

SPRINGER BRIEFS IN LAW

Robert Böttner

Jan Grinc

**Bridging Clauses
in European
Constitutional Law**
Legal Framework
and Parliamentary
Participation



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Bridging Clauses in European Constitutional Law

Legal Framework and Parliamentary
Participation

 Springer

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Preface

When the general bridging clauses were introduced into EU primary law by the Treaty of Lisbon, they initially sparked some debates in academia. Since then, however, it seems that the passerelle clauses have fallen into a state of hibernation—both in political practice and in academia. Only recently, they have reappeared on the political radar in Brussels, as both the Commission and the European Parliament have identified bridging clauses as one means to overcome the current paralysis of the European project. Nevertheless, there is still little research and a lot of questions remain unclear, especially with regard to the relationship between European and domestic law on parliamentary participation.

The present study tries to fill this gap. It is the outcome of an independent collaboration between the two authors, both of which have dealt with questions of parliamentary participation in EU affairs and treaty amendment procedures in their previous research.

We want to thank all colleagues from academia and the national Parliaments for their help and information on domestic procedures of parliamentary participation. All errors, however, remain in our responsibility. We hope that the study meets the interest of everyone involved with and interested in bridging clauses and that it may spark a debate and provide some guidance for future practice. We welcome any comments or questions at boettner@uni-speyer.de or grinc@prf.cuni.cz.

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Chapter 1

Introduction

Bridging clauses are no innovation of the Treaty of Lisbon, but certainly the introduction of a *general* bridging clause considerably broadens the scope of application. With a simple act of secondary law the voting procedures in the Treaties can be altered. While it seems that the passerelle clauses have fallen into a state of hibernation after their introduction, they can have considerable ramifications once they unfold their potential. At the same time, their non-use seems to go hand in hand with a certain lack of interest in legal research. The present study tries to fill this gap. The focus will be on the role of national Parliaments.

This introductory chapter will outline the framework in which the bridging clauses are located. For that purpose, it will start with a general outline of national parliamentary participation as foreseen by EU primary law (Sect. 1.1) and, specifically, in the procedures for the amendment of the Treaties (Sect. 1.2). In a second step, we will take a look at the coming into being of the bridging clauses in the current Treaty regime (Sect. 1.3).

The first main part of the study is dedicated to the substantial law of the general bridging clauses. We will first define the scope of application of the general passerelles (Sect. 2.1). This includes identifying when these clauses can be used (Sect. 2.3) and which written and unwritten exceptions exist (Sect. 2.2). Moreover, we will take a look at the relationship between the two general bridging clauses (Sect. 2.4) and the legal effects of the use of these clauses (Sect. 2.5).

The second part will then deal with the special bridging clauses that are scattered throughout the Treaties, most notably the sector-specific passerelle clauses (Sect. 3.1), the bridging clause for the area of enhanced cooperation (Sect. 3.2) as well as what we call the “semi-passerelle clauses” (Sect. 3.4). Of a special interest is the relationship between the bridging clause found in the area of the Common Foreign and Security Policy and the general bridging clauses (Sect. 3.3).

The third part of the study will tackle procedural issues. This requires first to take a look at the procedural requirements that are found in the provision itself. The important and most complex element is the participation of the national Parliaments (Sect. 4.1). The procedure itself begins with the initiative of the European Council

(Sect. 4.2), followed by the period for national parliamentary veto (Sect. 4.3), and the requirement of the European Parliament to give its consent (Sect. 4.4). Finally, the decision to activate a bridging clause is taken by the European Council. While European law does not make any further requirements, a number of national legal orders have installed more rigid safeguards and mandating systems for the national European Council representative (Sect. 4.5). We will also shortly discuss similar procedural issues related to special bridging clauses (Sect. 4.6).

Lastly, we will try and draw conclusions. This includes the question whether the bridging clauses will ever be used.

1.1 Parliamentary Participation in EU Affairs According to EU Primary Law

The last Treaty revision has profoundly changed the parliamentary dimension of the European Union's institutional setting. This is true for the European Parliament, which is now a true co-legislator, as the former co-decision procedure is now the default legislative procedure. It also acts as co-legislator in budgetary measures and has an important function in the election of the European Commission.

Furthermore, the Treaty of Lisbon has fundamentally altered the position of the national Parliaments within the Union's multilevel governance structure. The importance of the parliamentary dimension at Union level is spelled out by Article 10 TEU, which states in its paragraph 1, that the functioning of the Union shall be founded on representative democracy. As elaborated by paragraph 2, this means that citizens are directly represented at Union level in the European Parliament and that Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens; the latter aspect reveals the national Parliaments' role in the indirect legitimation of Union power.¹ Based on this provision, a general postulate may be formulated that important binding decisions in the European Council and Council should not be taken *arbitrarily* by the Member State representatives, but rather in their continuous connection with the collective bodies representing the "institutional seat of popular sovereignty"² in the respective Member States. To ensure this is the task of both EU and national institutions, as documented precisely by the various EU and national legal arrangements pertaining to bridging clauses.

In addition, Article 12 TEU states that national Parliaments contribute actively to the good functioning of the Union. It lists the cases in which participation of national Parliaments as one of the constituent elements of Union action and in the

¹See on this aspect also Blanke and Böttner (2015), p. 258 ff., with further references.

²von Beyme (1999), pp. 543–544.

further development of the Union is required. These cases are then specified in different parts of the Treaties.³

First, national Parliaments shall contribute through being informed by the institutions of the Union and having draft legislative acts of the Union forwarded to them in accordance with the Protocol on the role of national Parliaments in the European Union (Article 12(a) TEU). Besides the general obligation of the Union institutions, most notably the Commission, to inform national Parliaments in accordance with Article 12 TEU and Protocol No. 1, there are a number of other provisions that explicitly grant national Parliaments a right to be informed.⁴ In this context, national Parliaments shall review draft legislation by seeing to it that the principle of subsidiarity is respected in accordance with the procedures provided for in the Protocol No. 2 on the application of the principles of subsidiarity and proportionality (Article 12(b) TEU).⁵ While the information duties of the Commission or other EU institutions do not cover e.g. draft non-legislative acts,⁶ in practice, the Commission transmits to the national Parliaments all the relevant documents it makes publicly available.⁷

Furthermore, the Parliaments of the Member States shall take part, within the framework of the area of freedom, security and justice, in the evaluation mechanisms for the implementation of the Union policies in that area, in accordance with Article 70 of the TFEU, and through being involved in the political monitoring of Europol and the evaluation of Eurojust's activities in accordance with Articles 88 and 85 of that Treaty (Article 12(c) TEU).

Moreover, national Parliaments are involved in the process of accession to the Union of new Member States (Article 12(e) TEU). They shall be notified of applications for accession to the Union, in accordance with Article 49 of the TEU. As that provision spells out, accession to the Union requires an agreement between the current Member States and the applicant State, which shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements. This usually requires a parliamentary vote of consent.

Interestingly, the Treaties regard national Parliaments not only as individual players in the institutional and governance architecture of the Union. While rights granted by the Treaties can be exercised by national Parliaments only individually

³For an overview, see also the comments on Article 12 TEU by Calliess, in Calliess and Ruffert (2016), Hölscheidt, in Grabitz et al. (2017), Bieber, in von der Groeben et al. (2015).

⁴See the overview in Bieber, in von der Groeben et al. (2015), Article 12 EUV, para. 17.

⁵On the role of national Parliaments for the review of subsidiarity, see Kiiver (2011, 2012), Molsberger (2009), Schima (2013), see also the commentary on Protocol No. 2 in Blanke and Mangiameli (2013).

⁶Such as draft decisions under the special bridging clauses that do not include the parliamentary veto (see Chap. 3) or some of the decisions requiring approval by the Member States in accordance with their respective constitutional requirements listed in Sect. 1.2.5.

⁷The Commission uses the e-TrustEx platform (Electronic Trusted Exchange of Documents). Many of the documents are also published on IPEX, The platform for EU Interparliamentary Exchange established by EU Speakers' Conference, at www.ipex.eu.