



# European Union Bill

## HC Bill 106 of 2010-11

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The *European Union Bill* aims to strengthen the UK procedures for agreeing to or ratifying certain EU decisions and Treaty changes, in particular, it would:

1. Provide for a **referendum** throughout the United Kingdom on any proposed EU treaty or Treaty change which would transfer powers from the UK to the EU.
2. Ensure that an Act of Parliament would have to be passed before a '**ratchet clause**' or a **passerelle** (bridging clause) in the European Union Treaty could be used. In addition, if the *passerelle* involved a transfer of power or competence from the UK to the EU, this would also be subject to a referendum before the Government could agree to its use.

The Bill would also:

3. Provide for a **sovereignty clause** in the *European Communities Act 1972* (ECA) confirming that ultimate legal authority remains with the UK Parliament rather than the EU.
4. Enable the UK to ratify a Protocol to allow additional **European Parliament seats** for the UK and 11 other Member States during the current EP term, and to legislate for the extra UK seat.

The Bill comes in the context of new EU methods of approving Treaty changes and calls for more public and/or parliamentary involvement in such decisions. This paper looks at each of the Bill's aims, their implications and how they might be implemented.

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## Research Paper 10/79

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## Summary

[Bill 106](#) strengthens the provisions of the *European Union (Amendment) Act 2008* Act with explicit procedures for agreeing to or ratifying certain EU decisions or Treaty changes. The Bill received its First Reading in the House of Commons on 11 November 2010. The Commons Second Reading debate is on 7 December 2010. The Foreign and Commonwealth Office (FCO) published [Explanatory Notes](#), a [short Factsheet](#) and a [long Factsheet](#) on the Bill. The European Scrutiny Committee took oral and written evidence for an [Inquiry](#) on the Bill's 'sovereignty clause' in November 2010.

The Bill is concerned with four main topics:

### **The referendum lock**

The [Conservative election manifesto](#) in 2010 pledged to "restore democratic control" in the UK's relations with the European Union by means of a "referendum lock", a mechanism by which a referendum would have to be held before certain competences or powers could be transferred from the UK to the EU.

The [Coalition Agreement](#) of 11 May 2010 expanded on and clarified on this, promising to amend the *European Communities Act 1972* so that any proposed future Treaty that transferred power or competences from Westminster to the EU would be subject to a referendum on that Treaty.

### **Use of the Simplified Revision Procedures ('ratchet clause' and *passerelle*)**

The Lisbon Treaty introduced new Treaty revision procedures which do not require the traditional amendment and ratification methods. The so-called 'ratchet clause' allows the Treaty's provisions in the main areas of Union policy to be changed by a unanimous decision of the European Council and the approval of Member States. The *passerelle* allows for changes to be made to EU voting rules, replacing unanimity by qualified majority voting, without a formal Treaty amendment.

Decisions made using these procedures might require a referendum or an Act of Parliament before they can be approved or adopted in the UK. The Government believes this will put the UK on a similar footing to Member States such as Germany, where certain Treaty articles are subject to parliamentary agreement.

### **European Parliament extra seats**

In June 2010 Member States reached agreement on a transitional protocol to allow an adjustment of the distribution of Members of the European Parliament (MEPs) between 12 EU Member States. The UK receives an extra MEP to make 73 in all. The Protocol requires ratification by all Member States. As it amends the EU Treaties an Act of Parliament is required for its approval and ratification, and legislation is also needed for the European Parliament (EP) seat to be filled. The Cabinet Office Parliamentary Secretary, Mark Harper, [announced on 26 October 2010](#) that, based on the 2009 EP election results, the extra seat would go to the West Midlands. The [Conservative Home blog](#) reported on 26 October that the additional MEP seat would be allocated to a Conservative.

### **Sovereignty clause**

On 6 October 2010, at the Conservative Party Conference, the Foreign Secretary, William Hague, indicated that the Bill, which would include a 'sovereignty clause' to confirm the UK

Parliament as the ultimate legal authority in the UK. David Lidington further clarified the sovereignty clause in a [written statement on 11 October 2010](#), making it explicitly clear that EU Directives could take effect in the UK only by the will of Parliament, which could be withdrawn at any time.

# 1 Background

## 1.1 Conservative and Coalition election pledges

In opposition the Conservative leadership pledged that if they came to power in the 2010 general election, they would change the UK's relationship with the EU because the "steady

### A Conservative government will

- change the law so that never again would a government be able to agree to a Treaty that hands over areas of power from Britain to the EU without a referendum. That would include any attempt to scrap the pound for the euro;
- change the law so that any use of these "ratchet clauses" would require full approval by Parliament, and where they amount to handing over an area of power, e.g. abolishing vetoes over foreign policy, a referendum would be required.

*Conservative Party: Where we stand: Europe*

and unaccountable intrusion of the European Union into almost every aspect of our lives has been made worse by the Lisbon Treaty".<sup>1</sup> The party Leader, David Cameron, said that a referendum on ratification of the Lisbon Treaty would be held if that Treaty had not already come into force, and that a Conservative government would amend the *European Communities Act 1972* (ECA) to make any future EU Treaty that transferred powers from the UK to the EU subject to a referendum. The British people, Cameron said, "must be in charge of their future in Europe". This would resemble the position in Ireland, where the Supreme Court ruled in 1987 that a major transfer of power to the EU had to be approved by

referendum - and has effectively meant that the Irish people have voted on every EU treaty amendment since 1987.

The Conservatives and 15 Liberal Democrat MPs voted in favour of a referendum on the Lisbon Treaty during the passage of the *European Union (Amendment) Bill* in 2008, but the amendment clauses were defeated.<sup>2</sup> The Lisbon Treaty came into force on 1 December 2009.

The Conservative election manifesto in 2010 pledged to "restore democratic control" and institute a "referendum lock" with regard to proposals to transfer power from the Member States to the EU. Any future treaty or *passerelle* clause that transferred competences from Westminster to Brussels would have to be submitted to a referendum and the latter would in all cases have to be approved by an Act of Parliament. Both the Conservative and Liberal Democrat election manifestos contained a commitment to holding a referendum before the UK could join the euro. The Liberal Democrats, traditionally pro-European Union, had called for a referendum on the UK's EU membership, although a pledge to hold one was abandoned in their election manifesto. Nick Clegg signed up to the Coalition Agreement proposal for the "referendum lock" and primary legislation for any use of a *passerelle*.

**Passerelle** is a French word meaning 'footbridge' and has also been called a 'bridging' or 'escalator' clause, as it allows the parties to move a policy issue from unanimous decision-making (inter-governmentalism) to Qualified Majority Voting (the so-called "Community" method), without an Intergovernmental Conference.

By May 2010 a post-ratification referendum on the Lisbon Treaty was no longer a viable option for the new Conservative-led Coalition Government. However, legislation to introduce

<sup>1</sup> [Conservatives, "Where we stand: Europe"](#)

<sup>2</sup> For information on referendum clauses in EU bills, see Library Standard Note 4650, "EU Treaty Bills: the Whip and Referendum Clauses", 22 January 2008

a “referendum lock” on future transfers of power was announced in the [Queen’s Speech in May 2010](#).

In November 2009, in a speech on his party's policy towards the European Union, David Cameron also promised a future United Kingdom Sovereignty Act “to make clear that ultimate authority stays in this country, in our Parliament”. He insisted this was “not about Westminster striking down individual items of EU legislation”, but that it would “put Britain on a par with Germany, where the German constitutional court has consistently upheld ... that ultimate authority lies with the bodies established by the German constitution”.<sup>3</sup> Later, the Coalition Agreement also stated that the Government would “examine the case” for a UK Sovereignty Bill. At the Conservative Party Conference on 6 October 2010 the Foreign Secretary, William Hague, said the referendum lock bill would now include a sovereignty clause making it explicitly clear that EU directives could take effect in the UK only by the will of Parliament, which could be withdrawn at any time.

“This approach strikes the right balance between constructive engagement with the EU to deal with the issues that affect us all, and protecting our national sovereignty”.

**FCO Background Note on EU Bill**

William Hague outlined to the [Conference](#) the Government’s reasoning behind the new Bill, which was largely to restore “democratic legitimacy” to the EU by allowing the electorate to vote on certain EU matters before decisions were made by the Government. He spoke of the previous Government’s “disgraceful failure to hold a referendum” on the Lisbon Treaty (even though it had promised to hold one on the very similar *Treaty Establishing a Constitution for Europe*).

The *European Union Bill* aims to do four things:

- Provide for a **referendum** throughout the United Kingdom on any proposed EU treaty or Treaty change which would transfer powers from the UK to the EU.
- Ensure that an Act of Parliament would have to be passed before a **passerelle** (bridging clause) in the European Union Treaty could be used. In addition, if the *passerelle* involved a transfer of power or competence from the UK to the EU, this would also be subject to a referendum before the Government could agree to its use.
- Provide for a **sovereignty clause** in the *European Communities Act 1972* (ECA) confirming that ultimate legal authority remains with the UK Parliament rather than the EU.
- Enable the UK to ratify a Protocol to allow additional **European Parliament seats** for the UK and 11 other Member States during the current EP term, and to legislate for the extra UK seat.

The FCO Factsheet on the Bill states that the Bill will not:

- Weaken the role the UK plays in the EU
- Lead to a referendum on countries wishing to join the EU
- Lead to a referendum on the Lisbon Treaty
- Lead to a referendum on EU membership<sup>4</sup>

<sup>3</sup> “Cameron speech on EU” [BBC News 4 November 2009](#)

<sup>4</sup> FCO [EU Bill Factsheet](#)



The Bill does not make clear what exactly **competence** and **power** mean. The explanatory notes (ENs) on the bill describe **competence** as “the ability for the EU to act in a given area”. Articles 4 and 5 TEU explicitly define the limits of Union competences, which are *conferred*

A ‘**competence**’ is “the ability for the EU to act in a given area”.

A ‘**power**’ is a “Treaty change that abolishes national vetoes or confers a new power on an EU institution or body to impose an obligation or sanctions on the UK”.

**Explanatory Notes to Bill 106**

by the Member States on the basis of subsidiarity<sup>5</sup> and proportionality. Article 4 TEU makes clear that competences not conferred upon the Union remain with the Member States. In other words, there is a statement, rather than just a presumption, in favour of Member State competence.

The Treaties do not define what a **power** is. Under Part 1 of the Bill a transfer of power could be, for example, the replacement of unanimous voting or agreement by consensus or common accord - whereby each Member State has a power of veto - to QMV, where an individual Member State may be outvoted and forced to adopt an unpopular or unwanted measure. Other examples in the Bill are of an EU institution or body being conferred with the power to impose a requirement, obligation or sanction on a Member State.<sup>6</sup>

Under the Bill’s ‘**significance clause**’ ministers will decide what constitutes a transfer of powers. With ministerial discretion, however, it could be more difficult to ascertain what would constitute a “significant” transfer of powers.

## 1.2 How the EU Treaties are amended

Until the *Treaty of Lisbon* came into force in December 2009, competence (the ability to act) was *explicitly* transferred from Member States to the EU only through Treaty amendment. Amendments were agreed unanimously by Member States at an Intergovernmental Conference (IGC) and took the form of an amending treaty.

The Lisbon Treaty introduced in amended Article 48 of the *Treaty on European Union* (TEU) new procedures for amending the EU Treaties.<sup>7</sup> The “Ordinary Revision Procedure” (ORP) requires Member State ratification for future revision of the TEU and TFEU and is similar to the previous method, involving the convening of an Intergovernmental Conference (IGC). The “Simplified Revision Procedures” do not involve full Treaty revision processes and are largely a departure from the traditional Treaty revision method. It is these procedures with which the Bill is above all concerned.

The broad intention behind amended Article 48 was to clarify, and to some extent to simplify, the EU’s Treaty amendment procedures, and thus to move away from the sometimes cumbersome and time-consuming IGCs. The use of the Convention process, already

<sup>5</sup> The principle that the Union will act only if the objectives of the intended action cannot be sufficiently achieved by the Member States acting alone.

<sup>6</sup> David Lidington, Jeremy Browne, 11 November 2010, published at <http://conservativehome.blogs.com/files/document.pdf>. Curiously, when asked by Lord Tebbit about transfers of sovereignty and powers from the UK to the EU since 1972, the FCO Minister, Lord Howell, spoke instead of transfers of “competence” and listed the five EU Acts that had implemented five European Treaties since 1972, *HL Deb 10 November 2010 WA81*

<sup>7</sup> The EU Treaties now comprise the TEU and the *Treaty on the Functioning of the European Union* or TFEU, which is the amended *Treaty Establishing the European Communities* (TEC).

rehearsed in drawing up the Charter of Fundamental Rights and the EU Constitution, aims to widen input to the amendment process and make it more transparent.

Under general treaty law, where a treaty provides for its own amendment, those procedures should be followed.<sup>8</sup> For the EU Treaties Article 48(2)-(5), the Ordinary Revision Procedure, has become the method for amendment.

The *European Union (Amendment) Act 2008*, which was passed under the previous Labour Government, set out specific parliamentary procedures to be completed before Treaty change could be approved in the UK under the new procedures. It provided that amendments to the EU Treaties (TEU, TFEU or Euratom Treaty) agreed under the ORP had to be approved by an Act of Parliament. With regard to the simplified Treaty revision procedures, it set out a process for obtaining parliamentary approval by means of a motion agreed by each House approving the Government's intention to support the adoption of a specified draft decision. This applied to eight Treaty Articles.<sup>9</sup>

### **Ordinary Revision Procedure**

Under the Ordinary Revision Procedure (ORP), set out in amended Article 48(2)-(5) TEU, proposals for a Treaty amendment may come from a Member State, the EP or the Commission. The proposals are submitted to the Council (of EU Ministers), which passes them to the European Council (the meeting of Heads of State and Government). National parliaments are notified. The European Council then has to decide whether to submit the

The **Convention method**, used to draw up the draft *European Charter of Fundamental Rights* and the *Treaty Establishing a Constitution for Europe*, is now part of the **Ordinary Revision Procedure**. The European Council may decide by a simple majority to convene a Convention, but the Convention's proposals are decided by the unanimous agreement of an **Intergovernmental Conference (IGC)**, and the resulting Treaty amendments are ratified by all Member States. An IGC may be called without a Convention, if the extent of the proposed amendments does not justify convening one.

proposals for further examination, which it does by means of a decision by simple majority, after consulting the EP and Commission. If a decision is adopted to consider the proposals further, the President of the European Council calls a Convention. The Convention includes representatives of the national parliaments, the Heads of State or Government, the EP and the Commission. If the proposals concern institutional changes in the monetary area, the European Central Bank (ECB) is also consulted. The Convention then makes a recommendation, adopted by consensus, to an IGC, which is convened "for the purpose of determining by common accord the amendments to be made to this Treaty".

An alternative procedure is available whereby, if the European Council feels that the "extent" of the proposed amendments is not such as to justify consideration by a Convention, it may make a decision to this effect, by a simple majority and after obtaining the EP's consent. The European Council then defines the terms of reference for an IGC and there is no Convention.

<sup>8</sup> [Vienna Convention on the Law of Treaties 1969, Article 40](#)

<sup>9</sup> Article 48(6) TEU, Article 48(7) TEU, Article 31(3) TEU, Article 81(3) TFEU, Article 192(2) TFEU, Article 312(2) TFEU, Article 333 TFEU

The amendments in both cases take the form of a treaty, which must be ratified by all Member States before it can enter into force.

It is debateable whether this system will always be simpler or more efficient than the previous one under Article 48 TEU. It has more stages and more actors, which may lead to greater scope for disagreement. On the other hand, it does allow wider input and perhaps enhanced credibility. Since Lisbon came into force, there has been one short IGC, not preceded by a Convention, on the basis of a European Council decision in June 2010, to consider Treaty amendments concerning the composition of the European Parliament.

There is a procedure in case of difficulty in gaining universal ratification. The matter is referred to the European Council if, two years after the signature of an amendment treaty, four-fifths of the Member States have ratified it, but one or more have “encountered difficulties in proceeding with ratification”.

### ***Simplified Revision Procedures (‘ratchet clauses’ and passerelles)***

These are set out in Article 48(6) and (7) TEU.

#### **The ‘ratchet clause’**

Article 48(6) TEU allows Treaty changes to be made without the necessity of a new, amending treaty and universal ratification (as required under the ORP). However, some of the features of a treaty amendment are preserved.

Article 48(6)-(7) provides a simplified way of changing Treaty provisions in the main areas of Union policy set out in Part Three of the TFEU. Either Member State governments or the EP or the Commission may submit to the European Council proposals for changes to these policies. For the proposals to be adopted the European Council must first consult the EP and the Commission (and the ECB if the proposals are for institutional changes in the monetary area) and then it must act by unanimity. The decision thus adopted must be “approved by the Member States in accordance with their respective constitutional requirements.” This is not necessarily the same thing as treaty ratification, but it creates a possibility for national input and a national veto.

The fear that ‘competences’ could be acquired by this ratchet-like mechanism is addressed – though not sufficiently for many – by the stipulation in Article 48(6) that this kind of decision “shall not increase the competences conferred on the Union in the Treaties”.

One of the problems of legislating to exert national control over the use of Article 48 TEU is that there is no agreed definition of a ‘ratchet clause’. The Government uses the term ‘ratchet clause’ for both Article 48(6) and (7) procedures. As David Lidington pointed out in a Written Statement on 13 September 2010:

... some provide for a modification of the EU treaties without recourse to formal treaty change, others are one-way options already in the treaties which EU member states can decide together to exercise and which allow existing EU competence or powers to expand. Examples include clauses which would add to what can be done within existing areas of EU competence, such as the ability to add to the existing rights of EU citizens; and clauses on the

composition or procedures of EU institutions and bodies, such as a change to the number of European Commissioners.<sup>10</sup>

He defined ratchet clauses that would trigger a referendum as those that would transfer “an area of competence or power from the UK to the EU, such as the clause which would allow certain decisions in common foreign and security policy to be taken by majority voting rather than by unanimity”. In its background note on the bill in May 2010, the Government had said that “The use of any **major** ratchet clause, which amounted to the transfer of an area of power to the EU, would also be subject to a referendum”.

### The *passerelle*

Article 48(7) TEU provides *passerelle* or bridging procedures. These procedures, which allow for changes to the voting procedures for measures to be changed from unanimity to QMV, have led commentators to speak of “self-amending” EU Treaties.<sup>11</sup>

The previous EC/EU Treaties contained four *passerelle* provisions, Article 42 TEU (on police and judicial co-operation), Articles 67(2) TEC (immigration and asylum), 137(2) TEC (social policy matters) and 175(2) TEC (environmental policy matters), only one of which, Article 67(2), was activated. However, the previous Treaty did not give a possibility of veto to national parliaments.

Apart from the General provision on the *passerelle* under Article 48(7), there are six further *passerelle* provisions in the following areas:

- CFSP, but not in anything with defence or military implications (Article 31(3))
- Judicial co-operation, particularly in the area of family law where the EU has power to act (Article 81(3))
- Further extension of provisions on the environment (Article 192(2))
- Agreeing the multiannual budget (Article 312(2))
- Areas of social policy and employment law where the EU has power to act (Article 153(2))
- Enhanced co-operation (Article 333).

Article 48(7) provides that where the TFEU or Title V TEU (“General Provisions on the Union’s External Action and Specific Provisions on the Common Foreign and Security Policy”) stipulate decision-making by unanimity, the European Council (composed of the heads of state or government of the 27 Member States) may decide to authorise the Council to act instead by Qualified Majority Voting (QMV – roughly two-thirds of Council votes). Decisions with military or defence implications are excluded from potential moves of this kind. Article 48(7) also contains an equivalent provision for those laws adopted under a special legislative procedure,<sup>12</sup> which also means changing from unanimous voting to QMV.

In both cases - under Article 48(6) and 48(7) - a European Council initiative to change the voting procedure in a given area is notified to national parliaments, which have the opportunity to block the move. If a national parliament makes known its opposition to an initiative within six months, the decision will not be adopted.

<sup>10</sup> [Ibid cc 32-3WS](#)

<sup>11</sup> Commenting on former Article 42 TEU, an earlier *passerelle* clause, the UK European Scrutiny Committee, in its [41st Report, 2005-06](#), referred to the *passerelle* as a “gangplank”, much to the annoyance of the EP Constitutional Affairs Committee.

<sup>12</sup> Of the 34 ‘special legislative procedure’ provisions in the TEU; “most entail unanimous voting in the Council with consultation of the EP, but a few provide for unanimous voting with EP consent, or for QMV in Council with EP consultation. Three provide for the EP to adopt legislation with a lesser involvement of the Council”, Professor Steve Peers, [Statewatch briefing on the EU Bill](#), November 2010.

## 2 Referendums

The nature of the UK's relationship with the EU and the way in which the UK consents to changes in it has been controversial almost from the day the UK joined the EEC. Referendums and calls for them have been central to this debate. The first way in which the Bill would strengthen the current provisions on agreeing to or ratifying EU measures is by introducing referendums.

### 2.1 1994-2004

A UK-wide referendum was held in 1975, following renegotiation of the UK's terms of entry into the EEC, but this was not linked to legislation to implement a new treaty. Primary legislation, in the form of the *Referendum Act 1975*, set out the question and the franchise. An unusual feature of the 1975 campaign was the fact that the Government in effect agreed to suspend the normal convention of collective responsibility and individual Cabinet members campaigned on different sides.<sup>13</sup>

Perhaps surprisingly, the *European Communities (Amendment) Act 1987* to implement the *Single European Act* generated little debate on the subject of a mandate for closer European integration. The referendum began to feature as a major issue when the then Prime Minister, Margaret Thatcher, raised the question during the leadership contest of late 1990,<sup>14</sup> but the new Prime Minister, John Major, refused a referendum on the *Treaty on European Union* (Maastricht Treaty), despite repeated requests.<sup>15</sup> On 3 April 1996 he announced that the Cabinet had agreed to hold a referendum on a single currency under certain circumstances, namely if the Cabinet supported the UK joining and after the passage of the single currency legislation. On 20 November 1996 Mr Blair announced that the Labour Party would also hold a referendum on a single European currency.<sup>16</sup> The Liberal Democrats supported a referendum. The Referendum Party was formed to fight the 1997 election on a platform of a referendum on joining a 'federal Europe' versus returning to "an association of sovereign nations that are part of common trading market".<sup>17</sup> The UK Independence Party (UKIP) also campaigned for a referendum on the terms of the UK's association with the EU.

Referendums did not take place in connection with the Amsterdam and Nice Treaties, because the Government in each case rejected calls for one. The then Leader of the Opposition, William Hague, called for a referendum on the Amsterdam Treaty at the Scottish Conservative Party conference on 27 June 1997. This demand was repeated by the then shadow Foreign Secretary, Michael Howard, at the Conservative Party Conference on 8 October 1997. Mr Hague said that a Conservative government would not ratify the *Treaty of Nice* as it stood and implied that the party would submit it to a referendum.<sup>18</sup> The then Prime Minister rejected calls for a referendum on the Amsterdam Treaty in parliamentary answers of July 1997,<sup>19</sup> and announced that he would not hold one on the Nice Treaty.<sup>20</sup> The then

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<sup>13</sup> For further details see [Research Paper 04/82 \*The collective responsibility of ministers: an outline of the issues\*](#), 15 November 2004

<sup>14</sup> "Referendum hint as Thatcher vows to fight on" *Sunday Telegraph* 18 November 2005

<sup>15</sup> For full details see Library Research Paper 95/23 *Referendum*, 21 February 1995

<sup>16</sup> Briefing Note from office of Tony Blair 20 November 1996. For full text see Research Paper 97/10 *Referendums: Recent Proposals* p19

<sup>17</sup> For text see *ibid* p20

<sup>18</sup> HC Deb 11 December 2000, c353.

<sup>19</sup> HC Deb 2 July 1997, c289 and 9 July 1997, c 933.

<sup>20</sup> HC Deb 11 December 2000, c356.

Minister for Europe, Denis MacShane, said in reply to a question from Boris Johnston in February 2003:

This country does not have a tradition of plebiscites that allow populists to range over plebiscitary politics, using their weekly magazines to pump out endless anti-European propaganda. Every previous treaty from the treaty of accession in 1973 to Maastricht, Nice and Amsterdam has been debated properly in the House, and I think that ratification by Parliament is the right way forward.<sup>21</sup>

A draft bill was published in January 2004 for a referendum on the Single European Currency but there was no renewal of a referendum commitment after the 2005 general election.<sup>22</sup>

## 2.2 Proposed referendum on the EU constitution

On 30 March 2004 Jack Straw, then Foreign Secretary, responded to an Opposition Day debate which called for a referendum on the draft *Treaty Establishing a Constitution for Europe* (the so-called “EU constitution”) by stating that it was for Parliament to decide whether the treaty became part of UK law.<sup>23</sup> The Government had ruled out a referendum on the grounds that the draft constitution raised no particularly difficult constitutional issues and “the proposed changes, though important, do not involve any fundamental change in the relationship between the European Union and the Member States”.<sup>24</sup> A referendum would also be inappropriate, he said, because the decision would be difficult to reduce to a simple yes/no question. However, following press speculation about prospects for the Labour Party in the forthcoming European Parliament elections of June 2004,<sup>25</sup> Tony Blair announced the referendum on 20 April 2004:

It is right to confront this campaign head on. Provided that the treaty embodies the essential British positions, we shall agree to it as a Government. Once agreed—either at the June Council, which is our preference, or subsequently—Parliament should debate it in detail and decide upon it. Then, let the people have the final say. The electorate

“should be asked for their opinion when all our questions have been answered, when all the details are known, when the legislation has been finally tempered and scrutinised in the House, and when Parliament has debated and decided.”—[*Official Report*, 21 May 1997; Vol. 294, c. 735.]

If Conservative Members object to that, it is a quote from the right hon. and learned Gentleman the Leader of the Opposition, speaking about referendums in 1997.<sup>26</sup>

The Liberal Democrats also supported a referendum on adoption of the proposed EU constitution.<sup>27</sup>

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<sup>21</sup> HC Deb 25 Feb 2003 c114

<sup>22</sup> For further details see Library Standard Note 2851 *The draft single European currency (referendum) bill* at <http://hcl1.hclibrary.parliament.uk/notes/pcc/snpc-02851.pdf>

<sup>23</sup> HC Deb 30 March 2004 c1507

<sup>24</sup> Government White Paper, *A Constitutional Treaty for the EU: The British Approach to the European Union Intergovernmental Conference*, Cm 5934 p. 24. See also *Guardian*, 19 April 2004 at <http://politics.guardian.co.uk/eu/comment/0,9236,1194988,00.html>

<sup>25</sup> See for example “Cabinet kept in dark on policy switch” *The Guardian* 20 April 2004

<sup>26</sup> HC Deb 20 April 2004 c157

<sup>27</sup> HC Deb 20 April 2004 c162. For further information on referendum views, see Standard Note SN/IA/3040, *IGC 2004: issues surrounding UK ratification of the European Constitution* 10 May 2004 at <http://hcl1.hclibrary.parliament.uk/notes/iads/sn-03040.pdf>

The *European Union Bill*<sup>28</sup> was introduced on 25 January 2005 and had its second reading on 9 February 2005. The Bill made no further progress and was lost with dissolution for the general election of May 2005. Background to the Bill is set out in Library Research Paper [05/12 the European Union Bill](#).

The Labour manifesto for the May 2005 general election stated:

The new Constitutional Treaty ensures that the new Europe can work effectively, and that Britain keeps control of key national interests like foreign policy, taxation, social security and defence. The Treaty sets out what the EU can do and what it cannot. It strengthens the voice of national parliaments and governments in EU affairs. It is a good treaty for Britain and the new Europe. We will put it to the British people in a referendum and campaign whole-heartedly for a 'Yes' vote to keep Britain a leading nation in Europe'.<sup>29</sup>

The Conservative manifesto stated that the party opposed the "EU Constitution and would give the British people the chance to reject its provisions within six months of the General Election".<sup>30</sup> The Liberal Democrat manifesto supported the EU Constitution but declared "ratification must be subject to a referendum of the British people".<sup>31</sup>

The Bill was reintroduced on 24 May 2005 [Bill 5, 2005-06]. On 29 May and 1 June 2005 the draft Constitution was rejected in referendums in France and the Netherlands respectively. On 6 June 2005 the Foreign Secretary announced that the Government would postpone the Second Reading of the Bill because "until the consequences of France and the Netherlands being unable to ratify the treaty are clarified, it would not in our judgment now be sensible to set a date for the Second Reading".<sup>32</sup> Mr Straw said the Government would "keep the situation under review, and ensure that the House is kept fully informed". In the event, that Bill also fell at the end of the 2005-6 session, without having made any progress.

### 2.3 Calls for a referendum on the *Treaty of Lisbon*

Calls for the UK to hold a referendum on the Reform Treaty, as the Lisbon Treaty was initially known, intensified over the summer of 2007. On 30 August 2007, the former Cabinet Minister, David Blunkett, was reported to have challenged the Prime Minister to explain why a referendum on the new Reform Treaty (which was very similar in substance to the EU Constitution, and later became the *Treaty of Lisbon*) was considered unnecessary. The then Foreign Secretary, David Miliband, stated that the new Treaty was different in "absolute essence" to that which had failed in 2005.<sup>33</sup> On 1 September 2007, the then Minister for Europe, Keith Vaz, suggested that a referendum on the UK's continued membership of the EU could take place on the same day as polling day in the next general election.<sup>34</sup> During its conference in September 2007, the TUC called on the Government to hold a referendum<sup>35</sup> and a cross party campaign was launched to increase pressure during the party conference season.<sup>36</sup> The Liberal Democrat leader, Sir Menzies Campbell, said: "If there is to be a referendum it shouldn't be restricted to a comparatively minor treaty. It must be a decision

<sup>28</sup> Bill 45 of 2004-5

<sup>29</sup> *Britain forward not back: The Labour party manifesto 2005* pp83-84

<sup>30</sup> *Are you thinking what we're thinking? It's time for action.* Conservative party manifesto 2005 p26

<sup>31</sup> *The real alternative: Liberal Democrat manifesto 2005* p14

<sup>32</sup> [HC Deb 6 June 2005 c 991](#)

<sup>33</sup> "Blunkett challenges Brown on EU vote refusal" *Daily Telegraph* 30 August 2007

<sup>34</sup> "Vaz wants referendum on treaty to 'shut up' anti-Europeans" *Guardian* 1 September 2007

<sup>35</sup> "TUC ignores Brown appeal and calls for EU referendum" *Guardian* 13 September 2007

<sup>36</sup> "MPs from all parties launch EU referendum campaign" *Daily Telegraph* 6 September 2007

about the EU as a whole”.<sup>37</sup> The Conservative Shadow Foreign Secretary, William Hague, announced at the Conservative Party conference that the Conservatives would amend the *European Communities Act 1972* to require a referendum before any further EU treaties with transfers of competences were ratified:

If trust in politics is to be restored, manifesto commitments must be honoured. So let everyone be clear: a Conservative Government elected this autumn will hold a referendum on any EU treaty which emerges from the current negotiations. And I can tell you today that we will go further: the next Conservative Government will amend the 1972 European Communities Act, so that if any future government agrees any treaty that transfers further competences from Britain to the EU a national referendum before it could be ratified would be required by law.<sup>38</sup>

During the second reading of the *European Union (Amendment) Bill* on 21 January 2008, which authorised ratification of the Lisbon Treaty, Kenneth Clarke challenged David Miliband as to the Government’s reasons for refusing a referendum:

**Mr. Kenneth Clarke (Rushcliffe) (Con):** Does the Foreign Secretary not accept that he could save himself all this theological nonsense of trying to claim that the present treaty is different from the former treaty if he would accept that his own genuine view is that the last Prime Minister made a mistake when he came along and told us all, to our complete surprise, that he was going to have a referendum on the treaty that he then had? The then Prime Minister did not really believe in referendums on such subjects, and I am sure that the present Foreign Secretary was as amazed as I was to hear the Prime Minister’s statement. If he would only admit that the referendum should never have been offered in the first place, he could save himself this arcane and ridiculous argument, rather than trying to demonstrate that this is a different document, in fundamental terms, from the one that we had before.

**David Miliband:** As one who was a junior Minister toiling in the Department for Education and Skills at the time, I can certainly confirm that it came as a surprise and a shock to me to learn of the new decision. I certainly agree that there was no way on the basis of its constitutional significance that it merited the decision that was taken.<sup>39</sup>

William Hague argued that the Government was “brazenly abrogating the commitment made by every party in the House to hold a national referendum in this event”. However, he was himself attacked as not having supported a referendum at the time of the Maastricht treaty in 1992.<sup>40</sup>

There was some internal debate within the Conservative Party as to whether the Party would hold a referendum in government, even after the treaty had been ratified.<sup>41</sup> William Cash sponsored an EDM requesting a post-ratification referendum, which was signed by 40 MPs.<sup>42</sup> He argued on 21 January 2008 that there were precedents for re-opening negotiations even after implementation.<sup>43</sup>

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<sup>37</sup> “Public deserve real choice on Europe- Campbell” *Liberal Democrat News* 14 September 2007

<sup>38</sup> “A people’s referendum lock on more EU powers” *Conservatives Press Notice* 2 October 2007

<sup>39</sup> HC Deb 21 January 2008 c1246

<sup>40</sup> HC Deb 21 January 2008c1255

<sup>41</sup> “We would hold referendum even after EU treaty is ratified, Hague suggests” 13 November 2007 *Times*

<sup>42</sup> EDM 2143 2006-7

<sup>43</sup> HC Deb 21 January 2008c1295



## 2.4 Referendums in the UK

### **Background**

UK-wide referendums need primary legislation to set the terms of the question being asked, but the *Political Parties, Elections and Referendums Act 2000* regulates the conduct of referendums, setting limits on expenditure.

Referendums have become a relatively frequent constitutional device. Since 1973 the following referendums have been held in the UK, but only one, in 1975, has been nation-wide.

- Northern Ireland Border Poll, 8 March 1973
- Terms of continuing UK membership of the EEC, 5 June 1975
- Devolution for Scotland, 1 March 1979
- Devolution for Wales, 1 March 1979
- Establishment of the Scottish Parliament, 11 September 1997
- Establishment of the National Assembly for Wales, 18 September 1997
- Belfast (Good Friday) Agreement, 22 May 1998
- Establishment of the Greater London Authority, 7 May 1998
- Establishment of a regional assembly for the North East, 4 November 2004

Two referendums are already planned for 2011. The first, on devolving legislative powers to the National Assembly for Wales, is to take place on 3 March 2011. The second, on the issue of moving to the Alternative Vote system of elections, is to be held on 5 May 2011 under the *Parliamentary Voting System and Constituencies Bill*, currently in the Lords.

### **The constitutional theory of referendums**

Many states' constitutions contain specific provisions on the circumstances under which referendums must or can be held, and whether they are binding. In the UK, however, each referendum is introduced through separate legislation. A referendum is binding only if the Government so binds itself in that legislation. According to strict constitutional theory, Parliament could pass legislation to revoke the provisions of any act requiring a referendum. However, this would be very unlikely to occur.

### **Pre-legislative and post-legislative referendums**

Referendums can be classified as pre- or post-legislative. Pre-legislative referendums are held before the relevant bill is introduced into Parliament. This is what happened with the devolution referendums in 1979. A short bill was introduced, giving the Government power to hold a referendum on devolution in Scotland and Wales, and then the *Scotland Bill* and the *Government of Wales Bill* were introduced following 'yes' votes in the referendums in September 1979. White Papers were issued allowing voters to see the likely legislative provisions.

Alternatively, referendums can be held after the relevant legislation has been passed. This is what happened with the devolution referendums in 1978, where there were provisions in the *Scotland Act* and the *Wales Act* disapplying the legislation if there were not sufficient support in referendums in Scotland and Wales.<sup>44</sup> The *European Union Bill* of 2004-5 provided for a referendum, but the date of the referendum would have been set by order under the Bill<sup>45</sup>

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<sup>44</sup> See s85(2) of the *Scotland Act 1978*

<sup>45</sup> Bill 45 of 2004-5

The *Parliamentary Voting System and Constituencies Bill*, currently in the Lords, is a post-legislative bill, in that it makes provisions for elections to be held under AV, although the referendum has not yet taken place. Only if there is a Yes vote (and the number of parliamentary constituencies has reduced to 650) will the new electoral system come into effect.

The *European Union Bill* provides for other Bills to be put before Parliament to set out the decision to be agreed and the detailed provisions for a referendum. It appears to provide for these referendums to be post-legislative. .

### **Thresholds in referendums**

Discussions of the need for, or advantage of, some form of threshold usually arises in the context of ensuring the legitimacy and acceptance of the outcome of a referendum exercise. This incorporates the idea that major constitutional change is something more important than the result of ordinary elections, and therefore should be the result of something more than a simple plurality of the votes. The UK has only held two referendums with a threshold. These were the referendums held in Scotland and Wales in 1979 where the Act provided that 40 per cent of the electorate had to vote yes for devolution in those areas to come into effect. Background is given in [Standard Note 2809 Thresholds in Referendums](#). Subsequently, the Labour Government opposed the use of thresholds in the referendums held since 1997 and the Coalition Government has also rejected arguments that a threshold should apply in the referendum on the Alternative Vote in May 2011. Further detail is given in Research Paper 10/72 [The Parliamentary Voting System and Constituencies Bill: Commons Stages](#). The *European Union Bill* also does not contain any provisions on thresholds.

### **Expenditure limits**

PPERA established maximum expenditure limits for regional and national referendums - which was contrary to the recommendations of the Neill Committee on Standards in Public Life. The Committee report argued that controls would be impractical and might be considered an unwarranted restriction on freedom of speech.<sup>46</sup>

Briefly, expenditure limits apply during the 'referendum period' – a time period set out in the legislation authorising a particular referendum and explained further below. PPERA set maximum limits on expenditure (as defined in Schedule 13 of the Act). Groups (including political parties, campaign groups and other bodies) must register with the Electoral Commission if they plan to spend more than £10,000 during the referendum period.

'Permitted participants'<sup>47</sup> (groups and individuals) are subject to limits, as are the "designated organisations"<sup>48</sup> which receive public funding. For a UK-wide referendum, expenditure limits for political parties are determined on the basis of their share of the vote at the last General Election. The Electoral Commission website sets out the limits for participants in UK wide referendums:

For a UK-wide referendum, the expenses limits would be:

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<sup>46</sup> Cm 4057 12.46-12.47

<sup>47</sup> Individuals and organisations (including political parties) wishing to spend more than £10,000 campaigning in a referendum must register with the Electoral Commission as a "permitted participant"

<sup>48</sup> The PPERA allows the Electoral Commission to designate a permitted participant campaigning for a specified outcome in a referendum to act as the lead campaign organisation for the outcome they support. These permitted participants are known as "designated organisations".

<b>Type of permitted participant</b>	<b>Referendum expenditure limit</b>
Designated organisation	£5 million
Political party (over 30% of vote)	£5 million
Political party (20-30% of vote)	£4 million
Political party (10-20% of vote)	£3 million
Political party (5-10% of vote)	£2 million
Political party (less than 5% of vote)	£500,000
All other permitted participants	£500,000

These limits have not been increased since PPERA was enacted in 2000. It may be questioned why expenditure on referendums should be related to share of the vote at a general election.

At the 2010 general election only the Conservative party received above 30% of the vote. Labour received 29 per cent and Liberal Democrats 23%.<sup>49</sup>

### ***The referendum period***

Under PPERA the referendum period will normally begin on the day the bill (or order) providing for the referendum is introduced in Parliament, and end with the date of the poll.<sup>50</sup> Generally, the minimum referendum period for any particular referendum would be ten weeks. The period is important because it is during this time that expenditure and donations are regulated and designated organisations nominated by the Electoral Commission. The referendum period must be distinguished from the *relevant period* defined in s125 of PPERA as the 28 days preceding a poll, during which there is a restriction on the promotional material produced by central or local government. The *European Union Bill* does not make any further specification of the referendum period for EU referendum bills.

### ***Permitted participants***

Political parties and third parties are required to register with the Electoral Commission if they wish to spend over £10,000 in campaigning for a result in a referendum. The statutory term is 'permitted participant'. The European Union cannot be a permitted participant in the referendum, and therefore can only spend up to £10,000 during the referendum period.<sup>51</sup>

A registered party, as a permitted participant under PPERA sections 105 and 106, would need to indicate the policy it intended to adopt. PPERA S106 (7) defines "outcome" as "a particular outcome in relation to any question asked in the referendum". The declaration must be signed by the "responsible officers of the party", defined in s64 (7) as the "registered leader", the "registered nominating officer" and any other registered officer. Under s106, it is necessary to make the declaration in order to become a permitted participant. Campaigners who are not registered as participants cannot spend over £10,000 in a referendum (campaign) period. This presents some difficulties for parties which do not have an agreed line on a referendum issue. Given that Ministers were allowed to campaign on both sides at

<sup>49</sup> [Research Paper 10/36](#) *General Election 2010 summary*

<sup>50</sup> Explanatory Notes, *Political Parties, Elections and Referendums Act 2000*, paragraph 198

<sup>51</sup> HC Deb 18 January 2005 c903w

the last nationwide referendum in 1975, it is quite possible that the major parties could be split on a referendum question.<sup>52</sup>

Permitted participants must submit returns of expenditure to the Electoral Commission, within 6 months of the poll if their expenditure exceeds £250,000, and within three months if their expenditure is below this figure. Independent auditing is required for expenditure over £250,000. Further details are available from the [Electoral Commission website](#).

The Electoral Commission has expressed concern about the difficulty of regulating expenditure during the short campaign period, when accounts will not be submitted until after the poll.<sup>53</sup> Although established political parties could suffer loss of reputation if found to exceed limits or return expenditure details in time, pressure groups with a more ephemeral life may well be less concerned with breaching the legislation, particularly when the penalties are relatively small fines. There is also a danger of the proliferation of permitted participants, causing difficulties in assessing whether expenditure limits has been exceeded.<sup>54</sup> The *Parliamentary Voting System and Constituencies Bill* has provisions to address these concerns for the AV referendum; these aggregate expenses by persons acting in concert at a referendum, and ensure that a party treasurer cannot act for more than one permitted participant.

There has also been uncertainty over whether print media is affected by the controls in PPERA. The Government added New Clause 19 to the *Parliamentary Voting System and Constituencies Bill* to ensure that costs incurred by the media in reporting the referendum lie outside the regulatory regime. The new clause does not apply to advertisements by campaigning individuals or organisations. This amendment affects only the referendum on AV. A similar amendment might be expected when a bill to provide for a referendum on an EU matter is introduced into Parliament.

### **Controls on donations**

PPERA also introduced controls on donations made to permitted participants.

Donations over £7,500 must be registered with the Electoral Commission and donations over £500 from an impermissible source must be returned, and records must be kept of donations over £500.<sup>55</sup> Donations are impermissible if they are from donors not on the UK electoral register, from blind trusts or from unknown sources. These rules apply during the referendum period only.

### **Designated organisations**

PPERA provided for designated organisations to put the case for each side. Designated organisations are chosen by the Electoral Commission. For a UK referendum, these would benefit from maximum grants of £600,000 to each organisation, combined with a free referendum address to every household and referendum campaign broadcasts. The Commission may decide not to designate, where it does not consider that an organisation exists which represents the body of opinion on one side. It cannot designate one side only. Its website explains how it will decide on designation:

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<sup>52</sup> See Library Research Paper 04/82 *The Collective Responsibility of Ministers: An Outline of the Issues*

<sup>53</sup> HC 187-II, Q1327 Session 2002-3

<sup>54</sup> HC 1077-1 Session 2001-2, Q85

<sup>55</sup> Section 20 of the *Political Parties and Elections Act 2009*, which amended the limits in PPERA

All permitted participants can apply to become the designated organisation for the outcome they are campaigning for. Applicants must show why they best represent those campaigning for the specified outcome. If there is more than one applicant in respect of each outcome, the Commission will designate whichever applicants appears to them to represent to the greatest extent those campaigning for the relevant outcome.

It has developed designation criteria which are available from the Commission website. In general, if more than one applicant meets the adequate representation criteria, the Commission will designate the organisation that appears to represent to the greatest extent those campaigning for that outcome. The statutory underpinning is in section 109(2) (a) of PPERA.

There was a certain amount of controversy over the choice of the designated No campaign for the North East referendum, as there were two umbrella groups. “North East Says No”<sup>56</sup> was designated in preference to “North East No Campaign”.<sup>57</sup> The Commission made its announcement on 14 September 2004.

There was a range of campaigning groups in relation to the proposed referendum on the EU constitution in 2005, including “Britain in Europe” and “Vote No”.<sup>58</sup> Due to concerns about the need to produce a neutral document the Electoral Commission was given powers to promote public awareness in section 9 of the *Regional Assemblies (Preparations) Act 2003* and in Paragraph 2 of Schedule 3 of the *European Union Bill 2004-5*. Similar provisions appear in the *Parliamentary Voting System and Constituencies Bill*.

#### **Administration of the referendum**

PPERA provides that the Chief Counting Officer for the referendum is the chair of the Commission, who may delegate responsibility to counting officers for each local government relevant area.<sup>59</sup> The *Parliamentary Voting System and Constituencies Bill* allows for the appointment of Regional Counting Officers for the AV referendum, and requires local authorities to put their electoral services officers at the disposal of the Regional Counting Officers. Similar provisions would be likely for any EU referendum bill, but are not contained in the *European Union Bill*.

#### **Proposals for reform of the PPERA regime**

The Lords Constitution Committee issued a report *Referendums in the United Kingdom* in April 2010, which called for improvements in the regulation of referendums.<sup>60</sup>

On 8 October 2010 the [Government responded](#) to this report. On 12 October the House of Lords debated the substance of the report and the Government response.

One issue which is likely to come under scrutiny is the question of the regulation of information during the referendum period, which normally runs from royal assent until the referendum. The Lords were sympathetic to evidence from the Electoral Commission that the

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<sup>56</sup> <http://www.northeastsaysno.co.uk/>

<sup>57</sup> <http://www.northeastnocampaign.co.uk/index.html>

<sup>58</sup> There is also Labour against the SuperState chaired by Ian Davidson. See [http://www.politics.co.uk/party-politics/labour-party/labour-rebels-launch-assault-on-eu-constitution-\\$2404836.htm](http://www.politics.co.uk/party-politics/labour-party/labour-rebels-launch-assault-on-eu-constitution-$2404836.htm)

<sup>59</sup> Section 128

<sup>60</sup> HL Paper 99 2009-10, para 145

production of publicity should be regulated for the whole of this period, not just the 28 days before the poll as set out in PPERA. The Government did not agree:

**The restriction on the publication of promotional material by central or local government to apply from the start of the referendum period.**

The Government is concerned that putting in place such a requirement could impact upon the ability of Government to carry out its day-to-day duties, depending upon the subject of the referendum and the length of the referendum period. The Government believes that the existing 28-day restriction provided for in PPERA is adequate and that any extension of that period needs to be considered on a case-by-case basis.

## 2.5 The Bill provisions on the organisation of referendums

Referendums are held under generic provisions contained in the *Political Parties, Elections and Referendums Act 2000* as amended. A number of issues are also settled in clauses of the individual bill setting out the question to be asked. The *European Union Bill*, however, has a generic element to the regulation of referendums as well, in that it specifies the manner in which questions are to be set out in an EU referendum poll and the franchise to be used for polls on EU matters. It also provides for post-legislative referendums as follows.

### ***The wording of the question***

PPERA requires the Electoral Commission to consider the wording of the referendum question and publish a statement of any views it has about the question's intelligibility.<sup>61</sup> This must be done as soon as is practicable after the bill is introduced. The Electoral Commission is not required to consider the wording until the bill is introduced into Parliament. In practice, there are likely to be contacts at official level before the publication of any legislation.

**Clause 12** provides for separate questions on each treaty or decision requiring a referendum, even if the questions are taken in a single poll. The text of the question would be included in the bill that sets out the treaty or decision to be the subject of the referendum.

### ***The franchise***

The electorate to be used in a referendum is usually a simple choice between the local and parliamentary franchise. The local electorate includes other EU nationals resident in the UK and peers who sit in the House of Lords, but not British citizens who have registered as overseas voters. The parliamentary franchise includes these overseas voters, but not EU citizens or members of the House of Lords. In the case of the 1975 EC referendum, the electorate was the parliamentary franchise, with the addition of peers, and with special arrangements for the armed forces electorate.<sup>62</sup>

The local electorate was used for devolution referendums in Scotland, Wales and London, and the parliamentary for the Northern Ireland devolution referendum.

**Clause 11** of the *European Union Bill* sets out the franchise as those entitled to vote in a parliamentary election, plus peers who are entitled to vote in local government elections. Entitlement is as follows:

- Anyone aged 18 or over (an elector can register once they are 16 but cannot vote until their 18<sup>th</sup> birthday)

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<sup>61</sup> Section 104

<sup>62</sup> *Referendums Act 1975*, s1(3),(5)

- British or Commonwealth citizens who are resident in the UK
- Where the referendum is held also in Gibraltar, British or Commonwealth citizens who are resident in Gibraltar and entitled to vote in Gibraltar as an elector at a European parliamentary election
- Citizens of the Irish Republic who are resident in the UK
- In Northern Ireland electors who have been resident in Northern Ireland during the whole of the three-month period prior to the relevant date of 15 October each year
- British nationals living overseas for up to 15 years after moving abroad. An overseas voter should register in the constituency covering the address for where they were last registered within the UK. (Someone who has never been registered as an elector in the UK is not eligible to register as an overseas voter unless they left the UK before they were 18, providing that they left the country no more than 15 years ago)
- Service/Crown personnel serving overseas in the armed forces or with Her Majesty's Government
- Hereditary peers who do not have a seat in the House of Lords

The electoral register in use for a European parliamentary election in Gibraltar will be used to identify those entitled to vote in Gibraltar.

### ***Electoral Information campaigns***

Government information campaigns are covered by the general guidelines of the Government Communication Network (formerly the Information and Communications Service) which are available from the Cabinet Office website.<sup>63</sup>

PPERA places restrictions on promotional material published during the 28 days before a referendum (known as the “relevant period”) by the Government, local authority or other publicly funded body, apart from the Electoral Commission, the BBC and S4C.<sup>64</sup>

Due to concerns about the need to produce a neutral document, the Electoral Commission was given powers Commission may promote public awareness of the referendum and its subject matter. May

**Clause 13** provides that the Electoral Commission may promote public awareness of the referendum and its subject matter.

## **2.6 What is meant by a “referendum lock”?**

The so-called “referendum lock” is intended to have the effect of preventing the Government or Parliament from agreeing to ratify a treaty or a Treaty amendment without public endorsement.

The Europe Minister, David Lidington, clarified the use of the referendum in his [statement on 13 September](#). It would not apply, for example, if the Government disapproved of a proposed Treaty change, in which case the Government would use its power of veto to prevent such a change. It would apply only when the Government approved of a change that would bring about a transfer of power or competence from the UK to the EU, or before the Government

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<sup>63</sup> *Guidance on Government Communications* at <http://www.civilservice.gov.uk/documents/pdf/communities/gcn/guidance.pdf>

<sup>64</sup> Section 125

agreed to the use of a “major” ratchet clause. In other words, the referendum would be a mechanism to endorse or reject *Government support* for a change and not a right to vote on any major EU Treaty change. Public views on a change of which the Government disapproved would not be canvassed. However, the Government’s decision as to whether a referendum should be held, and why, would be subject to judicial review. This could delay agreement in the EU, and would, according to some observers, “significantly limit” ministers’ discretion over potential referendums.<sup>65</sup>

Where unanimity is required, such as for substantive Treaty amendments, the ‘lock’ could prevent treaties or amendments from coming into force for the rest of the EU as well. There have been several occasions<sup>66</sup> when negative national referendums have prevented EU amendment treaties from entering into force – although only one in which the treaty was abandoned - and it was this situation that the Member States sought to address with the introduction in the Lisbon Treaty of the simplified revision procedures.

The Government has pointed out that the referendum requirement is not intended to catch all Treaty amendments, because that would mean a referendum being held on minor Treaty changes of little or no consequence in the UK. According to David Lidington, candidates for a referendum might include the giving up of UK national vetoes and moving to majority voting in significant areas, such as the CFSP. The lock would not apply to accession treaties or to the transitional protocol on the composition of the EP, for example, on the grounds that these did not transfer additional powers to the EU, although with regard to accession treaties, it could be argued that the loss of voting power in the Council that comes with each new distribution of Council weighted votes could constitute a diminishing of national influence and power in that body.

David Lidington wrote to Parliament on 11 November to explain that the referendum provisions in the Bill were not intended to produce sclerosis:

The Bill does not make the British decision-making process so onerous as to deny the British Government or Parliament an ability to make decisions in the EU at all. It does ensure that significant decisions are made with proper democratic consent. It is in line with the growing tendency across the EU to impose greater national democratic controls on EU decision-making and rightly puts Britain at the forefront of that movement.

For more than a decade both Conservative and Liberal Democrat manifestos have included commitments on EU-related referendums, either general or particular. With this Bill we now have the chance to put our thinking into law.

The [FCO Factsheet](#) states that the effect of the Bill would not be to slow down EU decision-making: “It will not affect our ability to pursue an active agenda in the EU. On sensitive issues ... there may be some delay but it will not impede effective decision-making”.

When Mr Lidington elaborated on the forthcoming bill in a statement on 13 September 2010, there was a critical reaction from Conservatives Bill Cash MP ([Daily Mail 13 September](#)),

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<sup>65</sup> [Telegraph 11 November 2010](#)

<sup>66</sup> Denmark voted against the Maastricht Treaty in 1992 and approved it with modifications in 1993; Ireland voted against the Nice Treaty in June 2001 and in favour in October 2001. In 2005 France and the Netherlands voted against the Treaty Establishing a Constitution for Europe, which was subsequently abandoned, and Ireland voted against the Lisbon Treaty in June 2008, but in favour of it with concessions in October 2009.



Douglas Carswell MP on [his blog](#), Roger Helmer MEP (on Twitter), and the UKIP member, Jeffrey Titford ([UKIP website](#)). Mats Persson, the Director of the euro-critical organisation, Open Europe, thought the proposed referendum lock needed to be made effective:

The ‘referendum lock’ therefore needs to be strong enough to withstand any attempts to bury difficult questions like this, including:

– The decision on what constitutes a ‘transfer of powers’ cannot be left to the discretion of ministers or ministers’ legal advisors. It must be independent.– Absolutely key is that any decision to opt into measures in Justice and Home Affairs be subject to the referendum lock, or at the very least, an Act of Parliament. This would mean that the Coalition cannot opt in to, say, an amendment to the European Arrest Warrant, giving the ECJ the final say over this law, unless the people, or the Parliament, agree (if they don’t agree, the UK would automatically be required to opt out of the EAW altogether by 2014, which would effectively repatriate powers back to the UK).

– Every use of the Lisbon Treaty’s ratchet clauses or other articles, which involve handing over control to Brussels - subject to a strict definition (for example abolishing vetoes in an existing area of competencies or misuse of Treaty articles to extend the EU’s powers) - should be covered by the referendum lock or an Act of Parliament. This would neutralise the “self-amendment” provisions in the Lisbon Treaty.<sup>67</sup>

In October 2010 the Liberal Democrat MEP, Andrew Duff, found “contradictory” the inclusion of a sovereignty clause on the one hand and the ratification of Treaty amendments by referendum on the other.<sup>68</sup> He was critical of referendum provisions which would “impose directly on the hapless British electorate responsibility for taking complex decisions about the governance of Europe”. He continued:

On this matter, I am not impartial, having long believed that referenda should be reserved for things which are really big, simple and visceral -- like legitimising a coup d’état (or electoral reform). Referenda do not work for issues which are petty, complex and cerebral.

Isolated national referenda on EU issues may well unleash populist and nationalist forces that will be impossible for the mainstream political parties to manage, will provoke unholy coalitions of nay-sayers, will damage the Westminster parliament, will force the UK even further on to the margins of the EU, and, ultimately, settle nothing. (Which of us, if losing a referendum on Europe, would give up the fight?).<sup>69</sup>

He described *passerelles* as a “well-respected constitutional device to allow minor changes in decision making to be made without the full weight of a ponderous treaty change” that “are inserted pragmatically to oil the wheels of decision making. A passerelle might even prove useful for the UK when its own national interest is being blocked or distorted by another EU state”. Mr Duff was critical too of the Government’s claim to be putting the UK on a par with other EU States, such as Germany:

Although the Bundestag has legislated to increase its own powers over important EU decisions, including some passerelle clauses, Germany has a

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<sup>67</sup> *Coffee House Spectator blog* Mats Persson, 14 September 2010, “[Finessing the coalition’s EU referendum lock](#)”

<sup>68</sup> Andrew Duff “Move to accentuate British exceptionalism”, *Financial Times* 21 October 2010

<sup>69</sup> *Ibid*

constitution in which the checks and balances between government and parliament are comprehensively laid down in any case, and a Basic Law which commits the Federal Republic to advancing European integration. Referenda are prohibited in Germany. And no other state is dreaming of having a referendum on a passerelle especially those, like the Irish, who know a deal about referenda.

Duff concludes that the bill “serves to accentuate British exceptionalism, and will therefore encourage Britain’s EU partners to go ahead further and faster without the UK”.

The Economist’s *Bagehot* columnist commented on the lock:

Britain’s new referendum lock is a big idea, whose consequences could take years to emerge. It will not make the British public love the EU: that is a lost cause. Instead, assuming that the EU decides it needs hefty new powers in the future (above and beyond current proposals about economic governance, which overwhelmingly concern countries using the single currency), the new lock would probably lead to a multi-speed EU with the British in the slow lane.<sup>70</sup>

*Bagehot* was sceptical about the referendum pledge:

Future British governments would have to be mad to call a referendum on an EU treaty. A straight in-out vote on EU membership could probably be won—just. But a vote on transferring new powers would be suicide: just ask Irish, French or Dutch politicians. A European Union Bill with a functioning referendum lock amounts to a UK Veto Bill. The consequences are stark: either Britain will have to be offered an opt-out from ambitious new treaties, or British voters will vote No and trigger a monumental row.<sup>71</sup>

Piotr Maciej Kaczyński and Peadar ó Broin commented:

The challenge of referenda is probably the most difficult to avoid. It is often argued by those opposed to referenda that they are almost never on the topic at stake, and almost always about the popularity of the local government or president. In times of economic instability those politicians enjoy somewhat limited public trust. Hence should there be a referendum, the likelihood of a negative outcome in one or more places is considerably high. Therefore should there be no shift of sovereignty or powers towards the Brussels institutions, most of the arguments (i.e. from British and Danish) would be addressed.<sup>72</sup>

On *Conservative Home*, Tim Montgomerie argued:

The Lock is a good thing but a limited thing. It signals that the people should decide if powers are transferred to Europe. That’s an important principle. Although no parliament can bind its successor the Lock will also make it harder for major transfers of power to be ceded without a fuss. It is, however, a limited Lock. It does nothing to protect us against ECHR judgments, for example, on votes for prisoners.<sup>73</sup>

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<sup>70</sup> [Economist 11 November 2010](#) “The British bayonet: Do not underestimate the coalition’s pledge of a referendum on ceding new powers to the EU”

<sup>71</sup> Ibid

<sup>72</sup> Piotr Maciej Kaczyński and Peadar ó Broin, CEPS paper No. 216, October 2010, “From Lisbon to Deauville: practicalities of the Lisbon Treaty revision(s)”

<sup>73</sup> [Tim Montgomerie, Conservativehome 11 November 2010](#)

Douglas Carswell MP argued that the Bill is not legally watertight and could still allow ministers to cede powers to the EU without a referendum, which, he claims, the Coalition Government has already done in areas such as the European Arrest Warrant and regulation of the City, including hedge funds.

In a paper on the Bill, Professor Steve Peers comments on the inherent difficulties in deciding which Treaty amendments would be “significant”:

In light of the UK’s constitutional history (ie parliamentary, not direct, democracy) the best approach would be to hold a referendum only where changes to the UK’s relationship with the EU were genuinely fundamental, although it would be preferable to specify the application of this concept precisely in legislation rather than to rely on the ad hoc judgment of politicians as to when this criterion is reached.<sup>74</sup>

[...] As set out in the Bill this policy falls in between holding a referendum on all Treaty changes and holding a referendum on significant Treaty changes.

Professor Peers lists those Articles which he thinks are “cases where a change to the Treaties could not seriously be regarded as significant, never mind fundamental, but where a referendum would be required”:

a) a change to the voting rules regarding the Justice and Home Affairs provisions of the Treaties –where, as explained above, the UK has an opt-out, not a veto;

b) a change to the voting rules on the time limit for negotiations on a treaty of withdrawal from the EU – given that such treaties are not anyway necessary before a Member State withdraws;

c) the extension of a competence to ‘support, coordinate or supplement’ national actions or the creation of a new competence of this type, given that such EU measures do not ‘supersede[e]’ national ‘competence in these areas’ and that ‘acts of the Union adopted on the basis of the provisions of the Treaties relating to these areas shall not entail harmonisation of Member States’ laws or regulations’ (Article 2(5) TFEU); or

d) a Treaty amendment adopted under the ordinary revision procedure includes new powers to impose requirements, sanctions, et al upon Member States, and this new power is not significant (the Bill only imposes a significance test where such a measure is adopted by means of a simplified revision procedure, but this is inconsistent).<sup>75</sup>

He concludes that “Whatever the merits of direct democracy as opposed to representative democracy, it is not possible to defend on ‘democratic’ grounds the decision to transfer some key aspects of the determination of whether to call a referendum or not to unelected judges”.

A *BBC News* article by Ross Hawkins thought the referendum conditions were not restrictive enough and that “a minister will be able to simply state the transfer of power is not significant enough to merit a referendum in some cases”. This, he thought, would be “likely to cause alarm among Conservative eurosceptics, who will point to the commitment in the coalition

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<sup>74</sup> [Statewatch](#) “The UK’s European Union Bill”, Professor Steve Peers, Law School, University of Essex

<sup>75</sup> Peers, *ibid*

agreement to subject any future transfers of power to a "referendum lock".<sup>76</sup> David Lidington speaking about the importance of the EU Bill for safeguarding Parliamentary sovereignty in a [speech to the UK Association of European Lawyers on 25 November](#), sought to tackle this point.

... it is this particular point which has been the subject of some press attention and claims have been made, inaccurately, that Ministers will be able to use a "significance test" on any future treaty change. That is simply not true. The Bill places an absolute and unqualified referendum lock on the transfer of competence, the creation of new EU competence, or the removal of limits to existing competences and also upon a whole raft of specified policy areas. So, for example, the Government would have no choice about whether to hold a referendum before agreeing to the United Kingdom joining the euro, or joining a common European army, or giving up control of United Kingdom borders.

Where, however, the only reason for a proposed treaty amendment being caught by the referendum lock is that it would, while not transferring or extending competence, confer upon the EU the ability to impose new obligations or sanctions on this country, we do need to be able to distinguish between important and minor changes.

For example, the EU already has competence to act in respect of environmental policy. Let us imagine a situation in which a limited and precise treaty amendment were proposed to establish a new system for the allocation of carbon credits, under a European emissions trading scheme, perhaps with some new institution to carry out that work and set the rules. It would not seem to be sensible to have a national referendum just on that topic. Rather that is something I believe most people would accept ought to be left to be determined by Parliament which of course would still have to authorise such a treaty change by Act rather than just by resolution. What we are not doing is giving Ministers untrammelled powers of discretion. When a Minister, under our Bill, is required to make a statement on whether a proposed change requires or does not require a referendum, that Minister will have to give reasons and those reasons will have to refer to the criteria set out in the legislation itself. Not only that, but, like any executive ministerial decision, that Minister's judgement will itself be challengeable by way of judicial review. So there will be very strong incentives for Ministers to stick to both the letter and spirit of the law, and not to sidestep the requirement to seek a referendum.

The shadow Europe Minister, Wayne David, thought that while holding referenda on major constitutional and economic changes was the right thing to do, the present bill was "a dog's dinner which could lead to costly wrangling in the courts over what it means, and whether we need referenda on tiny changes too".<sup>77</sup>

According to the Daily Telegraph, the UKIP leader, Nigel Farage, thinks the Bill will "leave Conservative voters disillusioned" because it "gives the country no protection at all".<sup>78</sup>

## **2.7 The constitutional implications of the referendum lock**

As the UK does not have a single codified constitutional document, there are no unambiguously constitutional "higher" laws.<sup>79</sup> Under the principle of parliamentary

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<sup>76</sup> [BBC News 11 November 2010](#), "UK could transfer powers to Europe without referendum"

<sup>77</sup> [BBC News](#), *ibid*

<sup>78</sup> "EU referendum law is dismissed by sceptics" [Daily Telegraph 11 November 2010](#)

sovereignty as set out by Dicey, no Parliament can bind a future Parliament. Therefore, the *European Union Bill* can itself be amended or disapplied by another Bill at any time. This point is made by [Professor Anthony Bradley in his evidence](#) to the European Scrutiny Committee on its European Union Bill inquiry:

13...It is remarkable therefore that the Explanatory Notes to Part 1 of the Bill do not deal with the application of this proposition to the proposals in clauses 2, 3 and 6 that British approval to certain changes in EU law will require first to be approved by an Act of Parliament **and** that the change should be approved by a referendum. These clauses provide that the Act of Parliament to approve a specific change **must** contain provision for the holding of a referendum. It is one thing for Parliament to require that certain actions may be taken by the Government only when approval has been given for them by a further Act. But today's Parliament may not require that further Act to include the requirement of a referendum. A future Parliament may of course expressly repeal or amend the requirement of a referendum clause, but (unless the present European Union Bill is recognised by the courts as being a constitutional statute, and thus immune from implied repeal) what is the position if no referendum clause is included in the later Act – either because no such clause is proposed by the Government or if a referendum clause is proposed but is then defeated? The Explanatory Notes envisage that certain ministerial decisions under Part 1 of the Bill will be subject to judicial review: is it also envisaged that a future Act of Parliament that did not include a referendum clause would be subject to judicial review? Laws LJ in the *Thoburn* case declared that Parliament 'cannot stipulate as to the manner and form of any subsequent legislation'. Is not Part 1 of the Bill attempting to do exactly that?<sup>80</sup>

In his [evidence to the ESC](#), [Professor Hartley](#) also made the point that “the Bill, assuming it becomes law, will be an Act of Parliament. We know that Parliament cannot bind future Parliaments, so a future Parliament could always change it. It could repeal it—totally repeal it—or amend it, or repeal it in part. I don't think that this Bill limits the powers of Parliament, any more than the European Communities Act 1972 does—the original one”.

The legislative supremacy of Parliament would appear to make it impossible in law to specify that a referendum should always be held when a power is transferred to the EU. However, statutes such as the *Scotland Act 1998* can be said to have led to a permanent constitutional change due to a new political consensus on the benefits of devolution.

Michael Dougan took a similar line in an earlier comment in *Parliamentary Brief* online in November 2009:

Cameron's proposal might well have significant implications for the UK's own constitutional system. Insofar as the 'referendum lock' purports to be a legally binding obligation, so that any future EU treaty can only be ratified after a popular vote, this represents a direct challenge to the principle of parliamentary sovereignty.

<sup>79</sup> There is debate about the implications of Lord Justice Laws' comments on a hierarchy of laws in *Thoburn v Sunderland City Council* [2002] 3 WLR 247 (the Metric Martyrs Case) not discussed here. The *Jackson v Attorney General* [2005] UKHL 56, [2006] 1 AC 262 (Hunting Act 2004) is also relevant. See memorandum by [Professor Adam Tomkins to the European Scrutiny Committee](#) 18 November 2010 for a discussion of the issues

<sup>80</sup> [Written evidence from Professor Anthony Bradley, 23 November 2010](#), to European Scrutiny Committee Inquiry on the EU Bill

Indeed, if enacted as such by parliament, and accepted by the UK courts as valid, that would represent a greater challenge to the fundamental principles of the UK's (unwritten) constitution than the supremacy of EU law itself! It would also have potentially far-reaching implications for the idea of entrenching legislative choices in other fields: for example, as regards human rights or regional devolution.<sup>81</sup>

## 2.8 No referendums during the current Parliament?

David Lidington has said that, as there will be no transfer of competences from the UK to the EU during the present Parliament, there will be no referendum in this period. The likelihood of a Treaty change during this Parliament is perhaps not as remote as the Government suggests. Implementation of the 'Deauville Declaration'<sup>82</sup> of Chancellor Merkel and President Sarkozy on 18 October 2010, as well as other possible Treaty revisions, are already on the European agenda. The proposals include the establishment of a permanent European Financial Stability Facility (EFSF) mechanism to safeguard the financial stability of the Eurozone and the suspension of voting rights in the Council for a Member State found to be in serious violation of the basic principles of economic and monetary union. It is not yet clear whether the proposed Treaty amendment would be achieved by using the Ordinary Revision Procedure or a Simplified Revision Procedure. Neither is it clear whether such a change would be compatible with the ruling of the German Constitutional Court in 2009 on the Lisbon Treaty (see below). However, Piotr Maciej Kaczyński and Peadar ó Broin, writing in a CEPS paper, thought:

... any challenge to ratification brought before the German Federal Constitutional Court could be addressed by Chancellor Merkel by requesting a parliamentary constitutional majority in the Bundestag *before* she signs the amending treaty (or maybe even before Germany agrees to the opening of the IGC). At a later stage the parliament will also be involved in the ratification procedure. Although it is impossible to predict how the Court will view the treaty amendments, it is fair to assume that the German government has factored in a legal challenge and that the Deauville proposals should benefit therefore from a presumption of constitutionality.<sup>83</sup>

The Coalition Government has said there will not be a referendum on the Merkel proposals to establish a permanent mechanism to protect the euro, because they would affect only the Eurozone countries.<sup>84</sup> Gisela Stuart, the Labour MP who served on the Convention on the Future of Europe which prepared the draft EU Constitution, asked the Government:

Given that 25 of the 27 member states either are members of the eurozone or will have to become members under treaty obligation, and that only two have an opt-out, does he agree that anything that would strengthen the financial and economic co-ordination of the 25, plus the two with opt-outs, would represent a diminution of our sovereign ability to exert our influence and would therefore be subject to a referendum here?

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<sup>81</sup> "A very British volte face", 18 November 2009

<sup>82</sup> Franco-German Declaration on the occasion of the France-Germany-Russia tripartite meeting at Deauville on 18 October 2010 (available from the press service of the French Presidency)

<sup>83</sup> Centre for European Policy Studies (CEPS) paper No. 216, October 2010, [From Lisbon to Deauville: Practicalities of the Lisbon Treaty Revision\(s\)](#) 12 November 2010, Piotr Maciej Kaczyński and Peadar ó Broin

<sup>84</sup> See [Daily Telegraph](#), 8 November 2010

Mark Hoban replied that the Government would “not endorse a treaty that transfers sovereignty from Westminster to the EU”, noting Ms Stuart’s interest in the subject and the UK’s and other Member States’ concerns about Treaty change.<sup>85</sup>

One anticipated Treaty change is the Accession Treaty of Croatia under Article 49 TEU, which would require an IGC, probably in 2012. Other potential Treaty changes concern the adoption of a protocol confirming the so-called ‘Irish Guarantees’ granted to Ireland before the second Irish referendum on the Lisbon Treaty in 2009, and another protocol on the Czech demand for accession to Protocol 30 containing an exemption from the application of the Charter of Fundamental Rights. In both these cases the Simplified Revision Procedure would not be available so the ORP under Article 48 TEU would apply. It has been suggested that such protocols may form part of the Croatian accession treaty under Article 49 TEU, although it is questionable as to whether they could be appended to this treaty, as this would appear to circumvent Article 48 TEU.

The distinction between accession treaties and other treaties may be blurred when an accession treaty becomes the vehicle for other EU Treaty amendments, and raises the question of how the Bill would apply at the point at which an accession treaty (not subject to the referendum lock) stops being ‘just’ an accession Treaty (even if that is still its official title) for the purposes of the Bill, and becomes subject to the referendum lock because of the nature of other Treaty-changing provisions attached to it. These issues are both highly technical and highly political, but the implications for the enlargement process could be significant. Under the terms of the Bill, if an amendment unconnected with the enlargement were added to an accession treaty, this would result in the transfer of power or competence from the UK to the EU and would therefore trigger a referendum.

The explanatory notes (ENs) on the bill describe **competence** as “the ability for the EU to act in a given area”. Articles 4 and 5 TEU explicitly define the limits of Union competences, which are *conferred* by the Member States on the basis of subsidiarity<sup>86</sup> and proportionality. Article 4 TEU makes clear that competences not conferred upon the Union remain with the Member States. In other words, there is a statement, rather than just a presumption, in favour of Member State competence, which the former subsidiarity Article did not make clear. Articles 2-6 TFEU define categories of EU and national competences.

The Treaties do not define explicitly or implicitly what a **power** is. Under Part 1 of the Bill a transfer of power could be, for example, the replacement of unanimous voting or agreement by consensus or common accord - whereby each Member State has a power of veto - to QMV, where an individual Member State may be outvoted and forced to adopt an unpopular or unwanted measure. Other examples in the Bill are of an EU institution or body being conferred with the power to impose a requirement, obligation or sanction on a Member State.<sup>87</sup>

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<sup>85</sup> [HC Deb 27 October 2010 c 323](#)

<sup>86</sup> The principle that the Union will act only if the objectives of the intended action cannot be sufficiently achieved by the Member States acting alone.

<sup>87</sup> David Lidington, Jeremy Browne, 11 November 2010, published at <http://conservativehome.blogs.com/files/document.pdf>. Curiously, when asked by Lord Tebbit about transfers of sovereignty and powers from the UK to the EU since 1972, the FCO Minister, Lord Howell, spoke instead of transfers of “competence” and listed the five EU Acts that had implemented five European Treaties since 1972: [HL Deb 10 November 2010 WA81](#)

Under the Bill's 'significance clause' ministers will decide what constitutes a transfer of powers. With ministerial discretion, however, it could be more difficult to ascertain what would constitute a "significant" transfer of powers.

### **3 New procedures for approving EU decisions and Treaty changes**

**Part 1 Clause 1** clarifies the terminology used for the two EU Treaties, the definitions of a treaty, the meaning of Council and the meaning of voting in the European Council or the Council. **Clauses 2 – 4** set out detailed provisions on the procedures and conditions for approving a new EU treaty or a Treaty amendment, while **Clause 5** defines the statement the Government must lay before Parliament in specific circumstances and **Clause 6** concerns the requirement for both an Act of Parliament and a referendum. **Clause 7** concerns decisions requiring an Act of Parliament and **Clause 8** deals specifically with the "flexibility Article" 352 TFEU (formerly Article 308 TEC). **Clause 9** defines the terms of "Parliamentary approval" while **Clause 10** is about "Parliamentary control" of certain decisions that do not require an Act. **Clauses 11-13** make provision for entitlement to vote in a referendum and the role of the Electoral Commission.

#### **3.1 Restrictions on Treaties and decisions relating to EU**

**Clause 2** prevents the ratification of treaties replacing the TEU or TFEU until either a referendum is held which results in a yes vote (the referendum condition), or the exemption condition is applied which removes the need for a referendum. The Bill provides that a treaty which amends or replaces the present EU Treaties cannot be ratified in the UK unless:

- A statement has been laid before Parliament within two months of the agreement/treaty/decision at EU level, setting out the Government's opinion on whether the agreement is one that requires a referendum and why; and
- The treaty has been approved by an Act of Parliament; and
- The referendum condition or the exemption condition is met.

The **referendum condition** is that

- The Act providing for the approval of the treaty states that the provision approving the treaty is not to come into force until a referendum about whether the treaty should be ratified has been held throughout the United Kingdom (and Gibraltar if relevant); and
- The referendum has been held throughout the UK (and Gibraltar if relevant); and
- The decision has been approved by the majority of those voting.



**Referendum requirement for certain Treaty amendments:**

- where the Ordinary Revision Procedure applies (Clause 2)
- where the Simplified Revision Procedure applies under Article 48(6) TEU (Clause 3)
- where the Simplified Revision Procedure applies under Article 48(7) TEU (Clause 6)
- where alternative special procedures apply (Clause 6)
- on UK participation in fundamental EU policies (Clause 6).

These conditions would apply if the Government has agreed to the proposed treaty or Treaty amendment by a Convention of Member State representatives and/or an IGC under the Ordinary Revision Procedure.

Under Article 48(4) TEU Treaty amendments enter into force only “after being ratified by all Member States in accordance

with their respective constitutional requirements”. Whereas the UK constitutional requirements currently consist of an Act of Parliament to amend the *European Communities Act 1972* (ECA) and give the force of law in the UK to those aspects of the treaty that need it, the new constitutional requirements for this kind of Treaty change would include both an Act and a referendum.

The Bill lists 56 policy areas where a referendum would be or might be needed; some come under so-called “ratchet clauses”, which explicitly leave open the possibility of further transfers of powers.

**Clause 3** concerns Treaty amendment under one of the Simplified Revision Procedures (Article 48(6)), stipulating that before agreeing to such a decision, the Government must make a statement to Parliament within two months of the European Council approving it, the decision must be approved by an Act of Parliament, and the referendum or exemption condition must be met.

Under **Clause 5** the Government statement for this type of Treaty change must be laid before Parliament within two months of the treaty/amendment being agreed by the IGC, or within two months of an Article 48(6) TEU decision being adopted by the European Council.<sup>88</sup> The Government must state whether it thinks the decision falls within a category of Treaty Articles that would attract a referendum if Article 48(6) were applied, and, in two specific instances,<sup>89</sup> whether the effect of the decision on the UK would be “significant”. The assessment of whether the effect would be “significant” will be for the Government alone to make.

**Judicial review**

The Government statement on 13 September 2010 and the Bill Explanatory Notes make clear that this ministerial decision will be open to legal challenge through judicial review, whereby the Government would be held to account for its decision as to whether an EU proposal or decision would transfer powers from the UK to the EU.

<sup>88</sup> Heads of State and Government “agree” Treaty amendments, which are then collated as an amending treaty and signed by Government ministers a short time later. Once signed, the ratification process begins, which can last for over a year as all 27 Member States have to ratify the treaty before it can come into force.

<sup>89</sup> The specific instances concern the conferring on an EU body of the power to impose a requirement or obligation on the UK, the removal of any limitation on such a power and the conferring of a new or extended power to impose sanctions on the UK.

Thus, the two main grounds for judicial review in these circumstances would be that the Minister has not followed the procedure set out in Clause 5; or that the ministerial decision on the transfer of powers was unreasonable. It is more likely to be in relation to the second of these. The *Telegraph* reported on 11 November that “Coalition sources insisted that the opportunity to seek judicial review of decisions would “significantly limit” ministers’ discretion over potential referendums”.<sup>90</sup>

The procedure which governs making a claim for judicial review is set out in the Civil Procedure Rules CPR Part 54. The judicial review process must be expeditious and the claim made within three months of the grounds to make the claim first arising (CPR Part 54.5).<sup>91</sup> If a challenge goes from the Court of Appeal to the Supreme Court, the process could take several months, which would have implications at national and EU level for the adoption and implementation of EU legislation or Treaty amendments. Parliamentary,

Judicial review is a High Court procedure for challenging administrative actions. Delegated legislation may also be challenged. It allows individuals, businesses or groups to challenge in court the lawfulness of decisions taken by Ministers, Government Departments and other public bodies. These bodies include local authorities, the immigration authorities, and regulatory bodies (such as OFCOM and the OFGEM) and some tribunals [...]

The main grounds of review are that the decision maker has acted outside the scope of its statutory powers, that the decision was made using an unfair procedure, or that the decision was an unreasonable one.<sup>1</sup>

judicial and constitutional review processes, and ratification referendums on EU treaty changes in the EU Member States have delayed Treaty implementation on several occasions, leading in one case to the abandonment of the Treaty (the *Treaty Establishing a Constitution for Europe*).

There are precedents for judicial review of Government decisions on EU Treaty matters.<sup>92</sup> In early 2008 the British businessman, Stuart Wheeler, sought to challenge the Labour Prime Minister Gordon Brown’s decision not to hold a referendum on ratification of the Lisbon Treaty. Also in 2008 the Conservative MP, Bill Cash, sought a judicial review of the ratification process after Ireland had rejected the Lisbon Treaty in a referendum. In the first of these claims the High Court Judges said that they “found nothing in his case to cast doubt on the lawfulness of ratifying the treaty without a

referendum”.<sup>93</sup> In the second, Mr Justice Collins refused permission for judicial review, saying it would be for Parliament, not the court, to decide whether the EU amendment Bill should be passed, that ratification was “a matter of political not judicial decision” and that the case was “totally without merit since it is an attempt to pursue a political agenda through the court”.<sup>94</sup>

### 3.2 Treaty Articles that would attract a referendum

**Clause 4** of the Bill provides for a series of scenarios which will trigger the need for a referendum. The Bill seeks to strengthen these pre-ratification mechanisms by introducing explicit, restrictive and to some extent inflexible conditions before the Government can agree to legislation or Treaty change.

<sup>90</sup> [Telegraph 11 November 2010](#)

<sup>91</sup> See RP 06/44 for a summary of the stages of the procedure.

<sup>92</sup> For further information on the Lisbon challenges, see [Research Paper 08/66](#) “The Treaty of Lisbon: an Uncertain Future”, 30 July 2008

<sup>93</sup> *R (Wheeler) v Prime Minister and Foreign Secretary* Case No: CO/1915/2008, 25 June 2008

<sup>94</sup> See *European Journal July 2008* at <http://www.europeanfoundation.org/docs/July%202008.pdf>

**Clause 4(1)** lists the areas which, if the Treaty changes were proposed under **Article 48(6)**, would be regarded as representing a transfer of power or competence from the UK to the EU. In theory under Article 48(6) a decision “shall not increase the competences conferred on the Union in the Treaties” - that would require an amending treaty using Article 48(2)-(5). However, in the Bill any amendment of the following Articles by an Article 48(6) decision which either extended an EU competence or removed a limitation on an EU competence would trigger a referendum.

***Article 3 TEU: the general aims of the EU***

- To promote peace, its values , the well-being of its peoples
- An area of freedom, security and justice without internal frontiers and with freedom of movement
- Appropriate measures on external border controls, asylum, immigration, the prevention and combating of crime
- An internal market which works for the sustainable development of Europe based on balanced economic growth and price stability
- A highly competitive social market economy
- A high level of protection and improvement of the quality of the environment
- To promote scientific and technological advance
- To combat social exclusion and discrimination
- To promote social justice and protection, equality between men and women
- To promote solidarity between generations
- The protection of the rights of the child
- Economic, social and territorial cohesion
- Solidarity among Member States
- Respect for the Union’s cultural and linguistic diversity and ensuring Europe’s cultural heritage is safeguarded and enhanced
- Economic and monetary union with the Euro as currency
- To uphold and promote its values in the wider world and contribute to the protection of its citizens
- Contribute to peace, security, sustainable development, solidarity and mutual respect among peoples
- Free and fair trade
- Eradication of poverty
- Protection of human rights, particularly the rights of the child
- Strict observance of international law and respect for United Nations Charter

Some of these aims have such a broad conceptual scope that it could be difficult defining limitations and extensions, or the boundaries of conferral. Legal certainty as to whether a proposal extends one of these aims or merely upholds or enhances it could be difficult to establish.

***Article 3 TFEU: conferring on the EU a new exclusive competence or extending an EU exclusive competence***

The EU has exclusive competence, conferred upon it in the Treaties by the Member States, in the following areas:

- Customs union
- Establishing competition rules for the functioning of the internal market
- Monetary policy for Member States that have adopted the Euro as their currency

- Conservation of marine biological resources under the Common Fisheries Policy (CFP)
- Common Commercial Policy (CCP)
- Conclusion of an international agreement "when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or insofar as its conclusions may affect common rules or alter their scope".

Exclusive competence means that in these areas *only* the EU can act. Even in areas of exclusive EU competence, however, Member States are not barred from taking their own initiatives. For example, although the CCP is such an area of exclusive competence, the British Government was able to sign trade and economic agreements with China in November 2010.

The principle of Community exclusive competence was contained or implicit in various former Treaty articles and a number of European Court of Justice (ECJ) rulings acknowledged that a certain EC power was exclusive. The concept appeared in the *Treaty on European Union* (TEU) in 1992, which specified in former Article 3b that the principle of subsidiarity applied in areas "which do not fall within the exclusive competence" of the Community. However, Article 3b did not specify which areas were of exclusive EC competence. This gave rise to legal argument and uncertainty as to which areas constituted exclusive competence and what this meant with regard to Member State initiatives. The Lisbon Treaty attempted to remedy the legal uncertainty by listing areas of EU exclusive competence, and since its entry into force, the Commission has proposed initiatives based on the new competence clarification.<sup>95</sup>

#### The main areas of shared competence

- internal market
- social policy as defined in the Treaty
- economic, social & territorial cohesion
- agriculture & fisheries, except the conservation of marine biological resources
- environment
- consumer protection
- transport and trans-European networks
- energy
- area of freedom, security and justice
- common safety concerns in public health matters, for aspects defined in the Treaty
- research, technological development & space; development cooperation & humanitarian aid, but not preventing Member States from exercising own competence

#### ***Conferring a new competence on the EU/extending a competence of the EU that is shared with the Member States***

**Article 4 TFEU** concerns 'shared competence', where the Union and the Member States are both able to act. If the EU has not yet acted or has stopped acting in a specific area, the Member States can act accordingly. The idea that Member States' competence should be restricted once the Union has acted has been established in ECJ case law. In the *ERTA* case in 1971<sup>96</sup> the Court established that the Community had an exclusive power after it had adopted a common rule.<sup>97</sup> The ECJ ruled in *ERTA* that the prior use of internal competence adopting common rules was a necessary condition for the basis of the corresponding external power. Subsequent cases extended the powers of the Community in the conclusion of international agreements. In the *Kramer* judgment<sup>98</sup> it was implied that even if no common

<sup>95</sup> For example, the July 2010 [Commission Communication](#), "Towards a comprehensive European international investment policy" under Article 206 TFEU.

<sup>96</sup> Case 22/70, [1971] ECR 263

<sup>97</sup> Judgment 31 March 1971, *Commission v Council (European Road Transport Agreement- ERTA)*, case 22/70, [ECR] 1971

<sup>98</sup> Joined Cases 3, 4 & 6/76, *Cornelis Kramer and others*, [1976] ECR 1279

rule had been adopted at Community level, the EC may have a treaty-making power flowing implicitly from other provisions of the EC Treaty.<sup>99</sup>

In the Lisbon Treaty, where the Union is given a competence which is not exclusive, it is shared. In these areas Member States have competence to adopt legislation to the extent that the Union has not exercised its competence. For example, an environment or energy agreement with a third party would be possible, given that the EU does not have exclusive internal competence in this area. However, this arrangement has been interpreted by critics to mean, in effect, a back door to EU exclusive competence, giving the Union a right of first refusal with regard to competence, while Member States would only be able to do what the Union decided not to do.

A Treaty Protocol on the Exercise of Shared Competence states that “when the Union has taken action in a certain area, the scope of this exercise of competence only covers those elements governed by the act of the Union in question and therefore does not cover the whole area”. Further clarification is provided by a “Declaration in relation to the delimitation of competences”, which confirms that “competences not conferred upon the Union in the Treaties remain with the Member States”.

### ***Extending EU competence regarding the co-ordination of economic and employment policies or the Common Foreign and Security Policy (CFSP)***

**Article 5 TFEU** states that Member States “shall coordinate their economic policies within the Union”. Former Article 99 TEC stated that the economic policies of Member States were “a matter of common concern” and coordinated within the Council. The previous Government thought that cooperation among Member States was “in every member state's interest”,<sup>100</sup> while insisting that it would not agree to any changes that would “harm the UK's economic interest” and would “preserve the ability of member states to conduct their own economic policy, within rules agreed by member states in the Council”.<sup>101</sup> The emphasis in both the former and present Articles is on the Member States, rather than the Union, taking the initiative in the coordination.

Under the Lisbon Treaty the CFSP remains an intergovernmental process distinct from other policy areas. Unanimity remains the norm for decision-making and CFSP provisions remain in the TEU. They are supplemented by an IGC Declaration confirming that the provisions on CFSP will not affect the responsibilities of the Member States, as they currently exist, for the formation and conduct of their foreign policy, or of their national representations in third countries and international organisations. There are some areas in the CFSP in which QMV is used (see below) and Article 31.3 is a *passerelle*, allowing for the extension of QMV in CFSP matters beyond these areas, following unanimous agreement within the European Council. Under Article 31.4 QMV is not applicable to decisions “having military or defence implications”.

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<sup>99</sup> See [Court's Opinion 1/76, 26 April 1977](#) on the distribution of powers between the Communities and the Member States in the field of external relations, which confirmed that the implied treaty-making power may flow from the provisions creating internal powers.

<sup>100</sup> [Standing Committee on the IGC 10 November 2003](#) c 50

<sup>101</sup> HC Deb 9 July 2003 c871-2W

**EU may support, coordinate or supplement Member State actions**

- protection & improvement of human health
- industry
- culture
- tourism
- education, youth, sport & vocational training
- civil protection
- administrative cooperation.

***Conferring a new competence on the EU/extending EU competence to carry out actions to support, coordinate or supplement actions of Member States***

Article 6 TFEU sets out a category of areas of supporting, coordinating or complementary action. Action in these areas must not supersede the competence of Member States to act and must not entail the harmonisation of national laws. Before the Lisbon Treaty the EC Treaty already provided for EU supporting, coordination or complementary action in individual articles.<sup>102</sup>

***Conferring on an EU body a power to impose an obligation or a sanction on the UK; removing any limitation on such power of an EU body***

This is intended to prevent the EU institutions from acquiring new powers not provided by the Treaties to impose obligations or sanctions on the UK. Equally, any attempt to remove a limitation on an EU institution or body to impose an obligation or a sanction on the UK would be subject to a referendum.

***Amendment of the provision for voting by unanimity***

This refers to the list in Schedule 1 of the Bill of 44 Treaty Articles or sub-Articles where any amendment removing the need for unanimity (also consensus or common accord) would attract a referendum. They include several provisions on the Common Foreign and Security Policy, Treaty revision procedures, EU membership application, EP election and voting provisions, social security, police, border control and immigration provisions, indirect taxation, enhanced cooperation (several but not all Member States clubbing together to act), own resources (financing the EU) and the catch-all Article 352(1), whereby the EU may act to achieve an EU aim, even if there is no specific Treaty base.

***Any amendment of Article 31(2) TEU on the CFSP with QMV that removes or amends the provision by which a Member State can oppose a QMV decision***

CFSP decisions adopted in the Council of Ministers are by unanimity, except in the following situations, where QMV applies:

- When adopting decisions defining an action or position on the basis of a decision taken by the European Council (by unanimity) relating to the Union's strategic interests and objectives.
- When adopting a decision defining an action or position on a proposal presented by the High Representative, following a specific request to them from the European Council, made on its own initiative or that of the High Representative.

<sup>102</sup> For example, former Article 127 on supporting cooperation between Member States for attaining a high level of employment; former Article 149 TEC on supporting cooperation to achieve a high level of education; Article 151 on supporting cultural cooperation; former Article 44 TEC on Council and Commission coordination of measures on the freedom of establishment; former Article 177 TEC on complementary action on development cooperation; and former Article 181a on complementary action in economic, financial and technical cooperation with third countries.

- When adopting a European decision implementing a European decision defining a Union action or position.
- When appointing a special representative with a mandate in relation to a specific policy issue.

Under Article 31(2) any Member State is able to abstain from a vote in the Council of Ministers, but it is obliged to accept the decision that has been taken. If at least one third of the Member States, comprising at least one third of the population of the Union, constructively abstain then the decision is not adopted. This so-called “constructive abstention” could also theoretically be applied in the case of military operations, as the Council of Ministers adopts the necessary decisions for operational action on the basis of unanimity. Any Member State can also oppose the adoption of a decision by QMV for “vital and stated reasons of national policy”. In this case if the High Representative, in consultation with the State concerned, is unable to agree an acceptable solution then the Council, acting by QMV, may request that the matter be referred to the European Council for a decision by unanimity.

Article 31(3) is a *passerelle*, allowing for the extension of QMV in CFSP matters beyond those already outlined above, following unanimous agreement within the European Council. Under 31(4) QMV is not applicable to decisions “having military or defence implications”.

***Any change to Article 48 TFEU, 82(3) TFEU or 83(3) TFEU that removes or amends the provision allowing a Member State to suspend the OLP in relation to a legislative proposal***

These three Articles provide so-called ‘emergency brakes’ which allow Member States to suspend an OLP/QMV proposal and refer it to the European Council for a decision by unanimity – with the possibility of veto.

Article 48 TFEU concerns social security. It provides for the adoption of laws in this area using the OLP with QMV, although an ‘emergency brake’ mechanism is set out in Article 48(b) TFEU: where a Member State “declares” that a draft measure would “affect important aspects of its social security system, including its scope, cost or financial structure, or would affect the financial balance of that system”, QMV is suspended and the matter referred to the European Council, which may then refer the draft back to the Council or ask the Commission to submit a new proposal.<sup>103</sup> The TFEU also provides for the European Council to take no action following a referral to it.

In Article 82(3) TFEU on judicial cooperation in criminal matters and Article 83(3) TFEU on serious crime with a cross-border dimension, the ‘emergency brake’ establishes that where a Member State considers that a draft directive “would affect fundamental aspects of its criminal justice system”, it may request that the draft be referred to the European Council, which would decide by unanimity. In the case of judicial cooperation in criminal matters, if the European Council fails to agree within four months, a sub-group of at least nine Member States can move ahead with the proposed policy on their own in an “enhanced cooperation” arrangement.

The UK has the option to opt into measures under these Articles.

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<sup>103</sup> A Declaration on this paragraph confirms that the European Council will act by consensus here.

### 3.3 Exclusions from the referendum requirement

There would not be a referendum requirement under Article 48(6) in certain circumstances:

- if the proposal merely codified what was already happening under the TEU or TFEU;
- if the proposal did not apply to the UK because the UK Government had decided not to opt into a Title V proposal;<sup>104</sup> or
- if it concerned an accession treaty to admit a new member to the EU.

However, if an accession treaty was used as the vehicle for another Treaty amendment, it would trigger a referendum. Thus, if an accession treaty to admit Croatia to the EU were to include Treaty changes arising from the concessions granted to Ireland or from Czech demands for opt-outs, it is likely that this treaty would require a referendum under the Bill's provisions. The Explanatory Notes state (para. 55) that this is not an exhaustive list of cases where a change to the Treaties does not transfer competence or power to the EU, but is merely "illustrative".

### 3.4 Requirement for an Act of Parliament and a referendum

**Clause 6** provides for a separate category of decision which cannot come into effect until the draft decision is approved by an Act *and* the referendum condition is met.

To meet the referendum condition, a bill needs to be introduced to provide for details of the poll, such as the terms of the question. The *European Union Bill* appears to make clear that this referendum poll bill will also contain the provisions to be implemented if there is a Yes vote in the referendum. If the vote is no, then the provisions would not come into effect.

However, it is worth repeating that as with all legislation, the *European Union Bill* does not bind future Parliaments. Therefore, a bill to introduce a referendum on an EU matter may amend or disapply the requirements on referendums contained in the *European Union Bill*.

The Bill specifies that decisions made under the following 12 Treaty Articles would require both an Act of Parliament and a referendum meeting the referendum condition (see above) before the Government could support them.

These conditions would apply to decisions made under the following 12 Treaty Articles:

- **Article 42(2) TEU** in the (still) inter-governmental Treaty on European Union (TEU) concerns the Common Foreign and Security Policy (CFSP)., including the "progressive framing of a common Union defence policy". Article 42(2) states:
 

This will lead to a common defence, when the European Council, acting unanimously, so decides. It shall in that case recommend to the Member States the adoption of such a decision in accordance with their respective constitutional requirements.
- **Article 31(3) TEU** is a *passerelle* and provides for the European Council to decide by unanimity to act by QMV in cases other than those already specified. Under **subsection (4)** QMV is not applicable to decisions "having military or defence implications".

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<sup>104</sup> The UK has an opt-in arrangement for Title V decisions in the Area of Freedom, Security and Justice.



- **Article 48(7) TFEU** is a *passerelle* provision concerning voting procedures in Title V, the Area of Freedom, Security and Justice. It provides for a move from unanimous voting to QMV and an equivalent provision for laws adopted under a “special legislative procedure” (i.e. unanimity moving to QMV). It also provides that if a national parliament makes known its opposition to an initiative within six months the decision will not be adopted. If a decision is adopted the European Council acts by unanimity after obtaining the EP’s consent by a majority of its component members.

The UK has an opt-in provision for decisions in Title V, so this would only be invoked in connection with the Government’s intention to opt into a decision in Title V TFEU.

- **Article 86(1) TFEU** is in the chapter on Judicial Cooperation in Criminal Matters in Title V (therefore the opt-in applies). It provides for a decision by means of a special legislative procedure (unanimity + EP consent) to establish a European Public Prosecutor’s Office (EPPO) from the existing European Judicial Cooperation Unit (Eurojust), an agency of judicial cooperation for the investigation and prosecution of serious cross-border crime.

The European Commission presented an outline of a proposal to establish a European Public Prosecutor at the Nice IGC in 2000, but the proposal was not taken up. In 2001 the Commission published a Green Paper on “Criminal Law Protection of the Financial Interests of the Community and the Establishment of a European Prosecutor”.<sup>105</sup> It set out the proposed tasks of the EPPO:

- He would gather all the evidence for and against the accused, so that proceedings can be commenced where appropriate against the perpetrators of common offences defined in order to protect the Community’s financial interests. He should also be responsible for directing and coordinating prosecutions. He would have specialised jurisdiction, prevailing over the jurisdiction of the national enforcement authorities but meshing with them to avoid duplication.
- He would have recourse to existing authorities (police) to actual conduct the investigations but would direct investigation activities in cases concerning him. He would further reinforce the judicial guarantee as regards investigations conducted within the European institutions.
- Action taken under the authority of the European Public Prosecutor, whenever it could impinge on individual freedoms and basic rights, must be subject to review by the national judge performing the office of “judge of freedoms”. This review, exercised in a Member State, would be recognised throughout the Community so as to allow the execution of authorised acts and the admissibility of evidence gathered in any Member State.
- He would have authority, subject to judicial review, to send for trial in the national courts the perpetrators of the offences being prosecuted.
- When cases come to trial, he must prosecute cases in the national courts in order to defend the financial interests of the Communities. The Commission

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<sup>105</sup> COM (2001) 715 final 11 December 2001 at [http://europa.eu.int/eur-lex/en/com/gpr/2001/com2001\\_0715en01.pdf](http://europa.eu.int/eur-lex/en/com/gpr/2001/com2001_0715en01.pdf)

considers it essential that the trial stage remain in national hands. There is no question of creating a Community court to hear cases on the merits.<sup>106</sup>

When the Commission gave a presentation of its proposals to the Justice and Home Affairs Council early in 2002, the Council considered the time had not come for such a radical step and there were concerns about the proposed remit and constitutional implications of the post.<sup>107</sup> The Commons European Scrutiny Committee (ESC) considered the Green Paper in June 2002 and did not think “that any sufficient case had been made out for the Commission's proposals, and agreed with the Government that the establishment of Eurojust made these proposals unnecessary”.<sup>108</sup>

The proposal was brought forward again for inclusion in the EU Constitution and was resisted by the UK Government, which tabled an amendment to remove the article from the draft. It stated in both its September 2003 and September 2004 White Papers on the Constitution that it saw “no need” for such a post.<sup>109</sup> In their report on the role of Eurojust, the House of Lords EU Committee appeared to endorse witnesses’ suggestions that the extension of Eurojust’s powers alone would be a step towards having an EPPO, even without a specific Constitution Article.

In opposition the Conservatives were wary at best about the creation of this post. A referendum on the introduction of a European Public Prosecutor was one of four specific issues on which the Europe Minister, in his statement on 13 September 2010, pledged to hold a referendum.<sup>110</sup>

- **Article 86(4) TFEU**

The Treaty provides in Article 86(2) that the EPPO would apply only to combating crimes affecting the financial interests of the Union, but Article 86(4) provides for the EPPO remit to be extended by unanimous agreement to include “serious crime having a cross-border dimension.”

- **Article 140(3) TFEU** sets out the procedure for a unanimous Council decision to allow a Member State to adopt the Euro as its currency. It concerns the arrangements for Member States “with a derogation”, i.e. those Member States which do not fulfil the criteria for adopting the euro. These arrangements also apply to the UK.

In June 2003 the previous Labour Government assessed the UK economy against ‘five tests’ it had set out as a requirement for the UK to pass before recommending it joined the euro. The Labour Government also said that if these five tests were met, the matter would be put to a referendum.<sup>111</sup> Following the 2003 statement the Government committed itself to an annual review of progress, the outcome of which is

<sup>106</sup> Council press release 6533/02 28 Feb 2002

<sup>107</sup> Ibid

<sup>108</sup> ESC 34<sup>th</sup> Report 2001-02, June 2002

<sup>109</sup> Cm 5934 *A Constitutional Treaty for the EU: The British Approach to the European Union Intergovernmental Conference* September 2003, and Cm 6309 *White Paper on the Treaty establishing a Constitutions for Europe* September 2004 p.31

<sup>110</sup> See [HC Deb 13 September 2010, c 31WS](#). Adopting the euro, giving up border controls and adopting a common EU defence policy were the other three issues that would require a referendum in the UK.

<sup>111</sup> For information on the five tests, see [Research Paper 03/53](#), “The euro: background to the five economic tests”, 4 June 2003. The [assessment](#) found that not all the tests had been passed.

reported annually in the Budget. Following the announcement of the five tests in 2003, a draft referendum Bill was published in January 2004.<sup>112</sup>

During the 2010 election campaign the Coalition Government pledged specifically to hold a referendum on the UK's adoption of the euro, if this were proposed. This was also one of the four specific referendum pledges the Europe Minister made in his statement on 13 September 2010.

- **Article 153(2) TFEU** concerns social policy and is a *passerelle*. It specifies the social policy areas in which the EU is committed to supporting and complementing action in the Member States, and the basis for decision-making. The policy areas are:
  - (a) improvement in particular of the working environment to protect workers' health and safety;
  - (b) working conditions;
  - (c) social security and social protection of workers;
  - (d) protection of workers where their employment contract is terminated;**
  - (e) the information and consultation of workers;
  - (f) representation and collective defence of the interests of workers and employers, including co-determination, subject to paragraph 5;**
  - (g) conditions of employment for third-country nationals legally residing in Union territory;**
  - (h) the integration of persons excluded from the labour market, without prejudice to Article 150;
  - (i) equality between men and women with regard to labour market opportunities and treatment at work;
  - (j) the combating of social exclusion;
  - (k) the modernisation of social protection systems without prejudice to point (c).

Measures in these areas are subject to the OLP and QMV, with the exception of (c), (d), (f) and (g), which require unanimity. However, the Council may decide unanimously, following a proposal from the Commission, to change the basis of decision-making in **areas (d), (f) and (g)** (my emphasis) to the OLP with QMV. QMV *cannot*, however, be extended to (c) on social security and social protection of workers. Retaining unanimity for social security decisions was in 2004 (the EU Constitution) and 2007 (the Reform Treaty/Lisbon) one of the Government's so-called 'red lines'.<sup>113</sup> In a Memorandum to the House of Lords European Union Committee in February 2003, the then Labour Government said it was not convinced that more QMV in this area would create more and better jobs or help further alleviate social exclusion; neither did it think that voting by unanimity had been a bar to the adoption of necessary legislation in the social field, but that it had preserved the diversity of national traditions in the Member States.<sup>114</sup>

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<sup>112</sup> For information on the Bill see [Standard Note 2851](#), "The draft single European currency (referendum) bill", 8 January 2004.

<sup>113</sup> For information on the Government's 'red lines' in 2003-04, see Standard Note SN/IA/2740, *The Intergovernmental Conference on the Draft Treaty Establishing a Constitution for Europe: issues, concerns and 'red lines'*, 7 November 2003 at <http://hcl1.hclibrary.parliament.uk/notes/iads/sn/ia-02740.pdf>

<sup>114</sup> House of Lords Select Committee on the European Union 14<sup>th</sup> Report, Minutes of Evidence, 2002-3, 12 March 2003, p 2 at <http://pubs1.tso.parliament.uk/pa/ld200203/ldselect/ldcom/79/3031202.htm>

The Committee commented that, while the Government's concerns about the extension of QMV in the social policy field were understandable, it was doubtful whether unanimity would be a viable basis for making decisions in this area with further EU enlargement. It also argued that any discussion about extending QMV in social policy should be accompanied by an attempt to clarify the EU's competence in this area.<sup>115</sup> In its October 2003 Report, the Lords Committee called on the Government to "stand firm" against attempts to amend the draft Treaty to extend QMV to matters of tax or social security, which it did,<sup>116</sup> and sub-paragraph 4 of this Article confirms that it does not affect the "fundamental principles" of Member States' social security systems. The present Government appears to share the previous Government's approach in this area.

- **Article 192(2) TFEU** is a *passerelle* and concerns the environment, which is one of the areas of competence shared between the Union and the Member States. Unanimity is preserved from the previous EC Treaty, with consultation of the EP, Economic and Social Committee and Committee of the Regions, in the following areas: provisions of a fiscal nature, town and country planning, quantitative management of water resources or affecting the availability of those resources, land use, except waste management; and measures significantly affecting a Member State's choice of energy sources and the general structure of its energy supply.

Sub-paragraph (2) allows the Council to decide by unanimity to make the OLP applicable to those matters subject to unanimity in the Council.

- **Article 312(2) TFEU** is a *passerelle* concerning EU finance provisions, allowing the Council to move from a special legislative procedure (unanimity) for the adoption of the regulation laying down the multiannual financial framework to its adoption by QMV. The Framework sets out the longer term limits on EU expenditure and the annual EU Budget has to be set within the limits of the framework. The previous EU Treaties did not contain provision on the multiannual financial framework; it was agreed through an Inter-Institutional Agreement. In the amended Treaty each framework must last at least five years and requires unanimity in the Council following a majority in the EP. The Article also makes provision for annual budgeting to continue if no new framework is in place.
- **Article 333(1) and (2) TFEU** are *passerelles* for enhanced cooperation procedures. Sub-paragraph (1) provides for the approval by unanimity among participating Member States of a move to QMV in an enhanced cooperation programme that is already in progress. Sub-paragraph (2) allows participating Member States in the Council to decide by unanimity to change the legislative procedure within a program of enhanced cooperation from a special procedure to the ordinary legislative procedure. The Article appears to anticipate that once a programme is in progress, the need for unanimous voting may recede.

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<sup>115</sup> House of Lords Select Committee on the European Union 14<sup>th</sup> Report, *The Future of Europe: "Social Europe"* HL 79 2002-03, 7 April 2003, para 19

<sup>116</sup> House of Lords Select Committee on the European Union 41<sup>st</sup> Report, *The Future of Europe – The Convention's Draft Constitutional Treaty*, HL 169 2002-03 21 October 2003, para 93:  
<http://www.publications.parliament.uk/pa/ld200203/ldselect/ldcom/169/169.pdf>

The Bill specifies that the enhanced cooperation matter must be in the list of areas in its Schedule 1 (TEU and TFEU provisions where amendment removing the need for unanimity would attract a referendum) and must be an arrangement in which the UK is participating.

- **Article 4 of Schengen Protocol** concerns border controls, the fourth specific matter on which the Conservatives pledged to hold a referendum, and refers to Protocol No. 19 on the “Schengen *acquis* integrated into the framework of the European Union”, annexed to the TEU and TFEU.

The Schengen *acquis*<sup>117</sup> comprises agreements covering the abolition of checks at common borders and related cooperation and coordination between the police and the judicial authorities in participating States. With the incorporation of the Schengen *acquis*<sup>118</sup> into the TEC by the *Treaty of Amsterdam* in 1997, the UK, Ireland and Denmark secured various opt-in/opt-out arrangements in matters comprising the area of freedom, security and justice. Elements of the Schengen *acquis* went into Titles IV TEC and VI TEU. Under the *Protocol on Schengen* attached to the Treaties the UK and Ireland are not parties to Schengen but can, with the agreement of the Schengen States, opt in selectively to individual measures. After the incorporation of the Schengen *acquis* into the EU framework, the UK requested the right to participate in some aspects of Schengen. The Council approved the request and a Decision was adopted in 2000.<sup>119</sup> The UK participates in police and judicial cooperation in criminal matters, the fight against drugs and the Schengen Information System (SIS).

### 3.5 EU decisions requiring UK approval by an Act of Parliament

#### **Confirmation of UK approval of an EU decision**

The Bill lists in **Clause 7** four Treaty Articles which would give rise to decisions that could be adopted by the Government only if they had been approved by an Act of Parliament. The Explanatory Notes confirm that, as all the Articles listed in Clause 7 are subject to a unanimous vote in the Council, with the possibility of veto by any Member State, this Clause would apply only “when the Government has agreed to the use of one of the decisions set out in this clause”, and parliamentary approval is required before the Government could “approve formally the decision”. This reflects current procedures under the *European Communities Act 1972* as amended.

For the following four Articles, an Act of Parliament would be needed in the UK to approve a decision *after* its adoption in the Council:

- **Article 25 TFEU** allows the rights of citizens of the EU in Article 20(2) TFEU to be strengthened by a unanimous decision of the Council using a special legislative procedure. Articles 21-24 elaborate on these rights and specify voting procedures. They provide a new legal base for legislation relating to protection by diplomatic and consular authorities and for laws concerning social benefits in relation to the free movement of citizens.

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<sup>117</sup> The *acquis* is the total body of Treaty Articles, laws and Court rulings that form the EU’s achievements to date.

<sup>118</sup> The *acquis* include the 1985 Schengen Agreement, the 1990 Schengen Convention and the decisions of the Executive Committee established by the Schengen agreements. See the Protocol No 2 TEU. The UK’s participation is set out in Council Decision 2000/365/EC of 29 May 2000. See Lords EU Committee Report *Incorporating the Schengen Acquis into the European Union* 31st Report, Session 1997-98, HL Paper 139.

<sup>119</sup> 2000/365/EC, OJ L 131/43 1 June 2000.

The Bill requires an Act of Parliament before these rights could be strengthened or extended. There have been several additions to EU citizenship over the years. Elements of citizenship, such as free movement within the EU in order to exercise economic activity in any of the Member States, were established as far back as the 1957 *Treaty of Rome*. A more formal EU Citizenship, intended to complement, not replace, national citizenship,<sup>120</sup> was introduced in the Maastricht Treaty in 1992 in Article 2 TEU (the EU aims to “strengthen the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union”). In addition to the

#### EU citizenship rights in Article 20(2)

- Freedom of movement and residence in the EU
- Right to vote in and stand as candidate in EP elections under the same conditions as nationals of that State
- Protection of the diplomatic and consular authorities of any other Member State
- Right to petition EP, apply to European Ombudsman, address EU institutions & advisory bodies in any EU language and receive a reply in that language

earlier right to move and reside freely in any Member State, Maastricht introduced voting and election rights in EP and local elections, and extra consular protection. The *Treaty of Amsterdam* extended citizens’ rights with a new anti-discrimination clause on the grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. The *Treaty of Nice* extended QMV to measures to facilitate rights of citizens to move freely and reside within the EU through changes to justice and home affairs matters. Lisbon introduced the “Citizens’ Initiative”, whereby one million EU citizens may ask the Commission to introduce a measure in a particular area.

- **Article 223(1) TFEU** concerns the drawing up of a proposal for EP elections by direct universal suffrage “in accordance with a uniform procedure in all Member States or in accordance with principles common to all Member States” and the adoption of regulations and general conditions governing the performance of the duties of MEPs. The wording of the uniform procedure part is fundamentally the same as former Article 190(4) TEC.<sup>121</sup> The requirements for a unanimous vote in the Council and national ratification are believed to have been impediments to agreement of a common system for EP elections, although even without agreement, there has been a gradual convergence of EP electoral systems. A Council Decision of September 2002<sup>122</sup> established “common principles” for EP elections.

<sup>120</sup> This is spelled out in the present Treaties in [Article 9 TEU](#), “Provisions on democratic principles”

<sup>121</sup> In fact the wording goes right back to Article 20 of the 1951 *Treaty of Paris* on the European Coal and Steel Community, which provided for an Assembly consisting of “representatives of the peoples of the States brought together in the Community”, where Article 21(3) stated: “The Assembly shall draw up proposals for elections by direct universal suffrage in accordance with a uniform procedure in all Member States”.

<sup>122</sup> [Council Decision 2002/772/EC](#), Euratom of 25 June and 23 September 2002 amending the Act concerning the election of the representatives of the European Parliament by direct universal suffrage, annexed to the decision 76/787/ECSC, EEC, Euratom, OJL 283, 21 October 2002

#### 2002 Common Principles for EP elections

- Proportional representation based on the list system or single transferable vote, with a preferential list system as an option
- Direct universal suffrage with free and secret vote
- Member States decide electoral constituencies without generally affecting the proportional nature of the voting system
- Maximum national threshold of votes cast is 5%
- National ceiling for candidates' campaign expenses is possible
- MEPs enjoy the privileges and immunities applicable to them according to the Protocol of 8 April 1965 on the privileges and immunities of the European Communities
- From the 2004 European elections an MEP's office is incompatible with that of a member of a national parliament
- National provisions rule the electoral procedure in each Member State, subject to the provisions of the Act

The Lisbon Treaty formalised the principle of 'degressive proportionality'<sup>123</sup> in the composition of the EP and stipulated in Article 14 TEU that it "shall be composed of representatives of the Union's citizens" in place of the earlier definition of MEPs as "representatives of the peoples of the States brought together in the Community" (former Article 189 TEC).

- **Article 262 TFEU** allows the Council to decide by unanimity to give the Court of Justice jurisdiction in disputes over EU laws which create intellectual

property rights.<sup>124</sup>

Lisbon introduced a specific competence for Community intellectual property rights in Article 118 TFEU and changed the wording of a similar earlier Article from "Community industrial property rights" to "European intellectual property rights". Decision-making is by unanimity under a special legislative procedure and there is a requirement for a kind of national ratification. As well as expanding the jurisdiction of the Court of Justice, under Article 257 TFEU, Lisbon also enabled the establishment of specialised courts, with the agreement of the EP, in patent law, for example (the proposed European Union Patent Court),<sup>125</sup> and other areas of intellectual property.

In its impact assessment of the Lisbon Treaty, the Lords EU Committee noted that one of its expert witnesses, Professor Chalmers, had told them that conferring jurisdiction on the Court in this area "was codification; the Court had been interpreting legislation on intellectual property rights since 1997".<sup>126</sup>

- **Article 311 TFEU** concerns Member States' financial contributions to the EU, based on the provisions of the Own Resources Decision (ORD).<sup>127</sup> Article 311 states that the

<sup>123</sup> The EP's apportionment of seats is not strictly in accordance with the population of Member States; rather, seats are distributed by a scheme which roughly means that the larger the population, the more people per MEP are represented. In practice, small Member States are somewhat over-compensated, while larger States are under-represented.

<sup>124</sup> Intellectual property rights are the legal rights which result from intellectual activity in the industrial, scientific, literary and artistic fields.

<sup>125</sup> See [Council Conclusions 7 December 2009](#)

<sup>126</sup> House of Lords European Union Committee [10<sup>th</sup> Report 2007-08](#), "The Treaty of Lisbon: an impact assessment".

<sup>127</sup> The most recent ORD was in 2007, [2007/436/EC, Euratom](#). For further information on the EU Budget and ORD see Standard Note 864, "The EU Budget", 28 October 2010. See also [EUObserver, 24 November 2010](#)

EU budget shall be financed wholly from own resources, but the Treaty does not define what is meant by the EU's own resources). It provides in paragraph (3) that the Council, by a special legislative procedure (unanimity) and after consulting the EP, adopt measures on the EU's system of Own Resources, including the possibility of establishing new categories of own resources and abolishing existing ones. The Decision would have to be ratified by all Member States.

Some commentators believe this Article confers on the EU wide-ranging taxation and revenue-raising powers provided the whole Council agrees. One of the contentious issues at the recent fraught budgetary discussions concerned the EU's long-term budgetary perspective, such as raising more EU own resources through supplementary taxes.

### ***An Act of Parliament before Government approval in Council***

The following group of six Articles would require an Act of Parliament *before* the Government could approve a draft decision in the Council.

- **Article 17(5) TEU** allows the European Council to alter the size of the Commission by a unanimous decision from two-thirds of the number of Member States to some other number after November 2014.

The Nice Treaty in 2000 provided new institutional and decision-making arrangements to prepare the EU for enlargement of up to 27 members. Article 4 of Protocol A required the large Member States (the UK, France, Germany, Italy and Spain) to relinquish one Commissioner each in January 2005. From this date, the Commission comprised one national from each Member State. The Nice Protocol also provided that when the Union expanded to 27 members new provisions would apply, requiring the Commission to have fewer members than the number of Member States, who would be rotated "on the principle of equality". The Council would decide unanimously on the size of the Commission and on implementing measures.

Under the Lisbon Treaty, until 31 October 2014 the Commission will comprise one member from each Member State (including the President and the High Representative for Foreign Affairs). As from 1 November 2014 the whole Commission will be reduced to two-thirds of the number of Member States.

In order to encourage Irish voters to support the Lisbon Treaty in a second referendum in 2009, the European Council agreed in December 2008 to change that number with a decision taken once Lisbon had come into force "to the effect that the Commission shall continue to include one national of each Member State".<sup>128</sup> This could mean that from 1 November 2014 there will still be one Commissioner per Member State.

- **Article 48(7) TEU** is the general simplified revision – or ratchet – procedure, providing for a change from unanimous voting to QMV or from a special legislative procedure to the OLP. The Bill is concerned with any decision made under this Article which, in relation to any decision not already listed in Schedule 1, results in a move

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<sup>128</sup> [Presidency Conclusions, 11-12 December 2008](#)



from unanimity to QMV. This appears to be a catch-all provision in case of omissions from the Schedule.

- **Article 64(3) TFEU** allows the Council to adopt by unanimity (after consulting the EP) measures which constitute a backwards step in EU law regarding the liberalisation of the movement of capital to or from third countries. Before Lisbon, restrictions on the movement of capital and payments between Member States and third countries were prohibited in principle, although with some exceptions, including allowing for steps backward in liberalisation. Here, use of the special legislative procedure makes it difficult to renege on existing measures that have liberalised the free movement of capital between Member States and third countries.
- **Article 126(14)** provides for provisions that would replace the present Excessive Deficit Protocol (No. 12 - annexed to the TEU and TFEU), and would set out the detailed rules for the application of the Protocol. This requires unanimity in the Council after consulting the EP and European Central Bank (ECB). This Article could result in replacing a Protocol (protocols have the same legal status as treaties), which means in effect that a special legislative procedure could be used to replace a Treaty change and ratification.
- **Article 333(1) and (2) TFEU** allows in (1) for a unanimous decision of States participating in an enhanced cooperation arrangement to act by QMV and in (2) for participating States to decide by unanimity and after consulting the EP to move from a special legislative procedure to the OLP. These provisions do not apply to decisions with military or defence implications.
- A recent example of the use of Article 333(2) is the Council decision of 12 July 2010 authorising enhanced cooperation among 14 Member States “[in the area of the law applicable to divorce and legal separation](#)”. The EP, which was consulted, called on the Council to “adopt a decision pursuant to Article 333(2) of the Treaty on the Functioning of the European Union stipulating that, when it comes to the proposal for a Council Regulation implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, it will act under the ordinary legislative procedure”. It has been suggested that the Belgian EU Presidency wants adopt a regulation to this effect before the end of the year.<sup>129</sup>
- The Bill specifies with regard to 333(2) that an Act would be necessary if the decision related to a matter not listed in Schedule 1, if the voting procedure was by unanimity and if the UK was a participant in the enhanced cooperation decision.

### 3.6 The ‘Flexibility clause’: Article 352 TFEU

Article 352 TFEU (formerly Article 308 TEC) is the catch-all or “enabling clause”, also called the “flexibility clause”, the “competence clause” and once known as “la petite révision”. It allows the Union to adopt measures to attain an EU objective within its areas of competence but in the absence of an explicit Treaty base giving the EU the power to act in the area in question.

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<sup>129</sup> See [JURI report, EP Legal Affairs Committee, October 2010](#)

This Article applies to all Treaty areas except for the CFSP and can be used “within the framework of the Policies defined in the Treaties, to attain one of the objectives set out in the Treaties”. It cannot be used to harmonise national laws “in cases where the Treaties exclude such harmonisation”. Whereas under Article 308 TEC the Council was required to consult the EP, Lisbon requires the Parliament’s consent. The Commission must “draw national parliaments’ attention” to proposals to be adopted under this Article, in accordance with the subsidiarity monitoring procedure.

**Examples of Article 308 as legal base**

- Fundamental Rights Agency
- Anti terrorism legislation post 9/11
- Community trademark
- European Company
- Community Action Programme in civil protection
- Rapid-reaction mechanism for humanitarian aid

The use of the ‘flexibility clause’ was sometimes criticised as being a way for the EU to enact legislation for which there was no Treaty provision - so-called “competence creep”.<sup>130</sup> It formerly applied to the operation of the common market, although the Court of Justice interpreted this very broadly. The TFEU Article is more open-ended and does not refer to the common market but to the “framework of its policies”, which would appear to put an end to the argument between the “literal approach” and the “purposive approach”.<sup>131</sup>

In the Bill this Article is in the general category of Articles needing enhanced parliamentary approval. **Clause 8(1)** prohibits a Minister from voting for or supporting a proposal made on the basis of Article 352 TFEU unless one of the following sub-sections **(3)-(5)** has been complied with. **Clause 8(3)** requires an Act of Parliament. **Clause 8(4)** provides for a procedure to be used in emergencies (the post 9/11 legislation would have come into this category) by means of a motion agreed in each House of Parliament that the Government may support a measure.

Under **Clause 8(5)** an Act of Parliament would *not* be required for an Article 352 proposal if it satisfies exemption criteria listed in **Clause 8(6)**. The ENs state that these exemptions are an attempt to “prevent unnecessary Acts of Parliament to approve measures which have been agreed in substance under previous measures using the Article 352 TFEU legal base”. Thus, a proposal under Article 352 which is in substance the same as a previous measure to which the UK had agreed, would be exempted from the requirement for an Act of Parliament; likewise for an extension to the application of an existing Article 352 TFEU measure (e.g. extending a three-year lifetime by another three years). In these sub-sections, “other than an excepted measure” refers to a measure resulting from a decision made under the emergency provision in **Clause 8(4)**. **Clause 8(7)** clarifies that if the Government has agreed to an Article 352 measure on grounds of emergency, it cannot subsequently try to make use of these two sub-sections to avoid having to pass an Act of Parliament. As the ENs make clear, the Government could not “seek a further exemption to prolong an existing Article 352 measure, if that measure was adopted originally because it was considered urgent”. Any subsequent proposal to extend or renew an “urgent” measure would require an Act of Parliament.

An Act of Parliament would also be unnecessary if it were just to approve an extension of a previously agreed measure (e.g. training programme) to other Member States or third parties

<sup>130</sup> The House of Common EU Scrutiny Committee [29<sup>th</sup> Report](#) in July 2007 looked at the use of Article 308 TEC.

<sup>131</sup> The Scrutiny Committee concluded in July 2007 that in spite of the ECJ Opinion 2/94 and the judgments in the Yusuf and Kadi cases, the interpretation was still open to argument.

or when several Article 352 measures or amendments are consolidated into one EU act without changing the substance of their content.

### 3.7 Title V TFEU: the Area of Freedom, Security and Justice

Another area where the Bill provides for enhanced parliamentary scrutiny is Title V TFEU, the “Area of Freedom Security and Justice” (AFSJ). This Title replaced the former Title IV TEC, “Visas, Asylum, Immigration and Other Policies related to Free Movement of Persons” and former Title VI TEU “Police and Judicial Cooperation in Criminal Matters”. These fields were formerly in the intergovernmental ‘third pillar’ on Justice and Home Affairs, where decision-making was by unanimity. The Amsterdam, Nice and Lisbon Treaties moved these areas to the main ‘Community pillar’, making them subject to QMV and the jurisdiction of the Court of Justice. The UK Government secured an opt-in arrangement in these areas in 1997.

The AFSJ covers policies on border checks, asylum and immigration, judicial cooperation in civil matters, judicial cooperation in criminal matters and police cooperation. Lisbon changed the legislative procedure to the OLP for most measures on border controls, asylum and immigration. According to the Foreign Secretary at the time, the British Government supported the extension of QMV to the area of asylum and immigration.<sup>132</sup> The emergency brake in criminal matters, whereby a Member State may refer a matter to the European Council if a proposal poses a particularly serious difficulty, remained. The Labour Government secured a continued opt-in arrangement to this Title which is set out in the **Protocol on the position of the UK and Ireland**.

Under Article 3 of this Protocol the Government must notify the Council of its intention to opt into a decision within three months of the proposal going to the Council, and under Article 4 the UK “may at any time after the adoption of a measure by the Council pursuant to Title V .... notify its intention to the Council and the Commission that it wishes to accept the measure”.

While UK governments have generally agreed that minimum standards in civil procedure could be enhanced, they have not accepted that there is a need for an alignment of substantive criminal law. The Foreign Secretary told the ESC in 2003 that the Government would “strongly oppose” any draft EU framework law “establishing minimum rules on criminal procedure, that would threaten trial by jury or *habeas corpus*”.<sup>133</sup> These were “fundamental aspects of our criminal justice system” and the Government would expect to invoke the emergency brake mechanism if these areas were threatened. When the European Scrutiny Committee looked at similar provisions in the Treaty Establishing a Constitution for Europe in 2003, it welcomed the requirement for there to be a cross-border dimension before the EU could act, and the limits on the scope for action in relation to substantive criminal law. It did have reservations about the voting procedures for the adoption of criminal justice measures, but acknowledged the emergency brake mechanism (now in Article 83(3) TFEU). It also had concerns about the establishment of the European Public Prosecutor’s Office.

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<sup>132</sup> Jack Straw, HC Deb 9 July 2003 c 1208

<sup>133</sup> See [ESC 14<sup>th</sup> Report 2004-05](#); Cm 5934, para 83. See also First Special Report from the European Scrutiny Committee (2002-03), The Convention’s proposals on criminal justice: Government Observations on the Committee’s Report, HC 1118

The EU has already agreed minimum standards on civil procedural matters as, for example, in the European Enforcement Order. The Stockholm Programme of October 2009, which followed on from the earlier Tampere and Hague Programmes, included, among other things, proposals for the development of “common minimum rules” in the area of criminal matters:

The EU should continue to enhance mutual trust in the legal systems of the Member States by establishing minimum rights as necessary for the development of the principle of mutual recognition and by establishing minimum rules concerning the definition of criminal offences and sanctions as defined by the Treaty.

And:

### **3.3 Developing a core of common minimum rules**

To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters, the Union may adopt common minimum rules. The European Council considers that a certain level of approximation of laws is necessary to foster a common understanding of issues among judges and prosecutors, and hence to enable the principle of mutual recognition to be applied properly, properly, taking into account the differences between legal traditions and systems of Member States.<sup>134</sup>

This five-year programme forms the agenda for EU justice and home affairs legislation from 2010 to the end of 2014. The Law Societies of England and Wales, of Scotland and of Northern Ireland Brussels Office published in its August 2010 Law Reform Update Series a “legislative tracker” of decisions and proposals under “Judicial cooperation in criminal matters”. It lists 21 proposals, with a further nine in the pipeline. It is likely that there will be further proposals falling within the remit of the Articles set out in Clause 9 of the Bill (see below).

The previous Government generally supported the Stockholm Programme, but did not support common definitions of actual offences or a move away from the principle of mutual recognition. The Coalition Government has also signalled its support for the Stockholm Programme in general, but not all aspects of it. They do not support, for example, proposals for a European public prosecutor or a common asylum policy.<sup>135</sup> In its response to the Justice Select Committee’s Report “Justice issues in Europe”, the Government said:

We recognise the importance of the Stockholm programme in setting the EU agenda for work on Justice and Home Affairs over the next five years. However, this does not mean that the Government will necessarily support every aspect of it. The Stockholm programme refers, for example, to the creation of a European Public Prosecutor’s Office as a possibility that could be considered, but as referred to in the Introduction, this Government does not believe that the UK should participate in it.<sup>136</sup>

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<sup>134</sup> [Stockholm Programme: An open and secure Europe serving and protecting the citizen](#). See also the Lords EU Committee, sub-committee F (Home Affairs) report on The Stockholm Programme: home affairs published 9 November 2009 (25th Report of the Session 2008-09, HL Paper 175). The Government responded on 7 January 2010.

<sup>135</sup> See [HC Deb 27 July 2010 c 881](#) for information on recent opt-in proposals.

<sup>136</sup> Cm 7945, [Ministry of Justice, 27 October 2010](#)

**Clause 9** provides for parliamentary approval of provisions in the Area of Freedom, Security and Justice (AFSJ) in Part 3 Title V of the TFEU, where the UK's opt-in arrangement applies. This procedure would apply in relation to three Treaty Articles:

- **Article 81(3) TFEU** (Judicial Cooperation in Civil Matters) allows the Council to decide by unanimity to move from a special legislative procedure (unanimity) to the OLP (QMV) with regard to measures on family law with cross-border implications (e.g. divorce and child custody) in this Title. Such a proposal would be subject to a national parliamentary veto if opposition is notified within six months of receiving the proposal.
- **Article 82(2)(d) TFEU** (Judicial Cooperation in Criminal Matters) allows the EP and Council to adopt using the OLP minimum rules on aspects of criminal procedure in addition to those set out in the Treaty, which the Council had already identified in a decision. The Council would act by unanimity with the consent of the EP.
- **Article 83(1) TFEU** allows the EP and Council to adopt by the OLP minimum rules on the definition of criminal offences and sanctions in the areas of “particularly serious crime with a cross-border dimension” where there is a need to combat such crime on a common basis. The crimes included in the current definition are terrorism, drug, arms and people trafficking, money laundering, corruption, counterfeiting, computer crime and organised crime.

The third indent of this Article provides for the Council to adopt by unanimity and with the EP's consent, a decision identifying other areas of crime to add to this list with regard to which the EU would be able to specify minimum rules and sanctions.

As the ENs point out, as these three Articles are subject to unanimous voting in the Council, even if the UK had decided to opt in, it would be able to veto proposals. In this case, those Member States that wanted to participate would do so without the UK.

The Bill provides for a two-stage parliamentary approval procedure:

1. before the Government can participate in the negotiations or the decision, or in any decision drawing on a previous use of such a decision,<sup>137</sup> and
2. before it can give final agreement to the decision.

Under **Clause 9(3)** both Houses would have to pass a motion tabled by a Minister without amendment, which would constitute “parliamentary approval” for the purpose of approving the Government's notification of its wish to opt in to a proposal and to participate in the EU negotiations.

Under **Clause 9(4)**, before the Government can agree to (‘adopt’) a decision or a “subsequent decision” based on any of these three Articles in the Council, there must be an Act of Parliament to approve this.

**Clauses 9(5) and (6)** concern the UK opting into an AFSJ decision or subsequent decision retrospectively under Article 4 of the UK/Ireland Protocol. Again, the Government may not

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<sup>137</sup> See ENs para 87 for an example of a subsequent decision.

give notification of an intention to participate in an AFJS measure under Articles 81(3), 82(2) or 83(1) or any subsequent decision unless this has been approved by an Act of Parliament. The ENs state that “This prevents the UK from opting into a measure without passing an Act of Parliament, merely because the decision has already entered into force”.

The European Scrutiny Committee has asked the Government to improve the scrutiny mechanism for opt-in decisions<sup>138</sup> and the House of Lords looked at an enhanced parliamentary scrutiny procedure for the opt-ins in its report “Enhanced scrutiny of EU legislation with a United Kingdom opt-in”.<sup>139</sup> The two-stage parliamentary procedure set out in the Bill would provide a greater role for Parliament than under current arrangements, although it is not clear whether there will be an enhanced role for the European Scrutiny Committee itself.

### 3.8 Parliamentary approval of decisions without an Act of Parliament

**Clause 10** provides a form of parliamentary approval that is not an Act of Parliament before the Government can agree to proposals made under specific Articles. This would involve the approval of both Houses of a motion tabled by a Minister, without amendment. The proposals in question would be made under the following Articles:

- **Article 56 TFEU**, which allows the EP and Council to decide by the OLP to extend provisions on the free movement of services to nationals of a third country (i.e. not an EU Member State) who provide services and are established within the EU.
- **Article 129(3) TFEU** provides for the EP and Council to amend a range of provisions in the Statute of the European System of Central Banks (ESCB) and the European Central Bank (ECB) using the OLP and on a recommendation from the ECB after consulting the Commission, or on a proposal from the Commission after consulting the ECB.
- **Article 252 TFEU** allows the Council by unanimity to increase the number of Advocates-General of the Court of Justice from the present eight.
- **Article 257 TFEU** allows the EP and Council to adopt using the OLP (formerly the decision was by unanimity) regulations establishing specialised courts attached to the General Court (formerly the Court of First Instance).
- **Article 281 TFEU** provides for the EP and Council to amend by means of the OLP the Statute of the Court of Justice, either on the request of the Court after consulting the Commission or *vice versa*.
- **Article 308 TFEU** provides for the amendment of the Statute of the European Investment Bank (EIB). This can be done either by the Council acting unanimously under a special legislative procedure at the request of the EIB and after consulting the EP and Commission, or on a proposal from the Commission after consulting the EP and EIB.

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<sup>138</sup> Ministerial correspondence, European Scrutiny Committee

<sup>139</sup> HL Paper 25, 2<sup>nd</sup> Report, 2008–09

- **Article 218(8) TFEU** sets out the voting procedure for the possible future accession of the EU to the Council of Europe's European Convention on Human Rights under **Article 6(2) TEU**. The Council would act by QMV. However, it would act by unanimity to approve an agreement for which unanimity was required to adopt a measure in that field at EU level, e.g. for association agreements, agreements with EU candidate countries and on Union accession to the European Convention on Human Rights.

In **Clause 120(2)** the Bill specifically prohibits the Government from confirming the UK's approval of accession to the European Convention on Human Rights, unless parliamentary approval has been given as described above.

## 4 European Parliament additional seats

### 4.1 Increasing the size of the European Parliament

The *Treaty of Lisbon* established an overall cap on the size of the European Parliament of 751 MEPs. The June 2009 EP elections were held under the provisions of the *Treaty of Nice*, since the Lisbon Treaty was not in force, and a total of 736 MEPs were elected. Following a decision by the European Council on 17 June 2010, a short IGC was held in Brussels on 23 June 2010 in the margins of the meeting of the Committee of Permanent Representatives (COREPER II). The European Council decided with the EP's consent not to convene a Convention and the European Council defined the IGC's mandate.

Member States adopted a transitional protocol amending Article 2 of Protocol 36 of the Lisbon Treaty to allow an adjustment of the distribution of MEPs among 12 Member States, numbering 18 MEPs in all. This will raise the total to 754 seats until the next EP elections in 2014. It will allow the extra MEPs to be elected in the current 2009-2014 Parliament and for the three extra German MEPs not to have to stand down in the middle of a term of office.<sup>140</sup> The number of UK MEPs increases from 72 to 73. At EU level, unanimous agreement was needed for such a protocol, as it means a Treaty change. **Appendix 1** of this paper looks at the background to the June 2010 agreement on EP seats. This was the first use of the Ordinary Revision Procedure since the implementation of Lisbon.

An amendment to the EU Treaties can be ratified in the UK only if it is approved by an Act of Parliament. This is set out in section 5 of the *European Union (Amendment) Act 2008*. Legislation is also needed to provide for the seat to be filled. On 24 February 2010 the then Justice Minister, Michael Wills, told Parliament that the Government intended to fill the extra seat allocated to the UK under the Lisbon Treaty "in accordance with the results at the June 2009 EP elections".<sup>141</sup>

The EU Protocol does not determine how or from which parliamentary electoral region the additional MEPs should be elected; but that they should be elected using one of the methods set out in the Protocol. There is therefore no need for prior consultation of the Electoral Commission, although the Government has said "the Electoral Commission will be consulted

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<sup>140</sup> Under Article 5 of the 1976 EU Act on the election of EP representatives by direct universal suffrage (OJL 278, 8 October 1976, p. 5, consolidated text in [OJL 283, 21 October 2002 pp1-4](#)), it is not possible for the EU to curtail an MEP's mandate during a parliamentary term. It provides only for vacancies under Article 13(1) in cases where an EP seat falls vacant due to resignation, death or withdrawal of the MEP's mandate.

<sup>141</sup> [HC Deb 24 February 2010 c 70WS](#)

fully at the appropriate time, as required by the relevant legislation”.<sup>142</sup> The 18 additional MEPs cannot take office until all 27 Member States have ratified the protocol.<sup>143</sup>

**4.2 EP seats in the UK**

The last reduction of the UK’s EP seats from 78 to 72, which resulted from the accession of Bulgaria and Romania to the EU in 2005, was brought about in the UK by Statutory Instrument 2008 No. 1954, *The European Parliament (Number of MEPs and Distribution between Electoral Regions) (United Kingdom and Gibraltar) Order 2008* of 17 July 2008.<sup>144</sup> The *European Parliament (Representation) Act 2003* provides for the number of MEPs to be varied in response to changes in Community law. Under the principles set out in the *European Parliament (Representation) Act 2003*, changes must ensure that:

- (a) each electoral region is allocated at least three MEPs; and
- (b) the ratio of electors to MEPs is as nearly as possible the same in each electoral region.

The Electoral Commission published its [report](#) on 26 October 2010.<sup>145</sup> It used the St Laguë method to allocate the extra seat, following their decision on the method of allocation used since 2003.

4.4 The Sainte-Laguë method takes into account the regional electorate and the number of seats allocated so far when distributing subsequent seats. These figures are also shown in Table 3. The regional electorates are divided by one more than twice the number of seats so far allocated (the divisor). For example, the electorate for the East Midlands (3,333,802) is divided by 11 (twice the five seats allocated so far, plus one), which gives a quotient of 303,073. Starting with the current distribution of the UK’s 72 MEPs, the Sainte-Laguë method requires the electoral region with the highest quotient to be allocated the next – in this case, the seventy-third – seat.

4.5 Table 3 shows that the region with the highest Sainte-Laguë quotient is the West Midlands.

Using this method, it recommended that the extra seat go to the West Midlands:

Region	Current seats	Recommended allocation of the additional seat	Revised distribution of seats
East Midlands	5		5
Eastern	7		7
London	8		8
North East	3		3
North West	8		8
South East	10		10
South West	6		6

<sup>142</sup> [HC Deb 20 July 2010 c192W](#)  
<sup>143</sup> For further background information see [EP Background](#) briefing.  
<sup>144</sup> [http://www.opsi.gov.uk/si/si2008/uksi\\_20081954\\_en\\_1](http://www.opsi.gov.uk/si/si2008/uksi_20081954_en_1)  
<sup>145</sup> The Electoral Commission, *Allocation of the additional MEP awarded to the UK under the Treaty of Lisbon Recommendation*, October 2010



West Midlands	6	1	7
Yorkshire & the Humber	6		6
Wales	4		4
Scotland	6		6
Northern Ireland	3		3
Total	72	1	73

On the same day, Mark Harper, parliamentary secretary to the Cabinet Office, set out in a [written ministerial statement](#) how the extra seat would be filled:

The Government will include the necessary provisions to implement the Electoral Commission's recommendation in the forthcoming European Union Bill, as indicated in the Minister for Europe's statement of 13 September 2010. In the event that any changes to the electoral registration would result in a different UK electoral region gaining the seat while the European Union Bill is being considered by Parliament, the Government are clear that the Electoral Commission would be asked to make a further recommendation on the basis of the most recent data.

The Bill will also provide that the seat will be filled by reference to the results of the west midlands region at the last European parliamentary elections held on 4 June 2009, as if the extra seat had been available in the west midlands electoral region in those elections. This method of filling the seat is in accordance with the terms of the transitional protocol and is in line with the practice of most of the other member states which gain additional MEPs under the protocol.

Subject to parliamentary approval, the additional UK MEP provided for by the transitional protocol will be elected once the relevant provisions in the European Union Bill have entered into force, and once all EU member states have ratified the transitional protocol. The protocol cannot enter into force, and the additional MEPs provided for by the protocol cannot take up their seats, until all member states have ratified the protocol.

This is an interim measure until the next European parliamentary elections take place in June 2014. At those elections all UK MEPs, including the MEP for this extra seat, will then be elected as usual.<sup>146</sup>

The [Conservative Home blog](#) reported on 26 October that the additional MEP seat would be allocated to a Conservative, Anthea McIntyre. [Library Research Paper 09/73](#) contains the full election results for the European Parliament in June 2009.

**Clause 16** amends section 1 of the *European Parliamentary Elections Act 2002* by substituting 73 for 72. **Clause 17 and Schedule 2** allocate the additional seat to the West Midlands by reference to the results of the EP election in June 2009. As noted above, this arrangement lasts only until June 2014, the next set of European elections.

<sup>146</sup> HC Deb 26 October 2010 c7WMS

## 5 The Sovereignty Clause

### 5.1 The Lisbon Treaty Declaration on the primacy of EU law

The 1997 Treaty of Amsterdam came close to stating that Community law has primacy over national law. Its *Protocol on the Application of the Principles of Subsidiarity and Proportionality* maintains that subsidiarity “shall not affect the principles developed by the Court of Justice regarding the relationship between national and Community law”. These principles include the primacy of EC law.

The [EU Constitution](#) referred explicitly to the primacy of Union law over national law.<sup>147</sup> It stated simply: “The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States”. A [Declaration](#) annexed to the Final Act of the 2004 IGC recalled that this Article reflected “existing case law of the Court of Justice of the European Communities and of the Court of First Instance”. The Lisbon Treaty does not contain the primacy Article, but includes instead a Declaration (No.17), concerning primacy, which states:

The Conference recalls that, in accordance with well settled case law of the EU Court of Justice, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law.

The Conference has also decided to attach as an Annex to this Final Act the Opinion of the Council Legal Service on the primacy of EC law as set out in 11197/07 (JUR 260):

"Opinion of the Council Legal Service of 22 June 2007

It results from the case-law of the Court of Justice that primacy of EC law is a cornerstone principle of Community law. According to the Court, this principle is inherent to the specific nature of the European Community. At the time of the first judgment of this established case law (*Costa/ENEL*, 15 July 1964, Case 6/6411) there was no mention of primacy in the treaty. It is still the case today. The fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice."

1 "It follows (...) that the law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question."

The EU Constitution Article would have given the primacy of EU law an explicit legal and constitutional basis.<sup>148</sup> The Declaration incorporating the Council Legal Service Opinion confirms the *status quo* with regard to the relationship between EC and national law.

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<sup>147</sup> The primacy issue is also discussed in Standard Note SN/IA/3087, *The Draft European Constitution: the primacy debate*, 11 June 2004

<sup>148</sup> The 1997 Treaty of Amsterdam came close to stating that Community law has primacy over national law. Its Protocol on the Application of the Principles of Subsidiarity and Proportionality maintains that subsidiarity “shall not affect the principles developed by the Court of Justice regarding the relationship between national and Community law”. These principles include the primacy of EC law.

**Clause 18** of the *European Union Bill* is the so-called ‘sovereignty clause’. It states that directly applicable or directly effective EU law only takes effect in the UK by virtue of an Act of Parliament. It makes statutory the common law principle of the sovereignty of Parliament. In a written statement to Parliament, David Lidington said:

The common law is already clear on this. Parliament is sovereign. EU law has effect in the UK because - and solely because - Parliament wills that it should. Parliament chose to pass the European Communities Act 1972. That was the act of a sovereign Parliament.

The Government have explored how to ensure that this fundamental principle of parliamentary sovereignty is upheld in relation to EU law. We have assessed whether the common law provides sufficient ongoing and unassailable protection for that principle. Our assessment is that to date, case law has upheld that principle. But we have decided to put the matter beyond speculation by placing this principle on a statutory footing.

In the autumn, the Government will legislate to underline that what a sovereign Parliament can do, a sovereign Parliament can always undo. A clause to this effect will be included in the European Union Bill.

This clause will not alter the existing UK legal order on a day to day basis in relation to EU law. And it will be in line with the practice of other member states, like Germany. Although they have a different constitutional framework, they have given effect to EU law through a sovereign Act.<sup>149</sup>

And:

The EU Bill places on a statutory footing the common law principle that Parliament is sovereign and that EU law only takes effect in the UK by virtue of the will of our Parliament expressed through Acts of Parliament. To date, case law has upheld that principle. This Bill will put the matter beyond speculation by placing this principle on a statutory footing. The provision is declaratory, affirming this common law principle. It does not alter the existing relationship of EU law and UK law.<sup>150</sup>

## 5.2 The *European Communities Act 1972* and EU law

The UK’s membership of the EU is established by the *European Communities Act 1972* (ECA), which allowed the UK Government to confer competence on the then EEC. Subsequent conferrals or extensions of competence have been authorised by amendments to this Act. EEC entry meant the Government had to incorporate all existing EC legislation into UK law and repeal or amend any laws that were incompatible with it.

Incorporation of EU law in the UK is achieved by Section 2(1) ECA, to the effect that where a statute refers to the law of any part of the UK, the reference includes EC law.

All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law,

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<sup>149</sup> [HC Deb 11 Oct 2010 c 4WS](#)

<sup>150</sup> [HC Deb 11 November 2010 c 4WS](#)

and be enforced, allowed and followed accordingly; and the expression “enforceable Community right” and similar expressions shall be read as referring to one to which this subsection applies.<sup>151</sup>

Section 2(2) provides a general power for further implementation of Community obligations by means of secondary legislation.

Section 2(4) provide that past or future laws shall be construed and have effect subject to the provisions of Section 2 (i.e. including those providing for the direct effect of EC law).

Section 3 ECA instructs the UK courts to interpret any point of EC law in accordance with the jurisprudence of the European Court of Justice (now the Court of Justice) and also provides for a reference to be made for a preliminary ruling of the Court if there is any doubt. This section has been important in the instances of conflict between EU and national laws.

EU law is directly effective and applicable in UK law only because of the ECA, and European law has primacy over UK law unless Parliament uses its sovereign power to legislate for the withdrawal of the UK from the EU by repealing the ECA.

The EC/EU Treaties have never explicitly stipulated the primacy or supremacy of EU law and the Treaties over national laws. However, as described above, the principle was well established in the jurisprudence of the Court of Justice long before the UK joined the Community. Thus, Parliament’s acceptance of a limitation of its sovereignty when it enacted the ECA was entirely conscious. Under the terms of the ECA it has been clear that it was the duty of the UK courts to override a rule of national law found to be in conflict with a directly enforceable rule of Community law. The possible consequences of EEC membership for parliamentary sovereignty were drawn to the attention of the then Lord Privy Seal, Edward Heath, in a letter of 14 December 1960 by the then Lord Chancellor, Lord Kilmuir:

I have no doubt that if we do sign the Treaty, we shall suffer some loss of sovereignty [...] Adherence to the Treaty of Rome would, in my opinion, affect our sovereignty in three ways:-

Parliament would be required to surrender some of its functions to the organs of the Community;

The Crown would be called on to transfer part of its treaty-making power to those organs;

Our courts of law would sacrifice some degree of independence by becoming subordinate in certain respects to the European Court of Justice.<sup>152</sup>

The legal implications of UK membership were set out in Cmnd 3301 (1966-67), *The Legal and Constitutional Implications of United Kingdom Membership of the European Communities*, presented by the Lord High Chancellor in May 1967, and briefly mentioned in the 1971 White Paper, *The United Kingdom and the European Communities*.<sup>153</sup> The 1967 Command Paper looks at the implications for UK courts and for Parliament of the application of EC law. The 1971 White Paper is brief on this subject, stating:

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<sup>151</sup> [European Communities Act 1972, 1972 c 68](#)

<sup>152</sup> Full text of letter is in Appendix 3

<sup>153</sup> Cmnd 4715, July 1971

The common law will remain the basis of our legal system, and our courts will continue to operate as they do at present. In certain cases however they would need to refer points of Community law to the European Court of Justice. All the essential features of our law will remain, including the safeguards for individual freedom such as trial by jury and *Habeas corpus* and the principle that a man is innocent until proved guilty, as well as the law of contract and tort (and its Scottish equivalent), the law of landlord and tenant, family law, nationality law and land law.

During the Second Reading of the *European Communities Bill* in 1972, the Chancellor of the Duchy of Lancaster, Geoffrey Rippon, said of the provision which became section 2(2) of the ECA that in the future “our obligations will result in a continuing need to change the law to comply with non-direct provisions, and to supplement directly applicable provisions, and it is not possible in advance to specify the subjects which will have to be covered”.<sup>154</sup>

### 5.3 Conflicts of law in the UK Courts

If the UK were to enact legislation which it knew contradicted EC law, the UK courts would be faced with a contradiction. Under Section 2(1) of the ECA, all directly effective EC law is enforceable in the UK domestic courts, yet, according to the principle of Parliamentary sovereignty, there can be no authority higher than the UK Parliament, and the courts cannot challenge statutes. In 1979 Lord Denning stated in an equal pay case, *Macarthy Ltd v Smith*:

Thus far I have assumed that our Parliament, whenever it passes legislation, intends to fulfil its obligations under the Treaty. If the time should come when our Parliament deliberately passes an Act with the intention of repudiating the Treaty [of Rome] or any provision in it or intentionally of acting inconsistently with it and says so in express terms then I should have thought that it would be the duty of our courts to follow the statute of our Parliament.<sup>155</sup>

This would imply that the Courts would be bound ultimately by a UK Act of Parliament even if it contradicted or breached the terms of the EC Treaties and EC law. In *Stoke-on-Trent City Council v B & Q Plc* in 1990 Justice Hoffmann presented a different view:

The [EC] Treaty is the supreme law of this country, taking precedence over Acts of Parliament. Our entry into the European Economic Community meant that (subject to our undoubted but probably theoretical right to withdraw from the Community altogether) Parliament surrendered its sovereign right to legislate contrary to the provisions of the Treaty on the matters of social and economic policy which it regulated. The entry into the Community was in itself a high act of social and economic policy, by which the partial surrender of sovereignty was seen as more than compensated by the advantages of membership.<sup>156</sup>

The profound importance of the 1972 legislation was brought home to the British public after the *Factortame* ruling,<sup>157</sup> which led to the ‘disapplication’ of a UK Statute in accordance with the authority of the ECA.<sup>158</sup> In the *Factortame* case Lord Bridge commented on the supremacy matter:

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<sup>154</sup> HC Deb Vol 831, 15.2.72, c282

<sup>155</sup> *Macarthy Ltd v Smith* [1979] 3 AER 325 [1979] at 329c-d

<sup>156</sup> [1990] 3 CMLR 31

<sup>157</sup> Case C-221-89. See Research Paper 96/57 for other landmark cases up to 1996.

<sup>158</sup> The significance of the *Factortame* case is discussed in more detail below.

Some public comments on the decision of the Court of Justice, affirming the jurisdiction of the courts of the member states to override national legislation if necessary to enable interim relief to be granted in protection of rights under Community law, have suggested that this was a novel and dangerous invasion by a Community institution of the sovereignty of the United Kingdom Parliament. But such comments are based on a misconception. If the supremacy within the European Community of Community law over the national law of member states was not always inherent in the EEC Treaty it was certainly well established in the jurisprudence of the Court of Justice long before the United Kingdom joined the Community. Thus, whatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary.

Under the terms of the 1972 Act it has always been clear that it was the duty of a United Kingdom court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law. Similarly, when decisions of the Court of Justice have exposed areas of United Kingdom statute law which failed to implement Council directives, Parliament has always loyally accepted the obligation to make appropriate and prompt amendments. Thus there is nothing in any way novel in according supremacy to rules of Community law in areas to which they apply and to insist that, in the protection of rights under Community law, national courts must not be prohibited by rules of national law from granting interim relief in appropriate cases is no more than a logical recognition of that supremacy.<sup>159</sup>

David Pannick QC said of the *Factortame* ruling:

The decision can have come as no surprise to the government, which has highly competent legal advisers in this field. Critics of the decision have concentrated not so much on the legal merits of its analysis of the freedom of establishment provisions of European Community law as on what they have portrayed as the impropriety and the novelty of the court invalidating an act of Parliament. It is surprising that this constitutional issue retains its capacity to shock backbench MPs and to excite the media. There is no doubt that Community law takes priority over an act of Parliament. This has not been imposed on Britain but was decided by Parliament itself in the European Communities Act 1972. In 1980, Lord Denning considered these matters in the Court of Appeal. The Treaty of Rome 'takes priority over anything in our English statute which is inconsistent', he explained. This does not mean that Community law is 'supplanting English law'. Lord Denning explained: 'It is part of our law which overrides any other part which is inconsistent with it.' Last year, Lord Bridge pointed out the misguided nature of some public comments on an earlier European Court decision in the FACTORTAME saga. The supremacy of Community law over national law 'was certainly well established in the jurisprudence of the European Court of Justice long before the United Kingdom joined the Community'.<sup>160</sup>

Opinion differs over the primacy of EC law in the UK. Michael Shrimpton, a barrister who has written about the constitutional issues arising from the introduction of compulsory metrication

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<sup>159</sup> [1991] 1 AC 603 at 658-659

<sup>160</sup> *The Times*, 6 August 1991.

without enacting primary legislation (see the “Metric Martyrs” case below) considered the *Factortame* case to have been significantly flawed:

The judges with great respect ought to have stopped the case, but in fairness to them none could be described as a constitutional lawyer and huge mistakes often go uncorrected - indeed the failure to apply the settled doctrine that Parliament cannot bind its successors was not the only constitutional mistake made. The equally disastrous (with the utmost respect) ruling in *Factortame* (No 1) [1990] 2 AC 85 that a Minister of the Crown could not be restrained by injunction from acting unlawfully (which as Lord Templeman stated correctly with respect, at 395, reversed the result of the English Civil War) was not reversed until four years later, in *M -v- Home Office* [1994] 1 AC 377. It is unclear why Lord Templeman was not invited to sit in the *Factortame* cases, given his constitutional expertise. Since the subjugation of English common law and Parliament to European domination could fairly be said to have been a principal German war aim it could be said that in the *Factortame* cases the judges sought to reverse the outcome not only of the Civil War but the Second World War as well.<sup>161</sup>

There has continued to be a lively debate among politicians and the judiciary about the existence of a set of constitutional acts, but the weight of legal opinion would suggest that the existence of such a set is not universally accepted. These issues have been rehearsed in the *Thoburn* case in 2002, known colloquially as the “Metric Martyrs” case. In his Opinion, Lord Justice Laws held that the common law had come to recognise that there are rights which should be classified as constitutional or fundamental and that it followed that there was a hierarchy of Acts of Parliament, ordinary and constitutional.<sup>162</sup> Lord Laws said in the appeal judgment:

Thus there is nothing in the ECA which allows the Court of Justice, or any other institutions of the EU, to touch or qualify the conditions of Parliament’s legislative supremacy in the United Kingdom. Not because the legislature chose not to allow it; because by our law it could not allow it. That being so, the legislative and judicial institutions of the EU cannot intrude upon those conditions. The British Parliament has not the authority to authorise any such thing. Being sovereign, it cannot abandon its sovereignty. Accordingly there are no circumstances in which the jurisprudence of the Court of Justice can elevate Community law to a status within the corpus of English domestic law to which it could not aspire by any route of English law itself. This is, of course, the traditional doctrine of sovereignty. If is to be modified, it certainly cannot be done by the incorporation of external texts. The conditions of Parliament’s legislative supremacy in the United Kingdom necessarily remain in the United Kingdom’s hands. But the traditional doctrine has in my judgment been modified. It has been done by the common law, wholly consistently with constitutional principle.<sup>163</sup>

The Laws opinion caused considerable controversy. The constitutional lawyer Professor Dawn Oliver noted in *Constitutional Reform in the United Kingdom* that the “courts need to be wary about whether there really is a political consensus about the principles which they

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<sup>161</sup> Michael Shrimpton, cited on Metric Martyrs website, [The Silent Majority](#)

<sup>162</sup> *Thoburn v Sunderland City Council* [2002] 3 WLR 247

<sup>163</sup> Supreme Court, Queen’s Bench Division, Divisional Court, 18 February 2002, [Lord Justice Laws and Mr Justice Crane](#)

are elaborating” in the context of the uncodified constitution of the United Kingdom, where the doctrine of parliamentary sovereignty has not been explicitly overridden.<sup>164</sup>

#### 5.4 The effect of the sovereignty clause

Most commentators agree that **Clause 18** of the *European Union Bill* is, legally speaking, unnecessary and that it is in the Bill for political reasons. The ENs describe it as a “declaratory provision which confirms that directly applicable or directly effective EU law only takes effect in the UK as a result of the existence of an Act of Parliament”. This is intended to include subordinate legislation (e.g. Statutory Instruments and Orders), as well as primary legislation, and Acts and Measures of the devolved legislatures.

EU law has supremacy over conflicting national law, not because the EU says so, but because Parliament itself instructed it to have this status in the *European Communities Act 1972*. The *European Union Bill* does not seek to deny the primacy of EU law over national law. It has always been the case that EU law is enacted in the UK by virtue of the ECA, and the English Courts have confirmed the supremacy of EU law over UK law (see above), so the “sovereignty clause” does not add any new constitutional dimension to the basis for EU membership or UK adoption and implementation of EU law. However, by enshrining it in the ECA, the UK Courts will be bound to uphold the supremacy of the UK Parliament if faced with a conflict of laws.

Giving [evidence to the European Scrutiny Committee](#) in November 2010, Paul Craig (professor of law at Oxford University and St John’s College, Oxford) summarised his view of the implications of Declaration 17 attached to the Treaty:

... my view is that Declaration 17 will change nothing in terms of the case law as it existed before, either by the European Court of Justice or the responses of the national courts. The ECJ will continue to affirm that it has primacy over all national law, including national constitutional law. It has taken that position ever since the *Internationale Handelsgesellschaft* case in the 1970s, and it has never really shifted from that position, so, in its view, all EU law takes precedence over all national law. No national court has accepted the full impact of that assertion of authority by the ECJ. Pretty much all national courts, to varying degrees, have placed qualifications on the assertion or the arrogation of supremacy of the ECJ, and, to put it more specifically, pretty much all national courts place reservations on the extent to which the ECJ’s jurisprudence and EU law will take precedence over a national constitution and/or fundamental rights.

However, he did not think anything in Declaration 17 would “compel the Supreme Court in the United Kingdom to accept that the primacy of EU law over national law is unqualified in the sense that it takes precedence over national constitutional precepts in the UK”. Craig’s opinion of **Clause 18** was that “viewed from one perspective clause 18 is entirely un-novel and entirely traditional. It simply affirms the fact that EU law takes effect within the national constitutional order in the UK by and through an Act of Parliament”. Replying to a question as to whether EU legal supremacy over the constitutional doctrine of parliamentary sovereignty has been resolved by the decision of the divisional court in *Thoburn*, Craig summarised Lord Justice Laws on the supremacy of EU law in the UK:

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<sup>164</sup> Dawn Oliver, *Constitutional Reform in the United Kingdom*, Oxford University Press, 2003 p100-103



... what Lord Justice Laws said in *Thoburn* was that the constitutional impact of EU law on national law was not going to be dictated top-down by the European Court of Justice on our courts. The nub of his thesis was that whatever impact EU law had within the UK was going to be decided by UK constitutional precepts and by UK courts. That was not at all inconsistent in and of itself with the House of Lords decisions in *Factortame* and the Equal Opportunities Commission case. So it is for our courts to decide what they believe to be the impact of EU law within our national constitutional order. That is what I think Lord Justice Laws was saying, and rightly so, in the *Thoburn* case.

Logically, that of course means that it is still open to our national courts, within the framework of that reasoning, to, in effect, go in a number of different directions while staying within the framework of that reasoning. In other words one could, at one end of the scale, postulate a situation in which a national court—perfectly consistently with the reasoning of Lord Justice Laws in the *Thoburn* case—might well say that the impact of the EU law on national law was very far-reaching indeed, albeit decided and finalised by the UK courts in accordance with national constitutional precepts. They could also take the same conceptual foundation and reach rather more limited conclusions.

Paul Craig did not think Clause 18 could “be regarded as a primacy clause in the sense that it cannot be read as purporting to determine primacy between EU law and UK law in the event of a clash”. In his view:

clause 18 is sovereignty as dualism. It says nothing about sovereignty as primacy, and it doesn’t purport to reiterate, or iterate, the parent idea of sovereignty. There is no harm in having clause 18 if you wish it as a symbolic reaffirmation of the common law principle—it is a common law principle—that a statute has no impact in the United Kingdom unless or until it is embodied in an Act of Parliament.

He did not think “clause 18 in and of itself necessarily provides an answer to the arguments that were litigated and discussed in *Thoburn*” (see above), but that it “would lend support to the view taken by Lord Justice Laws”.

Professor Trevor Hartley of the London School of Economics also gave evidence to the ESC on the Bill. Asked by Michael Connarty about the value of Clause 18 and whether the clause would “change the way the courts interpret the duty to review legislation in the light of EU law under the European Communities Act 1972”, Professor Hartley replied:

I think that the clause has value, because it emphasises that this is the law and this is the constitutional position. In my opinion, even without clause 18, courts would do what it says, but it would encourage and sort of strengthen them. I think that it has value even though, strictly speaking, it does not change anything.

Professor Hartley did not think Clause 18 was strictly speaking a “primacy clause”:

It simply restates who decides the question of primacy, and how. Ultimate primacy lies with UK law, but UK law can—and, in the European Communities Act 1972, did—say that EU law is to have primacy. Obviously, that can be changed in the future, so, in that sense, it is not a primacy clause.[...] It reaffirms who decides on primacy, and the answer is that Parliament decides. It

does not itself say what happens, because that has already been specified in the 1972 Act.

## 6 Competence transfers in other EU Member States

The 13<sup>th</sup> bi-annual Conference of Community and European Affairs Committees of Parliaments of the European Union (COSAC) report *Developments in European Union Procedures and Practices Relevant to Parliamentary Scrutiny* in the EU Member States commented on new procedures in national parliaments to deal with the simplified revision procedures and *passerelles*:

Most Parliaments/Chambers have adopted rules regarding their **participation in the procedures for simplified revision** of the Treaties (henceforth “*passerelles*”), although a large minority have not yet done so. Several out of those who do have rules on this matter have introduced a provision to the effect that the respective Government may not support a proposal at the Council to use a “*passerelle*” clause unless it has the prior consent of the Parliament/Chamber. Since this constitutes an *a priori* veto, many of them have not considered it necessary to introduce any particular procedures for a decision *ex post*. Others, where an opinions issued by the Parliament/Chamber before a decision is taken at the Council are not legally binding upon the respective Government, have introduced procedures for taking a decision within the stipulated six-month period.

Regardless of whether a Parliament/Chamber deals with the matter before or after a decision at the Council (or both), it is, with few exceptions, the plenary that decides on the basis of a report drafted by the Committee on EU Affairs. However, other relevant committees are or may be involved, depending on the nature of the proposal.<sup>165</sup>

In his statement on 13 September 2010, the Europe Minister, David Lidington, referred to Ireland, France and Denmark, which require referendums on changes to the EU Treaties in certain circumstances; and to Germany, which has identified areas that require legislation or parliamentary approval in connection with the use of the ‘ratchet clause’ and the ‘flexibility clause’ (formerly the ‘catch-all’ Article 308, now Article 352 TFEU).

Also, as Paul Craig notes in his [evidence to the ESC](#), most countries have limited the role of the Court of Justice:

No national court has accepted the full impact of that assertion of authority by the ECJ. Pretty much all national courts, to varying degrees, have placed qualifications on the assertion or the arrogation of supremacy of the ECJ, and, to put it more specifically, pretty much all national courts place reservations on the extent to which the ECJ’s jurisprudence and EU law will take precedence over a national constitution and/or fundamental rights.

### Ireland

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<sup>165</sup> COSAC May 2010

Under Irish constitutional law, a ‘significant’ amendment to EU Treaties requires an amendment to the [Irish Constitution](#) and constitutional amendments require approval by referendum. That has been the case since a Supreme Court ruling in 1987 in a case brought by Raymond Crotty on ratification of the Single European Act (SEA).<sup>166</sup> The ruling stated that provisions in Title III of the SEA requiring consultation with other Member States in foreign policy matters of general interest warranted a constitutional referendum on an amendment to Article 29<sup>167</sup> of the Constitution. The Court further ruled that any EC treaty that substantially altered the character of the Union had to be approved by a constitutional amendment. For this reason Article 29 was amended to allow Ireland to ratify the SEA, the *Treaty on European Union* (Maastricht Treaty), the Amsterdam and Nice Treaties.<sup>168</sup> Under Article 46 of the Irish Constitution, a proposed amendment takes the form of a bill to amend the Constitution. It must be formally approved by both the Dáil and the Senate and then endorsed by a simple majority of the electorate in a referendum, with no minimum turn-out requirement.

The implications of the *Crotty* ruling for EU treaty ratification have not gone unchallenged. Rossa Fanning, a lecturer in law at University College Dublin, was critical of successive Irish governments’ adherence to *Crotty*, which had resulted, he thought, unquestioningly, in referendums on all EU amending treaties since the SEA, regardless of their import.<sup>169</sup> Responding to Fanning, Dr Gavin Barrett, also a law lecturer at University College Dublin, wrote of the “failure” in Ireland to ask “why the holding of a referendum has become a stimulus-response type reaction of Irish political culture to any significant EU treaty”.<sup>170</sup> He regretted that Irish governments continued “to find themselves boxed into a corner by the unfortunate Supreme Court decision in the 1987 Crotty case”. He found “unobjectionable” the principle that a referendum was required wherever the “essential scope or objectives” of the existing structures of EU integration were altered, but thought Ireland was now “shackled” and compelled by the judiciary in a way other EU Member States were not.

## Denmark

Under Section 20 of the 1953 Danish Constitution, in order to ratify a treaty which involves the transfer of powers to a supranational organisation such as the EU, there must be a five-sixths majority in the *Folketing* (the Danish Parliament). If there is a smaller majority in the *Folketing*, the Bill must be confirmed in a binding referendum. Article 42(5) of the Danish Constitution requires that in such a referendum, at least 30% of the electorate must vote in favour of the Bill for it to become an Act.

Should the Treaty be deemed to require a constitutional amendment, the procedure would be even more demanding. This would have to be passed by two successive Parliaments with intervening elections and then confirmed by at least 40% of the electorate. The *Folketing* can at any time decide to hold a non-binding consultative referendum.

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<sup>166</sup> *Crotty v An Taoiseach*, legal action taken in 1987 by Raymond Crotty, historian and social scientist, against the Irish Government. Ruling

<sup>167</sup> Article 29 is on international relations and permits separately each EU Treaty ratification since the SEA.

<sup>168</sup> The Nice amendment was the last such amendment. The *Twenty-sixth Amendment of the Constitution Act 2002* was approved by referendum on 19 October 2002 and became law on 7 November 2002.

<sup>169</sup> *The Irish Times* 22 April 2008

<sup>170</sup> *The Irish Times* 24 April 2008. See also Dr Gavin Barrett, “Brief Reflections on the Holding of a Referendum in Ireland on the Treaty of Lisbon: A Response to Rossa Fanning”, 24 April 2008, available at SSRN: <http://ssrn.com/abstract=1125246>

The Danish authorities, like the UK Government, thought a referendum would be necessary on the 2004 EU Constitution, but not on the Lisbon Treaty. Regarding the former, the Ministry of Justice, in cooperation with the Prime Minister's Office and the Ministry for Foreign Affairs, confirmed in a report on 22 November 2004 that the Constitutional Treaty would fall under Section 20 of the Danish Constitution. There were nine areas which might require the application of Section 20: EU accession to the European Convention on Human Rights, the flexibility clause, protection of personal data, measures concerning passports, identity cards, residence permits etc, diplomatic and consular protection, administrative measures regarding capital movements and payments (fight against terror), European Court of Justice jurisdiction, intellectual property rights, public health and possibly space policy.

The Ministry of Justice concluded that the Danish opt-in arrangement to Justice and Home Affairs matters and the fact that the changes to the CFSP did not affect its intergovernmental basis, meant that there was no transfer of sovereignty here. Any military action required under the solidarity provision in Lisbon Article 222 TFEU would be covered by the Danish defence opt-out and the *passerelle* was deemed not to require the application of Section 20. Finn Laursen of Dalhousie University, Halifax, NS, Canada, commented: "Seen from a political perspective it is interesting that the big political innovations of the treaty, including important institutional changes, did not require a referendum, but some – arguably - relatively minor extensions of the functional scope of the Union did".<sup>171</sup>

The *Folketing* approved the Lisbon Treaty on 24 April 2008 and the Ministry of Justice decided that the Treaty did not constitute a transfer of sovereignty in the sense of section 20 of the Danish Constitution, so a referendum was not required. Laursen examines the rationale behind this decision, but the explanation appears to lie in the fact that the Danish Government and most parliamentary parties supported the Lisbon Treaty in general and were also strongly in favour of the simplified revision procedures and *passerelles* as efficiency mechanisms.<sup>172</sup>

There are no specific procedures to deal with, for example, the question of the principles of subsidiarity and proportionality, or the issues of vetoing the European Council's initiatives to authorise the simplified revision procedure or proposals for Treaty the amendment.

## France

The French Parliament adopted an amendment to Article 88 of the French Constitution (88.7) which provides that the Parliament can oppose an amendment to EU rules by means of the *passerelle*. However, the use of the 'flexibility clause' (Article 352 TFEU), which can in certain circumstances effect a transfer of competence, is simply the subject of a notification to national parliaments and is not the subject of specific provisions in the Constitution.

The Constitutional Council asked for a constitutional amendment to expand the powers of the French parliament in EU matters. The Council wanted the Parliament to be able to use some of the powers conferred upon it by the Lisbon Treaty, such as the right to send complaints to the Commission. However, there was no amendment to enhance the Parliament's oversight powers any further.

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<sup>171</sup> Finn Laursen, [Paper for 4<sup>th</sup> annual EUCE conference, Dalhousie University, 6-8 June 2010, "Denmark and the Ratification of the Lisbon Treaty: How a Referendum was avoided"](#)

<sup>172</sup> See *Folketing* website, ["Political Agreement on Danish EU Policy in a Globalised World"](#), 21 February 2008

## Germany

Germany does not hold referendums on treaties or treaty amendments. David Lidington's reference to Germany in his statement on 13 September is with regard to the German Constitutional Court ruling in 2009 on the compatibility of the Lisbon Treaty with German democratic principles.

Following parliamentary approval of the Treaty (by the *Bundestag* on 24 April 2008 and by the *Bundesrat* on 23 May 2008), formal ratification was delayed by two legal challenges: one instigated by *Die Linke* (the left-wing coalition of the PDS and WASG), and the other by Peter Gauweiler, a centre-right politician from the Christian Social Union (CSU, a junior partner in the then Grand Coalition). Mr Gauweiler's challenge, submitted on 24 May 2008, concerned the compatibility of giving more powers to the EU with Germany's democratic principles. It was based on the legal opinion of Dr Dietrich Murswiek, a professor of law at the University of Freiberg, and maintained that the Lisbon Treaty was substantially the same as the defunct EU Constitution; that it created a de facto federal state with its own source of authority; that it deprived German citizens of their fundamental political rights by weakening their representation in the Bundestag and that amended Article 48(6) allowed the EU to change its rules without permission from national parliaments. The *Linke* challenge, announced on 27 June 2008, maintained that Lisbon would infringe the rights of parliamentarians and undermine German democracy by giving too much power to the European Council at the expense of national parliaments and the European Parliament.

On 10 February 2009 the German Constitutional Court in Karlsruhe began a two-day hearing to consider the substantive question of whether the Lisbon Treaty eroded the German Parliament's powers of participation in EU decision-making. On 30 June the Court ruled that the Act approving ratification of the Lisbon Treaty (*Gesetz zum Vertrag von Lissabon*) was compatible with the Basic Law, but that the Act Extending and Strengthening the Rights of the Bundestag and the Bundesrat in EU matters (*Gesetz über die Ausweitung und Stärkung der Rechte des Bundestages und des Bundesrates in Angelegenheiten der Europäischen Union*) infringed the Basic Law, as these bodies had "not been accorded sufficient rights of participation in European lawmaking procedures and treaty amendment procedures".<sup>173</sup> The Court criticised the national law of implementation which defined the participatory powers of the German legislative bodies, finding that these powers had not been sufficiently strengthened. The Court thought that any 'significant' step in the extension of the competencies of the EU (e.g. a move from unanimity to QMV in the Council or resorting to Article 352) had to be approved by an Act of Parliament and that governmental consent alone did not meet the requirements of democratic legitimacy.

The German Government halted the ratification process until it had put in place the legislation needed to strengthen the role of the legislative institutions in implementing EU law. The procedure used was unusual because the Federal Government was barely involved in drafting the bills and because the EU affairs committees in both parliamentary chambers held a joint public hearing on the bills with twelve experts.<sup>174</sup> On 8 September 2009 the Bundestag adopted four 'accompanying laws' on the Lisbon Treaty. The "[Act Extending and](#)

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<sup>173</sup> Judgment of 30 June 2009, 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09, Court press release no. 72/2009 of 30 June 2009

<sup>174</sup> *Deutscher Bundestag- Wissenschaftliche Dienste No. 75/09 10 September 2009*, "The Treaty of Lisbon: the 'accompanying laws'", Dr Birgit Schröder, Simone Hapel, Research Section WD 3 - Constitutional Law and Public Administration, Dr Christina Last, Research Section WD 11 – European Affairs

Strengthening the Rights of the Bundestag and of the Bundesrat in Matters concerning the European Union” amended existing legislation and introduced a new “Responsibility for Integration Act” (*Integrationsverantwortungsgesetz*), which is described below:

The **Responsibility for Integration Act** implements the requirements established by the Federal Constitutional Court. Specifically, it regulates the participation of the Bundestag and Bundesrat in amendments of primary law which are not subject to the usual ratification procedures, and in the application of legal bases in primary law for the extension of EU competences. Participation is also regulated in cases where the Member States can halt a deepening of European integration. A law pursuant to Article 23 (1) of the Basic Law is required for the Federal Republic of Germany to give its consent at EU level in the **simplified treaty revision procedure** under Article 48 (6) of the Treaty on European Union, which permits revisions in areas including the internal market, economic and monetary policy and employment policy. In addition, there are a number of **special treaty revision procedures** restricted to specific areas. In the case of the **general bridging clause** under Article 48 (7) of the Treaty on European Union, which allows a change in the voting modalities in the Council or in the legislative procedure to be applied, a law pursuant to Article 23 (1) of the Basic Law is required even for the German representative in the European Council or the Council to consent. The same applies in the case of the **clauses extending competence**, which include Article 83 (1) subparagraph 3 of the Treaty on the Functioning of the European Union as regards the field of criminal law. The **flexibility clause** of Article 352 of the Treaty on the Functioning of the European Union allows the EU’s existing competences to be extended for a specific purpose. This also requires a law on the basis of Article 23 (1) of the Basic Law.

By contrast, a decision of the Bundestag is sufficient for the German representative in the European Council or the Council to consent to the application of **special bridging clauses** relating to specific policies. In addition, a decision of the Bundesrat is required if the legislative competences of the *Länder* (or federal states) are affected. The Bundestag – and the Bundesrat in specific cases – can, via a decision, instruct the German representative in the Council to use the **emergency brake procedure**. This procedure allows a member of the Council to convene the European Council if it believes a draft legislative act infringes fundamental aspects of its criminal justice system or social security system. In addition, the Responsibility for Integration Act defines in more detail certain rights established in primary law, specifically the **subsidiarity objection** and **national parliaments’ right to make known their opposition regarding bridging clauses**. The Responsibility for Integration Act will be amended after its entry into force to incorporate the instrument of the **subsidiarity action**, which is related to the subsidiarity objection, when the Act Implementing the Amendments to the Basic Law for the Ratification of the Treaty of Lisbon enters into force.<sup>175</sup>

Philipp Kiiver, Associate Professor of European and Comparative Constitutional Law, Maastricht University, comments in an article in the *European Law Journal* that the German Government “will not be unique in that its approval to draft EU measures in the Council is made dependent on prior domestic approval. What makes it unique is that this requirement

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<sup>175</sup> *Deutscher Bundestag- Wissenschaftliche Dienste No. 75/09 10 September 2009, “The Treaty of Lisbon: the ‘accompanying laws’”, Dr Birgit Schröder, Simone Hapel, Research Section WD 3 - Constitutional Law and Public Administration, Dr Christina Last, Research Section WD 11 – European Affairs*

has actually been court-ordered, rather than politically imposed by parliament itself”.<sup>176</sup> The Court, he notes,

... qualifies the simplified treaty revision procedure, other passerelle-type procedures and also, crucially, the flexibility clause allowing for EU action without specific legal basis, as *de jure* or *de facto* Treaty amendment clauses. Consequently, and in the light of the fact that the nations of the Member States through their national parliaments remain the constituents in the EU *Staatenverbund*, the court insists that each *de jure* or *de facto* Treaty amendment be ratified by the German legislature. A carte blanche to the government acting in the Council, supported by tacit approval for all future Treaty amendments, would, according to the court, violate the Basic Law.<sup>177</sup>

The Court judgement “does not contradict EU Treaty law”, which leaves domestic scrutiny arrangements to the Member States, and does not in any case apply to the “regular, day-to-day negotiation of secondary EU law”, but Kiiver maintains that “the European Parliament’s assent to the application of the general *passerelle* and the flexibility clause is clearly not enough ... to confer democratic legitimacy upon the EU measures in question”. He asks whether national legislative approval will remedy the democratic deficit, concluding:

The court can only rule on the formal intactness of the chain of delegation from the constituent German people to the EU institutions. Whether the formal approval to EU measures in the German legislature will be actually accompanied by lively democratic debate, or whether it will be hammered through in a spirit of permissive consensus, remains to be seen.<sup>178</sup>

The full text of the new German law is as follows:

### **Section 1**

#### **Responsibility for integration**

(1) In matters concerning the European Union, the Bundestag and the Bundesrat shall exercise their responsibility for integration primarily on the basis of the following provisions.

(2) The Bundestag and the Bundesrat shall deliberate and take decisions in good time on the proposals referred to in this Act and, in so doing, shall take account of the relevant time limits for the adoption of decisions by the European Union.

### **Section 2**

#### **Simplified revision procedure for the Treaties**

Approval by the Federal Republic of Germany of a decision of the European Union within the meaning of Article 48(6), second and third subparagraphs, of the Treaty on European Union shall take the form of a law as defined in Article 23(1) of the Basic Law (Grundgesetz).

### **Section 3**

#### **Special revision procedure for the Treaties**

(1) Approval by the Federal Republic of Germany of a decision of the Council within the meaning of the second sentence of Article 218(8), second

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<sup>176</sup> Philipp Kiiver, *European Law Journal*, Vol. 16, No. 5, September 2010, pp. 578–588 “[The Lisbon Judgment of the German Constitutional Court: A Court-Ordered Strengthening of the National Legislature in the EU](#)”

<sup>177</sup> Kiiver, *ibid*

<sup>178</sup> Kiiver, *ibid*

subparagraph, or within the meaning of Article 311, third paragraph, of the Treaty on the Functioning of the European Union shall take the form of a law as defined in Article 23(1) of the Basic Law.

(2) Paragraph 1 above shall also apply to provisions enacted by the Council under Article 25, second paragraph, Article 223(1), second subparagraph, or Article 262 of the Treaty on the Functioning of the European Union.

(3) The German representative in the European Council may approve a proposal for a decision within the meaning of the second sentence of Article 42(2), first subparagraph, of the Treaty on European Union or abstain from voting on such a proposal only after the Bundestag has taken a decision to that effect. The Federal Government may also table a motion in the Bundestag to that end. In the absence of such a decision by the Bundestag, the German representative in the European Council must reject the proposal for a decision. Once a decision of the European Council within the meaning of the second sentence of Article 42(2), first subparagraph, of the Treaty on European Union has been taken, approval by the Federal Republic of Germany shall take the form of a law as defined in Article 23(1) of the Basic Law.

#### **Section 4**

##### **Bridging clauses**

(1) The German representative in the European Council may approve a proposal for a decision within the meaning of Article 48(7), first subparagraph, first sentence, or second subparagraph, of the Treaty on European Union or abstain from voting on such a proposal only after a law to that effect as defined in Article 23(1) of the Basic Law has entered into force. In the absence of such a law, the German representative in the European Council must reject the proposal for a decision.

(2) The German representative in the Council may approve a proposal for a decision within the meaning of Article 81(3), second subparagraph, of the Treaty on the Functioning of the European Union or abstain from voting on such a proposal only after a law to that effect as defined in Article 23(1) of the Basic Law has entered into force. In the absence of such a law, the German representative in the European Council must reject the proposal for a decision.

#### **Section 5**

##### **Approval in the European Council in the case of special bridging clauses**

(1) The German representative in the European Council may approve a proposal for a decision within the meaning of Article 31(3) of the Treaty on European Union or Article 312(2), second subparagraph, of the Treaty on the Functioning of the European Union or abstain from voting on such a proposal only after the Bundestag has taken a decision to that effect. The Federal Government may also table a motion in the Bundestag to that end. In the absence of such a decision by the Bundestag, the German representative in the European Council must reject the proposal for a decision.

(2) In addition to the decision of the Bundestag, the Bundesrat must also have taken a corresponding decision if areas of activity are affected for which no federal legislative competence exists, in which the Länder are empowered to legislate by virtue of Article 72(2) of the Basic Law, in which the Länder may adopt divergent provisions under Article 72(3) or Article 84(1) of the Basic Law, or the regulation of which by means of a federal law requires the consent of the Bundesrat.



**Section 6****Approval in the Council in the case of special bridging clauses**

(1) The German representative in the Council may approve a proposal for a decision within the meaning of Article 153(2), fourth subparagraph, Article 192(2), second subparagraph, or Article 331(1) or (2) of the Treaty on the Functioning of the European Union or abstain from voting on such a proposal only after the Bundestag has taken a decision to that effect. The second and third sentences of section 5(1) of this Act shall apply, *mutatis mutandis*.

(2) Section 5(2) of this Act shall apply, *mutatis mutandis*.

**Section 7****Competence clause**

(1) The German representative in the Council may approve a proposal within the meaning of Article 83(1), third subparagraph, or Article 86(4) of the Treaty on the Functioning of the European Union or abstain from voting on such a proposal only after a law to that effect as defined in Article 23(1) of the Basic Law has entered into force. In the absence of such a law, the German representative in the Council must reject the proposal for a decision.

(2) Paragraph 1 above shall apply, *mutatis mutandis*, to amendments to the Statute referred to in Article 308, third paragraph, of the Treaty on the Functioning of the European Union.

**Section 8****Flexibility clause**

The German representative in the Council may approve a decision on the adoption of measures within the meaning of Article 352 of the Treaty on the Functioning of the European Union or abstain from voting on such a decision only after a law to that effect as defined in Article 23(1) of the Basic Law has entered into force. In the absence of such a law, the German representative in the Council must reject the proposal for a decision.

**Section 9****Emergency brake mechanism**

(1) In the cases referred to in the first sentence of Article 48, second paragraph, in the first sentence of Article 82(3), first subparagraph, and in the first sentence of Article 83(3), first subparagraph, of the Treaty on the Functioning of the European Union, the German representative in the Council must table a motion that the matter be referred to the European Council if the Bundestag has adopted a decision instructing him or her to do so.

(2) If areas of activity within the meaning of section 5(2) of this Act are primarily affected, the German representative in the Council must table a motion in accordance with paragraph 1 above, even if a decision to that effect has already been taken by the Bundesrat.

**Section 10****Right of rejection in the case of bridging clauses**

(1) The following provisions shall apply to the rejection of a European Council initiative within the meaning of Article 48(7), third subparagraph, of the Treaty on European Union:

If an initiative relates primarily to an area in which exclusive legislative competence lies with the Federation, the Bundestag may decide that the initiative is to be rejected.

In all other cases, the Bundestag or the Bundesrat may decide that the initiative is to be rejected.

(2) The President of the Bundestag or the President of the Bundesrat shall notify the Presidents of the competent institutions of the European Union of the rejection of the initiative and shall inform the Federal Government accordingly.

(3) Paragraphs 1 and 2 above shall apply, *mutatis mutandis*, to proposals from the European Commission for a decision of the Council within the meaning of Article 81(3), third subparagraph, of the Treaty on the Functioning of the European Union.

### **Section 11**

#### **Subsidiarity objection**

(1) In their Rules of Procedure, the Bundestag and the Bundesrat may stipulate how a decision on the delivery of a reasoned opinion in accordance with Article 6 of the Protocol on the application of the principles of subsidiarity and proportionality is to be obtained.

(2) The President of the Bundestag or the President of the Bundesrat shall transmit the reasoned opinion to the Presidents of the competent institutions of the European Union and shall inform the Federal Government accordingly.

### **Section 12**

#### **Subsidiarity action**

(1) At the request of one quarter of its Members, the Bundestag is required to bring an action under Article 8 of the Protocol on the application of the principles of subsidiarity and proportionality. At the request of one quarter of the Members of the Bundestag who do not support the bringing of the action, their view shall be made clear in the application.

(2) In its Rules of Procedure, the Bundesrat may stipulate how a decision on the bringing of an action within the meaning of paragraph 1 above is to be obtained.

(3) The Federal Government shall make the application without delay to the Court of Justice of the European Union on behalf of the institution that has taken the decision to bring an action under paragraph 1 or paragraph 2 above.

(4) The institution that has decided to bring the action under paragraph 1 or paragraph 2 above shall assume responsibility for conducting the proceedings before the Court of Justice of the European Union.

(5) If a motion is tabled in the Bundestag or the Bundesrat for the bringing of an action under paragraph 1 or paragraph 2 above, the other institution may deliver an opinion.

### **Section 13**

#### **Notification**

(1) The Federal Government shall notify the Bundestag and the Bundesrat comprehensively, as early as possible, continuously and, as a rule, in writing of matters pertaining to this Act. The foregoing provision is without prejudice to details of the notification obligations arising from the Act of 12 March 1993 on Cooperation between the Federal Government and the German Bundestag in Matters concerning the European Union (Federal Law Gazette I, p. 311), as amended by ...., from the Act of 12 March 1993 on cooperation between the

Federation and the Länder in Matters concerning the European Union (Federal Law Gazette I, p. 313), as amended by ..., and from other provisions.

(2) The Federal Government shall notify the Bundestag and the Bundesrat if a matter is referred to the Council in preparation for an initiative of the European Council under Article 48(7) of the Treaty on European Union. The same shall apply if the European Council has taken such an initiative. The Federal Government shall notify the Bundestag and the Bundesrat of proposals made by the European Commission under Article 81(3), second subparagraph, of the Treaty on the Functioning of the European Union.

(3) Within two weeks of forwarding initiatives, proposals or decisions relating to the foregoing provisions, the Federal Government shall transmit to the Bundestag and the Bundesrat a comprehensive explanation of their implications for the contractual foundations of the European Union and an assessment of their necessity in terms of integration policy and their impact on such policy. The Federal Government shall also explain:

whether a law as defined in the first or second sentence of Article 23(1) of the Basic Law is required for the participation of the Bundestag and the Bundesrat;

whether, in the event of the procedure under section 9 of the present Act being an option:

a. draft legislative acts within the meaning of Article 48, first paragraph, of the Treaty on the Functioning of the European Union would affect important aspects of the German social-security system, including its scope, cost or financial structure, or would affect the financial balance of that system,

b. draft legislative acts under Article 82(2) or Article 83(1) or (2) of the Treaty on the Functioning of the European Union would affect fundamental aspects of the German criminal-justice system.

(4) In the case of urgent proposals, the time limit defined in paragraph 3 above shall be shortened so as to ensure that the Bundestag and the Bundesrat can deal with them in a manner commensurate with their responsibility for integration. If a particularly extensive appraisal is required, the time limit may be lengthened.

(5) The Federal Government shall notify the Bundestag and the Bundesrat in writing without delay of any request made by another Member State in the Council under the first sentence of Article 48, second paragraph, the first sentence of Article 82(3), first subparagraph, or the first sentence of Article 83(3), first subparagraph, of the Treaty on the Functioning of the European Union. This notification shall include the Member State's reasons for its request.

(6) The Federal Government shall transmit a comprehensive appraisal of proposals for legislative acts of the European Union within two weeks following their referral to the Bundestag committees but no later than the start of their discussion by the Council bodies. This appraisal shall contain indications regarding the competence of the European Union to adopt the proposed legislative act and its compatibility with the principles of subsidiarity and proportionality.

(7) The Federal Government shall notify the Bundestag and the Bundesrat as early as possible of the conclusion of legislative procedures of the European

Union; this notification shall also contain an assessment as to whether the Federal Government considers the legislative act to be compatible with the principles of subsidiarity and proportionality.

## Appendix 1 European Parliament seats under the Nice and Lisbon Treaties

It was envisaged that the *Treaty of Lisbon* would enter into force in January 2009, in good time for European Parliament elections in June 2009 to be held under its new institutional provisions.<sup>179</sup> But the Lisbon implementation target passed and the EP elections were held under the Nice Treaty provisions, with a different distribution of seats. Under Nice the total number of seats was reduced to 736, with fewer seats for 12 Member States, including the UK.

The Lisbon formula came from a proposal agreed by the EP Constitutional Affairs Committee on 2 October 2007 on the distribution of seats,<sup>180</sup> which the EP adopted in a resolution on 11 October 2007. This set out the distribution of seats from 2009 until 2014:

Member State	Population (1) (in millions)	% of EU-27 Population	Seats until 2009	"Nice"(2) 2009-2014	Report in plenary (3) 2009 -2014	Proposal rapp (4)
Germany	82.4	16.7%	99	99	96	-3
France	62.9	12.8%	78	72	74	2
<b>United Kingdom</b>	<b>60.4</b>	<b>12.3%</b>	<b>78</b>	<b>72</b>	<b>73</b>	<b>1</b>
Italy	58.8	11.9%	78	72	72	
Spain	43.8	8.9%	54	50	54	4
Poland	38.2	7.7%	54	50	51	1
Romania	21.6	4.4%	35	33	33	
Netherlands	16.3	3.3%	27	25	26	1
Greece	11.1	2.3%	24	22	22	
Portugal	10.6	2.1%	24	22	22	
Belgium	10.5	2.1%	24	22	22	
Czech Rep.	10.3	2.1%	24	22	22	
Hungary	10.1	2.0%	24	22	22	
Sweden	9.0	1.8%	19	18	20	2
Austria	8.3	1.7%	18	17	19	2
Bulgaria	7.7	1.6%	18	17	18	1
Denmark	5.4	1.1%	14	13	13	
Slovakia	5.4	1.1%	14	13	13	
Finland	5.3	1.1%	14	13	13	
Ireland	4.2	0.9%	13	12	12	
Lithuania	3.4	0.7%	13	12	12	
Latvia	2.3	0.5%	9	8	9	1
Slovenia	2.0	0.4%	7	7	8	1
Estonia	1.3	0.3%	6	6	6	
Cyprus	0.8	0.2%	6	6	6	
Luxembourg	0.5	0.1%	6	6	6	
Malta	0.4	0.1%	5	5	6	1
<b>EU-27</b>	<b>492,881</b>	<b>100,00%</b>	<b>785</b>	<b>736</b>	<b>750</b>	
(1) Population figures as officially established on 7 November 2006 by the Commission in Doc. 15124/06 on the basis of Eurostat figures.						
(2) "Nice": Distribution of Seats according to Art. 189 TEC as modified by Art. 9 of the BG/RO - Act of Accession.						
(3) "New": New Proposal on the basis of Art. 9A TEU new ( I-20).						
(4) The new figures concerning Germany and Malta derive automatically from the draft reform treaty provisions. <sup>181</sup>						

<sup>179</sup> OJC 115, 9 May 2008 p.322

<sup>180</sup> Co-rapporteurs Alain Lamassoure (EPP-ED, FR) and Adrian Severin (PES, RO), A6-0351/2007, approved in committee by 17 votes in favour, five against and three abstentions. See [procedure file](#)

Italy was granted an extra EP seat to bring it into line with the UK, bringing the ceiling of 750 to 751, including the EP President.<sup>182</sup> This was agreed by the European Council in October 2007 and was appended to the Lisbon Treaty.

### European Council decision on EP seats

The 2007 EP resolution was intended to enter into force after Lisbon had been implemented and before the June 2009 EP elections. However, the European Council which met on 11-12 December 2008, acknowledging that the timetable for implementing Lisbon was unlikely to be met, agreed transitional institutional provisions in the form of [Declarations in Annex 1 of the Presidency Conclusions](#). The Declaration on the EP provided that, if Lisbon has not been ratified by the time of the EP elections, there would be 736 members. Following ratification, the 12 Member States due to gain extra seats would obtain them.<sup>183</sup> Germany would temporarily keep the three extra seats it would have lost had Lisbon been ratified before the 2009 elections. The total number of MEPs would rise to 754 for a transitional period, going down in the following term from 2014 to 751, the actual Lisbon number.

### Spanish proposal

The Spanish Government proposed [a Treaty amendment](#), which was discussed at the European Council on 10 -11 December 2009. The European Council decided to proceed with the Spanish proposal, writing to the EP and the Commission in January 2010 and asking for the EP's consent not to convene a Convention in this instance. Íñigo Méndez de Vigo (EPP) was the rapporteur for two EP reports on the proposals, which were adopted by the Constitutional Affairs Committee on 7 April 2010 and by the EP plenary on 6 May 2010. The Commission gave a [favourable opinion](#) in April 2010.

Under the **Spanish proposal**, the number of EP seats would be increased as follows:

- 1 MEP for Bulgaria, Italy, Latvia, Malta, the Netherlands, Poland, Slovenia and the United Kingdom
- 2 MEPs for France, Austria and Sweden
- 4 MEPs for Spain

The proposal would enter into force on 1 December 2010.

The extra MEPs would be selected:

- (a) either in ad hoc elections by direct universal suffrage in the Member State in accordance with provisions applicable for elections to the European Parliament;
- (b) or by reference to the results of the EP in June 2009;
- (c) or by designation by the relevant national parliament from among its Members of the requisite number of

### Observer MEPs

One of the last decisions of the last European Parliament was to try and bridge the difference in the number of MEPs between the provisions of the Nice Treaty and the Lisbon Treaty, in anticipation of it coming into force.<sup>184</sup> In November 2009 the EP adopted a change to Rule 11 of its Rules of Procedure to allow the 18 new MEPs to start as observers during the period between the adoption of the change by the IGC and its ratification and entry into force. However, for financial reasons, the EP decided not to appoint the observers in the 2009-10 financial year. It is not yet clear whether there is enough funding for them in 2011.

<sup>181</sup> [EP briefing 4 October 2007, "Distribution of EP seats: Constitutional Affairs Committee approves proposal"](#)

<sup>182</sup> "Composition of the European Parliament", [DS 869/07, 19 October 2007](#) and Article 14(2) TEU

<sup>183</sup> Declaration on Lisbon and the Composition of the EP, Presidency Conclusions, 11-12 December 2008. For full details of the European Council agreement, see SN/IA/4921, "The Lisbon Treaty: the European Council and prospects for Irish ratification", 18 December 2008.

<sup>184</sup> [EurActiv 25 May 2010, "Eurosceptics pour scorn on 'phantom MEPs'"](#)

## Appendix 2 Letter to Edward Heath from Lord Kilmuir, December 1960

I have no doubt that if we do sign the Treaty, we shall suffer some loss of sovereignty [...] Adherence to the Treaty of Rome would, in my opinion, affect our sovereignty in three ways:-

Parliament would be required to surrender some of its functions to the organs of the Community;

The Crown would be called on to transfer part of its treaty-making power to those organs; Our courts of law would sacrifice some degree of independence by becoming subordinate in certain respects to the European Court of Justice.

### (a) The position of Parliament

It is clear from the memorandum prepared by your Legal Advisers that the Council of Ministers could eventually (after the system of qualified majority voting had come into force) make regulations which would be binding on us even against our wishes, and which would in fact become for us part of the law of the land. There are two ways in which this requirement of the Treaty could in practice be implemented:-

Parliament could legislate ad hoc on each occasion that the Council made regulations requiring action by us. The difficulty would be that, since Parliament can bind neither itself nor its successors, we could only comply with our obligations under the Treaty if Parliament abandoned its right of passing independent judgment on the legislative proposals put before it. A parallel is the constitutional convention whereby Parliament passes British North America Bills without question at the request of the Parliament of Canada; in this respect Parliament here has in substance, if not in form, abdicated its sovereign position, and it would have, pro tanto, to do the same for the Community.

It would in theory be possible for Parliament to enact at the outset legislation which would give automatic force of law to any existing or future regulations made by the appropriate organs of the Community. For Parliament to do this would go far beyond the most extensive delegation of powers, even in wartime, that we have experienced and I do not think there is any likelihood of this being acceptable to the House of Commons.

Whichever course were adopted, Parliament would retain in theory the liberty to repeal the relevant Act or Acts, but I would agree with you that we must act not on the assumption that entry into the Community would be irrevocable; we should have therefore to accept a position where Parliament had no more power to repeal its own enactments than it has in practice to abrogate the Statute of Westminster. In short, Parliament would have to transfer to the Council, or other appropriate organ of the Community, its substantive powers of legislating over the whole of a very important field.

### (b) Treaty-making Powers

The proposition that every treaty entered into by the United Kingdom does to some extent fetter our freedom of action is plainly true. Some treaties, such as GATT and O.E.E.C., restrict severely our liberty to make agreements with third parties and I should not regard it as detrimental to our sovereignty that, by signing the Treaty of Rome, we undertook not to make tariff or trade agreements without the Council's approval. But to transfer to the Council or the Commission the power to make such treaties on our behalf, and even against our will, is an entirely different proposition. There seems to me to be a clear distinction between the exercise of sovereignty involved in the conscious acceptance by use of obligations under our treaty-making powers and the total or partial surrender of sovereignty involved in our cession of these powers to some other body. To confer a sovereign state's treaty-making powers on an international organisation is the first step on the road which leads by way of confederation to the fully federal state. I do not suggest that what is involved would necessarily carry us very far in this direction, but it would be a most significant step and one for which there is no precedent in our case. Moreover, a further surrender of Parliamentary supremacy would necessarily be involved: as you know, although the treaty-making power is vested in the Crown, Parliamentary sanction is required for any treaty which involves a change in the law or the imposition of taxation (to

take only two examples), and we cannot ratify such a treaty unless Parliament consents. But if binding treaties are to be entered into on our behalf, Parliament must surrender this function and wither resign itself to becoming a rubber stamp or give the Community, in effect, the power to amend our domestic laws.

(c) Independence of the Courts

There is no precedent for our final appellate tribunal being required to refer questions of law (even in a limited field) to another court and – as I assume to be the implication of ‘refer’ to accept that court’s decision. You will remember that when a similar proposal was considered in connection with the Council of Europe we felt strong objection to it. I have no doubt that the whole of the legal profession in this country would share my dislike for such a proposal which must inevitably detract from the independence and authority of our courts.

Of these three objections, the first two are by far the more important. I must emphasise that in my view the surrenders of sovereignty involved are serious ones and I think that, as a matter of practical politics, it will not be easy to persuade Parliament or the public to accept them. I am sure that it would be a great mistake to under-estimate the force of the objections to them. But those objections ought to be brought out into the open now because, if we attempt to gloss over them at this stage, those who are opposed to the whole idea of our joining the Community will certainly seize on them with more damaging effect later on. Having said this, I would emphasise once again that, although these constitutional considerations must be given their full weight when we come to balance the arguments on either side, I do not for one moment wish to convey the impression that they must necessarily tip the scale. In the long run we shall have to decide whether economic factors require us to make some sacrifice of sovereignty: my concern is to ensure that we should see exactly what it is that we are being called on to sacrifice, and how serious our loss would be.