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Treaty Change after Lisbon: is there no end in sight?

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COMMENTS WELCOME

With the adoption of the Treaty of Lisbon the EU's appetite for treaty reform seemed sated. There would be no further reforms for a decade at least. Yet in 2010 an intergovernmental conference agreed a new treaty protocol and the European Council signalled its support for the simplified revision procedure to be used for the first time to amend Article 136 TFEU on economic governance in the eurozone. A passerelle was also used to alter the geographical application of the treaties. At the same time the UK government's proposed EU Bill envisaged a referendum lock on future treaty amendments and the use of passerelles. This paper explores the significance of these developments for the future of the EU's treaties and assesses whether they herald an era of *ad hoc* amendments and treaty change based on the passerelles and the new simplified revision procedures. It also assesses the significance of these developments in the light of the UK government's EU Bill.

1. The Treaty of Lisbon: an end to institutional navel-gazing?

When the Treaty of Lisbon was adopted and then signed, and later when it eventually entered into force, EU leaders appeared eager to call time on more than twenty years of seemingly interminable discussions about institutional reform and the next round of treaty change.¹ The Treaty's preamble is quite clear: in concluding the new treaty the Member States were 'DESIRING to complete the process started by the Treaty of Amsterdam and by the Treaty of Nice with a view to enhancing the efficiency and democratic legitimacy of the Union and to improving the coherence of its action' (Official Journal, 2007: 3). As far as the EU leaders were concerned, the member states had delivered. As the European Council in December 2007 declared the day after the signing ceremony in Lisbon, 'The Lisbon Treaty provides the Union with a stable and lasting institutional framework. We expect no change in the foreseeable future' (Council of the European Union, 2008: point 6). Such sentiments were widely shared. The mood was that the days of treaty reform were now over. Ideally there would be no major treaty for the next 25 years.²

However, the Treaty of Lisbon was never conceived as a definitive text establishing the *finalité politique* of the EU. Indeed, rather than limiting the options for treaty change, and primarily in order to facilitate further revision of both the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), it not only introduced two generally applicable 'simplified revision procedures', it also increased the number of provision-specific simplified revision procedures and so-called 'passerelle' clauses in the TEU and TFEU.³ Rather than therefore heralding a period in the EU's history free of treaty change, the Treaty of Lisbon provided advocates of treaty revision with increased opportunities to amend the EU's treaty base.

Moreover, as this paper's exploration of treaty change reveals the delayed entry into force of the Treaty of Lisbon and political deals struck to secure its eventual ratification have paved the way for a

¹ See, for example, the comment of Peter Ludlow, a seasoned observer of European Councils and IGCs, that at the European Council in October 2007 that secured agreements on the text of the Treaty of Lisbon: 'Everybody wanted an agreement, if only to put this wretched business behind them... Most of the heads of state and government were quite simply 'fed up with', 'sick and tired of' and 'bored stiff' with the business' (Ludlow, 2007: 9).

² Interview with senior official in the Council Legal Service, 20 May 2009.

³ The Treaty of Lisbon also revised the established procedure for treaty amendment contained in Article 48. Under what is now the 'ordinary revision procedure', the European Parliament (EP) may propose treaty amendments, In doing so, amendments may either increase or reduce the competences conferred on the Union', and use of the 'convention method' is standard. A convention need not take place, however, provide the EP consents. Furthermore, a partially ratified amending treaty adopted under the ordinary revision procedure is to be referred to the European Council if after two years four-fifths of the member states have ratified it but one or more member states is encountering 'difficulties'. The clause was inspired by *Declaration [No. 30] on the ratification of the Treaty establishing a Constitution for Europe* which made similar provision, although the European Council was unable to prevent the Constitutional Treaty *per se* from being ultimately abandoned.

series of revisions to be made to the EU's treaty base. With the EU needing also to provide a more legally secure basis for EU action in response to the economic crisis and the resulting challenges to the effective functioning of the eurozone, the four years since the adoption of the Treaty of Lisbon have witnessed, contrary to the desire of EU leaders, an unexpectedly high level of activity in the area treaty reform activity. Moreover, with further enlargement, MEPs pushing for further institutional change, and calls for fiscal union, it is unlikely that the EU will see treaty revision disappear entirely from its agenda.

2. Simplified Revision and Passerelles: 'new' mechanisms for treaty change

Conscious of the desire to facilitate treaty amendment without necessarily resorting to a potentially wide-ranging and lengthy process – now to be preceded by a convention, the Member States in the Treaty of Lisbon, introduced two 'simplified revision procedures' into the TEU and increased the number of both provision-specific simplified revision procedures and so-called 'passerelle' clauses in both the TEU and TFEU.

The first simplified revision procedure (Article 48(6) TEU) allows 'the provisions of Part Three of the Treaty on the Functioning of the European Union relating to the internal policies and action of the Union' to be amended by European Council decision. The amendments may not, however, increase the competences conferred on the Union. To obtain the Decision, the European Council acts unanimously on a proposal from either a Member State government, the EP or the Commission, and after having consulted the EP and the Commission, and the European Central Bank in the case of institutional changes in the monetary area. The decision then has to be approved by the Member States 'in accordance with their respective constitutional requirements' before it can enter into force.⁴

The second simplified revision procedure (Article 48(7) TEU) is far less protracted. It allows the European Council, acting unanimously and having received the consent of the EP to: (a) alter an existing requirement for unanimity in the Council to qualified majority (QMV); and (b) change the proscribed decision-making procedure to the ordinary legislative procedure. In both cases, national parliaments are to be informed of any initiative whereupon if any national parliament objects, the initiative is dropped. As far as a move to QMV is concerned this second 'simplified' revision procedure can be applied to any provision in either the TFEU or Part V of the TEU (concerning the

⁴ Given the requirement for national ratification, as de Witte (2011) observes, this hardly simplifies the procedure for treaty change.

common foreign and security policy) except regarding decisions in the area of defence or with military implications. Moves to the ordinary legislative procedure are restricted to provisions contained in the TFEU.

In addition to these general simplified revision procedures, the Treaty of Lisbon also increased the number of provision-specific simplified revision procedures to be found in the TEU and TFEU. These provide for treaty revision without recourse to an IGC. Prior to Lisbon, five such provisions existed.⁵ The Treaty of Lisbon introduced a further seven.⁶ The first three require a unanimous decision of the member states and the consent of the EP:

- Article 82(2)(d) TFEU, enabling the Council to identify other aspects of criminal procedure for which minimum EU rules may be established
- Article 83(1) TFEU, enabling the Council to extend the list of crimes which may be subject to minimum EU rules
- Article 86(4) TFEU, enabling the European Council to extend the powers of the European Public Prosecutors Office

A fourth procedure requires a unanimous decision of the European Council:

- Article 355(6) TFEU, enabling the amendment of the status, with regard to the Union, of a certain Danish, French and Netherlands country or territory

The remaining three procedures require only a qualified majority vote in the Council:

- Article 98 TFEU, enabling the repeal of the provision (i.e. Article 98 TFEU) allowing specific transport measures to be taken with respect to areas of Germany affected by the its division
- Article 107(2)(c) TFEU, enabling repeal of the provision (i.e. Article 107(2)(c) TFEU) allowing aid to be granted to the economy of certain areas of Germany affected by the its division
- Article 300(5) TFEU, enabling the review the nature of the composition of the Committee of the Regions and of the Economic and Social Committee

⁵ These are now: Article 25 TEU allowing for the rights of EU citizens to be strengthened or extended; Article 126(14) TFEU allowing for replacement of the Protocol on the excessive deficit procedure; Article 129(3) and (4) TFEU allowing for certain articles of the Statute of the European System of Central Banks and the European Central Bank to be amended; Article 281 TFEU allowing for certain articles of the Statute of the Court of Justice to be amended; and Article 308 TFEU allowing for certain articles of the Statute of the European Investment Bank to be amended.

⁶ See Piris (2008: 361-362), although he omits Article 355(6) from his list.

This leaves the ‘passerelles’ – or bridging – clauses which, following the second simplified revision procedure contained in Article 48(7) TEU),⁷ allow the European Council, acting unanimously [and having received the consent of the EP] to either alter an existing requirement for unanimity in the Council to QMV or change the prescribed decision-making procedure to the ordinary legislative procedure. As with the provision-specific simplified revision procedures, the presence of passerelles in the EU’s treaty base predated the Treaty of Lisbon.⁸ However, it did introduce four new ones:

- Article 31(3) and (4) TEU enabling moves from unanimity to QMV for CFSP decisions except those having military or defence implications
- Article 81(3) TFEU enabling a move from unanimity to QMV for the adoption of the multiannual financial framework
- Article 312(2) TFEU enabling a move from unanimity to QMV for the adoption of the multiannual financial framework
- Article 333 TFEU enabling moves, within enhanced cooperation, from unanimity to QMV or from a special legislative procedure to the ordinary legislative procedure (except for decisions having military or defence implications)

3. Treaty Change beyond Lisbon:

The Treaty of Lisbon’s insertion in the TEU and TFEU of new general and provision-specific simplified revision procedures and passerelles reflected the increasing sense among member states of the ‘very weak’ probability of any further full-scale ‘horizontal’ treaty reform (Piris, 2010: 109). In part this stemmed from the evident resistance to further integration from several member states, notably the United Kingdom and, with enlargement, Poland and the Czech Republic. They were not alone. Since the popular rejection of the Constitutional Treaty in France and the Netherlands in 2005 and with the acknowledgement that the Constitutional Treaty would most likely have suffered a similar fate in other member states had referenda been held, popular opinion was not supportive of more treaty change. Moreover, there has since the mid-2000s been a distinct air of reform *fatigue* and *ennui*. The enthusiasm for large-scale EU treaty reform simply does not exist.

⁷ Despite its TEU designation as a ‘simplified revision procedure’, it is more accurate, following Piris (2008: 108), to view Article 48(7) TEU as a passerelle.

⁸ These are now: Article 81(3) TFEU enabling a switch to the use of the ordinary legislative procedure for aspects of family law with cross-border implications – where the Treaty of Lisbon granted national parliaments a veto of the switch; Article 153(2) enabling a switch to the use of the ordinary legislative procedure for certain matters of social policy; and Article 192(2) enabling a switch to the use of the ordinary legislative procedure for certain matters of environmental policy.

Even so, the process of treaty reform did not grind to halt with the Treaty of Lisbon. In fact treaty change remains very much on the EU's agenda. Importantly, however, there has been a notable shift in focus away from large-scale horizontal change to more minor ad hoc changes. These have been – or are being – brought about by a combination of forces, some anticipated, others not. On the one hand treaty changes are being processed that are a direct consequence of political deals struck during the Treaty of Lisbon's ratification and the mechanisms created by its entry into force. On the other, the eurozone crisis has forced a return of treaty reform to the political agenda. This has triggered one of two uses to date of the new simplified revision procedures. It has also encouraged consideration of further steps to improve economic governance in the eurozone. If this did lead to some form of fiscal union within the EU framework then treaty change would be needed. Before then, the EP has to decide whether it wishes to use its new power to propose treaty amendments. Proposals are already circulating. And finally, there is enlargement. Croatia's accession to the EU, like all accessions, will see some adjustments to the EU's treaty base.

3.1. Ratification Delays and Ratification Deals

At present there are three treaty changes underway and one potential treaty change which follow directly from the political deals struck during the Treaty of Lisbon's protracted ratification. The first – the so-called MEP Protocol – follows from the delays experienced with ratification following the initial rejection of the Treaty of Lisbon by the Irish people in the June 2008. The negative vote in the first Irish referendum on the Treaty of Lisbon meant that the scheduled date for the treaty's entry into force – 1 January 2009 – would not be met. Consequently, a related redistribution in the allocation of MEPs would not take place in time for the 2009 EP elections. This was to the particular disadvantage of Spain which was scheduled to see its scheduled allocation of 50 MEPs increase to 54 MEPs. The Spanish government duly lobbied for appropriate transitional measures to be adopted. Other member states were supportive and the European Council in December 2008 agreed that a derogation from the ceiling on the size of the EP would be agreed to allow for the envisaged increases in the allocations of MEPs to twelve member states. As soon as the Treaty of Lisbon entered into force on 1 December 2009, the Spanish government submitted proposals for a treaty amendment (Council of the European Union, 2009d). Six months later, on 23 June 2010, and in what would turn out to be the shortest ever IGC, member states adopted a *Protocol amending the Protocol on transitional provisions annexed to the treaty on European Union, to the Treaty on the Functioning of the European Union and to the Treaty establishing the European Atomic Energy*

Community (Official Journal 2010a).⁹ Adopted under the ordinary revision procedure, the protocol allows for an increase in the size of the EP from 736 MEPs to 754 MEPs for the period up until the 2004 EP elections.¹⁰ It was planned that the protocol would enter into force on 1 December 2010. However, three member states (Belgium, Greece and Romania) are still to complete ratification.¹¹

The remaining three actual or potential treaty changes follow directly from the political deals struck during ratification process and were designed to ensure that the Treaty of Lisbon would eventually enter into force. The first deal followed rejection of the Treaty in a referendum in Ireland and initially involved agreement at the European Council in December 2008 that the EU would retain one Commissioner per member state despite the Treaty of Lisbon's anticipated reduction in the number of Commissioners to the equivalent of two-thirds of the number of member states (i.e. a reduction from 27 to 18 Commissioners) from 2014. A 'decision' to this effect would be taken following the entry into force of the Treaty of Lisbon (Council of the European Union, 2009a: point 2).

Initially it was envisaged that a European Council decision under Article 17(5) TEU would suffice. Such a decision has yet to be proposed. Indeed, legal experts appear divided on whether the European Council decision route can be taken. Some opine that the principle of a *reduced* sized Commission is enshrined in the TEU and that a European Council decision cannot be used to change the principle. As Article 17(5) states:

As from 1 November 2014, the Commission shall consist of a number of members, including its President and the High Representative of the Union for Foreign Affairs and Security Policy, corresponding to two thirds of the number of Member States, unless the European Council, acting unanimously, decides to alter this number.

The members of the Commission shall be chosen from among the nationals of the Member States on the basis of a system of strictly equal rotation between the Member States, reflecting the demographic and geographical range of all the Member States. This system shall be established unanimously by the European Council in accordance with Article 244 of the Treaty on the Functioning of the European Union.

A European Council decision can therefore only be used to alter the reduced size of the Commission further as the EU enlarges.¹² In the absence of a European Council decision and assuming this view gains increased acceptance, an amendment of Article 17(5) TEU may be required to deliver the promised reversion to a Commission composed according to the principle of one member from each

⁹ The IGC lasted no more than 15 minutes (*European Voice*, 2010). As one participant observed: 'blink and you would have missed it' (Interview, 29 June 2010).

¹⁰ The scheduled reduction in Germany's allocation of 99 MEPs to 96 MEPs would wait until the 2014 EP elections.

¹¹ This is according to information on the Council of the European Union [website](#).

¹² On the legal debate, see Piris (2010) at 227-228, footnote 24.

member state. Such an amendment would have to be adopted under the ordinary revision procedure. If the amendment is to be processed in time for the appointment of the next Commission, and assuming eighteen months is needed for ratification, then the treaty change would have to be adopted before mid-2012.

Also part of the political deal struck with Ireland was the adoption by the European Council in June 2009 of a formal 'Decision ... on the concerns of the Irish People on the Treaty of Lisbon'. This contained the so-called 'Irish guarantees' on: the right to life, family and education; taxation; and security and defence.¹³ EU leaders agreed that they would include the provisions of the Decision in a dedicated 'Irish Protocol' which would then be attached, following ratification, to the TEU and TFEU 'at the time of the conclusion of the next accession Treaty' (Council of the European Union, 2009b: point 5(iv)).

Four months later, the European Council had agreed that a second new protocol – the so-called 'Czech Protocol' – would also be attached to the TEU and TFEU at the same time. This second protocol emerged as part of a further deal agreed to secure ratification of the Treaty of Lisbon. Drawn up in October 2009, its primary purpose was to ensure that the Czech President, Vaclav Klaus, an ardent and vociferous critic of the EU and opponent of the Treaty of Lisbon, following majority approval in both houses of the Czech parliament, finally signed off on his country's ratification of the Treaty. The effect of the *Protocol on the Application of the Charter of Fundamental Rights of the European Union to the Czech Republic* is to extend the application of the existing *Protocol [No. 30] on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom*, which was agreed as part of the Treaty of Lisbon, to the Czech Republic. As with the 'Irish Protocol', it was decided that this 'Czech Protocol' would 'at the time of the conclusion of the next Accession Treaty and in accordance with their respective constitutional requirements', so following ratification in all member state, be attached to the TEU and TFEU (Council of the European Union, 2009c: point 2).

Although it was often assumed that the 'Irish' and 'Czech' protocols would be attached to the TEU and TFEU via the treaty governing the Croatia's anticipated accession to the EU, there was some doubt as to whether this would be possible. After all, accession treaties may only contain 'the adjustments to the Treaties ... which ... admission entails' (Article 49 TEU). Consequently the wording

¹³ The European Council, in an attempt to assuage the concerns of Irish voters, also adopted *A Solemn Declaration on Workers' Rights, Social Policy and Other Issues* and took 'cognisance' of a *National Declaration by Ireland*. These are reproduced in annexes to Council of the European Union (2009b).

of the Presidency Conclusions from the two European Councils was carefully chosen. The Protocols would be attached 'at the time of the conclusion of' and not 'by' the next accession treaty. The uncertainty about the legality of the accession treaty route for attaching the protocols to the TEU and TFEU has persisted. Hence, if the accession treaty route is closed down, a further post-Lisbon IGC will have to be called under the ordinary revision procedure in Article 48 TEU to draw up a treaty to formalize the wording of the two promised protocols and, pending ratification, attach them to the TEU and TFEU. The treaty would be short and specific to the protocols, thus reducing to a minimum the risk of any member state failing to ratify it. The aim would be to ensure ratification is completed in time for the treaty change to enter into force on the date of Croatia's accession to the EU. Irrespective of the route taken, treaty change will have taken place.

3.2 Simplified revision procedures in action – the European Stability Mechanism ... and Saint-Barthélemy

Far less uncertainty surrounds the use that has been made since the Treaty of Lisbon entered into force of two of the simplified revision procedures it introduced. The most well-known is the decision to use Article 48(6) TEU to amend Article 136 TFEU to enable the creation of a European Stability Mechanism.¹⁴ On 25 March 2011 the European Council adopted a Decision adding two short sentences in a new paragraph (3):

'The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality' (Official Journal, 2011).

This Decision is scheduled to enter into force on 1 January 2013. Currently no member state has completed ratification.¹⁵

In anticipation of – and on the assumption of – the treaty amendment's entry into force, Finance Ministers of the Eurozone member states signed a Treaty establishing the European Stability Mechanism (TESM) on 11 July 2011. This is currently undergoing ratification. It will enter into force once ratified by signatories 'whose initial subscriptions represent no less than 95 % of the total subscriptions' to the ESM (Council of the European Union (2011a: Article 43)).¹⁶ The scheduled date is

¹⁴ On the adoption of the Decision, see De Witte (2011).

¹⁵ This is according to information on the Council of the European Union [website](#).

¹⁶ Entry into force therefore requires ratification by at either the largest contributing signatory states which must include Germany, Spain, France, Italy and the Netherlands. The minimum number of signatory states required for the treaty to

1 February 2013. The entry into force of the TESM will not result in any amendment to the TEU or TFEU.

A far less well-known instance a provision-specific simplified revision procedure being deployed to day is the use that has been made procedure contained in Article 355(6) relating to the territorial application of the TEU and TFEU. Following a request from the French government, the European Council on 20 October 2010 adopted a Decision altering the status of Saint-Barthélemy, a French overseas collectivity (Official Journal, 2010b). From 1 January 2012 it will become an overseas country or territory and therefore an 'associate' of the EU under Part IV of the TFEU. The barely-noticed Decision amends Article 349 TFEU and Article 355(1) TFEU by deleting 'Saint-Barthélemy' from the list of member states' overseas territories and outermost regions to which the TEU and TFEU apply.

3.3. Treaty amendments to come?¹⁷

What further use will be made of the simplified revision procedures now contained in the TEU and TFEU remains to be seen. The provision-specific simplified revision procedures allowing for repeal of provisions permitting aid to be granted to the economy of areas of Germany affected by its division may well be activated. The Treaty of Lisbon has certainly set out an implicit timetable for their use. Sometime after 1 December 2014 (i.e. 'Five years after the entry into force of the Treaty of Lisbon'), the Commission may well propose and the Council decide, by QMV and so without necessarily support from Germany, to repeal Articles 98 and 107(2)(c) TFEU. More immediately, a further change to Article 355 TFEU may be proposed. The Netherlands, at the time the Treaty of Lisbon was agreed, attached a Declaration (No. 60) indicating its intention to submit 'an initiative for a decision, as referred to in Article 355(6) aimed at amending the status of the Netherlands Antilles and/or Aruba with regard to the Union' (Official Journal, 2007: 270). Kaczyński and ó Broin (2010) have, relatedly, indicated that the Netherlands, may also seek the removal of references in *Protocol (31) concerning*

enter into force would be ten: the five mentioned states plus Belgium, Greece, Austria, Portugal and one of Finland, Ireland, Slovakia or Slovenia. Any of the latter eight could be replaced by a combination of the remaining signatory states.

¹⁷ See also Kaczyński and ó Broin (2010) who have suggested that the Polish government might re-consider its opt-out from the application of the Charter of Fundamental Rights following political changes in the country; and the Danish government, which following a positive outcome in a national referendum could seek to alter its various opt-out and opt-in arrangements concerning Schengen, the area of freedom, security and justice, defence cooperation, and the euro. A further potential initiative may come from the UK government if it bows to eurosceptic pressure to seek a repatriation of certain powers from the EU. At present, however, any possible attempt to repatriate powers is likely to be in exchange for UK support for a eurozone-related treaty. See The Times (2011).

Imports into the European Union of Petroleum Products refined in The Netherlands Antilles to The Netherlands Antilles which ceased to exist on 10 October 2010.¹⁸

Member States, this time in the European Council, may also by then be considering proposals for treaty change from the MEPs. It has already been noted that the Treaty of Lisbon granted the EP the power to propose treaty amendments under the simplified revision procedure contained in Article 48(6) TEU. It was also granted in Article 48(2) TEU the power to propose amendments for adoption under the ordinary revision procedure.¹⁹ When issuing its opinion on the convening of the IGC that formally drew up the Treaty of Lisbon, MEPs indicated their 'firm resolve ... since the European Union is a common project that is constantly being renewed' to use their new power 'to put forward, after the 2009 elections, new proposals for a further constitutional settlement for the Union' (European Parliament, 2007: 4).²⁰ The EP is yet to deliver on its resolution. However, at least one MEP, Andrew Duff, has been seeking support for selective treaty amendments. His main focus has been on the establishment of a second list during EP elections for the election of an additional 25 MEPs in an EU-wide transnational constituency. This would necessitate amendments to Article 14(2) TEU (European Parliament, 2010). Duff's proposals also envisage amendments to the Protocol on the Privileges and Immunities of the European Union. Currently, following an inconclusive EP plenary debate on 7 July 2011 on whether to vote on them, the proposals are back with the Constitutional Affairs Committee for further discussion. They are scheduled for further plenary debate on 25 October 2011. Duff, inspired by the adoption of the European Union Act (2011) in the United Kingdom and the consequent expectation of a UK referendum on all significant future treaty changes, has also proposed amending Article 48(4) TEU so that treaties adopted under the ordinary revision procedure would enter into force on ratification by four-fifths of the member states (Duff, 2011).

Whether Duff's proposals, or indeed future proposals from other MEPs, will be adopted by the EP and forwarded to the European Council remains to be seen. At present, despite the various treaty amendments either already agreed since the entry into force of the Treaty of Lisbon or currently being processed, there has been and remains little appetite for treaty change in the European Council and more widely among officials. The scale of the treaty amendment to enable the European Stability Mechanism was kept to an absolute minimum with related proposals (e.g. from the UK government) to include an amendment to delimit the use of Article 122 TFEU and prevent it from being used again in relation to economic or financial crises being rejected. The lack of appetite for

¹⁸ The Netherlands Antilles is also listed in Annex II to the TFEU.

¹⁹ See note 3.

²⁰ The power had been envisaged in Article IV-443 of the Constitutional Treaty the content of which was, in line with the already agreed mandate for the IGC, to be incorporated in the Treaty of Lisbon.

further amendment of either the TEU or the TFEU has also been evident as eurozone leaders attempt to grapple with the challenges of securing the future of the euro and improving eurozone economic governance. Although they maintain their commitment ‘to do whatever is necessary to ensure the financial stability of the euro area as a whole’ (e.g. European Council, 2011b; Council of the European Union, 2011), they fail – publically at least – to include treaty change as an option. Indeed, the Sarkozy-Merkel letter to Herman van Rompuy of 16 August 2011 stated categorically that although their two countries propose ‘to strengthen further the governance of the euro area’ this would be done ‘*in line with existing treaties*’.²¹ The likelihood of some form of eventual treaty amendment is acknowledged in some quarters.²² And treaty revision would undoubtedly be required if calls for some form of fiscal union were heeded and substantive steps taken in this direction. However, for the foreseeable future EU and eurozone leaders simply do not want to consider further treaty change.

This reflects a variety of concerns, notably the length of time it would take to negotiate and ratify a treaty change. According to German Finance Ministry officials, at least two years would be required to secure a treaty amendment to provide a legal basis for the much discussed euro-bonds (*Der Spiegel*, 2011). On the one hand, time is of the essence in dealing with the Eurozone crisis and so waiting two years or more for a requisite treaty change is simply not practicable. This in part explains the current preference of eurozone leaders to take action on an essentially intergovernmental basis, as evidenced most notably with the adoption of the TESM in July 2011, and with only the *ad hoc* and informal involvement of the EU’s supranational institutions and structures. It does not, however, rule out the possibility – and potentially the legal necessity – to introduce treaty change to provide a formal legal basis for informal practices and procedures. This would certainly not be without precedent as the history of the European Council’s own formal status within the EU testifies.²³

On the other hand, Eurozone leaders are well aware that ratification of a treaty amendment would not be easily secured, if at all. Memories of the Constitutional Treaty’s popular rejection in France and the Netherlands as well the Irish people’s initial ‘no’ vote on adoption of the Treaty of Lisbon continue to loom large. Moreover, with more people voting for parties sceptical about or opposed to further European integration both generally and in the specific context of the eurozone, few

²¹ Letter to President van Rompuy, 16 August 2011

(http://www.elysee.fr/president/root/bank_objects/lettre_english_final_version.pdf)

²² See the reported comments of the German Finance Minister, Wolfgang Schäuble, that further economic and financial policy competences need to be transferred to the EU, ‘even when we know how difficult treaty change is’ (own translation). See *Frankfurter Allgemeine Zeitung* (2011).

²³ It should be recalled that the European Council was first recognized as an ‘institution’ with the entry into force of the Treaty of Lisbon on 1 December 2009.

governments can be confident that they would be able to secure the – often enhanced – parliamentary majorities necessary for ratifying a new treaty. Added to this, securing ratification in one of the EU’s member states least enthusiastic about further integration is now more likely to involve a referendum. The passing of the European Union Act (2011) in the United Kingdom has made ratification via referendum the default procedure for amendments to the TEU and TFEU.²⁴ Moreover, in Germany, the *Bundesverfassungsgericht* is maintaining an ever closer eye on what competences the Federal Government proposes transferring to the EU. Most significantly, according to legal experts, conferring a power on the EU to issue Eurobonds would contravene the German *Grundgesetz* and be unconstitutional and therefore require the *Grundgesetz* to be amended, a move likely to prove immensely unpopular and hence politically unacceptable.

3.4 Enlargement: Croatia’s Accession Treaty – adjustments only

If efforts to strengthen eurozone governance do necessitate treaty revision, the amendments will attract much scrutiny and no doubt stimulate much political debate. Less attention is likely to be given to the treaty adjustments that the Accession Treaty with Croatia will introduce. These will have a minimal impact on the TEU and TFEU. Articles 52(1) and 55(1) TEU will be adjusted to reflect respectively the new territorial application and authentic languages of the EU treaties, and Article 64(1) TFEU concerning the movement of certain forms capital to and from third countries will have a sentence added indicating that the relevant cut off date for Croatian laws that may still be applied is 31 December 2002. A number of adjustments concerning the composition of the Scientific and Technical Committee (Article 134(2)) and the authentic languages (Article 225) of the treaty will also be made to the Treaty establishing the European Atomic Energy Community (TEAC). Other adjustments will be to the Protocol on the Statute of the Court of Justice of the European Union (concerning the number of judges in the Court to be replaced every three years and to the total number of judges (28) in the General Court); the Protocol on the Statute of the European Investment Bank (to reflect the new level of subscribed capital, the increased size of the Board of Directors and rotation of its alternate members); and the Protocol on Transitional Provisions (to allocate Croatia seven Council votes; to determine the new threshold (260 votes) for a qualified majority; and to determine the number of Croatian members of the Economic and Social Committee (9) and the Committee of the Regions (9)). Provision is also made for a derogation from the same Protocol to allow for a temporary increase in the size of the EP to accommodate 12 Croatian MEPs and their election.

²⁴ However, the European Union Act (2001) does provide for exceptions. A referendum is not required if the treaty change involves provisions that apply ‘only to member states other than the United Kingdom’ (clause 4(4)(b)).

The United Kingdom and the European Union Act (2011): an insurmountable obstacle to further treaty change?

Reference has already been made to the European Union Act (2011) that now governs, among other things, ratification of EU treaty changes by the United Kingdom. Introduced as part of the Conservative-Liberal Democrat coalition government's 'determin[ation] to reconnect with the British people by making itself more accountable for the decisions it takes in relation to how the EU develops' and its 'commit[ment] to allowing the British people to have their say on any future proposals to transfer powers from Britain to Brussels' (UK Government, 2010), the new Act incorporates a referendum into the standard procedure to be adopted by the United Kingdom for the approval or ratification of amendments to the TEU and TFEU. Not all treaty changes will be subject to approval in a referendum.²⁵ The ratification of accession treaties, for example, will not be subject to a referendum provided, that is, that they do not involve a transfer of power or competence from the United Kingdom to the EU.²⁶ A treaty change involving either the codification of existing practice in exercising an EU competence contained in the TEU or TFEU will not require a referendum either. Nor will a treaty change – as is the case currently with the amendment to Article 136 TFEU providing for the European Stability Mechanism – that applies 'only to member states other than the United Kingdom'.

The default position, however, is that a referendum will be held. According to Clause 4(1) of the Act, any amending treaty of European Council Decision adopted under the simplified revision procedure contained in Article 48(6) TEU would be subject to a referendum if it involves: the extension of the objectives of the EU as set out in Article 3 TEU; the conferring on the EU of a new competence; the extension of an existing EU competence; almost any move away from decision-making by unanimity, consensus or common accord in the Council or European Council;²⁷ and the removal of a so-called 'emergency brake'. Given such provisions, it is undoubtedly the case that the treaties of Lisbon, Nice, Amsterdam and Maastricht as well as the Single European Act would have required endorsement in a referendum as part of the UK ratification process. Moreover, since it only requires one of the criteria in Clause 4(1) to be met, even an amending treaty that was overwhelmingly concerned with codification or was restricted in its effect to member states other than the United Kingdom, or

²⁵ European Union Act (2011): clause 4(4)(b).

²⁶ The UK Parliament may nevertheless decide to hold a referendum on an accession treaty.

²⁷ Schedule 1 to the Act lists 39 specific articles where a treaty amendment providing for a move away from unanimity, consensus or common accord in the Council or European Council would trigger a referendum. In addition, any treaty amendment providing for a move away from unanimity, consensus or common accord in the Council or European Council under the CFSP would trigger a referendum.

contained a single move to QMV or an expansion of a single EU competence affecting the UK would trigger a referendum.

With a UK referendum now almost certain to be required for the ratification of any substantive future amendments to the EU's treaties, a major political obstacle to treaty change given the evident popular scepticism in the United Kingdom towards the EU. Moreover, and arguably more significantly, pressure for a referendum on continued membership of the EU has been increasing in recent years. It received vocal expression during the course of the parliamentary debate on adoption of the European Union Act (2011). Petitioning campaigns have also been mounted and new cross-party pressure groups formed.²⁸ Most of the outspoken supporters of a referendum are advocates of either withdrawal from the EU – on which the United Kingdom Independence Party and its 11 MEPs campaign – or a renegotiation of the terms of the UK's membership of the EU. A potential – for some, anticipated – consequence of this is that any referendum, contrary to the assertions of supporters of the European Union Act (2011), would for many voters be treated as an 'in-out' referendum. Given current levels of disillusionment with the EU – according to a *YouGov* (2010) poll in October 2010, 47% of voters would vote to leave the EU in a referendum – there is a not inconsiderable risk of a treaty amendment, irrespective of its merits, being rejected in a UK referendum. Moreover, if a substantial 'no' vote were interpreted as signalling a popular desire in the UK to withdraw from the EU or renegotiate its terms of membership, this would present the EU with yet another unwelcome 'crisis'.

Conclusion

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²⁸ See, for example, the 'Give us an EU referendum' supported by the *Daily Express* newspaper (www.express.co.uk/web/referendum). As of 2 September 2011, 24,442 people had signed the associated e-petition (<http://epetitions.direct.gov.uk/petitions/356>). See also: the *People's Pledge* (www.peoplespledge.org) and the *EU Referendum Campaign* (www.eupledge.com).

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