

Institution: University of Liverpool
Unit of Assessment: 20 - Law
Title of case study: EU Constitutional Change and Its Legal Implications Within the UK
<p>1. Summary of the impact</p> <p>This case-study is based upon research by Prof Michael Dougan and Dr Michael Gordon (both members of the Liverpool European Law Unit) undertaken between 2008 and 2013. That work critically assesses a series of interlinked EU constitutional reforms, and their impact upon the EU's relationship to its Member States, with particular reference to the UK experience: first, the interpretation and implementation of the Lisbon Treaty 2007; secondly, the design and implications of the European Union Act 2011; thirdly, Britain's legal and political reception of the 2012 "Fiscal Compact" Treaty. The research's principal impacts have occurred within the period 1 January 2008 to 31 July 2013. They consist in providing a wide range of high-level institutional actors (including the European Court of Justice, the UK Foreign and Commonwealth Office and the House of Commons) with an objective and thorough critical evaluation of those major constitutional developments, so as directly to inform and assist their policy deliberations (including specific recommendations based directly on the research) on issues of fundamental importance to the future interests of the EU and the UK.</p>
<p>2. Underpinning research</p> <p>For over a decade, the EU has experienced a period of almost unbroken and often highly fraught constitutional reform. This has posed important legal challenges not just for the EU itself, but also for its Member States – not least the UK – as they seek to redefine their own relationship to the changing European landscape. Within that context, the research outputs detailed in Section 3 explore three main interrelated themes; in each case, identifying the key issues which should command legal and political attention, providing original and objective critical analysis of those issues, and offering practical recommendations to guide future policymaking.</p> <p>First, the adoption of the Lisbon Treaty 2007, which entered into force in 2009 and brought with it sweeping reforms to the EU. The research explores the constitutional significance of Lisbon for the fundamental structures and principles underpinning the EU's institutions, powers, procedures and policies. The research also addresses the impact of Lisbon upon the EU's system of fundamental rights protection, and discusses the new Treaty's relevance for broader debates about citizenship, democracy and legitimacy in Europe.</p> <p>Secondly, the UK's direct response to the Lisbon Treaty's entry into force through enactment of the European Union Act 2011. That legislation was proposed after the 2010 general election, in the light of the Conservative Party's manifesto pledge to reassess the UK's relationship to the EU. The Act is a major constitutional statute that radically increases public and parliamentary control over a host of decisions relating to British participation in European integration, as well as clarifying the fundamental legal basis of the UK's membership of the EU. The research critically assesses the Act's context, content and implications for both Britain and Europe.</p> <p>Thirdly, the conclusion of the Treaty on Stability, Coordination and Governance 2012 (the so-called Fiscal Compact). At a meeting of the European Council in December 2011, the UK controversially vetoed any changes to the post-Lisbon EU Treaties designed to tackle the Eurozone debt crisis. Instead, 25 Member States decided to pursue their reforms to governance of the single currency through the medium of an ordinary intergovernmental treaty. Here, the research explores various complex yet crucial questions: the relationship between the Fiscal Compact and the Lisbon Treaty's constitutional settlement for the EU as a whole; the interaction between the Fiscal Compact and the provisions of the EU Act specifically within the UK; and the broader implications of these developments for the UK's very place within the EU.</p> <p>All of the research underpinning this case-study was completed while Dougan was employed as Professor of European Law and Gordon as Lecturer in Public Law at the University of Liverpool. Some research outputs were published in peer-reviewed academic journals/edited collections. Others were written specifically at the invitation of/in response to consultations by major public</p>

bodies, but the latter papers were also drawn directly from academic publications in press or under preparation for future publication. All relevant research outputs were published after 1 January 2008. All associated impacts occurred during the period from 1 January 2008 to 31 July 2013.

3. References to the research

On the Treaty of Lisbon 2007, the key research output is a peer-reviewed article by Dougan in one of the field's leading journals: "The Treaty of Lisbon 2007: Winning Minds, Not Hearts" (2008) 45 *Common Market Law Review* 617-703. Derivative papers sought to summarise its main findings for non-academic audiences, e.g. "The Treaty of Lisbon: Selected Highlights" for the Foreign and Commonwealth Office (December 2009; 8,500 words); "Freer than we were" for *Parliamentary Brief* (February 2008 issue, Volume 11, Number 9; 2,000 words).

On the European Union Act 2011, the key research output is a peer-reviewed article by Dougan and Gordon in another of the field's leading journals: "The European Union Act 2011: 'Who Won the Bloody War Anyway?'" (2012) 37 *European Law Review* 3-30. This article was directly based on the authors' written evidence to the European Scrutiny Committee of the House of Commons.

On the Fiscal Compact 2012, the key research output consists of written evidence by Dougan and Gordon (12,000 words) submitted to the European Scrutiny Committee in response to its public inquiry *Possibilities for Reinforcing the Eurozone Following the December European Council*. That evidence provided the basis for two subsequent academic publications: "Some Thoughts Concerning the Draft Treaty on a Reinforced Economic Union" (2012) 49 *Common Market Law Review* 1-14 and "What do we want? 'Flexibility! Sort-of...'" (2013) 50 *Common Market Law Review* 673-682.

4. Details of the impact

Taken together, the research outputs detailed in Section 3 have led to a combination of significant impacts for a range of important beneficiaries, which can be divided into three main categories.

i) Benefiting the political and legal debate over Lisbon's ratification within the UK and beyond; while also assisting with the UK's legal preparations for implementing Lisbon

Within the UK, the research contributed to critical understanding of the Lisbon Treaty among the country's political leaders. First, it did so by helping to **inform Parliament's decision about whether or not to ratify Lisbon at all**. Dougan's analysis of various major EU reforms and their specific relevance for the UK, as summarised in "Freer than we were", was quoted (with approval) by Edward Davey MP during a Commons debate on the European Union (Amendment Bill) which led to the UK's ratification of Lisbon. The same paper was also the subject of direct (critical) correspondence by William Hague MP (then Shadow Foreign Secretary) in *Parliamentary Brief* (March 2008 Issue).

Secondly, the research also **directly assisted in Whitehall's preparations for implementing Lisbon**. In November 2009, Dougan was the primary speaker at the only in-house event organised for the entire Foreign and Commonwealth Office in preparation for Lisbon's entry into force. That event was designed to identify the new Treaty's potential implications for the UK and to explore the myriad challenges facing civil servants and diplomats. The FCO noted that the high turnout for this event meant that Dougan's work reached a wide audience, who appreciated his focus on those issues of greatest interest to, and that directly affected the work of, government policymakers. Moreover, the summary paper delivered at this event, drawn directly from Dougan's *CMLRev* analysis, was also widely circulated among the UK civil, legal and diplomatic services – including senior members of the FCO, the UK Permanent Representation to the EU, and the Cabinet Office.

In other EU Member States, ratification of the Lisbon Treaty caused problems more in the judicial than in the parliamentary context: **legal challenges were brought to Lisbon's compatibility with national constitutions** as concerns the extent to which it had created a new federal entity which threatened Member State sovereignty. In its 2009 ruling on the constitutionality of the Lisbon Treaty, the Latvian Constitutional Court cited "Winning Minds, Not

Hearts” as direct authority for confirming that Lisbon did not fundamentally change the legal character of the EU, nor the essential architecture of the EU’s judicial system, thus supporting the court’s decision that Lisbon’s ratification would not be incompatible with the Latvian constitution.

“Winning Minds, Not Hearts” has also **informed senior judicial understanding of other Lisbon reforms** particularly at the Court of Justice of the European Union: e.g. it was cited by Advocate General Trstenjak in the landmark *NS* case, as regards interpretation of the new Protocol on application of the Charter of Fundamental Rights to Poland and the United Kingdom; and by Advocate General Kokott in the equally important *Inuit* dispute, as representing the current state of scientific opinion, in the English-language scholarship, concerning Lisbon’s impact upon the access to justice of individual citizens directly before the EU courts.

ii) Benefiting Whitehall’s understanding and Parliament’s scrutiny of the EU Act 2011

In late 2010, Dougan and Gordon submitted **Written Evidence to the European Scrutiny Committee of the House of Commons for the purposes of its inquiry into the newly published EU Bill**. Evidence concerning Part 3 of the EU Bill, concerned with the impact of the draft legislation upon the fundamental UK constitutional principle of parliamentary sovereignty, was cited and discussed by the Committee in its final report. It was also cited, as making a “pretty powerful statement”, by Wayne David MP during the plenary debate in the House of Commons.

Moreover, evidence concerning Part 1 of the EU Bill, concerned with the legal and political problems associated with introducing a system of “referendum locks” on a wide range of EU matters, was described as “particularly useful” by the Committee and is cited repeatedly and extensively in its final report. **One point of particular influence concerned the authors’ unique research insight** that there were potential loopholes in the system of public and parliamentary control provided for under the EU Bill. Based on those research findings, the Committee specifically recommended amending the Bill so as to close those very loopholes. That aspect of the evidence was also highlighted during plenary debates in the House of Commons by both Emma Reynolds MP and William Cash MP.

In Autumn 2010, Dougan was **invited by the Foreign and Commonwealth Office to take part in a closed roundtable discussion** of academics and NGOs aimed at informing the department’s understanding of the detailed provisions and broader implications of the EU Bill. In March 2011, Dougan was also invited by The Constitution Trust to speak about the EU Bill to the **All-Party Parliamentary Group on the Constitution** (a regular meeting of parliamentarians from the House of Commons, the House of Lords and also the European Parliament to discuss issues of major constitutional concern): summarising the authors’ written evidence to the European Scrutiny Committee, as well as answering questions from the various parliamentary attendees, Dougan here sought to inform lawmakers’ critical understanding of the EU Bill at a key stage during its passage through the Commons and shortly before its consideration by the Lords.

iii) Benefiting the political and legal debate within Parliament over the Fiscal Compact, as regards its relationship to existing EU / UK law, and its broader future implications

In early 2012, Dougan and Gordon submitted **Written Evidence to the European Scrutiny Committee of the House of Commons, for its public inquiry into resolution of the Eurozone crisis**. Dougan was also among a small number of experts **invited to give Oral Evidence** to the Committee at a public evidence session.

That evidence was cited repeatedly and extensively by the Committee in its final Report. In particular, **the authors’ research findings directly informed the Committee’s critical evaluation of crucial but deeply contested constitutional questions** such as: whether the Commission’s roles under the Fiscal Compact were compatible with EU law; whether the EU Courts could legitimately be granted jurisdiction over the Fiscal Compact; and whether the UK had any legal grounds for objecting to the Fiscal Compact as a matter of EU law. The authors’ evidence was also directly cited by David Lidington MP (Minister of State for Europe) during an emergency House of Commons debate on the Fiscal Compact, as well as during the Minister’s own evidence to the European Scrutiny Committee.

After the adoption of the Fiscal Compact, the prospect of further EU constitutional reform prompted a broad political debate about the UK’s future place within/relationship to the rapidly

evolving EU legal landscape. In March 2012, the **Foreign Affairs Committee of the House of Commons launched a major inquiry into UK Government policy on the future of the European Union** in the light of the “December veto”. Dougan and Gordon **submitted Written Evidence** to that inquiry; the Committee itself solicited further views from Dougan and Gordon as the inquiry progressed.

Once again, that evidence was **cited repeatedly in the final report** of the Foreign Affairs Committee – the authors’ research findings serving directly to inform the Committee’s analysis and evaluation of key issues such as: the degree to which the legal obligations contained in the EU Act may have influenced the Government’s decision to exercise its veto over amendments to the EU Treaties; how far the EU Act should be seen as a watershed in the UK’s policy towards the EU; and the complex legal issues raised by the relationship between the EU Treaties and the Fiscal Compact. On that last point, Dougan and Gordon were specifically credited for having brought to the Committee’s attention the highly pertinent implications to be drawn from the recent *Pringle* ruling of the European Court of Justice (Case C-370/12; Judgment of 27 November 2012), which confirmed the authors’ interpretation of the legal relationship between the Fiscal Compact and the post-Lisbon EU legal order, as they had previously proposed to the European Scrutiny Committee.

Moreover, in his January 2013 keynote speech on the future of UK-EU relations, **the Prime Minister called for a debate about the possibilities for greater flexibility** in the terms of EU membership. In February 2013, Dougan was invited to speak on the legal framework for facilitating such greater flexibility within the EU legal order at a **closed-door, high-level policy forum** on *The Future of Europe* organised by Wilton Park (an agency of the Foreign and Commonwealth Office). That event was attended by politicians, political advisors, diplomats and political commentators from the UK and across the EU as well as the USA. Dougan presented the paper subsequently published in *CMLRev* as “What do we want?”. His presentation was followed by a plenary Q&A session in which attendees explored further the various legal and policy issues raised by Dougan’s analysis of the Prime Minister’s speech and the prospects for more flexible EU policymaking.

5. Sources to corroborate the impact

1. For documented impact on the European Scrutiny Committee’s deliberations concerning the EU Act, see [The EU Bill and Parliamentary Sovereignty \(10th Report of Session 2010-11\)](#): Written Evidence published at Ev 11 and Ev 32; Citations at paras 40 and 65 of Volume I. And [The EU Bill: Restrictions on Treaties and Decisions Relating to the EU \(15th Report of Session 2010-11\)](#): Written Evidence published at Ev 27; Citations at paras 38, 42, 45, 46, 48, 53, 54, 55, 76 and 99.
2. For documented impact on the European Scrutiny Committee’s analysis of the Fiscal Compact, see [Treaty on Stability, Coordination and Governance: Impact on the Eurozone and the Rule of Law \(62nd Report of Session 2010-12\)](#): Written Evidence published at Ev 60 and Ev 84; Oral Evidence published at Ev 16; Citations at paras 25, 26, 30-32, 36, 40-41, 46, 48, 51, 69, 71 and 73 of the Report; and also in Ev 42, Q 164.
3. For documented impact on the Foreign Affairs Committee’s inquiry concerning the Lisbon Treaty, EU Act and Fiscal Compact, see [The Future of the European Union: UK Government Policy \(1st Report of Session 2013-14\)](#): Written evidence published at Ev 110 and Ev 113 in Volume II; Citations at paras 23, 37, 45, 46, 80 and 122 of Volume I.
4. For documented impact in the various Commons debates referred to in Section 4, see: [HC Deb, 3 March 2008, c1524](#); [HC Deb, 25 January 2011, c187 and c208](#); [HC Deb, 11 July 2011, c76](#); [HC Deb, 29 February 2012, c346](#).
5. For documented impact on the various judicial proceedings referred to in Section 4, see: [Latvian Constitutional Court, Case No 2008-35-01 \(7 April 2009\)](#), paras 10.3 and 18.9; [Case C-411/10 NS \(Opinion of 22 September 2011\)](#), paras 169 and 176); [Case C-583/11 P Inuit Tapiriit Kanatami \(Opinion of 17 January 2013\)](#), para 28).
6. The Head of Europe Research Group at the FCO has provided a statement corroborating the nature of Dougan’s participation in the 2009 Lisbon Treaty seminar as well as the distribution of Dougan’s research within the UK civil service (as described in Section 4).
7. [Details of the 2013 Wilton Park policy forum](#) are available on their website (event reference: WP1215).