

THE EUROPEAN UNION ACT 2011: LOCKS, LIMITS AND LEGALITY

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1. Introduction

The European Union Act 2011 attracted little media attention when enacted in the UK. This was scarcely surprising given that it coincided with the hearings of the Murdochs and News International by the House of Commons. Nor did the 2011 Act dominate EU headlines. This was equally unsurprising given that its enactment occurred the day before a crucial European Council meeting to save the euro.

The European Union Act 2011 is nonetheless important, more especially because it may encourage similar ventures by other Member States. The statute is complex, and imposes a regime of parliamentary and referendum “locks” on EU Treaty amendments and a range of other EU decisions. The “locks” fashioned by Germany were part of the inspiration for the constraints in the 2011 Act. This article begins by providing an overview of the European Union Act 2011, followed by detailed consideration of the legal and political problems flowing from the legislation. The analysis concludes with some broader reflections on the impact of locks from the perspective of the UK, other Member States and the EU.

2. Parliamentary and referendum locks: Schema of the Act

2.1. *Section 2: Ordinary revision procedure*

Section 2 of the Act deals with Treaty amendment pursuant to the ordinary revision procedure in Article 48(2)-(5) TEU. It specifies that there must be a statement laid before Parliament in accordance with section 5, the Treaty amendment must be approved by an Act of Parliament, and the referendum condition or exemption condition must be met. The referendum condition requires, as specified in section 2(2), that the Act of Parliament approving the Treaty amendment cannot come into force until there has been a positive vote in a national referendum. The only qualification is where the exemption condition applies. This obviates the need to hold a referendum if the Treaty

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amendment does not fall within section 4, which defines the notion of Treaty change. Section 4 is very broad, and it will be rare for the obligation to hold a referendum to be negated by the exemption condition. The House of Lords proposed an amendment to the referendum condition, such that a positive vote in a referendum was not *per se* dispositive if the voter turnout was less than 40 percent. This amendment was however rejected by the House of Commons.¹

2.2. Section 3: Simplified revision procedure

Section 3 deals with Treaty reform pursuant to the simplified revision procedure in Article 48(6) TEU. It provides that where the European Council has adopted a decision pursuant to Article 48(6) TEU, a Minister of the Crown may not confirm the approval of the decision by the UK unless a statement has been laid before Parliament in accordance with section 5, the decision has been approved by statute, and the referendum condition, exemption condition or significance condition has been met. The only difference between sections 2 and 3 is therefore that the requirement to hold a referendum is obviated in section 3 not only where the exemption condition applies, but also where the significance condition in section 3(4) is applicable. This makes a referendum unnecessary if the change only comes within section 4(1)(i) or (j),² and such change is not significant for the UK.

2.3. Section 6: EU decisions requiring approval by statute and referendum

Section 6(1) specifies further instances where confirmation by statute and referendum is required. It states that a minister of the Crown may not vote in favour of a decision to which the section applies, unless the draft decision has been approved by Act of Parliament and the referendum condition is met.

Section 6(5) defines the terrain to which section 6(1) applies. It is concerned primarily with changes to Treaty voting rules and legislative procedure pursuant to passerelle provisions. Thus, for example, any EU draft decision made pursuant to the general passerelle clause in Article 48(7) TEU, whereby there can be a shift from unanimity to qualified majority voting, or from the special to the ordinary legislative procedure, must be approved by statute and a referendum in relation to any provision listed in Schedule 1 of the

1. House of Lords Select Committee on the Constitution's Thirteenth Report of Session 2010-11: European Union Bill, Government Response to the Report, available at <www.parliament.uk/documents/lords-committees/constitution/GovernmentResponse/GvtResEUBillReport.pdf>.

2. European Union Act 2011, s. 4(1)(i) the conferring on an EU institution or body of power to impose a requirement or obligation on the United Kingdom, or the removal of any limitation on any such power of an EU institution or body; (j) the conferring on an EU institution or body of new or extended power to impose sanctions on the United Kingdom.

Act,³ and so too must draft changes made pursuant to more particular passerelle provisions.⁴ Section 6(5) also mandates the need for a statute and referendum for certain other EU decisions which are not passerelle provisions. This includes draft decisions whereby the UK would join the euro,⁵ extension of the powers of the EU Public Prosecutor's Office,⁶ or removal of UK border controls by amendment to the Schengen protocols.⁷

The requirements for approval by Act of Parliament and referendum also apply in accordance with section 6(2) where the European Council has recommended to the Member States the adoption of a decision under Article 42(2) TEU in relation to common EU defence. These requirements are further mandated by section 6(3) in relation to the UK's participation in the European Public Prosecutor's Office, or an extension of the powers of that Office.

The House of Lords proposed an amendment, such that a referendum would not be required for most of the subject matter covered by sections 6(1) and 6(5), the rationale being that it was not sufficiently important to warrant a referendum. The House of Lords Select Committee on the Constitution took the view that the requirement of a referendum in over 50 policy areas constituted "a radical step change",⁸ because most such areas did not concern fundamental constitutional issues.⁹ This amendment was rejected by the House of Commons. The government argued that the Act provided clarity as to when a referendum was required,¹⁰ and that a referendum was warranted for the issues in section 6(5), because they could be just as significant as changes made by sections 2 and 3.¹¹

2.4. Section 7: Decisions requiring approval by Act of Parliament

The European Union Act 2011 section 7 stipulates instances in which EU decisions require statutory approval, although not a referendum. Section 7(1) provides that a minister may not confirm approval of certain EU decisions, unless they are approved by Act of Parliament. These are:¹² a decision under Article 25 TFEU permitting adoption of provisions to strengthen or add to the rights of EU citizens in Article 20(2) TFEU; a decision under Article 223(1)

3. European Union Act 2011, s. 6(5)(b).

4. *Ibid.*, s. 6(5)(a), (f)-(j).

5. *Ibid.*, s. 6(5)(e).

6. *Ibid.*, s. 6(5)(c).

7. *Ibid.*, s. 6(5)(k).

8. House of Lords Select Committee on the Constitution's Thirteenth Report of Session 2010-11: European Union Bill (HL 121, 2011), para 37.

9. *Ibid.*, para 38.

10. Government Response, cited *supra* note 1, paras. 12-25.

11. European Union Act 2011, Explanatory Notes, para 71.

12. European Union Act 2011, s. 7(2).

TFEU permitting the laying down of provisions necessary for the election of MEPs in accordance with that Article; a decision under Article 262 TFEU permitting conferral of jurisdiction on the ECJ in disputes relating to the application of acts adopted on the basis of the EU Treaties which create European intellectual property rights; and a decision under Article 311(3) TFEU to adopt a decision laying down provisions relating to the system of EU own resources.

Section 7(3) further provides that a Minister of the Crown may not vote in favour of or otherwise support certain decisions unless the draft decision is approved by Act of Parliament. The list is long.¹³ It includes, for example, a decision that permits alteration in the number of Commissioners.¹⁴ It also covers virtually any decision introducing a passerelle change that is not already covered by the more stringent requirements of section 6.¹⁵

The House of Lords Select Committee on the Constitution was supportive of the those provisions in the European Union Act 2011, such as section 7, which re-balanced “domestic constitutional arrangements in favour of Parliament”.¹⁶

2.5. Section 8: Article 352 TFEU

The UK’s zeal for control over EU decisions is further apparent in section 8, which is concerned with Article 352 TFEU, the EU’s flexibility clause. A Minister of the Crown may not vote in favour of, or otherwise support, an Article 352 decision unless one of the following mechanisms is complied with in relation to the draft decision.

The first option is for the draft decision to be approved by Act of Parliament.¹⁷ The second option is that the Minister of the Crown moves a motion in each House of Parliament that the House approves the government’s intention to support a specified Article 352 draft decision, because the measure to which it relates is required as a matter of urgency, and each House agrees to the motion without amendment.¹⁸ The third option is for the Minister of the Crown to lay before Parliament a statement specifying a draft decision and stating that in the Minister’s opinion the decision relates only to one or more exempt purposes.¹⁹

13. *Ibid.*, s. 7(4).

14. *Ibid.*, s. 7(4)(a).

15. *Ibid.*, s. 7(4)(b),(e),(f).

16. House of Lords Select Committee, cited *supra* note 8, para 41.

17. European Union Act 2011, s. 8(3).

18. *Ibid.*, s. 8(4).

19. The exempt purposes are set out in s. 8(6). They are: to make provision equivalent to that made by a measure previously adopted under Art. 352 of TFEU, other than an excepted

2.6. Section 9: Parliamentary approval, Acts of Parliament and the AFSJ

The European Union Act 2011, section 9, contains requirements that must be satisfied in relation to the Area of Freedom, Security and Justice, AFSJ. Protocol (No. 21) of the Lisbon Treaty provides an opt-out for the UK and Ireland in relation to AFSJ measures. Article 3 of this Protocol, however, states that within three months of any proposal for an AFSJ measure having been presented to the Council, the UK and Ireland can give a notification of their intent to take part in such a measure. It is this notification that is controlled by the 2011 Act: a Minister of the Crown may not give a notification to which section 9(1) applies unless Parliamentary approval has been given in accordance with section 9(3).

Section 9(2) provides that parliamentary approval must be gained if the UK makes a notification under Article 3 of Protocol (No. 21) that it wishes to take part in the adoption and application of certain AFSJ measures: the shift from the special to the ordinary legislative procedure pursuant to Article 81(3) TFEU concerning family law; the identification of further specific aspects of criminal procedure to which directives adopted under the ordinary legislative procedure may relate, pursuant to Article 82(2)(d) TFEU; and the identification of further areas of crime to which directives adopted under the ordinary legislative procedure may relate, pursuant to Article 83(1) TFEU.

The requirements for Parliamentary approval are in section 9(3). This provides that the Minister of the Crown moves a motion in each House of Parliament that the House approves the government's intention to give a notification in respect of a specified measure, and each House agrees to the motion without amendment.

The regime for Parliamentary control in this area is even tougher than it appears at first sight. Section 9(3) mandates Parliamentary approval before a Minister can signify the UK's intent to take part in the preceding measures by giving a notification under Article 3 of Protocol (No. 21). Section 9(4) however then provides that notwithstanding any such Parliamentary approval a Minister may not vote in favour of, or otherwise support, a decision under a provision falling within section 9(2) unless the draft decision is approved by Act of Parliament.²⁰

measure; to prolong or renew a measure previously adopted under that Article, other than an excepted measure; to extend a measure previously adopted under that Article to another member State or other country; to repeal existing measures adopted under that Article; to consolidate existing measures adopted under that Article without any change of substance.

20. This is further reinforced by s. 9(5)-(6), which deals with notifications made pursuant to Art. 4 of Protocol (No. 21).

2.7. *Section 10: Parliamentary approval for certain decisions*

Section 10(1) mandates Parliamentary approval for certain EU decisions. It states that a Minister of the Crown may not vote in favour of, or otherwise support, such decisions unless Parliamentary approval has been given. The list of EU decisions subject to this requirement covers important issues, such as decisions: amending the Statute of the Court of Justice; creating specialized courts; amending the Statute of the ECB; and increasing the number of Advocates General. Section 10(4) requires moreover that a Minister of the Crown may not confirm the approval by the United Kingdom of a decision under Article 218(8) TFEU for the accession of the EU to the ECHR unless Parliamentary approval has been given.

The requirements for Parliamentary approval mirror those found in other sections of the Act. Thus section 10(5) states that Parliamentary approval is given if in each House of Parliament a Minister of the Crown moves a motion that the House approves the government's intention to support the adoption of a specified draft decision, and each House agrees to the motion without amendment.

2.8. *Section 4: Substantive criteria for holding a referendum*

Section 4 specifies when a referendum is required pursuant to sections 2, 3 and 6. The drafting is very "British". Nothing is left to chance. Every conceivable form of Treaty change is exhaustively delineated. Section 4 is a "gem". Some legislative provisions cannot be adequately summarized, and must be set out in full.

- “(1) Subject to subsection (4), a treaty or an Article 48(6) decision falls within this section if it involves one or more of the following—
- (a) the extension of the objectives of the EU as set out in Article 3 of TEU;
 - (b) the conferring on the EU of a new exclusive competence;
 - (c) the extension of an exclusive competence of the EU;
 - (d) the conferring on the EU of a new competence shared with the member States;
 - (e) the extension of any competence of the EU that is shared with the member States;
 - (f) the extension of the competence of the EU in relation to—
 - (i) the co-ordination of economic and employment policies, or
 - (ii) common foreign and security policy;
 - (g) the conferring on the EU of a new competence to carry out actions to support, co-ordinate or supplement the actions of member States;

- (h) the extension of a supporting, co-ordinating or supplementing competence of the EU;
 - (i) the conferring on an EU institution or body of power to impose a requirement or obligation on the United Kingdom, or the removal of any limitation on any such power of an EU institution or body;
 - (j) the conferring on an EU institution or body of new or extended power to impose sanctions on the United Kingdom;
 - (k) any amendment of a provision listed in Schedule 1 that removes a requirement that anything should be done unanimously, by consensus or by common accord;
 - (l) any amendment of Article 31(2) of TEU (decisions relating to common foreign and security policy to which qualified majority voting applies) that removes or amends the provision enabling a member of the Council to oppose the adoption of a decision to be taken by qualified majority voting;
 - (m) any amendment of any of the provisions specified in subsection (3) that removes or amends the provision enabling a member of the Council, in relation to a draft legislative act, to ensure the suspension of the ordinary legislative procedure.
- (2) Any reference in subsection (1) to the extension of a competence includes a reference to the removal of a limitation on a competence.
- (3) The provisions referred to in subsection (1)(m) are—
- (a) Article 48 of TFEU (social security),
 - (b) Article 82(3) of TFEU (judicial co-operation in criminal matters), and
 - (c) Article 83(3) of TFEU (particularly serious crime with a cross-border dimension).
- (4) A treaty or Article 48(6) decision does not fall within this section merely because it involves one or more of 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.”

2.9. Section 5: Procedural duties concerning the holding of a referendum

The substantive criteria for holding a referendum are reinforced by procedural duties. Section 5(1) specifies that if a Treaty amending the TEU or TFEU is agreed in an IGC, a Minister of the Crown must lay the required statement before Parliament within two months. Section 5(2) contains the same

obligation in relation to a Treaty change made by the simplified revision procedure. The “required statement” as specified by section 5(3) is a statement as to whether the Treaty change made by the ordinary or simplified revision procedure falls within section 4 of the Act. The Minister must inform Parliament whether, in his or her opinion, the Treaty change or Article 48(6) decision falls within section 4, and reasons must be given for this statement. Section 5(4) amplifies the meaning of the significance condition. If the Minister is of the opinion that an Article 48(6) TEU decision falls within section 4 only because of provision of the kind covered by section 4(1)(i) or (j), the statement must indicate whether in the Minister’s opinion the effect of that provision in relation to the United Kingdom is significant.

2.10. *Section 18: The “Sovereignty Clause”*

A considerable amount of the Parliamentary time devoted to the European Union Act 2011 was taken up with section 18, what became known as the “sovereignty clause”.²¹ This was so notwithstanding the fact that it was not the most important issue in the legislation. Section 18 provides as follows.

“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 recognized and available in law in the United Kingdom only by virtue of that Act or where it is required to be recognized and available in law by virtue of any other Act.”

3. Parliamentary and Referendum Locks: Legal and political problems

3.1. *The 2011 Act: Repeal and disapplication*

There is nothing to prevent the requirements of the 2011 Act from being repealed and there is nothing to prevent its provisions from being dispensed with by a subsequent statute. The 2011 Act does not entrench the requirement to hold a referendum and on the traditional theory of sovereignty such a requirement would probably not be effective. Thus it would be open to Parliament when considering a proposed Treaty amendment to ratify the amendment by an Act of Parliament, and to include in the statute a section

21. House of Commons, European Scrutiny Committee, *The EU Bill and Parliamentary Sovereignty* (HC 633-I, 7 Dec 2010); House of Lords Select Committee, cited *supra* note 8, paras. 52–63.

stating expressly that the requirements for a referendum in the 2011 Act should not apply in this instance. The political implications of this will be considered below.²²

3.2. Section 2: Ordinary revision procedure

There is no legal problem insofar as EU law is concerned with the referendum requirement in section 2. Article 48(4) TEU stipulates that Treaty amendments made by the ordinary revision must be ratified in accordance with the constitutional requirements of the Member State. If a Member State chooses to make a referendum a condition of ratification, that is not legally problematic under EU law. The broader political implications of this will be considered below.²³

There may, however, be problems in deciding whether section 4 is applicable, and hence whether it is necessary to hold a referendum as a matter of UK law. This will not be problematic in relation to Treaty amendments that create a new category of competence, since this would then feature as an explicit addition to the relevant category of competence listed in Articles 3–6 TFEU. It may be more contentious whether a Treaty amendment extends an existing head of competence. The answer will depend on the level of abstraction at which the question is posed. Thus if one asks at a general level whether the EU has competence to regulate the flow of goods in the internal market the answer would be yes, and hence modification of the particular Treaty rules would not be regarded as extending the competence thus defined. If, by way of contrast, the initial inquiry is as to the more detailed Treaty rules that define the EU's regulatory competence over the flow of goods in the internal market, then a change to the detailed rules is more likely to be regarded as extending competence in that area.

The decision as to whether there has been a transfer or extension of power to the EU is further complicated by section 4(4). The formula used in section 4(4) is that a Treaty revision or Article 48(6) decision does not trigger the need for a referendum *merely* because it involves one of the issues listed in section 4(4)(a)-(c). This may well lead to complexities. Thus, to take an example, section 4(4)(c) deals with accession of new Member States, obviating the need for a referendum in such circumstances. However, accession treaties are also used to introduce other Treaty amendments, and thus the exception in section 4(4)(c) would not be applicable.²⁴

22. See *infra*, sections 3.6, 4.1.

23. See *infra*, section 4.1.

24. This is recognized by the European Union Act 2011, s. 1(4), and European Union Act 2011, Explanatory Notes, para 64.

There are analogous difficulties with section 4(4)(a), which provides that a Treaty amendment or Article 48(6) TEU decision does not fall within section 4 *merely* because it involves codification of practice under the TEU or TFEU in relation to the previous exercise of existing competence. The difficulties are not dispelled by the Explanatory Notes. The example given²⁵ is that section 4(4)(a) would cover the case where the EU acted under Article 352 TFEU, the flexibility clause, because a measure was required for which there was no specific legal base. If a later Treaty change were to provide a specific legal base and that legal base merely codified existing use then no referendum would be required because the power had already been transferred. The Explanatory Notes contrasted this with circumstances where the new legal base did more than codify the existing use, when a referendum would be needed. There may well be real difficulties in deciding on this divide.

The underlying premise is moreover questionable. The mere fact that EU action has been authorized in a particular instance under Article 352 TFEU is not the same as providing a new head of competence, even if the latter covers the same terrain as the former. The specific measure enacted under Article 352 is just that, a measure accepted by the EU institutions. It is no guarantee that if an analogous situation occurred later the EU institutional players would necessarily decide that the conditions for Article 352 were met. By way of contrast a specific head of competence dealing with the issue provides constitutional authority for EU action.

3.3. *Section 3: Simplified revision procedure*

The referendum requirement contained in section 3 of the 2011 Act is, subject to the important caveat below, also compatible with EU law. Article 48(6) TEU stipulates that a decision of the EU Council under the simplified revision procedure does not enter into force until it is ratified in accordance with the constitutional requirements of the Member States.

The difficulties concerning section 4 considered above are equally applicable here, since section 4 triggers the need for a referendum under section 3. There are in addition problems concerning the application of the significance condition, which obviates the need for a referendum if the change made by the simplified revision procedure only comes within section 4(1)(i) or (j),²⁶ and such change is not significant for the UK. The Explanatory Notes

25. European Union Act 2011, Explanatory Notes, para 62.

26. European Union Act 2011, s. 4(1)(i): the conferring on an EU institution or body of power to impose a requirement or obligation on the United Kingdom, or the removal of any limitation on any such power of an EU institution or body; (j): the conferring on an EU institution or body of new or extended power to impose sanctions on the United Kingdom.

provide little by way of guidance as to what constitutes significance.²⁷ It would ultimately be for the courts to give substance to the significance condition by requiring reasons and evidence to substantiate them. This will not be easy, since the significance condition requires a present determination of the likely future impact of an EU power to impose sanctions on the UK, and it may simply not be knowable at this stage whether and how often the power will be used.

The very inclusion within section 4 of provisions dealing with power as opposed to competence is itself questionable. It is acknowledged in the Explanatory Notes that “power” is not a term of art in the Lisbon Treaty in the same way as is “competence”.²⁸ The rationale given for use of the two terms in section 4 emerges most clearly in paragraph 45 of the Explanatory Notes. The term power is used to cover those instances where an Article 48(6) decision seeks to confer on an EU institution a new or extended power to require Member States to act in a specified way pursuant to the EU’s existing competence; or to confer on an EU institution a new or extended power to impose sanctions on Member States for their failure to act in a specified way already provided for by the Treaties. Such a development would not in itself, “transfer competence (the ability for the EU to act in a given area) from the Member States to the EU – instead, such a proposal would allow an institution or body of the EU to use the competence conferred on it already by the Member States in a different way”.²⁹

The argument in favour of the distinction is that there is a meaningful difference between the existence of competence, and the powers that can be exercised if such competence exists. Thus a Treaty amendment enabling new sanctions to be imposed would not thereby broaden the heads of competence in Article 2 TFEU, because these relate to the substantive areas in which the EU can act, and do not touch the powers accorded to the institutions under the TEU and TFEU.

The argument against the differentiation between competence and power is that the very scope of EU competence depends on the particular powers that the EU has within that area. An addition to those powers will in that sense expand the scope of EU competence within that area. The 2011 Act is premised on distinguishing between a Treaty revision that extends competence, by for example, broadening the subject matter remit of a Treaty article, and Treaty revision that extends “power” to impose sanctions. It is however unclear why the latter is not as much an extension of competence as

27. European Union Act 2011, Explanatory Notes, paras. 45–48.

28. *Ibid.*, para 26.

29. *Ibid.*, para 45.

the former, more especially if the extension of power is integrally linked to the subject matter area.

Commentators may differ as between the preceding arguments. The dichotomy between competence and power is important because the significance condition in section 3(4) applies only to conferral of power under section 4(1)(i) and (j), and only when done pursuant to the simplified revision procedure in Article 48(6) TEU. The assumption is that such a conferral of power may be insignificant, but that creation/extension of competence in relation to the other matters listed in section 4 cannot. This assumption does not readily withstand examination. The extension of competence in relation to, for example, an area in which the EU has competence to support, coordinate or supplement Member State action might be equally insignificant for the UK, but a referendum would nonetheless be mandatory in such cases.

The problems with the significance condition are not however the major issue with section 3. There is a more general legal and political tension between EU law and section 3 of the 2011 Act that was never acknowledged by the framers of the legislation.

The legal difficulty is that section 3 is predicated on a decision made under Article 48(6) TEU that creates or extends EU competence, or confers power, in one of the ways listed in section 4. However neither the Act, nor the Explanatory Notes, mentions the tension between this formulation and the fact that Article 48(6) TEU states expressly that a decision made thereunder “shall not increase the competences conferred on the Union in the Treaties”. The EU can therefore only make an *intra vires* decision pursuant to Article 48(6) if it does not increase competence. Section 3 of the 2011 Act, by way of contrast, is predicated on the contrary assumption, that a decision under Article 48(6) could create or extend, and hence increase, competence. The exemption condition means that if the Article 48(6) decision does not engage the issues in section 4 a referendum will not be required. This does not alter the point being made here: from the EU’s perspective no Article 48(6) decision can increase EU competence; from the perspective of the 2011 Act most decisions can do so. There might be some instances in which it could be argued that an Article 48(6) decision would not increase competence, while still violating section 4(1)(i) or (j). The reality nonetheless is that in the great majority of instances there will be the preceding tension: virtually all parts of section 4(1) entail an increase in competence, hence the conflict with Article 48(6), which states that such decisions do not increase EU competence.

This legal difficulty is compounded by political problems. If the Prime Minister opposes the Article 48(6) decision then section 3 is irrelevant, since there is no such decision without unanimity. If the Prime Minister agrees to the Article 48(6) decision and then always maintains, consistently with the Treaty

wording, that it has not increased competence, then section 3 is also redundant, since section 4 would never be triggered to demand a referendum.³⁰ It logically follows that if section 3 is ever to be used to demand a referendum this must be where the Prime Minister has assented to the Article 48(6) decision on the premise that it does not increase competence, but nonetheless maintains or accepts when back in the UK that it has increased competence in one of the ways in section 4. There will inevitably have been legal advice on the *vires* issue, from lawyers in the EU legal service, and governmental lawyers.³¹ The “logic” behind sections 3 and 4 combined is nonetheless that Article 48(6) decisions can increase competence, since otherwise the section is otiose.

The UK looks foolish to say the very least, and the judgment of the Prime Minister is inevitably called into question. His or her affirmation that the Article 48(6) decision was *intra vires*, because it did not increase EU competence, would be contradicted by later UK action. It is politically inconceivable that the ministerial statement to Parliament as to whether section 4 was engaged, and hence that section 3 required a referendum, would be made without agreement of the Prime Minister and Cabinet.³² If the Prime Minister were to give such clearance he would be subject to the critique that the initial judgment in agreeing to the Article 48(6) decision on the assumption that it did not increase EU competence was unsound. The political fallout might be greater. The Prime Minister might be accused of being disingenuous when agreeing to the Article 48(6) decision. It might be felt that he always intended to invoke section 3 when back in the UK, on the premise that the EU decision increased competence, thereby contradicting the assumption on which he signed the Article 48(6) decision in Brussels.

It is no answer to advert to the earlier example where one might be able to square the circle between Article 48(6) and section 3 by concluding that the former was *intra vires*, but still in breach of section 4(1)(i) or (j). It will be very rare for this way out to be legally plausible, and it will not cut any ice in EU political circles. Our political partners are likely to give such legalistic arguments short shrift, and to affirm their conclusions that the UK has been inept at best, disingenuous at worst.

30. Subject to possible use of s. 4(1)(i) or (j).

31. There may be doubts as to whether changes made pursuant to Art. 48(6) entail an increase in competence. This does not alter the force of the point being made here. These issues will be debated in Brussels prior to the change. If the UK Prime Minister is unhappy with the legal advice that the proposed changes do not increase competence then he or she should either veto the change, or insist on further debate.

32. European Union Act 2011, s. 5(2).

3.4. Section 6: EU decisions requiring approval by statute and referendum

Section 6 is also problematic legally and politically. The Explanatory Notes³³ justify the need for an Act of Parliament, plus referendum, in relation to the issues listed in section 6 on the ground that they are equally important to those dealt with in sections 2 and 3, since they involve loss of the veto, or entail transfer of competence.

We can begin with the legal difficulties. The Lisbon Treaty is carefully crafted as to the conditions that apply before a Treaty revision can take legal effect in the Member States. Articles 48(4) and 48(6) TEU specify that amendments made under the ordinary or simplified revision procedure must be ratified in accord with the constitutional requirements of each Member State.

The matters within section 6 do not however require approval in accord with national constitutional requirements. Insofar as section 6 deals with issues covered by Article 48(7) TEU, the general passerelle clause, the requirement is that an initiative under this Article must be notified to the national Parliament, which can make known its opposition. There is no requirement for positive approval via an Act of Parliament, or a referendum. The difference in relation to the other matters listed in section 6 is even greater. Section 6 mandates an Act of Parliament plus referendum for all matters listed in section 6(5). There is no authority for such requirements in the Lisbon Treaty, in relation to the particular passerelle changes listed in section 6(5). These changes simply take effect on the terms specified in the relevant Treaty provision, which is normally following a unanimous vote in the Council in favour of a change in voting rules or legislative procedure, plus consultation with the European Parliament.³⁴

It would therefore have been unlawful under EU law if the requirements for an Act of Parliament and a referendum had been specified as conditions on the matters listed in section 6, *after* the EU decisions had been made. This is reinforced by the very fact that in some instances the Treaty specifies that certain decisions can be subject to approval in accord with constitutional requirements,³⁵ the clear implication being that where this is not specified it is neither required nor allowed. The general rule is that the EU decisions/regulations/directives listed in section 6 would be enacted in the normal manner specified by Article 289 TFEU and there would be no legal room for any limits in terms of referendum and/or Act of Parliament. The

33. European Union Act 2011, Explanatory Notes, para 71.

34. See e.g. Arts. 153(2), 192(2), 312(2), 331(1), 333(2) TFEU.

35. This includes decisions listed in s. 7(2), which covers Arts. 25, 223(1), 262, 311 TFEU. The decisions covered by s.7(4) contain no requirement or authorization for approval in accord with national constitutional requirements.

framers of the 2011 Act sought to “finesse” the problem by framing section 6 in terms of pre-conditions for the UK minister to vote in favour of, or support, the draft EU measures. It is therefore central to this strategy that these pre-conditions operate *before* the EU measure is finalized. The key issue is whether this strategy is valid under EU law.

The legality of the section 6 conditions was raised during the deliberations on the 2011 Act. The ministerial response was brief: section 6 was lawful since it was for the UK to decide whether to consent to a measure. On this view the Lisbon Treaty requires ministerial consent in the Council before a measure is enacted, and there is nothing to prevent this consent from being subject to conditions chosen by the Member State. If the Member State chooses to condition the consent by a referendum and Act of Parliament as in section 6, it is entitled to do so.³⁶

“All of the ratchet clauses on which the Government has proposed approval by Act of Parliament and referendum are subject to unanimity. There is nothing in either the TEU or TFEU that puts any constraints on the way in which a Member State decides how to cast its vote in the Council or the European Council. The duty of loyal cooperation does not mean the UK has to say ‘yes’, or place any constraint on the way in which we could say ‘no’. We would not try to tell any other Member State how to decide their vote, and we would not expect them to tell us. The requirements the UK may choose to put into place before a Minister can vote, or otherwise support certain decisions, is a matter for national law and not EU law.”

The government reinforced this argument by contending that the ECJ would have no jurisdiction to interpret a proposed Treaty change or decision prior to ratification or approval of that decision, stating that the ECJ “does not have the jurisdiction to pass judgment on how the UK ratifies Treaty changes or decisions.”³⁷ The government’s response concerning the legality of section 6 under EU law was robust. There are nonetheless very strong counter-arguments.

This is most evident in relation to the government’s contention that the ECJ would lack jurisdiction to adjudicate on how a Member State consents to EU decisions. This argument is surely mistaken. It elides two quite different issues. The ECJ would not generally have jurisdiction to pass judgment on the factors that motivated a State to vote for or against an EU decision that required unanimity. Thus if a Member State were to vote against an EU decision for a European Public Prosecutor because it felt that it was not a

36. House of Commons, European Scrutiny Committee, *The EU Bill: Restrictions on Treaties and Decisions relating to the EU: Government Response to the Committee’s Fifteenth Report of Session 2010-11* (HC 852, 2 March 2011), para 74.

37. *Ibid.*, para 75.

sound idea, it would not be for the ECJ to conclude that this assessment was wrong. It is however axiomatic that the ECJ has jurisdiction to interpret the Treaty and this surely includes interpretation as to whether the general conditions that a Member State sets before expressing its consent are legally consistent with the Treaty. This is the salient issue.

The substantive arguments against the legality of the conditions in section 6 are compelling. The Lisbon Treaty is quite clear when approval in accord with the constitutional requirements of national law is required. This is true for Treaty revision, and where such approval is a pre-condition for the validity of an EU decision. The situations in which such approval is required have always been the subject of debate and deliberation. Viewed from this perspective, the drafting strategy that underpins section 6 is simply trying to make approval in accord with national constitutional requirements a pre-condition where the Treaty does not allow for it. The framers of the 2011 Act recognized that they could not make the statutory and referendum conditions applicable when the EU decision had been enacted because there was no warrant in the Treaty, and therefore sought to achieve the same end through attaching the requirements as pre-conditions for the Minister to vote in favour of the draft decision.

There is a related objection to the section 6 strategy, which is that it makes the particular national parliament and the national electorate a formal part of the EU decision-making process where there is no warrant in the Treaty. If a Member State conditions its ministerial approval for unanimous decisions on a positive vote in a referendum plus an Act of Parliament, then these conditions become requirements that must be satisfied before the EU measure can be enacted. Insofar as some might feel that this is desirable, it should be noted that there is no warrant for acceptance of such a power in any of the deliberations on Treaty reform, nor is there any warrant for accepting that Member States can unilaterally arrogate such a power to themselves.

If section 6 is lawful under EU law it would moreover be open to a Member State to pick any other conditions, which could prejudice passage of EU legislation requiring unanimity. It is, for example, difficult to see why a Member State could not condition its ministerial approval by a requirement that the draft decision should not be finalized unless and until national opinion surveys had been conducted over a year, to test people's reaction to the draft measure. It is equally difficult to see what would preclude a Member State from establishing a condition that its minister should not vote in favour of a particular draft decision unless it had been approved by, for example, 90 percent of the national legislature.³⁸

38. If indeed the UK Government were correct that EU law contains no constraints on the conditions that a State might impose before it expressed its consent to an EU measure then

There are further arguments against the legality of the section 6 conditions. Thus it could be contended that the schema in section 6 does not meet the requirements of Article 16(2) TEU, whereby the national representative in the Council “commits” the government of his Member State. The sense in which the national representative would be able to “commit” his State is far more attenuated when approval in a national referendum is a pre-condition for finalizing the decision. There may moreover be very real legal as well as political difficulties with the idea of a Council draft decision that “sits there” pending the UK Act of Parliament/referendum.

This last point leads naturally to the political problems that beset section 6, which reveal the dangers of locks to their creators. The drafting strategy in section 6 was designed, as we have seen, to “finesse” the fact that the statutory and referendum conditions would not have been lawful if they were conditions to be met when the decision had already been enacted at EU level. The framers of this “cunning strategy” have not however thought through the political as well as the legal implications of their clever creations.

Consider the sequence of events. It follows logically from section 6 that the EU decision-making process must be stopped before the final decision is taken for the referendum and Act of Parliament “locks” to apply. It also follows logically that this must occur once the UK has decided to vote in favour of the measure and hence needs to secure approval from Parliament and a referendum. The latest time when the UK could press “pause” in the decision-making process would be when Coreper had formed a view, but before any definitive Council vote. The UK would then have some idea whether other Member States were likely to vote in favour of the measure. If the UK hits the “pause” button the rest of the EU must await the outcome of the UK statute and referendum. This is likely to cause some irritation to say the least in EU capitals. It is doubtful whether our European partners will view with equanimity the prospect of sitting on draft decisions while the UK enacts the statute and organizes the referendum, but that is not the biggest political problem.

The most significant political problem is that section 6 mandates approval by statute plus a referendum even when it is reasonably clear that the measure will not get through the Council, and when it is unclear what the final outcome might be.

The former scenario may lead the UK Government to join those voting against the measure, since if it remains in favour then it is compelled to hold a referendum on a measure that will not come to fruition. This is because the

Euro-sceptics with a Shakespearian turn of mind might prefer something more dramatic, for example, that the draft decision could not be finalized until Burnham Wood comes to Dunsinane.

wording of section 6 is mandatory, and there is no qualification whereby the need for an Act of Parliament and a referendum could be avoided where the UK was inclined to vote for the change, merely because the indications are that other states will veto the proposed decision.

The latter scenario is however far more difficult for those who created the locks in section 6. It may genuinely be unclear whether the proposed EU measure, of which the UK government approves, will get through the Council. It may seem when the UK presses the “pause” button that the decision will be approved, but Member State views can change with the consequence that the measure would fail in the Council. The UK is still compelled to hold a referendum, even though it might be otiose because the measure would not gain the requisite support in the Council.

The UK government looks extremely foolish. The cost of a UK referendum is approximately £30–50 million. Consider the reaction of the UK tabloid press at such expenditure where the outcome made no difference, because the measure would have failed, or been likely to fail, in the Council. Consider too the reaction of the people in hard-pressed financial times, as to whether such sums would be better spent on education, health or welfare.

The chances that some other Member State could change its view on the draft decision are enhanced by the very time gap necessitated by the UK hitting the “pause” button. A simple mathematical model could be devised that would determine the likelihood of an election in the twenty seven Member States. The longer the period, the greater the number of elections that will be held and the greater the likelihood that there will be changes of government in some Member States, leading to reconsideration as to whether the EU draft decision should be supported. It is very unlikely that a UK referendum could be organized in less than six months and it could well take longer. This is ample time for elections in other Member States, with changes of government and shifts in view about the EU draft measure.

There is a further very real political danger with the clever locks in section 6. It mandates a referendum and Act of Parliament for the subject matter in section 6(5), no matter how trivial or insignificant the change. It is very doubtful whether significant numbers of voters will exercise their franchise in relation to many of the issues on which a referendum is mandated by the 2011 Act. I would not wish to be the one seeking to engage voters to participate in a referendum on whether, for example, a shift to qualified majority voting in the context of enhanced cooperation should take place. The reality is that voter turn-out will often be low, maybe embarrassingly so. If the vote is negative on a 10 percent total turnout and blocks the desired change our Treaty partners will not be pleased, nor will they think the result has much in the way of legitimacy. The legal reality under the EU Act is nonetheless that a referendum

must be held. This may well prove the truth of the old adage, be careful what you wish for because it might just come true.

3.5. *Sections 7–10: Statutory and parliamentary approval*

Sections 7–10 require approval of certain EU decisions by statute, or some other form of parliamentary approval, before they can have the force of law for the UK. There is no formal legal difficulty insofar as EU law is concerned with the issues covered by section 7(2), because the Treaty provisions covered by this section (Arts. 25, 223(1), 262 and 311 TFEU) all provide that the decisions must be accepted in accord with the constitutional requirements of the Member States. If the UK wishes to require an Act of Parliament before the Minister of the Crown confirms that the UK accepts these decisions it is allowed to do so.

There are however real legal and political difficulties with the terrain covered by the remainder of section 7, and sections 8–10. Section 7(3) stipulates that a Minister of the Crown may not vote in favour of the decisions listed in section 7(4) unless the draft decision is approved by Act of Parliament. This strategy, requiring approval by statute before the decision has been voted on in the Council, was motivated by the same considerations as informed section 6. The relevant Treaty provisions covered by section 7(4) contain no clause stating that they must be approved in accord with national constitutional requirements, and hence the framers of the 2011 Act recognized that national control had to be exercised before the EU decision was made.

The rationale given in the Explanatory Notes was that the issues covered by section 7 were all ratchet or passerelle clauses, albeit dealing with less important issues than those covered by section 6, hence the need for statutory approval, but not a referendum.³⁹ This explanation is contestable, since none of the issues dealt with by section 7(2) entails a passerelle clause as that term is commonly understood. Some of the issues covered by section 7(4) are passerelle clauses, others are not.

These taxonomic matters should not conceal the important issues of principle that underlie sections 7–10 of the 2011 Act. The areas covered by sections 7–10 commonly require unanimity in the Council, but the controls are not limited to such instances since some of the issues subject to parliamentary approval in section 10 are governed by qualified majority voting. The supporters of the legislation see this regime of statutory and parliamentary approval as legitimately enhancing national control, and the fact that the Lisbon Treaty does not countenance such control, except in the areas covered by section 7(2), is not seen as problematic. It should however be recognized

39. European Union Act 2011, Explanatory Notes, paras. 86–88.

that sections 7–10 embody a “precedent” with pragmatic and principled implications, and that it is highly questionable whether these provisions should be regarded as valid under EU law.

The pragmatic implications are potentially far-reaching. If sections 7–10 of the 2011 Act are lawful under EU law then it would be open to any Member State to adopt analogous constraints. There would be no reason why all twenty-seven Member States might not require statutory or parliamentary approval for EU decisions about which they felt especially strongly, and these topics would differ as between the Member States. There is moreover no reason why such national constraints should be confined to areas where unanimity is required. The UK constraints are not thus confined, although their efficacy will be greater where the Council voting rule is unanimity. The impact on EU decision-making would be grave. The decision-making process would come to resemble a bizarre panel game in which at some stage prior to the Council decision a Member State or Member States would press the “pause” button, signifying the need for national statutory or parliamentary approval. There would be countless EU legislative initiatives floating in limbo awaiting the outcome of the national legislative processes.

The principled objections to such national constraints are equally significant. It can be accepted that a Member State may well give instructions to its Council representative as to how to vote. That is however different from the regime in the 2011 Act. The Lisbon Treaty it is worth repeating contains no provisions authorizing such national controls as contained in sections 7–10, apart from section 7(2). The UK regime in these sections is premised on the national controls being exercised before the decision is made by the Council, and this in turn is premised on the conceptual assumption that the Treaty places no constraints on the conditions which a Member State imposes before it decides to vote. The problematic nature of this premise was considered above. These objections are reinforced when it is recognized that sections 7–10 make approval by the national parliament a condition precedent for the EU decision becoming law. They make consent by the national parliament a formal requirement of the EU decision-making process. This is self-evidently the case where unanimity is required in the Council, but it would also be so in relation qualified majority voting if sufficient Member States adopted constraints analogous to those in the UK, since there would then not be sufficient states voting in favour of the measure prior to securing the requisite parliamentary approval.

Some might regard this as a good thing, and might indeed be poised to write an e-mail signed “outraged of Westminster” insofar as I am suggesting the contrary. They should nonetheless pause before pushing the send button. The reason is quite simple. There have been many discussions about the role of

national parliaments in the EU decision-making process. There have even been suggestions that representatives from national parliaments should constitute a second parliamentary chamber at EU level with powers beyond those of COSAC, although such proposals never came close to being accepted. The salient point for present purposes is that no one has suggested anything remotely akin to the regime exemplified by sections 7–10 of the 2011 Act. There has never been a suggestion that each national parliament could of its own volition arrogate to itself a role in EU decision-making, such that its formal statutory approval is a condition precedent for a measure to be enacted, or such that some other form of national control should be mandatory, when there is no Treaty foundation for such power. There are good reasons why such suggestions were never voiced in the decade culminating in the Lisbon Treaty or earlier. They would lead to the pragmatic problems considered above and would have fundamental implications for the institutional balance that characterizes the EU decision-making process.

3.6. *Sections 2, 3 and 6: Judicial review and enforceability of the conditions*

We can now consider the legal enforceability of the conditions in the 2011 Act. The most interesting issue is whether the decision to hold a referendum is amenable to judicial review. The 2011 Act is framed in mandatory not discretionary language, subject to the exemption condition, the significance condition, and section 4(4). This suggests amenability to judicial review. There will often be no plausible argument that the exemption condition applies, given the breadth of section 4, and the significance condition only obviates the need for a referendum in very limited circumstances concerning sections 4(1)(i) and (j).

The principal difficulty is that if Parliament enacts a statute pursuant to sections 2, 3 or 6 without holding a referendum then judicial review would involve challenge to a primary statute, and would run into traditional sovereignty reasoning: the courts do not review the validity of primary statutes in the UK. There are nonetheless two possible ways to surmount this objection.

An aggrieved citizen or Member of Parliament might frame a case on the Human Rights Act 1998, arguing that denial of the referendum violated one of the Convention rights brought into UK law by the HRA. The court would then review the statute approving the Treaty amendment without the referendum pursuant to the Human Rights Act, sections 3–4, and could issue a declaration that the statute was incompatible with Convention rights. This “solution” would however be problematic. The assumption is that Parliament has already enacted a statute approving the relevant Treaty change pursuant to sections 2, 3 or 6 of the 2011 Act. This would have legal and political consequences at EU

level. It is difficult to see how this could be unravelled by the UK accepting pursuant to a judicial decision under the HRA that it should have held a referendum.

An alternative approach would be to argue that while the courts will not review the validity of primary statute on substantive grounds, they can do so in relation to arguments of manner and form. This is the “New View” of sovereignty advocated by writers such as Jennings, Heuston and Marshall,⁴⁰ who contend that if, for example, an Act of Parliament specified that it could only be amended or repealed by a two-thirds majority, then a later statute that made such change by a simple majority should not be recognized by the courts because it did not comply with the conditions for its enactment. It might be argued that the referendum requirement in the European Union Act 2011 is a manner and form condition, such that if a later statute were enacted without a positive vote in a referendum then the later Act of Parliament should not be recognized by the courts. This reasoning is reinforced by the wording of sections 2(2) and 3(2). Judicial review would be facilitated since it would be simple to determine whether a referendum had been held, and whether the majority had voted in favour of the change.

There is another legal option available, which is to seek judicial review against the Minister, who is under a legal obligation not to approve a Treaty change or Article 48(6) decision unless the referendum condition is met, where that condition is applicable. A judicial review action against the Minister might be contemplated if this condition was disregarded. This may however be scant comfort to the claimant if the Act of Parliament approving the EU measure has been finalized.

There is an additional foundation for judicial review of the Minister.⁴¹ There is a ministerial duty pursuant to section 2(1)(a) and section 3(1)(a) to make a statement under section 5 as to whether the proposed change falls within section 4. If the Minister fails to make such a statement there is no reason why an applicant should not seek a mandatory order from the courts to comply with this obligation. If the Minister makes such a statement, but the applicant believes that it is erroneous, or incomplete, then this too should be regarded as justiciable, although there would be issues concerning the intensity of review.

40. Jennings, *The Law and the Constitution*, 5th ed. (University of London Press, 1959), ch. 4; Heuston, *Essays in Constitutional Law*, 2nd ed. (Stevens, 1964), ch. 1; Marshall, *Constitutional Theory* (OUP, 1971), ch. 3.

41. European Union Act 2011, Explanatory Notes, para 67.

3.7. *Section 18: The sovereignty clause*

It is clear from the Explanatory Notes that a major concern driving section 18 concerned parliamentary sovereignty.

“This declaratory provision was included in the Act in order to address concerns that the doctrine of parliamentary sovereignty may in the future be eroded by decisions of the courts. By providing in statute that directly effective and directly applicable EU law only takes effect in the UK legal order through the will of Parliament and by virtue of the European Communities Act 1972 or where it is required to be recognised and available in law by virtue of any other Act, this will provide clear authority which can be relied upon to counter arguments that EU law constitutes a new higher autonomous legal order derived from the EU Treaties or international law and principles which has become an integral part of the UK’s legal system independent of statute.”⁴²

It is important to be clear at the outset in what sense section 18 is to be regarded as a “sovereignty clause”. It is necessary to distinguish between “sovereignty as dualism” and “sovereignty as primacy”.

Section 18 is concerned with “sovereignty as dualism”. It embodies in statutory form the common law concept of dualism. Section 18 states that EU law falls to be recognized and available in the UK by virtue of an Act of Parliament. This supports the sovereignty of Parliament by making clear that executive affirmation of a Treaty will not have domestic legal effect without parliamentary ratification in a statute. This is reflected in the heading of section 18, which is “status of EU law dependent on continuing statutory basis”. This reading of section 18 is supported by the Explanatory Notes attached to the Act.⁴³ The legal premise is that in a dualist country such as the UK there must be an Act of Parliament that adopts or transforms the EU Treaty into UK law. Viewed from this perspective there is nothing novel about section 18. The European Communities Act 1972, and in particular section 2(1), is the gateway for EU law becoming part of UK law.

There was nothing in the prior case law that undermined sovereignty in the sense of dualism. The UK cases concerning EU law and national law were predicated on dualism. The case law of the EU courts did not attack the idea that the relationship between UK law and EU could be premised on dualism. Nor does the principle of directly applicable EU law offend sovereignty as dualism. The UK in the European Communities Act 1972 expressly agreed to the Treaties, including the idea that regulations were directly applicable. Thus insofar as rules of EU law can have effect without the foundation of a

42. European Union Act 2011, Explanatory Notes, para 120.

43. *Ibid.*, para 119.

particular statute this is because the EU Treaty and case law there under affirmed that this was so, and the UK agreed to this regime when joining the EEC via the European Communities Act 1972. This is readily apparent from the express wording of section 2(1) and 3(1) of the 1972 Act. To be sure directives require implementation and this will normally be through UK statute or delegated legislation, but this is consonant with the very nature of directives under EU law. The UK has not constitutionally required separate national legislation as a pre-condition for the legal validity of each directly applicable EU regulation within UK law, and such a requirement would place the UK in systematic breach of EU law.

Section 18 is not concerned with “sovereignty as primacy”. It tells us nothing about the relation between EU law and national law in the event of a clash between the two. Indeed the Explanatory Notes state that section 18 was not intended to affect the primacy of EU law.⁴⁴ The EU courts have always taken the view that all EU law has primacy over all national law. This has not been generally accepted by national courts, which have resisted the idea that EU law takes precedence over the national constitution and/or fundamental rights. The UK courts in *Factortame*⁴⁵ and the *EOC* case⁴⁶ accepted that EU law can in general have primacy over national law in the event of a clash. Detailed discussion of this case law can be found elsewhere.⁴⁷ The relevant point is that section 18 does not address this second sense of sovereignty.

The preceding discussion prompts the obvious inquiry as to why section 18 was included in the 2011 Act. The previous quotation from the Explanatory Notes provides guidance in this respect. It states that inclusion of section 18 would “counter arguments that EU law constitutes a new higher autonomous legal order derived from the EU Treaties or international law and principles which has become an integral part of the UK’s legal system independent of statute”.⁴⁸ This concern was fuelled by argument of counsel in the *Thoburn* case⁴⁹ that “in effect, the law of the EU includes the entrenchment of its own supremacy as an autonomous legal order, and the prohibition of its abrogation by the Member States”.⁵⁰ This argument was rejected by Laws J. in *Thoburn*,

44. *Ibid.*, paras. 123–124.

45. *R. v. Secretary of State for Transport, ex parte Factortame Ltd (No. 2)*, [1991] 1 AC 603.

46. *R. v. Secretary of State for Employment, ex parte Equal Opportunities Commission*, [1995] 1 AC 1.

47. Craig, “Parliamentary Sovereignty of the United Kingdom Parliament after *Factortame*”, 11 *YEL* (1991), 221; Wade, “Sovereignty—Revolution or Evolution?”, (1996) *Law Quarterly Review*, 568; Allan, “Parliamentary Sovereignty: Law, Politics and Revolution”, (1996) *Law Quarterly Review*, 443; Craig, “Britain in the European Union”, in Jowell and Oliver (Eds.), *The Changing Constitution*, 7th ed. (OUP, 2011), ch. 4.

48. European Union Act 2011, Explanatory Notes, para 120.

49. *Thoburn v. Sunderland City Council*, [2003] QB 151.

50. European Union Act 2011, Explanatory Notes, para 121.

who held that the constitutional foundation for acceptance of EU law in the UK was based on UK constitutional principle. It is in any event doubtful whether EU law claims the effect argued for by counsel in the case. This begs the further inquiry as to when section 18 would be relevant. There are only two scenarios in which this might occur, and both are unlikely.

The first would be where the UK expressly repealed the European Communities Act 1972, with the intent of leaving the EU, but had not yet exited from the EU pursuant to Article 50 TEU. On this scenario there would be no Act of Parliament through which EU law fell to be recognized in the UK. However until the UK left the EU it might be contended that EU law could continue to apply in the UK as an autonomous legal order even in the absence of a domestic statute. Section 18 of the European Union Act 2011 would block this line of reasoning in the UK courts. It should nonetheless be recognized that the UK would still remain bound by EU law as an international Treaty obligation and it would be in breach of its obligations if it failed to comply with EU law during the period after the repeal of the European Communities Act 1972, and before the UK's withdrawal took effect in accord with the TEU. Article 50 TEU stipulates that while a State may decide to withdraw from the EU, the details of the withdrawal are to be negotiated between the State and the EU. Article 50(3) TEU provides that the Treaties only cease to apply to that Member State from the date of entry into force of the withdrawal agreement, or in the event that an agreement cannot be reached, two years after the State has notified its intent to withdraw from the EU, unless this period is extended by the European Council.

The alternative scenario is one in which the UK remains within the EU, but a UK statute expressly derogates from a provision of EU law, and unequivocally excludes application of the European Communities Act 1972. If this occurred it might be argued that there would to that extent be no Act of Parliament by virtue of which EU law was recognized and available on the relevant topic in the UK. Section 18 could then be used to counter any argument that the provision of EU law could apply in the UK because EU law constituted an autonomous legal order. Needless to say such an Act of Parliament would constitute breach of EU law. It would be for the UK courts to determine whether such an Act of Parliament was compatible with the UK's continued membership of the EU. The Supreme Court might decide that the UK derogating statute could be given effect pursuant to the traditional theory of parliamentary sovereignty, plus section 18. It might alternatively decide that such a statute could not be made while the UK remained within the EU.

In the absence of some very serious and well-founded concern about the impact of EU law on national constitutional precepts/fundamental rights, such a statute should not be enacted, and such a step should only be contemplated

after according the EU courts the opportunity to rule on the issue via a preliminary ruling. EU membership brings benefits and burdens. If a Member State could derogate from EU law simply because the Member State disliked the outcome, this would entail inequality *vis-à-vis* other Member States, the denial of a level playing field, and would undermine the Union. EU membership entails a diminution of the capacity for autonomous State action, but this is true of any form of collective action. If a Member State does not wish to accept the burdens of membership it should not be able to take the benefits. Lord Bridge in *Factortame*⁵¹ correctly noted that insofar as there has been a diminution of sovereignty flowing from EU membership this was not the result of judicial decisions, but was rather the consequence of the political decision to join.

4. Conclusion: Locks and limits, broader considerations

The preceding discussion has considered the schema of the European Union Act 2011. The analysis concludes by considering more broadly the consequences of this kind of “lock” for the UK, the Member States and the EU.

4.1. *The UK: Be careful what you wish for*

It might be argued in “sceptical and realist mode” that insofar as there are legal and political problems with the European Union Act 2011 this renders it even more attractive to the euro-sceptic wing of the Conservative party. Given that the requirements of the 2011 legislation apply when a government wishes to approve Treaty changes, the problems with the legislation will then be faced by the Labour or Liberal Democrat Party, but not the Conservatives. This “sceptical and realist” argument is nonetheless weak.

It is premised on the assumption that the Conservatives would not wish to accede to any Treaty amendment extending competence. This conveniently forgets the fact that it was the Conservative party when in government that ratified the two most significant extensions of EU competence, the Single European Act and the Maastricht Treaty. In more general terms the lessons of EU history are that it is not easy to predict when States, including the UK, will acknowledge that the EU needs new powers.

Any euro-sceptic glee felt at the discomfort that the Act will cause the Labour and Liberal Democrat parties that wish to approve Treaty amendments

51. *Factortame*, cited *supra* note 45, at 658–659.

should moreover be muted, since the “lock” that they have fashioned will in reality be turned on them.

Thus one scenario is that the Conservative government is in power and recognizes the need for a Treaty amendment, albeit on a point of minor importance. The 2011 Act requires it to hold a referendum at a cost of approximately £30–40 million. The Labour opposition might well “turn the political screw” by proposing that the 2011 Act should be disapplied, thereby obviating the need for a referendum. The Conservative government is in a dilemma, caught between a rock and a hard place. If it accedes to the Labour suggestion it angers its euro-sceptic right wing, and is open to the critique that it does not take its locks seriously. If it rejects the Labour suggestion it faces anger from the populace and the press that it has expended £30–40 million on a referendum for which there is scant voter interest in times of financial exigency. It also faces political consequences from its EU partners if the proposed Treaty amendment is prevented by a negative vote in a referendum where the total turnout was very low.

The alternative scenario is that the Labour or Liberal Democrat Party is in government. The Conservative opposition would however be subject to the same dilemma. Thus the Labour or Liberal Democrat Party may support what is a minor Treaty amendment. The government proposes that the amendment should be ratified by statute and that the 2011 Act should be dispensed with in this instance. The Conservative opposition faces a dilemma. If it accepts the government’s suggestion then it acknowledges that the rationale underlying the 2011 Act whereby a referendum should be required for every Treaty change howsoever small was misguided. If it opposes the government’s suggestion it lays itself open to the critique that it would rather spend a large sum of taxpayers’ money on an exercise where the voter interest is very limited, rather than on extra nurses, doctors and teachers.

4.2. *Member States: The symmetry of locks*

The simplest facts are the easiest to forget. All actions have consequences. This trite proposition applies to legal decisions as to any other. If a legal system decides to apply locks then it must determine their content and how to apply them. This trite proposition leads to a less obvious one. The very language of locks is indicative of asymmetrical power. Someone imposes constraints on someone else. The reality is more complex. The reason is not hard to divine. The creator of the lock has to live with the constraint that it has fashioned. Tough talk, whether by national courts or legislators, leading to “tight locks”, has consequences for the author. The tighter the lock, the more demanding it is for the creator, not just for the person or institution constrained. This is fine if the creator of the lock really wishes to follow

through the implications of its constraint. It is problematic if the creator becomes equivocal about the lock that it has created. It then has to find ways of “softening” its constraint, without losing credibility and opening itself to the critique that its tough talk is not matched by tough action.

The German jurisprudence reveals how the imposition of locks can be controversial. Thus the foundation of the recent identity lock has been questioned by German scholars.⁵² The application of such locks is equally important. The national court should be wary of condemning the ECJ for activist interpretation of the kind that the national court itself regularly engages in.⁵³ What is most apposite for present purposes is how German courts have softened their locks over time. It is now far more difficult for a claimant to resist the supremacy of EU law before the German courts based on fundamental rights and competence/*ultra vires*.⁵⁴ It remains to be seen how the identity lock is applied in subsequent case law. Claimants are likely to challenge EU legislation before the German courts on the ground that it transgresses an identity limit listed in the judgment. The *Lisbon* ruling⁵⁵ may then prove a dilemma for the BVerfG that created the identity lock. It can take the identity lock seriously, with the consequence that it comes into repeated conflict with the EU in relation to the five areas listed in the judgment. It can, alternatively, soften the identity lock in ways analogous to the modification of the *ultra vires* lock, with the consequence that it is criticized for not “taking locks seriously”. It remains to be seen whether its “bark is worse than its bite”. The indication from the President of the BVerfG is that it may well soften this lock too.⁵⁶

The German experience is relevant by analogy to the UK. The UK legislature will have to decide how readily it should dispense with the referendum requirement from the 2011 Act when dealing with subsequent Treaty amendments. The difference resides in who makes the operative

52. Schorkopf, “The European Union as an Association of Sovereign States: Karlsruhe’s Ruling on the Treaty of Lisbon”, (2009) *German Law Journal*, 1219; Halberstam and Möllers, “The German Constitutional Court says ‘Ja zu Deutschland!’”, (2009) *German Law Journal*, 1241; Thym, “In the Name of Sovereign Statehood: A critical introduction to the *Lisbon* Judgment of the German Constitutional Court”, 46 CML Rev. (2009), 1795; Mayer, “Rashomon in Karlsruhe: The German Constitutional Court’s Lisbon Decision and the Changing Landscape of European Constitutionalism”, forthcoming (2011) *International Journal of Constitutional Law*.

53. Craig, “The ECJ and *Ultra Vires* Action: A conceptual analysis”, 48 CML Rev. (2011), 395.

54. 2 BvR 2661/06, 6 July 2010; Payandeh, “Constitutional Review of EU law after Honeywell: Contextualizing the Relationship between the German Constitutional Court and the EU Court of Justice”, 48 CML Rev. (2011), 9.

55. 2 BvE, 2/08, 30 June 2009.

56. Voßkuhle, “Multilevel cooperation of the European Constitutional Courts, *Der Europäische Verfassungsgerichtsverbund*”, 6 EuConst (2010), 175

decision. The German legislature has imposed requirements concerning the reception of EU law in Germany. It nonetheless remains the case that the constitutionality of the locks is in the hands of the BVerfG, which has creative discretion to determine how firmly they are applied. In the UK it is the legislature that created the locks in the 2011 Act, and it is for Parliament to decide on their application, with the consequence that the political stakes are thereby raised for the political parties in the manner considered in the previous section.

4.3. *The EU: Individual power and collective action*

It is axiomatic that the broader the spread of locks among the Member States, the more difficult will it be for the EU to take action, more especially if those locks are applied strictly in accord with their respective criteria, whatsoever they might be. The locks give the holders thereof a degree of individual power, which can inhibit collective action. There are, for example, indications that the constraints embodied in German legislation requiring the German Government to consult the *Bundestag* prior to taking a position in the Council on certain issues has had some disruptive effects on EU decision-making.

There is nonetheless a tension or paradox lurking beneath the surface here. Member States may look closely at one another, and the bald sentiment may well be “if that State has locks, we want some too”. Indeed the very fact that a state asserts the right to impose a lock based on *vires*, identity or some other criterion necessarily means that it must accept that other States could apply an analogous lock if they wished to do so. There is at the same time an unspoken “delicate” concern, viz, that while States may accept that other States have the right to adopt the same or analogous locks, they may not necessarily trust the way in which such power is used. The implicit premise may well be that “we”, of course, will use such constraints responsibly, but “we” are not sure that others will do so.

This may in turn affect the way in which such locks are applied by any particular Member State. The softening of the German stance towards its *ultra vires* and identity locks may be explicable in part on this ground. If ever the BVerfG were minded to take its own constraints seriously, and refuse to apply EU law in Germany because it infringed its *vires* or identity locks, it would be cognizant that this would, other things being equal, encourage other States to do likewise. It might well be concerned that the EU measures thus neutralized by a particular Member State would be ones that it regarded as important for the success of EU policy in a particular area.

4.4. *The UK and the EU: Looking to the future*

The general message from this article is that many provisions of the 2011 Act are either unlawful as a matter of EU law, and/or create significant legal and political problems for the UK from a domestic perspective. It remains to be seen how the provisions of the European Union Act 2011 are used in practice. The attempt by the House of Lords to include a sunrise and sunset clause in the legislation was rejected by the House of Commons. The 2011 Act can nonetheless be dispensed with through express statutory provisions in later legislation and it remains to be seen whether this occurs.

It is an irony of this legislation that while it mandates statutory approval plus referendum for many Treaty changes that will generate scant interest from the voters, the area where voter interest is likely to be strongest, accession of new Member States, does not fall within such the remit of the 2011 Act. This exception in turn demonstrates the political problems that the Act will generate. The framers of the legislation were aware that accession Treaties can be used as the vehicle for other Treaty amendments.⁵⁷ A referendum would then be required under the 2011 Act, since the accession would not “merely” be concerned with accession and hence not fall within the exception in section 4(4). Although it is not free from doubt, the strict reading of section 4(4) is that the referendum would cover the matters other than accession. Assuming this to be true, the electorate would be offered the opportunity to vote about Treaty changes in relation to which they may have little interest, while being denied the opportunity to vote on the one issue that they would really like to express an opinion. I would not wish to be the person that tries to rationalize this to the inquiring voter.

57. This is recognized by the European Union Act 2011, s. 1(4), and European Union Act 2011, Explanatory Notes, para 64.