

*These notes refer to the European Union Act 2011  
(c.12) which received Royal Assent on 19 July 2011*

# EUROPEAN UNION ACT 2011

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## EXPLANATORY NOTES

### BACKGROUND

#### *General*

10. The provisions contained in the European Union Act give effect to commitments contained in *The Coalition: Our Programme for Government*. This document can be found online at the following web address:

[http://www.cabinetoffice.gov.uk/media/409088/pfg\\_coalition.pdf](http://www.cabinetoffice.gov.uk/media/409088/pfg_coalition.pdf)

11. This document set out the following Government commitments:

“We will ensure that there is no further transfer of sovereignty or powers [from the UK to the EU] over the course of the next Parliament... Any proposed future treaty that transferred areas of power, or competences, would be subject to a referendum on that treaty – a ‘referendum lock’... The use of any *passerelle* would require primary legislation.

“We will examine the case for a United Kingdom Sovereignty Bill to make it clear that ultimate authority remains with Parliament.

12. The Minister for Europe made a statement in the House of Commons on 13 September 2010 (HC Deb, cols 31–33WS) setting out that these commitments would be provided for by this Act, as would the necessary Parliamentary approval of the Transitional Protocol on MEPs. The Minister for Europe also stated that in specified cases where the existing Treaties provide for decisions that would transfer power or competence from the UK to the EU, these decisions would also be subject to a referendum. This statement was repeated by Lord Howell of Guildford in the House of Lords on 27 September 2010 (HL Deb, cols 170-172WS).
13. Lord Howell of Guildford made a statement in the House of Lords on 6 October 2010 (HL Deb, cols 5–6WS) setting out that the Government had examined the case for a statutory provision on Parliamentary sovereignty, and had decided to include such a provision in the European Union Bill. This statement was repeated by the Minister for Europe in the House of Commons on 11 October 2010 (HC Deb, cols 3-4WS).
14. Following the introduction of the European Union Bill to Parliament, the House of Commons European Scrutiny Committee conducted an inquiry into the European Union Bill in two parts. The first part concluded with the publication of a report on clause 18 on 7 December 2010, which is available at:

<http://www.publications.parliament.uk/pa/cm201011/cmselect/cmeuleg/633/633i.pdf>

15. The Government published a response to this report on 10 January 2011, which is available at:

<http://www.publications.parliament.uk/pa/cm201011/cmselect/cmeuleg/723/723.pdf>

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16. On 21 January 2011, the same Committee published a report on Part 1 of the Bill, which is available at:  
<http://www.publications.parliament.uk/pa/cm201011/cmselect/cmeuleg/682/682.pdf>
17. The Government response to this report was published on 3 March 2011, and is available at:  
<http://www.publications.parliament.uk/pa/cm201011/cmselect/cmeuleg/852/852.pdf>
18. Following the First Reading of the European Union in the House of Lords, the [House of Lords Select Committee on the Constitution](#) published a report on the European Union Bill on 17 March 2011. This is available at:  
<http://www.publications.parliament.uk/pa/ld201011/ldselect/ldconst/121/121.pdf>
19. The Government's response to the report was published on 30 March 2011, and is available at:  
<http://www.parliament.uk/documents/lords-committees/constitution/GovernmentResponse/GvtResEUBillReport.pdf>

### **Part 1: Restrictions on Treaties and Decisions Relating to EU**

20. The European Union (Amendment) Act 2008 ('2008 Act'), which provides Parliamentary approval for the ratification of the Treaty of Lisbon, requires that any amendment to the Treaties of the European Union (TEU, TFEU, and the Treaty Establishing the European Atomic Energy Community) should be approved by an Act of Parliament before the UK can 'ratify' (that is, finally approve) the amendment concerned. Part 1 of this Act provides that an Act of Parliament would continue to be required in the case of any treaty which sought to amend or replace TEU or TFEU, but would in addition require the holding of a referendum if a proposed amendment of TEU or TFEU (including the replacement of TEU or TFEU) sought to transfer power or competence from the UK to the EU.
21. A referendum would only be required if the Government of the day wanted to support the treaty change in question. If the Government of the day did not want to support the change in question, it would block the proposal at the negotiations stage. As all of the types of treaty change that are to be subject to the referendum provisions would have to be agreed by unanimity at the EU level, the proposal could not form part of a new treaty or a treaty change - and there would then be no need for a referendum - if the Government did not support the proposal.
22. [Part 1](#) deals with the situation where a transfer of competence or power from the UK to the EU is proposed in the future through the use of one of the following mechanisms providing for a treaty change:
  - a) Use of the Ordinary Revision Procedure set down in Article 48(1) to (5) TEU, which would make a formal amendment to TEU or TFEU following consideration of the proposed changes by a Convention (composed of representatives of national Parliaments, of the Heads of State or Government of the Member States, of the European Parliament and of the European Commission) and/or agreement by an Inter-Governmental Conference (IGC) of representatives of the governments of the Member States. Formal approval, or 'ratification', of the changes is then required by all Member States in accordance with their constitutional requirements before the proposed amendment(s) to the Treaties can enter into force.
  - b) Use of part of the Simplified Revision Procedure set down in Article 48(6) TEU. The Simplified Revision Procedure allows the European Council to amend

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provisions on EU policies and internal actions as set out in Part Three of TFEU without using the formal treaty change procedure provided for in Article 48(1) to (5) TEU, but without increasing the competence of the EU.

23. Article 1 of TFEU provides that TFEU ‘determines the areas of, delimitation of, and arrangements for exercising [the EU’s] competences’ in respect of TEU and TFEU. ‘Competence’ is conferred on the European Union by the Member States of the EU, and in essence specifies how and to what extent the EU can act in a given area. The EU is bound to act within the confines of the Treaties, as only the Treaties provide the EU with the ‘competence’ to act in a given area.
24. The UK has previously agreed to confer competence on the EU in a number of areas specified in TEU and TFEU by approving the Treaty of Lisbon, which amended the EU Treaties. The UK agreed to confer on the EEC the competence to act in ways specified in the Treaties at that time, when the UK joined in 1973. The statutory provision which permitted the UK to confer competence on the EEC at that time is the European Communities Act 1972.
25. Articles 2 to 6 of TFEU set out in more detail the categories and areas of EU competence. The EU’s competence can be expressed in the following five ways:
  - a) Exclusive competence, where only the EU can act. The areas concerned are set out in Article 3 TFEU (examples include the customs union and competition rules).
  - b) Supporting competence, where the EU can carry out actions to ‘support, coordinate or supplement’ the actions of Member States in certain specific areas, on the condition that the EU action does not supersede the Member States’ competence in those areas. The areas concerned are set out in Article 6 TFEU (examples include the protection and improvement of human health; culture and education).
  - c) Shared competence, where the EU can legislate in a specific area set out in the Treaties, but where if the EU has not yet acted in a specific area or has stopped acting in that area, the Member States can legislate accordingly. Under Article 4 TFEU, shared competence applies in those areas set out in the Treaties but which are not specified in Articles 3 or 6 TFEU (exclusive or supporting competence).
  - d) The Member States shall also coordinate their economic, employment and social policies within the EU; and the EU can adopt measures and arrangements in order to achieve this end. Specific provisions apply to those Member States who use the European single currency (the Euro).
  - e) The EU also has competence to define and implement a common foreign and security policy, including the ‘progressive framing of a common defence policy’, though this remains largely subject to the unanimous approval of Member State governments in the Council.
26. Unlike ‘competence’, which is described in detail in the Treaties as summarised above, the term ‘power’ is not defined in the Treaties. For the purposes of Part 1 of the Act, a transfer of power could take place in four ways:
  - a) First, through a move in specified areas set out in Schedule 1 of the Act to permit qualified majority voting in the European Council or Council in place of unanimity, consensus or common accord. This means that a referendum is needed before the UK can agree to give up its ability to block or veto legislative proposals made under any of the specified Articles or any relevant articles in Chapter 2 of Title V of TEU (Specific Provisions on the Common Foreign and Security Policy). Mere use of these Articles as a legal basis for proposals for action will not require a referendum.

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- b) Second, through the amendment or removal of a provision in four specific areas in the EU Treaties, which enables a member of the Council to oppose the adoption of a decision to be taken by qualified majority voting, or to ensure the suspension of the ordinary legislative procedure (sometimes referred to as an ‘emergency brake’ provision).
  - c) Third, through the conferring of a power on an EU institution or body to impose a requirement or obligation on the UK.
  - d) Fourth, through the conferring of a new or extended power on an EU institution or body to impose sanctions on the UK.
27. As the majority of treaties and Article 48(6) decisions will require the exercise of judgement as to whether a transfer of power or competence is involved, in those cases the Act requires that a Minister must make a statement giving an opinion as to whether or not the Treaty or Article 48(6) decision meets the criteria for a referendum, and must give reasons. As with all Ministerial decisions, it would be possible for a member of the public to challenge the decisions of the Minister in such a statement.
28. *Section 6* of the Act provides that a number of other decisions, which are considered to transfer power from the UK to the EU in every case, require approval by Act of Parliament and a referendum (but no Ministerial statement is required). When one of these decisions is taken, a referendum will always be required. These decisions can be classified into three categories:
- a) Use of part of the Treaties’ Simplified Revision Procedure set down in Article 48(7) TEU to permit qualified majority voting in the European Council or Council in place of unanimity, consensus or common accord in specified areas in the Treaties. The European Council can use this mechanism to abolish vetoes and move to majority voting in relevant articles in Title V of TEU (which concerns general provisions on the EU’s external action and specific provisions on the EU’s common foreign and security policy) or the whole of TFEU, except any vetoes with military or defence implications.
  - b) Decisions under particular Articles in the existing Treaties which are highly significant for the UK, such as a proposal to join the Euro or give up the UK’s border controls and join the Schengen area (the area within which free movement is permitted across internal country borders).
  - c) Decisions under certain Articles in the Treaties which are sometimes referred to as ‘passerelles’ or ‘ratchet clauses’, which transfer an area of competence or power from the UK to the EU. *Section 6* lists seven of these that allow for the removal of the UK’s ability to veto a decision in an area specified in *Schedule 1* of the Act, and therefore need to be subject to a referendum for consistency. The other three are one-way, irreversible decisions that would transfer competence from the UK to the EU. These are the Treaty articles on taking a decision to move to a EU common defence; on taking decisions that the UK would at any stage participate in a European Public Prosecutor’s Office (which can be set up to combat crimes affecting the EU’s financial interests); and in that event, any expansion of the powers of the European Public Prosecutor.
29. There are other provisions in the Treaties which also constitute ‘passerelles’ or ‘ratchet clauses’, but do not enable the transfer of power or competence from the UK to the EU. There is no one agreed definition of what constitutes a ‘ratchet clause’ in the Treaties. Some of these provisions provide for a specified modification of the Treaties without using the Treaties’ Ordinary Revision Procedure, such as Article 81(3) TFEU, allowing for a move from unanimity to qualified majority voting in respect of specific areas of family law with cross-border implications. Some other provisions are in effect one-way options, which EU Member States can together decide to exercise and which allow existing EU powers to expand within the scope of the competence already defined in

the Treaties, such as Article 262 TFEU, allowing for an expansion of the jurisdiction of the Court of Justice of the EU (ECJ) in relation to disputes concerning European intellectual property rights.

30. As it is difficult to come up with one definition for such Treaty provisions, Part 1 of the Act specifies those provisions that the Government considers should require an Act of Parliament to be passed before the Government can agree to their use in the Council or European Council, and those that the Government considers should require other forms of Parliamentary approval.

## **Part 2: Implementation of Transitional Protocol on MEPs**

31. The Treaty of Lisbon provides for an increase of 18 Members to the overall number of Members of the European Parliament ('MEPs'), allocated among 12 Member States (including an increase in the number of UK MEPs from 72 to 73). This change in MEP numbers was not put into effect when the last European Parliamentary elections were held in June 2009 because the Treaty of Lisbon had not yet entered into force. Following the entry into force of the Treaty of Lisbon, the Government agreed to a Transitional Protocol, in an Inter-Governmental Conference on 23 June 2010, to allow the additional MEPs to take up their seats in the European Parliament during the current term of office instead of waiting until the next scheduled European Parliamentary elections in 2014, and without the corresponding reduction in the number of MEPs allocated to Germany (also provided for by the Treaty of Lisbon).
32. Bringing in these extra MEPs before the next European Parliamentary elections needs an amendment to the Treaties, as it temporarily increases the maximum number of MEPs allowed by the Treaties. Section 5 of the European Union (Amendment) Act 2008 provides that any amendment to the Treaties requires an Act of Parliament to be passed before the UK can ratify the amendment of the Treaties. Part 2 of the Act therefore provides for this approval.
33. **Part 2** of the Act also provides for the election of the additional UK MEP provided for under the Transitional Protocol. The Protocol provides for three options for Member States to choose from in determining how to elect their additional MEPs during the current term:
- by-elections by direct universal suffrage in the Member State concerned, in accordance with the provisions applicable for elections to the European Parliament;
  - by reference to the results of the European Parliamentary elections from 4 to 7 June 2009; or
  - by designation, by the national Parliament of the Member State concerned from among its members, of the requisite number of members, according to the procedure determined by each of those Member States.
34. The Act makes the necessary provision to enable the UK to elect an additional MEP in accordance with the second of these options, by reference to the results of the 2009 European Parliamentary elections. Section 5 of the European Parliamentary Elections Act 2002 already allows for a vacancy arising in an *existing* seat to be filled without a by-election, and under the European Parliamentary Elections Regulations 2004, by-elections are not normally required. However, in this case as it is a *new* seat, specific provision is required.
35. In the event that the use of the 2009 results cannot produce a result, the Act provides as an alternative that a by-election would be held to elect the additional MEP. In June 2014, all 73 UK MEPs will then be elected at the scheduled 'general' elections to the European Parliament.