

## The European Union Act: Why? What? How?

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- Speaking not as a representative of Commission, but in personal capacity as someone who has a long experience of the EU and, to a perhaps lesser extent, of UK-EU relations.
- EU Act has both **legal and political implications**. Despite the nature of the audience, focus in my contribution mainly on political implications:
  - Not a lawyer and largely covered by previous speakers
  - Role of EU institutions does not normally address how a country approves changes to Treaty. This is a national responsibility; EU/Commission role is to monitor and ensure implementation.
- Two legal remarks nonetheless:
  - Points raised by Paul Craig (in his article) suggest that requirement of prior legislative action (or even a referendum), where subsequent approval is inconsistent with EU law, may have **EU law implications**. TOO SOON TO LOOK AT THIS IN PRACTICE. We shall have to see whether, in its application, the Act's Section 6 does actually lead to a breach of EU law. Paul Craig's arguments can no doubt be countered by Ivan Smyth. So it would be up to Commission to decide whether its actual application in fact constituted a justiciable infringement worth pursuing in the ECJ. This may more likely be the case on issues where the Act applies to QMV measures.
  - In this respect, it is instructive to look at **first case** that demonstrates the impact of the Act. EU Scrutiny Committee Report on draft European Private Company Regulation: (considered on 19 July). This proposal is based on Article 352 TFEU. Although UK is not a strong supporter of the draft legislation, it did not oppose it and was ready to agree to its adoption. Nor had the previous EU Scrutiny Committee in the last parliament (prior to adoption of the EU Act). However, EU Act now requires adoption of an Act of Parliament before a UK minister can accept it in the Council. Thus a delay and a clear waste of parliamentary time – never mind the potential for endless parliamentary debate on only vaguely-related issues. And all this about an issue that the UK doesn't really care about.
- Turning to political implications, two aspects:
  - Internal within UK
  - Relations with EU and other EU Member States
- N.B. Remember the context in which it was conceived (May 2009). At that moment, there was no expectation that any Treaty amendments would be considered during this

parliament, other than Croatia's accession. The sovereign debt crisis has substantially changed this situation. Thus the “finesse” of politically tying down a future parliament (an interesting constitutional issue in itself) has slightly backfired on this one.

- Incidentally, could a case be made for a referendum on the Croatia accession treaty, since it also incorporates the protocols for the Czech Republic that were the price of Czech acceptance of the Lisbon Treaty. At the very least a possibility of judicial review of the "insignificance" justification for excluding a referendum?
- Clearly the **internal political implications in the UK** are beyond the remit of the EU institutions. The Act primarily clearly intended to try to resolve the internal conflict within the Conservative Party and “put the European issue to bed”. It is far from clear that that outcome has been achieved. Calls for a referendum are still coming and we saw the biggest ever rebellion by Conservative backbenchers in the debate last autumn (81 rebels on the Tory benches). The potential requirement for parliamentary legislation on a whole host of European measures (like the Private Company Statute) allows perpetual picking at that sore. And the impact of this on the government's conduct of routine EU business cannot be ignored.
- Furthermore it will inevitably affect the **flexibility for the government and its ministers to manoeuvre** in the complex horse-trading that typically goes on in the final stages of EU negotiations on most issues. The potential for judicial review of ministerial decisions will further complicate issues. Finally, it is far from clear that it really addresses one of the principal concerns of the House of Commons – that of exercising adequate control over the actions of the government. Whatever one may say about Section 18 of the Act, the issue of effective parliamentary sovereignty over the government lies at the root of much of the concern over the EU.
- The Act's **impact on the UK's relations with the EU and other Member States** is eminently political. Because of the potentially protracted approval procedure, the UK risks losing its ability to be a centre for forming a consensus on an issue, in favour of being the one whose concerns are addressed towards the end, on the basis of an emerging consensus among the rest. While technically this might be seen as irrelevant, since most cases affected by the Act require unanimity, some are subject to QMV. The general reluctance of the Council to force QMV voting might be modified if nobody wants to wait while the UK gets its parliamentary ducks in line. This of course raises the further question of how the UK then deals with implementing a measure, adopted by QMV against a UK abstention/negative vote. If parliamentary assent would have been required to allow a minister to vote in favour prior to its adoption, how would parliament then deal with primary or secondary domestic implementing legislation?

- **Conclusion:** Irrespective of the legal implications, it is far from clear that the political implications are very positive. Paul Craig has pointed to the risk that subsequent governments, even Conservative ones, may feel the need to get round the “locks” they have put in place. In any case, it has signally failed to close down the European debate in the UK and, if there has to be frequent recourse to its application, will simply lead to further confrontational debates in the House of Commons. In addition it could imperil legislation that the UK wants, simply due to the delay, or fritter away the UK’s negotiating capital on issues it is less keen on but where it has to deal with the referendum lock.