House of Commons

European Scrutiny Committee

The EU Bill: Restrictions on Treaties and Decisions relating to the EU

Fifteenth Report of Session 2010–11

Report, together with formal minutes, oral and written evidence

Ordered by the House of Commons
to be printed 19 January 2011

HC 682
Published on 24 January 2011
by authority of the House of Commons
London: The Stationery Office Limited
£14.50

The European Scrutiny Committee

The European Scrutiny Committee is appointed under Standing Order No.143 to examine European Union documents and—

a) to report its opinion on the legal and political importance of each such document and, where it considers appropriate, to report also on the reasons for its opinion and on any matters of principle, policy or law which may be affected;

b) to make recommendations for the further consideration of any such document pursuant to Standing Order No. 119 (European Committees); and

c) to consider any issue arising upon any such document or group of documents, or related matters.

The expression "European Union document" covers —

i) any proposal under the Community Treaties for legislation by the Council or the Council acting jointly with the European Parliament;

ii) any document which is published for submission to the European Council, the Council or the European Central Bank;

iii) any proposal for a common strategy, a joint action or a common position under Title V of the Treaty on European Union which is prepared for submission to the Council or to the European Council;

iv) any proposal for a common position, framework decision, decision or a convention under Title VI of the Treaty on European Union which is prepared for submission to the Council;

v) any document (not falling within (ii), (iii) or (iv) above) which is published by one Union institution for or with a view to submission to another Union institution and which does not relate exclusively to consideration of any proposal for legislation;

vi) any other document relating to European Union matters deposited in the House by a Minister of the Crown.

The Committee's powers are set out in Standing Order No. 143.

The scrutiny reserve resolution, passed by the House, provides that Ministers should not give agreement to EU proposals which have not been cleared by the European Scrutiny Committee, or on which, when they have been recommended by the Committee for debate, the House has not yet agreed a resolution. The scrutiny reserve resolution is printed with the House's Standing Orders, which are available at www.parliament.uk.

Current membership

Mr William Cash MP (*Conservative, Stone*) (Chair)
Mr James Clappison MP (*Conservative, Hertsmere*)
Michael Connarty MP (*Labour, Linlithgow and East Falkirk)*
Jim Dobbin MP (*Labour/Co-op, Heywood and Middleton*)
Julie Elliott MP (*Labour, Sunderland Central)*
Tim Farron MP (*Liberal Democrat, Westmorland and Lonsdale*)
Nia Griffith MP (*Labour, Llanelli*)
Chris Heaton-Harris MP (*Conservative, Daventry*)
Kelvin Hopkins MP (*Labour, Luton North*)
Chris Kelly MP (*Conservative, Dudley South*)
Tony Lloyd MP (*Labour, Manchester Central*)
Penny Mordaunt MP (*Conservative, Portsmouth North*)
Stephen Phillips MP (*Conservative, Sleaford and North Hykeham*)
Jacob Rees-Mogg MP (*Conservative, North East Somerset)*
Henry Smith MP (*Conservative, Crawley*)
Ian Swales MP (Liberal Democrat, Redcar

Contents

Report

1 Introduction

1. In his evidence to us, the Minister for Europe, David Lidington, described the purpose of the "referendum lock" in Part 1 of the EU Bill as follows:

> The point of having the referendum lock is to guard against the risk that, in future, powers would be transferred to the European Union, without the consent of the British people in the way that has happened in the past. I very much want to see the UK not only remaining a member of the EU, but being a very active participant as well. One of the difficulties in us taking on that role with confidence has been the fact that people in this country feel that vital decisions have been taken in the past, about which they were not consulted and about which they ought to have had a say, and about which the populations of other European countries have been able to have a say.[1]

2. At the conclusion of his evidence, he added:

> I think [Part 1 of the Bill is] a lot more than a *de minimis* measure. I think that the introduction of additional powers for Parliament to insist on giving its assent before certain decisions are taken, and the new powers for the people to have the final say over any future proposal to transfer competence, are very significant changes to our law. What is true is that the Bill does not set out to revisit previous treaties or the existing legal order as regards the directly effective nature and primacy of European Union law in this country.
>
> What the Bill is doing is delivering two of the Government's commitments under the coalition programme. It brings in legislation to require a referendum before transfers of competence and to require primary legislation before *passerelle* clauses are used. Secondly, it delivers on what was in the coalition programme simply as an agreement to consider the case for a sovereignty Bill—that Bill is being introduced by the means of clause 18. There was a third limb to the coalition programme's commitments on Europe, which was to examine the balance of competencies between this country and the European Union and, in particular, to examine ways in which the operation of the Working Time Directive could be made less onerous. That work is going on.[2]

3. But the Government has made plain that there will not be a referendum under Part 1 of the Bill in the lifetime of this Parliament.[3] And the Explanatory Notes to the Bill (the Explanatory Notes) emphasise that the Government's consent to a proposal in Brussels is an important pre-condition to triggering the referendum lock:

> A referendum would only be required if the Government of the day wanted to support the change to the TEU or TFEU in question. If the Government of the day did not want to support the change in question, it would block the proposal at the negotiations stage. *As all of the types of Treaty change that are to be subject to the*

1 Q 154 (HC 633-II)

2 Q 193 (HC 633-II)

3 *The Coalition: Our programme for government*, page 19

> *referendum provisions will have to be agreed by unanimity at the EU level*, the proposal could not form part of a new Treaty or a Treaty change—and there would then be no need for a referendum—if the Government did not support such a change.[4] (Emphasis added.)

4. The approach this Report takes is to explain in chapter 2 what Part 1 of the Bill sets out to do and then to summarise it; in chapter 3 to examine Part 1 for gaps in the constitutional safeguards it introduces, and to consider other legal concerns; in chapter 4 to look at the practicalities of implementing the referendum requirements; and in chapter 5 to look at the impact of Part 1 on UK-EU relations. Chapter 6 contains our evaluation and conclusions.

5. This is the second of two Reports which we have produced on the European Union Bill. This Report draws on evidence published as Volume II of our Tenth Report of Session 2010-11, *The EU Bill and parliamentary sovereignty*. Where this occurs the footnotes to the text make clear that references relate to Volume II of the Tenth Report (HC 633–II). Further written evidence has been received and oral evidence taken since we published the Tenth Report. The oral evidence sessions with Professor Simon Hix, Professor of European and Comparative Politics, London School of Economics and Political Science; Professor Ken Minogue Professor Emeritus at the Department of Government, London School of Economics and Political Science; and Sir John Grant, former UK Permanent Representative to the European Union, are published in Volume II to this Report along with further written evidence. This Report is concerned with the provisions of Part 1 of the Bill. Where evidence relates to the subject of our earlier Report—the Bill's Parliamentary sovereignty clause and the question of binding of future parliaments—it is published but not commented on.

2 Part 1 of the EU Bill explained

6. Part 1 of the EU Bill applies three types of constitutional control mechanisms, or "locks", to future increases in the competence or power of the EU: referendums followed by Act of Parliament (clauses 2, 3 and 6)(the "referendum lock"); Acts of Parliament (clauses 7, 8 and 9); and Parliamentary approval by motion without amendment (clauses 8, 9 and 10).[5] Clauses 2, 3 and 8(5) also require a ministerial statement to be laid before Parliament.

Clause 2—Treaties amending or replacing TEU or TFEU

7. Clause 2 concerns increases in EU competence and or power after full-scale Treaty revision, such as preceded the adoption of the Lisbon Treaty. This type of Treaty revision takes the form of a new amending Treaty. It usually requires a Convention to be established including the European Parliament and national parliaments of the Member States, which makes recommendations to an Intergovernmental Conference (IGC) of

4 Paragraph 15 of the Explanatory Notes

5 Clause 8 also provides for an Article 352 TFEU decision to be approved in urgent cases once a ministerial statement is laid before Parliament.

Member States, which in turn negotiates the amending Treaty. The amending Treaty has to be ratified by Member States "in accordance with their respective constitutional requirements"[6]. This procedure is called "the ordinary revision procedure", and is set out in Article 48(2)–(5) of the Treaty on European Union (TEU).

8. Clause 2 also applies to accession Treaties (see clause 1(4)(b)), but only if they incorporate provisions that go beyond those necessary for the accession, as confirmed by paragraph 58 of the Explanatory Notes. In contrast to the ordinary revision procedure, accession Treaties are negotiated under a purely intergovernmental procedure with the accession State, the process for which is set out in Article 49 TEU. The accession Treaty also has to be ratified by Member States "in accordance with their respective constitutional requirements".[7]

9. By virtue of clause 2, a Treaty adopted by the EU pursuant to the ordinary revision procedure, or an accession Treaty that incorporates provisions that go beyond those necessary for the accession, is not to be ratified by the Government unless:

— a statement in accordance with clause 5 has been laid before Parliament;

— the Treaty has been approved by Act of Parliament; and

— the "referendum condition" or the "exemption condition" is met.[8]

10. The referendum and exemption conditions are alternatives—only one has to be met.

11. The statement is a statement as to whether the Treaty "in the Minister's opinion" falls within clause 4 of part 1 of the Bill (clause 5(3)).

Referendum condition

12. The referendum condition is met if the coming into force of the Act of Parliament approving the Treaty is made conditional upon the result of the referendum; the referendum has been held; and the majority of those voting were in favour of the ratification of the Treaty. By this means, the referendum is post-legislative and the result of the referendum is made legally binding through statute.

Exemption condition

13. The exemption condition is met simply if "the Act providing for the approval of the treaty states that the treaty does not fall within section 4." If this condition is met, there is no requirement for a referendum. It is to be inferred, therefore, that if the transfer of competence or power does not fall within clause 4(1)-(3), it is exempt. However, although not referring expressly to the exemption condition, clause 4(4) provides the following examples of changes to the EU that would be exempt:

6 Article 48(4) TEU

7 Article 49(2) TEU

8 The current constitutional requirement for an amendment of the EU Treaties by a further Treaty is an Act of Parliament to amend the European Communities Act 1972.

A treaty or Article 48(6) decision does not fall within this section merely because it involves one of more of the following –

(a) the codification of practice under TEU or TFEU in relation to the previous exercise of an existing competence;

(b) the making of any provision that applies only to Member States other than the United Kingdom;

(c) in the case of a treaty, the accession of a new Member State.

14. The Explanatory Notes tell us that this list:

"*is illustrative*, rather than exclusive. In other words, *there may be other types of Treaty change which do not transfer competence or power from the UK to the EU and therefore do not trigger a referendum*".[9] (Emphasis added.)

Subsequent paragraphs in the Explanatory Notes illustrate further examples of exempt Treaty amendment.

Clause 3—Amendment of TFEU under simplified revision procedure

15. Clause 3 appears to concern increases in EU competence and/or power after the "simplified revision procedure", set out in Article 48(6) TEU. This procedure allows Member States acting unanimously by means of a Decision of the European Council to revise Part 3 of the Treaty on the Functioning of the European Union (TFEU), "Union Policies and Internal Actions", without having to engage the lengthy procedures of an ordinary revision of the Treaties.[10] There is, however, an important caveat to its use: the proposed revision must "not increase the competence conferred on the Union in the Treaties".[11]

16. By virtue of clause 3, a European Council Decision agreed pursuant to the simplified revision procedure in Article 48(6) TEU is not to be ratified by the Government unless:

— a statement in accordance with clause 5 has been laid before Parliament;

— the Treaty has been approved by Act of Parliament; and

— the referendum condition, the exemption condition, or *the significance condition* is met.[12]

9 Para 55

10 This is the procedure being used to establish the permanent bail-out mechanism for the eurozone, the European Stability Mechanism(see the Committee's Report on this: HC 428-xii (2010-11), chapter 2 (12 January 2011).

11 Article 48(6), third paragraph, and see paragraph 60 of this Report.

12 The current constitutional requirement for approval of a European Council Decision following the special legislative procedure is set out in section of the European Union (Amendment) Act 2008, which incorporates the Lisbon Treaty into national law. Section 6(1)(a) requires the Decision to be approved by motion without amendment in both Houses.

17. The referendum, exemption and significance decisions are alternatives—only one has to be met.

18. The statement is a statement as to whether the Article 48(6) TEU Decision "in the Minister's opinion" falls within clause 4 of part 1 of the Bill.

The significance condition

19. The referendum and exemption conditions are as above. What distinguishes clauses 2 and 3 is that the latter requires, in two specific circumstances related to the transfer of power rather than competence, a "significance condition" to be met. The two circumstances are:

> "the conferring on an EU institution or body of power to impose a requirement or obligation on the United Kingdom, or the removal of any limitation on any such power of an EU institution or body;" (clause 4(1)(i)); or
>
> "the conferring on an EU institution or body of new or extended power to impose sanctions on the United Kingdom" (clause 4(1)(j)".

20. The significance condition is met if the Act approving the Article 48(6) TEU Decision states that the European Council Decision falls within one or other of the transfers of power in clause 4(1)(i) and (j) above, and that its effect on the United Kingdom "is *not* significant" (clause 3(4)(b)). If this condition is met, there is no requirement for a referendum.

21. In addition, if the European Council Decision falls within one or other of the transfers of power in clause 4(1)(i) and (j) above, the statement laid before Parliament must indicate whether "in the Minister's opinion the effect of that provision in relation to the United Kingdom is significant" (clause 5(4)). This would appear to apply whether the significance condition was met or not, and would therefore apply even where the Minister concludes that the transfer is significant.

22. It should be noted that the significance decision does not, by inference, apply to the two transfers of power in clause 4(1)(i) and (j) if they have been agreed as a consequence of an amending Treaty following the ordinary revision procedure (clause 2). Nor, in these circumstances, would the Minister's statement have to say whether the transfer of power was significant under clause 5(4).

Clause 4—Cases where a Treaty or Article 48(6) decision attracts a referendum

23. Clause 4 lists the types of transfers of competence (clause 4(1)(a)-(h)) and power (clause 4(1)(i)-(m))[13] which attract a referendum. Clause 4(1)(k) refers to the removal of the UK's right of veto in 44 Treaty provisions listed in Schedule 1 to the Bill.

13 There is some confusion here. Paragraph 20 of the Explanatory Notes say that three types of transfer of power are possible—subsection 1(i)-(k) of Clause 4. It is unclear whether the Government considered that the loss of the "emergency brake" in subsection (1)(l) and (m) would amount to a transfer of power.

24. As stated above, the exceptions to the requirement for a referendum are if the exemption condition is met; or if the significance condition is met in relation to a Article 48(6) TEU Decisions concerning the two transfers of power in clause 4(1)(i) and (j).

Clause 5—Statement to be laid before Parliament

25. Clause 5 is explained in the context of the operation of clauses 2–4 above.

Clause 6—Decisions requiring approval by Act and referendum

26. Clause 6 lists specific cases where a referendum and an Act of Parliament are required. These decisions would not involve a new Treaty or Article 48(6) TEU Decision and so would not be caught by the provisions of clauses 2, 3 or 4. Neither the exemption nor the significance condition applies to clause 6. The Explanatory Notes make clear that "[i]n the case of these decisions, no judgment is required by a Minister as to whether a transfer of competence or power would occur in each case".[14]

27. The provisions listed in clause 6 mostly concern *passerelle* clauses[15] (self-amending provisions where the possibility for amendment is provided for in the Treaty Article) which permit a change in the voting procedure from unanimity to qualified majority (QMV), or in the legislative procedure from special legislative procedure to the ordinary legislative procedure (co-decision). In the case of the latter change, the voting procedure in the Council almost always goes from unanimity to QMV.

28. Principal among these clauses is what is called the "general *passerelle* clause" set out in Article 48(7) TEU.[16] This, in essence, permits the European Council, acting unanimously, to authorise the Council to act by QMV instead of unanimity in the area of Common Foreign and Security Policy (CFSP) (with the exception of military and defence matters), and by ordinary instead of special legislative procedure in all other policy areas under the TFEU. The European Parliament has to consent to its use. National parliaments have six months within which to approve the European Council's decision; if any oppose it, it cannot be finally adopted. Clause 6(4)(b) provides that Article 48(7) TEU Decisions taken in relation to the 44 Treaty provisions listed in Schedule 1 of the Bill will need to be approved by referendum and Act of Parliament in the UK before they can be adopted by the European Council.[17]

29. In addition, clause 6 requires a positive referendum result and an Act of Parliament to be passed before the UK can agree to a common EU defence policy; before it can participate in a European Public Prosecutor's Office; before the euro can become the currency of the UK; before the Council can move to QMV in specific instances in the field

14 Para 64

15 There is no one definition for what a *passerelle* (or "ratchet") clause is.

16 It would appear from the structure of Article 48 TEU that this is recognised by the Lisbon Treaty also as a simplified revision procedure, but it is generally called the general *passerelle* clause.

17 The current constitutional requirement for approval of a European Council Decision based on the general *passerelle* clause is Parliamentary approval by motion without amendment, pursuant to section 6(1)(b) of the European Union (Amendment) Act 2008.

of social and environmental policy and EU finance;[18] before the UK can agree to a change in voting procedures in areas of "enhanced cooperation" in which it participates; and before any border control can be removed.

Clause 7—Decisions requiring approval by Act

30. Clause 7 provides that in respect of the specific matters set down in subsections (2) and (4) a Minister may not confirm the UK's approval of a Council Decision, vote in favour of or otherwise support a Council Decision, unless the Decision is approved by an Act of Parliament. Again, neither the exemption nor the significance condition applies, so no ministerial judgment is required. The Treaty Articles covered by this clause include Article 48(7) TEU Decisions (the general *passerelle* clause) taken in relation to any Treaty provisions *not* listed in Schedule 1 of the Bill—in other words all other Treaty provisions not considered sufficiently important to merit a referendum (unless dealt with elsewhere in Part 1); the adoption of provisions to strengthen or add to the rights of EU citizens; the conferring of jurisdiction on the ECJ in the area of European intellectual property law; the adoption of a new decision on own resources; and the alteration of the number of Commissioners.

Clause 8—Decisions under Article 352 of TFEU

31. The Council can use Article 352 TFEU (the "flexibility clause") to adopt measures in order to attain one of the EU's objectives, but only where the existing Treaties have not provided the necessary powers to do so already. Subsection (1) provides that any one of the conditions in subsections (3), (4) or (5) needs to be satisfied in relation to an Article 352 TFEU Council Decision.

32. Subsection (3) contains the general rule, which is that the UK may not agree to a Decision under Article 352 TFEU unless the Decision has been approved by an Act of Parliament.

33. Subsection (4) provides for the Parliamentary approval of urgent or emergency uses of the flexibility clause without the need for an Act of Parliament. The Explanatory Notes say that this has been used in the past for urgent or emergency uses, where rapid EU action has been agreed but where there was no explicit legal basis on which to base that action. Subsection (4)(a) and (b) stipulate that the UK may agree to the adoption of a measure based on Article 352 TFEU in urgent or emergency cases if approved by motion without amendment in each House of Parliament.

34. Subsection (5) provides that an Act of Parliament would not be required for any Article 352 TFEU proposal which satisfies any of the exemptions listed in subsection (6). The exemptions in subsection (6) seek, the Explanatory Notes tell us, to prevent Acts of Parliament to approve measures which have been agreed in substance under previous measures using the Article 352 TFEU legal base. In these circumstances a Minister must lay a statement before Parliament saying that the use of the flexibility clause is for an exempt purpose, in which case Parliamentary approval is not required.

18 These three *passerelles* are currently subject to Parliamentary approval under section 6(1)(e)-(g) of the of the European Union (Amendment) Act 2008.

Clause 9—Approval required in connection with Title V of Part 3 of TFEU

35. Clause 9 prevents the UK from opting into three types of proposal under Title V TFEU—the Area of Freedom, Security and Justice (FSJ) (also known as Justice and Home Affairs (JHA))—unless approved by motion without amendment in each House of Parliament; and from agreeing to the final adoption of the legislation in Brussels unless an Act of Parliament has been passed. The three proposals are:

— a Council Decision under Article 81(3) TFEU, which would permit a move from the special legislative procedure to the ordinary legislative procedure in respect of family law measures with cross-border implications. This would in effect mean a move from unanimity to qualified majority voting;

— a Council Decision under Article 82(2)(d) TFEU, which would permit additions to the list of specific aspects of criminal procedure on which the EU can adopt minimum rules; and

— a Council Decision under Article 83(1) TFEU, which would permit additions to the list of areas of particularly serious crime with a cross-border dimension on which the EU can act to specify minimum rules on the definition of those offences or sanctions to apply.

Clause 10—Parliamentary control of certain decisions not requiring approval by Act

36. Under clause 10 seven specified Council Decisions have to be approved by motion without amendment in both Houses. The areas covered include free movement of services, increases in the number of Advocates-General at the Court of Justice of the European Union (ECJ), establishment of "specialised courts" attached to the General Court,[19] and amendments to the statutes of the ECJ, the European Central Bank (ECB) and the European Investment Bank (EIB). They are subject to qualified majority voting in the Council, with the exception of those in subsections (1)(c) (increase in the number of Advocates-General), (1)(f) (EIB), and (2) (EU accession to the European Convention on Human Rights), which are subject to a unanimous vote in Council.

Summary of the control mechanisms in Part 1

37. The following summarises Part 1 of the Bill:

— *Clauses 2, 4 and 5:* If the EU decides to amend its Treaties by means of a full-scale revision, in other words by the ***ordinary revision procedure*** in Article 48(2)-(5) TEU, the UK cannot ratify the amending Treaty unless a statement is laid before Parliament, the Treaty is approved by Act of Parliament, and a majority voting in a referendum is in favour of ratification. The ***one exception*** relates to the requirement for a referendum: if the subject matter of the amending Treaty does not fall within any of the categories of transfer of competence or power in clause 4, the ***exemption condition*** is met and a

19 Pre-Lisbon Treaty, the Court of First Instance.

referendum is not required. Clause 4(4) gives an illustrative list of exemptions from the requirement for a referendum. (There are no exemptions, however, from the requirement for a ministerial statement and Act of Parliament.)

— *Clauses 3, 4 and 5:* If the EU decides to amend any provision in Part 3 of the TFEU by means of a European Council Decision following ***simplified revision procedure***, as set out in Article 48(6) TEU, the UK cannot confirm its approval of the Decision unless a statement is laid before Parliament, the Decision is approved by Act of Parliament, and a majority voting in a referendum is in favour of ratification. The simplified revision procedure ***only applies to transfers of power***. The ***two exceptions*** relate to the requirement for a referendum: firstly if the subject matter of the Decision is ***exempt*** (as above), a referendum is not required; secondly if the subject matter falls within the types of transfer of power set out in clause 4(1)(i) and (j), the relevant Minister may decide that the transfer of power is not ***significant*** enough for a referendum to be held.

— *Clauses 6(4)(b) and 7(4)(b):* ***the general passerelle clause.*** If the EU decides to change the voting or legislative procedure in the Council from unanimity to QMV or from the special to the ordinary legislative procedure (co-decision) in an area of EU policy by means of an Article 48(7) TEU European Council Decision, the UK cannot confirm its approval in the European Council unless:

— for any of the Treaty provisions listed in ***Schedule 1*** of the Bill, the Decision is approved by Act of Parliament and a majority voting in a referendum is in favour of ratification of it (clause 6(4)(b);

— for all other Treaty provisions ***not included in Schedule 1*** nor dealt with elsewhere in the Bill, the Decision is approved by Act of Parliament (clause 7(4)(b)).

Neither the exemption nor the significance condition applies to the general *passerelle* clause, so no judgment is required by a Minister as to whether, respectively, a referendum and an Act of Parliament or an Act of Parliament would be required.

Passerelles and other provisions. Clause 6: the decisions listed are subject to approval by referendum and Act of Parliament. ***Clause 7***: the decisions listed are subject to approval by Act of Parliament. ***Clause 8*** is concerned with Article 352 TFEU, the flexibility clause: the basic requirement is approval by Act of Parliament or a motion approved without amendment by both Houses, unless the purpose is exempt under subsection (6); ***Clause 9*** deals with three Title V TFEU (FSJ) opt-in decisions where Parliamentary approval is required for the UK to opt in, and an Act of Parliament before the UK can give its agreement to the adoption of the legislation. ***Clause 10*** lists seven provisions which have to be approved by motion without amendment.

3 Part 1 of the EU Bill reviewed

38. Several of the written submissions from legal experts addressed Part 1 of the Bill as well as clause 18.[20] We found the evidence submitted by Professors Craig[21] and Dougan[22] particularly useful, as was that of the recently retired Director-General of the Council Legal Service, Jean-Claude Piris.[23] Where relevant we summarise their arguments below and make some additional ones of our own.

Coherence of the scheme of Part 1

Power versus competence

39. The Explanatory Notes contrast competence: "the ability for the EU to act in a given way", with power: allowing "an institution or body of the EU to use the competence conferred on it already [...] in a different way."[24] Two categories of transfer of power are defined in clause 4(1)(i) of (j), and are subject to the significance condition in clauses 3(4) (and 5(4)). In evidence the Minister described the transfer of power as follows:

> "Power, as you rightly say, is not defined in the Treaties or European law in the way that competence is a well understood concept. The decision that we took was to define power in terms of important and irreversible changes to the way in which decisions were taken within the European Union to take decisions and to bring forward legislation, so in the Bill, as you will have seen, we use the term "power" largely to apply to the surrender of vetoes, to moves away from the special legislative procedure to the ordinary legislative procedure, and to measures that would take us from a unanimity requirement to a qualified majority vote."[25]

40. Professor Craig said that there are arguments both in favour and against drawing a distinction between competence and power, but that he did not feel strongly as to whether the Bill should have made this distinction. On the one hand, there is a meaningful distinction that can be drawn between the existence of competence, and the powers that can be exercised if such competence exists (a similar distinction is reflected in national systems of administrative law). On the other, he thought the very scope of the competence possessed by the EU in any area will depend on the powers the EU is given in that area:

> "The EU Bill is premised on distinguishing between a Treaty revision that extends competence, by for example, broadening the subject matter remit of a Treaty article, and Treaty revision that extends 'power' to impose sanctions. It is however unclear why the latter is not as much an extension of competence as the former, more

20 See HC 633-I

21 Ev 16 (HC 633-II)

22 Ev 34 (HC 633-II)

23 Ev 39 (HC 633-II)

24 Para 39 of the Explanatory Notes.

25 Q 147 (HC 633-II)

especially if the extension of power is integrally linked to a particular subject matter area."[26]

Are the different constitutional requirements under the Bill consistent with the competence or power being transferred?

41. Professor Craig thought there was, however, a point of some importance that flowed from the distinction drawn in the Bill between competence and power. The significance condition in Clause 3(4) applies only to the conferring of power under Article 4(1)(i) and (j), and then only in relation to a conferring of power pursuant to the simplified revision procedure in Article 48(6) TEU. The assumption is that such a conferral of power may be insignificant, but that creation/extension of competence in relation to the other matters listed in Clause 4 cannot be. This assumption does not withstand examination, according to Professor Craig. The extension of competence in relation to, for example, an area in which the EU has competence to support, coordinate or supplement Member State action might equally be insignificant for the UK, but a referendum would nonetheless be mandatory in such cases.[27]

42. Professor Dougan raised similar concerns in his written evidence.[28] He commented that the Bill treats all the issues falling within clause 4(1) (apart from transfers of power under (i) and (j)) as significant *per se*, automatically triggering the requirement for a referendum. "Yet it is far from evident that any such measure should always be considered "significant" enough to justify the mandatory holding of a national referendum."[29] He gave examples of where a transfer of competence could be considered insignificant even though triggering a referendum, and of where a transfer of power could be considered significant even though not triggering a referendum.[30]

Exceptions to the referendum requirement—significance and judicial review

43. We asked the Minister whether the significant test in clause 5(4) could not be strengthened as a safeguard by a requirement for parliamentary approval of the Minister's decision. We also reminded him that witnesses who had given evidence in relation to Part 3 of the Bill had criticised the Explanatory Notes for inviting judicial review of a Minister's decision under clause 5(4):[31] a decision on whether a referendum should be held was a matter for Parliament, not the courts. We also asked the Minister whether the reference to "opinion" in clause 5(4) did not diminish the prospects of successful judicial review. The Minister's legal adviser, Ivan Smyth, replied that a Minister's decision will be explained in a "fully reasoned"[32] statement; one of the criteria for judicial review is the reasonableness test,

26 Ev 16 (HC 633-II)

27 *Ibid.*

28 Ev 32 (HC 633-II)

29 Ev 34, para13 (HC 633-II)

30 Ev 34–35, paras 16–20 (HC 633-II)

31 Paras 21, 41, and 61 of the Explanatory Notes.

32 Q 170 (HC 633-II)

and this will apply to the Minister's statement. We pressed the Minister on why Parliament should not have the final say on whether a transfer of power is significant enough for a referendum, rather than a Minister, arguing that Parliament's view would have more democratic weight than the Minister's. The Minister replied:

> "I think that Parliament will have the right to second-guess the Minister. Let us say that the Minister produces his reasoned opinion that this is an insignificant addition to the obligations on the UK and that either there is no challenge by judicial review or that there is a challenge which is unsuccessful. That amendment, under the simplified revision procedure, still has to come before Parliament for a full Act in order to ratify it. So Parliament then can use that opportunity to second-guess the Minister's opinion."[33]

He continued:

> "What we have sought to do here is to go further even than giving Parliament the final say, which would be necessary anyway because of the requirement for an Act to ratify any treaty change. We are saying that in addition to Parliament having that right—bearing in mind the fact that you can have Parliaments with extremely large majorities for the Government of the day, and a number of us served in such Parliaments in which it was possible for a determined Government using a large parliamentary majority to take something through if it so chose—the judicial review possibility provides an additional safeguard, over and on top of what Parliament is aiming to do."[34]

44. Professor Craig commented that clauses 3(4) and 5(4) provide no real indication of the criteria of significance; nor do paragraphs 40–42 of the Explanatory Notes. [35] He thought that the availability of judicial review would depend on the circumstances. Judicial review is not in general available against a primary statute, and it would, in his view, be difficult to imagine circumstances in which review pursuant to the Human Rights Act would be relevant. On the other hand, it is possible to conceive of circumstances in which judicial review might be sought of the ministerial statement made pursuant to Clause 5(4) if such an action were brought before enactment of the statute referred to in Clause 3(4). If the courts were willing to hear such a case, the judicial review would almost certainly be "low intensity".

45. Professor Dougan also commented on the lack of express criteria to define the threshold of significance:

> "On the surface, Clause 3(4) would therefore seem to leave considerable room for the exercise of ministerial discretion; and to be ill-suited to judicial review other than on procedural grounds or in the event of a manifest excess of discretion."[36]

33 Q 178 (HC 633-II)

34 Q 180 (HC 633-II)

35 Ev 19, para 14 (HC 633-II)

36 Ev 34, para 10 (HC 633-II)

46. In the absence of criteria, he said that the judgement of whether a transfer of power is significant would have to be informed by the overall scheme of Part 1 of the Bill; in other words, by which transfers of competence require a referendum and an Act of Parliament, which an Act of Parliament, and which approval of a motion without amendment. Professor Dougan's analysis of Part 1 led him to the following conclusion:

> "Without doubting that the question of when to insist upon the use of a referendum for the approval of certain EU changes falls to be determined by Parliament, it is nevertheless open to debate whether the current text of the Bill provides an entirely appropriate and consistent model for making that political choice. Some really rather minor changes to the Treaties would nevertheless have been classified a priori as important enough to require a full national referendum. That prospect could, in turn, tend to frustrate any attempt to define implicitly the criterion of "significance", specifically for the purposes of implementing Clause 3(4); or to argue that that criterion is capable of providing a more meaningful yardstick for the judicial review of relevant ministerial decisions."[37]

Codification of existing practice as an exemption from the referendum requirement[38]

47. Clause 4(4)(a) provides that a Treaty or Article 48(6) decision does not fall within clause 4 "merely because it involves [...] the codification of practice under TEU or TFEU in relation to the previous exercise of an existing competence".

48. Both Professors Craig[39] and Dougan[40] thought it would be difficult to decide when the use of a measure, such as the flexibility clause in Article 352 TFEU, should be regarded as creating a new head of competence; and both concluded that the application of this clause would be problematic. Professor Dougan commented:

> "Answering that question implicitly requires the exercise of subsequent political judgment, which may legitimately involve the choice between competing interpretations of the prevailing state of EU law, as well as taking into account the precise nature of the proposed Treaty or Article 48(6) decision."[41]

49. We agree, but we also think the competing interpretations are likely to be resolved in favour of the EU institutions and that the scope of this exemption is therefore broad. The ECJ ultimately decides how the EU Treaties should be interpreted. Through its judgments it can refine the boundaries of the competences within which EU institutions and Member States are permitted to act, as laid down by the Treaties; and it has been known in the past to interpret Treaty provisions in favour of giving the EU greater competence to act than might be thought to have been expressly conferred on it by the Treaties. One example is the development of the doctrine of implied power for the European Community to enter into

37 Ev 35, para 21 (HC 633-II)

38 We deal with the two other examples of exemptions from the referendum requirement—clauses 4(4)(b) and (c)—elsewhere in this Report.

39 Ev 17, para11c (HC 633-II)

40 Ev 33, paragraph 9 (HC 633-II)

41 *Ibid.*

international agreements where the legal base did not provide for it to do so. The Court found the existence of such a power from a purposive (teleological) and generous approach to the overall objectives of the EC Treaty, notwithstanding the absence of an express provision.[42] A further example is the principle of pre-emption,[43] whereby the Member States can only exercise their competence in an area of shared competence with the EU if the EU has not exercised its competence. This principle was codified in the EU Treaties as a result of the Lisbon Treaty.[44] Several of the new legal bases in the Lisbon Treaty were incorporated because they were argued to codify existing practice, such as energy[45] and civil protection.[46]

50. We give these examples to underpin our concern that clause 4(4)(a) could be relied on to legitimise competence creep at the hands of the Court. We suggested to the Minister that this means of expanding the EU's competence was significant, but not addressed in the Bill. He replied that the "European Court of Justice decides on the interpretation of European law, but the European Commission, the Council, can take action only on measures where competence is provided for in the treaties."[47] He added that he disagreed "very strongly" that the Bill was flawed because it did not address ECJ judgments, although he accepted:

> "that there have been occasions in the past where, for example, a treaty base involving the single market was used to justify a measure that the British Government of the time thought properly ought to have been on a health and safety basis. At that time, from memory, I think what we favoured would have attracted a requirement for unanimity, whereas what the Commission, supported by the Court of Justice, wanted was a single market treaty basis, which would be dependent upon qualified majority voting instead."[48]

He continued that the Bill implicitly accepts the *status quo* in EU law; but what clause 4(1)(d) does is to require a referendum if the EU is to gain a new area of shared competence (as a result of Treaty change). The Minister's legal adviser confirmed that clause 4(1)(e) does not deal with existing areas of shared competence.

Further gaps in the control mechanisms of Part 1

Opt-ins

51. We asked why government decisions to opt into proposals in the Area of Freedom, Security and Justice (FSJ, but also still called JHA) under Title V TFEU were not subject to increased parliamentary control. Such proposals typically place obligations on national

42 Case C-22/70 *Commission v Council* (ERTA), considered more recently in C-467/98 *Commission v Germany (*the "Open Skies" case).

43 E.g. C-262/88 *Barber v Guardian Royal Exchange.*

44 Article 2(2) TFEU. The Member States were sufficiently concerned by this to insist on the inclusion of a Protocol (No 25) on Shared Competence to the Lisbon Treaty, intended to safeguard their competence to act in areas of shared competence.

45 Article 134 TFEU

46 Article 196 TFEU

47 Q 149 (HC 633-II)

48 Q 150 (HC 633-II)

criminal or civil law and affect individual rights. The Minister replied that Parliament can have its say through "the vigilance and actions of the Committee".[49] We pressed the Minister further:

> "Could you, by way of an amendment, look at the whole question of the opt-ins, which are significant? At the moment, we have an opt-out as far as the relevant chapter is concerned. Could we have at least a parliamentary vote under the parliamentary procedure that you set up in this Bill? That would be a much more satisfactory way of dealing with things-where we can have a resolution in front of Houses of Parliament, a proper debate and a vote on any opting-in to the home affairs chapter."[50]

52. The Minister replied that there were two practical difficulties with that suggestion:

> "One is that there is a strict time limit attached to our opt-in-that we have to take that decision within three months. It takes the Government, through interdepartmental consultation, some time to work out what their own assessment of a particular measure is once it is published. The other is that we would expect a lot of these-perhaps 40-in the course of a year. We can't be certain of this because it is still new, but our estimate is that perhaps 30 to 40 JHA measures may be brought forward in the course of a year. There is an issue of providing adequate parliamentary time."[51]
>
> However, he said he would take note of what had been suggested.

Enhanced cooperation—internal passerelles

53. Professor Dougan pointed to the following loophole in the control mechanisms provided for in Part 1 of the Bill.[52] Article 333 TFEU contains two "internal" *passerelle* clauses through which the Council (acting unanimously in its restricted formation, i.e. taking into account only the votes of participating Member States) may decide to convert unanimity into QMV or a special into the ordinary legislative procedure, specifically for the purposes of the relevant enhanced cooperation.

54. Professor Dougan said that the control mechanisms cover most, *but not all*, of the potential scenarios where the UK might forgo its national veto for the purposes of an enhanced cooperation. He gave the following situation as an example. A group of Member States (not including the UK) has been authorised to initiate an enhanced cooperation. Exercising the "internal" *passerelle* powers conferred upon the Council (acting unanimously in its restricted formation, thus excluding the UK and other non-participating Member States), QMV is substituted for unanimity as regards the relevant legal bases for future measures adopted within the enhanced cooperation. The UK later decides to join the existing enhanced cooperation, and must accept all measures already adopted under it, including the "internal" *passerelle* decision to abolish unanimity in

49 Q 156 (HC 633-II)

50 Q 157 (HC 633-II)

51 *Ibid.*

52 Ev 36–7, paras 29–35 (HC 633-II)

respect of the adoption of any future acts. Such a situation would fall outside the scope of Clause 2 or 3, read in conjunction within Clause 4.[53]

55. In such situations the Bill makes no provision for any specific form of democratic scrutiny. Bearing in mind the aim of consistency and coherence in the overall scheme of the Bill that omission is perhaps surprising, comments Professor Dougan:

> "Even if non-participants cannot (and should not be able to) prevent Member States within an existing enhanced cooperation from making use of the "internal" *passerelle* clause, one might have expected that the UK's own decision to join an existing enhanced cooperation where QMV has already been substituted for unanimity should be subject to both an Act of Parliament and a national referendum (in the case of Treaty provisions falling within the scope of Schedule 1) or at least to an Act of Parliament (in the case of Treaty provisions falling outside the scope of Schedule 1)."[54]

Inadvertent breaches of the Bill

56. In our view it is not unlikely that a Minister may inadvertently agree, in breach of a provision in the Bill, to an EU proposal that extends its competence or power. If that proposal were directly effective or applicable, it would automatically become an enforceable right under section 2(1) of the European Communities Act. Case law suggests that the European Communities Act is not an Act that can be impliedly amended. So we asked the Minister to say whether the Bill should make provision to clarify that an EU proposal that does extend competence or power in breach of Part 1 can never become an enforceable right for the purposes of section 2(1) of the European Communities Act.

57. The Minister replied that there were already checks and balances in the system to stop that happening. First, the EU institutions were legally bound to act within the confines of the Treaties. Secondly, the UK had a detailed system of scrutiny against competence creep, both through our Committee and the Lords Committee, and through what the Government was doing through the European Affairs Committee. Thirdly, the Government would, under the existing arrangements, lobby and build alliances against competence creep; and if outvoted it would, fourthly, take the case to the ECJ.[55]

58. And in relation to the actual amendment we proposed, he said:

> "The problem with the sort of amendment that you are proposing, Chair, is that it would introduce enormous uncertainty into the system. That would affect everybody who has to comply with EU law-business and individuals. If it led to infraction proceedings for non-implementation of EU law, it would be costly and it could lead to claims for *Francovich* damages against the United Kingdom, so we are not attracted by that course of action."[56]

53 *Ibid*, para 32

54 *Ibid*, para 33

55 Q 189 (HC 633-II)

56 *Ibid.*

Compatibility of Part 1 with EU and international law

59. The recently retired Director-General of the Legal Service, and Legal Adviser to the European Council, Jean-Claude Piris, submitted evidence on Parts 1 and 3 of the Bill.[57] He explained that in the Lisbon Treaty, as in previous Treaties, the Member States agreed to insert, in addition to the ordinary revision procedure which requires ratification by all Member States "in accordance with their respective constitutional requirements",[58] other specific provisions which provide for easier procedures in certain cases. These include the simplified revision procedures under Article 48(6) and (7) TEU, and the other *passerelle* clauses.[59] These latter provisions were inserted in the Treaty in order to achieve a balance between the different views of the Member States. The Parties ratified the Treaty of Lisbon, thereby mutually committing to implement it *bona fide*—a principle of "overriding importance under international law",[60] he explained—which implies preserving the purpose and effect of all its provisions. He concluded that:

> "[i]t is undoubtedly for each Member State to determine the constitutional mechanisms through which it gives effect to those legal obligations. It will be for the other Member States to assess whether the Bill, and more particularly Clauses 4 and 6 thereof, which introduce a referendum requirement with regard to the triggering of most of the *passerelles*, respect those obligations. If they were to consider that the national legal constraints of the UK were to lead to the practical impossibility of taking certain steps within the Union which would be perceived as necessary or desirable by many or all other Member States, *it could not be ruled out that the compatibility of the referendum requirement with international and EU law might become an issue.* Furthermore, if, in a specific case, the requirement to hold a referendum were to result in an impasse in the future, this might lead to the UK being sidelined on certain issues. This is because it could trigger a tendency among other Member States to circumvent this situation, either by engaging in enhanced cooperation among themselves without the participation of the UK, or by concluding intergovernmental agreements outside the framework of the EU."[61] (Emphasis added.)

60. Following a similar logic, Professor Craig drew our attention to the conflict between clause 3 of the Bill, a clause which he described as "deeply problematic",[62] and the Lisbon Treaty.[63] Article 48(6) TEU states expressly that a Decision made there under "shall not increase the competences conferred on the Union in the Treaties". Clause 3 of the Bill, by

57 Ev 39 (HC 633-II)

58 Article 48(4) TEU

59 He explained that there are 21 such provisions in the Treaties. Eight of these are so-called *passerelles* which enable the European Council or the Council to decide to switch from unanimity to QMV. Out of these eight *passerelles*, three already existed in the previous EC Treaty (Articles 67(2), second indent (family law), 137(2), second subpara., (social policy) and 175(2), second subpara., (environment), renumbered Articles 81(3), second subpara., 153(2), second subpara. and 192(2), second subpara., TFEU).

60 The International Court of Justice has held that bona fide is "*one of the basic principles governing the creation and performance of legal obligations*", see Case *Border and Transborder Armed Actions*, Rep. (1988), p. 105.

61 Ev 39 (HC 633-II)

62 Ev 18, para12d (HC 633-II)

63 Ev 17–18 (HC 633-II)

contrast, is predicated on the contrary assumption: that a Decision under Article 48(6) could create or extend, and hence increase, competence. He continues:

> "To be sure Clause 3(3) embodies the exemption condition, such that if the Article 48(6) Decision did not engage any of the issues in Clause 4 a referendum would not have to be held, and an Act of Parliament would suffice to validate the measure. This does not, however, alter the force of the point being made here: from the EU's perspective no Article 48(6) Decision can increase EU competence; from the perspective of the EU Bill some such Decisions can do so. This will inevitably lead to legal and political tension between the EU and UK."[64]

61. Like M. Piris, Professor Craig thought it significant that the Lisbon Treaty specifies where EU decisions can be subject to approval in accordance with the constitutional requirements of Member States, "the clear implication being that where this is not specified it is neither required not allowed. The EU decisions/regulations/directives on these matters would be enacted and take effect in the normal manner specified by, for example, Article 289 TFEU and there would be no legal room for any limits in terms of referendum and/or Act of Parliament."[65] He concludes that clauses 6–8, in imposing constitutional requirements where none is foreseen by the Lisbon Treaty, may be in breach of EU law—"This is, as one might say, a 'nice' legal question."[66] The Government could argue before the ECJ that there is nothing to prevent ministerial consent in the Council from being subject to constitutional requirements chosen by a Member State. Alternatively, it "would be perfectly possible to draft the outlines of an ECJ decision which reached the contrary conclusion."[67] He sets these out in greater detail:

> "Thus it could be argued that Clauses 6-8 are indirectly undermining the schema of the Treaty. The Lisbon Treaty is quite clear when approval in accord with the constitutional requirements of national law is required. This is true both in terms of Treaty revision, and in terms of the limited instances where such approval is a pre-condition for the validity of a particular EU decision. Viewed from this perspective, the drafting strategy that underpins Clauses 6-8 is simply trying to make approval in accord with national constitutional requirements a pre-condition where the Treaty does not allow it. It could further be argued that if Clauses 6-8 were lawful it would be open to any Member State to pick any other such conditions, which could prejudice passage of EU legislation requiring unanimity. It is, for example, difficult to see why a Member State could not condition its ministerial approval by a requirement that the Draft Decision should not be finalized unless and until national opinion surveys had been conducted over a year to test people's reaction to the draft measure. The preceding arguments could be further reinforced in other ways. Thus it could be contended that the schema in Clauses 6-8 does not meet the requirements of Article 16(2) TEU, whereby the national representative in the Council 'commits' the government of his Member State. It is difficult to see in what sense the national

64 *Ibid*; see also the example Professor Craig gives of the practical problems which could be triggered in the European Council by clause 3.

65 Ev 18, para 12e (HC 633-II)

66 *Ibid*, para 12f (HC 633-II)

67 *Ibid.*

representative would be 'committing' his state when approval in a national referendum was a pre-condition for finalizing the decision. There may moreover be very real legal as well as political difficulties with the idea of a Council draft decision that 'sits there' pending the UK Act of Parliament/referendum."[68]

4 Implementation of the referendum lock

Should referendums be limited to issues of constitutional significance?

62. Since 1973, nine referendums have been held in the UK, one of which has been nationwide.[69] A further nationwide referendum on the alternative vote system for the election of Members of Parliament is planned for this year. By contrast, this Bill introduces 56 Treaty provisions[70] which, if invoked, would trigger a referendum. The majority of them does not concern major issues of national policy, such as changing the currency of the UK, but a change in the voting system in the Council from unanimity to QMV.

63. The evidence given by Professor Hix was that referendums were better suited to major constitutional questions rather than procedural issues, and that this was key to their effectiveness:

> "Referendums are a legitimate tool, but often they are not regarded as legitimate unless they are on major constitutional questions. In a democracy we believe that ultimately sovereignty resides with the people, so it is legitimate that referendums should be used for major constitutional changes. Examples of such major constitutional changes include the transferring of policy competences to the European level; the transferring of policy competences to a lower level of government, as is the case with devolution; changing the way our electoral system works; and whether or not we should elect an upper House.
>
> "I see a range of issues that I would categorise as being clearly of a fundamental constitutional nature and that, therefore, would only be regarded as legitimate by future generations if they are ratified in some way through a referendum. *I think that those questions are inherently and fundamentally significant enough to answer all the other questions that have been raised about whether there would be sufficient turnout, whether there would be a proper debate on the issue, whether people would really form their opinions on the questions that were on the table and so on. I think that they do by their nature.*
>
> "You can, of course, have referendums on a whole range of other minor issues, but questions will always be raised afterwards about whether there was a legitimate outcome. For example, California recently had a referendum on the legalisation of

68 *Ibid.*

69 House of Commons Library Research Paper 10/79, 2 December 2010, page 13.

70 *Ibid*, page 29

> marijuana, but I imagine that there will be another referendum next year, and another one the year after that and so on. In Texas, they have referendums in local communities on whether they should ban smoking or ban alcohol. You have a referendum every year on the same issue, because people question any one binding outcome on whether it was the right question or whether the turnout was high enough or whether people were voting on other things. When you have a fundamental constitutional question, however, the issue gets resolved for a significant time, because of its nature."[71] (Emphasis added.)

64. And in applying this approach to the UK's relationship with the EU, he regarded the UK's ratification of recent Treaties as of major constitutional significance:

> "I think there should have been a referendum on Maastricht, on Amsterdam, on Nice, on the constitutional treaty, on the Lisbon treaty, on whether Britain should join EMU or on any other major question like that."[72]

65. This view corresponds with the conclusion of the House of Lords Select Committee on the Constitution, in its recent Report on *Referendums in the United Kingdom,*[73] in which the Committee concluded that, "notwithstanding our view that there are significant drawbacks to the use of referendums, if referendums are to be used, we acknowledge arguments that they are most appropriately used in relation to fundamental constitutional issues."[74]

Voter turnout for referendums required by the Bill

66. When asked whether he thought a sufficient number of voters would turn out for a referendum required by the Bill, the Minister said that he thought there would be a "pretty large turnout" for a referendum following the ordinary revision procedure. This was because the "issues raised would be so obviously of political importance, and the debate over the content of such a new Treaty or set of amendments would have been going on for a considerable time".[75]

67. As for a referendum after the simplified revision procedure, that the Minister said that our concern:

> "about a ridiculously low turnout for a referendum might have more weight if we were talking about the simplified revision procedure where we can have a much more narrow Treaty change, or the *passerelle* clauses where we have also provided for a referendum lock. In answer to that, I would say two things. It would be illogical for us to say that the transfer of new competencies or powers to the EU is so politically important-over, say, common foreign and security policy-that we should have a referendum, if that is done by the ordinary revision procedure. But no referendum should apply if the same objective is to be secured through simplified revision

71 Q 22

72 Q 27

73 12th Report of Session 2009–10 (HC 99).

74 Para 210

75 Q 144 (HC 633-II)

> procedure, or through a *passerelle* clause, which is possible in respect of common foreign and security policy through the surrender of vetoes. That would almost invite a Government that wanted to see such a change take place in the future to go for one of the latter routes, rather than the full Treaty-making process of ordinary revision procedure."[76]

68. He added that the Government had made a distinction in the Bill, in a limited number of areas, between issues significant enough to attract a referendum and those that were not. Whilst there was a "blanket referendum commitment" in the Bill for any transfer of or addition to competence, in clause 4 and in relation to *passerelles* the Government has tried to distinguish between those issues that it thought were politically significant, on which it was right to ask the public to express a view and on which, for that reason, the public would be willing to turn out and vote, and those that it thought were less significant.[77]

69. We asked the Minister what he thought the turnout would be for a referendum on, for example, a decision to move from unanimity to qualified majority voting on something like an EU carbon tax. He replied:

> "What the proposition before people would be is that not just for a particular measure to do with carbon tax, but permanently, in the future, decisions about environmental taxation at European level could be taken by qualified majority and the United Kingdom outvoted on measures that would impose new or additional taxes upon the population of the United Kingdom, without the United Kingdom electors being able to get rid of the politicians who had been responsible for imposing them. That seems, to me, to be something that would attract the public to the ballot box."[78]

70. Professor Hix had a very different perspective. He laid emphasis on the critical importance of turnout:

> "The point is whether you feel it is feasible to hold a referendum, how the referendum is going to be seen by the public and whether there is going to be sufficient turnout in such a referendum. If it is on a specific issue that is regarded as relatively technical, I cannot imagine that there would be high turnouts.
>
> "[…] I can see how a referendum would be a useful tool to give a mandate and resolve a significant issue for a generation, for example. It would bind the hands of a majority in the Commons either one way or the other on a major issue and a major change. I just don't see how in practice a referendum could do such a thing on a relatively minor issue."[79]

71. He also thought that there was a clear link between the subject of the referendum and the turnout:

---

76 *Ibid.*

77 *Ibid.*

78 Q 152 (HC 633-II)

79 Q 8, 9

> "I think there is a big difference between a referendum on a procedural issue and a referendum on a policy issue.
>
> "[…] I would be very surprised if, on a specific issue like that, which can be constrained to those narrow issues, you would have a high turnout; I can imagine that it would be a very low turnout—far less than 50%. Potentially, it could be less than 25%. The only way in which it could become larger than 50% would be if it gradually turned into a debate about Britain's place in the EU."[80]

Voting on the question asked in the referendum

72. We asked the Minister whether a referendum on technical aspects of EU competence or procedure would not inevitably become a referendum on the country's membership of the EU. He disagreed, saying that he thought people were "mature enough to take a decision on the basis of the choice put in front of them".[81] He gave as an example a referendum on the Euro: people would be able to distinguish between the UK joining the Euro, with all the economic implications involved, and it wishing to leave the EU.

73. The reality of Part 1 of the Bill is, however, that the vast majority of the referendum lock provisions concern *passerelles* on voting procedures in the Council. Professor Hix thought this would have an impact on what a consequent referendum would ultimately decide:

> "Any referendum on a procedural issue will ultimately turn into a debate about policy. A referendum, quite rightly under the rules of the Bill, can say that it is not about a policy issue, but about a procedural change that could allow policy in the future. But inevitably, it would come down to a debate about whether you are for or against a particular policy; about whether that policy is more likely or less likely as a result of the change; and about asking why would we be making this change anyway and what are its policy implications.
>
> "I don't agree with the Minister that it is possible to separate things so neatly to say that it's not about whether there would be a carbon tax, but about whether or not we could have the possibility of deciding whether we could have a carbon tax plus some other things by QMV or the ordinary legislative procedure. I just don't think that the public, the media or politicians will be able to have a debate on those terms, because ultimately the public wants to know, "What are the policy implications of this? What am I actually voting on here? What are the consequences of this?" It will ultimately come down to that sort of debate."[82]

80 Q 15

81 Q 145 (HC 633-II)

82 Q 15

5 What are the potential impacts of the Bill on UK-EU relations?

Impact of domestic constraints on EU negotiations

74. The Government in both its written submission and in the Minister's oral evidence stressed the domestic nature of the Bill as part of the Government's "wider objective of restoring trust and enhancing democratic accountability of the EU among the British people".[83] The Minister for Europe told us that "The question of strengthening our negotiating hand is a secondary consideration. It is not what motivated us to bring forward the Bill in the first place."[84] However, he went on to say:

> "I think that an awareness that a particular change has to win approval from Parliament, or from the British people, or both, is a useful check to have. I have noticed that other countries represented at Council of Ministers meetings are very concerned about whether a particular proposal might cause a referendum in their own nation, and that is something their colleagues around the table take account of in discussion."

75. In our call for evidence at the start of the inquiry we asked: "What are the potential impacts of the Bill on UK-EU relations?" Those submissions which addressed the question were uniformly of the view that the effects would be negative. Professor Craig wrote that the Bill was likely to be "regarded with emotions ranging from dismay to anger within the EU and in many European capitals".[85] Andrew Duff MEP described the Bill as accentuating British exceptionalism in the European Union.[86]

76. The Government however maintains that its approach is shared by other Member States, which provide for referendums and Parliamentary approval in order to consent to Treaty changes or specific decisions which transfer powers or competence.[87] This view was challenged by several witnesses. In terms of imposing domestic constraints on a government in its EU negotiations, the provisions of the Bill are, according to Professor Simon Hix, "completely unique".[88] Professor Dougan wrote "the referendum requirements proposed under the Bill go *significantly* further than the corresponding regimes in force in any other Member State".[89] While several have used referendums in the past for ratifying Treaties, no other Member State has introduced any requirement either for passing legislation through Parliament or for a referendum in respect of the items covered under

83 Ev 38, para 48

84 Q 159 (HC 633-II)

85 Ev 20 (HC 633-II)

86 Ev 24 (HC 633-II)

87 Ev 38, para 51

88 Q 1

89 Ev 38 (HC 633-II)

clauses 4 and 6 in the Bill, relating to the *passerelle* clauses or the special amendment provisions in the Treaty.[90]

77. While improving the UK's negotiating hand may not have been the primary purpose of the Bill, it might be assumed that domestic constraints are a factor in negotiations. Professor Hix referred in his evidence to the "paradox of weakness"; the idea that if there are significant domestic constraints on a government in international negotiations, then the government can credibly threaten that an agreement will be rejected domestically if it does not gain sufficiently in the negotiations.[91] As a result, the greater the domestic constraints imposed on governments in EU negotiations, the more they are likely to gain in bargains that have to be reached unanimously. Denmark in particular was seen as having done well in both budget and Treaty negotiations because of high domestic requirements for Treaty reforms.[92] During the negotiations on the Convention on the Future of Europe, France and the UK were seen as strengthening their hands in the middle of negotiations after referendum commitments were announced in both countries.[93]

78. However, for Professor Hix, two conditions had to apply for domestic constraints to increase a government's bargaining position and in his view neither applied in the case of the provisions of the EU Bill. The first condition was that the constraints were seen as credible by other Member States. And, while the threat of a referendum was well understood in the case of a major Treaty reform, the same could not be said of the use of *passerelle* or ratchet provisions in the Treaty. It was on these procedural issues—the possibility of a referendum on the movement from special legislative procedure to ordinary legislative procedure for the passage of an EU carbon tax, for example—that Professor Hix doubted that the threat would be taken seriously by other Member States and that they would call the UK's bluff.[94] The Minister for Europe disagreed and cited the carbon tax example as one "that would attract the public to the ballot box".[95]

79. The second condition is that on the issues which are subject to a domestic constraint there are no alternatives for the other Member States to act without the UK. Again, in the case of major Treaty reform there is no alternative to including the UK, but when it comes to the less significant issues listed under Clauses 4 and 6, on most of these issues there are other options available for Member States. In certain areas an alternative can be found within the "enhanced cooperation" provisions of the Treaty, or if enhanced cooperation cannot be used then there is the possibility of concluding intergovernmental agreements outside the framework of the EU.[96]

80. Professor Hix summed up the position as follows:

90 Q 1

91 Ev 46 (HC 633-II)

92 Q 3

93 Q 3

94 Q 3

95 Q 152 (HC 633-II)

96 Q 41, Ev 39 (HC 633-II)

> "I think that a lot of other Member States will look at the Bill, if it is passed and if an issue comes up, and either say, "If a British Government is in favour of us making this change, they will find some way to amend the Bill relating to those provisions, so that they can get on with business in Brussels." or, "I don't expect that they're going to have a referendum on these things, and therefore they will have to vote no." or, "There will be a referendum on these things, and it will inevitably be a no, so therefore we have to think about ways to get around the British position." Any of those scenarios weakens the hand of any British Government in negotiations, because the assumption is either, "It is not a credible threat and therefore we don't take you seriously," or, "It is a threat but you're binding your hands already to say no. Whatever we come up with you are going to say no, so therefore we won't negotiate at all with you."[97]

81. Professor Hix proposed as an alternative replacing the referendum requirements under Clauses 4 and 6 with a two-thirds majority requirement in the Commons. This, in his view, would both increase the accountability of Ministers when in Brussels and, by being credible, strengthen the UK's bargaining position.[98] If the Government considered this option the Minister for Europe chose not to comment on it.[99]

82. In contrast to Professor Hix, Sir John Grant, the UK's Permanent Representative to the European Union from 2003-07, took a very different, if perhaps at times technocratic, view of the Bill's likely impact on the UK's relations with the EU. Asked how he might have operated as the UK's Permanent Representative had the Bill been in place, he replied that, since by definition the Council's working groups and the Council of Ministers worked within the competence of the EU and as there could be no negotiations on legislation where there was no competence, the Bill, which concerns itself with competence or changes in voting procedure, would have made no difference. At official level negotiations in Brussels take place on the merits of the issue and alliances of convenience are formed to pursue the national interest.

83. Other considerations might arise at the political level, principally in the European Council but occasionally in Ministerial Councils,[100] but Sir John stressed that:

> "People tend to vote in the Council, in my view, in relation to their interest on the question, so countries will look at the piece of legislation and say, "Does it suit us?" There's very little, in my experience, of people saying, "We'll vote for that, although we don't like it very much, because we're dependent on another Member State for something else." In my experience, there's very little of that."[101]

84. Sir John played down the likelihood of there being a referendum in the next five years on a move from unanimity voting to QMV by a *passerelle*. He added that *passerelles* were

97 Q 28

98 Ev 47, para19

99 Q 146 (HC 633-II)

100 Q 80

101 Q 90

in any case difficult to use for the simple reason that "everybody's got to agree that some of them are going to be outvoted". [102] .

85. Sir John was similarly unconvinced by the likelihood of a move to greater use of enhanced cooperation in response to an increase in British awkwardness, for the simple reason that the Bill was designed to put a referendum lock on the transfer of *new* areas of competence but enhanced cooperation could only take place where competence already existed: "I don't think the question about whether the Bill will lead to more enhanced cooperation is a very big question. It's a good question—you have to ask it—but I think the answer is: maybe in the odd, relatively limited case."[103]

86. He concluded that the impact of the Bill would be on the specifics; that the UK might frustrate the odd move from unanimity to QMV or the addition of minor new competences to Part 3 of the TFEU, but he did not see the Bill's Part 1 provisions as marking a change in the UK's relations with its EU partners, commenting:

> "if you look back over the history of the past 25 years in Europe, I don't think this will be regarded by anyone in Brussels as a qualitative change in British awkwardness … Where it would become dramatic would be if everybody woke up tomorrow morning and said, "There's only one way to sort all of this: we need another treaty." But do you really think that there is an appetite for that in France, the Netherlands, Ireland, Denmark or the Czech Republic? I don't think so."[104]

EU enlargement and Accession Treaties

87. The Government has explained the need for the Bill in terms of addressing a perceived disconnection between the will of the British people and the decisions taken in their name by the British Government in respect of the EU.[105] It might be thought surprising therefore that an issue as significant as EU enlargement is not covered by the Bill. But clause 4(4)(c) clarifies that accession Treaties which do not go beyond the changes necessary for the accession of the new Member State are exempt from the referendum lock. The Minister for Europe explained the exclusion thus:

> "The reason is that we have followed a particular principle; which is that a referendum should be required where there is a transfer of competence or power, and an accession Treaty transfers competence and power from the acceding state to the EU. I would add … that, of course, every accession treaty will have to be ratified by a separate Act of Parliament here."[106]

88. Sir John Grant took the same view, that accession takes place within the existing powers and on the basis of the existing competence of the Treaties. He acknowledged that enlargement brought with it a dilution of the UK's relative weight in the Council and in the European Parliament but saw this as distinct from a transfer of power to the supranational

102 Q 93

103 Q 94

104 Q 95

105 HC Deb,13 September 2010, WMS, col 32-33W

106 Q 166 (HC 633-II)

level.[107] Indeed, running counter to the argument that enlargement always meant a dilution of UK influence, he pointed out that it also brought new alliances and cited the accessions of 1994-95 and the Central and Eastern European enlargements as changing the balance of power overall to the UK's benefit.[108]

89. Professor Hix disagreed. If the intention of the Bill was to establish a principle that any significant transfer of powers, or anything which significantly changed the balance of powers between the institutions or between the Member States in Brussels, required a referendum, it ought to include the accession of Member States above a certain size. Size mattered and the accession of a state like Turkey to the EU would fundamentally change the influence that the UK had on legislative decision making. He concluded, "Turkish accession to the EU is, for me, a much more significant shift in the influence and power of the UK in Brussels than the majority of things that are mentioned under clauses 4 or 6."[109]

6 Evaluation and conclusions

90. We set out the following evaluation and conclusions with a view to them informing the consideration of the Bill in Committee.

The likelihood of referendums being held pursuant to Part 1 of the Bill

91. Given the troubled history of the Lisbon Treaty, and that it came into effect so recently, we agree with those witnesses who thought that it was unlikely that the EU will want to revise its Treaties through the ordinary revision procedure under Article 48(2)-(5) TEU for several, if not many, years to come. **It is unlikely therefore that clause 2 of the Bill will come into play in the near future, except possibly in the case of an accession Treaty under Article 49 TEU which incorporates additional transfers of competence or power.**[110] We also conclude that if and when an ordinary revision were to take place, it would be likely to include several amendments to the competences and powers of the EU, and so would require a referendum under one or several of the subsections in clause 4.

92. However, **the referendum lock is more likely to be considered as a consequence of the use of the simplified revision procedure under Article 48(6) TEU—the quickest and simplest way for the EU to gain power in a particular field.** Article 48(6) TEU is, for example, the basis for the European Council's Decision to establish the permanent eurozone bail-out mechanism, the European Stabilisation Mechanism, which it is due to adopt in March this year (and which will replace the temporary bail-out mechanism adopted on the basis of Article 122 TFEU, a legal base which we regard as unsound).

107 Q 102

108 Q 101

109 Q 44

110 See clause 1(4)(b).

93. It is also possible that the general *passerelle* clause under Article 48(7) TEU, or the individual *passerelle* clauses to which the referendum lock attaches, may be invoked by a group of Member States frustrated that the requirement for unanimity in the Council is blocking the development of an EU policy. **But we question how likely it is that the Government of the day will want to give up its veto right if it objects to a policy.** On this point Sir John Grant said:

> "The point about the *passerelles* is that-they're significant in a way, of course they are, they're there for a reason-but it's very difficult to use them, whether or not there is a referendum Bill. It seems to me that what the Government is seeking to do is to put beyond any doubt its position on the matter and its assessment of the relative importance of that and the way it wants to deal with it, but the reason *passerelles* aren't used very much is that everybody's got to agree that some of them are going to be outvoted."[111]

94. Professor Hix made a similar point:

> "I think [the Bill] is primarily designed to put a brake—to bind the hands of the current Government or of future Governments—on what Britain can sign up to in Brussels, on the understanding that there would never in practice be referendums on most of these things. That is how I read it. My question is how credible it is in that aim, and frankly I don't find it that credible."[112]

95. So notwithstanding the Government's statement that there will not be a transfer of competence or power, and therefore a referendum, in the course of this Parliament, we conclude that:

— **it is in reality unlikely that most of the Treaty provisions which attract a referendum under the Bill will ever successfully be invoked; but**

— **if one is, one of the exceptions below may be applicable.**

Exceptions to the referendum requirement—significance, exemption, and judicial review

Significance

96. Clause 4(1)(i) and (j) provide as follows:

> "the conferring on an EU institution or body of power *to impose a requirement or obligation on the United Kingdom*, or the removal of any limitation on any such power of an EU institution or body;" (clause 4(1)(i)); or
>
> "the conferring on an EU institution or body of new or extended power *to impose sanctions on the United Kingdom*" (clause 4(1)(j))". (Emphasis added.)

111 Q 93

112 Q 55

97. Where transfers of power pursuant to these provisions are, in a Minister's opinion, insignificant, it is not necessary to hold a referendum (clause 3(4)). **We seek clarification from Government on what circumstances the imposition of new obligations or sanctions would be considered insignificant.**

98. **We think the possibility for successful judicial review of a ministerial decision whether a transfer of power under clause 4(1)(i) and (j) is significant will, in practice, be limited.** There is little coherence in the way in which EU Treaty provisions have been allocated to national control mechanisms: some with significant national consequences are subject to approval by motion without amendment; others with less significant consequences to referendums. In the absence of clear criteria, we think the Administrative Court will have difficulty in construing how the "significance condition" in clause 2(4) is to be applied reasonably. The expressions "if the Minister is of the opinion" and "in the Minister's opinion" in clause 4(4) underline the subjectivity of this process and the difficulty of judicial review.

Exemption

99. **The scope of the "exemption condition" is similarly unclear**. Clauses 2(3) and 3(3) simply state: "[t]he exemption condition is that the Act providing for the approval of the treaty states that the treaty does not fall within section 4". Clause 4(4) appears to give examples of Treaty amendments that would be exempt, although it does not refer to the "exemption condition":

— (a) "codification of practice […] in relation to the previous exercise of an existing competence", the meaning of which Professors Craig and Dougan thought would rarely be amenable to one interpretation.[113] **In our opinion, this exception is significant: it would cover the practice of EU institutions pushing at the boundaries of their competence (competence creep), sometimes supported by judgments of the ECJ, and subsequently codified in a revision of the Treaties.** The Explanatory Notes say that this provision would also cover use of the flexibility clause[114] where there was no legal base in the Treaty. Several of the new legal bases in the Lisbon Treaty were incorporated as a result of codification of past practice.[115]

— (b) "any provision that applies only to other Member States". This we presume is designed to cover the European Council Decision to establish the European Stability Mechanism, and any future Treaties or Decisions that apply to the eurozone or another forum of Member States excluding the UK. **This subsection is not qualified at all, for example by a requirement to consider the impact of the provision on the UK, and so could cover Treaties or European Council decisions which have a profound effect on the UK even though they are expressed not to apply to the UK.**

113 See paragraph 48 of this Report.

114 Article 352 TFEU; formerly Article 308 EC.

115 E.g. civil protection; energy, see footnotes 45 and 46.

— (c) accession Treaties, **which we think is anomalous given the effect of the accession of new Member States both on UK relations with the EU and on the voting power in the Council** (see, for example, the case of Turkey at paragraph 119 below).

100. The Explanatory Notes tell us that **this list is "*illustrative* rather than exclusive"**.[116] Subsequent paragraphs give examples of amending provisions that would be exempt. These include, with respect to clause 4(b):

> "A treaty or an Article 48(6) decision does not apply to the UK merely because it *may have consequences for individuals or organisations in the UK, such as UK businesses*. Nor does it apply to the UK merely because the amendment *imposes new responsibilities on EU institutions in which the UK participates and which the UK helps to fund*".[117] (Emphasis added.)

101. We had assumed from the way the referendum lock has been presented, with emphasis on the consent of the people being required for EU decisions that affect them,[118] that provisions which have "consequences for individuals and organisations in the UK, such as UK business" would be the type to trigger a referendum, even if such provisions were addressed to a group of Member States other than the UK, such as the eurozone. Giving "new responsibilities" to EU institutions "which the UK helps to fund" similarly implies to us a transfer of power; but neither is this caught by the referendum lock. Nor would it appear that any future integration process which applied to other Member States but fundamentally affected the UK's relations with one or several of those Member States, or the EU itself, is caught by the referendum lock (see further below at paragraph 106).

102. The exemption condition applies to all transfers of power and competence whether as a result of the full-scale ordinary revision procedure (Article 48(2)-(5) TEU) or the simplified revision procedure (Article 48(6) TEU). **So it has a far wider application than the significance decision, which is limited to two types of transfer of power (clause 4(1)(i) and (j)) agreed by an Article 48(6) Decision.**

103. **We conclude that the exemption condition, read together with clause 4(4) and the relevant paragraphs of the Explanatory Notes, is sufficiently broad and open-ended to allow a Minister wide discretion to consider a provision exempt.** The breadth of power again is likely to defeat a successful application for judicial review. We note again that the clause 5 statement requires the Minister to state "whether, *in the Minister's opinion*, the treaty or Article 48(6) decision falls within section 4."

Judicial review

104. **On four occasions the Explanatory Notes mention the possibility of judicial review of Government decisions.[119] We question the appropriateness of this.** Firstly on the legal grounds summarised above—it seems contradictory to tell "member[s] of the public it is possible to challenge the decisions of the Minister" but not to provide clear criteria by

116 Para 55

117 Para 57

118 See for example paragraph1 of this Report.

119 See paragraphs 21, 41, 61 and, in relation to clause 8, paragraph 82.

which the reasonableness of the Minister's decision can be reviewed. **So we conclude that recourse to judicial review is a more illusory safeguard than the Explanatory Notes imply.**

105. Secondly, on political grounds. **The decision whether to hold a referendum is ultimately a political one, and therefore one in which the courts will, rightly, be reluctant to interfere.** This is particularly so where the statutory provisions lack clear criteria defining when a provision is too insignificant or alternatively exempt from the referendum requirement, making it easier but no less unacceptable for a court to make its own assessment. We draw support for this view from the decision of the Divisional Court in the *Wheeler* case. When, in 2008, it was asked to review the decision of the previous Government not to hold a referendum on the Lisbon Treaty, it said that the promise to hold a referendum "**lies so deep in the macro-political field that the court should not enter the relevant area at all**".[120] For this reason as well, it is concerning then that the Explanatory Notes repeatedly refer to the possibility of judicial review; several of the expert witnesses commented on this.[121]

Conclusion

106. **We conclude that the exceptions above have been drafted to allow the Government to support certain EU policies, such as strengthening of the eurozone, including through harmonisation of economic, fiscal and social measures if necessary,[122] or enlargement, without triggering the referendum lock.** This concerns us because it is not how Part 1 of this Bill has been promoted: it has been promoted as a referendum lock with minor exceptions. It also concerns us because it denies access to the referendum lock even where the issue is profoundly significant to the UK public, for example where a re-concentration of power among other EU Member States takes place. See, for example, our conclusion below on accession Treaties; or on a mechanism for further integration in the eurozone excluding the UK which would flow from the comments of the French Prime Minister, François Fillon, on his recent visit to London:

> "In order to consolidate the euro we will need gradually to harmonise our economic, fiscal and social policies, hence we are going towards greater integration. We are going to need to put in place an economic system of governance of the eurozone. *Great Britain is not part of the eurozone; at the same time the decisions we will take will have great importance to Britain.*
>
> [...] We in the eurozone have no other choice right now than further integration. Essentially the question is whether the UK wants to exert an influence on this change in Europe or not"[123] (Emphasis added.)

120 *R (on the application of Wheeler) v The Office of the Prime Minister and the Secretary of State for Justice* [2008] EWHC 1409 (Admin), as per the dicta of Lord Justice Richards at paragraph 43.

121 For example, Ev 76, Q 103 (HC 633-II)

122 See below.

123 *The Times*, 13 January 2011.

Further gaps in the control mechanisms of Part 1

Extensions of EU competence in criminal law and procedure and family law

107. Two of the three decisions in clause 9, subsections (2)(b) and (c), concern clear extensions of EU competence in the field of criminal procedural law and substantive criminal law:

> (b) the provision of Article 82(2)(d) of TFEU (criminal procedure) that permits the identification *of further specific aspects of criminal procedure* to which directives adopted under the ordinary legislative procedure may relate;
>
> (c) the provision of Article 83(1) of TFEU (particularly serious crime with a cross-border dimension) that permits the identification *of further areas of crime* to which directives adopted under the ordinary legislative procedure may relate.

108. Both are areas of mixed competence under Article 4(1)(j) TFEU. **To be consistent with extension of shared competence under clause 4(1)(e), the application of both of these provisions should be premised on a referendum and Act of Parliament, as in clause 6; not an affirmative vote before the Government's opt-in decision and an Act of Parliament before it agrees to the adoption of the legislation.**

109. Clause 9(2)(a) —"the provision of Article 81(3) of TFEU (family law) that permits the application of the ordinary legislative procedure in place of a special legislative procedure"— **is in our view of similar if not greater importance to social or environmental policy and ought to come within clause 6, triggering a referendum as well as an Act.**

Opt-in decisions

110. The reasons given by the Minister for Title V TFEU opt-in decisions not being included in the Bill[124] are contradicted by clause 9, which attaches as a pre-requisite Parliamentary approval by motion without amendment before three opt-in decisions can be taken by the Government and an Act of Parliament before the final legislation can be adopted (see clause 9(2)(a)-(c)). **It would seem to us consistent with the aim of Part 1 of the Bill for all opt-in decisions to be subject to formal Parliamentary approval.**

Enhanced cooperation and internal passerelles

111. **We recommend that a decision by the UK to enter enhanced cooperation where the voting procedure has been changed from unanimity to QMV be subject to a referendum lock.**[125]

124 See paragraph 52 of this Report.

125 See paragraphs 53-55 of this Report.

Inadvertent breaches of the provisions contained in Part 1 of the Bill

112. **We recommend that the Minister consider an amendment to the European Communities Act to avoid inadvertent breaches of the provisions contained in Part 1 of the Bill being automatically incorporated into national law.**[126]

Compatibility of Part 1 with EU and international law

113. Both M. Piris[127] and Professor Craig[128] raise serious doubts about whether some of the domestic control mechanisms introduced by Part 1 of the Bill are compatible with EU or international law. **Again, we recommend that this be addressed during the Bill's consideration in Committee.**[129]

Article 352 TFEU—the flexibility clause

114. The purpose of the flexibility clause, Article 352 TFEU, formerly Article 308 EC, is to provide a residual "power", when none is available elsewhere in the Treaties, for the institutions to attain any of the objectives set out in the Treaty. Our predecessor Committees, concerned by the wide reach of this aptly-named clause, closely scrutinised its use to ensure that it addressed a legitimate Treaty objective where no other power existed. They also took evidence on it from the Commission and Council Legal Services, Professor Alan Dashwood CBE, and the then Foreign Secretary (Margaret Beckett).[130] **We welcome the default control mechanism of an Act of Parliament which clause 8 introduces before Article 352 TFEU can be used as a legal base, but recommend that the exceptions to the requirement for an Act of Parliament in clause 8, subsections (4)-(6), be carefully considered in Committee.**

Implementation of the referendum lock

115. Since 1973, nine referendums have been held in the UK, one of which has been nationwide.[131] A further nationwide referendum on the alternative vote system for the election of Members of Parliament is planned for this year. By contrast, this Bill introduces 56 Treaty provisions which, if ever invoked, would trigger a referendum. The majority of them does not concern major issues of national policy, such as changing the currency of the UK, but a change in the voting system in the Council from unanimity to QMV.

116. The evidence from Professor Hix was that referendums should be reserved for "major constitutional questions"[132] rather than "procedural issues"[133], for example he thought all the previous EU amending Treaties—Maastricht, Amsterdam, Nice—should have been

126 See paragraphs 56-58 of this Report.

127 Ev 39 (HC 633-II)

128 Ev 13 (HC 633-II)

129 See paragraphs 59-61 of this Report.

130 *Article 308 of the EC Treaty,* Twenty-ninth Report of Session 2006–07.HC 41-xxix.

131 House of Commons Library Research Paper 10/79, 2 December 2010, page 13.

132 Q 22

133 Q 15

subject to a referendum;[134] that voter turn-out would be low on a referendum on a procedural *passerelle* (potentially less than 25%)[135], which would undermine the legitimacy of the result of the referendum;[136] and that voters who did turn out would be unlikely to focus on the particular procedural question but rather on broad policy issues.[137] He made an important point about why a referendum should address a major constitutional question:

> "I see a range of issues that I would categorise as being clearly of a fundamental constitutional nature and that, therefore, would only be regarded as legitimate by future generations if they are ratified in some way through a referendum. *I think that those questions are inherently and fundamentally significant enough to answer all the other questions that have been raised about whether there would be sufficient turnout, whether there would be a proper debate on the issue, whether people would really form their opinions on the questions that were on the table and so on. I think that they do by their nature.*"[138]

117. **We are concerned whether the Government has considered the important issues raised by Professor Hix. Similarly, it is not clear to us that the Government has considered the potentially profound constitutional implications of the referendum lock provisions for the principles of Parliamentary democracy and direct democracy in the UK.** We trust the matter will be addressed by the Minister during the Bill's consideration in Committee.

Potential impacts of the Bill on UK-EU relations?

118. We began this section of the Report by asking what the impact of the Bill might be on UK-EU relations. The evidence we received was mixed. When it came to Treaty revision, Sir John Grant thought that there was such little appetite among Member States for a new Treaty and that the matter was shelved. In any case it was thought unlikely that the UK Government would countenance or want a new Treaty, European Union Bill or not. For Professor Hix, Treaties were not the main problem; in a Treaty negotiation many issues were on the table and it was possible to conclude a package deal. The potential for gridlock lay rather in issue-specific negotiations, should other Member States also adopt domestic constraints on *passerelles* or the special amendment provisions in the Treaty. It seems clear that whatever the reason for the Bill, strengthening the UK's bargaining position is not its primary purpose. **Nevertheless, is hard not to conclude that the Bill is intended to send a signal, even if it is not as strong as to "accentuate British exceptionalism**".[139]

134 Q 27

135 Q 8, Q 15

136 Q 8, Q 22

137 Q 18

138 Q 22

139 *Op cit*

EU enlargement and Accession Treaties

119. In addition to the constitutional impact, the political, economic and social consequences of Turkish accession might be thought significant to the UK public. Yet it remains the case that a stand-alone Treaty on Turkish accession with nothing of a constitutional nature added to it would not trigger a referendum. For Professor Hix the reason was political pragmatism. He commented that the Government, "would like Turkey to be a member of the EU, and they would not want the British public to stop it. Such a provision is therefore excluded from the Bill".[140] **We agree with Professor Hix; the whole question of excluding the accession Treaties implies that one major item of constitutional change in the EU has been left out of the Bill because it suits the Government to do so, and we regard this as anomalous.**

Devolution

120. EU affairs are reserved matters for the UK Government. Neither the Explanatory Notes to the Bill nor the FCO's evidence make reference to the devolved administrations. The submission from the European and External Relations Committee of the Scottish Parliament points out that given the nature of devolution, the powers or competences to be transferred from the UK to the European Union could be ones that have been devolved under the Scotland Act 1998.[141] The impact of the transfer of such powers or competencies might be quite different in Scotland (or other devolved areas) to the UK as a whole. **It is not clear that the Government has considered the implications of this and we trust the matter will be addressed by Ministers during the Bill's consideration in Committee.**

140 Q 46

141 Ev 38

Formal Minutes

Wednesday 19 January 2011

Members present:

Mr William Cash, in the Chair

Mr James Clappison
Michael Connarty
Jim Dobbin
Julie Elliott
Nia Griffith
Chris Heaton-Harris
Kelvin Hopkins
Chris Kelly
Stephen Phillips
Jacob Rees-Mogg
Henry Smith

****

The Committee deliberated.

Draft Report (*The EU Bill: Restrictions on Treaties and Decisions relating to the EU*) proposed by the Chair, brought up and read.

Draft Report *The EU Bill: Restrictions on Treaties and Decisions relating to the EU*) proposed by Michael Connarty, brought up and read, as follows:

"**Introduction:**

1. In his evidence to the European Scrutiny Committee the Minister for Europe, David Lidington claimed that:

> "The point of the referendum lock is to guard against the risk that, in future, powers would be transferred to the European Union without the consent of the British people in the way that has happened in the past."

2. The Government has made it plain that there will not be a referendum under Part 1 of the Bill in the lifetime of this Parliament. The explanatory notes to the Bill emphasise that Government consent to a proposal in Brussels is a pre-condition to triggering the 'referendum lock'.

3. The Minister for Europe also stated that:

> 'I very much want to see the UK not only remaining a member of the EU, but being a very active participant as well.'

4. There is a clear contradiction between the claim of the Government to deliver legislation to require a referendum before transfers of competence and the EU Bill being presented to the House at this time. These contradictions are contained in both the requirements for a 'significance' test and in the 'exemptions' in reference to clauses of the Bill.

5. It is obvious that the process of participation in the EU policy making institutions, and in addition the role of the ECJ in judgements on the applicability of those policies will create situations where the Government Minister will make use of the 'significance' test to avoid having to call for a referendum, or the exemptions condition to avoid having to bring forward an Act of Parliament.

Impact on EU-UK Relationships

6. The Bill increases the impression of 'British Exceptionalism' but lacks credibility as a tool to increase the UK's negotiating position in the context of the EU policy making process. We believe there is some credibility in the evidence received that it is likely that the Bill will be viewed by other EU governments with a mixture of 'dismay to anger'. The Bill contains the danger that it will start the UK down a road that was last trodden by the 1992-1997 Government under John Major when the UK was marginalised in the EU. This is a position of which the Committee would not approve.

Evaluation and conclusions

7. The Committee concurs with the view of Professor Hix that the Bill is not credible as he stated:

> '[It]...is primarily designed.....on the understanding that there would never in practise be referendums on most of these things. My question is how credible it is in that aim. And frankly I don't find it that credible.'

And concludes that:

> 'It is in reality unlikely that, most of the Treaty provisions will attract a referendum under the Bill, will ever be successfully invoked.'

8. We believe that the 'significance' assessment in the Bill is a deliberate escape condition for the Government and we seek clarification and codification from the Government in what circumstances and at what level the imposition of obligations or sanctions would be considered insignificant.

9. The scope of the "exemption condition" is similarly unclear as it simply states that "the Act providing for the approval of the treaty does not fall within section 4".

10. In our opinion the exception in Clause 4 (4) (a) of "codification of practice...in relation to the previous exercise of an existing competence" is of serious concern as there is past evidence of EU institutions pushing the boundaries of their competence (competence creep) sometimes supported by the judgements of the ECJ—and subsequently in the codification in a revision of the Treaties.

11. We think it is anomalous to exclude accession Treaties from the scope of a Bill that claims to give consideration, as claimed by the Minister for Europe, David Lidington to "the consent of the British people". Similarly it is anomalous given the effect of the accession of a new Member State both on UK relations with the EU and on subsequent the voting power in the Council. It is disingenuous of the Government to exclude accession Treaties from this Bill.

12. We conclude that the exemption condition, read together with clause 4(4) and the relevant paragraph of the Explanatory Notes, is so broad and open-ended to allow the Minister too wide a discretion to consider a provision exempt and to undermine the stated aim of the Bill.

13. We consider Opt-in decisions to be at this moment too far removed from the process of Parliamentary Scrutiny and control to be consistent with the Democratic process and to be a major source of the transfer of policy making and powers to the EU. It is necessary for decisions to Opt-in to existing EU Directives, or parts there-of to be brought under the scope of Part 1 of the Bill and for all Opt-in decisions to be subject to formal Parliamentary approval of an affirmative resolution.

14. We are of the opinion that the use of a referendum should be used for major issue of national policy and for matters of serious constitutional concern. We view the EU Bill as presently before the Parliament as an attempt to trivialise the proposed uses of the referendum while at the same time misleading the British people with a Bill that is very unlikely to ever be used in the process of participation in the policy making of the EU.

15. We furthermore consider that the EU Bill and the rhetoric around it will damage the standing of the UK in the institutions of the EU and with the other EU Governments as the emphasis on "British Exceptionalism" will drive the UK away from the centre of the table at EU negotiations which will not be to the benefit of the people of the UK."

Motion made, and Question proposed, That the Chair's draft Report be read a second time, paragraph by paragraph.—(*The Chair.*)

Amendment proposed, to leave out, "Chair's draft Report" and insert "draft Report proposed by Michael Connarty".—*(Michael Connarty.)*

Question put, That the Amendment be made.

The Committee divided.

Ayes, 4	Noes, 5
Michael Connarty	James Clappison
Jim Dobbin	Chris Heaton-Harris
Julie Elliot	Chris Kelly
Nia Griffith	Jacob Rees-Mogg
	Henry Smith

Main Question put and agreed to.

Ordered, That the Chair's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 91 read and agreed to.

Paragraph 92 read.

Amendment proposed, in line 3, leave out from "field" to end of paragraph.—*(Michael Connarty.)*

Question put, That the Amendment be made.

The Committee divided.

Ayes, 3	Noes, 8
Michael Connarty	James Clappison
Jim Dobbin	Nia Griffith
Julie Elliot	Chris Heaton-Harris
	Kelvin Hopkins
	Chris Kelly
	Stephen Phillips
	Jacob Rees-Mogg
	Henry Smith

Paragraphs 93 to 105 read and agreed to.

Paragraph 106 read.

Amendment proposed, in line 2, leave out from "as" to "enlargement" in line 4. —*(Michael Connarty.)*

Question put, That the Amendment be made.

The Committee divided.

Ayes, 4	Noes, 7
Michael Connarty	James Clappison
Jim Dobbin	Chris Heaton-Harris
Julie Elliot	Kelvin Hopkins
Nia Griffith	Chris Kelly
	Jacob Rees-Mogg
	Stephen Phillips
	Henry Smith

Paragraph 107 read and agreed to.

Paragraph 108 read.

Amendment proposed, in line 3, leave out from "premised" to end of paragraph and add "on an affirmative resolution considered on the floor of both Houses.". —*(Michael Connarty.)*.

The Committee divided.

Ayes,4	Noes, 7
Michael Connarty	James Clappison
Jim Dobbin	Chris Heaton-Harris
Julie Elliot	Kelvin Hopkins
Nia Griffith	Chris Kelly
	Jacob Rees-Mogg
	Stephen Phillips
	Henry Smith

Paragraph 109 read.

Question put, that the paragraph stand part of the Report.

The Committee divided.

Ayes, 6	Noes, 5
James Clappison	Michael Connarty
Kelvin Hopkins	Jim Dobbin
Chris Kelly	Julie Elliot
Stephen Phillips	Nia Griffith
Jacob Rees-Mogg	Chris Heaton-Harris
Henry Smith	

Paragraph 110 read and agreed to.

Paragraph 111 read.

Amendment proposed, in line 2 leave out "a referendum lock" and add "an affirmative resolution considered on the floor of both Houses of Parliament."—(*Michael Connarty.*)

The Committee divided.

Ayes, 4	Noes, 7
Michael Connarty	James Clappison
Jim Dobbin	Chris Heaton-Harris
Julie Elliot	Kelvin Hopkins
Nia Griffith	Chris Kelly
	Stephen Phillips
	Jacob Rees-Mogg
	Henry Smith

Paragraph 112 to 117 read and agreed to.

Paragraph 118 read.

Amendment proposed, in line 12, leave out from "intended" to end of paragraph and add "to accentuate British exceptionalism, which could result in difficulties in the UK's relationship with other EU countries that would not be in the best interests of the UK."—(*Michael Connarty.*)

The Committee divided.

Ayes, 4	Noes, 7
Michael Connarty	James Clappison
Jim Dobbin	Chris Heaton-Harris
Julie Elliot	Kelvin Hopkins
Nia Griffiths	Chris Kelly
	Stephen Phillips
	Jacob Rees-Mogg
	Henry Smith

Paragraphs 119 and 120 read and agreed to.

Motion made, and Question put, That the Report be the Fifteenth Report of the Committee to the House.

The Committee divided.

Ayes, 7	Noes, 3
James Clappison	Michael Connarty
Chris Heaton-Harris	Julie Elliot
Kelvin Hopkins	Nia Griffith
Chris Kelly	
Stephen Phillips	
Jacob Rees-Mogg	
Henry Smith	

Ordered, That the Chair make the Report to the House.

Written evidence was ordered to be reported to the House for printing with the Report.

The Committee further deliberated.

[Adjourned till Wednesday 26 January at 2.00 p.m.

Witnesses

Wednesday 8 December 2010

Wednesday 15 December 2010

List of printed written evidence

Oral evidence

Taken before the European Scrutiny Committee

on Wednesday 8 December 2010

Members present:

Mr William Cash (Chair)

Mr James Clappison	Penny Mordaunt
Michael Connarty	Stephen Phillips
Chris Heaton-Harris	Jacob Rees-Mogg
Kelvin Hopkins	Henry Smith
Chris Kelly	

Examination of Witness

Witness: **Professor Simon Hix**, Professor of European and Comparative Politics, Department of Government, London School of Economics and Political Science, gave evidence.

Q1 Chair: Good afternoon, Professor Hix. It is a great pleasure to have you here this afternoon. You may have noticed that despite the—as I described it in the debate yesterday—eerie silence of the BBC, the reality is that a lot of other people are taking a considerable interest, including the House itself. I will ask the first question. How do the referendum and legislative requirements in the Bill compare with corresponding regimes in force in other member states?

Professor Hix: They are completely unique. Several other member states have provisions, either statutory provisions or constitutional provisions, for referendums on major treaty changes—Denmark and Ireland in particular. But in Denmark, the referendum is triggered only if there isn't a parliamentary vote of a four-fifths majority in favour of treaty reform. So they can override the referendum requirement with a particular oversized majority in the Folketing. In Ireland, the constitutional practice that has now been established is that there is a referendum on any major EU treaty reform.

Several other member states have used referendums in the past for ratifying treaties, but do not have specific constitutional provisions that require them to do that. It has become established practice in France, for example, and I think it will be very difficult in the future for any French Government to deny a referendum. In the Netherlands, following the referendum on the draft constitutional treaty—or the promise of a referendum on the draft constitutional treaty—the expectation is that in the future there will be referendums. Again, I think it will be difficult for a future Dutch Government if there is a significant treaty change.

But no other member state of the EU has introduced any particular requirement, either for the passage of a Bill through Parliament or for a referendum in respect of the items covered under clauses 4 and 6 in the Bill relating to the passerelle clauses or the special amendment provisions in the treaty.

So the assumption is that referendums are really required only for major treaty changes. I am not saying this could not happen in the future; it may well. I think that several other member states might well copy some elements of what the UK is doing, and what the UK is doing in the Bill is being watched closely by several other member states.

Q2 Chair: Thank you very much. In your submission at paragraph 12, you refer to the paradox of weakness—the idea that if there are significant domestic constraints on a Government in international negotiations, then the Government can credibly threaten that an agreement will be rejected domestically if they do not gain sufficiently in those negotiations. As a result, the greater the constraints on domestic Governments in EU negotiations, the more likely they are, you say, to gain in bargains that have to be reached unanimously. Does the research back that up?

Professor Hix: Yes it does.

Q3 Chair: Can it be seen that certain member states punch above their weight as a result of domestic constraints on their Governments in EU negotiations?

Professor Hix: Absolutely. There is plenty of evidence that that is indeed the case. That is indeed the case in the cases of Denmark and Ireland that we just mentioned. Denmark, historically, has done very well out of the EU budgetary bargains and out of treaty negotiations because of the high domestic requirements for the passage of treaty reforms.

You can argue that in the negotiations on the Convention on the Future of Europe, France and Britain strengthened their hands in the midst of the negotiations after the referendums were announced in the two countries. In a sense, France announced that it would have a referendum in response to the announcement that there would be a referendum in Britain, because it perceived very much that if Britain was going to have a referendum, it equally wanted to increase the domestic constraints.

There is plenty of research that has studied exactly what happened in negotiations and how those announcements actually changed the way things were moving in favour of a treaty that is largely perceived in the rest of the continent as quite a British treaty. So, it is interesting how it is perceived very differently in the UK. It seems that a lot of other member states

look at it and think that the Brits got a lot of what they wanted in the treaty as a result of these very high promises back home.

Having said that, what I also point out in my written evidence is that there are two conditions with which raising domestic constraints can increase your bargaining position. One is that there aren't alternatives that the other member states can use to exclude you. If the threshold is very high and you are threatening to veto, they will start to look for other ways to skirt around this. It only really works as a credible threat when there are major treaty negotiations.

I don't think it works as a credible threat in the passage or the usage of some of the provisions covered by the Bill relating to passerelle clauses, for example, in the treaty. If the UK is expected to have to hold a referendum, and I will come to that in a second, I think that the other member states would then just assume that Britain would not be in favour of it and then also assume that they will have to try and go ahead without the UK. That may well be a good or bad thing from the point of view of the Committee, but I think in practice that will be what will happen.

The other condition is that the threat has to be credible. There is a question about whether it really is credible, because can we really envisage there being a referendum on a lot of these small issues? Can you really expect a referendum on the movement from the special legislative procedure to the ordinary legislative procedure for the passage of an EU carbon tax? I doubt it. It wouldn't be taken seriously by British Ministers and I don't think it would be taken seriously by the other member states. So in that sense, it wouldn't be credible.

Q4 Chair: So following on from your remarks about them punching above their weight, if you are right, why hasn't there been a growth in the adoption of these domestic constraints by member states? There does not appear to have been.

Professor Hix: Well, there has been. There were many more referendums promised on the constitutional treaty than in any previous treaty ratifications. I think 11 member states were due to have referendums on the constitutional treaty. Once one or two had announced, then they all started to announce. So exactly that happened.

Q5 Chair: Lastly, what is the point at which you get gridlock? How many member states can do this before you get gridlock?

Professor Hix: Well, you don't get gridlock in a sense with these unanimous negotiations. The reason why you don't get gridlock and still manage to get an agreement is that not everybody wants the same thing. So each member state will come to the table saying, "These are the three or four things that really are top priority for us"—the equivalent of the British red lines—"and we want a referendum, and the referendum will probably focus on these things so you'd better give us what we want on these issues." The point is that not everybody names the same issues, so you can put package deals together in treaty reforms where you give the Brits what they want on the things they care about, the Czechs what they want in their area and the Irish in their area and so on.

So that is how you manage to get these unanimous deals. It's going to be harder. The real uncertainty and the uniqueness in the Bill, which is not replicated and we have not seen at all anywhere else so it is hard to generalise from, is the provisions for an Act, or for an Act and a referendum, on the usage of the passerelle provisions in the treaty. There is large uncertainty about the implications of those things for Britain's position within the EU and, more generally, for the functioning of the EU as a whole.

If other member states copy those sorts of things, what does that mean for these very issue-specific negotiations? Issue by issue by issue there will be gridlock, but in a treaty negotiation there are a whole lot of issues on the table and so you can do a package deal.

Chair: Thank you.

Q6 Chris Heaton-Harris: Is that a bad thing?

Professor Hix: Well, it depends on what you want. If the idea is that you would like to strengthen the hand of the British Government in negotiations—and, of course, that is a worthy thing to do—is requiring a referendum on each of these specific things the way to do it? I am not sure that it is, because I think that most of the other member states would see this as faintly absurd.

There isn't really going to be a referendum in the UK on each of these relatively small things—and anyway, wouldn't some future British Government just try to amend the Bill to delete that provision if they were in favour of it, and couldn't we put pressure on them to do that anyway? After all, a majority in Parliament can't bind a future majority in Parliament. Yes, there may be a public debate about that, but really would the public take any notice? Would the media take any notice?

My expectation is that if a future British Government are in favour of moving, for example to QMV from unanimity in a particular area such as environment taxes, and they want to move because they feel it is being blocked and there is a policy that they are in favour of, I bet that they would then say, "Let's just amend the Bill and move it to another part of the Bill where we can just pass an Act of Parliament." So I do not necessarily see it as credible. So it would not strengthen the hand of the British Government in those situations.

Q7 Chair: On the question of what is important and what is not, by any reasonable standards one might have thought that the financial stability mechanism was a massive issue—the Irish bail-out, the possibility of going down the route to Portugal and Spain and so forth. So would you not have thought that that was the kind of thing, because it combines a treaty which were told about in Hungary the other day and it was confirmed yesterday that there is going to be a treaty? Secondly, there is the question of whether it would be temporary or permanent. In addition, the extension of the prospect of the British taxpayer bailing out Portugal and any other country, including Spain,

becomes an extremely big issue. Would you not have expected in those circumstances, given that the Minister said last night that they already intend to operate as if these provisions were in place, that the question of a treaty for extending the financial stability mechanism would be ideal for both the treaty and the referendum?

Professor Hix: Any major treaty reform—if you consider this to be a major treaty reform—

Q8 Chair: I think I said "treaty"; I meant to say "the Act and the referendum".

Professor Hix: Okay, but I think there are other options. The point is whether you feel it is feasible to hold a referendum, how the referendum is going to be seen by the public and whether there is going to be sufficient turnout in such a referendum. If it is on a specific issue that is regarded as relatively technical, I cannot imagine that there would be high turnouts.

Do you want the majority in the Commons to be bound by the outcome of a referendum with a very low turnout? Is it not better to think about some other mechanism that would raise the bar over which a Government have to pass before they can sign up to something like that? There are plenty of other mechanisms for doing that. One thing I mentioned in my evidence is a two-thirds majority requirement in the Commons.

Q9 Chair: We'll come on to that in a minute.

Professor Hix: Yes, because I can see how a referendum would be a useful tool to give a mandate and resolve a significant issue for a generation, for example. It would bind the hands of a majority in the Commons either one way or the other on a major issue and a major change. I just don't see how in practice a referendum could do such a thing on a relatively minor issue.

Q10 Chris Heaton-Harris: I wonder whether that is not disproved by what goes on in California and many other American states, which are constantly holding ballots. There are referendums or questions asked about individual political issues, and in California, although there was a dip some five years ago, turnout has never been so high as it is now. So perhaps people quite like being asked questions.

Professor Hix: Okay, if you are asking whether we should fundamentally transform the nature of British democracy into a referendum-based society, I would say yes.

Chris Heaton-Harris: So would I.

Professor Hix: Because I do not like parliamentary sovereignty.

Chris Heaton-Harris: I do.

Professor Hix: But if you think that parliamentary sovereignty is the basis of British constitutionalism, I do not think we should go down the Californian route.

Chris Heaton-Harris: I think the two can go hand in hand.

Professor Hix: My question back to you would be: if a majority in the Commons take one view and the majority in a referendum take another view, which of those two things is sovereign?

Q11 Chair: The Whips. That is the problem with a two-thirds majority—we have already had this in the debate on fixed-term Parliaments—because in reality a two-thirds majority is not what it seems; it is actually driven by the leadership, which imposes the Whip and generates votes.

If we were to have a referendum on a big enough question, I would accept your point. If, for example, we were expected to pay £30 billion for Portugal and Spain, or whatever, there would be a conjunction of circumstances in which people would be asked a very big question attached to an Act that endorses a treaty. So you're right to ask the question on the importance of the issue.

When you get a conjunction of enormous economic consequences that follow a decision in the European Union, and you get the problem of whether or not you get it through the House of Commons, perhaps you get a different answer to your question on a two-thirds majority. We will come on to that a bit later.

Professor Hix: Can I say another thing about that? There is a fundamental difference between the way our democracy works and the way democracy works in California. I used to live in California, so I know. California has an election day once a year, and on that day they have a lot of elections and a lot of referendums all at the same time. So there is an established practice of an election day, which is the third Tuesday in November, and that is how it all works.

We don't have such a political culture or such a political set-up, so I think it will be very difficult and very challenging to set up regular referendum practice in the British environment. If we do set up regular referendum practice, it raises serious questions about the legitimacy of the majority of the Commons versus the legitimacy of the majority of the public. My bet would be that the public and the media would accept the legitimacy of the majority of the public over and above the majority of the House of Commons, which would be the end of parliamentary sovereignty.

Chair: Right. Moving on.

Q12 Jacob Rees-Mogg: Can I just ask something before we move on? I actually agree with your definition of how parliamentary sovereignty comes about. It comes from the British people to the Parliament. Therefore, I don't think the two are contradictory. They work very neatly, hand in glove. But you have to defend parliamentary sovereignty within each five-year term, which is why it is so important to have referendums if Parliament is trying to give away its base power to Europe.

Professor Hix: If you have a referendum on an issue that results in a no, can the majority in Parliament say yes several months later?

Q13 Jacob Rees-Mogg: That would be absurd.

Professor Hix: You might say that it would be absurd, but what would the courts say?

Chris Heaton-Harris: The courts don't have to go to the public, whose minds they have changed, to try to regain their vote a couple of years later.

Jacob Rees-Mogg: Parliament cannot oppose the people.

Professor Hix: I'm with you on that, but I think the courts would take a different view.

Q14 Chair: By the way, there is another factor: you can't have a referendum without an Act of Parliament in the first place. It is about Parliament, as I said last night, abdicating its position because it realises that it really is not something that should be left to the whim of the Whips or the leadership, and taking the view that this is so large that it should go to the people.

After all, as Jacob Rees-Mogg makes quite clear, ultimately we are representatives of the people and we therefore have the implied—and, I believe, absolute—necessity to go to the people for a referendum if it is impossible to get a decent answer out of the House of Commons.

Professor Hix: I'm with you on that, but I should point out that all the other places that have regular referendum practices—whether it is Texas, California, Switzerland or Italy—have had repeated and ongoing difficult constitutional debates.

California, for example, has seen the courts take one view, the public in a referendum take another, and the majority in the state legislature take a third view, followed by an ongoing debate about which of those three things is sovereign. The courts say, "We protect fundamental rights in the constitution, and they are sovereign." The public say, "We are sovereign, because we are the popular sovereignty." And the state legislature says, "We are sovereign until the end of our term, so we can do what we want."

Chris Heaton-Harris: Which in the American constitution would be right.

Professor Hix: So the question I would be asking is: do we want to go down that route?

Q15 Chair: I don't think that many people, judging from last night's debate, were over-enthusiastic, to put it mildly, at the idea of our big constitutional questions relating to democracy being decided by judges, but that is a separate question. Can we move on to the next point, which relates to your example of a referendum on the means for adopting an EU carbon tax?

I don't know whether you noticed, but the Minister replied: "What the proposition before people would be is that not just for a particular measure to do with carbon tax, but permanently, in the future, decisions about environmental taxation at European level could be taken by qualified majority and the United Kingdom outvoted on measures that would impose new or additional taxes upon the population of the United Kingdom, without the United Kingdom electors being able to get rid of the politicians who had been responsible for imposing them. That seems, to me, to be something that would attract the public to the ballot box."

What do you make of his reply? Are these issues really as low in salience as you suggest? What would you estimate as the turnout in such a referendum?

Professor Hix: I think there is a big difference between a referendum on a procedural issue and a referendum on a policy issue. Any referendum on a procedural issue will ultimately turn into a debate about policy. A referendum, quite rightly under the rules of the Bill, can say that it is not about a policy issue, but about a procedural change that could allow policy in the future. But inevitably, it would come down to a debate about whether you are for or against a particular policy; about whether that policy is more likely or less likely as a result of the change; and about asking why would we be making this change anyway and what are its policy implications.

I don't agree with the Minister that it is possible to separate things so neatly to say that it's not about whether there would be a carbon tax, but about whether or not we could have the possibility of deciding whether we could have a carbon tax plus some other things by QMV or the ordinary legislative procedure. I just don't think that the public, the media or politicians will be able to have a debate on those terms, because ultimately the public wants to know, "What are the policy implications of this? What am I actually voting on here? What are the consequences of this?" It will ultimately come down to that sort of debate.

Even then, I would be very surprised if, on a specific issue like that, which can be constrained to those narrow issues, you would have a high turnout; I can imagine that it would be a very low turnout—far less than 50%. Potentially, it could be less than 25%. The only way in which it could become larger than 50% would be if it gradually turned into a debate about Britain's place in the EU. Ultimately, I suspect that the first such referendum would come down to that; it would ultimately come down to a debate, and that is how it will be portrayed in the press and how the public platforms will end up being portrayed. Whether or not that is a good or bad thing is a separate question. My expectation is that that is what will happen.

Chair: You have just anticipated the next question—exactly and in precise terms. I will ask Chris Kelly to move on from question 4, which you have already answered. Your prescience is so great that you actually got that question completely right. I have no doubt that your answer will be taken on board by all concerned. Chris, would you like to ask the next question?

Q16 Chris Kelly: Professor Hix, what is the experience of referendums in terms of a minimum turnout being required for the result to be regarded as politically binding?

Professor Hix: It varies considerably. In France and Ireland, there were no requirements on that. Switzerland has gradually introduced requirements—not just for turnout, but for certain majorities; I mean majorities of people plus majorities of the particular count in the regions of Switzerland. A provision could be put into the Bill, or into some Act that then calls a referendum, to say that the results would only be binding if there is a certain turnout in the vote, which has been the practice in the UK in the past—in the Scottish Devolution referendum in 1979, for example. Sorry, what was the second part of your question?

Chris Kelly: For the result to be regarded as politically binding.

Professor Hix: That is more of a political question than a legal one. Even if you meet a certain threshold,

whether or not that is politically accepted as legitimate relative to a particular majority size in the Commons, it is a separate question that is very difficult to answer.

Q17 Chair: Turning to the Scotland devolution vote, Michael and I were engaged in the debate on the question of turnout on the alternative vote Bill. My amendment said that it should be 40% of turnout, which I thought was rather a modest and fairly low threshold. However, as Michael remembers only too well, the George Cunningham amendment was 40% of the yes vote.
Professor Hix: The yes vote had to represent at least 40% of voters.
Chair: That is right. The yes vote had to represent 40%.
Professor Hix: That is quite a high threshold.

Q18 Chair: Yes, and that had a significant impact on the outcome of the Bill. In fact, it was the reason that the Bill was lost. Do you have any thoughts on whether or not the percentage should be geared to turnout or to the "yes or no" question?
Professor Hix: I think that it should be geared to turnout. The practice in most other countries that have such a system is that there is a trigger that says the result is binding if the overall turnout is above a certain size.
Let me say one other thing that I forgot to say in response to Mr Kelly's question, which is when you trigger a referendum, there is an ongoing debate among the people who research and study referendums across the world over whether the public answers the question in referendums or some other question. That is particularly the case with European referendums—even the very big major European referendums on big issues, such as joining economic and monetary union. A great example of that was in the two referendums on the Maastricht treaty in Denmark. The first one was against, and that was largely seen as a vote against a very unpopular Government who were then defeated and who then triggered an election campaign. The new Social Democrats won the election, called a second referendum and then won the referendum on exactly the same question. That is the example to which people point to say that even on a major issue, the result was really driven by domestic political considerations, and it had nothing to do with the question.
Having said that, research on the referendums on the constitutional treaty and the Lisbon treaty—not only in France, the Netherlands and Ireland, but in Spain and Luxembourg—has indicated that the biggest predictor of how people voted individually was their individual attitudes towards Europe, not their attitudes towards the Government. In those examples, the referendum campaigns were organised in such a way that there was a big information mobilisation, particularly in the French case, which meant that they were not just about the unpopularity of the Chirac Government, but about the question on the table. It is not that the Government's unpopularity did not matter, but you can think of it like this: 40% of the answer was related to people's attitudes towards Europe; 30% was related to their attitudes towards the Government of the day; and the other 30% was related to some other factors.

Q19 Chris Heaton-Harris: I think that this is a pretty bogus argument, because surely the same case can be made for local, parliamentary and European elections in the United Kingdom. I was elected to the European Parliament on a 28% turnout. In fact, that was on the same day that Bubble was evicted from the Big Brother house with more votes than my party achieved nationally. I don't buy the argument that you can't have a legitimate result on a small turnout.
Professor Hix: I'm not saying that you can't, but that it raises questions about the legitimacy of those outcomes. People certainly do raise questions about the legitimacy of the majority in the European Parliament because of the low turnout in elections.
Chris Heaton-Harris: When voters turn out in local elections they tend to be answering national questions. God knows why some people voted for me—some have been questioning that in my constituency since May. Some people voted for me on one particular policy area. I do not think that you can define the question that people are answering when they put a tick on a ballot paper. We just have to accept that the majority of people will be doing the right thing in their own mind. We have to get used to the fact that democracy evolves. Surely in an evolving democracy referendums have a place.

Q20 Henry Smith: Briefly, I want to take you back to threshold limits. Are there many examples where the threshold for acceptance is 50% of those eligible to vote? Granted, it is a high threshold.
Professor Hix: I do not know off the top of my head and would have to look that up.

Q21 Henry Smith: Nothing leaps out at you?
Professor Hix: Nothing.

Q22 Michael Connarty: On the question of scale and importance in determining what is the legitimate use of referendums, the most recent referendum in Scotland was on whether to set up a Scottish Parliament and, in a second question, whether to give it tax-varying powers. Where does that fit in the scale of what is salient and, therefore, justifiable in using a referendum? Would that fit your model of something that is large enough in scale?
Professor Hix: My basic view about this is somewhere between that of Chris Heaton-Harris and that of others. Referendums are a legitimate tool, but often they are not regarded as legitimate unless they are on major constitutional questions. In a democracy we believe that ultimately sovereignty resides with the people, so it is legitimate that referendums should be used for major constitutional changes. Examples of such major constitutional changes include the transferring of policy competences to the European level; the transferring of policy competences to a lower level of government, as is the case with devolution; changing the way our electoral system works; and whether or not we should elect an upper House.

I see a range of issues that I would categorise as being clearly of a fundamental constitutional nature and that, therefore, would only be regarded as legitimate by future generations if they are ratified in some way through a referendum. I think that those questions are inherently and fundamentally significant enough to answer all the other questions that have been raised about whether there would be sufficient turnout, whether there would be a proper debate on the issue, whether people would really form their opinions on the questions that were on the table and so on. I think that they do by their nature.

You can, of course, have referendums on a whole range of other minor issues, but questions will always be raised afterwards about whether there was a legitimate outcome. For example, California recently had a referendum on the legalisation of marijuana, but I imagine that there will be another referendum next year, and another one the year after that and so on. In Texas, they have referendums in local communities on whether they should ban smoking or ban alcohol. You have a referendum every year on the same issue, because people question any one binding outcome on whether it was the right question or whether the turnout was high enough or whether people were voting on other things. When you have a fundamental constitutional question, however, the issue gets resolved for a significant time, because of its nature.

Q23 Chair: Of course, they don't have such referendums in the United States on major constitutional issues.

Professor Hix: Not at the federal level. They do at the state level.

Chair: That's the point.

Q24 Michael Connarty: I'm trying to get the scale, because I think I lean in the direction that you go with it. Clause 4 and clause 6—

Professor Hix: I think they're too minor.

Michael Connarty: They are likely to be too impenetrable for people, and they will become referendums should they ever be used on other things. On the scale, you are basically saying that you think the Scottish referendums for devolving power and to give tax-raising or varying powers were significant. Would you, therefore, conclude that, should we go to a second Scotland Bill and do as is recommended by Calman, for example, and give 10% of tax-raising powers to the Scottish Government, that would require a referendum?

Professor Hix: If you have the principle that any major transfer of sovereignty that relates to a significant policy competence requires a referendum, that would fit my description.

Chair: I think we ought to be a bit careful and to stick to the European Union.

Q25 Michael Connarty: Yes, I know that. Finally, should Lisbon, therefore, have had a referendum?

Professor Hix: I think Lisbon should have had a referendum, but the Lisbon treaty is the least significant treaty that the EU has ever signed.

Q26 Chair: But the Maastricht treaty was not.

Professor Hix: The Maastricht treaty was not what?

Chair: Was not insignificant.

Professor Hix: I think all of the EU treaties are significant. If they fit my description, as I say, it's perfectly legitimate to say that any major treaty reform requires a referendum.

Q27 Chair: So you would have said yes to a Maastricht referendum.

Professor Hix: I think there should have been a referendum on Maastricht, on Amsterdam, on Nice, on the constitutional treaty, on the Lisbon treaty, on whether Britain should join EMU or on any other major question like that.

Chair: That's very helpful. Thank you very much. Now, you go on to say that domestic constraints have to be credible in the eyes of other member states in the Council. On that basis, you call into question the likelihood that a UK Government would in fact hold a referendum on the less significant issues, which arise under clauses 4 and 6 of the Bill, because on most of these issues there are alternatives for the other member states. Penny, you were going to ask the next question, I think.

Q28 Penny Mordaunt: Can you elaborate on what those alternatives for other member states would be?

Professor Hix: There are two sorts of alternatives. There is one alternative within the mechanisms of the treaty, and there is one alternative outside the treaty. Within the mechanisms of the treaty, there are provisions for enhanced co-operation. Those provisions are written in such a way that they could apply to most of the areas in the treaty that are covered by this so-called passerelle, which was put into the Lisbon treaty to make it easier. You can even read that that element of the Lisbon treaty was in response to an increase in the usage of referendums by member states to ratify treaties. As member states increased the threshold for passing treaties, the elites negotiating such things said, "It's going to be more and more difficult in the future for us to get treaty reform, so let's figure some other way we can amend the treaties." That was the reason why they came up with this sort of simplifying treaty mechanism.

My reading of the treaties is that most of those simplifying mechanisms could be covered by enhanced co-operation. Enhanced co-operation cannot be invoked if it undermines the basic elements of the single market, but it could be used in a lot of these areas. If they then feel that, legally, they cannot use enhanced co-operation, they can always use some separate intergovernmental deal among themselves to act in a particular policy area, and we have seen, historically in the way the EU works, that being used a lot by member states if they feel that they cannot get it through the normal treaties.

Talking to colleagues in other member states, and, interestingly, reading the evidence from the retired legal adviser to the Council, Mr Piris, I think that a lot of other member states will look at the Bill, if it is passed and if an issue comes up, and either say, "If a British Government is in favour of us making this change, they will find some way to amend the Bill relating to those provisions, so that they can get on

with business in Brussels." or, "I don't expect that they're going to have a referendum on these things, and therefore they will have to vote no." or, "There will be a referendum on these things, and it will inevitably be a no, so therefore we have to think about ways to get around the British position." Any of those scenarios weakens the hand of any British Government in negotiations, because the assumption is either, "It is not a credible threat and therefore we don't take you seriously," or, "It is a threat but you're binding your hands already to say no. Whatever we come up with you are going to say no, so therefore we won't negotiate at all with you."

Q29 Chair: So basically you don't take a very sanguine view of the practical consequences of all these provisions set out ad nauseam.
Professor Hix: I don't, and this is why I think there are other mechanisms that could—I think it is legitimate, given the fact that I don't like the way the treaty is now designed to allow essentially the elites sitting in Brussels to make significant constitutional shifts in the way the EU works without them being ratified by national Parliaments. I am not happy with that. I think that is a breach of the tradition in which the EU has been built through voluntary sanctioning by national Parliaments and by national publics. I think there should be some more constraints, but I am not convinced that the referendum is the appropriate way to do it.

Q30 Mr Clappison: Can I take you back to the point you have made about enhanced co-operation, so I understand this correctly? You are saying that—as you have put it—the elites in Brussels could get round the various constraints that there are on doing things in the EU Bill by using enhanced co-operation as an alternative to one of the mechanisms that is covered in the Bill that would trigger a referendum. Is that what you are saying?
Professor Hix: Not in all those areas, but certainly in some of them.

Q31 Mr Clappison: Enhanced co-operation would be a way of circumventing the referendum blocks that are in place. Presumably, you have studied the EU Bill. If they went for enhanced co-operation, what would be the process under the EU Bill as it stands? There would not be a referendum, would there?
Professor Hix: It doesn't look like there would be a referendum. My assumption would be that the other member states would want to do this without Britain, so in that sense they could go ahead without Britain's agreement.

Q32 Mr Clappison: Suppose a British Government wanted to take part in enhanced co-operation, which is on the table from other member states, what process would be followed to bring about that enhanced co-operation?
Professor Hix: So far as I as I can see, I don't see that as being covered right now.
Mr Clappison: It's not covered in the Bill as it stands. So it wouldn't be covered by a referendum.
Professor Hix: That's a good point.

Q33 Chair: I think Professor Dougan makes that point as well in his evidence. Do you think that enhanced co-operation in this context would be more inclined towards creating an association of nation states. You have Schengen; you have opt-outs; you have enhanced co-operation—
Professor Hix: Defence co-operation, which doesn't apply to every member state.

Q34 Chair: Yes; what I'm saying is that increasing evidence is emerging that a diversity and a flexibility is penetrating the assumption that everything has to be a one-size-fits-all, uniform policy within one legal framework and an acquis. You know where I am coming from; for practical purposes, although they won't admit it, there is an increasing tendency to go down the route of an association of nation states.
Professor Hix: I'm not sure that the second of your statements follows logically from the first. I think it is true that there have been increasing usages of what people call flexible integration, so several sub-clubs of the EU moving forward in particular policy areas because the other member states are not willing to go along. We can see that with the euro, with defence, with Schengen and so on. Whether or not I think that is leading to an association of states; I think that is not true. I think that an association of states is saying that all these mechanisms are intergovernmental, but they are not. You cannot make the argument to me that the euro is an intergovernmental mechanism when you have delegated significant powers to an independent central bank, where ECOFIN is deciding by majority vote how it manages its macro-economic policies in relation to the euro. It doesn't logically follow that an association of states is the consequence of flexible integration.

Q35 Henry Smith: However, Switzerland is a member of Schengen, but obviously it is not a member of the European Union. That might be a weaker example, and I accept the points relating to the euro, although there are nations that use the euro that aren't members of the EU. I thought I would just throw that out there.
Professor Hix: Okay, on Switzerland and Schengen, as far as I can gather in the development of the area of freedom, security and justice in the EU and how that relates to Schengen, Schengen is gradually being hollowed out in what it is used for. In a sense, Schengen is the treaty just for agreeing rules on the removal of borders. Everything else on the policy that covers what you do with the movement of peoples is now being done through the area of freedom, security and justice. You can see that one of the major significant growth areas in European legislation over the past decade has been that of freedom, security and justice—whether that is to do with common refugee policy, asylum policy, common visas, or family reunification, and so on. That is where it is a quasi-federal political system. The Commission has an agenda-setting power. It is a bi-cameral system; the European Parliament has co-equal power with the Council. It is not an association of states.
Chair: Henry, would you like to ask the next question?

Q36 Henry Smith: Yes, I think this has probably already been answered. Is there evidence from the domestic checks in other member states that these forms of constraints are taken seriously by member states?

Professor Hix: They are, as I mentioned in relation to the treaty negotiations, and there are other types of checks which are taken seriously. The classic example is the check of the Danish Parliament on Danish governance—the check that the committee in the Folketing gives to the binding of the hands of Ministers before they negotiate in Brussels. That has a particular effect in the Danish context, because most Danish Governments are minority Governments, so the Folketing has significantly more power than in any other Parliament where the Government are sitting in a majority. That gives one particular context. One of the things that I mentioned in my evidence, which I think is missing from the Bill, is anything more detailed on what our Ministers are actually required to do and to give to the Committee when negotiating on day-to-day legislation in Brussels.

Q37 Chair: So you're recommending that there should be some form of a mandate, as well as a scrutiny reserve.

Professor Hix: I think there should be some form of mandate, and I also think there should be much tighter restrictions and requirements on what has to be provided to the Committee in terms of documents. It is not sufficient just to say that the Committee sees what the Commission proposes, and then, if it wants to, the Committee sees anything that is available to the public from the Council. The Council is still a largely secretive organisation, despite its claims to the contrary. There are a lot of things that you and I don't see, but Ministers do.

Chair: Just before James comes in, you may or may not be aware that, in relation to the task force and the whole of that business about European economic governance, it was only because I happened to be at the COSAC meeting and was given a copy of the document that I was able to ask an urgent question the next day.

Professor Hix: Exactly.

Chair: If that doesn't make your point, nothing does, and the whole argument has gone on from there.

Q38 Mr Clappison: Perhaps I should be giving evidence myself; I would say amen to what's just been said. On the Danish point, I had the opportunity to go to Denmark fairly recently to speak to members of their committee. It seemed very popular with them, it seemed to work very well, and it had been in place for a number of years. Is that your academic view as well?

Professor Hix: Yes.

Q39 Michael Connarty: Can I just clarify the traction that the two-thirds majority has? Have you had any indication that the UK Government are in any way thinking about anything other than referendums? They have always said that they didn't want to have qualified majorities, but they are about to introduce a Bill on fixed-term Parliaments, which would bring in a two-thirds majority Government. We have that in Scotland, because the electoral system is deliberately and inherently designed not to have a majority, and therefore you must have a stability clause. However, this is the first time that I have known the British Parliament to bind itself. So is that unique to that particular circumstance?

Professor Hix: No, I think there's something fundamentally different between rules that relate to how Parliaments can dissolve themselves and call elections and rules that relate to the passage of certain Acts or pieces of legislation. In the former, I can see some very difficult issues relating to raising the hurdle for calling an election and what that does, in practice, for the sustaining of what could be potentially a very unpopular minority Government. Across the world, a lot of democracies—such as Germany and several other states in Europe, and elsewhere in the world—have different majority requirements relating to the nature of the legislation that is being passed. For example, there are different rules in Germany relating to whether or not the legislation relates to a federal competence or a Land competence, and then what majority is required to get it through the two chambers.

Q40 Michael Connarty: Can I come back to you? We had a rather interesting debate with Professor Craig and Professor Allan about whether there was such a thing as a hierarchy of law, and if there were such things as constitutional laws that were at the top of the hierarchy and therefore could never have an implied repeal by passing another Act that contradicted it. Are you saying that there are such constitutional laws that are, in fact, part of a hierarchy and therefore require different circumstances?

Professor Hix: I think there are. I am persuaded by a recent book by Professor McLean at Nuffield college, Oxford, in which he makes exactly that case. He says that in the British system there is, in practice, a difference between Bills that are quasi-constitutional in that they have set up and set out the fundamental powers that exist in Britain. You could say that the devolution Bill is one of those, that any Bill on the electoral system is one, that the European Communities Act 1972 is another, and so on. So I think there are certain categories of Acts which are of a constitutional nature. His recommendation would be that the amendment and repeal of those Acts should require a higher threshold than a simple majority.

Chair: I am rather keen to stick to the European Communities Act.

Professor Hix: But I think that is logically consistent with the idea that you could have similar sorts of requirements for these sorts of issues relating to the EU treaties.

Q41 Michael Connarty: That raises the question of implied repeal. If an Act were passed by the UK Parliament that contradicted an EU law, given that the 1972 Act is, in your assessment, a constitutional Act and so there could not be an implied repeal immediately, a British court would therefore be required to strike down the enactment of the new law passed by a British Parliament if it contradicted the

European law that we agreed to in the 1972 Act, because it cannot be implied to have been repealed.

Professor Hix: I am not a constitutional lawyer, and I would defer to my colleagues who are that exact thing. I am just talking about the establishment of political practice and what that would logically mean for the majority requirement in a Parliament.

Chair: I think we are moving down the territory of constitutional law and McCarthy versus Smith, Diplock and Garland and all the rest of it. Henry, did you want to ask a question?

Q42 Henry Smith: This is a fascinating area. I agree with your contention about a hierarchy of certain Acts. Do you think they should be more explicitly in a written constitution, for example? I highlight that because obviously it is a subject of academic debate as to whether there is a hierarchy or not and whether such Acts should only be amendable by referendum.

Professor Hix: We could be here all afternoon talking about whether we should have a written constitution, so I will answer this very briefly. I think there have been fundamental constitutional changes in Britain over the past 20 to 25 years, whether that relates to European integration, devolution, mayors, whether we have an elected upper House, or the Human Rights Act. We have a new constitution that is not the same constitution we had 30 years ago. It would be appropriate for us to sit down and think about what this means in the long term. Therefore, I would be in favour of some sort of convention that draws up a proper written constitution for Britain that includes exactly these sorts of things.

Q43 Chair: On the question of the two-thirds majority, it is a fact—Jacob Rees-Mogg had this very much in mind—that in the 19th century Gladstone had, I think, 100 votes as a minimum. Some people, including myself, have made a suggestion about 150 MPs deciding to call for a motion on the question of whether there should be a free vote on the European issue. In other words, the idea of percentages and some degree of majority is already around.

Coming back to something we were discussing earlier, do you think that part of the problem is that the whipping system distorts the apparent purity of a percentage majority because people are told, "You're going to do this"? Two thirds of the seats was the criterion for the Fixed-term Parliaments Bill, but going back to the European Union, in the context of the German constitution, it is two thirds of those voting on constitutional questions that is the determining factor, not just two thirds of the seats. When we are talking about two-thirds majorities, we would be quite clear that it would be with regard to the number of those voting, not merely the number of seats.

Professor Hix: For me, the actual threshold is a secondary question. The primary question is: why would you have a higher threshold? For me, the argument about why there should be a higher threshold is that you want broad political consensus. In Denmark, broad political consensus is four fifths—80%. It would be up to the House of Commons to decide what it thought was broad political consensus, but the whole point is that you would want to prevent the particular majority of the day from being able to make what could be fundamentally constitutional decisions, so you want a higher threshold that forces a broader political consensus, meaning that the major political parties would all have to get together and agree to something. This would be a constraint on the Conservatives as much as it would be on a constraint on Labour or the Liberals. So two thirds might not be high enough. In Denmark, what they think is sufficient to guarantee broad political consensus is interpreted as four fifths. Two thirds might not be thought of as significant.

Under first past the post, where swings are magnified—the electoral swings are magnified in seat shares—I can imagine that a party could get close to a two-thirds majority in the Commons with significantly less than 50% of the votes. If we stay with our current electoral system, I can imagine that the threshold should be significantly higher than two thirds to guarantee that there is broad political consensus.

Chair: Finally on that point, there are those of us who strongly believe that a majority of one suffices, but I'll pass on to Michael Connarty.

Q44 Michael Connarty: It does in the elections I've lost.

One thing that strikes me about this Bill—I made this comment when it was announced in its outline—is that the Government have said that there will not be a referendum, or even in fact the specific requirement of an Act of Parliament, to allow an accession treaty to go through. Is that consistent with part 1, which refers to treaties excluded from the referendum requirements; as is clearly mentioned in clause 4(4). Could the accession of Serbia or Turkey be considered a significant enough a transfer of power to require a referendum?

Professor Hix: I think you could definitely make that case with Turkey. It would be harder to make the case with a smaller state like Croatia or Serbia. If you are going to establish a principle that says that any significant transfer of powers, or anything which significantly changes the balance of powers between the institutions or between the member states in Brussels, requires a referendum, I cannot understand how you would not include the accession of member states above a certain size. I think size is significant here, because with the way that majority voting on legislative issues now works under the ordinary legislative procedure—or will work after 2014 and 2017—the accession of a state like Turkey to the EU will fundamentally change the influence that the UK has on legislative decision making in the EU legislative process. It will significantly weaken the voting power of the UK and the ability of the UK either to want things through that it would like or to block things that it doesn't like—either of those two things. In a sense, Turkish accession to the EU is, for me, a much more significant shift in the influence and power of the UK in Brussels than the majority of things that are mentioned under clauses 4 or 6.

Q45 Mr Clappison: You have helpfully mentioned some of the constitutional changes that will come about as a result of, say, the accession of Turkey but, obviously, there will also be political consequences about which people might wish to express an opinion one way or another. Migration springs to mind, but there is also economics, spending by the European Union, distribution of funds within the European Union, and so on. You will have studied the Bill on this point. As the Bill stands, if there were a stand-alone treaty just on Turkish membership—to continue to take Turkey as my example, although it could be anyone else—it would not trigger a referendum.
Professor Hix: No.

Q46 Mr Clappison: A referendum on that particular treaty would be triggered only if something else of a constitutional nature were tacked on to the treaty. And the same would apply to any other candidate member state that becomes a full member state by acceding?
Professor Hix: That is correct.
Mr Clappison: There is no provision in the Bill as it stands for even a vote of Parliament on whether there should be a referendum. There would not be a referendum.
Professor Hix: The Bill explicitly states that accession treaties are excluded from its provisions, which is one of the things that I remember highlighting as I read through it—I thought that it seemed absurd. It is clearly politically pragmatic. Reading the Bill, it is clear that there are very strong political preferences. The Conservative-Liberal Government would like Turkey to be a member of the EU, and they would not want the British public to stop it. Such a provision is therefore excluded from the Bill; the issues that they don't want are therefore included in the Bill. For me, either you are going to be logically consistent or you are going to be political. Make your choice.

Q47 Michael Connarty: You have almost exactly anticipated the question I might have asked you, so it is interesting that you have made that judgment, which some people may say is a political assessment as well as a constitutional assessment. The whole question of excluding the accession treaties clearly implies that one major item of constitutional change across the European Union has been left out of this Bill because it suits the Government to do so.
Professor Hix: I think that's right.

Q48 Michael Connarty: Those of us who have sat on this Committee for a long time are also concerned that the Government have left out any reference to how the opt-in process will be proceeded with. We seem to get notified "opt in" or "don't opt in" according to the whim of Government Departments or perhaps their Ministers. There is nothing in the Bill about that at all—it is a complete omission. You talked about scrutiny, but the Bill doesn't give any indication of what the threshold is for opting in or opting out. In a sense, that is of concern to the British public and it has been coming up for many years. Could you think of any other omissions that you would include in the Bill if you genuinely wanted to create a mechanism for scrutiny and accountability on decisions related to the European Union?
Professor Hix: There were two things that I highlighted in my evidence, and one related to accession. I think there will be referendums on Turkish accession because Turkey is so significant in terms of its size and what it means for the nature of the EU. There are various other political, economic and social consequences of Turkish accession. It is a serious enough issue that I can imagine there being calls for referendums and pressure for referendums in a lot of member states, including France and Austria, and, potentially, the Netherlands and Denmark. We could well find ourselves among the states that are not having referendums on that issue.

Q49 Henry Smith: I think you are absolutely right. There are many European nations in which the populace will demand referendums on Turkish accession, which is why I don't think that Turkish accession will ever come about, because I don't think Austria or Germany will agree to it. Do the laws or constitution of any member state say that there has to be a referendum for accession?
Professor Hix: No. Not currently.
There was one other thing that I was going to say, because there is a second area that I feel was excluded from the Bill, but which I think could have been included. I read at least part of the Bill as trying to hold our Ministers and our civil service more to account when they are doing business in Brussels. I can see a logic behind that, but if that is part of the aim of the Bill, there could be extra provisions on what the British Government provide for the way in which legislation is scrutinised. The EU passes approximately 150 to 200 pieces of legislation a year, and the way in which that legislation is negotiated in COREPER—as far as I understand the way in which decision making works now in the Council—is that the Council presidency puts forward a proposed draft and the member states propose amendments. They have to put together composite amendments and co-sponsor amendments, because with 27 member states, the practice of how things works has changed. They have got rid of the tour of the table, in which every member state had its right to make a proposal. Now there is a need to club together to have joint speaking time and joint amendment time. I want to see the texts of the amendments that our Governments put forward, who they co-sponsored them with, and whether they are passed or fall. We see this in the European Parliament; why can't we see it in the Council? This Committee should have the right to see that, and that should be in the Bill.

Q50 Chair: And without it, it is thoroughly undemocratic, because majority voting equals laws that are imposed on the people of this country, and we haven't the faintest idea, and nor can we ask the questions of anybody who is making the decisions.
Professor Hix: That is right.

Q51 Chris Heaton-Harris: I want to go back to Turkey, if I may. I have been waiting to ask a question and I think that you might be the right witness to

answer it. Another part of the Bill means that we are getting another MEP—very exciting. When Turkey comes in, there will be a reduction in the number of Members of the European Parliament, because the number of seats in the Parliament is capped and we will all take a hit. That will probably affect Northern Ireland and the north-east; in fact, probably one seat from every region of the United Kingdom will be going down. Is that diminishing representation not something that we could worry about in a constitutional way?

Professor Hix: Do I want to speculate? I don't know whether Turkey is going to come in. I am probably of the view that it raises significant hurdles. By the way, by the time the EU has decided whether it wants Turkey to be in, Turkey will have probably decided that it doesn't want to be in.

I didn't put this in my evidence, because I was asked to focus on part 1, but if I were to comment on the issue relating to the extra British MEP and how they are allocated, I would have thought that, given the commitment in the Conservative manifesto to have open lists in European Parliament elections in the UK, which I would be in favour of, this would be an opportunity to change the way in which European Parliament elections work in the UK. That could easily be in this Bill. It would not be too difficult to make that shift from currently closed party lists to open lists. I would have thought that that could have been put in the Bill.

Q52 Chris Heaton-Harris: I didn't know that was a commitment of ours.

To change tack slightly, in response to yesterday's debate and in evidence the day before, the Minister for Europe told us how binding this would be for future Governments. In fact, he said you can't bind a future Parliament. How binding is this on a future Parliament? I know that a future Government could repeal these provisions under pretty much any circumstance, but what is your view on that?

Professor Hix: The promise that there should be a referendum on major treaty reforms is probably difficult for any future Government to overturn, because that is the sort of thing you can ask in an election debate: "We have committed to have a referendum on treaty x. Are you committed to that?"; and, "Are you going to change the EU Bill to prevent us from doing that?" The political salience of that issue in effect binds a future majority.

I don't think that's the case with the smaller issues. I can't imagine that a leader's debate would include the question, "We are committed to a referendum on a shift from unanimity to QMV in social policy. Are you committed to that?" I just don't see it ever happening. So, with the minor issues under clauses 4 and 6, if any future Government want to change these things, or if they are under pressure from the other member states, I think they will just whip their majorities to back an amendment to the Bill. I think it is much harder for them to overturn a referendum requirement related to a major treaty reform.

Q53 Chair: May I ask the final questions? Do you think that a referendum as a result of any of the trigger clauses in the Bill would ever be successful? If so, what does that tell us about the legislative intent of part 1 of the Bill? Following on from that, is it consistent with part 1, in your view, that an accession treaty is excluded from the referendum requirement, so that, for example, the accession of Serbia or Turkey could be considered as a significant transfer of power?

Professor Hix: My reading of this was that the assumption is that the British public will vote no to whatever you ask them relating to Europe and, therefore, the view is "Let's not talk about accession, because we are in favour of it." Asking me to speculate about whether the public will vote in favour of any of these things is an impossible question to answer. I think referendum campaigns can change significantly. The attitude of the British public towards Europe has hardened, but the level of information and understanding of European issues is relatively low. I can imagine, at some point in the future, people's attitudes changing if something comes up that they are particularly in favour of. Right now, if there were going to be a referendum any time in the next year on any of these issues, I would speculate that the answer would inevitably be no, but five or 10 years down the line—who knows?

Q54 Michael Connarty: Evidence was given by the Minister for Europe about the carbon tax, basically saying that we must have a referendum on a carbon tax. Surely we face a dilemma in that it seems to be contradicted by the fact that at the most recent Environment Council a carbon tax on lorries heavier than 12 tonnes was agreed to, including an option for a daily charge of £11. That is a tax, and we argued that that was a tax, but the Minister seemed to fold on it and agreed that it was a transport policy. But it is clearly a tax; you ask anyone who has a 12-tonne lorry or above when they come to have to pay it whether it is a tax. That was just slipped through by the process of the Government deciding to cave in and accept that it was a transport matter, and therefore that it was qualified majority voting and we couldn't veto it. Is it not likely to be the scenario in clauses 4 and 6 that every time it comes to the crux of a decision, the Minister will find some way of folding and saying that it is not important enough to require a referendum? I agree with the Minister that getting anyone interested in a carbon tax would be quite difficult; it would become a question about taxation from Europe. I am sure if we had put the Eurovignette to a referendum people would have said, "It is a tax from Europe, and we are not having it."

Professor Hix: I think that's right, but there is a limit to how far that sort of strategic behaviour by officials in Brussels is possible. There are constraints under the treaty on what's possible, and I think the Court of Justice has actually upheld those things. For example, on tobacco advertising, where the directive on tobacco advertising was passed under free movement of goods, the Court of Justice struck it down on the grounds that it wasn't relating to the free movement of goods but was a public health issue. Public health requires unanimity, and of course it was never going to pass. They managed to finagle it under free movement of persons. There are limits on the

possibility of doing that, but I think there is plenty of precedent that already the Commission and the member states are used to finding some other way of getting stuff that they want passed if there are constraints in the treaty.

Q55 Chair: One last question in general. Is part 1 really designed to provide power to the people, as is claimed, or is it really designed, in your opinion, to strengthen to the United Kingdom negotiations in Brussels?

Professor Hix: I don't think it is designed to do either of those things. I think it is primarily designed to put a brake—to bind the hands of the current Government or of future Governments—on what Britain can sign up to in Brussels, on the understanding that there would never in practice be referendums on most of these things. That is how I read it. My question is how credible it is in that aim, and frankly I don't find it that credible.

Q56 Kelvin Hopkins: I apologise for being late; I have been at a speaking engagement. I have just one question before you go, and you may have dealt with this already. In your paper you have said "If the EU collapses, and I genuinely fear that this is a possibility, this would be a disaster of historic proportions for Britain." I proposed, when speaking last night, that a rational deconstruction of the euro, rather than letting it collapse, would be the sensible way forward using the resources. It's a looser arrangement of nation states with powers repatriated, the end of the common agricultural policy and the end of the common fisheries policy. We would still have good relations with our neighbours—better relations with our neighbours, I suspect. I just wonder what your case is for it being "a disaster of historic proportions for Britain".

Professor Hix: There is often a fiction in the UK that we could just have a single market without any of the bells and whistles that go with it and that, therefore, that could just be done through an association of states with the repatriation of most powers. That is a fantasy. The great achievement of European integration, which is taken for granted by current generations, is the creation of a continental-scale market.

I have been invited to various other regions in the world to talk to policy makers, and I was recently involved, in a project for the Asian Development Bank, in trying to design a single market for east Asia—modelled on the EU. They would love to have one. The big stumbling block is that they cannot have one without there being sufficient political integration to have the necessary institutions to create and regulate that market. You cannot have a market on a continental scale unless you have a certain degree of political integration. It just does not happen. It is a fiction to assume that we can have this and not have anything of the politics that go with it.

You have to have a way to adopt common rules and regulations on the production, distribution and exchange of goods, service, capital and labour. The best way to do that is to delegate some agenda-setting power and to have certain checks and balances through a system of government in Brussels. The EU has more checks and balances than virtually any other system of government in the world. Nothing can be passed without a majority in the Commission, a qualified majority in the Council, a majority in the European Parliament and judicial review by the Court of Justice and by national courts. It is a super-checks and balances system.

I don't believe the idea that Brussels is some sort of runaway bureaucracy that does things that we don't really sign up to. I don't believe that we can have all of the benefits and freedoms that we now have and take for granted as a result of this market of half a billion people without there being a certain level of political integration. That is not to say that I think the CAP should not be torn to pieces or that other elements of the policies of the EU should not be changed—I think they should be—but I don't think that it is possible to have a continental-scale market and an association of states. Those two things are completely incompatible. That is what other regions in the world are finding, and I think we would find the same in Europe.

Q57 Chair: But is it arguable that the system that is going on in the euro and the low growth and the high unemployment and the rise of the far right and all the rest of it are indicative of the fact that this great bureaucratic system is not, and should not, be entirely institutionally run and, really, does not work as well as some people hoped it would?

Professor Hix: I absolutely agree. That is exactly what I argue in my book, *What's Wrong with the European Union and How to Fix It*, but the answer is not to tear it to pieces; the answer is to think creatively about what we do with it and how we make it more democratic and more dynamic. The two things go hand in hand. It cannot be more dynamic without being more democratic.

Chair: I am delighted that we finish on the word "democratic". That's very helpful. Thank you very much, Professor Hix.

Examination of Witness

Witness: **Professor Ken Minogue**, Professor Emeritus at the Department of Government, London School of Economics and Political Science, gave evidence.

Q58 Chair: Good afternoon, Professor Minogue. I'll start with the first question or two.

Your submission deals largely with parliamentary sovereignty aspects of the Bill. Of course, we have just reported on that: we had to, because of the time constraints that the Government imposed on us as a result of holding Second Reading yesterday. Most of our questions today will turn on the referendum lock provisions in part 1 of the Bill.

At the end of your submission, you make an interesting reference to the transfer of power from Britain to the EU as having the aspect of a slow-motion coup d'état. You say: "That is why the clarifications of the European Union Bill are significant." What do you see the Bill clarifying, and who is the intended audience for this clarification?

Professor Minogue: Well, on the referendum lock, I have nothing directly to say that would be useful, but my response is in general about a wider generic problem of the 20th century. British Governments and other Governments tended to become internationalised, as I have called it. I have therefore tried to locate the European Union within this broader tendency to believe that there is a source of wisdom beyond the House of Commons and the King in Parliament to which we ought to be, as it were, obedient. We now have large numbers of rules, laws, directives and so on that come from abroad, which are not things that the British Parliament itself has decreed and, indeed, which it probably would not. We are restive under many of these laws, some of them being human rights and some of them being part of the European Union.

This is such an odd situation, because there is quite a lot of evidence that the people at large, when polled, do not like this result. They are resentful of it and all sorts of falsities occur in their responses. At the same time, the political class, which I think is distinguishable, in Parliament, largely—of all three parties—more or less adopts this internationalist position. They're edgy about it and occasionally they make slight moves towards saying, "Yes, we will give a referendum if there are any future problems along these lines." Nonetheless, they don't come up with the restraints that I think there is evidence that the population at large would need.

To end that very general and slightly waffly account, let me say that the basic political theory question—that's my trade—is, "Where is wisdom to be found in decisions in politics?" The answer is, of course, nobody and no decision maker is totally reliable, when it's sovereign Parliament, the people making a decision in a referendum or whether it is some rational set of economic rights. You don't know what the effects will be, and the effects will, in fact, include unpredictabilities. My view of the EU and the problems which it raises is broad. Therefore I'm always slightly on the edge of irrelevance as far as the deliberations of this Committee are concerned.

Q59 Chair: Some commentators have pointed to what they see as a contradiction in the Bill, which purports to be drafted to enshrine the principle of parliamentary sovereignty against the threat of the EU itself, while at the same time seeking to limit parliamentary sovereignty by appealing over Parliament's head—in quotes—to the people in the form of referendums, etc. What's your general view about this contradiction between these two propositions?

Professor Minogue: It's not a contradiction, because it simply places a restraint upon certain types of actions that a parliamentary vote might generate. It simply says that if the vote seems to generate that consequence, there is a further check that must be used. It doesn't bind Parliament to anything in particular that cannot be unscrambled. Furthermore, with that provision itself, as has been made clear by the constitutional lawyers who have written to the Committee, parliamentary sovereignty remains intact in spite of the immense changes—some of which were discussed with Professor Hix—in attitude and control over British life that have taken place.

Q60 Chair: So, when you're looking at the evidence that we have already seen, do you have the sense that the Bill is likely to be effective in binding future Parliaments? And under what circumstances do you feel that a future Government will or might repeal these provisions? Do you have a sense of the direction in which that might go?

Professor Minogue: In answer to the second part, I think that if the drift of internationalism and the belief in a world government and supranational powers were to reach a certain point, people might then face up directly to the question of saying, "Britain should merely be a province of some larger entity—perhaps the world or perhaps merely Europe—and as a province, it should have very limited powers." In other words, "We should give up the sovereignty and self-determination of the British nation which has so far continued for 1,000 years," I suppose.

Q61 Penny Mordaunt: How far is the decision whether to hold a referendum a legal question, amenable to judicial review? And, how far is it a political question?

Professor Minogue: I think it is basically a political question, and that is basically the problem raised by the whole idea of a referendum lock. It can never be a purely political question, but it can also never be a purely legal question. Those who want to leave the situation as it is at the moment can certainly point to the problems of determining whether this change—change x—really requires a referendum. Incidentally, I hadn't thought of the accession of Turkey as being a possible thing that might require a referendum, as mentioned in the later stages of Simon Hix's discussion, but it's obviously a very important change in the powers that Britain would be able to exercise. The accession of new states has been going on without very much control by the British Government for a very long time.

Q62 Michael Connarty: I hope we will come back to the question of accession treaties, given that that was clearly the most glaring omission in the original speeches that were made about the promise of a Bill when the Government came into power. They have ignored the comments made then and brought in a Bill without accession treaties contained in it.

In your analysis—whether I agree or not; I also voted yes in 1975 and have never regretted it, so I don't have to recant—all the things that you say about where the power lies may or may not be true to a certain degree, particularly after Lisbon, which we did say was a tipping point in terms of where the triangulation of forces in the European Union would fall. That power would fall more towards the European Parliament and Commission and less to nation states—that's true. However, there is the

question about what use the Bill is in that debate. Do you really believe that all these matters in clauses 4 and 6 will be subject to referendums, if the Minister decides they are serious enough? Of course, if they do not, they will just do them in Council anyway. Where does it fit in in assuaging some of your concerns about the continuing movement of power?

Professor Minogue: It certainly doesn't entirely assuage my concerns. There is no political solution that is absolutely definite. The media question, "Can you guarantee that 'x' will not happen, or that 'x' will happen?" is always an absurd question. Therefore, if you want to argue that a referendum should be triggered by certain types of transfer of power, you can never define that in such a way that it will be unambiguous and will give a guarantee. It is like a shot across the bows. It is a declaration by Parliament, with appropriate action, that things have, over the decades since 1972, moved in a direction which has brought us to a situation where we are subject to bright ideas about the hours we can work, the kind of benefits for maternity and paternity that will be allowed, and how our City operates. These things are being determined by foreigners. Now, that is an abandonment of British self-determination and therefore, I think, an abandonment also of democracy. I come back, of course, to the idea that no source of political decisions is entirely wise, but at this point on constitutionality, where the whole power of the nation is being exported to outsiders, then at the very least the people should have an opportunity to declare on it. It is no guarantee, fully, of wisdom in politics, but it is better than nothing.

Q63 Stephen Phillips: Does it follow from that answer, and I think from your evidence, that you regard this as a useful Bill in the sense that it establishes that the will of the British Parliament should be seen as sovereign and that it should determine the fate of those who have sent Members here to make law and, indeed, to form the Government who preside over their affairs?

Professor Minogue: Yes. I think the answer to that is straightforwardly yes. What I am trying to avoid is to be saying that the significance of the Bill is merely declaratory. It has to be a law, and I think that it has legislative implications. So, it is not merely declaratory, but its declaratory force is quite an important aspect of it.

Q64 Chair: And if the mechanism that was employed, for example, under clause 18 was to lead in the direction, through UK constitutional law, to the judges in the light of the Jackson case, for example, to qualify or even to reduce parliamentary sovereignty, would you agree that that would be an unsatisfactory conclusion and that it would be far better to make clear that Parliament has its own sovereignty and its own right, and does not need to go down what Professors Allan and Craig describe as the common law principle?

Professor Minogue: I agree with all that except the last phrase about the common law principle. I take it that the sovereignty of Parliament is a common law principle, is it not?

Q65 Chair: The evidence that we got was that Professor Allan and Professor Craig thought it was, but that the traditionalists—such as the late Lord Justice Bingham in his book "The Rule of Law", but also Professor Adam Tomkins—emphatically put the view that the common law principle was not a sustainable proposition and that it led to consequences in terms of interpretation in UK constitutional law in relation to the European Communities Act, which gave the judges a greater interpretive role and thereby would enable them to be able to make decisions in line with some of their judgments or dicta that parliamentary sovereignty was not everything that it was cracked up to be and ought to be qualified. So that was the balance of our evidence, and I am really asking you if you agree that the ultimate authority, to put it bluntly, should be the UK Parliament, or whether there should be an ultimate authority in, say, the Supreme Court?

Professor Minogue: Where the question arises of an ultimate authority, I think there is no doubt that the sovereign Parliament, which is accountable, must be that ultimate authority. As I said before, ambiguity is inherent in political judgments and indeed in legal judgments. Therefore you cannot exclude the role of judges in interpreting what this principle means. On the other hand, one of the corruptions of political, social and moral life in our time has been the tendency of judges to extend their power. This is often criticised as judicial activism, and I think it is a genuine problem. It is certainly a problem in America, and I think it can sometimes be a problem here. It is seen in the internationalist inclinations of constitutional courts these days to pay close attention to what courts in other jurisdictions are doing. The Americans will take an interest in Australian, British or French judgments, and this is a tendency towards centrism in politics, which is the fundamental discriminator of what is supportable and what is not supportable in respectable terms. That is a very big subject.

Q66 Chair: It is a very big subject. But what if under all the verbiage and under all the doctrines that some constitutional lawyers produce, this question of the common law principle, which I have mentioned, ended up by undermining the ultimate authority of the UK Parliament's sovereignty in the hands of the Supreme Court to diminish parliamentary sovereignty? Would you conclude that clause 18, if it had that mischief in it, as you might put it, would be much less useful and of much less value if it produced those consequences?

Professor Minogue: Certainly if it had that mischief in it, as you so wisely put it. My view of parliamentary sovereignty is that it is a multifaceted principle, justifiable in common law terms, justifiable in democratic terms because it allows an accountability that judicial decisions do not, and justifiable far more widely in the fact that it coheres with the entire tradition of British freedom which, I think, is central to what we ought to understand of our political situation.

Q67 Kelvin Hopkins: I apologise for being late. I wanted to pursue a point with Professor Hix earlier.

It strikes me very strongly that this desire for self-government is very powerful and relates to people seeing themselves as culturally homogeneous. For 700 years the Greeks were governed by the Turks, but they still retained Greek identity. The Poles have been battered from side to side by Orthodox Russians and Protestant Germans and they have retained their sense of identity. Once they have self-government they are quite happy to deal with other countries but they do not want to be governed by other people. They are prepared to hand over a degree of sovereignty temporarily for self-protection. The Baltic states, for example, like to be within the European Union because they are much more frightened about being governed by someone further east. But they still want self-government. This idea that somehow we want to get rid of self-government and go in for some world order strikes me as being a psychological phenomenon, not a rational one.

Professor Minogue: In the world at large.

Q68 Kelvin Hopkins: Yes. You mentioned the political class. It is the political class, and I have been across Europe to many countries and the political class are almost united in their fanaticism for the European Union. Yet the peoples are not. The people want to have a Government that they can relate to and can elect and de-elect from time to time as well. We have not cut that Gordian knot.

Professor Minogue: That is absolutely the starting point for understanding the whole position. Universities periodically sink into corrupt institutions. They did when they became scholastic in the late middle ages and had to be rescued by external scholars. In our time there is a subfusc doctrine, an anti-national doctrine, an anti-bourgeois respectability doctrine, that makes large numbers of people in universities adopt a self-flattering idea that their critical credentials are at stake if they do not embrace something international, subversive, et cetera. That is not something to be elaborated in a Committee such as this one with serious business to conduct, but, none the less, there is a kind of déformation professionnelle of the academic and the educated classes that is a significant fact of our time.

Q69 Michael Connarty: You throw out so many tempting titbits that I could chase that one down the road for a long time—whether the academics of our country, or any country, have a naturally subversive nature, and whether there should be such a nature, given that we don't want the bureaucrats running our lives entirely, or nothing would ever change.

Professor Minogue: That is a sound doctrine.

Q70 Michael Connarty: Focusing on the Bill, you have said that the Bill is an attempt by the Government to give power back, but it appears to be not a consultative referendum process, but a policy-making referendum process. So, obviously, it takes the power from Parliament and gives it to a group of people who may or may not turn out in large numbers and who may divide on the issue by a small margin. You are saying that that group of people who turn up for the referendum are more valid than those people who turned up for the parliamentary process. We have seen a lot of that recently, with very right-wing politicians getting into coalitions with what were libertarian politicians. Each group was seriously damaged by that in the end in the eyes of the people who voted for them.

In the referendum situation, the people who turned out for my election to the UK Parliament may be a completely different group of people from those who turn out for the Scottish elections to the Scottish Parliament next year. Considerably fewer people turn out and the majorities are slightly different. Because of electronic voting, we now have very clear indications of who votes where—we don't have the names, but we receive the numbers for each polling station electronically for the Scottish election—so we know the pattern of votes, which is entirely different from the pattern of votes for my election. Why should that referendum process, some of which—on the technical material in clauses 4 and 6, for example—may be of very little interest to people, be more valid than the democratic will of a sovereign Parliament elected on whatever constitutional and electoral system we choose to have for our Parliament?

Professor Minogue: The answer is that no one knows. Sometimes the one, and sometimes the other. The vital point in that interesting position is the word "consultation". It is not the case that people voting in the House of Commons, who are heavily whipped, are always the wisest and the most accountable judges of what ought to be done.

Michael Connarty: If you are talking about the Whips, I entirely agree.

Q71 Chair: Professor Minogue, you are not seriously considering what happened last night by any chance, are you?

Professor Minogue: No. I suppose that the Bill does hand power over to a set of people, but I think it's also a consultation process. You are perfectly right, if a Parliament, with its own peculiar déformations, is forced to consult a set of people, what that set of people will be, what their wisdom will be and what their particular interests will be is always a dodgy matter. None the less, it is one further consultative process checking the possibility of a movement of power away from Westminster to something, in all these cases, much less accountable. So it might best, I think, be taken as a protection of accountability.

Q72 Michael Connarty: You have probably heard me rehearse the issue, sitting here now for 12 years—the Chair has been sitting here for 26 years—that trying to control the Minister who is going to sell the pass on a negotiation in the Council over my 12 years or the Chair's 26 has proven to be very difficult. By the way, I don't think it's better in Denmark or Sweden, because what they do is they find ways around the mandate. We have had many cases explained to us of how they get around the mandate. However, at least the process is well known.

I give the example of the euro vignette. What is basically a carbon tax on lorries over 12 tonnes, which could be up to £11 a day, was clearly a tax, but the agreement by our Ministers was that they would use

the transport legal base. It would not be called a tax, but be part of the transport clause so they could go around it. They didn't have a veto, and therefore they could say, "I couldn't stop it because there wasn't a veto, as it is not a tax, but transport." That will go on, and has gone on all the time I have been in this Parliament. If you think it's good to consult the people in some way in a referendum, surely there are major omissions in the Bill, in that there is no way in which the Parliament can control its Ministers through the well worn subterfuges they use. As you put it very well, they become clubbable. They go native when they go to Council meetings, and they sell things that the British people don't want them to give away. If they stood firm and were controlled by Parliament, they would not give them away.

Professor Minogue: These are corruptions that lie at the very heart of politics. I don't think there is a procedure or system that will entirely defeat them. We hope that they will be defeated by frank and free discussion and by media criticism, but as I have been suggesting, there is a sort of elite judgment of what is legitimate and decent to say and what is not. That barrier limits the extent to which people face realities. I think you're absolutely right that names are very important here, and people switch names in the most outrageous way. When you were talking to Professor Hix, I thought that was an extremely good point. I don't see how you get over that. What we have to recognise right through this is that there is no foolproof way of doing what we hope to do, which is to try to make the laws under which the British live reasonably tolerable to the British people themselves. What we now face is a situation in which they don't like whole streams of things: payments they have to make, resources such as fish they have handed over and laws about working hours. This is an extensive interference with their lives that has not arisen because the British Parliament has decided that this is desirable. It simply was the result of powers in general handed over in 1972 and developed over the years. I don't think there is a foolproof way of preventing this, but we face a political rather than a legal situation, and I think this is a move, in some degree, that would be helpful.

Q73 Chair: In terms of referendums, which would put a question to the people about European issues, whether it is the specific list set out in the Bill or more generally on the European question overall, do you think that such a referendum should be legally binding?

Professor Minogue: No. I think it should probably not be legally for some of the reasons that your colleague here has been suggesting. It would, however, be difficult, but, in EU experience, it would be by no means impossible for a British Government to defy the results of a referendum. It would have to take them on board.

Q74 Chair: Are you really saying, right at the heart of this entire operation of the Bill, that you can have all the legal safeguards or legal propositions in the world, you can speak of sovereignty in terms of a common law principle and you can have academics from different parts of the United Kingdom converging into this Committee and giving their view, from a legal point of view, but, in your assessment of this as a political scientist—if I can put it that way round—ultimately the question is one of political decision? Therefore, the issues ultimately turn out to be the decision of the electorate as a whole—as a political entity—rather than the more specific legal analysis, which is quite often given to it.

Professor Minogue: I certainly think that is how it ought to happen: it should correspond to what the demos want. On the other hand, the demos are not infallible, and that is why I put references in my submission to international declarations of rights and things of that sort, which also often cause trouble and impose rules upon Britain that the British, with changed circumstances, often find intolerable. Votes for convicts is a recent example of one that combines both issues.

Q75 Chair: Would you be worried at the thought of this being reduced to one main issue, which is difficult, of the ultimate authority in the land on these questions being the Supreme Court? Would you regard that with concern?

Professor Minogue: Yes. I would certainly regard it with concern, because the Supreme Court has a specific professional function, which is interpreting the law and not making judgments of what ought to be the rules for the country. I would be very worried about that.

Q76 Kelvin Hopkins: For me, the justification for referendums is that political systems, whichever one you choose, are all slightly imperfect. There are different outcomes. If you change to PR from first past the post, you get a different outcome. Our system has, essentially, two major parties that are heavily centrally controlled by their leadership, who control the membership of the parliamentary party as well, and the centres are both either openly pro-European or acquiesce in the European Union and are at odds with what the majority of the population clearly want.

It seems to me that, on constitutional matters, there is a case for testing the opinion of the people to put pressure on our politicians. We vote for our major parties for other reasons such as tribal reasons, because one is seen to be more socially democratic and the other is seen to be more pro-big business or whatever. We reluctantly have to go along with the fact that one is pro-European and the other one acquiesces in the European Union, and we don't really get a choice.

The change from governing ourselves to being governed by a supranational body is a fundamental one, and yet we haven't really, since 1975, been asked about the direction that we want to go in. I would have had a referendum on the Single European Act and other things since then. That seems to me to be a justification for a referendum, even though referendums themselves are not perfect instruments. It seems to be justified to get the opinion of the British people on a fundamental, constitutional change that they clearly understand and clearly don't like. I sense that, across Europe, we now have politicians, who are

ostensibly democratic, conspiring against their own people, and that is unhealthy and unacceptable.

Professor Minogue: I abound in your sense. I would revert to one of the central points of my submission, which is that what is wrong with the present situation is that we become saddled with laws and regulations made by foreigners, which we cannot repeal. The whole point of national sovereignty as it developed historically in Britain was as a result of too much law, which one couldn't ignore; one had to find some way of getting rid of it. We found legislative ways of repealing it.

We now find ourselves in the same situation in that social comment and the newspapers are full of rather idiotic rules and laws to which we are subject, many of which we did not enact ourselves, which are misunderstood by people without the corresponding common sense that would be needed to make these laws work as they were intended. This is the situation we face, and I think this Bill is a useful contribution to shifting direction.

Q77 Michael Connarty: My final question relates to the element that we passed over at the beginning. The purpose of the Bill was supposed to be to ensure that no significant transfer of power would go from the UK to the EU without the people having a say through a referendum.

Professor Minogue: No further.

Q78 Michael Connarty: Under clause 4(4)(c) the Bill excludes treaties that deal with accession—so if Turkey, Serbia or, let's say in the future, Belarus or Ukraine are going to accede. Apart from the fact that you can slip in little clauses that deal with Ireland's problems, let's deal with the big question. When an accession takes place, surely this is a major transfer of power. It changes the relationship completely between the UK and the rest of the EU. How can it be justified? Do you think it can be justified that such a referendum is excluded from this Bill?

Professor Minogue: It cannot be justified and accession should also be one of the items that could trigger a lock. There is no doubt about that.

Chair: Professor Minogue, thank you very much indeed for coming.

Professor Minogue: It has been a great pleasure.

Wednesday 15 December 2010

Members present:

Mr William Cash (Chair)

Mr James Clappison
Michael Connarty
Kelvin Hopkins
Penny Mordaunt
Jacob Rees-Mogg

Examination of Witness

Witness: **Sir John Grant KCMG**, Former UK Permanent Representative to the European Union, gave evidence.

Q79 Chair: Sir John, welcome to the Committee. As you know, we've been taking evidence from constitutional experts on the sovereignty question, and we've also had some political scientists to give a broader analysis. What we'd like to do today with you, if we may, is to look at the question of what goes on inside the system. It's somewhat opaque to many of us, but no doubt your evidence will throw some interesting light on what is going on and how you see it going on under this Bill. So I'll ask the first question, which is basically this: how would you describe the United Kingdom's influence as a negotiator in the Council when you were the Permanent Representative? Did we actually punch above our weight? What factors do you think gave the UK credibility and influence in the Council, and what would take that credibility and influence away?

Sir John Grant: I'm not sure I'm a neutral witness on that point, Chairman, but I'll do my best to be one. This is a subject I've thought quite a bit about over the years, so I hope I can give you an answer. My answer might strike you as a little long, but it may be relevant to some of your other questions judging by the evidence session with Professor Hix, which I've read. On this question of punching above our weight, I think it's quite important to be clear about the metaphor. In other words, is it one boxer versus another in a ring, or is it something slightly more unruly—a whole bunch of people fighting with one another?

I think the most important point of departure for understanding the UK's position in the European Union is to recognise that on a range of quite big issues, which tend to define Member States' political positions, we start off in a natural minority. Let me just give you two or three examples. The first point is I think the most important and most relevant to the deliberations of this Committee. If you look at the development over an extended period of the national political institutions of the Member States of the European Union, it's clear that very, very few—a handful—of those Member States have national political institutions that historically have been a success and have endured. The United Kingdom is one. If you look at Europe and the history of the 20th century, there are very few others. Now I think that's been very, very decisive in shaping the attitudes of other Member States of the European Union and the United Kingdom's attitude to questions of political integration.

I could give you quite a long list of similar considerations: the structure of our agricultural sector, the fact that we have a Common Law system, the structure of our economy, the role of the City, our relations with the rest of the English speaking world, the nature of our foreign policy etc. So we start off in a different place to the majority of our partners on a lot of big issues. Now that's changed a bit with enlargement and I suspect we'll come on to enlargement—judging by your exchanges with Professor Hix—and I'll touch on that then. Nevertheless, it remains broadly true. Given that, I think that we have often been able to exercise influence disproportionate to that starting position. I'll give you a couple of examples in a moment.

I think that influence derives from three main things: first of all, the efficiency and effectiveness of our diplomacy—in other words, our arguments and our ability to work the system. I think we've been good at that, and I think if you were to go to Brussels or Paris or Berlin, you would find that everybody thought that we'd been a bit too good at that actually. We can come back to that if you like. This is not a smart comment on anything to do with the current Government, I absolutely assure you of that, but when I was in Brussels the Prime Minister of the day had some strong political relationships in other European capitals. Not so much the obvious ones such as Paris and Berlin but others, and he used these to effect. Now, what did that mean in practice? I'll give you a couple of examples. I was in Brussels during the period of the no votes, one of the many crises of the European Union—and they're very frequent of course. There was a lot of hesitation about continuing with enlargement because it actually suited quite a lot of people in the European Union to ascribe the no votes, the lack of support for the constitutional treaty, and the general sense of malaise to the enlargement project. We succeeded, not alone but working with the Commission and some other Member States, in maintaining momentum behind enlargement when a lot of other Member States would have liked to slow it down or stop it.

Secondly, if you look back at the records, climate change became a top priority for the European Commission in the autumn of 2006, leading to the decisions of the March European Council of 2007, under the German Presidency, to set the targets that the European Union has on climate change. Now that was a very rapid change. If you look back at the public statements for instance of the President of the

Commission in the middle of 2006, climate change was not a factor. By the autumn of 2006, it had become one, and by March 2007, we'd taken some very far-reaching and significant decisions. I like to think that British diplomacy and influence was behind that.

So there are some examples. I don't think this is open and shut; you can't demonstrate it beyond doubt. My best test is if you go elsewhere in Europe and say, "Do the Brits get a better deal than they deserve?" most people will say yes.

Chair: Thank you very much.

Q80 Penny Mordaunt: I wanted to ask you what difference you think part 1 of the Bill would have made to the way you operated as the UK's Permanent Representative?

Sir John Grant: I think very little. By definition, the working groups of the Council, the Committee I sat on, and indeed the Council of Ministers, are working within the competence of the European Union. Now that doesn't mean there aren't disputes about competence. There have been occasions when the United Kingdom, for instance, has taken a different view from the majority of Member States and the Council Legal Service on where the EU has competence, but you can't negotiate on legislation if there isn't competence. Since the Bill concerns itself with changes in competence or changes in voting procedure, I think it would have made no difference. If I can just add a point that may be implicit in your question: except at political level, principally in the European Council, occasionally in Ministerial Councils, but certainly among officials, negotiations in Brussels take place on the merits of the issue. We form alliances of convenience in order to pursue the national interest. So, if this was behind your question—and it might have been—a Permanent Representative of another Member State doesn't sit there thinking, "Those Brits have got this unpleasant piece of legislation and therefore I'm not going to support them on this issue." If it happens to suit him for his negotiating purposes he will do so, and vice versa. So I think it would have made very little difference.

Q81 Michael Connarty: Sorry, I was slightly late. Welcome, and thank you for taking the time to come and see us. I'd like to ask about the idea of having a whole wedge of issues that are subject to a second control mechanism, like our referendums and all these things in section 4 and section 6. In your experience, do you think that they will be viewed by other members of the Council and the people you worked with in COREPER as an extra barrier and difficulty in dealing with what in many cases will be qualified majority votes, eventually, on a lot of these issues? I'm trying to get into my mind, if we pass this Bill and into an Act, what that will do to the way decisions are made in the Council. I don't know if you've thought about the new environment where there's clearly a lot more influence from the Parliament and a lot more troika meetings. Is it troika meetings where they actually get together and deal with final difficulties of final drafts?

Sir John Grant: Yes.

Michael Connarty: How do you think this will affect that process? The Government says it's signalling to people that Ministers are not free agents. When they go to the Council, they may be called back to put their views to a vote of the people.

Sir John Grant: I understand exactly why—and I've tried to do this in my mind too—it would be good if one could give a general answer to that. But I think it is quite difficult, because the only way of doing it is to look at the specific areas of competence covered by the Bill; in other words, those areas where, in practice, it seems extremely unlikely that we will be able to make a transition from unanimity to qualified majority. At least, that is the conclusion that other Member States and Commission will draw.

The question you then have to ask is: are any of these issues ones to which the rest of the EU, if we can call it that, is going to attach a very strong political priority? Or are they going to shrug their shoulders and say, "Well, we are not going to be able to make progress on this. Does it really matter? Is it existential, either for us as a Member State or for the European Union?" I think at the moment the answer would be that none of those issues fall into that category. I am, as it were, looking at this from a technocratic point of view, but in the end this is a political—I was going to say this is a political union, but I shouldn't use that expression in this Committee. But the European Union is driven by politics, and if you go through the specific issues that are caught—if that's the right word—by the Bill and say to yourself, "Well, where are the interests in Brussels that are going to rise up and feel like the United Kingdom is frustrating an essential piece of legislation?", I think, subject to one point, which I'd like to make now, if I may, we are not in that situation now. I can't rule it out for the future, because anyway, this Government has been fairly categorical about its refusal, irrespective of the Bill, not to countenance this. So I'm not sure it changes very much on a view of a few years.

What is it that the European Union is preoccupied by at the moment? It's the financial crisis and the future of the euro. The reason, therefore, that I don't think this Bill will impact on the major preoccupation inside the EU at the moment, on my reading of it and my reading of the treaties—remember I'm out of the game now, so I've had to mug up on this—is it doesn't seem to me the Bill will have the effect of frustrating that, because of the arrangements that apply to the United Kingdom and the terms of the Bill. I think that's the fundamental point. But I'm not absolutely certain about that, because I haven't had the chance to get expert advice, but I think that's the key issue.

Q82 Michael Connarty: You were going to enter a caveat; you said "with one exception."

Sir John Grant: That's my euro point. If you look at the politics of, let's call it Brussels by shorthand—the rest of the European Union as a whole—the issue is the euro and the future of the euro. For instance, on Saturday in the *Financial Times*, there was an article, I think from a Franco-German summit the previous day, saying that Angela Merkel and Sarkozy had called on their eurozone partners to draw fundamental

lessons from the debt crisis and take steps towards political integration. When you read the article, it wasn't political integration in the historical sense of the world, but that's the issue of the day and I suspect several years to come. If a situation were to arise where the United Kingdom by virtue, for any reason, was to set an immovable roadblock in the way of changes that the members of the eurozone thought were necessary, then I think that that could have a very significant impact on our relationship with our partners and on work in a broad range of contexts in Brussels. Subject to that, I myself don't see a major issue. There may be specific issues, but I can't identify them I'm afraid.

Q83 Chair: Could I perhaps offer you one? I have an amendment down to the Bill relating to the proposals for having an Act and a referendum. This relates to the treaty proposal relating to the application of the financial stability mechanism. What I've proposed is that any extension of the use beyond the Republic of Ireland—i.e. down the road to Portugal or Spain—would require an Act or a referendum, where you would therefore have a natural convergence of political and economic requirements in our national interest, together with something that does impinge on the euro and its stability in terms of whether or not there would be a bail-out for Portugal and for Spain or anybody else. Now, don't you think that is the kind of situation where—I am asking you for an opinion about whether there should be a referendum—there would be quite a lot of very serious reaction on the basis that the UK was going to say "so far and no further," in terms of financial bail-out.

Sir John Grant: Yes, I mean, the devil is always in the detail of these things, and I'd have to think it through. I go back to my general point: if by virtue of either this Bill or anything else the United Kingdom was going to act in a way that was, as I described it, an immovable roadblock, then I think that that might create a significant reaction from our partners, as I think you'd expect it to.

Chair: As was intended. I think you've answered the next two questions. Jacob, would you be kind enough to refer to question five?

Q84 Jacob Rees-Mogg: Thank you very much. If there were to be new treaty negotiations, so beyond dealing with the existing competencies, do you think the Bill would strengthen or weaken the position of the United Kingdom—increase or decrease its credibility?

Sir John Grant: One of the reasons I hesitate is because I've taken the view for some time, and by some time I mean a number of years, that there wouldn't be, after this treaty, a new wide-ranging treaty for very many years to come. The whole history of the Constitutional Treaty and then the Treaty of Lisbon suggests to me that, quite apart from the position of the United Kingdom, there isn't a readiness in the rest of the European Union collectively to have such a treaty. My own view is that it is a hypothetical question. Perhaps the best way to answer it is to look back a bit. The Prime Minister of the day, Mr Blair, announced a referendum before we completed the negotiations on the constitutional treaty. We had a number of red lines; we maintained those so-called red lines. I think the assumption that other Member States drew was that Mr Blair thought he could win a referendum and that if they met his points on the red lines that would be enough. So in that particular case it didn't make an enormous difference in the endgame. I think this is the right answer: if you're seeking to prevent something, and the general expectation is that it will be extremely difficult to win a referendum in a country, then it makes it easier for you to prevent the things you are trying to prevent.

Chair: Could I just ask on that? Andrew Duff, in his evidence, says that actually the European Union, he uses I think it is the Walter Hallstein analogy of the bicycle, and if you want to keep it going you have to keep on pedalling. So is it so hypothetical?

Sir John Grant: I don't agree with the analogy—well, I agree with it up to a point, but that doesn't necessarily mean treaty change. The European Union started as an exercise in using treaties to create institutions. That approach to the development of the European Union has historically been very strong, is still strongly held in what I now believe is a minority of Member States, and that view is held by a not insignificant number of Members of the European Parliament. But I don't think that it has to mean the development of institutions and process through treaty change. For instance—and this is a slightly slippery argument; I will try and make it clearly—the Treaty of Nice wasn't a perfect treaty, but the assumption in what I'm generically calling Brussels was that the reasons that the European Union quite frequently wasn't acting as effectively as the Member States and those involved in it would wish was because there was something wrong with the institutions or the voting procedures. I don't take that view. The accumulation of legislation is not axiomatically a route to the effectiveness of an organisation or a set of institutions. What seemed to me to have happened, probably starting in the late '90s but certainly was the case by the beginning of this century, was that Europe was being measured by a different series of tests. It was being measured by a test, for instance, of whether it was contributing to the economic success of the individual Member States in the European Union as a whole. The reaction of quite a lot of people was, "We need another treaty." In my view it is not likely to make an enormous amount of difference to that particular test; nor—well, we'll see—to some other things. I know Andrew, and in many ways I certainly respect him and I admire him for some things, but I think that's a slightly depressing conclusion to draw, that the only way that the European Union can succeed into the future is to have more treaties. I simple don't buy that.

Chair: Okay, thank you very much. Now, Professor Simon Hicks claimed in his evidence that there was evidence that backed up his claim that where there were significant domestic constraints on the Government in negotiations on treaty change, the Government can credibly threaten that an agreement will be rejected domestically if it doesn't gain

sufficiently in the negotiations. The consequence, at least in his view, is that the greater the constraints on domestic Governments in any such negotiations, the more likely they are to gain in bargains unanimously. Now, Denmark and Ireland he gave as examples of this, but he also went on to say that France and the United Kingdom strengthened their hand in negotiations on the Convention on the Future of the Europe when they announced that referendums would be held. James, would you like to take up the next question on that?

Q85 Mr Clappison: Yes, I think you've already touched on this, but when you draw on your experience of what happened after the Prime Minister of the day, Mr Blair, announced that there'd be a referendum on the Constitutional Treaty, I think it was implicit in your answer that you thought that States were then looking to see how they could accommodate him, if they could, within their negotiating positions.
Sir John Grant: Yes, what other Member States would want to know in that case is what do you need to win the referendum, and they got an answer. It wasn't an answer that was radically different to the answer they were getting—indeed, not significantly different to the answer they were getting three or four months earlier. Remember, and this is etched on my memory, we had a negotiation in the autumn of 2003. There was then a hiatus after the European Council of December 2003 collapsed. Everybody was expecting an agreement. President Chirac and Chancellor Schröder weren't ready for that. We all collectively gave up for a bit, and then we came back to it under the Irish Presidency. In the interim, the Prime Minister announced his intention to have a referendum. Most of the negotiation was done. So that is completely different from going into a negotiation with a referendum requirement behind you. It is different in concept.

Q86 Mr Clappison: We're also requiring various procedures to be followed in the case where a passerelle clause is implemented and there is a change in the voting referendum requirements on internal Council procedures. Do you think this will have an effect in negotiations as far as that's concerned or not? Will the same thing happen?
Sir John Grant: No, I don't think so. I think two things can happen then. I may not have been listening carefully enough; are we talking about the movement from unanimity to QMV or the simplified?

Q87 Mr Clappison: Yes, unanimity to QMV where there's a requirement in the Bill dealing with that. Would that have an effect on the Member States in their approach towards the UK, or not?
Sir John Grant: A bit. So let's take a hypothetical example where the Commission bring forward a proposal under unanimity for a piece of legislation that is desirable. The United Kingdom supports it; most Member States support it; but two don't. Then the next question is: will those two be prepared to agree to move to Qualified Majority Voting, so they can be outvoted? It's inherently unlikely, but I suppose it could happen. I don't think it's very likely in practice. So the other possibility is that in anticipation of such a problem an attempt is made to engineer the move from unanimity to QMV, so that you can outvote somebody who'd be opposed to it under unanimity. It's on the margin—isn't it?—once you think it through.

Q88 Mr Clappison: On a different subject, drawing on your experience, you referred earlier on to the Franco-German meeting that took place. Looking at it from the outside, this always seems one of the curious things as far as the EU is concerned, that those two countries have their own meetings where matters are discussed between them, as arguably the two most powerful members of the EU. What effect do you think those meetings and the message that comes out of them has on other states, particularly smaller states?
Sir John Grant: It depends on the message. It's quite a pragmatic world. People have got used to the idea of close Franco-German co-operation, and it's become clear over a number of years that that co-operation isn't always trouble free. It is a commitment by both those countries; it's institutionalised.
Mr Clappison: But there is a recognition on each side that it is of their benefit to keep that going.
Sir John Grant: It is, and they are both prepared to compromise in order to keep it going, which is the crucial element in it. So do people resent it? Yes, sometimes, and I think recently they may have, from what I read in the press—for instance, over the question of a new treaty, if I understood what happened between Merkel and Sarkozy correctly. But it's a fact of life, and so people sometimes resent it.

Q89 Mr Clappison: But pragmatically, is there an effect upon smaller states that they see the message coming from there and they then want to fall into line with what's been decided or take advantage in whatever way they can of the message that's coming out?
Sir John Grant: Yes, because if something has the support of France and Germany, it has enormous political momentum, and therefore people look at it and say, "There is a high probability that this will happen. Can we frustrate it?" It doesn't always happen. If you go back, for instance, to June 2004, when there was very clear Franco-German support for Mr Verhofstadt as President of the Commission, that didn't happen.

Q90 Chair: Could I follow that by asking a question relating to the manner in which majority voting applies, where those countries economically dependent upon Germany have a tendency to vote with her. Ronald Vaubel of Mannheim University has written quite extensively about what he called "regulatory collusion"—the application of majority voting to secure a comparative advantage to certain blocs—and of course Germany does have economic ties with the Czech Republic, Hungary, Poland and the rest of it. Do you think that in general, despite the Franco-German alliance if you could put it that way, there is an inevitable centre of gravity which we've seen recently in relation to the euro questions, where

Germany does have a predominant influence when it comes to economic questions?

Sir John Grant: I think its influence reflects the size and success of its economy. The point you make is very interesting; I have never noticed it, but perhaps I've been looking in the wrong place.

Chair: I'll send you the paper if you're interested.

Sir John Grant: Yes, I would be interested. People tend to vote in the Council, in my view, in relation to their interest on the question, so countries will look at the piece of legislation and say, "Does it suit us?" There's very little, in my experience, of people saying, "We'll vote for that, although we don't like it very much, because we're dependent on another Member State for something else." In my experience, there's very little of that. But I think that, given the success and the size of the German economy and its importance for the work that's going on in the eurozone, what has happened is very logical. It may be that if you take a snapshot of the past 12 months, where the preoccupation of the EU has been the eurozone, and for the reason I've given Germany has played the absolutely decisive part in decisions on that, that doesn't extend to the rest of the EU. Britain retains very significant influence in Europe, despite the fact that it's not a member of the euro. Sweden was able to conduct a successful presidency of the European Union despite the fact that it's not a member of the euro. I never felt in COREPER—and I hope I speak on behalf of the Swedes—nor I think did I sense at least that the Swedish negotiating position suffered on other issues outside the Ecofin sphere, and indeed not always within the Ecofin sphere, because it wasn't a member of the euro. My point, Chairman, is that I think you're quite correct to identify the decisive German influence. It will always be very significant because of the country's size and importance, but it's disproportionately high in relation to the euro.

Chair: And, of course, there is Thomas Mann's remark about whether it would be a European Germany or a German Europe? Perhaps we'll go on from there.

Q91 Kelvin Hopkins: What is your view of the credibility with which this threat of the Bill's referendum locks will be viewed by other Member States?

Sir John Grant: Well, I think that is very credible, because if the United Kingdom passes legislation that requires it to have a referendum then people will assume that it will. Forgive me if I'm going to be anticipating incorrectly what lies behind that question. There was a point in Professor Hix's evidence where he thought there would be a point at which people wouldn't think it was credible. I think that he might have referred to environmental taxation in that respect.

Chair: Carbon tax.

Sir John Grant: Yes. If every other Member State of the European Union was ready to take a unanimous decision to move to Qualified Majority Voting, so that legislation could be passed on a carbon tax, then I think what was really behind Professor Hix's point, if I can reinterpret him, is that people would say "Surely, you can't be serious?" If the United Kingdom was one of those countries that wanted to pass this piece of taxation then all the more so. I think in that quite narrow respect, this issue of "Surely, you can't be serious" might well arise. It seems to me the answer would have to be: "Well, we are absolutely serious." But I think you have to look at the specific issues, and I think on the issue of carbon taxation, for instance, we have an emissions trading scheme in the European Union, it's several years since I looked carefully at it, but I'd be very surprised if the issue of a carbon tax in addition to that was actual, and the emissions trading scheme, any adaptations to it are decided by qualified majority. So, hypothetically, it raises an interesting issue. I just wonder in practice how pertinent it is.

Q92 Kelvin Hopkins: Supplementary to that, if I may Chair, I would guess this would depend to a large extent on the previous position of the Government of the day to the European Union in general. A Eurosceptic Government would use the threat seriously, and there's also the likelihood that the introduction of any kind of referendum in present circumstances, with a high degree of Euroscepticism amongst the public, would imply a no vote. But if there were a Government led by somebody like Tony Blair, a Euro-enthusiast, they would use every trick to make sure we got round the problem. I speak as a Eurosceptic of the left, I may say.

Sir John Grant: I think I knew that already, but I certainly deduced it.

Q93 Kelvin Hopkins: This is how I would have seen it. The previous position of the Government of the day, plus the threat of referendum lock, together would make a difference.

Sir John Grant: About whether others perceived this as credible?

Kelvin Hopkins: Yes, yes.

Sir John Grant: Well, yes, but for the reasons I gave, I think, that we're talking probably five years ahead, at least. We're talking about a situation where we were the only Member State seeking to stand out against a move to Qualified Majority Voting, so that somebody else could be outvoted. The point about the passerelles is that—they're significant in a way, of course they are, they're there for a reason—but it's very difficult to use them, whether or not there is a referendum Bill. It seems to me that what the Government is seeking to do is to put beyond any doubt its position on the matter and its assessment of the relative importance of that and the way it wants to deal with it, but the reason passerelles aren't used very much is that everybody's got to agree that some of them are going to be outvoted. Let's say, I'm sitting in COREPER and I'm blocking something. I promise you, it did happen.

Chair: That's very encouraging.

Sir John Grant: I thought you'd say that, Chairman, and I can provide lots of witnesses to confirm that to the Committee. And there's a passerelle clause, so one of my very irritated colleagues says, "This is absolutely intolerable. We must use the passerelle clause. John, will you agree to use the passerelle clause, so that you can be outvoted?" I wouldn't have felt uncomfortable.

Chair: Can we move on to enhanced co-operation?

Q94 Michael Connarty: It is interesting that you mentioned the one example of carbon tax and the fact that we have an emission trading scheme, which is a form of taxation of businesses.

Sir John Grant: I didn't say that.

Michael Connarty: It's an interesting one because I did point out, when that was being discussed in evidence, we had actually passed in the Committee an agreement by the Government to the Eurovignette, which of course is a carbon tax on lorries over a certain weight. I've been talking to my road haulage industry in my constituency since and it's exactly what they see it as. But it went through without anyone calling for anything. Even the people in the industry would say they were consulted but ignored, because they didn't want to have to pay extra taxation on their lorries for the benefit of the EU climate change agenda. The interesting thing having you here is that you've been in the COREPER situation where these negotiations go on, where the things are ironed out, and according to one of the past Commissioners who came here in a previous Committee, she said that basically, if a couple of big countries object to something, then the Commission take it away and find another way of doing it so that you don't have a major fall-out. But what the Government seems to be doing with this Bill is saying there are a number of issues. One, the Government will have to want to do it, because they won't call a referendum on something they're opposed to, because they will vote it down in the House. But then we have to have a referendum before we can agree. I'm trying to get the scale on which this will cause changes in behaviour in the way Europe makes its policy, and particularly, will there be, in your opinion and from your knowledge, a tendency to go for more enhanced co-operation and leave the UK behind if the UK won't play ball?

Sir John Grant: I note, incidentally, on enhanced co-operation that Professor Hix said that he thought that referendum locks strengthen your position, but he also predicted that there might be greater use of enhanced co-operation. There is a slight contradiction between the two. There can only be enhanced co-operation where there is competence. So those provisions of the Bill that relate to the transfer of competence to the EU are not relevant to enhanced co-operation. That's, in my view, the guts of it, because, partly for the reason I've given, passerelle clauses—I'm not saying they can't and won't be used—can only be used a limited number of times. So enhanced co-operation will only arise where there is unanimity full stop—there is no scope for a passerelle, and at that point the question of the Bill is not relevant because, if we are blocking something, we're blocking it—or where we are blocking the move to a passerelle.

I'm not certain about this, because I haven't been able to talk to a lawyer about it. I don't think the question about whether the Bill will lead to more enhanced co-operation is a very big question. It's a good question—you have to ask it—but I think the answer is: maybe in the odd, relatively limited case. But because, by definition, it can't increase the competence of the EU and enhanced co-operation can only be based on the competence of the EU, it's not the big question. The more interesting question—I haven't been able to think it through and I apologise to the Committee for that—is whether enhanced co-operation will be used at some stage in the future downstream of efforts to deal with the problems of the euro.

Q95 Michael Connarty: I think then it all turns on what does Europe do? I remember during the constitutional convention when the EU had 100 amendments, all of which were rejected when Peter Hain put all these things on behalf of the EU and the UK and they were all swept aside, we still went on, and then we ended up with the Lisbon Treaty. It was quite clear at that time that we were seen as being a bit irritating, the UK. We had a particular role, we were seen to be slightly annoying, but the machine rolled on. Politically we were tolerated, in a sense, and we didn't necessarily lose a lot of friends; we just saw that as being the British way—we were being awkward. What do you think, if enhanced co-operation or some other strategy is adopted, will happen in terms of the UK's influence? We have all this list of things at which we are going to throw a spanner in the works and hold everyone back and keep having to refer to all the things of this new Act that we have to take into consideration every time we sit around a table with our colleagues in Europe. What will happen then, if, as you say, it's not enhanced co-operation? What will happen, and do you think what will happen will see us sidelined in some way, or weakened in our negotiating position, because we have all these burdens we carry now on all these matters? Of course, Professor Hix said that they were not very significant, but we're just adding them to the things we have to be awkward about in our negotiations. How do you think you see that playing out? If it's not enhanced co-operation, what will other EU countries do to get around our awkwardness?

Sir John Grant: I think that there may be some specific cases, and I can't predict them, where our awkwardness will hold something up that they will want to do. But I think that they'll be quite specific, because I don't think that they, the other 26, collectively want a new wide-ranging treaty. I do think they want to take action in relation to the eurozone and that they will be able to do so within the terms of the treaties and the Bill. We may frustrate the odd move from unanimity to Qualified Majority Voting, and there may be other cases where—again, I can't predict them—it makes sense to others to add a small piece of competence to part 3 of the treaty where we prevent it. But if you look back over the history of the past 25 years in Europe, I don't think this will be regarded by anyone in Brussels as a qualitative change in British awkwardness. You're exactly right: we think of ourselves as the grit in the oyster. There are different views on that, but we've always been the biggest problem, and this confirms that. We were a problem in a whole series of respects during the last Government's time, whatever the views of Committee members may be on the policies of that Government. The reason for that, the underlying reason and the reasons I tried to give at the beginning, is that our point of departure is different.

Can I add a point that is germane to your question? That has changed, first because of the accession of Sweden, Finland and Austria—Sweden and Finland in particular—and also because of the other rounds of enlargement, because we have a greater community of interest, not on all issues, but on a number of issues, with those new countries. It doesn't alter the fact that, by and large, we have more problems than anybody else. This is another problem, and I don't think it will fundamentally change the dynamic in Brussels in any significant way, unless I'm completely wrong in my analysis. Where it would become dramatic would be if everybody woke up tomorrow morning and said, "There's only one way to sort all of this: we need another treaty." But do you really think that there is an appetite for that in France, the Netherlands, Ireland, Denmark or the Czech Republic? I don't think so.

Q96 Chair: Can I ask a question on that, because we've already got Chancellor Kohl in the past, you referred to the past 25 years, talking about the convoy? That was at the time when they were trying to drive things forward. Now, they wanted enhanced co-operation for that purpose—in other words, there would be an inner core, which is not dissimilar to the eurozone problem as Wolfgang Münchau, for example, and others are now addressing it in the *Financial Times*. So that there is a question surely that we may prove to have been right, or at any rate some parts of the opinion making elite in this country have turned out to be perhaps more right than wrong. Is it not possible that, where you've got Schengen, you've got opt-outs, you've got enhanced co-operation, you are effectively beginning to witness, under the pressure of economic reality, a shift in the dynamics of the European Union, so that there is something that is approximating an association of nation states as compared with the centralised, uniform system on which the whole system has been constructed. There may be resistance to this, as you've indicated, but isn't that the direction in which the dynamics are taking the Union as a whole?

Sir John Grant: I think you had this discussion with Professor Hix. Am I right about that? I agree with his answer. His answer was that, and I'm paraphrasing it now, there is difference between a loose association of Member States and a set of supranational arrangements where not all Member States are participating; so, clearly, arrangements for the euro are fully set out in the treaty. I think the beginning of the treaty says something like the European Union shall have a currency which shall be known as the euro. Now, the fact that there are then a set of arrangements that mean there are either legal opt-outs—we have a legal opt-out—or other Member States have de facto opt-outs, doesn't alter the fact that it is supranational. I think it has been true for a long time that we have had an EU where there was—the phrase "variable geometry" was very fashionable at one point—a core of activity focused around the single market, and not only the single market, of course, but that's been the guts of it, which everybody's had to participate in, and then there have been some other parts of the project where there has been a greater degree of choice. That trend has existed for a long time. My guess is that it will be accentuated by the response to the euro crisis. So I go back to this article in the *FT*—I can't find it now; I should have underlined it—but anyway, this talk about if you go underneath the euro crisis, what is the problem? The problem is lack of convergence between the economies that are members of the euro. That is the underlying reason for the problem. So any long-term solution has to address that in some way.

Q97 Chair: And lack of growth.

Sir John Grant: Yes, absolutely, lack of convergence around things like growth, so you have an enormous difference in growth and wage costs, and all those kind of things. In order to find a solution to the problem you have to address that in time in some way. I don't understand Wolfgang Münchau's articles, Chairman; I am glad you do, because they are too complicated for me. But there will have to be a number of steps taken within the eurozone to deal with the problems that have arisen, and we won't be part of that process and a large number of other states won't be part of that process either. But that doesn't make it a loose association of Member States.

Chair: Thank you for that.

Q98 Jacob Rees-Mogg: May I just continue on that, Chair, rather than coming immediately to the next question? I think what you are saying is extremely interesting and important. The euro has a crisis; they are not going to say the euro's failed and we go back to ordinary currencies; and therefore the argument for more integration rather than less becomes very strong, saying we've got to have a closer political Union, a closer fiscal Union, and therefore we need more of a single Government across the eurozone countries. Now we're obviously outside that, but if there were to be a move in that direction it would require a big treaty rather than a little treaty. What then happens to our position? Do we then become a satellite looking at or attached to this big central body? Do we find that there's a new body that we're simply outside and are basically irrelevant to? Do we try and block it by saying we don't actually like a treaty that leaves us so far on the outskirts? How do you think that would develop, and what effect, ultimately, would our referendum lock have or not have on that?

Sir John Grant: First of all it's very early days, and I don't think that you would need—remember, I make these remarks with real hesitation because I'm not an expert in matters related to economic and monetary union—a new big treaty. It doesn't seem to me that the kind of issues that you face would require a new big treaty. I might be wrong, but that's my assumption. Incidentally, I think a new big treaty would be very difficult, even if it only involved members of the eurozone, completely hypothetically. Of course, it would require our agreement if it was to be within these treaties; that's absolutely clear. So I think that, if I may say so, we just have to take this exercise; we have to observe what's going on not one step at a time, exactly, but we shouldn't jump all the way to the conclusion and assume that there will be a further wide-ranging move to political union via a new treaty. That doesn't seem to me to follow at all, not least because I don't see how treaty change, in

other words changes to the institutions and to the voting procedures, even if you could agree it, and it was difficult enough last time, would address the kind of issues that are causing the problems of the eurozone.

Q99 Chair: I know that you have to get off, Sir John, so I wonder if we could move on. If you could give a brief answer to the question about the reasons for the passerelle clause in the Lisbon Treaty, what is your judgment about that?
Sir John Grant: The big one?
Chair: You've done some aspects of it already, but what is your view about the reasons for the passerelle clause in the Lisbon Treaty?
Sir John Grant: The passerelle clause, if you call it that, allows you to change the treaty within the treaty, as it were; it allows you to change part 3. I think that was just a feeling that this binary situation, where either you've got to do the whole lot and chuck everything into a basket, or nothing at all, wasn't very practical. That's right, incidentally. There are some things that, objectively, probably would make sense to do without having to have a new treaty. So I think the reason for that was common sense; the reason for the other ones was that was the compromise.

Q100 Penny Mordaunt: Do you think it is likely that this Bill could trigger similar constitutional constraints in other Member States? If so, is there a risk that it could lead to gridlock?
Sir John Grant: No, I think, is the answer to both questions. It might do. Another Member State might feel under intolerable political pressure to do the same, but I'd be surprised. On the gridlock, I take the view that people are not going to say, "We really want a new treaty but we're not going to have one because the UK has a referendum Bill." That's my view over the next few years, not least because I don't think anyone believes that the present British Government would be ready to countenance a new treaty, even if it didn't have the referendum Bill. Nobody is knocking on the Prime Minister's door, as I understand it, saying, "This is a terrible thing, Mr Cameron, please rethink; we must have a new treaty." Again, it's a slightly theoretical question.

Q101 Chair: Thank you. We're just sorting out the next questions because of the time factor. How important, do you think, is the effect on the balance of power within the Council and the accession of new Member States? That is not intended to explicitly be a Palmerstonian question, by the way.
Sir John Grant: I'll try not to give a Palmerstonian answer. I think it's important on the balance of power. I noticed in Professor Hix's evidence that the question came up of whether accession should be covered by the Bill, and perhaps that question is coming, I don't know. Yes, it is important, because what it does is, it changes alliances. It changes alliances between the Member States of the Union. I've said earlier on more than one occasion this morning that he accessions of 1994–95 and Central and Eastern European enlargements have changed the so-called balance of power overall to the United Kingdom's benefit. In other words, we've had more allies on more issues than was the case when we were 12. So in terms of alliances, I think it is significant.

Q102 Michael Connarty: Turning to one of the, I think, most significant things—it's not an omission, because it's quite clearly covered in section 4(4)—the Bill excludes, and the Act will exclude, the need to use referendum on accession treaties. It seems to be one of the most fundamental questions before the EU and the UK in the next decade; for example, the accession of Turkey. Do you think it's consistent with the stated aims of the Bill and constitutional constraints placed in part 1 on other matters to have this exclusion and say we will not use referendums for accessions?
Sir John Grant: It seems to me it actually is consistent, because the Bill, as I understand it from what I have seen and what ministers have said about it, seeks to deal with this question of the transfer of power from a Member State, from the United Kingdom, to the supranational level, as it were, so transfer of competence. That idea is extended to cover voting procedures, for reasons I understand, if I can put it like that. Whereas accession: one, it takes place very clearly within the existing powers and on the basis of the existing competence of the treaties; and secondly, and I think that this is also a point, what happens when there is an accession is that a slab of your votes and of your relative weight in the Council goes to the acceding Member State. That's what happens. It's very oversimplified, but we have X percentage of the current EU; if the EU gets bigger, our percentage goes down a bit in order to ensure that the new Member State also has votes and MEPs. Now, that's not the same as transferring power to the supranational level. So I think there is a very real distinction.
Michael Connarty: Can I challenge you in that?
Sir John Grant: You may, Mr Connarty.

Q103 Michael Connarty: Because when an accession takes place, the Single European Act means that anyone from within the new extended EU can travel anywhere. They don't necessarily have the right to work or to live, but they can travel. So suddenly you're saying anyone can come from any of these countries, and we've seen stories where there has been quite a substantial amount of what appears to be temporary migration. In reality, people come in as visitors, so-called, and stay for ever. Interrogate any of the people selling the *Big Issue* on the streets of London or the streets of Glasgow, and they're not working. They're here as visitors under the Single European Act. But they've quite clearly taken over that area of begging, shall we say, to allow them to remain here, but they're from countries that don't have the right to come and reside or work, but because they're in the EU—I'm talking about Romania and Bulgaria—we have no control over their movements. So we give away massive powers to the EU when we have an accession without anything to do with voting in Council or distribution of any other powers that would be specifically under section 4 or section 6. It totally gives away power, so how can it possibly be

excluded from a Bill that's supposed to guarantee the people of Britain the chance to say when those powers will be transferred? You can't avoid the Single European Act if someone is allowed into the EU.

Sir John Grant: The general point, that accession is significant, I accept. I'm not sure I would have characterised its significance in exactly the way you have, but I absolutely accept the point. But the decision that the new Member States should accede is fully provided for in the existing treaties, and my reading of the evidence given by the Foreign Office Minister who came to the Committee and the other things I've read about the Government's position on the Bill suggests to me that their objective was to address the question of the transfer of competence or power as defined as a change from unanimity to Qualified Majority Voting. Given that that's the position that the Government has taken, accession seems to me to fall clearly outside those two broad definitions. That's my only point.

Chair: Could I ask one final question? Alright, go on.

Michael Connarty: They've said, in section 4(4), they're excluding it. Now, I don't think that's a response to the statement that they are not going to allow the transfer of power. So we will have to disagree on that one.

Chair: There we are. James, you will have to be very quick.

Q104 Mr Clappison: Very quick question: your answer was predicated on the assumption that the Bill was just dealing with the transfer of power. If one took a different approach to it and one said one wants to give a say possibly to ordinary people, the electorate, in what happens in the European Union, which might have an effect on their lives, then you'll all take a different view. Some accessions would clearly have a very big effect on people's lives, as the last one did through migration and other things.

Sir John Grant: But that applies to a whole range of decisions that are taken in the European Union. One of the things that I noticed in your first Report was a very powerful paragraph in the introduction about the range of areas where European Union decisions and legislation impact. It's a very long list, and I'm sure it was a comprehensive list; it looked to be. So the fact is that, whether one approves of it or not, a very wide range of extremely significant decisions are taken at the EU level. You could take the view, and I think one of your witnesses did, that there should be far more referendums in the UK. I just think that what you're saying is if the bill was trying to do a different thing it should be different. I agree with that, but it's trying to do one thing and I think that the omission of accession is logical with its stated objectives.

Mr Clappison: Yes.

Q105 Chair: I hope you'll forgive me for asking a last very brief question for a brief answer. Against the background of the daily lives issue and the impact it has on people, do you not think that it is time that we had a much more transparent way of knowing who casts which votes in the context of both COREPER and also the Council of Ministers, so we know who is calling the shots?

Sir John Grant: I'm very surprised that you don't feel you know when the United Kingdom votes in favour of a measure or against it in the Council. I am genuinely surprised.

Q106 Chair: Well, I'm surprised that you're surprised, in that case, but there you are.

Sir John Grant: I thought it was always in the *Financial Times*?

Chair: Ah, that's another question.

Sir John Grant: No, there is a point. Yes, but if you're saying there should be a formal system for communicating to Parliament, to this Committee and to other Committees those arrangements—

Chair: That's what I had in mind.

Sir John Grant: Yes, I think I'd prefer not to express a view on that question if you don't mind.

Chair: I thought that might be the answer—very diplomatic. Thank you very much, Sir John.

Written evidence

Written evidence from Michael Gordon, Lecturer in Law, University of Liverpool

RE: PART 1 OF THE EUROPEAN UNION BILL
(RESTRICTIONS ON TREATIES AND DECISIONS RELATING TO THE EU)

1. The call for written evidence issued by the European Scrutiny Committee acknowledges the potentially important impact that Part 3 of the EU Bill could have on the doctrine of parliamentary sovereignty. It is important to note, however, that the doctrine of parliamentary sovereignty may also be affected by Part 1 of the EU Bill. For, in requiring referendums to be held in a range of situations before further competence or power can be transferred from the UK to the EU, Part 1 of the Bill can be seen as attempt by the present Parliament to bind its successors, something traditionally thought to be constitutionally impossible.

2. This submission will contend that this traditional understanding of parliamentary sovereignty can no longer be supported, and seek to explain why the steps taken in the EU Bill to place "referendum locks" on future Parliaments are constitutionally permissible. Nonetheless, given the undoubted significance of the measures here proposed, the constitutional desirability of making these fundamental changes to the legislative process must be fully explored.

3. In what sense can the EU Bill be said to be an attempt by Parliament to bind its successors? By Clause 2, a treaty amending or replacing TEU or TFEU can only be ratified once approved by an Act of Parliament which must satisfy either the referendum condition or the exemption condition. The approving Act must therefore either (i) provide for a referendum to be held on the proposed treaty changes; or (ii) provide that the proposed changes do not have the kind of impact caught by Clause 4. An Act of Parliament which purported to approve the ratification of a treaty amending or replacing TEU or TFEU but which satisfied neither requirement (i) nor requirement (ii) would be insufficient to authorise the proposed alterations. Therefore, when a future Parliament seeks to legislate to authorise the amendment or repeal of TEU or TFEU, whether a referendum is deemed to be required or not, an additional legislative hurdle has been put in place by Clause 2.

4. Similarly, by Clause 3, a Minister may not confirm an Article 48(6) decision of the European Council unless it has been approved by an Act of Parliament which must satisfy the referendum condition, the exemption condition or the significance condition. In relation to Clause 3, the approving Act must therefore (i) provide for a referendum to be held on the proposed decision; or (ii) provide that the proposed decision does not have the kind of impact caught by Clause 4; or (iii) provide that the decision falls within a specified part of Clause 4 only, and will not have a significant impact on the UK. An Act of Parliament which purported to approve the adoption of an Article 48(6) decision but which satisfied neither requirement (i) nor requirement (ii) nor requirement (iii) would be insufficient to authorise the change proposed. Again, therefore, as with Clause 2, when a future Parliament seeks to legislate to authorise the adoption of an Article 48(6) decision, whether a referendum is deemed to be required or not, an additional legislative hurdle has been put in place by Clause 3.

5. The actual impact in practice of these additional legislative hurdles will of course vary depending on whether the Minister deems a referendum to be required or not. When a referendum is deemed to be required, because in relation to Clause 2 the proposed change is not exempt, or in relation to Clause 3 the proposed change is neither exempt nor insignificant, the additional hurdle will be substantial: a majority of those voting in the referendum will have to be in favour of the change proposed for it to be lawfully authorised by Act of Parliament. Where a referendum is not deemed to be required by the Minister, the additional hurdle will be insubstantial: all the approving Act need do here is explicitly provide that the planned measure is either exempt or insignificant (where the latter option is available) for the proposed change to be lawfully authorised. While it may therefore appear that the legislative process has only actually changed where a referendum is deemed to be required by the Minister, due to trivial nature of the additional action required of Parliament to satisfy either the exemption condition or the significance condition, this is not strictly accurate. That the additional legislative hurdles put in place by Clauses 2 and 3 will necessarily vary in the extent of their practical impact does not detract from the fact that *all* still constitute additional legislative hurdles. Whether a future Parliament legislates subject to the requirement that a referendum must be held, or subject to the requirement that the proposed measure must be declared to be exempt or insignificant, the legislative procedure which must be followed to produce approving Acts for the purposes of Clause 2 or 3 will be altered by the EU Bill.

6. That the EU Bill constitutes an attempt by the present Parliament to bind its successors is even more clearly demonstrated by Clause 6. In the circumstances covered by Clause 6, a Minister can only support a decision when it has been approved by an Act of Parliament which satisfies the referendum condition. There is no opportunity for a Minister to declare the decision exempt from the requirement that a referendum be held: a decision which falls into Clause 6 will always require a majority of those voting in a referendum to support it before an approving Act of Parliament can lawfully authorise the proposed change. In relation to decisions covered by Clause 6, it is presumed that their adoption would have a significant impact on the UK, either through a considerable transfer of power or competence from the UK to the EU, or through the removal of the UK's veto in a range of policy areas. As a result, a future Parliament will only be able to legislate to authorise a decision covered by Clause 6 subject to the proposed change being approved in a referendum. The

additional legislative hurdle put in place by Clause 6 of the EU Bill will always be substantial, and is also unavoidable, due to the absence of a mechanism enabling a Minister to judge a decision exempt.

7. The EU Bill can therefore be seen as an attempt by the present Parliament to bind its successors. Clauses 2, 3 and 6 limit the capacity of future Parliaments to legislate to approve the ratification of treaties which amend TEU or TFEU or the adoption of decisions in a range of areas which transfer power or competence from the UK to the EU without further steps also being taken: future Parliaments will be subject to additional legislative hurdles. In many cases, the additional legislative hurdle will be that a referendum must be held. This would be a substantial practical limitation on Parliament's freedom to legislate, as a negative result in the referendum would prevent the lawful authorisation of the relevant treaty or decision.

8. A serious question must thus be confronted: *is this constitutionally possible?* The UK constitution is underpinned by the doctrine of parliamentary sovereignty, according to which Parliament has legally unlimited legislative authority. Does this doctrine mean that the present Parliament can use its sovereign power to alter the legislative process that must be adhered to by future Parliaments? Or is a future Parliament entitled to exercise its sovereign power without regard to the requirements of the EU Bill, and legislate to authorise the ratification of a treaty or the adoption of a decision covered by Clause 2, 3 or 6 without complying with the referendum condition, or, where relevant, the exemption or significance conditions? This is likely to be a matter of fundamental constitutional importance, for a future government which is seriously inhibited from taking action which would expand the competence or power of the EU, either as a result of a defeat in a referendum or an unwillingness even to hold a referendum due to the prospect of defeat, could well consider attempting to legislate to authorise the proposed change disregarding entirely the provisions of the EU Bill.

9. So can a sovereign Parliament bind its successors? The notion of sovereignty itself provides no inherent solution to this constitutional conundrum. Past opinion and practice must therefore be briefly considered. A.V. Dicey, the classic authority on parliamentary sovereignty, believed that Parliament was not empowered to bind its successors, and argued that "a sovereign power cannot, while retaining its sovereign character, restrict its own powers by any particular enactment". However, Sir Ivor Jennings, among others, disagreed. According to Jennings, Parliament could bind its successors in a particular way: by changing the manner and form required for legislation to be produced. While absolute limits could not be placed on Parliament's sovereign power, changes made by one Parliament to the legislative procedure would have to be adhered to by future Parliaments for statutes to be validly enacted. For, according to Jennings, if Parliament "has for the time being power to make laws of any kind in the manner required by the law", any law made by the Queen-in-Parliament "will be recognised by the courts, *including a rule which alters this law itself*". For Jennings and others, that Parliament possessed the power to alter the law-making process was a manifestation, not a limitation, of its sovereign legislative authority. This "manner and form" view was, however, rejected by Sir William Wade who influentially insisted that the rule that the courts will always accept Acts produced by the Queen-in-Parliament was a "political fact" which could not be altered by legislation, as it was the very source of legislative authority.

10. Wade further took the case of *Ellen Street Estates* v. *Minister of Health* [1934] 1 K.B. 590 to preclude Parliament from binding its successors as to the future legislative procedure. In this case, Maugham LJ claimed that "[t]he Legislature cannot, according to our constitution, bind itself as to the form of subsequent legislation". However, as Jennings noted, this observation was made obiter, and therefore was not legally binding, for no genuine attempt had been made by Parliament in the statute considered by the Court of Appeal in *Ellen Street Estates* to alter the manner and form for legislating that future Parliaments would have to follow. An alternative perspective to that provided obiter in *Ellen Street Estates* can be seen in a trilogy of merely persuasive authorities from Australia (*Attorney-General for New South Wales* v. *Trethowan* [1932] AC 526), South Africa (*Harris* v. *Minister of the Interior* 1952 (2) SA 428) and Sri Lanka (*Bribery Commissioner* v. *Ranasinghe* [1965] AC 172). In all three cases, additional legislative hurdles similar to those set out in the EU Bill were upheld, and in the *Ranasinghe* case, decided by the Privy Council, Lord Pearce suggested that even a sovereign legislature "has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its power to make law".

11. Nonetheless, this is far from definitive. The lack of a clear authority indicating whether the UK Parliament has the power to alter the manner and form which must be adhered to for legislation validly to be enacted (and in so doing binding its successors) is primarily due to the fact that Parliament has mostly refrained from interpreting its sovereign power in this way. Few attempts have been made by Parliament to modify the legislative process in an Act of Parliament. Section 1 of the Northern Ireland Act 1998, according to which a referendum would have to be held in Northern Ireland before the nation could cease to be part of the UK, is a notable exception, but it does remain an exception.

12. In recent years, however, it has become increasingly plausible to assert that Parliament has interpreted its sovereign power as including the authority to change the manner and form for the enactment of valid legislation, an interpretation which it was never conceptually prohibited from adopting. For Parliament has now legislated to change the law-making procedure applicable in certain contexts both implicitly and explicitly, and these changes have been upheld as lawful by the courts.

13. Parliament has done so implicitly by passing the European Communities Act 1972 which has, in effect, changed the manner and form for Parliament to produce successfully legislation which violates EU law. As Clause 18 of the present EU Bill will confirm, Parliament still retains the capacity to contradict EU legal

norms. However, following *R.* v. *Secretary of State for Transport, ex p. Factortame (No. 2)* [1991] 1 A.C. 603, in which the House of Lords had to afford domestic supremacy to EU law, Parliament must now adopt a particular manner and form to enact legislation which violates EU law: to be valid, a statute which substantively breaches EU law must expressly state that it is to take effect regardless of section 2(4) of the ECA 1972.

14. Parliament has further altered the law-making procedure explicitly by passing the Parliament Acts 1911 and 1949, replacing the absolute legislative veto of the House of Lords with a delaying power. In the critical recent case of *R. (Jackson)* v. *Attorney General* [2005] UKHL 56; [2006] 1 A.C. 262, the House of Lords was called on, in its judicial capacity, to consider the legal status of the Parliament Acts. The argument derived from Wade that the Parliament Acts had created a subordinate legislature of the House of Commons and Queen was decisively rejected by the Law Lords. Instead, the court held that Parliament had, in the words of Lord Bingham, created "a new way of enacting primary legislation", or what Lord Nicholls called a "parallel route by which... any public Bill introduced in the Commons could become law as an Act of Parliament". This decision is of profound importance for present purposes, for here the House of Lords held that Parliament had the power to effect a statutory alteration of the manner and form to be adhered to for the enactment of valid primary legislation. As Baroness Hale observed obiter, although arguably explaining the necessary implications of the court's decision in *Jackson*, "[i]f the sovereign Parliament can redefine itself downwards, to remove or modify the requirement for the consent of the Upper House, it may very well be that it can also redefine itself upwards, to require a particular parliamentary majority or a popular referendum for particular types of measure".

15. The EU Bill can therefore be seen as further confirmation of a recalibration of our understanding of the doctrine of parliamentary sovereignty. If it was arguable prior to the creation of this Bill, as I submit it was, that the manner and form understanding of parliamentary sovereignty offered the best available explanation of contemporary constitutional practice, in particular following the decision of the House of Lords in *Jackson*, then now the constitutional position seems clearer still. Our understanding of the nature of the doctrine of parliamentary sovereignty has shifted, and Parliament must now be understood to possess the power to change the manner and form which must be followed for valid legislation to be lawfully enacted. In short, Parliament can now bind its successors, not absolutely, but as to the manner and form of future legislation. As a result, the changes to the legislative process envisaged by the EU Bill can be seen as constitutionally permissible.

16. The changes to the legislative process proposed in the EU Bill will therefore bind future Parliaments. It is of course the case that the EU Bill makes no attempt to entrench the requirement that referendums be held in the circumstances provided for, by stipulating, for example, that Clause 2, 3 or 6 could only be repealed by legislation approved at a referendum. This lack of entrenchment ensures that a future Parliament could in principle, if it were judged to be necessary, repeal, entirely or partially, the EU Bill by an ordinary Act of Parliament. However, on the assumption that the EU Bill is passed in its present form, until such a repeal was effected (if ever), any future Parliament would be required to adhere to the terms of Clause 2, 3 or 6 to enact valid legislation on any matter covered by these provisions while they remain on the statute book. The changes to the manner and form for the valid enactment of future legislation made by the EU Bill will therefore be of full legal effect unless or until repealed, with future Parliaments unable to legislate to authorise the ratification of treaties or the adoption of decisions covered by Clause 2, 3 or 6 other than in accordance with the modified legislative procedure.

17. Nonetheless, while the enactment of these "referendum locks" is not constitutionally prohibited, and can be reconciled with the doctrine of parliamentary sovereignty, the matter of the constitutional desirability of these changes remains. The changes to the manner and form required for legislative action in the areas covered by Clauses 2, 3 and 6 must be examined in context. Parliament has historically been extremely reluctant to introduce onerous additional legislative hurdles which would bind future Parliaments, and the EU Bill deviates radically from this past practice.

18. The EU Bill will require referendums to be held to authorise the ratification of treaties or the adoption of decisions in a significant range of situations. The breadth of areas in which a referendum will be required is striking, especially when it is considered that the UK-EU relationship is being singled out for this exceptional treatment. The Bill will give UK citizens far more say in the structure and development of the EU's constitutional arrangements than those of the UK itself. It is therefore especially difficult to justify adequately the extensive use of referendums to authorise the further alteration of the powers and institutional structure of the EU when the population of the UK is provided with no similar potentially wide-ranging involvement in the development of the domestic system of governance. While in recent years referendums have begun to be utilised more frequently as a way of validating domestic constitutional change, with national referendums being held in Scotland and Wales in 1997 and in Northern Ireland in 1998 prior to the devolution settlement being established, and a UK-wide referendum now planned on the voting system of the House of Commons, there is no guarantee that even the most critical areas of the UK constitution will in future be reformed in accordance with the wishes of the population expressed in a specific plebiscite. The EU Bill can therefore be seen to treat the development of the EU as if a matter of unique interest to UK citizens, a judgment which seems unsustainable.

19. Further, the extensive range of situations in which a referendum would be required under the EU Bill could exacerbate voter apathy. Can it be said that a referendum to protect the UK's veto in any one of a number of contexts, such as those delineated, for example, in Schedule 1, would be likely to animate citizens in such

a way as to ensure something approaching a sufficient turnout could be achieved? While there may be a strong democratic case for guaranteeing the use of referendums in the circumstances of a palpable, substantive shift of power from the UK to the EU, the EU Bill seems to go well beyond this in requiring referendums to be held on what could be viewed as relatively esoteric issues. Consequently, the question of how adequate voter turnouts could be obtained, to ensure that the result of any referendum held is seen as legitimate, requires full consideration. Yet there are no easy solutions, for legislating to impose a minimum turnout threshold which would have to be met for the result of a referendum to have legal effect would be likely to cause further problems, with the prospect of repeat referendums inducing even greater voter fatigue.

20. The EU Bill therefore takes the UK into uncharted constitutional territory. While the present Parliament binding its successors as to the manner and form of future legislation, in the way outlined above, should not be understood to be constitutionally prohibited, this dramatic divergence from past practice must be comprehensively evaluated. Given the UK's traditions of constitutional flexibility and the primacy of political as opposed to legal limits on legislative authority, Parliament must be wary of placing itself in a straightjacket. While it may have the constitutional power to do so, Parliament should not too readily provide that its legislation shall take effect subject to the approval of the general population in a referendum. The fact that the EU Bill does not purport to entrench itself, noted above, does serve formally to preserve Parliament's ultimate constitutional authority, for any future Parliament could outright repeal the EU Bill by an ordinary Act of Parliament. Nevertheless, it may be difficult in practice for a government to seek to justify an attempt to remove legal rights to popular participation in the legislative process from citizens. As such, Parliament should proceed cautiously when making such profound alterations to the future legislative process. While the ordinary law-making procedure which requires only the assent of the House of Commons, House of Lords, and Queen for a statute to be enacted should not be viewed as sacrosanct, extensive changes to the legislative process must be fully justified. If this consideration is taken into account, it would seem to indicate that the kind of "referendum locks" proposed by the EU Bill should be reserved for truly exceptional cases of the utmost constitutional or political significance only, when an informed and engaged population can quite properly resolve questions of critical national importance, rather than being employed excessively in relation to a single area of political activity.

7 December 2010

Written evidence from Martin Howe QC

1. The "Referendum Lock"

1. There is an inherent difficulty under the constitution of the United Kingdom which affects the provisions of the Bill which seek to create a "referendum lock". Under the doctrine of sovereignty of Parliament, the present Parliament cannot pass an Act which would bind itself or a successor Parliament to hold a referendum in particular circumstances. It is therefore inherently impossible (short of a fundamental constitutional change away from the sovereignty of Parliament to the sovereignty of a written constitution) for the "referendum lock" in this Bill to amount to a lock in legal terms.

2. It would be possible to amend the Parliament Acts 1911 and 1949 to add any Act by-passing the referendum requirements of this Bill to the categories of Act which would need the assent of both Houses; but the effectiveness of this safeguard would depend upon the willingness of the House of Lords (or a future elected second House) to enforce the safeguard. More radical constitutional revisions would be needed in order to "entrench" a referendum requirement.[1]

3. That does not mean that the provisions of the Bill relating to referendums are without value. Although a future Parliament *could* over-ride the provisions of the Bill requiring a referendum, that would have to be done explicitly and a political price would have to be paid.

4. Clauses 2 and 3 (in my view appropriately and correctly) apply the requirement that a treaty change be approved by Act of Parliament, and the referendum requirement if applicable, to all amendments of or replacements of the existing European treaties (TEU and TFEU) regardless of the mode in which such amendment or replacement is carried out. Thus, whether the amendment or replacement is under the "ordinary revision procedure" under Art 48(2)–(5) TEU, the so-called "simplified revision procedures" under Art 48(6), or by some other procedure outside these treaty Articles, the restrictions in the Bill will apply. However, the Bill would not cover treaties which supplement the existing EU treaties but do not amend them: for example, a treaty between the UK and other EU member states creating a bail-out fund to which the UK is obliged to contribute.

[1] Such a requirement can be "entrenched" by a written constitution. For example, Article 6 of the Constitution of the Republic of Singapore provides that: "There shall be—(a) no surrender or transfer, either wholly or in part, of the sovereignty of the Republic of Singapore as an independent nation, whether by way of merger or incorporation with any other sovereign state or with any Federation, Confederation, country or territory or in any other manner whatsoever ... unless such surrender, transfer or relinquishment has been supported, at a national referendum, by not less than two-thirds of the total number of votes cast by the electors registered under the Parliamentary Elections Act". Further, Article 9 of the constitution provides that Part III of the constitution containing Article 6 may not be amended except after a referendum in which a two-thirds majority votes in favour of the amendment.

5. Clause 5(4) permits the Minister to state that certain Article 48(6) decisions are not "significant", in which case the referendum requirement does not apply to them. Although the Minister's statement in this regard is subject to judicial review, the limitations of judicial review in this context should be appreciated. The courts will not substitute their own view as to whether or not a decision is "significant" in place of the view of the Minister. It has been said, in the context of the courts' review of the validity of regulations under section 2(2) of the European Communities Act 1972, that the courts are not equipped to assess the importance or unimportance of a measure and to apply that as a legal standard of validity.[2]

6. However, as I have already pointed out, this Bill cannot bind the actions of future Parliaments. If this Bill were to contain no explicit provision exempting "insignificant" measures from the referendum requirement, that would provide a pretext for a future Parliament simply to legislate to by-pass the requirements of the Bill on the ground that the change involved is too insignificant to justify a referendum. There would then be no form of control over the judgement of "significance" involved in such an exercise. Accordingly it is preferable that the machinery for judging "significance" is provided for within the Bill so that it is subject to the requirements of possible judicial review and objective justification, even if those requirements cannot be perfect. In my view, the only practical way to strengthen these requirements of the Bill would be to place the duty to make a statement under clause 5 on an independent body or committee rather than on a Minister. That would then require decisions to be made as to the composition and procedures of such a body and the method appointment of its members.

2. Parliamentary Control Over Other EU Decisions and Measures

7. The Bill's provisions in clauses 7 to 10 represent an important and long overdue correction to the balance between the executive and Parliament. When the European Communities Act 1972 was passed, the extent to which the legislative machinery of the EEC transferred law-making powers from Parliament to ministers was not fully appreciated.

8. In particular, the general power under Art 352 TFEU (originally Art 235 of the Rome Treaty) to legislate in aid of the objectives of the treaty when the specific legislative treaty bases have not provided the "necessary powers" has always been a law-making power of enormous scope. It has been little short of scandalous that ministers were able to exercise this sweeping legislative power without a formal legal requirement for the prior consent of Parliament. It is therefore very much to be welcomed that clause 8 will subject the exercise of ministerial power under Art 353 to approval by Act of Parliament.

9. Clause 9, relating to "opt-ins" to measures under the "Area of Freedom, Security and Justice" is also to be welcomed. However, there is another, and very important, "opt in" decision which the Bill does not appear to deal with. Article 10(4) of Protocol (No 36) on Transitional Provisions provides that the UK may, within 4½ years of the coming into force of the Lisbon Treaty, notify the Council that it does not accept the conversion of existing Third Pillar measures into supranational First Pillar measures. The consequence of failure to give such a notification is profound, since such measures will then bind the UK as First Pillar measures which are fully subject to the interpretative jurisdiction and coercive powers of the ECJ.

10. It is true that as a matter of formalities, this is a case where a simple failure to act will result in an extension of EU competences over the UK, rather than a case where a positive decision or act is required. However such an extension of competences is more important than that resulting from many of the decisions or acts which are covered by the Bill. Accordingly it seems illogical that the Bill does not provide for Parliamentary control over this important decision, which must be taken within the likely lifetime of this present Parliament.

11. In my opinion, the arguments for giving notice under Art 10(4) at an early stage are strong, since this would then allow an orderly, progressive negotiated replacement of existing Third Pillar measures with intergovernmental agreements between the UK and the core EU states. This would permit, for example, the replacement of the European Arrest Warrant framework decision with more satisfactory extradition arrangements. The alternative of doing nothing would lead by default to this deeply flawed measure become entrenched (by default) as part of directly effective, binding and justiciable EU law.

12 December 2010

APPENDIX

PROTOCOL (NO 36) ON TRANSITIONAL PROVISIONS
ARTICLE 10(4), FIRST PARAGRAPH

4. At the latest six months before the expiry of the transitional period referred to in paragraph 3, the United Kingdom may notify to the Council that it does not accept, with respect to the acts referred to in paragraph 1, the powers of the institutions referred to in paragraph 1 as set out in the Treaties. In case the United Kingdom has made that notification, all acts referred to in paragraph 1 shall cease to apply to it as from the date of expiry of the transitional period referred to in paragraph 3. This subparagraph shall not apply with respect to the amended acts which are applicable to the United Kingdom as referred to in paragraph 2.

---

[2] R. (Orange Personal Communications Ltd) v Secretary of State for Trade and Industry [2001] 3 C.M.L.R. 781.

Written evidence from the Foreign and Commonwealth Office, HM Government

Part One: Restrictions on Treaties and Decisions Relating to the European Union

What is the meaning of, and difference between, the terms "competence" and "power" as used in the Bill? Are "competence" and "power" as used in the Bill terms that are already recognised under national law?

1. In its chapter on "Europe", the Coalition's *Programme for Government* set out that legislation would be introduced to ensure that any future treaty which proposed a transfer of power or competence from the United Kingdom to the European Union would require the consent of the British people in a referendum.

2. "Competence" is a term used in the EU Treaties. The term relates to the Member States' conferral of a right or ability on the EU to act. In some cases, such as trade, the EU has exclusive competence to act on behalf of the Member States. In other areas, such as the environment, the EU shares the competence to act with the Member States. In some other areas, such as health protection, the EU can support, coordinate or supplement the actions of the Member States.

3. Article 1 of the Treaty on the Functioning of the European Union (TFEU) provides that the TFEU "determines the areas of, delimitation of, and arrangements for exercising [the EU's] competences" in respect of that Treaty and the Treaty on the European Union (TEU). The EU is bound to act within the confines of the Treaties, as only the Treaties provide the EU with the "competence" to act in a given area—where the Treaties do not provide for the competence to act, the EU cannot act in that area.

4. The nature and extent of the EU's current competence are set out in Articles 2 to 6 of the TFEU. The EU's competence can be expressed in the following five ways, as set out in the *Explanatory Notes* to the European Union Bill:

(a) Exclusive competence, where only the EU can act. The areas concerned are set out in Article 3 TFEU (examples include the customs union and competition rules).

(b) Supporting competence, where the EU can carry out actions to "support, coordinate or supplement" the actions of Member States in certain specific areas, on the condition that the EU action does not supersede the Member States' competence in those areas. The areas concerned are set out in Article 6 TFEU (examples include the protection and improvement of human health; culture and education).

(c) Shared competence, where the EU can legislate in a specific area set out in the Treaties, but where if the EU has not yet acted in a specific area or has stopped acting in that area, the Member States can legislate accordingly. Under Article 4 TFEU, shared competence applies in those areas set out in the Treaties but which are not specified in Articles 3 or 6 TFEU (exclusive or supporting competence).

(d) The Member States shall also coordinate their economic, employment and social policies within the EU; and the EU can adopt measures and arrangements in order to achieve this end. Specific provisions apply to those Member States who use the European single currency (the Euro).

(e) The EU also has competence to define and implement a common foreign and security policy, including the "progressive framing of a common defence policy", though this remains largely subject to the unanimous approval of Member State governments in the Council.

5. The term "power", unlike competence, is not defined in the EU Treaties. For the purposes of the EU Bill, a transfer of power could take place in three ways. Firstly, through a move in specified areas set out in Schedule 1 of the Bill to permit qualified majority voting in the European Council or Council in place of unanimity, consensus or common accord. This means that a referendum is needed only before the UK can agree to give up its ability to block or veto legislative proposals made under any of the specified Articles. It should be emphasised that mere use of these Articles as a legal basis for proposals for action will not require a referendum; but a proposal to give up the ability for the UK to block agreement on a measure using one of these Treaty articles would require a referendum.

6. The Treaty articles in Schedule 1 cover the following subject areas, which have previously been viewed by all parties as sensitive and requiring the maintenance of a UK veto: foreign policy, defence policy, security and national security policy, military issues; third country and international agreements; justice and home affairs; national economic, tax, fiscal, and energy policies; provisions on the EU budget and financial management of the EU; citizenship and elections; social, social security and employment policy; membership issues and enlargement.

7. The second transfer of power in the Bill is any treaty or treaty change which would confer a power on an EU institution or body (either an existing institution or a new institution) to impose a new requirement or obligation on the British Government or any organisations or individuals in the UK.

8. The third is the conferral of a new power on an EU institution or body, whether a new organisation or an existing institution, the ability to impose sanctions on the British Government or any organisations or individuals in the UK.

9. The UK has previously agreed to confer competence on the EU (or, in other words, confer on the EU the ability to act) in a number of areas as a result of the UK's ratification of successive Treaty changes, most recently that of the Treaty of Lisbon. The UK agreed to confer on the EEC the competence to act in ways

specified in the Treaties at that time, when the UK joined in 1973. The statutory provision which permitted the UK to confer competence on the EEC at that time is the European Communities Act 1972.

10. The term "competence" in the EU context is not referenced in UK statute law at present (though of course it would be if, subject to Parliament's approval, the European Union Bill were to be enacted). However, the spirit of the term is captured in Acts of Parliament, not least the European Communities Act 1972:

> Section 2(1), European Communities Act 1972
>
> "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, and be enforced, allowed and followed accordingly; and the expression e nforceable EU right and similar expressions shall be read as referring to one to which this subsection applies."

11. The term "power" in the EU context is referenced in legislation, not least in the section set out above. However, these are generic references to powers arising as a result of the EU Treaties—and yet the term power is not defined in the EU Treaties. This is the reason why the Government has listed what it considers to be a transfer of "power" for the purposes of the Bill.

Are the conditions on which the Minister decides that a Treaty change or decision amounts to the transfer/ extension of an area of competence or power from the UK to the EU sufficiently clear?

12. The Government is satisfied that the Bill is drafted as clearly as possible in order for Parliament and the wider public to understand when a referendum would be required, when a referendum would not be required, and when the exercise of Ministerial judgement is required in determining whether a transfer of power or competence would arise from a Treaty change.

13. There are a number of decisions/Treaty changes which would require the consent of the British people in a referendum, with no exercise of Ministerial judgement required. These are as follows, and are set out in Clauses 4 and 6 of the Bill and in Schedule 1:

(a) Any decision to give up any one or more of the 50 vetoes listed in Schedule 1 of the Bill, using either the Ordinary Revision Procedure or Simplified Revision Procedure, whether Article 48(6) TFEU or Article 48(7) TFEU (as provided for in clauses 4(1)(k) and 6(4)(b));

(b) Any decision to give up any of the four emergency brake provisions provided for in the EU Treaties (as set out in clauses 4(1)(l) and 4(1)(m));

(c) Any decision under Article 42(2) TEU that provides for a common EU defence (clause 6(2));

(d) Any decision under Article 4 of the Schengen Protocol that removes the UK's control of its own borders (clause 6(4)(k));

(e) Any decision under Article 86 (1) TFEU that would mean the UK participating in a European Public Prosecutor (in clause 6(4)(c));

(f) Any decision under Article 86(4) TFEU enabling the European Council to extend the powers of the European Public Prosecutor, if the UK is already a participant in that Office (in clause 6(4)(d));

(g) Any decision under Article 140(3) TFEU adopting the Euro as the currency of the UK (in clause 6(4)(e));

(h) Any decision under the following Treaty articles to give up specific vetoes without the need to engage in formal Treaty change:

  (i) Article 31(3) TEU on common foreign and security policy decisions;

  (ii) Article 153(2b) TFEU on certain social policy matters;

  (iii) Article 192(2) TFEU on certain environment matters;

  (iv) Article 312 (2) TFEU on the EU budget multi-annual financial framework;

(i) Any decision to give up a UK veto if in an area of enhanced co-operation:

  (i) The UK is already a participant;

  (ii) Participants of that initiative wish to move to qualified majority voting, including the UK;

  (iii) The area of enhanced co-operation is based on one of the 50 Treaty articles listed in Schedule 1.

14. Given the Government's intention that this legislation should provide a sustainable framework under which any future Treaty changes would be considered, there are other possible transfers of competence or power over which it is not possible entirely to remove the element of Ministerial judgement. However, in order to minimise the level of Ministerial judgement required when considering whether a transfer of power or competence would occur, clause 4 of the European Union Bill provides a comprehensive list of criteria against which all future Treaty changes would be judged.

15. The criteria in clause 4 to be used by a Minister to determine whether a transfer of competence or power from the UK to the EU would occur are in the following list. However, it should be emphasised that if any of

the decisions in paragraph 14 above are included in a Treaty change, then a referendum would be required regardless of a Minister's judgement on the remainder of the Treaty change:

(a) the extension of the objectives of the EU as set out in Article 3 of the TEU (any expansion of the list of objectives in Article 3, whether in Article 3 or elsewhere in the Treaties, would trigger a referendum);

(b) the conferring on the EU of a new exclusive competence (for example, a proposal to move an area of existing competence shared between the EU and the Member States into exclusive competence of the EU);

(c) the extension of an exclusive competence of the EU;

(d) the conferring on the EU of a new competence shared with the member States;

(e) the extension of any competence of the EU that is shared with the member States;

(f) the extension of the competence of the EU, beyond what is already provided for in the existing Treaties, in relation to:

(i) the co-ordination of economic and employment policies, or

(ii) common foreign and security policy;

(g) the conferring on the EU of a new competence to carry out actions to support, co-ordinate or supplement the actions of Member States;

(h) the extension of a supporting, co-ordinating or supplementing competence of the EU (for example, any removal of a limitation preventing the EU from proposing a harmonisation of national rules under any of the areas of policy in which the EU has a supporting role);

(i) the conferring on an EU institution or body of power to impose a requirement or obligation on the United Kingdom, or the removal of any limitation on any such power of an EU institution or body (for example, a proposal to require Member States to provide annual data on how Member States' national systems had co-operated in an area of supporting competence);

(j) the conferring on an EU institution or body of new or extended power to impose sanctions on the United Kingdom (for example any extension to the sanctions which could be imposed on UK businesses under the EU's competition policy).

16. The criteria in the Bill would therefore require that any transfer of competence from the UK to the EU, regardless of its size or sensitivity, would require that a Minister lays a statement before Parliament stating that a transfer of competence would occur under the Treaty change to be ratified, and would therefore require the consent of the British people in a referendum as well as the approval of Parliament by Act. The Minister would also have to make a statement if no transfer or competence from the UK to the EU is involved, again giving reasons.

17. The Treaties explicitly state that Article 48(6) TFEU, the first part of the Simplified Revision Procedure, cannot be used to increase the competences conferred on the EU; only the Ordinary Revision Procedure could be used to transfer competence. It is, in contrast, possible for an Article 48(6) TEU decision to result in a transfer of power from the UK to the EU and the Bill provides that any such transfers would, on the whole, require the consent of the British people in a referendum. It should be borne in mind throughout that Article 48(6) TEU can only be used for amendments of Part Three of the TFEU, which relates to internal policies and actions of the EU. Article 48(6) cannot be used for any other provisions in the Treaties.

18. The EU Bill provides that the Government would still be required to analyse any proposal under the Simplified Revision Procedure to confirm whether any of the criteria in clause 4 of the Bill would be triggered as a result of the decision in question. The Bill also provides that an Act of Parliament would be required to signify Parliamentary approval of any future decision under Article 48(6) TEU, whereas under the European Union (Amendment) Act 2008, a proposal under Article 48(6) would only require Parliamentary approval as a result of a positive vote in both Houses of Parliament. As the Minister for Europe said in the debate on the Second Reading of the Bill, "the Government intend to use the provisions of the Bill for any future treaty change" (HC Deb, column 270), including the limited Treaty change in respect of Eurozone economic government, which is to be discussed at the December 2010 European Council and is expected to use Article 48(6) as its base. Under the EU Bill, an Act of Parliament would therefore be required before the UK could ratify that Treaty change—regardless of whether competence or power would be transferred from the UK to the EU.

19. Where the only reason for a proposed decision under Article 48(6) TEU requiring a referendum 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 (therefore only the criteria in (i) and (j) in the list above and in clause 4(1)), we need to be able to distinguish between important and minor changes. This is where the "significance test" comes in.

20. It should be emphasised that the significance test only applies in the following circumstances:

(a) Only with uses of Article 48(6) / Simplified Revision Procedure. If the Ordinary Revision Procedure is used, then any transfer of powers regardless of size or sensitivity would automatically require the consent of the British people in a referendum.

(b) Only where criteria (i) or (j) are involved. If the Article 48(6) decision triggers any of the other criteria

(which would most likely be the giving up of a veto in Schedule 1 given that Article 48(6) decisions cannot transfer competence), then a referendum would be required. If any of the decisions set out in paragraph 14 were part of the Article 48(6) decision, then a referendum would automatically be required.

(c) Only where the Government judges that there is a transfer of power under criteria (i) or (j). For the significance test to be applied, there would need to be a judgement that a transfer of power would take place.

21. If a proposal therefore satisfied these three conditions, then the Government could examine the proposed transfer of power and decide whether that transfer would be significant or not, and set out the conclusions of this examination in the statement to Parliament required by clause 5 of the Bill. If the transfer is judged to be significant, a referendum of the British people would be required.

22. If judged not to be significant, then an Act of Parliament would still be required before the UK could approve that decision, and during the consideration of that legislation Parliament is of course able to legislate as it wishes—so if Parliament took a differing view and thought that the transfer of power in question should be agreed by the British people, a referendum could be provided for in that Act. And as with all Ministerial decisions, it would be possible for a member of the public to seek a judicial review of the Minister's decision on whether a proposed transfer of power would be significant.

23. There are therefore three levels of decision provided for in Part 1 of the Bill:

(a) Decisions where no Ministerial judgement is required;

(b) Decisions where some Ministerial judgement is required, but where a comprehensive list of criteria will minimise the degree of discretion available;

(c) In two specific circumstances, decisions where Ministerial judgement is required to ascertain whether a transfer of power is significant or not.

Are the distinctions in the Bill between national approval by referendum, Act of Parliament or Resolutions of both Houses consistent with the nature of the competence or power being transferred/extended?

24. If the use of an existing Treaty Article would involve a transfer of power or competence from the United Kingdom to the European Union, the EU Bill provides that both an Act of Parliament and the consent of the British people in a referendum would be required before the UK could agree to its use. Clause 6 of the Bill lists those decisions which, were they to be exercised by the EU, would involve such a transfer and would therefore be subject to the referendum provisions.

25. Where a ratchet clause would transfer competence or power from the UK to the EU, the Bill provides that a referendum would be required. There are two categories of decision here:

(a) Where we have decided that giving up a veto is significant, we need to put a referendum lock over any way of giving up that veto. This covers:

(i) One ratchet clause allowing any of the vetoes in Part Three of the Treaty on the Functioning of the European Union which we have identified as significant to be given up;

(ii) Four of the vetoes relating to foreign and security policy and some aspects of social policy, environment policy and EU finance which we have identified as significant and which could be given up under their own specific ratchet clauses;

(iii) Two ratchets which could allow a veto we consider significant to be given up while the UK and a smaller group of Member States are negotiating under enhanced cooperation arrangements.

(b) One-way irreversible decisions which transfer competence from the UK to the EU. Three ratchets fall into this category. These are the Treaty articles on taking a decision to join the Euro, give up border controls, move to a common EU defence, to allow for the United Kingdom's participation in a European Public Prosecutor, and then for the powers of that Prosecutor to be expanded if the UK is participating in that office.

26. There are a number of articles in the existing Treaties which would allow the Member States to decide together to add to, or reduce, what can be done within existing areas of EU competence, but without a change to the voting or legislative procedure. These provisions would require Parliamentary approval by an Act of Parliament under the EU Bill, but a referendum would not be required as these provisions would not result in a transfer of power or competence. Examples include proposals to add to the list of areas of serious cross-border crime on which the EU can legislate, or to strengthen or add to the list of rights of EU citizens already provided for in the Treaties.

27. Clauses 8 and 9 of the Bill provide for specific Parliamentary controls over two types of decision: any future use of the so-called "broad enabling clause" set down in Article 352 of the Treaty on the Functioning of the EU; and three ratchet clauses in the field of justice and home affairs. Article 352 TFEU can be used to adopt measures in order to attain one of the EU's objectives. It can only do this where the existing Treaties have not provided explicitly for the necessary powers to do so already, and so long as the measure concerned remains within the confines of the objectives of the EU. Because of its enabling nature, it can be used for a broad range of proposals. It is an Article in whose use the Parliamentary Scrutiny Committees take great

interest. So, as in Germany, the Government proposes that in principle any future use of Article 352 would need Parliamentary approval by Act of Parliament before the Government could agree to that use in the Council.

28. However, the Government recognises that there are measures agreed under Article 352 which either satisfy an urgent need, or which are substantially the same as previous measures agreed under Article 352 or its predecessor article, Article 308. One example is a decision to extend a programme setting up anti-counterfeiting measures for the Euro in one country to run in another country—the substance of the programme is identical, but a separate decision is required to run the programme in the second country. In order therefore not to waste Parliamentary time by introducing repeated Bills for measures which are genuinely urgent or which have already been approved, the Government has adopted a workable approach and have provided a small number of exemptions in clause 8 of the Bill to avoid this.

29. The UK benefits from a Protocol in the area of freedom, security and justice, which allows the Government to decide on a case-by-case basis whether to opt into a JHA measure or not. Because of this, and to allow the UK to be able to opt into a negotiation, the Government has made provision for a two-stage Parliamentary approval process in the Bill in respect of the three JHA ratchet clauses. Firstly, a motion would need to be approved in both Houses before the Government could opt into one of these measures. Once the negotiation had then taken place on the proposal and it was acceptable to the Government, an Act of Parliament would then be required before the Government could agree finally to the proposal in the Council.

30. Some proposals will require a vote in both Houses of Parliament under the EU Bill and these are provided for in clause 10. These are mostly articles which modify the composition or rules of procedure or the statutes of existing EU institutions or bodies. Examples include proposals enabling the General Court of the EU Court to organise its workload by establishing specialised chambers to deal with certain types of cases, or proposals which change the rules of the European Investment Bank.

31. Four of these decisions in clause 10 are not subject to unanimous agreement in the Council, which means the UK could not veto the exercise of the decision. Therefore, if an Act of Parliament were to be required before the UK could agree to a proposal in Council, we could find that a vote could take place in Council before the Bill could be introduced or while the Bill was being considered by Parliament—and either the UK would be outvoted in Council during the passage of the legislation, or otherwise the UK would not be able to stop the decision being adopted.

32. It would therefore be a waste of time and money to have an Act of Parliament on these decisions; but given their subject matter, the Government nevertheless believes that these Articles should be subject to an additional level of Parliamentary control and so a vote in both Houses represents a practical solution.

Are there areas of extension of competence and/or conferral of power which are not covered in the Bill?

33. The competences of the EU are set out explicitly in the EU Treaties. Any extension to the EU's competence can only be achieved through Treaty change, and both methods of Treaty change are captured by this Bill. The Government is also clear that transfers of power not already provided for in the Treaties can happen only as a result of Treaty change, or as a result of the use of certain decisions in the existing Treaties, for which provisions have been included in clause 6 of the Bill.

34. It has been argued that the new exercise of an existing EU competence is in effect a transfer of power, in a case where the EU has not yet acted in a given policy area and is doing so for the first time. However, the exercise of a competence is not the same as the extension of a competence. This Bill does not provide for a referendum on individual EU proposals where EU action is already permitted by the Treaties, whether or not the competence to act has yet been exercised by the EU; because the competence has already been provided for in the Treaties as agreed by all Member States. In practical terms, if proposals do not require Treaty change or a change under Article 48(6), we consider that the EU has already been conferred the competence to act by the Member States. The only exceptions to this principle are the provisions in clause 6, in respect of any proposal to participate in the European Public Prosecutor, or agreement to the formation of a common EU defence.

35. It has been argued that the process of opting into a measure in the area of freedom, security and justice, in which the UK benefits from an opt-in Protocol, is tantamount to a transfer of power. All measures in this area are examples of the exercise of the EU's existing shared competence, as provided for in the Treaties that have already been negotiated and ratified by all Member States. The United Kingdom's Protocol, and full ECJ oversight of measures in the area of freedom, security and justice are both provided for under the existing Treaties. This is not altered by the exercise of a UK opt-in, and as such are not transfers of power from the UK to the EU.

36. The justice and home affairs provisions covered by the EU Bill are distinct because either they are ratchet clauses which would add to what can be done within existing areas of EU competence (for example, by adding to the areas of serious cross-border crime on which the EU can act), or are deemed of fundamental importance because of their potential impact on the UK legal system (for instance, the creation of a European Public Prosecutor).

37. The suggestion has been made in the past that competence can be expanded by the judgments of the Court of Justice of the European Union. However, when reviewing EU legislation the Treaty is explicit that

the CJEU must act within the limits conferred upon it, and have regard to the competences conferred upon the EU under the Treaties. It is wrong to suggest that the Court has always taken an expansive interpretation of existing competences. There have been previous rulings rejecting assertions from the European Commission that the EU had had competence that the Treaties did not, in reality, confer upon the EU.

38. Similarly, it has been argued that "competence creep" remains an issue. The Government is clear that the limits of EU action are clearly defined in the EU's Treaties and can only be amended through Treaty change or through the use of specified decisions, on which the EU Bill makes provisions to ensure an appropriate level of Parliamentary and public control. Moreover, the Government assesses every proposal for new EU legislation against the competences set out in the Treaties. This Government will resist strongly any proposal that seeks to go beyond the competences conferred on the EU by the Treaties, including by escalating the issue for example at the European Council, and by taking cases to the Court of Justice to the EU.

Is it clear what a Minister must take into account when deciding whether "in his opinion" a proposal under Clause 4(1)(i) and (j) is "significant"?

39. It would of course be a judgement on the part of the Government of the day as to whether a proposed Article 48(6) decision fulfilled one or both of criteria (i) and (j) in clause 4(1) on which the significance test would apply, and no other criterion in that list, and then whether they felt that the proposed transfer of power would be significant or not. The significance test only applies to two of the cases listed in Clause 4, and only when a decision under Article 48(6) is being taken. It is important to note that this means that any transfer of power under Clause 4(1)(i) and (j) to which the significance test will be applied would be within existing EU competence. Article 48(6) cannot be used to increase the competences conferred on the Union in the Treaties (though the Bill provides safeguards to ensure that Article 48(6) decisions are still tested to ensure that they do not breach that requirement).

40. It is not possible to set down clear criteria in the Bill on how significance is to be judged, because significance depends not just on the nature of the power, but also on the subject area, the way in which the new power is to be used, the potential impact upon the UK and the context in which the power is to be exercised. The Bill does however require the Minister of the day to give reasons for their opinion on significance.

41. It would of course be a judgement on the part of the Government of the day to ascertain whether a proposed Article 48(6) decision fell within the two criteria on which the significant test would apply, and then whether they felt that the proposed transfer of power would be significant or not.

42. However, one possible example of a transfer of power might be considered significant is where the Commission would be given a new ability to compel EU businesses to do something which would increase burdens upon British businesses. One possible example of a transfer of power that might not be considered significant is perhaps where the Commission would be given the ability to compel Member States to provide annual updates on how their national systems were co-operating with those of other Member States in a field of supporting competence.

How far in practice would such a decision [on significance in the case of relevant decisions under Article 48(6) TEU] be amenable to judicial review? How far is a decision whether or not to hold a referendum a legal question, amenable to judicial review, and how far a political question?

43. To the extent that a judgement on whether or not to hold a referendum according to the provisions of the EU Bill rests with the Government of the day, it would be for a Minister of the Crown to make an assessment as to whether the proposed Treaty change or decision fulfilled one or more of the criteria in the Bill, and to set out their analysis, decision and reasoning in a statement to be laid before Parliament within a period of two months after the relevant decision at EU level. As set out above, a number of decisions would not require the exercise of Ministerial judgement, and those that would are governed by a comprehensive set of criteria as set out in clause 4 of the Bill.

44. Ministers will have to take a definite decision on whether any use of the Treaties' ordinary or simplified revision procedures would transfer power or competence from the UK to the EU, and therefore whether a referendum would be required as a result of the provisions of the EU Bill. As with all formal Ministerial decisions, the decision taken in accordance with Part 1 of this Bill can be subject to judicial review before the Court.

45. It is of course up to the Court to determine whether a challenge should be heard, and if so, when to hear the challenge and whether the challenge should be upheld. Requests for judicial review should ordinarily be brought within three months of the statement being laid before Parliament in accordance with the provisions in clause 5. A judicial review would be likely to consider the reasonableness of the Minister's reasoning in the published statement, and whether the obligations set out in the EU Bill have been complied with.

46. As set out in the *Explanatory Notes* to the Bill, once the statement is laid before Parliament, the Government would then be required to prepare and introduce a Bill to Parliament at an appropriate stage in the legislative programme, which would provide for the approval of the Treaty change, and where relevant the provisions enabling a referendum of the British people to be held.

What might be the effect of Part 1 of the Bill on the UK's future relationship with the EU?

47. The Government believes that membership of the EU is in the national interest of the United Kingdom. We remain committed to playing a strong, positive and active role in the European Union, and to pursuing a range of objectives for EU action. We want an open external market, and so support the negotiation of new EU Free Trade Agreements with key trading partners (for example with India, China and South Korea). We want to strengthen and expand the single market, including the energy market, in order to deliver growth. We want to promote a resource efficient, low carbon EU economy. And we want to work through the EU to achieve our international objectives.

48. But many people feel disconnected with the decisions that have been taken in their name by the Government on the European Union. The European Union Bill is part of the Government's wider objective to transfer power back from Government to the people, and seeks to restore trust and enhance the democratic accountability of the EU among the British people; to help ensure that the British public are engaged and active participants in the UK's future within Europe. Part 1 of the Bill proposes to use referendums and a strengthening of the role of Parliament in order to encourage the restoration of trust and the enhancing of Parliamentary and popular accountability.

49. There is nothing in the EU Treaties that puts any constraints on Member States in respect of their choice of domestic procedures for determining how their Governments should cast their votes in the Council or European Council, or indeed the "constitutional requirements" by which a Treaty change should be considered domestically before ratification by the Member State. There is nothing in the EU Treaties which implies that the UK has to agree to any passerelle provision or Treaty change, or that places any constraint about the way in which the UK decides how to vote. Indeed, the EU Treaties allow for the Member State to take certain decisions and all Treaty changes back to the Member State's Parliament, and in many cases the people, to seek their consent before the change is approved or ratified.

50. As Jean-Claude Piris, former Head of the Council Legal Service, set out in his evidence to the Committee last month, "It is undoubtedly for each Member State to determine the constitutional mechanisms through which it gives effect to [the] legal obligations [provided for by the EU Treaties]."

51. Although there are differences between the constitutional frameworks of the United Kingdom and those of our European partners, a number of other Member States have systems which provide for referendums to be held in order to consent to Treaty changes or specific decisions which transfer powers or competence. A number of Member States, in particular Germany, also have mechanisms in which Parliament are required to approve any agreement to specified decisions. The UK would therefore be implementing a set of provisions which are already embedded in a number of other systems.

December 2010

Written evidence the European and External Relations Committee, Scottish Parliament

1. At its meeting on 7 December, the European and External Relations Committee considered a paper on the European Union Bill and undertook to contact the European Scrutiny Committee, given its current inquiry into the Bill.

2. We appreciate that the Bill covers reserved matters and that you have already reported on Part 3. Nevertheless we would like to draw to the Committee's attention one or two implications as regards devolved matters in Part 1 of the Bill.

3. The Bill makes provision for referenda in the event of proposed amendments to TEU or TFEU which seek to transfer power or competence from the UK to the European Union. Given the nature of devolution, these powers could be ones that have been devolved under the Scotland Act. In this context it is conceivable that the impact of the transfer of powers might be significantly different in Scotland (or other devolved areas) to the UK as a whole.

4. This in turn has a number of potential implications:

- Should the Minister responsible be obliged to take representations from devolved Parliaments/ Governments prior to producing the statement to be laid before Parliament?
- Should the Minister be obliged to reflect in the statement any devolved matters raised?
- Should any centrally-produced material for the referendum include information concerning the differential impact on Scotland (or other devolved areas) where relevant?
- Will the referendum results information be broken down at sub-state level?

5. There may of course be other implications for the Bill of which we are unaware.

6. We would invite the Committee to consider these issues within its overall consideration of the Bill.

9 December 2010

Printed in the United Kingdom by The Stationery Office Limited
01/2011 007808 19585

ISBN 978-0-215-55607-3

PEFC/16-33-622