British Brinkmanship and Gaelic Games: EU Treaty Ratification in the UK and Ireland from a Two Level Game Perspective

Dermot Hodson and Imelda Maher

Research Highlights and Abstract

- Viewed from the theory of two-level games, the European Union (EU) Act (2011) is a rare example of a government tying its hands in international diplomacy.
- The UK government could find its hands more tightly bound than anticipated under the EU Act, inter alia, due to the enhanced role of the courts in EU treaty ratification.
- The EU Act could convey bargaining advantages to the UK, but it could also encourage other EU member states to walk away from the negotiating table.
- The risks posed by tighter ratification rules are borne out by Ireland’s experience of EU treaty ratification since the Supreme Court ruling Crotty v. An Taoiseach (1987).
- David Cameron’s ‘veto’ of plans for a new EU treaty in December 2011 illustrates the difficulties of knowing ex ante when a referendum is required under the EU Act.

The European Union (EU) Act (2011) provides for greater parliamentary oversight and the possibility of a referendum before EU treaties can be ratified. This article explores the EU Act from a two-level game perspective, seeing it as a rare example of a government tying its hands in international diplomacy. That the UK government could find its hands more tightly bound than anticipated is suggested by Ireland’s turbulent experience of treaty ratification in the light of Crotty v. An Taoiseach (1987), a landmark ruling by the Irish Supreme Court and an inspiration for the EU Act. This situation could, the theory of two-level games predicts, bolster the UK’s bargaining position in Brussels, but it could also damage the country’s credibility and encourage other member states to walk away from the negotiating table. This last point helps to shed some light on the UK’s ‘veto’ of the Fiscal Compact in December 2011.

Keywords: ratification; two-level game; tying hands; Crotty; EU act; fiscal compact

Introduction

Robert Putnam’s theory of two-level games posits that a government can, under certain conditions, boost its bargaining position in international negotiations by adopting more stringent ratification rules at home (Putnam 1988, 441). Two decades of scholarship have generated numerous theoretical insights into what these conditions are (e.g. Mo 1995; Milner and Rosendorff 1996; Leventoğlu and Tarar 2005) alongside evidence that domestic ratification constraints can be an advantage in international deal making (e.g. Clark et al. 2000; Konold 2010). There are
nonetheless comparatively few concrete examples of governments making it more difficult to ratify international agreements (Pahre 1997; Hug and Schulz 2007).

Viewed against this backdrop, the European Union (EU) Act 2011, which became law in the United Kingdom in July 2011, is significant. Although the passage of the Act provoked little public debate, Members of Parliament (MPs) made much of its ‘sovereignty clause’, which states that EU law can take effect in the UK only through an Act of Parliament (House of Commons European Scrutiny Committee 2010). This clause places the common law doctrine of parliamentary sovereignty on a statutory footing, and in doing so codifies the orthodox position of the UK courts that the supremacy of EU Law is based on national law (Gordon and Dougan 2012; Craig 2011, 1937; House of Lords Constitution Committee 2011). Altogether more radical are the Act’s provisions for approving EU treaty revisions, which give Parliament a greater say in the ratification process, specify the conditions under which a referendum must be held and enhance the scope for judicial review in cases where the government chooses not to hold a public vote.

There is more than one way to interpret this ‘referendum lock’. Murkens (2012, 396–397), for example, sees the EU Act as sending ‘an important political signal to the Europhobic wing of the Conservative Party ... that its concerns would in the future be taken seriously’. Lynch and Whitaker (2012, 18) disagree on the grounds that the Act is likely to leave ‘the Eurosceptic appetite for a referendum unsatisfied’ for now because the May 2010 Coalition Agreement between the Conservatives and Liberal Democrats has effectively ruled out support for the kind of treaty change that would trigger a referendum. Either way, this remains a fast-moving and fractious area of UK politics, with David Cameron announcing in January 2013 that he would, if the Conservatives win the next general election, seek a ‘new settlement’ with the EU before holding an in-out referendum on remaining in the Union (Cameron 2013). This article explores the scope and limits of treaty ratification under the EU Act from a two-level game perspective using Ireland’s experience of ratification in the light of Crotty v. An Taoiseach (1987), a landmark ruling by the Irish Supreme Court, as a comparative case study. It seeks, in the first instance, to show that the Act significantly reduces the core executive’s discretion over how to ratify EU treaty changes and is thus a seldom seen instance of a government tying its hands in international negotiations.

Students of the EU Act have already looked to the German Federal Constitutional Court’s ruling on the Lisbon Treaty in June 2009 for inspiration (Gordon and Dougan 2012; Craig 2011) but comparison with Crotty is also valid here. Ireland is one of a small minority of EU member states with a ‘referendum lock’—France, Denmark and Slovakia are also typically included on this list—and the only one to require a mandatory referendum on all constitutional changes. Ireland’s approach to treaty ratification was, moreover, cited by UK Prime Minister David Cameron (2009) as a spur for the EU Act. The lesson from the Irish case, this article argues, is that the UK could find its hands more tightly bound than anticipated as a result of the EU Act but without the same options for overcoming ratification failures. EU member states could respond to the resulting risks of involuntary defection from treaty revisions, the theory of two-level games implies, by walking away from the negotiating table.
The remainder of this article is divided into four sections. The first recalls the logic of tying hands in two-level games and introduces the EU Act. The second section discusses the potential pitfalls of the Act’s tighter ratification rules, drawing on Ireland’s experience of treaty ratification since Crotty. The third section looks at two early test cases of the EU Act and the final section summarises the key findings of this investigation and considers their implications for students of international, EU and UK politics.

The EU Act as an Instance of Tying Hands

Putnam’s (1988) point of departure is that international negotiations will succeed if and only if the win sets of the parties involved overlap. By ‘win set’ he means the set of all deals that can be struck in the international arena, which he calls ‘Level 1’, and ratified in a state’s domestic arena, which he calls ‘Level 2’. Ratification refers here to the process whereby the outcome of negotiations in Level 1 is approved by the relevant actors in Level 2. Win sets, Putnam suggests, can be determined by exogenous factors, such as the distribution of power or preferences on particular policy issues, or endogenous factors, where governments seek to alter formal or informal ratification procedures. Putnam (1988, 440–1) says little about how such ratification procedures work, but he does speculate that a government may, under certain conditions, make it more difficult to ratify an agreement in Level 2 so as to drive a harder bargain in Level 1. Moravcsik (1993a, 28) refers to this strategy as ‘tying hands’ and contrasts it with a policy of ‘cutting slack’, where the chief negotiator takes steps to expand the set of agreements acceptable to domestic constituents in Level 2.

Examples of cutting slack are plentiful, with the United States Congress’s ability to expedite the ratification of trade agreements by granting trade promotion authority to the President among the best known. Instances of tying hands are harder to come by. Evans, Jacobsen and Putnam (1993), in an early attempt to put the theory of two-level games to the test, provide some evidence that constraints in Level 2 matter for Level 1 negotiations but find no cases in which such constraints were endogenous. More recent work by Leventoglu and Tarar (2005) suggests that governments do tie their hands by making public pronouncements on their bargaining position before and during international negotiations but this argument is about rhetoric rather than ratification per se.

The EU’s recurring recourse to treaty changes over the last quarter century lends itself to the analysis of two level games but scholars have thus far found little conclusive evidence of hand tying. In a landmark study, Hug and König (2002) find a link between the negotiation and ratification of the Amsterdam Treaty, with the final text shown to be more conservative on those issues where national parliaments with a veto over ratification favoured the status quo. The authors do not say, however, whether member states were tying their hands or having their hands tied by parliaments or other bodies. The same is true of Hug and Schulz’s (2007) study of the European Constitution, which finds that the decision by eleven member states to call a referendum secured concessions in some cases but remains agnostic as to how and why these referenda were called. König and Finke (2009) model member states’ reasons for calling a referendum on the European Constitution,
although their analysis indicates that governments did so by exploiting the flexibility within existing ratification procedures rather than tying their hands through more stringent rules. Such was this flexibility, indeed, that all member states with the exception of Ireland opted to ratify the Lisbon Treaty via parliamentary channels in spite of the many areas of commonality between this treaty and the European Constitution.

Thought of in these terms, the EU Act can be understood as a rare example of a government attempting to tie its own hands. Before the Act became law, the UK’s win set was shaped by essentially exogenous factors, with the need for parliamentary approval being the most important of these. Historically, Parliament had no formal role, the ratification of treaties being a matter for the Foreign Secretary acting as representative of the Crown. Following the 1924 Ponsonby Rule, Parliament debates (most) treaties to which the UK is a signatory (Miller 2001, 9). For EU treaties, the fact that the European Communities Act (1972) has to be amended has also ensured parliamentary involvement.

Calls for a referendum on treaty changes have been commonplace since the UK entered the European Economic Community (EEC) in 1973 but the lack of a codified constitution has generally allowed the government of the day to brazen it out in the face of such demands. Prime Ministers Thatcher, Major, Blair and Brown all insisted that treaties negotiated under their watch entailed no significant loss of sovereignty and hence that no referendum was needed. Tony Blair eventually agreed to a referendum on the European Constitution but he rescinded this offer after a ‘no’ vote in France and the Netherlands. Brown reverted to the traditional Prime Ministerial approach by refusing to put the Lisbon Treaty to a referendum despite the many similarities between it and the European Constitution. Although this move was vociferously opposed by Cameron’s Conservatives and, indeed, by many in the Labour Party, Parliament approved the European Union (Amendment) Act 2008, allowing the Lisbon Treaty to take effect in the UK. A last minute legal challenge by the entrepreneur Stuart Wheeler, one of several such challenges over the years, stalled but did not stop ratification.

The EU Act distinguishes between treaty revisions made via the Ordinary Revision Procedure and the Simplified Revision Procedure, under the Treaty on European Union (EU). The Ordinary Revision Procedure allows the European Council to convene a convention or an intergovernmental conference to decide on all categories of treaty amendment. The Simplified Revision Procedure allows the European Council to amend Part III of the Treaty on the Functioning of the European Union (TFEU) on the basis of a unanimous vote if the amendments confer no new competences on the Union. The EU Act: (i) requires an Act of Parliament on all treaty amendments; (ii) necessitates a referendum on treaty changes via the Ordinary Revision Procedure unless the exemption condition is met; (iii) allows for treaty changes via the Simplified Revision Procedure that do not meet this exemption condition to be ratified without a referendum provided the significance condition is met; and (iv) requires that a Minister must give a reasoned opinion on a decision to ratify a treaty without a referendum; (see Figure 1).

From a two-level game perspective, these changes tie the UK government’s hands in relation to EU treaty revisions in three principal ways.
(1) Increased Parliamentary Oversight

The provision that all treaty changes require an Act of Parliament arguably gives MPs and peers a greater say over the ratification process, whether a referendum ultimately takes place or not. Under the EU (Amendment) Act (2008), a Minister could not support a decision under the Simplified Revision Procedure unless s/he had first put a motion before both Houses of Parliament and the Houses had positively approved the motion. This has now been changed so that, at a minimum, an Act of Parliament will be required.

(2) Increased Scoped for Judicial Reviews

The Ministerial statement requires that a Minister give a reasoned opinion concerning a decision not to hold a referendum. That this opinion would have the status of a ministerial decision opens up the possibility of a judicial review before the Act becomes law, or the Act itself might be challenged on the basis that it did not comply with the form and manner set down for enactment. This latter possibility is an unsettled area of English law so it is not clear that the courts would entertain it given their traditionally strongly held view that they cannot review the validity of an Act of Parliament. This is why a review of the ministerial decision (given with reasons) is more likely but would need to be triggered before the final Bill becomes law to be effective (Craig 2011, 1935–6).
Qualified Commitment to Hold a Referendum

The narrowly drawn exemption condition reduces the scope for treaty ratification without a referendum. The exemption condition applies only if treaty amendments do not fall under one of thirteen headings listed. One set of headings refers to changes extending the EU’s competence in any area. Specific mention is made here of coordination in the area of economic or employment policy and the common foreign and security policy. A second set of headings requires a referendum where the EU imposes new requirements, obligations or sanctions on the UK. A final set of headings requires a referendum for treaty changes that alter existing requirements to act by unanimity, consensus or common accord or remove the ‘emergency brake’, whereby an EU Member State can refer a draft measure to the European Council suspending the ordinary legislative procedure and the use of qualified majority voting. This brake can be used in relation to some aspects of the EU’s common foreign and security policy and in sensitive domains such as social security, judicial cooperation in criminal matters and serious crime of a cross-border character.

The significance condition, finally, applies where (i) where treaty changes under the Simplified Revision Procedure fall within either of two specific headings listed under the exemption condition and (ii) ‘the effect of that provision in relation to the United Kingdom is not significant’. The headings under (i) refer to (a) ‘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’ and (b) ‘the conferring on an EU institution or body of new or extended power to impose sanctions on the United Kingdom’.

Crotty v. An Taoiseach and the Risks of Involuntary Defection

A strategy of deliberately contracting a win set so as to secure concessions, Putnam (1988, 441) insists, is not without risks. Tightening ratification rules, he notes, brings the possibility of involuntary defection, i.e. a situation where a government supports an agreement reached in the international arena only to see it overturned at home. Mo (1995) questions this logic on the grounds that a government would be unlikely to delegate responsibility for ratifying an international agreement to an agent with divergent preferences from its own. Governments do not always have complete information about the preferences of parliaments or the public, however, making it difficult to strike a deal at the international level that will eliminate entirely the risk of involuntary defection domestically (Milner and Rosendorff 1996).

Whether the EU Act will bolster the UK’s bargaining position in relation to EU treaty changes or heighten the risk of involuntary defection will be known only in due course, but Ireland’s experience of EU treaty ratification in the wake of Crotty v. An Taoiseach (1987) offers some clues on what to expect. There are categorical similarities and differences between the EU Act and Crotty from a two-level game...
perspective. The most obvious difference is that the UK government instigated the EU Act, a detailed piece of legislation that seeks to be comprehensive as to the circumstances where a referendum will be necessary. *Crotty* is, to state the obvious, judge-made law, stemming from the actions of a private citizen and a degree of activism on the part of the Supreme Court (Barrett 2009, 35). Nonetheless, both the EU Act and *Crotty* contract the win set of their respective states by drawing a legal line (however blurred in the Irish case) between treaty changes that require a referendum and those that do not.

In *Crotty*, Raymond Crotty, an agricultural economist and activist, challenged the ratification of the Single European Act by statute only without a referendum to amend the Irish Constitution. The challenge was rejected at the first hearing of the case, but Crotty won on appeal before the Supreme Court, Ireland’s apex constitutional court. In a single judgment, the Supreme Court saw no reason why the European Communities (Amendment) Act (1986), which sought to transpose the Single European Act into Irish law, was unconstitutional. In separate judgments, however, the Court held that Title III, providing for co-operation in foreign policy, was in fact a new treaty that went beyond ‘the essential scope or objectives of the Community’ and not merely an extension of the integration objective at the core of the [then] EEC project (Barrett 2009). A majority of three judges went on to hold, therefore, that Title III could only be ratified by referendum as it curtailed the sovereign powers of the state in foreign affairs in a way not sanctioned by the constitution. The government was thus required to put the ratification of the Single European Act on hold until it held a referendum.

Perhaps the most striking feature of the Irish case from a two-level game perspective is the extent to which the government found its win set curtailed with respect to subsequent treaty changes. The Supreme Court, it should be recalled, gave no indication in *Crotty* that referenda should be the default way to decide treaty changes. Chief Justice Finlay, in delivering the single judgment on the Single Act, acknowledged the case for steering a course between giving the state open-ended authority to agree treaty changes without seeking a change to the constitution and no authority at all.23 Because such a low threshold was set in relation to sovereignty transfer, however, it was legally risky for any government not to hold a referendum. Thus, successive governments put the Maastricht, Amsterdam, Nice and Lisbon Treaties to the people rather than make the case that the proposed changes fell within the essential scope and objectives of the Communities.

One reason for this risk aversion is that the judiciary clouded rather than clarified the size of the state’s win set in relation to treaty changes. The members of the Supreme Court, it is important to note, were divided in *Crotty* as to the precise significance of the Single European Act’s provisions on foreign policy. Whereas Chief Justice Finlay saw nothing in the treaty that could ‘override or veto the ultimate decision of the State on any issue of foreign policy’, Justice Walsh foresaw a situation in which member states ‘are no longer to have separate foreign policies’. In the end, Finlay found himself in the minority, even though Walsh’s prediction proved wide of the mark given the incremental, intergovernmental approach to foreign policy cooperation that flowed from this and subsequent treaties. The Court’s decision to focus on non-binding elements of the Single European Act can,
moreover, only have added to the government’s uncertainty about whether future
treaty changes would survive a judicial review.

A second lesson from the Irish case is that the government, having had its hands
tied, eventually experienced the attendant risks of involuntary defection. In spite of
the controversy surrounding the Single European Act, its ratification proved to be
a straightforward exercise, with 70% of voters backing the proposed amendments
to the Irish Constitution. Comprehensive though this result was, it represented a
sharp fall in support for European integration compared to the referendum in May
1972 on Ireland’s accession to the EEC (see Table 1). This trend continued in
subsequent referenda, with Ireland sending shockwaves through the EU in June
2001 when close to 54% of voters rejected the Nice Treaty. Although the ‘yes’ vote
rebounded to nearly 63% when this referendum was rerun in October 2002, a little
over 53% of voters rejected the Lisbon Treaty at the first time of asking in June
2008. This result was overturned, once again, with more than 67% backing the
Lisbon Treaty in a second poll in October 2009.

A third lesson from the Irish case concerns the problems posed by imperfect
information in securing the successful ratification of EU treaties. As a small member
state, Ireland’s ability to steer treaty negotiations may be limited but other member
states have shown a willingness to offer concessions in the hope of securing
ratification (Hug and König 2002; Hug and Schulz 2007). During the drafting of the
Maastricht Treaty, for example, the government negotiated a protocol protecting
Article 40.3.3 of the Irish Constitution, which guarantees the right to life of the
unborn, a provision that has been carried over in all subsequent treaties. This
guarantee was not enough, however, to prevent concerns over abortion from
recurring in the first referendum on Lisbon,24 forcing the Irish government to secure
agreement on a second, legally-binding guarantee in advance of the re-run Lisbon
referendum.25 This agreement also included guarantees on taxation, education, the
family and neutrality, the last of these measures coming in addition to a declaration
by the European Council at Seville in June 2002 concerning Ireland’s neutrality

<table>
<thead>
<tr>
<th>Date</th>
<th>Amendment to Irish Constitution</th>
<th>Treaty</th>
<th>Yes (%)</th>
<th>No (%)</th>
<th>Result</th>
<th>Turnout (%)</th>
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<tr>
<td>10 May 1972</td>
<td>3rd Accession</td>
<td></td>
<td>83.09</td>
<td>16.91</td>
<td>Accepted</td>
<td>70.88</td>
</tr>
<tr>
<td>26 May 1987</td>
<td>10th Single European Act</td>
<td></td>
<td>69.92</td>
<td>30.08</td>
<td>Accepted</td>
<td>44.09</td>
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<tr>
<td>18 June 1992</td>
<td>11th Maastricht</td>
<td></td>
<td>69.05</td>
<td>30.95</td>
<td>Accepted</td>
<td>57.31</td>
</tr>
<tr>
<td>22 May 1998</td>
<td>18th Amsterdam</td>
<td></td>
<td>61.74</td>
<td>38.26</td>
<td>Accepted</td>
<td>56.20</td>
</tr>
<tr>
<td>7 June 2001</td>
<td>24th Nice</td>
<td></td>
<td>46.13</td>
<td>53.87</td>
<td>Rejected</td>
<td>34.79</td>
</tr>
<tr>
<td>19 October 2002</td>
<td>26th Nice</td>
<td></td>
<td>62.89</td>
<td>37.11</td>
<td>Accepted</td>
<td>49.47</td>
</tr>
<tr>
<td>12 June 2008</td>
<td>28th Lisbon</td>
<td></td>
<td>46.60</td>
<td>53.40</td>
<td>Rejected</td>
<td>53.13</td>
</tr>
<tr>
<td>2 October 2009</td>
<td>28th Lisbon</td>
<td></td>
<td>67.13</td>
<td>32.87</td>
<td>Accepted</td>
<td>59.00</td>
</tr>
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and sovereignty in military matters (Costello 2005). Ireland also secured a declaration by the European Council on, inter alia, workers rights and social policy and a commitment that one European Commissioner should continue to be appointed from each EU member state.26

That the Lisbon protocols were not put in place when the original treaty was negotiated owes less to the intransigence of Ireland’s EU partners than the difficulties of knowing in advance what domestic constituents want. Putnam (1988, 452), it should be recalled, allows for the possibility that governments can be badly informed about their own political situation, with Moravcsik (1993b, 158) going further in his suggestion that domestic constituents have an incentive to conceal their preferences until a late stage of negotiations so as to maximize their leverage. A striking example of the latter phenomenon was the Irish Farmers’ Association’s decision to 2008 to withhold support for the Lisbon Treaty until the government declared its willingness to exercise a veto over World Trade Organization negotiations. Eurosceptic groups threw their own curve ball during the Lisbon Treaty campaign by going beyond longstanding concerns about abortion and defence to stoke fears about corporate taxation and the minimum wage (e.g. Coir 2008). Whereas Irish farmers were amenable to the politics of quid pro quo, Eurosceptic groups sought to defeat the treaty at all costs and so had little interest in seeking concessions. This speaks to Putnam’s (1988, 445) point about side-payments being a useful tactic in Level 2 games but only in relation to marginal voters. It also chimes with Moravcsik’s (1993b, 156) observation that attempts to manipulate domestic win sets are likely to struggle in the presence of concentrated opposition.

A fourth and final lesson from the Irish case is that the government, having had its hands tied by Crotty, eventually sought to loosen them. This response was not quick to materialise, with the Irish government waiting until the second referendum on the Lisbon Treaty in October 2009 before successfully proposing a new text be added to the Irish Constitution that ‘affirms ... [the country’s] commitment to the European Union within which the Member States of that Union work together to promote peace, shared values and the well-being of their peoples’ (Article 29.4.4). Although the rationale for this revision by Minister for Foreign Affairs Micheál Martin was to reflect ‘Ireland’s highly positive experience of membership going back to 1973’27 it can be understood as an attempt by the government to increase its room for manoeuver in relation to the Crotty test. Quite how successful this attempt will be in the long run is unclear (see Barrett 2012, 25) but the Irish government’s decision to ratify the Article 136 TFEU revision—a treaty change approved by the European Council in March 2011 under the simplified revision procedure with a view to establishing a stability mechanism for the euro area—without recourse to a referendum is suggestive of a more assertive approach to treaty ratification.28

Whether Crotty holds lessons for the EU Act will, of course, depend to some degree on differences between the two states’ political and legal systems. A key difference concerns party political cleavages over Europe. The fact that Ireland’s main parties are moderately pro-European makes parliamentary approval for EU treaty changes a largely pro forma affair. In Benoit’s study of Irish political party policy on Europe, Fianna Fáil, Fine Gael and Labour score 11.0, 10.4 and 10.6 respectively on the
question of EU accountability, where a score of 1.0 denotes a preference for the
direct accountability of the EU to citizens via the European Parliament, for example,
while a score of 20.0 favours indirect accountability via national governments
(Benoit 2009, 465). The corresponding score for UK political parties in Benoit and
Laver (2006, 251) was 11.8 for the Labour Party, as compared with 4.6 for the
Liberal Democrats and 17.8 for the Conservatives. This difference of political
opinion complicates the parliamentary stage of ratification in the UK. Whereas
Fianna Fáil, Fine Gael and Labour have generally backed EU treaty changes, neither
Labour nor the Conservatives have ever unequivocally supported a major treaty
change while in opposition. The effects of such inter-party differences are magnified
by intraparty differences, particularly in the case of the Conservatives, with John
Major facing a backbench rebellion over the ratification of the Maastricht Treaty in
1992 and party members remaining divided on the question of Europe to this day
(Web and Childs 2011). That the EU Act strengthens parliamentary control over the
ratification of EU treaties thus increases the prospects of involuntary defection by
the UK even before the role of the courts and the possibility of a referendum are
taken into account.

Turning to the courts, another key issue here is whether the UK government might
be more willing than its Irish counterpart to lock horns with the judiciary over a
decision to ratify treaty changes without resorting to a referendum. Judicial
reviews, Sterett (1994) observes, are now part and parcel of the UK’s system of
governance, but they clearly lack the status of constitutional reviews in Ireland
because of the principle of parliamentary sovereignty on which Westminster was
built. This can be seen most clearly in the European Convention on Human Rights
Act (ECHR) (1998) where even if a court finds a statute is in breach of the ECHR,
it is referred back to Parliament. The English courts, in other words, cannot strike
such legislation down. Similarly, the nature of review is different in relation to the
specific issue of whether or not to hold a referendum. While both systems allow for
judicial review of administrative action, only the Irish courts can find statutory
provisions void because they are unconstitutional.

In principle, this might make the UK government less risk averse than the Irish
government when it comes to treaty changes but a judicial review has the potential
to delay ratification in the UK. This was apparent during the passage of the Lisbon
Treaty, with Lord Justice Richards making it clear that ratification should not, in his
view, be concluded until the High Court had ruled on Stuart Wheeler’s challenge
(Parker 2008). The UK government might also be wary of litigation because the EU
Act makes it easier to challenge a government decision not to hold a referendum.
Whereas Wheeler’s case hinged on the inherently political question of whether the
government had delivered on an election manifesto pledge, the EU Act provides
greater leverage to future judicial reviews by setting out a detailed set of criteria
concerning the circumstances under which a public vote is required, with the
fulfilment of any one of these conditions sufficient to trigger a referendum. Such
detail ensures that the UK courts have considerably less room for interpretation
than Irish judges enjoy, but neither does it eliminate the possibility of judicial
discretion entirely. A key question is whether the courts will share the govern-
ment’s interpretation of the EU Act’s significance condition, which waives the need
for a referendum when the treaty imposes new requirements, obligations or sanctions on the UK that are not deemed significant without defining the meaning of significance.

Another unknown is whether Ireland’s practice of running a second referendum on rejected EU treaty changes would be open to the UK. Precisely how the UK electorate would decide in an as-yet hypothetical referendum cannot, of course, be known, but persistently low levels of popular support for EU membership in the UK provide few grounds for optimism. Whereas Ireland, in spite of its reticence towards treaty changes, saw popular support for EU membership average 66% between 1973 and 2009, this figure stood at just 37% for the UK (Figure 2). Although it was unable to prevent a ‘no’ vote against the Nice and Lisbon Treaties, the Irish people’s enthusiasm for EU membership provided a pretext for the government to return to the polls and made a ‘yes’ vote more likely than not. The UK government would find it considerably more difficult to construct such an argument given the EU’s low standing among the electorate, with Eurosceptics likely to seize the opportunity in the event of a ‘no’ vote on a particular treaty to push for a plebiscite on the more general question of EU membership.

All of this raises the question of how other EU member states might respond to a situation in which the UK votes ‘no’ to a future treaty change and then finds itself unwilling or unable to secure ratification through a second referendum. The answer from a two-level game perspective is that EU leaders might choose to walk away from the negotiating table rather than offer further concessions. Putnam (1988, 440) describes this as the ‘“sweet-and-sour” implications of win-set size’. Whereas self-imposed restrictions on a country’s win-set can, he notes, initially

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**Figure 2: Support for EU Membership in Ireland and the UK, 1973–2009**

- **Note**: Respondents were asked ‘Generally speaking, do you think that (your country’s) membership of the European Community (Common Market) is a good thing?’
- **Source**: Eurobarometer
confer a bargaining advantage, they could, if taken too far, lead to a situation in which the win-sets of the parties involved no longer overlap and negotiations result in deadlock.

Threatening to walk away from the negotiating table is, of course, a well-worn tactic when it comes to dealing with the UK’s antipathy towards European integration. Perhaps the most extreme example occurred at the Fontainebleau Summit in June 1984, with French President François Mitterrand raising the prospect of a two-speed Europe and Greek Prime Minister Andreas Papandreou calling on the UK to reconsider its membership of the EEC in an effort to produce agreement over the budget rebate and plans to complete the internal market. More subtle was Angela Merkel’s thinly veiled threat to the then Leader of Her Majesty’s Opposition, David Cameron, in December 2009, about opposing treaty change while championing the continued enlargement of the EU. If such tactics have encouraged UK chief negotiators over the years to choose a pragmatic rather than a principled approach towards the EU, then it remains to be seen whether such arguments would carry any weight with UK voters.

Two Test Cases of Treaty Ratification under the EU Act

Successive UK Prime Ministers have not only, as discussed above, sought to play down the constitutional significance of EU treaty changes so as to fend off calls for a referendum. They have also engaged in a degree of brinkmanship by using the veiled threat of ratification difficulties back home to secure opt outs from EU partners in sensitive areas of policy-making. Ceteris paribus, the EU Act is likely to codify this arrangement by signalling in advance what concessions the UK government needs in treaty negotiations to avoid a hard to win popular vote. Although section 4(1) of the Act appears to be an attempt to slow down the pace of European integration in the EU as a whole by making a referendum in the UK mandatory for a treaty that, *inter alia*, extends the objectives or competences of the Union, section 4(4) qualifies this by making clear that a referendum would not be necessary where the provisions do not apply to the UK.

How this ‘business as usual’ scenario might unfold is suggested by the UK’s response to the aforementioned Article 136 TFEU revision. Initially, a motion in support of this treaty change was laid before and approved by both Houses in March 2011. It was, however, decided to ‘re-ratify’ the Article 136 TFEU revision once the EU Act entered into force. In October 2011, the UK Foreign Secretary presented a ministerial statement to Parliament justifying the government’s decision not to seek a referendum on the grounds that the changes applied only to member states other than the UK. This was followed in May 2012 by the European Union (Approval of Treaty Amendment Decision) Bill 2012–13, this draft legislation being discussed in depth as the Bill made its way through three readings in both Houses and the usual committee stage before receiving royal assent in October 2012.

Business was by no means as usual in December 2011 when David Cameron decided to block negotiations over a revision to the EU treaty to establish a Fiscal Compact to foster closer economic policy coordination following the financial crisis. Whether such a treaty change would have triggered a referendum under the EU Act...
is debatable (see Yowell 2012 and Murkens 2012) given that it is almost certain that a ministerial statement on a decision not to hold a vote would have been challenged before the courts. Viewed from a two-level game perspective, therefore, the EU Act reduced the UK’s win set in December 2011 by creating uncertainty over the ratification process. Even if the prospect of a referendum was low, the Act still required ratification via Act of Parliament, a difficult proposition for a Prime Minister who saw 81 Conservative MPs defy a three-line whip over a referendum on EU membership in October 2011. Also true to the theory of two level games was the decision of other EU leaders to respond to Cameron’s credibility problem by walking away from the negotiating table. Having rejected the UK Prime Minister’s calls for UK concessions on sensitive single market issues, the other heads of state or government decided to by-pass UK (and Czech) opposition by adopting the changes through an intergovernmental treaty, binding on the remaining 25 member states. Yet another cautionary tale from Ireland for the EU Act occurred in relation to this treaty. Having initially kept open the possibility of ratification via parliamentary channels alone, the Irish government decided in February 2012 to hold a referendum on the Fiscal Compact. In the end, this treaty was comfortably ratified—60.3% voted in favour in a referendum in May 2012—but the decision to hold this vote was seen as a U-turn by the government.

Conclusion

‘For all of the theoretical advantages of a smaller win set’ as Evans (1993, 402–3) notes, ‘governments generally prefer to come to a negotiating table with as large a win set as possible or arrive with constraints that are not of their own choosing’. For students of International Relations, therefore, the EU Act can be seen as a rare case of a government tying its hands in relation to international treaty negotiations. Less significant here is the Act’s symbolic declaration of parliamentary sovereignty than its substantive provisions on the ratification of changes to the existing EU treaties. These changes give Parliament and, under certain conditions, the courts and the electorate a greater say in the approval of treaties, thus significantly restricting the core executive’s room for manoeuvre in an area of policy-making over which it has traditionally enjoyed considerable leeway (Burch and Holliday 2004).

Contracting one’s win set in this manner, Putnam suggests, brings potential risks as well as rewards. Chief among these risks is the possibility of involuntary defection, with stricter ratification procedures leaving the government unable to win approval at home for agreements negotiated in the international arena. Ireland’s experience of treaty changes in the light of the Crotty case speaks to this point. This landmark case before the Irish Supreme Court established the legal test that only those treaty changes going beyond the essential scope or objectives of the Communities and, therefore, inconsistent with the constitution require a referendum. In practice, the subtleties of this test were rarely taken into account, with successive governments putting all major treaty revisions—including the inter-governmental Fiscal Compact—to a referendum rather than risk constitutional challenge before the courts. Having thus seen its hands tied more than expected, the Irish government saw the risks of involuntary defection become reality, with the Treaties of Nice and Lisbon rejected first time round. That these ‘no’ votes occurred in spite of other
member states’ willingness to offer concessions to Ireland underlines the problems of double-edged diplomacy under conditions of imperfect information and in the presence of well-organised interest groups with intense preferences.

A government that finds its hands tightly bound in a two-level game may be in a stronger bargaining position in some circumstances, but it could see its credibility compromised if unable to deliver domestic backing for the results of international negotiations. The second of these scenarios is of relevance for understanding David Cameron’s decision to block plans for a EU treaty revision in December 2011. Faced with the prospect of a second backbench rebellion over the EU in as many months, the UK Prime Minister could not have been certain about his ability to win support for such a treaty change back home. The response of other EU member states to this situation was also consistent with the theory of two-level games, with the UK’s partners opting to press ahead with plans for an intergovernmental treaty rather than wait on a state that was either unable or unwilling to strike a deal.

For EU scholars, the EU Act can be viewed as part of a wider phenomenon of post-Lisbon constitutional politics. With the entry into force of the Lisbon Treaty in December 2009 some politicians sought to draw a line under further treaty changes after attempts to push through six major revisions in eighteen years. Nowhere was this view more prevalent than in the UK, with the May 2010 Coalition Agreement between Conservative and Liberal Democrats ruling out a ‘further transfer of sovereignty or powers [to the EU] over the course of the ... Parliament’ (Cabinet Office 2010, 19). In fact, the Lisbon Treaty has served only to intensify the process of treaty change in the EU, with 108 national ratification procedures launched over the period 2011–12 alone. The UK, it would seem, is not alone in reconsidering the rules of its Level 2 game in response to these developments, with the changes to Article 29.4.4 of Ireland’s constitution and the accompanying laws to increase parliamentary oversight of EU affairs passed in Germany in response to the Federal Constitutional Court’s Lisbon ruling (see Beichelt 2012) likely to have an important bearing on what can and cannot be negotiated at Level 1.

While future governments would, in principle, be free to undo the EU Act, Foreign Secretary William Hague has made clear his desire to see its provisions become part of the ‘accepted constitutional framework of this country’. For students of UK politics, therefore, the Act provides a further test case for the emergence of a ‘new Constitution’ (Bogdanor 2012). Of significance too is the fact that the EU Act challenges the conception of the referendum as an ad-hoc device used by the government to overcome internal party divisions (Bogdanor 2012, 32). This description may aptly apply to Harold Wilson’s decision to call a referendum on the UK’s continued membership of the EEC in 1975, Tony Blair’s U-turn over the need for a referendum on the Constitutional Treaty in 2004 and perhaps even David Cameron’s promise of an in-out referendum by 2017, but it struggles to explain the double-edged diplomacy behind David Cameron’s contingent offer of a hard to win referendum on all future EU treaty changes.

About the Authors

Dermot Hodson, Department of Politics, Birkbeck College, Malet Street, London WC1E 7HX, UK, email: d.hodson@bbk.ac.uk

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Notes

1. Earlier versions of this paper were presented in September 2011 at the Society of Legal Scholars Annual Conference and the University Association for Contemporary European Studies Annual Conference. Thanks to Gavin Barrett, Donal Coffey, John O’Dowd, Joni Lovenduski and anonymous referees for helpful comments. The usual disclaimer applies.

2. EU Act section 18.


4. EU Act Sections 2–5.

5. The Coalition Agreement (2010, 19) states that the government ‘will ensure that there is no further transfer of sovereignty or powers [to the EU] over the course of the next Parliament’.


7. Sections 2–3.

8. Article 48(2–5) TEU

9. Article 48(6) TEU

10. The EU Act also provides for a referendum before certain decisions under the existing treaties can be ratified (EU Act section 6) but the focus in this paper is on treaty revisions.

11. For an alternative view see Bogdanor (2012, 190), who sees the Act as curtailing Parliament’s ability to legislate.


13. EU Act sections 5(3) and 5(4)

14. EU Act sections 4(1)(a)–(h) and 4(2)

15. EU Act section 4(1)-(f)

16. EU Act section 4(1)(i)–(j)

17. EU Act section 4(1)-(k)

18. EU Act sections 4(1)(m) and 4(3)

19. EU Act section 3(4)

20. EU Act section 4(1)(i)

21. EU Act section 4(1)(j)

22. EU Act section 5(4)

23. [1987] IR 713. para. 6

24. According to Eurobarometer (2008, 11), 60% of ‘no’ voters saw the rejection of the Lisbon treaty as guaranteeing that Ireland would not have to change its law in this domain.

25. The European Council guaranteed this agreement in June 2009 but it was not until October 2011 that it sought to embed this guarantee in the treaty through the so-called ‘Lisbon protocols’.

26. The deal on the number of Commissioners took the form of a political agreement to invoke Article 17(5) TFEU, which allows member states to decide by unanimity not to reduce the size of the College of Commissioners from November 2014.


28. The decision to ratify this treaty change without referendum was also unsuccessfully challenged in the Irish Courts see *Pringle v. Ireland* [2012] IESC 47 (Supreme Court). A reference in that case was also made to the ECJ see Case C-370/12 *Pringle v. Ireland*, 27 November 2012.

29. See *Pringle* where the government won the case by a 4:1 majority in the Supreme Court.

30. Four treaty revisions were launched using the Simplified Revision Procedure during this period. They concerned: (i) transitional arrangements on the number of Members of the European Parliament; (ii) the revision to Article 136 TFEU to allow the creation of a stability mechanism for the euro area; (iii) the accession of Croatia to the EU; and (iv) Ireland’s Lisbon protocols. A treaty change concerning the
Czech Republic’s ‘opt out’ out from the Charter on Fundamental Rights—an eleventh hour concession secured by President Václav Klaus in December 2009 before he agreed to sign the Lisbon Treaty—was postponed as a result of domestic wrangling.


**Bibliography**


