaty, which will allow EU leaders to bargain away national vetoes in areas such as Justice and Home Affairs.

### **c) CRITICISMS OF THE REFERENDUM LOCK**

- There is a problem with the referendum lock when it comes to national vetoes. The problem with it is that due to the power any government has in the British parliamentary system they are likely to get through legislative changes leading to the abolition of national vetoes, whereas if there was a referendum every time a national veto was under threat then there is less chance the legislation losing the veto will be passed.
- People also believe because the referendum lock is also based on judicial review where a ministers decision on whether a subject merits a referendum or not can be challenged by a judge will give unelected judges too much power. The government in response has said they are using this as a check on ministerial discretion on the use of the referendum lock.



- There are worries about its effectiveness as when asked they admitted that the referendum lock wouldn't have come into play either for the creation of the European External Action Service (EU diplomatic corps), EU regulation over the city, EU surveillance of the budget or the European Investigation Order.
- This highlights a large loophole in the law as it allows the government in certain circumstances to decide when a particular transfer power is insignificant and therefore not worthy of a referendum.
- Voters who think ministers have got it wrong would be forced to seek a judicial review in order to overturn the decision. This is a very tricky and expensive process that most voters will not be attracted to or have the financial means to do so.
- Another way further transfers of power could avoid any parliamentary or public scrutiny is through proclaiming that there can be no referendum on treaty changes being suggested that do not effect the UK. However it is often hard to tell what legislation will effect the UK from the EU.
- For example parliament was told repeatedly that the bailout mechanism included in the Lisbon Treaty would not affect the UK. However as the recent bailout of Ireland highlighted, it has.
- It is reasonable to expect an assurance in the bill that the UK will be exempted from any liability to prop up the ill-fated euro in other euro-states. This has the backing of Bill Cash the Chairman of the European Scrutiny Committee who has said the bailout mechanism could be unlawful. The effect the mechanism could have on UK taxpayers' highlights that this is an area that affects the UK and therefore should be up for referendum despite what the government says.
- This example does highlight how it is easier for any UK government to bypass these so called safeguards stopping any further transfers of power.
- This has also provided a green light for Angela Merkel's attempts to push through changes in the Lisbon Treaty to prop up the Euro and increase economic governance supposedly only for Eurozone countries.
- This does not seem to be a way of re-connecting UK citizens with EU decision making as individual citizens have no say in this process. Perhaps to clear up the matter it could be made clear in the bill what would be seen as insignificant.
- The loophole was not an initial part of the bill so an amendment could be put in to remove it and thereby strengthen the referendum lock.
- The way ministers have justified changes in EU law is through saying that no transfer of powers has taken place. This is the standard line the government can now fall back on when it comes to the referendum lock. Thus the ball is still not in the UK parliament's court. This is because the decision on what constitutes a transfer of power is not being made by an independent voice such as parliament but by the government.
- A way this could be improved is if the decision for when the referendum lock is triggered can be taken by a vote of the entire parliament rather than by ministerial decree. For example it should be made clear in parliament any opt-in into an EU law covering Home Affairs should be subject at the very least to an act of parliament. By doing this, a repeat of the European Investigation Order that was passed by ministerial decree could not take place.
- The referendum lock will also have no effect whatsoever on the enlargement of the EU. Therefore despite many people in the UK having worries about Turkey joining the EU they will not be able to make these concerns known. This is despite the new European

Union Bill supposedly being there so decisions can be made closer to the people. Accession treaties enlarging the EU can also be done in such a way that the EU increases its power over all member states. A way this could be done is through using an accession treaty as the vehicle for further EU treaty amendments. If this did take place and a transfer of power occurred through this, it would be hard to use the referendum lock.

## **CHAPTER 4**

### **OTHER CRITICISMS OF THE BILL**

- The bill does not make clear what exactly competence and power mean. There are worries consequently that ministers will justify new powers for the EU by saying that it is just adding competences to the EU and does not represent a transfer of power.
- Neither does the bill contain a definition of power. This can cause problems, as an area where the government does not feel they are giving power to the EU may not be perceived as such by the whole of parliament. Under the bill's 'significance clause' ministers will decide what constitutes a transfer of powers. With ministerial discretion, however, it could be more difficult to ascertain what would constitute a "significant" transfer of powers".
- The bill says it aims to bind future parliaments to the sovereignty clause and the referendum lock. However the bill is just a simple act of parliament. If future parliaments wanted to overturn these areas of this EU bill they could through a simple majority vote in parliament. In his evidence to the ESC, Professor Hartley also made the point that "the Bill, assuming it becomes law, will be an Act of Parliament. We know that Parliament cannot bind future Parliaments, so a future Parliament could always change it. It could repeal it—totally repeal it—or amend it, or repeal it in part.
- David Lidington has said there will be no transfer of competences from the UK to the EU during the present parliament and therefore there will be no referendum in this period. However there have already been transfers in parliament to the EU in areas of Foreign Affairs, Justice and Home Affairs making this point null and void.
- All of this seems to back up Phillip Davies MP who on the matter has said "You can't even say this is a step in the right direction, it's just promising not to put another step in the wrong direction".

## **CHAPTER 5**

### **SILVER LININGS**

- One way further powers can be stopped going to the EU in Criminal Justice is by holding referendums on a specific piece of European legislation affecting the UK such as the European Arrest Warrant.
- The bill makes this a possibility as it says that if the EU tries to transfer more competences to itself in relation to Common Security or Foreign Policy a referendum lock can be triggered. This suggests that the European Investigation Order that Theresa

May claimed wasn't applicable to the proposed referendum lock actually would have been.

- If the bill covers EU Justice and Home Affairs measures in its entirety it could stop measures where an amendment to the European Arrest Warrant giving the ECJ (European Court of Justice) the final say over this law. Through the bill it could be argued that this amendment could not take place unless the people or parliament agree. If they do not agree the UK would be required to opt out of the European Arrest Warrant altogether, which would effectively repatriate powers to the UK. Thus if ministers are brave enough they can use the bill in such a way to repatriate powers back.
- There was also a feeling that under the last Labour government a lot of decisions taken in relation to the EU were undemocratic. The best example of this was the Lisbon Treaty. Thus the bill aims to increase parliamentary control, decision-making and scrutiny over EU decisions. This aims to neutralise the complaint by eurosceptics that the UK parliament doesn't have a say in much anymore due to most decisions on legislation coming from the EU.
- Some arguing in favour of the bill say it creates an effective veto to stop Britain become further integrated with the EU. David Rennie of the Economist argued this point of view because he believes it will be impossible to win a referendum in favour of transferring sovereignty from the UK. Thus it could be an effective block if the power was not just in the hands of government ministers.
- A way the bill could be strengthened is through allowing citizens initiatives. This could be introduced for example by allowing large-scale petitions on matters pertaining to further powers to the EU to set off the referendum lock. That way EU decision-making would be responding to the public's concerns.

## CHAPTER 6

### POLITICAL LANDSCAPE

- The Bill is aiming to highlight Cameron's eurosceptic credentials.
- On November 13 2010 it was reported in the Daily Telegraph that as many as 100 Conservative MPs are willing to rebel on the bill as they believe the referendum lock has been watered down as it gives too much powers for ministers to decide when a referendum on EU legislation can take place.
- They believe giving this much power to ministers is problematic as given that five major transfers of power to Brussels have taken place since the Coalition came to power in May, all of which were talked down by ministers at the time, there is evidence that the government cannot be trusted to make such a decision.
- The rebels believe by doing this they could force Mr Cameron into concessions that would strengthen the bill and resist any further power grabs from Brussels.
- Those who are thinking of rebelling include many new Conservative MPs, some veteran Conservative Backbenchers backed by eurosceptic Labour MPs such as Gisela Stuart and Kate Hoey.



- At least 40 Conservatives are prepared to vote for amendments to strengthen the bill, with another 50 considering their position. These 50 could either join the rebellion or abstain.
- Amendments to strengthen the bill will only go through with the support of the Labour Party. This does not seem to be forthcoming.
- The EU is an area where there have already been rebellions highlighted by the 37 Conservative MPs who signed Douglas Carswell's EDM to reduce Britain's contributions to the EU budget.
- The anger on the Conservative backbenches on the EU bill highlights the dangerous gulf between their views on what constitutes a transfer of power to the EU and the government's.
- There have been reported attempts to write in a clause to ensure that no EU Home Affairs matters can be foisted on Britain in the future. This could be effective as Home Affairs is an area where due to the Lisbon Treaty the EU has been expanding the most. However as we have already signed up to the European Arrest Warrant and the European Investigation order this clause if it got through may be too little too late.
- The European Scrutiny Committee has carried out an inquiry into the bill. However Bill Cash has criticised the amount of time they were given to look over the bill believing it was insufficient. The committee was only given a month to look over the complex bill. This suggests parliamentarians will criticise the bill as ill thought out and rushed.
- In all political efforts in parliament the government needs to be reminded that the country is a much more eurosceptic place than in 1992 and this is reflected in the modern Conservative Party. Therefore David Cameron cannot afford to paint those who are eurosceptic as loonies as often they are most in touch with political opinion.
- Some Liberal Democrats have criticised the upcoming EU bill from a completely different point of view. Andrew Duff an MEP and close ally of Nick Clegg has said it is pandering to nationalist and populist concerns. Clearly this is an area where the coalition is split.
- The Labour Party believe the bill is ill thought out and confused. They will therefore vote against the bill.

## **CHAPTER 7**

### **CONCLUSIONS**

- The EU Bill of 2010 highlights that we cannot repatriate powers from the EU, as they have already been lost.
- The bill as it stands will not stop the UK's continuing integration into the EU.
- Ministers have said that the bill will mean that voters will be able to vote on the next treaty. However there will be no new treaty due to the nature of the Lisbon Treaty meaning if the EU needs to gain more powers it just uses provisions from the Lisbon Treaty.
- It is credible to say that the bill actually breaks the coalition agreement. This is because concerns have been expressed that the proposals break the terms of the government's coalition agreement, which committed to a promise that powers could not be transferred to Brussels without a referendum-taking place. Yet under the bill powers deemed as minor can be passed without a referendum.

- Again this shows how the bill has been worded by the Foreign Office to try and avoid as many referendums taking place as possible. This is an example of where the civil servants have won the battle when it comes to how the legislation will be formatted.

## CHAPTER 8 (amended on 7/02/11)

### a) LATEST PROPOSED AMENDMENTS

- **Amendments 9 and 10** – This sought to amend Clause 18, which would have provided a sovereignty clause to the Bill. Bill Cash’s amendment, which was backed by 41 MPs, would have added “The sovereignty of the United Kingdom Parliament is hereby reaffirmed.” The amendment aimed to protect sovereignty, through preventing un-elected judges tampering with the British Constitution (PRU, 2010).
- **Amendments 18,20, 21, 22 and 23** - This sought to provide more opportunities for the referendum lock to be triggered. This would have made it harder for the Government to make decision’s against the Parliament’s will (PRU, 2011).
- **Amendment 19** - This would subject to a referendum, any amendment to the treaty abolishing the veto, through the use of the Common Foreign and Security Policy ratchet clause (Booth, S, 2011).
- **Amendment 26** - This would close the Bill’s loophole that allows proposals made under the Lisbon Treaty’s ‘flexibility clause’ to bypass Parliamentary approval altogether. Open Europe has stated that the clause “allows the EU to adopt new measures to attain the EU’s objectives, if they are not already provided for in the EU treaties” (Booth, S, 2011).
- **Amendment 27** - This would require Parliamentary approval before the UK opts into any further EU proposals for Justice and Human Affairs. Justice and Home Affairs was an area where The Lisbon Treaty aimed to take significant amount of powers away from member states, including the UK. (Booth, S, 2011)
- **Amendment 32** - This relates to the EU providing further powers to the EU judicial body, Eurojust. In 2012, as part of the Lisbon Treaty, the European Commission is likely to present proposals which will give Eurojust new powers. To ensure that the Government does not take the issue lightly, a referendum would be triggered if they opted into a proposal or law giving Eurojust significant powers (Booth, S, 2011).
- **Amendment 39** - This works with amendment 27. It would require approval by a referendum, for a decision based on the ratchet clause, expanding EU competence in Justice and Home affairs. This would be done before the Government can opt into a measure based on that new competence, even if the UK Government had not opted into the ratchet decision itself (Booth, S, 2011).
- **Amendment 48** - This would mean that an In/Out referendum would be triggered giving the British people a voice on EU membership for the first time in 36. An In/Out referendum would be triggered if a referendum was triggered due to a perceived transfer of competency, and if the British people voted against such a transfer of power (Bone, P, 2011).
- **Amendment 82** - This relates to a decision the Government must in July 2014: whether a whole raft of Justice and Home Affairs legislation, before the Lisbon



Treaty came into force in 2009, will continue to apply in the UK beyond 2014. If the Government opts out of any legislation here, it has to opt out of the whole lot. However if they opt in to the legislation, ultimate power will be transferred to the European Court of Justice. An amendment should be proposed, to ensure that this important decision is decided by a referendum (Booth, S, 2011).

None of these amendments were passed.





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