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European Scrutiny Committee

The EU Bill and Parliamentary sovereignty

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Written evidence

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The European Scrutiny Committee

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Written evidence

Written Evidence from Professor Adam Tomkins, Chair of Public Law, University of Glasgow

CLAUSE 18 OF THE BILL: PARLIAMENTARY SOVEREIGNTY AND EU LAW

INTRODUCTION

1. This evidence is submitted to the House of Commons European Scrutiny Committee as part of its inquiry into the European Union Bill. This evidence is concerned principally with Clause 18 of the Bill.

2. The evidence is submitted by Professor Adam Tomkins, John Millar Professor of Public Law in the University of Glasgow. I am an academic specialising in constitutional law. Part of the evidence is drawn from my publications: in particular, A Tomkins *Public Law*, (Oxford University Press, 2003) and C Turpin and A Tomkins, *British Government and the Constitution* (Cambridge University Press, 6th ed 2007).

3. In addition to being a Professor of Law at Glasgow I am also a legal adviser to the House of Lords Select Committee on the Constitution. This evidence is submitted solely in a personal capacity. Nothing written here is to be taken as representing the view of any member, committee or official of the House of Lords.

DEFINITION OF PARLIAMENTARY SOVEREIGNTY

4. Dicey's definition of parliamentary sovereignty (*The Law of the Constitution* (1885), pp 39–40) was as follows:

The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament . . . has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.

5. The sovereignty of Parliament is a doctrine whose cardinal importance to the British constitution would be difficult to exaggerate. As the “keystone” of the constitution (as Dicey called it), what is meant is that the doctrine is no less than “the central principle” of the system, “on which all the rest depends” (to quote from the *OED*).

6. What the doctrine establishes is the legal supremacy of *statute*. It means that there is no source of law higher than—ie more authoritative than—an Act of Parliament. Parliament may by statute make or unmake any law, including a law that is violative of international law or that alters a principle of the common law. And the courts are obliged to uphold and enforce it.

7. There is an issue about what is the legal source of the rule that Parliament is sovereign. This matter is highly pertinent to clause 18 of the EU Bill and I address it in detail later in this evidence.

8. It may assist the Committee if I declare at this point that, as an academic constitutional lawyer and as a citizen and voter I like the doctrine of parliamentary sovereignty. Unlike several of my colleagues in the world of constitutional law I have never argued that the doctrine of parliamentary sovereignty should be replaced with a power whereby the courts may quash legislation if they rule it to be unconstitutional or otherwise illegal. While I seek to advocate a strong and robust role for the courts in enforcing the rule of law, I am not of the view that the courts should be permitted to quash Acts of Parliament. I also see myself, for what it is worth, as being pro-European. While I am deeply critical of a number of aspects of the law and politics of the European Union (and I have been particularly critical of some of the ECJ's case law), I do consider that it is in the United Kingdom's clear interest to remain a committed member of the EU.

CHALLENGES TO PARLIAMENTARY SOVEREIGNTY: (1) EU LAW

9. When the United Kingdom joined the European Community (now the European Union) in 1972 it was already an established principle of the Community legal order that laws issuing from it, within the areas of Community competence, should have supreme authority in all the Member States. To this end the European Court of Justice insisted that the Member States had, in transferring powers to the Community, necessarily limited their own sovereign authority (see Case 26/62 *Van Gend en Loos* [1963] ECR 1 and Case 6/64 *Costa v ENEL* [1964] ECR 585). Accordingly, the European Communities Act 1972 provides that UK legislation—including Acts of Parliament—is to have effect *subject to* authoritative provisions of Community law.

10. The most important instance to date of this matter being litigated in the courts is the *Factortame* saga. The background is as follows. Parliament enacted the Merchant Shipping Act 1988, Part II of which specified requirements for the registration of fishing vessels as British (whose catches would then count as part of the British quota). The Act stipulated that only British-owned vessels managed and controlled from within the United Kingdom could be registered as British fishing vessels. As a result ninety-five fishing vessels, previously registered as British under an Act of 1894 but managed and controlled from Spain or owned by Spanish nationals, would not qualify for registration under the 1988 Act. The owners of these vessels sought judicial review, claiming a declaration that the 1988 legislation should not apply to them.

11. The Divisional Court decided to obtain a preliminary ruling from the European Court of Justice under (what is now) Article 267 TFEU on the questions of EU law arising in the case. Since there would be a delay before the ruling of the Court of Justice was given and the owners of the fishing vessels would suffer hardship if obliged to refrain from fishing in the meantime, the Divisional Court granted interim relief, ordering that Part II of the 1988 Act should be “disapplied”. In *R v Secretary of State for Transport, ex parte Factortame (No 1)* [1990] 2 AC 85 the House of Lords held that the Divisional Court had had no power, as a matter of English law, to make an interim order in such terms. The House of Lords then went on to consider whether an appropriate interim remedy might be available to the applicants *as a matter of European law*. Their Lordships decided that EU law on the matter was unsettled and accordingly sent a second reference to the Court of Justice.

12. The ECJ held that a national court was obliged to set aside provisions of domestic law which might prevent rights in EU law from having full force and effect. The House of Lords then granted an injunction against the Secretary of State, requiring him to suspend the application of the requirements of British residence and domicile in the Merchant Shipping Act to nationals of other Member States: *R v Secretary of State for Transport, ex parte Factortame (No 2)* [1991] 1 AC 603.

13. In this profoundly important decision, the House of Lords acknowledged that its obligation to comply with a principle of EU law as affirmed by the European Court of Justice required it to deny effect to the terms of an Act of Parliament. In the course of his opinion in *Factortame (No 2)* Lord Bridge made the following observations:

Some public comments on the decision of the European Court of Justice, affirming the jurisdiction of the courts of Member States to override national legislation if necessary to enable interim relief to be granted in protection of rights under Community law, have suggested that this was a novel and dangerous invasion by a Community institution of the sovereignty of the United Kingdom Parliament. But such comments are based on a misconception. If the supremacy within the European Community of Community law over the national law of Member States was not always inherent in the E.E.C. Treaty it was certainly well established in the jurisprudence of the European Court of Justice long before the United Kingdom joined the Community. Thus, whatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary. Under the terms of the Act of 1972 it has always been clear that it was the duty of a United Kingdom court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law ... Thus there is nothing in any way novel in according supremacy to rules of Community law in those areas to which they apply ...

14. Academic opinion is divided on how this decision should be interpreted. There are perhaps two main camps, which may be dubbed the ‘revolution view’ and the “evolution view”. Leading the former was the late Sir William Wade, who argued (in “Sovereignty: revolution or evolution?” (1996) 112 *Law Quarterly Review* 568) that a constitutional revolution had occurred because the House of Lords had recognised that the result of the European Communities Act 1972 was that future Parliaments were, unless and until they expressly repealed it, bound by its terms. Parliament remained sovereign in the sense that it retained the power expressly to repeal the 1972 Act (thereby necessitating, presumably, the United Kingdom’s withdrawal from the European Union), but for as long as the United Kingdom continued to be a member of the European Union on the terms set out in the 1972 Act, the United Kingdom Parliament remained tied to the terms of that statute.

15. An alternative, more evolutionary, set of views has been suggested by a variety of commentators, including Sir John Laws and Professor TRS Allan. Sir John Laws (a Lord Justice of Appeal) has argued as follows (“Law and democracy” [1995] *Public Law* 72, 89):

The effect is that section 2(4) of the European Communities Act falls to be treated as establishing a rule of construction for later statutes, so that any such statute has to be read (whatever its words) as compatible with rights accorded by European Law. Sir William Wade regards this development as “revolutionary”, because in his view it represents an exception to the rule that Parliament cannot bind its successors. But I do not think that is right. It is elementary that Parliament possesses the power to repeal the European Communities Act in whole or in part (I leave aside the political realities); and the most that can be said, in my view, is that the House of Lords’ acknowledgement of the force of European law means that the rule of construction implanted by section 2(4) cannot be abrogated by an implied repeal. Express words would be required. That, however, is hardly revolutionary: there are a number of areas where a particular statutory construction is only likely to be accepted by the courts if it is vouchsafed by express provision [as where a statute is said to exact taxes, impose criminal liability or to have retroactive effect]. Although *Factortame* ... undoubtedly demonstrate[s] what may be described as a devolution of legislative power to Europe, it is no true devolution of sovereignty. In legal (though certainly not political) terms, the organs of European legislation may in truth be described, for so long as the Act of 1972 remains on the statute book, as Parliament’s delegates; the law of Europe is not a higher-order law, because the limits which for the time being it sets to the power of Parliament are at the grace of Parliament itself.

16. Professor Allan’s challenge to Wade is slightly different. He attacks the jurisprudential basis of Wade’s account of sovereignty. For Wade, the sovereignty of Parliament is ultimately a judicially recognised “political fact”. And when the judges recognise that the political facts have changed, the meaning of sovereignty changes accordingly. So, for Wade, what the House of Lords recognised in *Factortame (No 2)* was that the political fact of sovereignty had changed—Parliament since 1972 legislates not in the splendid isolation of a supreme

being but in a geo-political environment in which the United Kingdom is a loyal member of the European Union. Allan disputes this analysis on the basis that sovereignty should be seen, not as judicial recognition of political fact, but as a rule of the common law based on reason just like any other rule of the common law. For him, what occurred in *Factortame (No 2)*, “far from any dramatic, let alone unauthorised, change”, was that “the House of Lords merely determined what the existing constitutional order required in novel circumstances” (‘Parliamentary sovereignty: law, politics, and revolution’ (1997) 113 *Law Quarterly Review* 443, 445). As he recognises and, indeed, welcomes, the consequences of Professor Allan’s analysis are potentially great (pp 448–9): “If it is possible to recognise limits on the power of Parliament to enact legislation which conflicts with [EU] law, even if only to the extent of requiring express wording, it is equally possible to countenance other limits on parliamentary sovereignty which reflect the demands of constitutional principle. Since the requirement of judicial obedience to statutes constitutes a principle of common law . . . its nature and scope are matters of reason, governed by our understanding of the constitution as a whole.”

17. This distinction between the “political fact” and “common law” schools of thought is directly relevant in terms of clause 18 of the European Union Bill, and I shall return to it later in this evidence.

18. My own conclusions as to how *Factortame (No 2)* is best understood are as follows. As will be seen, I agree with Wade that the source of the doctrine of parliamentary sovereignty is “judicial recognition of political fact” rather than the common law *simpliciter*; but I do not agree with him that *Factortame (No 2)* was a revolutionary decision. What follows is adapted from Tomkins, *Public Law* (2003), chapter 4:

In order to examine exactly what the House of Lords decided in *Factortame (No 2)*, and how it fits in to the doctrine of legislative supremacy, we must start with the terms of the European Communities Act 1972. The key provision is section 3(1). The House of Lords decided in *Factortame* that, in the light of the ruling from the ECJ, the applicants were as a matter of Community law entitled to the protection of interim relief. In other words, the House of Lords granted the remedy not in its capacity as a court of English law, but specifically in its capacity as a court empowered to determine questions of Community law. Now, from where did the House of Lords get its power to determine questions of Community law? The answer is section 3(1) of the ECA. Courts in the United Kingdom possess the power to determine questions of Community law for one reason and for one reason only: namely, because Parliament legislated so as to confer that power on them, in section 3(1) of the ECA.

On this reading, all the House of Lords did in *Factortame* was to enforce the will of Parliament as laid down in statute. Parliament legislated in 1972 that courts in the United Kingdom were to enforce Community law, and that what the House of Lords did. *Factortame* was a case in which, acting under instructions contained in the 1972 Act, the House of Lords enforced Community law, and the legislative supremacy of Acts of the United Kingdom Parliament has never been a doctrine of Community law: only of English law. The House of Lords did not take on a jurisdiction to enforce Community law because the European Court of Justice required that it do so, or because the House of Lords volunteered for it, but because Parliament legislated for it, in section 3(1). There was no revolution here. *Factortame* could be read as revolutionary only if it were read as a case decided under the rules of English law, and such a reading would be in grave error, as the opening paragraph of Lord Bridge’s speech in the case shows. Lord Bridge explained perfectly clearly that, whereas *Factortame (No 1)* had been decided by the House of Lords in its capacity as a court of English law, the question in *Factortame (No 2)* was “whether Community law [has] invested us with . . . jurisdiction” to grant interim relief in certain circumstances.

What then are the implications of the decision for the doctrine of legislative supremacy? Recall that there are two limbs to the doctrine. The first is that Parliament may make or unmake any law whatsoever. Is this still the case? Does Parliament, post-*Factortame*, retain the power to make or unmake any law? The answer is absolutely, yes. There is nothing in *Factortame* to suggest that Parliament cannot make a law that is contrary to Community law. Parliament might have difficulties in having its law effectively enforced, but that is a separate issue and does not speak to Parliament’s capacity to make law. The first limb of the doctrine of legislative supremacy is thus untouched by *Factortame*.

The second limb provides that nobody may override or set aside an Act of Parliament. Now, as a matter of English law this remains the case, but as a matter of European Community law it never was the case: from as long ago as 1964—eight years before the United Kingdom joined the Community—it was clear from the case law of the Court of Justice that in a conflict between national law and directly applicable or directly effective Community law, the latter would as a matter of Community law prevail over the former. As soon as the House of Lords (and all other courts in the United Kingdom) became empowered by section 3(1) of the ECA to determine questions of Community law, it was clear from reading the text of the 1972 Act alongside the pre-existing jurisprudence of the Court of Justice that it was no longer true that nobody in England could set aside an Act of Parliament.

To clarify: it remains the case that *under English law* nobody has the power to override or to set aside a statute, *but it is no longer the case that English law is the only law that is applicable in England*. Since 1 January 1973 there have been two legal systems operating in this country, not one, and the doctrine of the legislative supremacy of statute is a doctrine known to only one of those two systems. This is not a revolution: it is rather the incorporation of a new legal order into a very old country. European Community law is, moreover, a new legal order that is to be enforced by the same courts as enforce domestic law. They may be the same courts, but they are not enforcing the same law. The House of Lords is one court with two jurisdictions, one in domestic law (which does not allow the court to set aside a statute) and one

in Community law (which in certain circumstances does). Thus, as these legal systems currently stand, the doctrine of legislative supremacy may be stated as follows: Parliament may make or unmake any law whatsoever, and under English law nobody may override or set aside a statute.

19. Could Parliament reclaim the fullness of its sovereignty? Parliament retains its ultimate sovereignty as long as it has the power to terminate the application of EU law in the United Kingdom (and its overriding force) by repealing or further amending the European Communities Act 1972. It is hardly open to doubt that the Queen's courts would give effect to an Act of Parliament which was passed in the process of effecting a withdrawal from the Union.

20. Meanwhile it is conceivable that Parliament might legislate deliberately in contradiction of a rule of EU law, perhaps even with the *expressly stated* purpose of negating the effect of the rule in the United Kingdom. A bill to this effect was introduced in Parliament in 2005 (the Food Supplements (European Communities Act 1972 Disapplication) Bill). The bill's long title stated that it was "to provide that a specified Community instrument relating to food supplements shall not have effect in the United Kingdom notwithstanding the provisions of the European Communities Act 1972". To this end, clause 1 of the bill provided that "Notwithstanding the provisions of the European Communities Act 1972 (a) Directive 2002/46/EC . . . on the approximation of the laws of the Member States relating to food supplements, and (b) any judgment of the European Court of Justice relating to the [directive], shall not have effect in the United Kingdom".

21. If an Act were to be passed in terms such as these the courts could not refuse to apply it without asserting a power which our constitution has not hitherto accorded to them and to which no English court has yet laid claim. Should the issue arise, however, the response of the British courts cannot be predicted with certainty. (One thing is likely, however: the Commission would bring infringement proceedings before the Court of Justice against the United Kingdom (under Article 258 TFEU) and, if the United Kingdom ignored the Court's judgment, the country would be heavily fined under the penalty payment procedure of Article 260 TFEU. What would happen if the United Kingdom refused to pay such a penalty payment, insisting on its national sovereignty, is a question which has not yet arisen in the history of the European Union and which, in any event, cannot be answered by reference to law alone.)

CHALLENGES TO PARLIAMENTARY SOVEREIGNTY: (2) COMMON LAW RADICALISM

22. The past twenty years or so have seen a remarkable renaissance in what might be called common law radicalism. Common law radicals believe that the entire constitution, including the doctrine of the sovereignty of Parliament, is based on the common law: an example of this sort of thinking was provided above by Professor Allan's account of *Factortame (No 2)*.

23. In *Jackson v Attorney General* [2005] UKHL 56, [2006] 1 AC 262 a challenge was launched to the constitutional validity of the Hunting Act 2004 and the Parliament Act 1949. The case had nothing to do with EU law but is the most recent leading decision on the law of parliamentary sovereignty. It is directly relevant to a number of the issues raised in the Committee's call for evidence. Technically, the comments made in *Jackson* about the sovereignty of Parliament were *obiter* and, moreover, they were uttered in the context of litigation concerning statutes passed without the consent of the House of Lords. It may therefore be that they prove to be of little precedential value. That said, however, their Lordships' opinions do not expressly state that their comments about parliamentary sovereignty should apply only in the context of legislation passed under the Parliament Act procedure.

24. Among the most interesting *obiter* comments in *Jackson* are the following from Lords Bingham, Steyn and Hope.

Lord Bingham: The bedrock of the British constitution is, and in 1911 was, the supremacy of the Crown in Parliament . . . Then, as now, the Crown in Parliament was unconstrained by any entrenched or codified constitution. It could make or unmake any law it wished. Statutes, formally enacted as Acts of Parliament, properly interpreted, enjoyed the highest legal authority.

Lord Steyn: We do not in the United Kingdom have an uncontrolled constitution . . . In the European context the second *Factortame* decision made that clear: [1991] 1 AC 603. The settlement contained in the Scotland Act 1998 also points to a divided sovereignty. Moreover, the European Convention on Human Rights as incorporated into our law by the Human Rights Act 1998 created a new legal order . . . The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the general principle of our constitution. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism. In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish. It is not necessary to explore the ramifications of this question in this opinion. No such issues arise on the present appeal.

Lord Hope: Our constitution is dominated by the sovereignty of Parliament. But parliamentary sovereignty is no longer, if it ever was, absolute . . . Step by step, gradually but surely, the English

principle of the absolute sovereignty of Parliament which Dicey derived from Coke and Blackstone is being qualified . . .

The rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based . . .

Each of the two main parties has made use of the 1949 Act's timetable, and in subsequent legislation passed by both Houses each of these Acts has been dealt with in a way that has acknowledged its validity . . . The political reality is that of a general acceptance by all the main parties and by both Houses of the amended timetable which the 1949 Act introduced. I do not think that it is open to a court of law to ignore that reality . . .

Trust will be eroded if the [Parliament Act] procedure is used to enact measures which are, as Lord Steyn puts it, exorbitant or are not proportionate. Nevertheless, the final exercise of judgment on these matters must be left to the House of Commons as the elected chamber.

25. Several comments may be made about these passages. First, as the contrast of approaches between Lord Bingham on the one hand and Lords Steyn and Hope on the other illustrates, their Lordships were far from unanimous in terms of their thoughts about sovereignty. For Lord Bingham, outwith contexts in which the European Union was relevant there was no difference between the doctrine of sovereignty as it stood in 1911 and the doctrine of sovereignty now. For Lords Steyn and Hope, by contrast, even if the sovereignty of Parliament persists as a "general" doctrine, it does so in a way that is heavily qualified both by statute and by the common law. For Lord Steyn, moreover, Dicey's account, while apparently accepted by Lord Bingham, is "out of place in the modern United Kingdom".

26. Secondly, is there not something curious about the construction of Lord Steyn's argument? He cites three respects in which, in his view, the sovereignty of Parliament is now limited. These are: the United Kingdom's membership of the European Union, the devolution "settlement" of 1998, and the incorporation by the Human Rights Act of fundamental rights into domestic law. Each of these, it is to be observed, came about as a result of *legislation*. Yet from this starting point his Lordship goes on to state that the sovereignty of Parliament is a "construct of the common law", "created" by judges and *alterable by them*. Even if this is correct (and I submit below that it is incorrect) the conclusion does not follow from the evidence his Lordship cites. The changes he outlines were made through legislation by Parliament; not through common law adjudication by judges.

27. Thirdly, two of Lord Steyn's descriptions are worth noting. First, he describes the devolution legislation of 1998 as pointing to 'a divided sovereignty'. It is not at all clear what this means. The Scottish Parliament, created by the Scotland Act 1998, which his Lordship cites, is anything but a sovereign legislature, as the Scotland Act makes abundantly plain. Moreover, the existence of the Scottish Parliament has done nothing to limit the legal power of the Westminster Parliament to legislate for Scotland, even on ostensibly devolved matters: see Scotland Act 1998, section 28(7). The political reality may for the time being be that the Westminster Parliament will not legislate for Scotland on devolved matters without the consent of the Scottish Parliament, but this behaviour results from a political agreement and has nothing to do with the legal principles that Lord Steyn is concerned with. Secondly, he describes the Human Rights Act as having created a "new legal order". This is obvious mimicry of the European Court of Justice, which in 1963 famously described the European Union as having created a "new legal order of international law", a new legal order that dealt with matters of national sovereignty, for example, differently from the way in which they were understood in ordinary international law. Again, however, is his Lordship's terminology not somewhat tendentious? The Human Rights Act seeks to *balance* Convention rights with parliamentary sovereignty, and seeks to ensure that the sovereignty of Parliament is *preserved* in the scheme of the Act. It is to be noted that Lord Steyn's dicta in *Jackson* were subsequently described as "'unargued and unsound", "historically false", and "jurisprudentially absurd" (R Ekins, 'Acts of Parliament and the Parliament Acts' (2007) 123 *Law Quarterly Review* 91, 103) and, moreover, that Lord Bingham seemed to ally himself with these criticisms in his 2007 *Commemoration Lecture* delivered at King's College London, in which he stated that Lord Steyn's comments 'did not bear on an issue which had to be decided in the case and therefore have no authority as precedent'.

28. Fourthly, there is some difficulty in reconciling all of the statements that Lord Hope makes. He starts with the rather sweeping proposition that the rule of law is the "ultimate controlling factor on which our constitution is based". This sounds very much like the common law radicalism of Lord Steyn and others, but Lord Hope goes on to make two further comments, which seem significantly to dent the extent to which he can really believe what he says about the rule of law. First, he offers as a reason for the court holding that the Parliament Act 1949 is valid that each of the two main political parties has made use of the Act, that both Houses of Parliament have treated legislation made under the Act as valid, that the political reality is of a "general acceptance" of the Act's procedures and, moreover, that 'it is not open to a court of law to ignore that reality'. Secondly, and similarly, he states that the "final exercise of judgment" as to when the Parliament Act procedures may be used should be left to the House of Commons "as the elected chamber", not to a court of law. Now, if the constitution really were based on the rule of law as its "ultimate controlling factor", neither of these would be the case. Neither the "political reality" nor the judgment of the House of Commons would stand in the way of the court stating that the rule of law had been violated. The rule of law would trump both. As it is, Lord Hope holds that the rule of law has to be conditioned by—has to give way, even?—to political reality and to the Commons' democratic superiority.

29. Finally, and related to the previous point, what is perhaps most important about Lord Hope's opinion is the reliance he places on political fact. This brings us back to what Sir William Wade wrote about the sovereignty of Parliament half a century before *Jackson* was decided (see 'The legal basis of sovereignty' [1955] *Cambridge Law Journal* 172). What is the source of the authority for the proposition that Acts of Parliament enjoy legal supremacy in the British constitution? Lord Steyn, Professor Allan and the common law radicals say that it is a rule of the common law, which, like any other rule of the common law, was created and may be altered by the courts. Sir William Wade and Lord Hope, however, take the view that its source lies in political fact—or, more precisely, in judicial recognition of political fact. As Wade argued, it was the political fact of Parliament's seventeenth-century victories over the Crown that the courts took into account when articulating the orthodoxy of parliamentary sovereignty. Similarly, the political facts of the United Kingdom's membership of the European Union and of its incorporation into domestic law of Convention rights may be recognised by the courts as conditioning the constitutional environment in which the doctrine of sovereignty now operates.

30. Lord Bingham, in his 2007 *Commemoration Lecture* delivered at King's College London, to my mind correctly stated that it has been 'convincingly shown that the principle of parliamentary sovereignty has been recognised as fundamental in this country not because the judges invented it but because it has for centuries been accepted as such by judges and others officially concerned in the operation of our constitutional system. The judges did not by themselves establish the principle and they cannot, by themselves, change it.'

CONCLUSIONS

31. For the above reasons, my principal conclusions for the Committee are as follows.

32. The doctrine of the sovereignty of Parliament is better understood as having its legal source in judicial recognition of political fact than in the common law. The Bill's explanatory notes talk (para 8) of the "common law principle of Parliamentary sovereignty". It would be preferable for this to be corrected, so that both Government and Parliament are clear.

33. European Union law is far from being the only contemporary challenge to the doctrine of parliamentary sovereignty. Human rights law and, indeed, the common law itself, also pose potent challenges. For Parliament to assert its legislative supremacy fully, it would have to deal with these challenges as well as with that posed by EU law. Clause 18 is silent as to these challenges. If anything, this may make the situation more fluid rather than less. Parliament addressing but one of the contemporary challenges to its sovereignty may be taken in some quarters as representing parliamentary acceptance (or even approval) of the other such challenges. It does not take much to imagine ingenious lawyers crafting arguments to the court to the effect that old concerns about parliamentary sovereignty need no longer detain us in the contexts of human rights or of the development of the common law as, when Parliament took the opportunity to legislate on sovereignty it chose to do so only in the context of the EU, leaving human rights law and the common law free. With this in mind, there is an argument that Parliament would be better advised either to legislate for sovereignty in the round or to leave the subject alone altogether. Partial legislation on sovereignty, such as clause 18, may yet be the most dangerous option of all.

34. Even within the context of parliamentary sovereignty and EU law, the scope of clause 18 is severely limited. This is because it does nothing to stem the further growth of competence creep. While other provisions in the Bill address *legislative* transfers of competence and/or power, there is nothing in the Bill—and certainly nothing in clause 18—which addresses the problem of the further development of EU law at the hands of the European Courts. Let us not forget that many of the doctrines of EU law that have posed the greatest challenge for parliamentary sovereignty find their origin not in the articles of the Treaties, nor even in European legislation, but in the case law of the ECJ. This is true, for example, of the doctrine of supremacy (*Costa*), of direct effect (*Van Gend en Loos*), of indirect effect (*Marleasing*), of State liability (*Francovich* and *Factortame (No 3)*), as well as many others. The law of European citizenship has been aggressively developed by the Court so as significantly to extend the reach of EU law. And the law pertaining to the Charter of Fundamental Rights may be about to be likewise developed by that Court. Indeed, the first signs are already emerging that this is precisely what will happen (see, eg, the Opinion of the Advocate General in Case C-34/09 *Zambrano*). Neither clause 18 nor any other provision in the Bill safeguards the United Kingdom from the further development of EU law by the ECJ.

35. For all of these reasons, clause 18 as presently drafted may be seen as an opportunity missed. Parliamentary sovereignty is under considerable challenge from multiple sources. For those who seek its robust defence and protection, clause 18 falls substantially short of the mark.

36. None of which is to say that Parliament would necessarily be acting wisely to legislate in forthright or comprehensive terms in defence of parliamentary sovereignty. Courts tend to be jealous in the protection of what they see as their rightful jurisdiction, and they do not generally react favourably to attempts to diminish it or to remove it from them. If Parliament is of the view that its sovereignty requires to freshly articulated and

safeguarded in legislation, it would be well advised to proceed with great care and caution, lest the consequences of its actions come to be seen as the proverbial red rag to the bull.

Professor Adam Tomkins

John Millar Professor of Public Law in the University of Glasgow

November 2010

Written evidence from Professor Philip Allott, University of Cambridge

CLAUSE 18

1. The word “only” is incorrect and should be deleted.

(1) Direct applicability and direct effect of EU law in the United Kingdom are a product of three things—(a) our international legal obligations (the Accession Treaty, and subsequent treaties); (b) EU law; and (c) parliamentary legislation (the European Communities Act 1972, as amended).

(2) The 1972 Act makes it clear that it is designed to produce its effect *in conjunction with* EU law. This is the meaning of the phrase “as *in accordance with the Treaties* are without further enactment to be given legal effect or used in the United Kingdom” in Section 2(1) of that Act. This is to be read with Section 3 of the Act which makes the substance of EU law (including the nature of direct applicability and direct effect) a matter to be determined *in accordance with EU law* and its procedures, of which our courts are required to take *judicial notice*.

(3) As a matter of British constitutional law, it would not be open to Parliament to create *a new source of law* in the United Kingdom (which is the nature of the direct applicability and direct effect of EU law) by a mere Act of Parliament, except to the extent that its doing so is recognised by the courts as having achieved that effect. The power and the limits of an Act of Parliament are a combined product of basic inherited constitutional principles and the determinations of the courts. It so happens that the British courts ultimately chose to accept EU law as a new source of law, beyond statute and common law, (*Factortame, inter al.*), giving effect to their understanding of the factors set out in (1) and (2) above. They might well have decided otherwise.

2. The legal status of Clause 18 is obscure. It has no evident legislative effect. It is essentially declaratory in character. It cannot itself finally determine the constitutional problem of the legal basis of direct applicability and direct effect. That matter can only be finally determined by the Supreme Court and the European Court.

3. Being merely a provision in an Act of Parliament, Section 18 would be as vulnerable to amendment or repeal as any other provision in an Act of Parliament. The provisions of the 1972 Act are less vulnerable, given the complex constitutional framework set out above. It is no longer clear that a mere provision in an Act of Parliament could undo the direct applicability and direct effect of EU law. That question would also be a matter for the Supreme Court and the European Court finally to determine.

LONG TITLE

4. The phrase “to make provision about the means by which directly applicable or directly effective European Union law has effect in the United Kingdom” is inappropriate and should be redrafted as “to make provision concerning the direct applicability and direct effect of European Union law in the United Kingdom”.

5. The whole point of direct applicability and direct effect (affirmed in countless decisions of the European Court and the British courts) is that there must be no “means” of implementing them. They take effect as such and automatically within the United Kingdom.

6. This suggests that the phrase in question is intended to refer to Clause 18. But (a) Clause 18 does not “make provision” about any such thing; and (b) it does not have any legal effect whatsoever on the status of EU law as a source of law in the UK.

7. The Supreme Court or the European Court might be interested to read the text of a future Section 18. But they might also ignore it entirely—or they might give it their own interpretation which, one may hope, would be in line with the analysis set out above in relation to Clause 18.

8. It follows that the phrase in question in the Long Title is misleading. Although a Long Title has no legislative effect, it should not contain anything that is misleading about the legislation that it summarises.

CLAUSE 8

9. We should have objected to Article 235 of the EC Treaty (now, more or less, Article 352 of the TFEU) at the time of UK accession. Much has been done over the years by the EU institutions and by the European Court to mitigate its awfulness. The provisions of Clause 8 may be very difficult to apply in practice—and could lead to much litigation in the UK and in the European Court. But they certainly address a notorious problem.

10. The problem of Article 235/352 is that it makes explicit provision—and unconscionably generous provision in favour of the Council—in relation to one of the most subtle and difficult of constitutional matters—

the question of *implied powers*—what are the powers of an organ of the constitution which are not explicitly conferred, but which prove to be incidentally necessary, from time to time, in the implementation of explicit powers?

11. Every constitution must deal with this question. The best solution has been the American (and also, in effect, the British) solution.

“Let the end be legitimate, let it lie within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but which consist with the letter and spirit of the constitution, are constitutional.”.-. Chief Justice Marshall, *McCulloch v. Maryland* (US Supreme Court, 1819).

12. Through the assertion of this common-law constitutional principle, the US Supreme Court created a broad framework for countless subsequent, often highly controversial, decisions about implied powers. The position has been essentially the same in the United Kingdom, albeit in the absence of a written constitutional document, through the medium of countless cases decided, as necessary, by the courts.

GENERAL

13. The Bill has a whiff of revolution about it. It is a Boston Tea Party gesture against *creeping integration*. As such, one might say, it is twenty years too late.

With an elegance of drafting reminiscent of the 1972 Act, it seems to echo Luther’s “here I stand”. Is the Bill compatible with our international treaty obligations and EU law?

14. It is a principle of EU law that member states must make their own constitutional and administrative arrangements for participation in the EU institutions, subject always to their acting in conformity with EU law. The UK led the way in involving Parliament in the scrutiny of proposed EU legislation—and that precedent has been followed in many other member states. The reports of the UK parliamentary scrutiny committees have been recognised as major contributions to the general EU pre-legislative process.

15. All the leading member states have struggled with the problem of how to involve their parliaments in the functioning of the EU system. The German Federal Constitutional Court has insisted, on several occasions, that no development in the EU must be allowed to undermine the fundamental place of the German parliament, as the immediate voice of the people, in the overall constitutional structure of the Federal Republic.

16. So far as I know, no other member state has anything remotely approaching the degree of parliamentary involvement which the Bill would create, albeit only in relation to a particular kind of EU law provision—those provisions that can, piecemeal, increase the legal powers of the Union and its institutions.

17. Needless to say, if this approach were to be extended to other kinds of EU provisions, or if other member states, in any great number, adopted the same kind of regime, the EU law-making process would grind to a halt. Even within the United Kingdom, one might expect that the new procedures would give rise to much extra work—and some litigation.

18. In the time available, I have not been able to check every one of the very many Treaty provisions which are to be subjected to these new procedures. So far as I can tell, they are all provisions in which the United Kingdom, represented by ministers in the Council, has the power to agree or not to agree to the adoption of a proposed legal act. The Bill would, therefore, not increase or decrease the UK’s powers under EU law in relation to such legal acts. If this is so, then the Bill is covered by the principle noted above—that it is for each member state to determine its domestic procedures for participating in EU institutions.

19. If a personal comment may be permitted, one may hope that this legislation will not divert attention from the great constitutional challenges posed by the present deplorable state of functioning of the EU—

(a) the absence of any European democratic politics, given the failure of the European Parliament to give rise to a Europe-wide democratic forum integrated into national politics;

(b) the marginalisation of national parliaments in relation to policy-making and law-making;

(c) the spectre of *taxation without representation*, given that the EU budget is determined obscurely and remotely from the taxpayers who pay for it;

(d), most generally, the absence of any kind of constitutional unity embracing the EU and the member states. On the contrary, through a kind of *acquis anticommunautaire* of recent years, the total system has become more grossly anomalous than ever—with the governments of member states seeing participation in the Council as diplomacy by other means, pursuing narrow national interests, and with the vast statist leviathan of the institutional EU apparently beyond redemption, and terminally incapable of projecting European power globally—a fundamentally disintegrated over-integration—a monstrous constitutional paradox.

20. It may be that something more than a whiff of revolution is overdue.

Philip Allott

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16 November 2010

Written evidence from Professor Trevor Hartley, London School of Economics

THE EUROPEAN UNION AND BRITISH SOVEREIGNTY

SUMMARY

This memorandum deals with the effect of the EU Treaties and EU legislation on the sovereignty of the British Parliament. It concludes that parliamentary sovereignty (supremacy) is unaffected by them.

1. I am a Professor of Law Emeritus at the London School of Economics, where I have taught courses on European Union Law for many years. I have published extensively in the field.¹

2. I start with two self-evident propositions. First, the United Kingdom constitution owes nothing to European-Union law or to international law: it is the product of British history. Secondly, European Union law is either contained in the Union treaties or is based on them; and those treaties derive their validity from international law.

3. Since the European-Union treaties are *treaties* and nothing more, their effect in the United Kingdom legal system can be no greater than that accorded to treaties under the United Kingdom constitution.²

4. The effect of treaties within the United Kingdom legal system has been considered by the courts on a number of occasions. As is well known, a treaty does not as such have the force of law in the United Kingdom.³ In order to give it such effect, Parliament must pass legislation. The same is true with regard to legislation adopted by an international or supranational organization (such as the European Union) of which the United Kingdom is a member. Without such legislation, a treaty or such legislation will not constitute law in the United Kingdom.⁴

5. In view of this, when the United Kingdom first joined the European Union (then the European Communities), Parliament passed the European Communities Act 1972, section 2 of which gave legal effect in the United Kingdom to such provisions of the EU Treaties and EU legislation as were required by EU law to be applied in the Member States. When new treaties were agreed, new legislation had to be adopted.

6. As far as the United Kingdom is concerned, the effect of the entire EU legal system depends on a series of Acts of Parliament. Without them, EU law would have no legal effect in the United Kingdom. The European Court of Justice may take a different view, but, in the British courts, the legal effect of EU law in the United Kingdom depends on United Kingdom law and not on EU law.

7. For this reason, United Kingdom law determines the nature of the relationship between United Kingdom law and European Union law: it decides which will prevail in the event of a conflict and whether and how that relationship can be changed.

8. Section 2(1) of the European Communities Act 1972 provides for EU law to have effect in the United Kingdom legal system, and section 2(4) purports to entrench the position of EU law by providing that future Acts of Parliament are to have effect subject to Union law. It states that “any enactment passed or to be passed ... shall be construed and have effect subject to the foregoing provisions of this section.” The “foregoing provisions” of course include section 2(1).

9. However, it is a well-known provision of the United Kingdom constitution that Parliament is constitutionally unable to limit its future powers: any such limitation is invalid and ineffective.

10. For this reason, section 2(4) could not deprive Parliament of the power to legislate contrary to EU law. Section 2(4) should, therefore, be read as laying down no more than a rule of interpretation—though it should be regarded as a strong rule of interpretation—that, unless a contrary intention is expressly stated, the courts

¹ Publications relevant to the present subject include: T. C. Hartley, *The Foundations of European Union Law* (Oxford University Press, Oxford, 7th Edition, 2010); Trevor C. Hartley, *European Union Law in a Global Context* (Cambridge University Press, Cambridge, 2004); Trevor C. Hartley, *Constitutional Problems of the European Union* (Hart Publishing, Oxford and Portland, Oregon, 1999); Hartley, “The Constitutional Foundations of the European Union” (2001) 117 *Law Quarterly Review* 225; Hartley, “International Law and the Law of the European Union—A Reassessment” [2001] *British Year Book of International Law* 1.

² In the past it was sometimes suggested that the EU Treaties had become “constitutionalized” and were thus something more than treaties. Not much is heard of this theory today. For a criticism of it, see Hartley, “The Constitutional Foundations of the European Union” (2001) 117 *Law Quarterly Review* 225 at pp. 226–233.

³ The citation of authority for this proposition is hardly necessary, but if it is needed it can be found in *Attorney General for Canada v. Attorney General for Ontario* [1937] AC 326 (PC).

⁴ At most, it will have effect as an aid to the interpretation of existing United Kingdom legislation. See *Salomon v. Commissioners of Customs and Excise* [1967] 2 QB 116 (CA).

are to assume that future Acts of Parliament are intended to be subject to directly effective EU law. Where a contrary intention is expressly stated, however, the Act of Parliament will prevail.

11. This point was made by Lord Denning MR as long ago as 1979 when he said:⁵

If the time should come when our Parliament deliberately passes an Act with the intention of repudiating the Treaty or any provision in it or intentionally of acting inconsistently with it and says so in express terms then I should have thought that it would be the duty of our courts to follow the statute of our Parliament. ... Unless there is such an intentional and express repudiation of the Treaty, it is our duty to give priority to the Treaty.

12. So, unless Parliament expresses a contrary intention, directly effective EU law prevails over United Kingdom law. But if Parliament does express such an intention, and does so clearly, then the Act of Parliament will prevail. Moreover, Parliament could always repeal the European Communities Act, in which case EU law would have no direct effect at all in the United Kingdom.

13. The leading case today is *Thoburn v. Sunderland City Council*,⁶ in which Lord Justice Laws said:

[T]here is nothing in the [European Communities Act] which allows the [European Court], or any other institutions of the EU, to touch or qualify the conditions of Parliament's legislative supremacy in the United Kingdom. Not because the legislature chose not to allow it; because by our law it could not allow it. That being so, the legislative and judicial institutions of the EU cannot intrude upon those conditions. The British Parliament has not the authority to authorise any such thing. Being sovereign, it cannot abandon its sovereignty. Accordingly there are no circumstances in which the jurisprudence of the [European Court] can elevate Community law to a status within the corpus of English domestic law to which it could not aspire by any route of English law itself. This is, of course, the traditional doctrine of sovereignty. If it is to be modified, it certainly cannot be done by the incorporation of external texts. The conditions of Parliament's legislative supremacy in the United Kingdom necessarily remain in the United Kingdom's hands.

14. He went on to make clear that the relationship between the United Kingdom and the European Union depends on United Kingdom law, not European Union law.

15. For this reason, clause 18 of the European Union Bill, which states that it is only by reason of an Act of Parliament that EU law applies in the United Kingdom, is entirely in accord with the constitutional position in the United Kingdom.

16. The position is similar in other Member States. In Germany, the Federal Constitutional Court (*Bundesverfassungsgericht*) has made clear on a number of occasions that the German Constitution remains supreme law in Germany; European Union law applies in Germany only to the extent permitted by the Constitution.⁷ In 2005, the Federal Constitutional Court held that the German legislation giving effect to the EU third-pillar framework decision on the European Arrest Warrant⁸ was invalid because it was contrary to the constitutional provision forbidding the extradition of German citizens.⁹ The Danish Supreme Court¹⁰ and the Polish Constitutional Court have given similar rulings.¹¹ I believe that the position is the same in all the Member States. The fundamental principle—the starting point of legal analysis—is the national constitution. EU law applies only by reason of, and to the extent permitted by, the national constitution. The United Kingdom is in no way out of line on this question.

17. Of course, the European Court takes a different view. There are thus two ways of looking at the question: that of the European Court and that of the Member-State courts. The former reflects the position in Union law and would prevail at the Union level; the latter reflects the position in Member-State law and would prevail at the national level.

18. Declaration 17 attached to the Treaty of Lisbon provides:

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

⁵ *Macarthy Ltd v. Smith* [1979] 3 All ER 325 at 329. See also per Lawton LJ at 334. In subsequent proceedings in the same case, Lord Denning made the point even more forcefully: see [1981] 1 All ER 111 at 120. For an earlier statement by Lord Denning, see *Shields v. E. Coomes (Holdings) Ltd* [1979] 1 All ER 456 at 461–2, [1978] 1 WLR 1408 at 1414, CA.

⁶ [2002] EWHC 195 Admin; [2002] 3 WLR 247 (Divisional Court).

⁷ *Bundesverfassungsgericht*, decision of 12 October 1993, reported in English as *Brunner v. European Union Treaty* [1994] 1 *Common Market Law Reports* 57. See in particular, paragraph 55 of the CMLR text. For the German text, see 2 BvR 2134/92 and 2 BvR 2159/92. The background and significance of the case are explained in Foster, "The German Constitution and EC Membership" [1994] *Public Law* 392.

⁸ Council Framework Decision 2002/584/JHA, OJ 2002, L190/1.

⁹ Decision of 18 July 2005, 2 BvR 2236/04: see http://www.bundesverfassungsgericht.de/en/decisions/rs20050718_2bvr223604en.html (English translation). For a comment, see Hinarejos Parga, (2006) 43 CMLRev. 583.

¹⁰ *Carlsen v. Rasmussen*, Danish Supreme Court, judgment of 6 April 1998, Case 1 361/1997, [1999] 3 CMLR 854 (English translation).

¹¹ Case K 18/04. English translation and summary: http://www.trybunal.gov.pl/eng/summaries/wstep_gb.htm. See especially at paragraphs 6–16 of the English-language summary.

The precise status of such declarations is controversial, but in any event they cannot have greater effect than a provision in the treaty to which they are attached. As a treaty provision, it would be subject to the limitations set out in paragraph 4, above: it could not affect the constitutional position under United Kingdom law. The sovereignty of the United Kingdom is not limited by it. All the Declaration does—as the Declaration itself recognizes—is to restate the position under European Union law, as laid down by the European Court.

19. The result is that the position under Union law differs from the position under national law. Under United Kingdom law, the powers of the British Parliament remain undiminished. Provided it makes its intention clear, Parliament can legislate contrary to Union law. It can restrict or abolish the power of the European Court to give judgments that are legally binding in the United Kingdom. It can abolish, in whole or in part, the power of United Kingdom courts to refer questions to the European Court. If the Act was appropriately drafted, there would be no way in which its effectiveness could be challenged in the courts of the United Kingdom.

20. At the EU level, the position would be different. Proceedings could be brought against the United Kingdom before the European Court and fines imposed, though it is hard to see how the United Kingdom could be forced to pay these fines if it did not want to. The final outcome would depend on political considerations.¹²

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November 2010

Written evidence from Michael Dougan, Dean of the Liverpool Law School and Professor of European Law, University of Liverpool

PART 3 OF THE EUROPEAN UNION BILL (PARLIAMENTARY SOVEREIGNTY CLAUSE)

1. The Explanatory Notes observe (at para 106) that Clause 18 has been included in the EU Bill “to address concerns that the doctrine of Parliamentary sovereignty may in the future be eroded by decisions of the courts”. The Explanatory Notes continue to state (also at para 106) that Clause 18 “will provide clear authority which can be relied upon to counter arguments that EU law constitutes a new higher autonomous legal order... which has become an integral part of the UK’s legal system independent of statute”.

2. It should be observed from the outset that the “concerns” referred to in para 106, so far as concerns the domestic status of EU law, find no objective basis in UK constitutional law and no real support within mainstream scholarly opinion. In fact, the argument that EU law could somehow oust Parliamentary sovereignty as the cornerstone of the UK constitutional order—particularly when expressed in terms of a slow-burning judge-led plan to recognise the EU as a self-authenticating entity whose authority is substituted for that of the UK (or any other Member State)—is essentially political in nature. It is associated, in particular, with a Eurosceptic rhetoric lacking any persuasive evidential foundation. Indeed, the “arguments” referred to in para 106 of the Explanatory Notes are heard, most commonly, from Eurosceptic politicians and popular commentators. They certainly do not emanate from the EU itself: the amendments introduced by the Treaty of Lisbon have clarified beyond any credible doubt that the EU is an organisation of purely derived authority and strictly limited competences. Nor can those “arguments” be attributed to the UK judiciary, or even understood as a vision of the UK constitutional system to which the UK judges have shown themselves in any degree sympathetic.

3. There is a strong consensus among legal experts that EU law was and remains incorporated into UK law by virtue of an Act of Parliament. Doctrines such as the duty of consistent interpretation (the obligation of national courts to interpret national law, as far as possible, in conformity with EU legislation), the principle of direct effect (the capacity of a provision of EU law to produce cognisable legal effects within the national system) and the principle of supremacy (the preference given to EU law where national law is incompatible with directly effective EU provisions) all apply within the UK thanks to the Parliamentary mandate created by the European Communities Act 1972, as interpreted by the UK courts in landmark rulings such as *R v Secretary of State for Transport, ex parte Factortame (No 2)* [1990] 3 WLR 818 and *R v Secretary of State for Employment, ex parte Equal Opportunities Commission* [1995] 1 AC 1.

4. On the basis of that mandate, the UK courts will interpret UK legislation in conformity with our EU obligations and will disapply UK legislation if it conflicts with directly effective EU law. The requirement that directive effective EU law enjoys supremacy in the event of an irreconcilable conflict with national law is a highly significant practical reality within the UK—but it does not take effect in some autonomous manner, directly under the authority of the European Union or the European Court of Justice, independently of or despite the will of Parliament itself. Its fundamental constitutional basis remains the principle of Parliamentary sovereignty.

¹² For the way in which political considerations can override the law in the European Union, one only has to look at the reaction of the Union to France’s deportation of Roma immigrants from other Member States. This was almost certainly a violation of EU law, which permits such deportation only on the basis of the personal conduct of the individual concerned. Initially, the EU Justice Commissioner, Ms Reding, took a strong line and threatened France with legal proceedings in the European Court. However, she had to back down when it appeared that she did not enjoy political support among her fellow Commissioners.

5. For that reason, as observed by Lord Denning in *Macarthy's Ltd v Smith* [1979] 3 All ER 325, Parliament remains free clearly and explicitly to derogate from EU law (however unlikely that is to happen in reality, given the high political costs such a course of action would inevitably entail). Parliament also remains entitled ultimately to repeal the European Communities Act 1972 altogether (as would happen in the event of the UK's voluntary withdrawal from the EU). Short of such steps, the UK courts will assume that Parliament did not intend to repudiate the UK's obligations under EU law; and will thus pursue the appropriate interpretation or, if that is not possible, the necessary disapplication of the relevant legislation. As one would expect, the UK courts have thus crafted a careful balance between the integrity of the UK constitutional system (on the one hand) and the demands of EU membership (on the other hand) which is entirely appropriate for our mature legal and political order.

6. It is true that, within the space which lies between faithful implementation of the European Communities Act 1972 (on the one hand) and the theoretical possibility of a future Parliamentary derogation from EU law (on the other hand), some judges have explored the implications of rulings such as *Factortame*, when viewed in their broader constitutional context alongside other major domestic developments (such as enactment of the Human Rights Act and of the Devolution Acts), for the common law understanding of Parliamentary sovereignty. Perhaps the most famous of those judicial reflections is the judgment of Laws LJ in *Thoburn v Sunderland City Council* [2002] 4 All ER 156, in which he suggested a distinction between "ordinary" statutes and a special class of "constitutional statutes", with the latter being exempt from the usual doctrine of implied repeal, such that the relevant measures can only be abrogated by clear and express Parliamentary language.

7. Such an analysis—even if one accepted it to reflect the current state of the common law—is neither uniquely concerned with the status of EU law within the UK nor at all incompatible with the doctrine of Parliamentary sovereignty per se. Indeed, as Laws LJ stated (at para 69 of his judgment in *Thoburn*), "[t]he fundamental legal basis of the United Kingdom's relationship with the EU rests with the domestic, not the European, legal powers". If the common law were in the future to evolve in a direction that recognised the existence of certain limits to the principle of Parliamentary sovereignty as a matter of UK constitutional law, such restrictions are far more likely to emerge in fields such as the fundamental rights and liberties of the citizen, than as regards the status of EU law within the UK legal order (consider, e.g. the House of Lords' ruling in *Jackson v Attorney General* [2005] UKHL 56). Indeed, insofar as the UK courts have toyed with the idea that the common law may itself impose certain inherent constraints upon Parliamentary sovereignty in the context of EU law, it has been to leave open the entirely hypothetical possibility of recognising *limits* to the degree that Parliament has authorised, or may in the future authorise, the supremacy of EU law within the UK (consider, e.g. *Thoburn v Sunderland City Council* [2002] 4 All ER 156; *Gouriet v Secretary of State for Foreign and Commonwealth Affairs* [2003] EWCA Civ 384).

8. In short: there are no reasonable grounds for arguing that Parliamentary sovereignty as the conceptual foundation stone of the UK constitution is threatened by the EU or by the approach of UK judges towards the status of EU law within the national legal system. Clause 18 should therefore be seen as a mere codification of the constitutional status quo. It is a legally unnecessary provision, but one which does no constitutional harm, and could indeed serve a potentially valuable political purpose, i.e. insofar as it helps the Government and other mainstream political opinion to counter rhetorical (Euro-sceptic) claims that EU law might surreptitiously oust UK sovereignty. For the same reasons, it is difficult to see how / why Clause 18 could / should have any appreciable substantive effect upon the current practice of the UK courts towards the interpretation and application of EU law within the national legal system.

9. The terms of reference for the present European Union Bill Inquiry also raise the question of consistency between Clause 18 (on the one hand) and Declaration 17 annexed to the Final Act of the IGC which adopted the Treaty of Lisbon (on the other hand). The latter Declaration essentially recalls that, in accordance with the caselaw of the European Court of Justice, EU law has primacy over national law under the conditions laid down by that caselaw.

10. It should be stressed that the issue of consistency between Clause 18 and Declaration 17 should not be considered a relevant concern for the UK or indeed for the EU.

11. It is well known that the ECJ has developed (and is perfectly entitled to hold) its own perspective on the principle of supremacy. Under that perspective, the principle of supremacy is an unconditional one, subject only to the limits recognised by EU law itself (for example, for the safeguarding of legal certainty in favour of individuals whose interests might be unfairly prejudiced by the enforcement of directly effective EU provisions).

12. That perspective is not shared by the vast majority of Member States, in particular, under the jurisprudence of their national supreme courts. For the latter, the principle of supremacy takes effect only by virtue of national law and is therefore subject to whatever limits are determined under such national law.

13. Those limits differ from Member State to Member State. For example, the German Federal Constitutional Court recognises the supremacy of EU law but insists that the latter remains subject to various constitutional safeguards based on ensuring (first) that EU law offers a level of fundamental rights protection equivalent to that guaranteed under the German Basic Law; (secondly) that the EU does not act ultra vires the Treaties, by perpetrating an obvious violation of the limits of its attributed powers, so as to bring about a structural shift in the balance of competence between the EU and its Member States; and (thirdly) that EU action does not

endanger the fundamental constitutional identity of Germany, by compromising the capacity of the democratically legitimate organs of state to shape the circumstances of life for their citizens in various policy fields.

14. Within the UK, the comparable / relevant limits imposed upon the principle of supremacy as a matter of national law are those which derive essentially from the doctrine of Parliamentary sovereignty, i.e. the possibility that Parliament may clearly and expressly derogate from its EU obligations and ultimately repeal the European Communities Act 1972. Despite the dicta in cases such as *Thoburn* and *Gouriet*, referred to in para 7 above, there is as yet no clear authority to affirm or illustrate the existence of additional common law qualifications to the principle of supremacy within the UK legal order (akin to the approach of the German Federal Constitutional Court).

15. In short: Declaration 17 reflects the position of the ECJ within its proper sphere of competence, i.e. the derived legal order of the EU itself. Clause 18 reflects the position of the UK within its own sphere of competence, i.e. the legal order of the UK as a sovereign state under international law. The pertinent question is not really one of consistency between Declaration 17 and Clause 18—though it should be observed, for the avoidance of doubt, that the latter provision of itself contains no contradiction of the ECJ’s caselaw such as would place the UK in breach of its obligations under the EU Treaties. A better understanding of the position would be to think in terms of an ongoing interaction between two distinct legal orders—EU and UK—whose creative tensions and exchanges are inherent in the very nature of the EU as a complex legal and political entity.

16. I should like to add a brief and rather obvious concluding observation. There is a certain irony in the drafting of a Bill which purports to enshrine the principle of Parliamentary sovereignty so as to safeguard it from the entirely fictitious prospect of an attack from either the EU itself or the UK’s own judges on the basis of EU law; while simultaneously launching a direct challenge to that very same principle of Parliamentary sovereignty as a matter of internal UK constitutional law, i.e. by proposing a system of “referendum locks” which purport to limit the competence of future Parliaments to enact legislation relating to specified EU matters in various circumstances. If there is a real concern about the doctrine of Parliamentary sovereignty that needs to be addressed during the passage of this Bill, it surely consists in an attempt by the Government to persuade the current Parliament to bind its successors in a manner which runs counter to accepted understandings of our constitutional order.

November 2010

Written Evidence from Professor Paul Craig, St John’s College Oxford

EUROPEAN UNION BILL—EUROPEAN SCRUTINY COMMITTEE

PART 3, STATUS OF EU LAW, THE PARLIAMENTARY SOVEREIGNTY CLAUSE

The committee poses a number of questions concerning the impact of Clause 18 of the Bill. The answers to these questions depend, however, on more precise consideration of the purpose and wording of Clause 18. This is important because the Explanatory Memorandum, EM, and the wording of Clause 18, raise three issues that are related but distinct.

(1) Issue 1: An Act of Parliament is a necessary condition for the UK’s entry into the EU and is therefore a necessary pre-condition for the application of any EU law in the UK. The legal premise is that in a dualist country such as the UK there must be an Act of Parliament that adopts or transforms the EU Treaty into UK law. Viewed from this perspective there is nothing novel about Clause 18 insofar as it stipulates that “it is only by virtue of an Act of Parliament that directly applicable or directly effective EU law ... falls to be recognised and available in law in the United Kingdom”. The 1972 Act, and in particular s 2(1), is the gateway in the preceding sense for EU law becoming part of UK law. There is in general no “legal fight” with the EU vis-à-vis this issue. The application of EU law within a national legal order is predicated on that legal order being part of the EU, as determined by the constitutional requirements of that state. Clause 18 could nonetheless potentially be relevant in two unlikely scenarios.

- (a) The UK expressly repeals the 1972 ECA, but has not yet exited from the EU as it is allowed to do under the Lisbon Treaty, Article 50 TEU. On this scenario there would be no Act of Parliament through which EU law fell to be recognized in the UK. However until the UK left the EU it might be argued that it remained bound by EU law as an international Treaty obligation. It might further be contended from the perspective of the EU/ECJ that EU law could continue to apply in the UK as an autonomous legal order even in the absence of a domestic statute. Clause 18 if enacted would operate to block or at the very least impede this line of reasoning within the UK courts.
- (b) The alternative scenario is one in which the ECA 1972 remains, but a UK statute expressly derogates from a provision of EU law in a particular instance, with appropriate statutory words expressly excluding application of the principles in the ECA 1972. There has been no such case thus far. If it were to arise it might be argued in the light of Clause 18 that if an Act of Parliament expressly derogated from EU law and expressly excluded application of the ECA 1972, there would to that extent be no Act of Parliament by virtue of which EU law was recognized and available in the relevant area in the UK. Clause 18 could then be used to counter any argument that the relevant provision of

EU law could apply within the UK because EU law constituted an autonomous legal order. Needless to say such an Act of Parliament would constitute breach of EU law. It would be for the UK courts to determine whether such an Act of Parliament was compatible with the UK's continued membership of the EU. The Supreme Court might decide that the UK statute could be given effect pursuant to the sovereignty of Parliament, plus Clause 18. It might alternatively decide that such a statute could not be made while the UK remained within the EU. My personal view is that in the absence of some very serious and well-founded concern about the impact of EU law on national constitutional precepts/fundamental rights, such a statute should not be enacted for the reasons given in 4a below, and that such a step should only be contemplated after according the EU courts the opportunity to take action via a preliminary ruling.

(2) Issue 2: It seems, however, from the EM, especially paras 104–106, 109, that the framers of the Bill might have intended something more than this. Clause 18 could be read to mean that an Act of Parliament is required before any particular EU law takes effect in the UK, notwithstanding the existence of the 1972 Act, and notwithstanding the fact that the particular EU law is directly applicable and/or directly effective. The wording of EM para 104 and 105 seems premised at least in part on this assumption, insofar as both paras assume that the validity of EU law within the UK might be dependent on the need for some UK statute over and beyond, or independent of, the 1972 Act. If this is the intent behind Clause 18 it is problematic from the perspective of UK law and EU law.

- (a) UK perspective: UK law has never demanded the existence of a UK statute or statutory instrument to incorporate each individual act of EU legislation within UK law.
 - (i) The ECA s 2(1) is expressly framed thus: “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”. Moreover the ECA s 3(1) specifies that the interpretation of the Treaties and interpretation/validity of EU acts are issues of law that must either be referred to the ECJ under what is now Article 267 TFEU, or be decided by the UK courts in the light of the ECJ's jurisprudence.
 - (ii) To be sure directives require implementation and this will normally be through UK statute or delegated legislation, but this is of course consonant with and demanded by the very nature of directives under EU law. The UK has not constitutionally required separate national legislation as a pre-condition for the legal validity of each directly applicable EU regulation within UK law, nor has it required UK legislation as a pre-condition for the enforcement of directly effective rights in UK law. There must, to be sure, be an Act of Parliament that authorizes the application of EU law in national law, as noted in point 1 above, and this is provided for by ECA 1972, s 2(1). There may moreover be national legislation that has to be altered in the light of a directly applicable regulation or directly effective EU norm, or in order to implement a directive, hence the power contained in s 2(2) ECA. That is quite different from saying that each such EU provision must be recognized in a separate UK statute or statutory instrument before it has legal effect in the UK.
- (b) EU perspective: if Clause 18 were to be accorded the meaning being considered here it would place the UK in persistent and systematic breach of EU law. It is clear from EU law, and has been for the last fifty years, that regulations once made by the EU are directly applicable in all national legal orders without the need for separate transformation or adoption into national law. The rationale is simple. If each regulation had to be separately incorporated into each legal order the EU would not be able to function, since there would always be imperfect national implementation, and hence unequal application of EU law in the relevant area, thereby undermining the very idea of a level playing field. It is equally clear that directly effective Treaty articles, regulations, directives and decisions are not dependent for their effect on acceptance into the national legal orders via separate statute or the like.

(3) Issue 3: It is clear from the EM that a major concern driving Clause 18 concerned Parliamentary sovereignty. The nub of the argument is contained in para 106 of the EM, which can be paraphrased thus: there is concern that the doctrine of Parliamentary sovereignty might be eroded by the decisions of the courts; by placing on a statutory footing the common law principle that EU law takes effect in the UK by virtue of an Act of Parliament, this will then provide clear authority to counter arguments that EU law constitutes a new higher autonomous legal order derived from the EU Treaties or international law and principles which has become an integral part of the UK's legal system independent of statute. The EM also states, para 109, that Clause 18 is not intended to alter the relationship between EU and national law, and is not intended to affect the primacy of EU law. The following issues should be disaggregated for the purposes of analytical clarity.

- (a) It is important to be clear at the outset in what sense Clause 18 is to be regarded as a Sovereignty Clause.
 - (i) It can properly be so regarded insofar as it embodies in statutory form the common law concept of dualism. It states in terms that EU law falls to be recognized and available in the UK by virtue of an Act of Parliament. This supports the sovereignty of Parliament by making clear that executive affirmation of a Treaty will not have domestic legal effect without Parliamentary ratification/approval in a statute. This is reflected in the heading of Clause 18, which is: “Status of EU law dependent on continuing statutory basis”.

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- (ii) Clause 18 is not a sovereignty clause in that it tells us nothing as such about the relation between EU law and national law in the event of a clash between the two. It does not address sovereignty as primacy. Indeed EM para 109 expressly states that nothing in Clause 109 is intended to affect this.
 - (b) The next step is to consider the purpose of Clause 18 in the light of the two preceding senses of sovereignty.
 - (i) There was nothing in the prior case law that undermined sovereignty in the sense of dualism, 3(a)(i). The UK cases concerning EU law and national law were predicated on dualism. The case law of the EU courts did not attack the idea that the relationship between UK law and EU could be premised on dualism, *insofar as* this connoted the way in which the EU Treaty initially became part of national law. The principle of directly applicable EU law does not offend sovereignty in the sense of dualism. The UK, through the ECA 1972 expressly agreed to the Treaties, including the idea that regulations were directly applicable. Thus insofar as rules of EU law can have effect without the foundation of a particular statute this is because the EU Treaty and case law there under affirmed that this was so, and the UK agreed to this regime when joining the EEC via the ECA 1972 ss two and three. The affirmation of sovereignty as dualism in Clause 18 does no harm. It would however only be relevant in the unlikely scenarios set out in point one above; or on the assumption that Clause 18 were to be given the meaning in point two, which is very problematic for the reasons given above.
 - (ii) There has to the contrary been much case law concerning sovereignty in the sense of the relationship between EU law and national law in the event of a clash, 3(a)(ii). The EU courts have always taken the view that all EU law has primacy over all national law. This has not been generally accepted by national courts of Member States, which have, for example, resisted the idea that EU law takes precedence over the national constitution and/or fundamental rights. The UK courts in *Factortame* and the *EOC* case accepted that EU substantive law can have primacy over national law in the event of a clash. *Thoburn* is authority for the proposition that the relationship between EU law and national law is to be decided by UK courts in accord with our constitutional precepts, including the sovereignty of Parliament. The answer is not to be regarded as one dictated by ECJ jurisprudence. The relevant point for present purposes is that Clause 18 does not in terms address this second sense of sovereignty. It tells us that EU law takes effect in the UK by virtue of an Act of Parliament (sovereignty as dualism); it says nothing as to what should happen when there is a clash between EU law and national law (sovereignty as primacy), which will continue to be determined by the prior case law. The same point can be put in a different way: the issues of how EU law enters national law, and its status vis-à-vis other norms of national law are distinct. Thus even if, by way of contrast to the UK, a Member State conceives of the relationship between treaties and national law in monistic terms, such that a domestic statute is not required for a Treaty to take effect within the national legal order, this does not in itself determine the relevant hierarchy between national law and Treaty law in the event of a clash between the two. The answer may be expressly determined by a provision of the national constitution, or it may be decided by the courts where the national constitution gives no explicit answer. Insofar as member States have accorded primacy to EU law they have done so for reasons connected with their own legal order and not because of the communautaire reasoning of the ECJ.

(4) The committee's specific questions can now be answered in the light of the preceding analysis. The fear of erosion of sovereignty by the courts: the fundamental point in this respect was recognized by Lord Bridge in *Factortame*. Membership of the EU brings benefits and burdens. If a Member State could derogate from EU law in an area where the EU undoubtedly had competence, simply because the Member State disliked the outcome, this would entail inequality vis-a vis the other Member States, the denial of a level playing field, and the collapse of the EU. EU membership thus entails a loss of sovereignty viewed in terms of the capacity for autonomous state action. But if a Member State does not wish to accept the burdens of membership it should not be able to take the benefits. Lord Bridge was therefore correct to premise his famous dictum by noting that insofar as there has been a diminution of sovereignty flowing from EU membership this was not the result of judicial decisions, but was rather the consequence of the political decision to join.

(5) What additional protection if any is served by placing the principle of parliamentary sovereignty in relation to EU law on statutory footing? The answer to this question is contained in points 1–3 above. It should moreover be noted that when the EU Bill under consideration becomes a statute it would, in accord with traditional precepts of sovereignty, be capable of being repealed or amended. It may well be that the EU Act 2010–11 would be regarded as a constitutional statute in the manner articulated by Laws LJ in *Thoburn*, in which case it would have to be amended or repealed expressly, or by clear words that could not be given any other meaning. This does not alter the point being made here, which is that insofar as Clause 18 reflects sovereignty as dualism, which is a common law precept, it could be expressly repealed/amended pursuant to the constitutional precept of sovereignty that Parliament can do whatever it wishes, save that it cannot bind its successors.

- (6) The impact if any of Clause 18 on the ECA 1972, and in particular ss 2(4) and 3(1).
 - (a) Clause 18 and the EU Bill as a whole are predicated on the continued existence of the ECA 1972. There is nothing in Clause 18 that directly undermines the 1972 Act. It would indeed be difficult to convince a UK court, which would in the spirit of *Thoburn* require express repeal or amendment of

the ECA 1972, to regard Clause 18 as having any such effect, given that Clause 18 refers uncritically to the language of ECA, s 2(1).

- (b) The ECA s 2(4) is notoriously difficult to interpret if one attempts to give sense to every word. The brief answer for present purposes is that the strong interpretive obligation/priority clause embodied in s 2(4) is not generally undermined by Clause 18. The only way in which this might be so, short of repeal of the ECA or its express exclusion in a particular instance, is if Clause 18 were to be interpreted to require express statutory approval for each and every norm of EU law before it became applicable in the UK. The difficulties with this view were set out in point two above. The same conclusion follows in relation to the ECA s 3(1): Clause 18 would not affect the substance of s 3(1) unless it was read so as to mandate separate statutory authorization before each EU norm could become part of UK law. This would be inconsistent with EU law as propounded by the ECJ, and according to s 3(1) the UK courts are to make their determinations on points of EU law in accord with the principles of the ECJ.

(7) The question as to whether Clause 18 applies to future Acts of Parliament as well as the past: the answer in principle must be affirmative. An Act of Parliament applies unless and until repealed. Thus whatever meaning is given to Clause 18 will apply to future Acts of Parliament unless there is something express to indicate the contrary.

(8) The Committee asks “what (if any) is the likely effect of putting the principle of parliamentary sovereignty with respect to directly applicable or directly effective EU law on a statutory footing on UK judges reviewing the acts of public authorities and/or national legislation for consistency with EU law? Paragraph 106 of the explanatory notes says that this Clause “will provide clear authority which can be relied upon to counter arguments that EU law constitutes a new higher autonomous legal order derived from EU Treaties or international law and principles which has become an integral part of the UK’s legal system independent of statute”. The Committee asks in what circumstances and by whom such an argument might be relied on.

- (a) The circumstances in which such an argument might be of relevance were set out in point 1, but such scenarios are not likely to become a reality. The argument might also be relevant if Clause 18 were to be interpreted in the sense articulated in point 2, but this interpretation is problematic for the reasons given above.
- (b) An argument for the application of EU law in the absence of a UK statute might be made by a litigant who sought to rely on EU law in the national courts where the outcome for that litigant was preferable to that based on national law.

(9) The final question in this part asks whether Clause 18 is consistent with Declaration 17 of the Lisbon Treaty and the ECJ’s case law on primacy.

- (i) Clause 18 does not in terms address the primacy of EU law, as explained above in 3. Moreover the EM para 109 states expressly that Clause 18 is not intended to affect the primacy of EU law insofar as it has been recognized in UK law.
- (ii) If however the UK were, for example, to derogate from EU law in the manner set out in 1b above, and to use Clause 18 in tandem with the derogating statute with the hope of preventing application of EU law in national courts, this would undoubtedly be regarded as a breach of EU law by the ECJ.

PART I, RESTRICTIONS ON TREATIES AND DECISIONS RELATING TO THE EU

(10) 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?

- (a) It is acknowledged in the EM para 20 that “power” is not a term of art in the Lisbon Treaty in the same way as is “competence”. The rationale given for use of the two terms in the Bill emerges most clearly in the EM para 39: the term power is used to cover those instances where an EU decision seeks to confer on an EU institution or body a new or extended power to require Member States to act in a specified way in accordance with the EU’s existing competence; or to confer on an EU institution or body a new or extended power to impose sanctions on Member States for their failure to act in a specified way already provided for by the Treaties. Such a development would not, says EM para 39, in itself, “transfer competence (the ability for the EU to act in a given area) from the Member States to the EU—instead, such a proposal would allow an institution or body of the EU to use the competence conferred on it already by the Member States in a different way”. This is said to be the rationale for the use of the word power in clause 4(1)(i) and (j).
- (b) There are arguments that can be put both ways as to whether the differentiation between power and competence is necessary.
 - (i) The argument in favour of the distinction would be as follows. There is a meaningful distinction to be drawn between the existence of competence, and the powers that can be exercised if such competence exists. This dichotomy is familiar in, for example, national systems of administrative law and it can also be found in Article 263 TFEU. The separate treatment of competence and power within the EU Bill facilitates moreover coverage of the situation in which there is an amendment to the Treaty enabling, for example, new sanctions to be imposed by the Commission

or ECJ. Such an amendment would not thereby broaden the heads of competence as delineated in Article 2 TFEU, because these relate to the substantive areas in which the EU is able to act, and do not touch the powers accorded to the institutions under the TEU and TFEU.

- (ii) The argument against the differentiation between competence and power would be as follows. The very scope of competence possessed by the EU in any particular area will depend inter alia on the more particular powers that the EU is given within that area. An addition to those powers will in that sense expand the scope of EU competence within 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 especially if the extension of power is integrally linked to a particular subject matter area.
 - (c) I do not feel strongly as between the preceding arguments. There is however a point of some importance that flows from the dichotomy between competence and power that can be questioned. The significance condition in Clause 3(4) applies only to conferral of power under Article 4(1)(i) and (j), and then only in relation to conferral 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. This assumption does not withstand examination. 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.
- (11) 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?
- (a) The general answer to this question is as follows. Clause 5(3) imposes an obligation on the Minister to state whether in his opinion the Treaty amendment or Article 48(6) decision falls within Clause 4. This will not normally be problematic in relation to Treaty amendments that create a new category of competence, since this would then feature as an explicit addition to the relevant category of competence listed in Articles 3–6 TFEU. It may, however, be more contentious whether a Treaty amendment is regarded as extending an existing head of competence. The answer will depend implicitly or explicitly on the level of abstraction or detail at which the question is posed. Thus if one asks at a general level whether the EU has competence to regulate the flow of goods within the internal market the answer would be yes, and hence modification of the particular Treaty rules in this area would not be regarded as extending the competence thus defined. If, by way of contrast, the initial inquiry is more specific the answer might well be different. Thus if the initial inquiry is as to the more detailed Treaty rules that define the EU’s regulatory competence over the flow of goods in the internal market, then a change to detailed rules is more likely to be regarded as extending competence in that area.
 - (b) The preceding discussion addressed the question asked in relation to Treaty amendment and Clause 2 of the EU Bill. That analysis is equally applicable to Clause 3, but there are additional problems with Clause 3. It is predicated on a Decision made under Article 48(6) TEU that creates or extends EU competence, or confers power, in one of the ways listed in Clause 4. However neither the Bill, nor the EM, mentions the tension between this formulation and the fact that Article 48(6) TEU states expressly that a Decision made there under “shall not increase the competences conferred on the Union in the Treaties”. This leads to the following tension. The EU makes a Decision pursuant to Article 48(6), which can only be *intra vires* if it does not increase competence. Clause 3 of the EU Bill by way of contrast is predicated on the contrary assumption, that a Decision under Article 48(6) could create or extend, and hence increase, competence. 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. This is thrown into sharp relief by considering the sequence of events. The Prime Minister in the European Council agrees to an Article 48(6) Decision. Unanimity is required and hence if the Prime Minister agrees to the Decision it must be on the premise that it does not increase EU competence, since otherwise it would be *ultra vires*. The Prime Minister steps off the plane from Brussels, having penned his signature in good faith on the assumption that the Article 48(6) Decision did not increase competence. The premise behind Clause 3 is that a week or month later a Minister of the Crown calls for a referendum on the ground that the Article 48(6) Decision extends competence or power in one of the ways listed in Clause 4. In political terms the UK looks foolish to say the very least, and the judgment of the Prime Minister is inevitably called into question, since his affirmation that the Article 48(6) Decision is *intra vires* because it does not increase EU competence is contradicted by the later action of his Minister. Indeed the political fall out could well be worse. It seems inconceivable in political terms that a Minister of the Crown would invoke Clause 3 without clearance from the Prime Minister and Cabinet. If the Prime Minister were to give such clearance he

would then be subject to the critique that at the very least his initial judgment in agreeing to the Article 48(6) Decision on the assumption that it did not increase EU competence was unsound. The political fall out might be greater: the Prime Minister might be accused of being disingenuous when agreeing to the Article 48(6) Decision. It might be contended that he always intended to invoke Clause 3 when back in the UK, on the premise that the EU Decision increased competence, thereby contradicting the assumption on which he signed the Article 48(6) Decision when in Brussels.

- (c) The decision as to whether there has been a transfer or extension of power to the EU is further complicated by Clause 4(4), and more especially Clause 4(4)(a), which provides that a Treaty amendment or Article 48(6) decision does not fall within Clause 4 merely because it involves codification of practice under the TEU or TFEU in relation to the previous exercise of existing competence. It could well be difficult to decide whether Clause 4(4)(a) is operative so as to obviate the need for a referendum and Act of Parliament. The difficulties in this respect are not dispelled by the example given in EM para 56. It is said that Clause 4(4)(a) would cover the case where the EU acted under Article 352 TFEU, the flexibility clause, because a measure was required for which there was no specific legal base. If a later Treaty change were to provide a specific legal base and that legal base merely codified existing use then no referendum would be required because the power had already been transferred. However if the new legal base did more than codify the existing use a referendum would be needed. There may well be real difficulties in deciding on this divide. It might also be argued that the underlying premise is itself questionable. The mere fact that EU action has been authorized in a particular instance under Article 352 is not necessarily the same as providing a new head of competence, even if the new head covers the same terrain as the specific measure enacted under Article 352. The reason is as follows. The specific measure enacted under Article 352 is just that, a measure that is accepted by the EU institutions at the time it is made. It is no guarantee that if an analogous situation occurred later the EU institutional players would necessarily decide that the conditions for Article 352 were met. By way of contrast the inclusion of a specific head of competence dealing with the relevant issue would provide a firm base for future EU action in that area.

(12) 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 or extended? This is an important question, the answer to which raises issues that may not have been fully perceived by the framers of the EU Bill.

- (a) The structure of the EU Bill in this regard can be summarised briefly as follows. Clause 2, Treaty amendment pursuant to the ordinary revision procedure in Article 48(2)-(5) TEU: there must be an Act of Parliament plus positive vote in national referendum, unless the exemption condition applies. Clause 3, a Decision made pursuant to the Simplified Revision Procedure in Article 48(6): there must be an Act of Parliament, plus positive vote in national referendum, unless the exemption or significance condition applies. Clause 6, the decisions listed therein are subject to Act of Parliament, plus positive vote in national referendum. Clause 7, the decisions listed therein are subject to approval by Act of Parliament. Clause 8 is concerned with Article 352 TFEU: the basic requirement is approval by Act of Parliament, or in one of the ways specified in Clause 8(4)-(5). Clause 9 deals with instances where Parliamentary approval is required.
- (b) The EM para 63 justifies the need for an Act of Parliament, plus referendum, in relation to the issues mentioned in Clause 6 on the ground that they are equally important in substantive terms as those dealt with in Clauses 2-3: they involve loss of the veto or entail transfer of competence. They should therefore in the view of the EM be subject to the same conditions as in Clauses 2-3, even though most decisions in relation to the matters listed in Clause 6 do not involve any Treaty revision. Clause 7 requires approval by Act of Parliament, but not a referendum, the general rationale being that these matters are less important.
- (c) A commentator might take issue with the disposition of issues as between Clauses 6 and 7, or with the matters included within Schedule 1 or 2. There is nonetheless a potential problem with the legality of this strategy, which must be confronted.
- (d) The Lisbon Treaty is carefully crafted with regard to the conditions that apply before a Treaty revision or decision can take legal effect within the Member States. Article 48(4) TEU specifies that amendments made under the ordinary revision procedure must be ratified in accord with the constitutional requirements of each Member State, and Article 48(6) specifies the same requirement in relation to a Decision made under the simplified revision procedure. Viewed from this perspective the provisions in Clause 2 are not problematic legally: if the UK chooses these pre-conditions for constitutional ratification so be it. The requirements in Clause 3 are also not problematic, insofar as Article 48(6) states that approval of such Decisions can be in accord with national constitutional requirements, although Clause 3 itself is deeply problematic for the reasons given in 11(b)(i). The political implications of these constitutional requirements will be considered below.
- (e) The situation with respect to the matters dealt with in Clauses 6-9 is different. These matters do not under the Lisbon Treaty require approval in accord with national constitutional requirements. Insofar as Clauses 6-7 deal with issues covered by Article 48(7) TEU, the general passerelle clause, the requirement is that an initiative under Article 48(7) TEU must be notified to the national Parliament, and that it should have the opportunity to make known its opposition. There is no requirement for

positive approval via an Act of Parliament or a referendum. The difference in the legal position under the Lisbon Treaty in relation to the other matters listed in Clauses 6–9 is even greater. Clause 6 mandates an Act of Parliament plus referendum for all such matters. Clause 7 mandates an Act of Parliament. There is no authority for such requirements in the Lisbon Treaty. It would therefore clearly have been unlawful under EU law if the requirements for an Act of Parliament and a referendum had been specified as conditions for decisions/regulations on the matters listed in Clauses 6, *after* EU decisions on these matters had been made. It would equally have been illegal under EU law for an Act of Parliament to have been specified as a condition for the application of all the matters listed in Clause 7, *after* EU decisions on these matters had been made. This point is reinforced by the very fact that in some instances the Lisbon Treaty specifies that certain decisions can be subject to approval in accord with constitutional requirements,¹³ the clear implication being that where this is not specified it is neither required nor 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.

- (f) The framers of the EU Bill were cognizant of this and sought to “finesse” the problem by framing Clauses 6–8 in terms of pre-conditions for the UK minister to vote in favour of, or support, the relevant EU measures. This explains the wording of these Clauses: the schema is for a ministerial vote that leads to a draft EU decision, which can only be finalized after approval in a referendum and/or an Act of Parliament. It is therefore central to this strategy that these pre-conditions operate *before* the EU measure is finalized and takes legal effect. The key issue is whether this strategy is legally valid under EU law. This is, as one might say, a “nice” legal question.
- (i) The argument for the legality of this strategy would be along the following lines. The Lisbon Treaty requires ministerial consent in the Council before a measure is enacted. There is nothing to prevent this requirement of consent from being subject to certain conditions chosen by the Member State. If the Member State chooses to condition the consent in a case where unanimity is required on a referendum and/or Act of Parliament as in Clauses 6–7 it is entitled to do so, and the strategy is lawful in terms of EU law. The UK government would undoubtedly press this argument before the ECJ if the matter ever came before it.
- (ii) It would however be wrong to imagine that acceptance of the preceding argument would or indeed should be a foregone conclusion. It would be perfectly possible to craft the outlines of an ECJ decision which reached the contrary conclusion. 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 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.

(13) Are there areas of extension of competence and/or conferral of power which are not covered in the Bill? A brief answer: no. The EU Bill is “very British”. Clause 4 covers any realistic, conceivable case. The only caveat is this. Clause 4(4)(c) in effect excludes new Treaty accessions from the need for a referendum. This raises an interesting issue. Given the zeal for involvement of the public via a referendum in all the instances listed in Clause 4 it is difficult to see precisely why the people should not have a “voice” in relation to new entrants, more especially because the impact of accession on the citizenry may be far greater than in relation to those issues where a referendum is provided under the Bill.

(14) 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”? How far in practice would such a decision be amenable to judicial review?

- (a) Clauses 3(4) and 5(4) provide no real indication of the criteria of significance. Nor does the EM paras 40–42 furnish much guidance in this respect.
- (b) The availability of judicial review would depend on the circumstances. Clause 3(4) assumes that an Act of Parliament approving the Article 48(6) Decision states that the decision only falls within Clause

¹³ This includes decisions listed in Clause 7(2) of the Bill, which covers Arts 25, 223(1), 262, 311 TFEU. The decisions covered by Clause 7(4) contain no requirement or authorization for approval in accord with national constitutional requirements.

4 because of Clause 4(1)(i) or (j), and that its effect is not significant in the UK. Judicial review is not in general available against a primary statute, and it would be difficult to imagine circumstances in which review pursuant to the HRA would be relevant. 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.

(15) 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? The relevant considerations in answering this question are as follows.

- (a) The EU Bill is framed in mandatory language. The holding of a referendum is not a matter within the discretion of the government. It must be held where mandated, subject to the exemption condition, the significance condition, and Clause 4(4). This suggests amenability to judicial review. This is more especially so because there will often be no plausible argument that the exemption condition applies, given the breadth of Clause 4, and the significance condition can only serve to deny a referendum in very limited circumstances concerning Clause 4(1)(i) and (j).
- (b) The principal difficulty is that if Parliament enacts a statute approving the Treaty amendment or Article 48(6) Decision without holding a referendum then any judicial review action would be challenging this primary statute. A legal action would run into traditional sovereignty reasoning: the courts do not review the validity of primary statutes in the UK. There are nonetheless two possible ways to surmount this objection.
 - (i) An aggrieved citizen or MP might try to frame an HRA case, arguing that denial of the referendum violated one of the Convention rights brought into UK law by the HRA. The court would then review the Act of Parliament approving the Treaty amendment without the referendum pursuant to HRA sections 3–4.
 - (ii) An alternative would be to argue that while the courts will not review the validity of primary statute on substantive grounds, they can do so in relation to arguments of manner and form. This is the “New View” of sovereignty advocated by writers such as Jennings, Heuston and Marshall, who contend that if, for example, an Act of Parliament specified that it could only be amended or repealed by a two thirds majority, then a later statute that made such change by a simple majority should not be recognized by the courts because it did not comply with the conditions for its enactment. It might be argued that the referendum requirement in the EU Bill is, by analogy, a manner and form condition, such that if a later statute were enacted without a positive vote in a referendum then the later Act of Parliament should not be recognized by the courts. This reasoning is reinforced because of the wording of Clauses 2(2) and 3(2). The UK courts have not directly pronounced on the reasoning underlying the New View in relation to a case concerned solely with the UK.
- (c) There is another legal option available, which is to seek judicial review against the Minister. Clauses 3 and 6 impose a clear duty on the Minister not to approve a final EU decision unless the referendum condition is met and hence a judicial review action against the Minister might be contemplated if the Minister disregarded this condition. This may be scant comfort to the claimant if the Act of Parliament approving the EU measure has been enacted and if the EU measure has been finalized.

(16) What might be the effect of Part 1 of the Bill on the UK’s future relationship with the EU? The short answer: negative. There is little appetite for further Treaty reform after the near decade that it took to achieve ratification of the Lisbon Treaty, and this is exemplified by the Member States’ initial reaction to Germany’s push for minor Treaty reform to safeguard its position constitutionally in the light of action taken in the financial crisis. Notwithstanding this fact, the EU Bill is likely to be regarded with emotions ranging from dismay to anger within the EU and in many European capitals. The EU Bill is, notwithstanding the exemption condition and the significance condition, extraordinarily broad. It mandates a referendum and/or an Act of Parliament in relation to any Treaty change that extends or creates new competence, no matter how trivial or insignificant the change, and even in relation to any extension of the EU’s objectives. The same requirements pertain to the matters listed in Clause 6, an Act of Parliament is required for the matters listed in Clause 7, with analogous restrictions operating in Clause 8. It is doubtful whether our European partners will view with equanimity the prospect of sitting on draft decisions while the UK enacts the relevant statute and organizes the referendum. It is equally doubtful whether they will be content with the delays and possible vetoes on Treaty reform when such amendment is deemed necessary. This adverse reaction is likely to be heightened if such changes are prevented by a negative vote in a referendum when the voter turn-out is small. I doubt whether significant numbers of voters will exercise their franchise in relation to many of the issues on which a referendum is mandated by the EU Bill. I would not wish to be the one seeking to engage voters to participate in a referendum on whether, for example, a shift to qualified majority voting in the context of enhanced cooperation should take place. The political reality is that voter turn-out will often be low, maybe embarrassingly so. If the vote is negative on a 10% total turnout and blocks the desired change our Treaty partners will not be pleased, nor will they think the result has much in the way of legitimacy. The legal reality under the EU Bill is nonetheless that a referendum must be held. Enactment of this Bill may well prove the truth of the old adage, be careful what you wish for because it might just come true.

Written evidence from Andrew Duff MEP ¹⁴

I welcome the opportunity to give evidence on the European Union Bill which, as the Chairman says, raises issues of major constitutional significance for the United Kingdom. The Bill also raises significant questions about the evolving constitutional order of the European Union, and, naturally, about the future of the UK's membership of the EU.

EUROPEAN UNION BILL

The 'Sovereignty Clause' and the Status of EU law

1. Clause 18 appears to underline the logic of the European Communities Act 1972 in the context of the new Treaty of Lisbon. At face value, this might be a useful and even necessary clarification.

2. As long as the 1972 Act remains in force the UK remains beholden to uphold any new or amended EU Treaty. So long and in so far as the UK is a member of the EU it must respect the primacy of EU law in those matters where the states have agreed by treaty to confer competence on the Union. The Lisbon treaty sets out for the first time precisely what those competences are (Article 5 Treaty on European Union (TEU) and Articles 2, 3, 4, 5 & 6 Treaty on the Functioning of the European Union (TFEU)).

3. Member states have some latitude in how they act to give material effect to the primacy of EU law and its direct effect or application. If, after Lisbon, the UK wishes to change the way it chooses to articulate the UK's compliance with the constraints and obligations which flow from its recognition of EU law, it may of course do so. But at the end of the day if the UK is not to put itself in breach of EU primary law it must conform in one way or another to the imperatives of all the legal acts of the EU and to the jurisprudence of the European Court of Justice (ECJ).

4. Politicians and the press may take fright at the large corpus of EU law which can sometimes seem to dominate domestic law. EU law is certainly a new, separate and important legal order different from that of international or national law. But it is not correct, in my view, to see EU law as a 'higher autonomous legal order' but rather as the judicial and legislative expression of a federal level of authority in which neither the federal level nor the state level is allowed to dominate the other. Indeed, the Lisbon treaty expressly enjoins the Union to respect the national constitutions of its states (Article 4(2) TEU); and alerts one to the federal principles of sincere cooperation (Article 4(3) TEU), subsidiarity and proportionality (Article 5 TEU). Both EU and national law are held to be binding on both the Union and its states. The Lisbon treaty has not suddenly rendered the constitutional order of the EU hegemonic to the detriment of its states.

5. There seems to be an implicit suspicion behind the drafting of the EU Bill that the transfer of larger competences to the Union and of greater powers to its institutions, as agreed under the new treaty, somehow departs from the traditional practice of pooling or sharing sovereignty in the common European interest and propels us instead towards a destination in which the transfer of sovereignty actually diminishes the British national interest. I do not share that assumption. Indeed, I welcome Lisbon as a genuine step forward in the good governance of Europe in which the respective roles of the state and federal authorities become more clearly defined (and therefore better protected) than ever before. Even national parliaments, which are said to 'contribute actively to the good functioning of the Union', gain enhanced status in the EU system (Article 12 TEU).

6. Lisbon lays down that the states agree to 'confer competences [on the Union] to attain objectives they have in common' (Article 1 TEU). Where competences are not so conferred, they remain with the states (Article 4(1) TEU). 'The Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties' and not by any other means (Article 3(6) TEU). The multifarious checks and balances built into the Lisbon treaty disallow a leaching of national competence to the EU without a further treaty change: see, for example, the very careful definitions of the scope and force of the Charter of Fundamental Rights or the limitations placed on the deployment of the simplified treaty revision procedure (Article 48(6) TEU). Illegitimate 'competence creep' will not be tolerated. Article 352 TFEU—the so-called 'flexibility clause'—is not about expanding the competences of the Union but about increasing the powers of its institutions '[I]f action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties ...'. Helpfully, Lisbon also sets out clearly what objectives the states hope to attain by dint of their membership of the Union and through the instrumentalisation of the Union (Article 3 (1–5) TEU).

7. The government is therefore right, in my view, to claim that clause 18 of the Bill is declaratory only and does not alter the historic, existing or future relationship between the UK and the EU. 'The rights and obligations assumed by the UK on becoming a member of the EU remain intact'. So also do the rights and obligations of the EU in respect of the United Kingdom.

8. That being said, there may well be occasions when the opinion of national constitutional authorities, including the House of Commons or the UK Supreme Court, will be found not to be in complete accord with the substance of EU law or the judgments of the ECJ. Such discordance is best dealt with in the federal

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manner by effective collaboration between the respective courts, executives and parliaments. In a trustworthy, democratic and decentralised order based on the rule of law—in other words, a federal construct - not all legal disputes of a constitutional nature need to be resolved definitively. (There is a certain flexibility in all good federations allowing room for pragmatic adjustment.) The EU institutions, which represent both the states and the citizens (Article 10 TEU), are bound between them to ‘practice mutual sincere cooperation’ (Article 13(2) TEU). And on the whole they do.

9. The Court of Justice has powers to rule on disputes between states and among institutions and on actions brought by natural or legal persons (Article 19(3) TEU). Its only job is ‘to ensure that in the interpretation and application of the Treaties the law is observed’ (Article 19(1) TEU). It has no general juridical authority to intervene in national or domestic matters (although it may give preliminary rulings at the request of national courts). The EU has no general competence to do what it likes. The EU is a federal union of states and citizens and not a federal state, and the ECJ is not a federal supreme court. The EU Treaties are certainly analogous to the constitutions of the states but they are not the same.

10. Clause 18 has therefore rightly avoided the risk that an over-elaborate preoccupation with national sovereignty would impose on the UK Supreme Court powers to arrogate to itself a claim of right to rule on *ultra vires* matters more properly left to the ECJ in Luxembourg. There are different and actually competing concepts of sovereignty, and the EU Treaties remain sensibly silent on the sovereignty question. All that matters is that the sovereign High Contracting Parties of the states ‘establish among themselves a European Union’ (Article 1 TEU).

11. The establishment of the European Union is not irrevocable. Any state of the Union has always been able to secede from membership under the terms of the Vienna Convention on the Law of Treaties by taking a unilateral decision according to its own constitutional requirements. In the case of the UK, abrogation of membership would be achieved by the repeal of the European Communities Act 1972. Sensibly, the Lisbon treaty installed a mechanism for the orderly withdrawal from membership status and the negotiation of alternative arrangements between the states that go and those that stay (Article 50 TEU).

Restrictions on Treaties and Decisions relating to the EU

12. The coalition government is apparently committed to opposing any EU treaty change during its term of office and the lifetime of the Parliament elected in May 2010. So we must assume that the measures the Bill seeks to introduce in this Parliament, irrelevant to itself, are intended to bind its successor. The Committee will understand better than me how this squares with the classical concept of parliamentary sovereignty in which no single act of one Parliament (not excluding the European Communities Act 1972) can bind its successor.

13. A second paradox is that this Bill purports to uphold the sovereignty of the Westminster Parliament against the federalist forces of the European Union yet it does this by surrendering that very same sovereignty of the Westminster Parliament to the vagaries of a popular vote. I would merely register here in passing my distaste for the widespread resort to populist referendum campaigns as a substitute for more informed parliamentary deliberation. Exceptional referenda on regime change, domestic constitutional reform or on whether to join (or leave) the EU are one thing. But the imposition of systematic referenda on EU matters will in the end, and probably quite quickly, bore the public, trouble the markets, weaken the Westminster Parliament, divide the political parties—and infuriate our EU partners.

14. The Bill proposes to instigate regular referenda within the UK on all manner of European questions. The government has not coordinated this move with its EU partners, none other of whom is intending to take the same route. Indeed, rather the contrary: France and the Netherlands retreated from the use of referenda after their experiences in 2005; other countries, such as Austria, Denmark and Ireland are desperate to avoid having to hold future EU referenda. (Ironically, and Ireland apart, the only issue on which there will be referenda in other EU countries is enlargement—a federal issue if ever there was one—but on which very question the Bill would seem to rule out referenda in Britain.) The UK is indeed the odd man out, and its unilateral move has placed all its partners in an invidious position when it comes to future treaty negotiations. This Bill may not be the wisest diplomatic move Britain has ever made.

15. What is true, in the aftermath of Lisbon, is that other national parliaments have taken steps to strengthen scrutiny of their own government’s performance in the European Council and Council of Ministers and to put in place more weighty parliamentary procedures than existed before when it comes to the ratification of certain specified provisions of the Treaty, including the use of some *passerelle* clauses. It is good that the UK Parliament is following this trend, although it is important to recall that mainland European countries already have in place entrenched constitutions which lay down precisely the checks and balances between executive and parliament and between government and opposition. Some, like the Federal Republic of Germany, also have clauses in those constitutions which commit the state to integration within the European Union. The new rules introduced in the Bundestag are intended to improve the democratic quality of Germany’s contribution to the development of the EU, not to fortify the bastions of German national sovereignty.

16. The Bill is drafted for domestic purposes by a government which is in charge of its own national agenda and whose European policy is to support the EU status quo and to oppose EU reform. No single European government, however, is so clearly in charge of the European agenda. And the status quo in Europe is an uncertain fixture. Like the man on the bicycle who falls off when he stops, the European Union has a dynamic

of its own in which constitutional change, for one reason or another, is an almost constant feature. At the time of writing, one can already envisage seven treaty changes within the next few years, some more minor than others: the Czech and Irish Protocols to the Treaty of Lisbon, the addition of the 18 extra MEPs, the permanent loan facility for the eurozone, electoral reform of the European Parliament, and the accessions of Croatia and Iceland. Within the next two years the Union will have to address the big federal questions of the reform of the own resources system and the new multi-annual financial framework (Articles 311 and 312 TFEU, respectively). In parallel with those financial negotiations, work on installing a proper common European economic government will intensify: according to the provisions of the Bill such reforms would certainly trigger a referendum in the UK, as would moves to strengthen sanctions and penalties against states, not excluding the UK, which breach the excessive deficit procedure. The UK's self-exclusion from the eurozone and the Schengen Area are not cast-iron insurances against decisions being reached in the European Council or at an Intergovernmental Conference (IGC) which impact upon the UK.

17. In any case, all treaty changes, whomsoever they primarily affect, will have to be agreed and ratified by all member states, including the UK. So the idea of there being a comfortable status quo in the EU on which Britain, insulated by its treaty opt-outs, can ride out the storm seems to me, at least, to be far-fetched. One may usefully recall here, too, that, according to the ordinary treaty revision procedure, the European Council can decide to open an IGC by simple majority vote and that the European Parliament can choose whether or not to prepare such an IGC by a constitutional Convention in which national parliaments take part (Article 48(3) TEU). Experience suggests that Conventions can develop an important dynamic of their own.

18. Lack of clarity about when the UK will hold a referendum and when it will not is unlikely to help the EU reach consensus in sensitive areas of treaty change in particular under the simplified revision procedure (Article 48(6) TEU). It is likely that the terms of the Bill will be put to the test in the course of 2011 when a modest treaty change to cope with the problem of sovereign debt default will be made to either Article 122 or Article 136 TFEU. Particular attention, therefore, should be paid by the Committee in this regard to the government's interpretation of Clause 4(1)(d), (e) and (f)(i), as well as of Clause 4(4)(b) on a treaty change that applies ostensibly only to other states.

19. One aspect of the Bill which seems particularly odd from a government which purports to want to foster its membership of the European Union is the provision under Clause 6(4)(i) whereby a referendum will be needed if the UK decides to participate in an enhanced cooperation with other states in a particular area of single market policy, such as EU patents. (The Lisbon treaty makes it clear that the very purpose of enhanced cooperation in such cases is to change the unanimous voting rule in the Council to QMV.)

20. Another curiosity is the insistence on having referenda even in those instances where the Lisbon treaty already provides for a *passerelle* clause to be triggered by a unanimous decision of the European Council and then subject to the unilateral right of veto of a single national parliament (Articles 48(7) TEU and 81(3) TFEU). The superimposition of a uniquely British referendum is typical of a British tendency, frequently criticised by the Scrutiny Committee, to ornament EU law when transposing it into the domestic context.

21. Under all these scenarios, the British public will be invited to vote down an Act of Parliament endorsing a decision by the government of the day to participate in a positive move towards the attainment of an objective of the European Union to which the UK is committed by treaty. To say the least, the legal and political situation is likely to become surreal. The prospect of a confused referendum campaign won by a facile coalition of nay-sayers on a low turnout, with adverse reaction in the financial markets and a final loss of confidence in government and parliament becomes all too probable.

22. One recalls that it was largely to escape from the British 'red lines' that the Lisbon treaty facilitates enhanced cooperation between a core group of like-minded states. In some cases, as in criminal law, the passage to enhanced cooperation is automatic once nine integrationist states find themselves frustrated by others (Articles 82(3) and (83(3) TFEU). In other cases, the decision by a core group to go ahead and leave others behind will not be able to be stopped by this UK government or any other: with the exception of common foreign and security policy, the decision to move to enhanced cooperation is taken by QMV (Article 329 TFEU).

23. Many of the instances cited in Schedule 1 where a referendum would be needed under the terms of the Bill are highly unlikely ever to be subject to treaty amendment. Nevertheless there remain a number of issues mentioned here above where treaty revision or the use of a *passerelle* or of enhanced cooperation will sooner or later inevitably be sought by Britain's EU partners and where the threat of a referendum in the UK will be distinctly unhelpful to the good management of already complex negotiations.

24. The enactment of this Bill will greatly increase the number of ministerial statements and parliamentary acts which will need to find their place in the parliamentary timetable. That is primarily a problem for the Westminster Parliament to resolve, but, even in the absence of referenda, the impact of delay to the EU's legislative processes caused by these proposed changes in British domestic procedures should be acknowledged. The protracted ratification of the Lisbon treaty is still fresh in the memory and an additional cause for another slowdown in EU decision making will not be popular.

25. Presumably it is not the intention of the government to destabilise the European Union by fundamentally and unilaterally altering the terms of British membership. Nor can it be the purpose of this Bill to hobble all

future governments in their dealings with the EU. But the Bill is nakedly constitutional in its character and intention. It alters the balance between the British people and Parliament at Westminster, as well as between Parliament and Government. It accentuates British exceptionalism in the European Union, making the UK a less accommodating partner, and therefore inevitably tempting other EU states to loosen the ties that bind them with the UK. Because of its constitutional nature one is drawn to wonder what set of circumstances would need to prevail for a repeal of this EU Act to be possible.

26. Nobody would deny that Parliament is right to seek to take a tighter grip on the government's conduct of EU affairs. But one may question whether the prescriptions made in this Bill are not too ponderous in their construction, too wide in their scope and too uncertain in their consequences for the long term to be sure it is the right course to take. All in all, I find it difficult, even as a loyal foot-soldier of the coalition, to support this Bill, which where it is right adds nothing much new and where it is wrong pitches the UK into the realm of privileged partnership with the European Union, no longer a full member state—less at the heart of Europe than a torn limb. In the best spirit of coalition politics, we could live without it.

Written evidence from Professor Anthony Bradley¹⁵

EUROPEAN UNION BILL

Clause 18—Status of EU law dependent on continuing statutory basis

1. The bulk of this paper deals with clause 18 of the Bill, although I add at the end a short comment on Part 1 of the Bill.

2. The Coalition Agreement included in chapter 13 (on the European Union) the statement that there should be 'no further transfer of sovereignty or powers over the course of the next Parliament' and undertook to 'examine the case for a United Kingdom Sovereignty Bill to make it clear that ultimate authority remains with Parliament'.

3. Clause 18 of the Bill is the result of such examination: see the statement by the Minister for Europe, David Lidington, on 11 October: HC WS col 3. I consider it to be an advantage that the clause does not use the term 'sovereignty'. That word is much used in political debate and in academic writing but its meaning is often not clear: see, for instance, the final sentence of the Minister for Europe's statement on 11 October. In referring to the practice of other member states in legislating on EU law, and instancing Germany, Mr Lidington states that although the other member states "have a different constitutional framework, they have given effect to EU law through a sovereign Act".

4 The term "sovereign Act" as used by Mr Lidington appears to confuse two meanings of the word 'sovereign'. (A) The sovereignty of states is a basic principle in public international law, referring to the criteria that determine whether a territory is to be regarded as an independent state in its own right. It is fundamental that a state may accept obligations in international law by entering into treaties with other states, from which (it must be assumed) the resulting benefits make up for the new obligations. Treaty-making is the exercise of such sovereignty, and thereby states may gain membership of international organisations. (B) Within the United Kingdom, our constitutional law recognises the sovereignty of Parliament. This is a quite different matter from sovereignty in international law (the UK's sovereignty in international law is exercised by Her Majesty's Government). In very few states today (apart from the United Kingdom, there are none in Europe) does the system of constitutional law provide for a 'sovereign' legislature. Germany certainly does not, which makes Mr Lidington's statement on 11 October difficult to understand.

5. What Germany has is a written constitution (Basic Law) that deals with the federal division of powers, protection of fundamental rights, jurisdiction of the Federal Constitutional Court and so on. It is quite possible that the Minister for Europe had in mind Article 23 of the Basic Law, which was re-written in 1992 to take account of German reunification, the Maastricht Treaty and the Constitutional Court's jurisprudence on the EEC.¹⁶ Other EU states have amended their constitutions to provide for European law (as, for instance, the Republic of Ireland first did in 1972)—such provision may create an open door to receive EU law but it may also limit the dimensions of the door-way. None of these states have a 'sovereign' legislature, since the powers of the legislature are derived from the national constitution and are subject to it. The nature of the EU system, in particular the direct effect of European law, justifies a state in making express provision for EU law in its constitution. In such countries, the reception (or recognition) of EU law has been given by what is in those countries the ultimate national authority—the process for amending the constitution (*le pouvoir constituant*). Such recognition, as the German instance shows, may be compatible with the retention by the national constitutional court of power to decide whether for any reason a provision of EU law is affected by national limits set on the recognition of EU law.

6 Dicey's *Law of the Constitution* made famous the phrase "the sovereignty of Parliament", but a more exact term for the legal doctrine is "legislative supremacy", whereby the power of the Queen-in-Parliament to

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¹⁶ See JEK Murkens, ' "We Want Our Identity Back"—the Revival of National Sovereignty in the German Federal Constitutional Court's Decision on the Lisbon Treaty' [2010] *Public Law* 530–550.

legislate is subject to no legal limitations, and the courts have no power to review the validity of Acts of Parliament. This doctrine is always considered to be subject to the limitation that Parliament is unable to bind its successors (a matter to which I return briefly below). An advantage of using the term supremacy rather than sovereignty is that it enables the supremacy of EU law to be balanced against the supremacy of national law.¹⁷

7. What the legal doctrine of the legislative supremacy of Parliament does not address is the source of that supremacy—where does ‘ultimate authority’ lie in Britain? It is generally said that ultimate authority cannot derive from an Act of Parliament (since Parliament cannot pull itself up by its own bootstraps). Is then the only other source of that authority to be found in decisions of the courts—in “the common law”? However, we again need to ask: what is the source of the courts’ power to decide? If the “common law” is the source, the rule of legislative supremacy is, to say the least, a rather unusual rule of the common law. We must further ask whether, if the rule of legislative supremacy is merely a rule of the common law, (a) may the courts today re-visit and modify the rule? and (b) may the rule be modified by an Act of Parliament? “Yes” was the answer given to question (b) by Sir Ivor Jennings; and “no” was Sir William Wade’s answer.¹⁸ Fortunately I need not here go deeply into these matters. A complete answer to the question of ultimate authority may rather be found in the history of law and government in the United Kingdom since 1689, taking account of matters such as the Bill of Rights 1689 (that gave a parliamentary basis to the monarchy and asserted the powers of Parliament over the monarch) and the settled practice of the courts in denying that they have power to limit the legislative authority of Queen-in-Parliament.¹⁹

8. To come specifically to clause 18. This in effect declares that the status in the law of the United Kingdom of EU law, as identified in the European Communities Act 1972, section 2(1), is dependent on there being an Act of Parliament that makes provision for this. I see no good reason to dispute what is almost a truism, but I am not persuaded that there is a need for this even as a declaratory measure for the avoidance of doubt. If this is enacted, we can be certain that if at a future date the UK Parliament wished to revoke the 1972 Act to enable Britain to leave the EU, an Act to do so would be upheld by United Kingdom courts. However, is there any real doubt about this at the present time? For instance, in his elaborate discussion of overlapping sovereignties in Europe today, MacCormick accepted that Parliament retained the power to reverse the decision in 1972 to enter Europe,²⁰ as others have also done.²¹ The leading judgments in the *Factortame* affair do not exclude the existence of that power.

9. Whether or not there is a need for clause 18, the drafting is a little awkward in the phrase ‘only by virtue of an Act of Parliament’. (Possibly the clause would read more easily if it stated that ‘directly applicable or directly effective EU law shall be recognised and available in law in the United Kingdom only where there is statutory authority for this’—in the great majority of cases that authority would be found in the European Communities Act 1972.) But as is clearly stated in para 109 of the Explanatory Notes, what clause 18 does not do, and could not do, is to alter the nature of EU law, its primacy within the EU system and its relationship with UK law. Thus, for instance, it does not (and could not) change section 2(1) of the 1972 Act into a provision equivalent to the delegation of Parliament’s legislative powers to Ministers. The 1972 Act, against the background of European treaties and the case-law of the Court of Justice, continues to be the entry-point to a legal system that does not derive its character from the Westminster Parliament or from decisions of UK courts. Nor does clause 18 provide an answer to questions about implied repeal of the kind that were considered by Laws LJ in the *Metric Martyrs* case, a matter to which I return below.

10. I now turn to some difficulties that in my view arise from the Explanatory Notes, paragraphs 106–108. According to para 106, clause 18 addresses concerns that the doctrine of Parliamentary sovereignty “may in the future be eroded by decisions of the courts”. If the fear is that at a future date Parliament might legislate to repeal the 1972 Act and end the application of EU law within the United Kingdom, only to find that the UK courts had nullified such legislation and required Britain to remain in continued membership of the EU, the fear is wholly unfounded. If the fear is that there could be another *Factortame* affair in which a statutory provision might be disapplied because it was incompatible with EU law, clause 18 would not lead to a different result. The reality is that so long as the United Kingdom continues in membership of the EU, the Diceyan doctrine of legislative supremacy has been eroded, and clause 18 does not address this. In a similar way, the effect of the Human Rights Act has been an erosion of important aspects of legislative supremacy in the Diceyan sense. But such erosion as has taken place is not to be attributed to decisions of the courts, but to the legislation enacted by Parliament. There may of course be scenarios of an intermediate kind in which there is an inconsistency between a future Act and rights under EU law: in such situations, UK courts will have to make the best decisions that they can, taking into account the effect of sections 2 and 3 of the European Communities Act 1972. Such decisions would not in my view be affected by clause 18.

¹⁷ As Laws LJ does in his judgment in *Thoburn v Sunderland City Council* [2003] QB 151.

¹⁸ For a recent discussion of this dispute, see M Gordon, “The Conceptual Foundations of Parliamentary Sovereignty” [2009] *Public Law* 519–543.

¹⁹ I argue this more fully in my chapter, “The Sovereignty of Parliament—form or substance?” in J Jowell and D Oliver (eds) *The Changing Constitution* (6th edn, 2007; 7th edn, in press). See also N MacCormick’s theoretical development of a similar position in *Questioning Sovereignty* (1999) e g at pp 85–6, 103; and J Goldworthy, *The Sovereignty of Parliament: History and Philosophy* (1999).

²⁰ MacCormick, *op cit*, pages 88–89.

²¹ See A Tomkins, *Public Law* (2003), page 117.

11. Another difficulty in the Explanatory Notes comes from paras 107–108 dealing with the *Thoburn* case. In his closely argued judgment in that case, Laws LJ dealt with the opposing arguments of the two sides and rejected the extreme positions advanced by each of them. The Explanatory Notes do not present a balanced account of this complex judgment. The judge’s conclusion summarising the relationship between the competing ‘supremacies’ of EU and domestic law was given in four propositions:

- (1) All the specific rights which EU law creates are by the 1972 Act incorporated into our domestic law and rank supreme: that is, anything in our substantive law inconsistent with any of these rights and obligations is abrogated or must be modified to avoid the inconsistency. This is true even where the inconsistent municipal provision is contained in primary legislation.
- (2) The 1972 Act is a constitutional statute: that is, it cannot be impliedly repealed.
- (3) The truth of (2) is derived, not from EU law, but purely from the law of England: the common law recognises a category of constitutional statutes.
- (4) The fundamental legal basis of the UK’s relationship with the EU rests with the domestic, not the European, legal powers. In the event, which no doubt would never happen in the real world, that a European measure was seen to be repugnant to a fundamental or constitutional right guaranteed by the law of England, a question would arise whether the general words of the 1972 Act were sufficient to incorporate the measure and give it overriding effect in domestic law. But that is very far from this case.²²

12. There is much force in the judge’s ruling that the statute book includes a number of “constitutional statutes” that may call for an appropriate response in the courts, in particular that they are not subject to being implied repeal. This conclusion is however difficult to reconcile with some of the orthodox propositions asserted by Laws LJ in para [59]—in particular that relating to implied repeal. Further, as I have explained elsewhere, I do not agree with the assertion that the British Parliament “being sovereign, it cannot abandon its sovereignty”; and I consider that the proposition that Parliament cannot bind its successors is an over-broad proposition.²³

13. This paper is limited to consideration of clause 18. Nonetheless, as the previous paragraph indicates, discussion of legislative supremacy is likely to involve the proposition that Parliament is unable to bind its successors. It is remarkable therefore that the Explanatory Notes to Part 1 of the Bill do not deal with the application of this proposition to the proposals in clauses 2, 3 and 6 that British approval to certain changes in EU law will require first to be approved by an Act of Parliament and that the change should be approved by a referendum. These clauses provide that the Act of Parliament to approve a specific change must contain provision for the holding of a referendum. It is one thing for Parliament to require that certain actions may be taken by the Government only when approval has been given for them by a further Act. But today’s Parliament may not require that further Act to include the requirement of a referendum. A future Parliament may of course expressly repeal or amend the requirement of a referendum clause, but (unless the present European Union Bill is recognised by the courts as being a constitutional statute, and thus immune from implied repeal) what is the position if no referendum clause is included in the later Act—either because no such clause is proposed by the Government or if a referendum clause is proposed but is then defeated? The Explanatory Notes envisage that certain ministerial decisions under Part 1 of the Bill will be subject to judicial review: is it also envisaged that a future Act of Parliament that did not include a referendum clause would be subject to judicial review? Laws LJ in the *Thoburn* case declared that Parliament “cannot stipulate as to the manner and form of any subsequent legislation”. Is not Part 1 of the Bill attempting to do exactly that?

23 November 2010

Written evidence from Professor T R S Allan

EUROPEAN UNION BILL

Clause 18—Status of EU law dependent on continuing statutory basis

1. There is much debate over the nature and foundations of the doctrine of parliamentary sovereignty. Broadly speaking, two general approaches can be distinguished. On one view, parliamentary sovereignty is an expression of ‘political fact’: the courts acknowledge the supremacy of Parliament as presently constituted, bowing simply to the outcome of historical events as they have unfolded. This was the view adopted by Professor Sir William Wade (see ‘The Legal Basis of Sovereignty’ [1955] CLJ 172) and now endorsed by Professor Adam Tomkins (para 29 of Professor Tomkins’s written evidence).

2. It is easy to see, in the present context, where that view might lead. When Parliament passed the European Communities Act (ECA) 1972, in exercise of its sovereignty, the United Kingdom joined a new legal order whose law took primacy over national law. According to the established jurisprudence of the European Court of Justice, at the time of accession, EU law enjoys a special authority derived from the EU Treaties; rather than being assimilated to domestic law, EU law has an independent and uniform existence throughout the

²² [[2003] QB 151 at para [69].

²³ See the chapter from *The Changing Constitution* already cited; and AW Bradley and KD Ewing, *Constitutional and Administrative Law* (15th edn, 2010), chapter 4.

Member States. As a practical consequence of what was done in 1972, EU law has been entrenched: its operation in the UK can be brought to an end only by secession from the EU. (Compare counsel's argument in the *Thoburn* case [2003] QB 151, para 53 of the judgment.)

3. At the time of accession Professor J.D.B. Mitchell had put forward a similar view. The ECA 1972 merely acknowledged the legal consequences of the fact of accession to the Treaty: there had been a 'revolution' comparable to that entailed by enactment of the Acts of Union 1707, or Statute of Westminster 1931. Professor Wade's view of the effect of the *Factortame* cases was very similar. Parliament had chosen to embrace membership of the EU, with the obligations it entails, and the court had bowed to the consequences: there had been a revolution which only the wholesale repeal of the ECA could reverse: 'While Britain remains in the Community we are in a regime in which Parliament has bound its successors successfully, and which is nothing if not revolutionary.' (Sir William Wade, 'Sovereignty — Revolution or Evolution?' (1996) 112 LQR 568, p. 571.) Like counsel in *Thoburn*, Professor Wade cited Lord Bridge's remarks in *Factortame (No 2)* [1991] 1 AC 603, 658: 'Thus, whatever limitation of its sovereignty Parliament accepted when it enacted the ECA 1972 was entirely voluntary.' The House of Lords was acknowledging the new political facts.

4. An alternative approach rejects the idea that questions of law can be simply reduced to matters of fact. Political and historical events have to be interpreted in the light of general principles, giving weight to our conceptions of democracy and fundamental rights. All questions about the meaning and effects of legislation are partly evaluative questions about legitimacy: how should statutory instructions be understood in the light of the nature of the UK legal order as a liberal democracy based on the Rule of Law?

5. In the present context, it is necessary to consider not merely what Parliament did in 1972 but what it was entitled to do. There is much force, I believe, in Lord Justice Laws's view, expressed in *Thoburn*, that Parliament's authority did not extend to the abandonment or surrender of its own continuing legislative supremacy. The true basis for the reception of EU law lies in British constitutional law: 'The conditions of Parliament's legislative supremacy in the UK necessarily remain in the UK's hands.' (*Thoburn* judgment, para 59.)

6. The doctrine of 'parliamentary sovereignty' is itself conducive to some confusion, in my view; like Professor Bradley (para 6 of his written evidence) I prefer the term 'legislative supremacy', which signifies that Parliament is the supreme law-making body within the UK legal order. *Sovereignty* must, I believe, reside in the legal order itself, from which Parliament's legislative supremacy is derived. The nature and scope of legislative supremacy are matters of common law in the sense that they are questions to be resolved, necessarily, by the courts in order to determine contested and doubtful cases. Such cases depend for correct resolution on consideration of all the pertinent reasons. The present context, concerning the implications of British membership of the EU, vividly illustrates the dependence of Parliament's continuing legislative authority on judicial interpretation of the nature of the UK legal order, viewed as a whole.

7. The *Thoburn* judgment provides a good illustration of the operation of the common law constitution. In seeking to accommodate the European doctrine of the primacy of EU law with the supremacy of Parliament, as a matter of domestic constitutional law, Lord Justice Laws made —or rather proposed—a very modest change to the general rule permitting implied repeal: it would be necessary for Parliament *expressly* to amend or repeal the ECA before it could be overridden by a later statute. The (common law) presumption that Parliament has no intention to create any conflict with directly applicable EU law is simply a reflection of the practical consequences and requirements of UK membership of the EU. By recognising only the most modest adjustment of the previous understanding, sufficient to accommodate the *Factortame* decisions, the continuing sovereignty and independence of the *UK legal order* remains untouched.

8. Lord Justice Laws's approach to legislative supremacy illustrates the importance of the question of legitimacy. He notes that circumstances could be imagined when the ECA would be an inadequate basis for the effective operation of EU law, *even without any further parliamentary intervention*: a European measure perceived to be 'repugnant to a fundamental or constitutional right guaranteed by the law of England' would be repudiated. That would be consonant with the position of other Member States such as Germany, where the Federal Constitutional Court insists on the sanctity of rights guaranteed by the Basic Law. The correct approach, in my view, not only protects the future exercise of legislative supremacy by Parliament, but also provides an ultimate guarantee against European measures that threatened basic human rights or other fundamental principles of the UK legal order.

9. The Explanatory Memorandum, para 107, shows that clause 18 is intended to resist the theory whereby 'the law of the EU includes the entrenchment of its own supremacy as an autonomous legal order, and the prohibition of its abrogation by the Member States'. The clause is apparently intended to confirm the view of Lord Justice Laws, who insisted that since Parliament could not abandon its own continuing sovereignty, it was not possible for the ECJ by its own jurisprudence to alter the constitutional basis on which EU was received in the UK.

10. It is hard to see how clause 18, if enacted, could affect the existing constitutional position. If it is true that the constitutional basis for the reception of EU law is a matter of British constitutional law, it must be true in virtue of a correct understanding of the common law. According to Lord Justice Laws's account, Parliament may not abandon or surrender its continuing legislative supremacy, which is ultimately defined by judicial interpretation of the UK legal and constitutional order. Clause 18 therefore makes no difference: since it is a

question of the nature and boundaries of Parliament's powers, a statutory declaration adds nothing to the existing common law position.

11. If, in the alternative, *Thoburn* were wrongly decided, and the correct position were that the autonomous EU legal order is now also the constitutional basis for the authority of EU law in the UK, clause 18 would equally be unable to alter the position. A court which accepted that the primacy of EU law was now entrenched within the UK would be forced to conclude that clause 18, if enacted, was erroneous.

12. The Explanatory Memorandum, para 106, says that by 'placing on a statutory footing the common law principle that EU law takes effect in the UK though the will of Parliament and by virtue of an Act of Parliament, this will provide clear authority which can be relied upon to counter arguments that EU law constitutes a new higher autonomous legal order derived from the EU Treaties . . . which has become an integral part of the UK's legal system independent of statute.' It is not, however, possible to place such a common law principle 'on a statutory footing' because the principle concerns the nature of continuing legislative authority. If, for example, a new statute were to purport to override, or derogate from, directly applicable EU law, there would be a conflict with the legal consequences of the ECA, which only the courts could resolve. Doubts about the limits or consequences of conflicting statutory instructions cannot be resolved by appeal to further such instructions without begging the question at issue.

24 November 2010

Written evidence from Vernon Bogdanor, Research Professor, King's College, London

NOTE FOR HOUSE OF COMMONS EUROPEAN SCRUTINY COMMITTEE.

1. The European Union bill provides that a referendum must be held before there can be any amendments to the Treaty on the European Union or 'significant' transfers of power from Parliament to the European Union.

2. There are a number of precedents, amounting almost to a convention, for the proposition that a referendum is required for a significant transfer of the powers of parliament 'downwards' to devolved bodies. Logic would then seem to require that a referendum also be needed for a transfer 'upwards' to the European Union. The rationale in both cases is the same, and was first stated by Locke in his *Second Treatise of Government*, para. 141. 'The Legislative cannot transfer the power of making laws to any other hands. For it being but a delegated power from the People, they who have it cannot pass it to others'. Voters, it might be said, entrust MPs as agents with legislative powers, but they give them no authority to transfer those powers, to make radical alterations in the machinery by which laws are to be made. Such authority, it may be suggested, can be obtained only through a specific mandate, that is, a referendum. The referendum, therefore, could be argued to be in accordance with, rather than in opposition to, the basic principles of liberal constitutionalism.

3. Nevertheless, a referendum is only needed for 'significant' changes. It is held that a referendum is needed for the introduction of primary legislative powers in Wales, but will not, I believe, be required for implementation of the Calman Commission proposals on devolving revenue-raising powers to the Scottish Parliament.

4. Although there is therefore a basic rationale for the European Union bill, it seems to me that its provisions are inconsistent with the declaratory clause insisting that Parliament is sovereign. Indeed, the purpose of the bill is unclear to me. A government will not provide for a referendum unless it wishes to support a proposal for treaty amendment or transfer of powers. If it is opposed to such a proposal, it can use its veto, since all matters to be made subject to the referendum require unanimity. The present government has indicated that it will not support any amendment or transfer of powers in this parliament. Therefore, the purpose of the bill must be to prevent a future government from supporting such an amendment or transfer without a referendum. The bill seeks, in other words, to bind a future government. That seems to me inconsistent with the declaratory proposition that Parliament is sovereign. If Lord Justice Laws is right in his judgment in *Thoburn v Sunderland City Council* [2002], that Parliament cannot stipulate against implied repeal', cited in the Explanatory Notes to the bill in para. 108, then, presumably, a future government could, if it wished, simply ignore a European Union Act, and accept an amendment or transfer without a referendum. So the bill would have no purpose. In fact, I do not think that Lord Justice Laws was right. Therefore, the bill does have a purpose. But, if Lord Justice Laws was, as I believe, wrong, then the bill purports to do what clause 18 declares to be impossible, namely to bind a successor Parliament.

5. Past referendums in Britain—the national referendum in 1975 and the various devolution referendums—have, with one exception, caused few problems. The exception was the Scottish devolution referendum of 1979 when, although the 'Yes' vote gained a small majority, this failed to surmount the 40% hurdle required by Parliament.

6. Turnout in some referendums has, however, been low. In the Welsh devolution referendum in 1997, just 50% voted. In the referendum on a mayor and assembly for London in 1998, just 34% voted, even though it had been suggested as part of the justification for the reform that there was great popular pressure for a London-wide assembly.

7. Because the referendum has worked well in the past, there may be some danger of overlooking possible future problems. The first such problem would be a narrow majority against a proposal recommended by the government on a low turnout. Suppose, for example, that a government recommended acceptance of a particular treaty amendment or transfer of power, but, in a referendum, with a turnout of 26%, 13.5% voted against it, with 12.5% voting for. Ought the government to feel itself bound by such a result?

8. A second problem might be that of different outcomes in different parts of what has become a multi-national kingdom. Suppose, for example, that a particular proposal was endorsed in the United Kingdom as a whole, and endorsed in England by a small majority, but rejected by a large majority in Scotland. Then a government might well consider again whether it ought to be bound by the referendum.

9. The solution to these difficulties is to provide that the referendums be explicitly advisory. Before the 1975 referendum on the European Communities, Edward Short, Leader of the House of Commons, told the House that 'This referendum is wholly consistent with parliamentary sovereignty. The Government will be bound by its result, but Parliament, of course, cannot be bound'. He then added, 'Although one would not expect honourable members to go against the wishes of the people, they will remain free to do so'.²⁴

10. That was an accurate statement of the constitutional position as it was then. Opinions differ as to whether it is possible for Parliament to legislate for a binding referendum. It would, however, be peculiar to do this in a bill which also declared that Parliament is sovereign!

11. The European Union bill declares that Parliament is sovereign. It then proposes to bind future parliaments through a referendum lock. Was it not the Queen, in Lewis Carroll's *Through the Looking Glass*, who declared that she had been able to believe in six impossible things before breakfast?

Vernon Bogdanor,

Research Professor, King's College, London

Written evidence from Martin Howe QC

INQUIRY INTO THE EUROPEAN UNION BILL

INQUIRY INTO THE EUROPEAN UNION BILL

1. This evidence relates to the first phase of the Committee's inquiry, on Part 3 of the Bill and the status of EU law.

2. In late 2009, I published a paper ("Safeguarding Sovereignty: A Bill for UK Constitutional Rights in the EU", *Politeia*) which advocated the statutory entrenchment of the supremacy of Parliament against the potential erosion which might result from the application by our courts of the doctrine of the primacy of Community²⁵ law. That paper (which I am making available to the Committee with this memorandum²⁶) examines at greater length than is possible in this evidence a number of relevant legal decisions of the ECJ, of the courts of this country, and of other Member States.

3. The central argument in that paper is that the UK's fundamental constitutional doctrine, the supremacy of Parliament, is at least potentially vulnerable to erosion as a result of changes in judicial climate, because it is a doctrine expressed in the judgments of courts and the words of writers on constitutional law rather than in a formal written constitutional document. In this respect the United Kingdom's constitutional order differs from the constitutional orders of the other Member States surveyed where, with the possible exception of Belgium, written constitutions define the ultimate limits of EU powers within the domestic legal order.

4. In these circumstances I am naturally pleased that the Government has brought forward a proposal in Clause 18 of the Bill which is designed to address this issue. Such a clause is neither unnecessary (since there is a real danger of such erosion), nor futile (which would be the case if ultimate sovereignty had already passed from Parliament by virtue of the European Communities Act 1972). I will therefore concentrate, in the light of the issues raised in the Committee's notice of inquiry, on whether the drafting of this clause is optimal to achieve its intended objective.

Relationship with the European Communities Act 1972

5. The heart of the potential ambiguity which the Clause is intended to address arises from the words used in subsection 2(4) of the 1972 Act:-

"... and any enactment passed or to be passed, other than one contained in this Part of this Act, shall be construed and have effect subject to the foregoing provisions of this section;"

6. These words on their face purport not merely to require that other Acts are to be *construed* so as to be consistent with directly effective EU law, but also purport to limit the *effect* of Acts (both past and future). This alters, at least to some degree, the operation of the doctrine of sovereignty of Parliament. The drafting of

²⁴ House of Commons Debates, vol. 888, col. 293, 11 March 1975.

²⁵ Now properly styled "EU law" after the coming into force of the Lisbon Treaty.

²⁶ Not printed.

the 1972 Act does not, either at this point or elsewhere, explicitly spell out the scope of this limitation on the effect of future Acts of Parliament. The courts have (at least so far) said that this provision limits the effect of later Acts of Parliament which are in conflict with EU law, even to the extent of rendering them partly or wholly inoperative, *unless Parliament expresses a contrary intention*.

7. However, this conclusion itself rests on interpretation of the 1972 Act against the background of the doctrine of sovereignty of Parliament. The Explanatory Memorandum accompanying the Bill helpfully quotes paragraph 59 of the important judgment of Lord Justice Laws in the *Thoburn* (“Metric Martyrs”) case. In this paragraph, he appears to express the view that Parliament *cannot* legislate to abandon its sovereignty: “The British Parliament has not the authority to authorise any such thing. Being sovereign, it cannot abandon its sovereignty.”

8. In my opinion, this aspect of the judgment can be misunderstood. It is clear beyond any possibility of doubt that Parliament *does* have the power to abandon its sovereignty, if it were ever deliberately to take that step.²⁷ The Parliament of the United Kingdom came into existence as a result of two successive Acts of Union, between England and Scotland and between Great Britain and Ireland. By the Act of Union with Scotland, the Parliament of England dissolved itself and transferred its sovereignty to the new Parliament of Great Britain. Accordingly, it cannot be denied that the present day Parliament of the United Kingdom has the legal power, were it to choose to do so, to abandon its sovereignty: either to the organs of a greater political union to which the United Kingdom were to subscribe, or to transfer its sovereignty to a written Constitution which created a legislature with constitutionally limited powers.

9. It follows that the observations of Lord Justice Laws about Parliament’s inability to abandon its sovereignty are only valid so long as the fundamental doctrine of sovereignty of Parliament is in place, and must be read with this implicit limitation in mind. The argument is therefore circular. The argument would not apply if a court interpreting the 1972 Act were to take the view that Parliament’s intention in passing that Act had indeed been to abandon or permanently transfer its sovereignty.

10. Accordingly the heart of the problem is remedying any possible ambiguity in the 1972 Act itself. For this reason it would be preferable if the wording of Clause 18 of the present Bill were to be inserted by amendment to stand as a new section within Part I of the 1972 Act, rather than standing as a section a separate Act. This would mean that it would then be encompassed by the words “other than one contained in this Part of this Act” in section 2(4) of the 1972 Act and there would be no doubt at all that it is not subject to section 2(4). If the section resulting from Clause 18 stands as part of a separate Act, there is still room for a verbal argument that its effect is limited by the words in section 2(4).

11. In my view Clause 18 as presently drafted is valuable and is almost certainly sufficient to achieve its intended purpose of preventing judicial drift towards the erosion of the doctrine of Parliamentary sovereignty. This is because it can be said that it is evident from the nature of the clause itself and from its express reference to section 2(1) of the 1972 Act that it is intended by Parliament to limit, or at least to qualify by way of clarification, the effects of section 2(4) and other provisions of Part I of the 1972 Act. However, since the purpose of this clause is to prevent all doubt, it would ideally be preferable if the opportunity were taken to squash conclusively any lingering arguments which might arise from the fact that it is not within Part I of the 1972 Act.

Consistency with Declaration 17 to the Lisbon Treaty

12. This requires consideration of the case law developed by the ECJ on the doctrine primacy of Community law (now EU law). This is dealt with more fully at pages 7 to 9 of my “Safeguarding Sovereignty” paper. Briefly, I consider that this doctrine as developed by the ECJ can be separated into two distinct aspects.

13. First, it is a well established doctrine of public international law that a State cannot pray in aid internal constitutional or legal provisions as an excuse for non-compliance with obligations imposed by international law. It is inevitable that a court such as the ECJ operating on the international plane should apply this doctrine. I will call this “external primacy”.

14. However, the language used in some of the ECJ’s judgments suggests that the courts of the Member States are under a legal duty arising directly from Community law to apply it in preference to all national laws including provisions of the State’s own constitution. I will call this the doctrine of “internal primacy”. This was most clearly stated in the following quotation from *Internationale Handelsgesellschaft*:²⁸

“The law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed ... Therefore the validity of a Community measure or its effect within a Member State remains unimpaired even if it is alleged that it runs counter to either fundamental rights as formulated by the Constitution of that State or the principles of a national constitutional structure”.

15. Despite this and other utterances of the ECJ on this subject, it is clear in my view that a doctrine of *internal* primacy is not accepted by a number of major Member States. Most explicitly, the Federal German Constitutional Court has made it clear in the *Manfred Brunner* case and in the more recent Lisbon Treaty

²⁷ This indeed was the view of A.V. Dicey.

²⁸ [1970] ECR 1125 at 1134.

case²⁹ that the legal effectiveness of Community/EU law within Germany stems from the German Constitution and is therefore subject to the limitations imposed by the German constitutional order. Accordingly Declaration 17 to the Lisbon Treaty must be read subject to the limitation that most Member States do not recognise full *internal* primacy within their own constitutional orders.

November 2010

Written evidence from Jeffrey Goldsworthy, Professor of Law, Monash University

SUBMISSIONS ON PROPOSED EU BILL

1. The reasoning in the Thoburn case is that of two judges of the Court of Appeal. It cannot be taken to be a conclusive statement of the law. The reasoning is correct insofar as it asserts that UK membership of the EU is ultimately based on UK law. But the reasoning is incorrect insofar as it suggests that the doctrine of parliamentary sovereignty is a matter of common law determined by the courts. That erroneous suggestion has also been endorsed in obiter dicta in the recent Jackson case, dealing with the Parliament Acts.

2. For the same reason (which I explain below), I disagree with the statement in the first paragraph of this Committee's "Announcement of Inquiry", dated 12 November 2010, namely:

"The Bill also seeks to place on a statutory footing the common law principle of parliamentary sovereignty with respect to directly applicable or directly effective EU law."

3. It is dangerous for Parliament to state that parliamentary sovereignty is a "common law principle". Because the common law is, today, generally regarded as judge-made law, this statement implies that the doctrine of parliamentary sovereignty has been made by the judges—and if so, that the judges could at any time "unmake" it, if they should come to the view that it is no longer justified. Parliament should not lend any support, even unintended support, to these implications.

4. The statement is not only dangerous, but false—both as a matter of history, and as matter of jurisprudential analysis. Detailed reasons for this view are given in the second chapter of my new book, "Parliamentary Sovereignty, Contemporary Debates" (Cambridge UP, 2010), and the final chapter of my previous book, "The Sovereignty of Parliament, History and Philosophy" (Clarendon Press, 1999). As I explain there, it is absurd to maintain that, as a matter of historical fact, the doctrine was created by the courts. It is also based on the simplistic and false notion that since the doctrine of parliamentary sovereignty could not have been created by statute (for the reason given in the next paragraph), it must have been created by the common law.

5. The statement is also inaccurate in suggesting that the doctrine of parliamentary sovereignty can be placed "on a statutory footing". Any attempt by Parliament to enact that it has sovereign power would be open to the objection that it is begging the question—because the validity of that enactment would presuppose that Parliament already has the sovereign authority needed to enact it.

6. The true foundation of the doctrine of parliamentary sovereignty is general consensus among senior official of all branches of government, supported by public opinion and based on commitments to principles of political morality such as democracy. The principled commitments of Parliament itself, of the Crown, and of senior judges, are all essential parts of this consensus. For this reason, the doctrine of parliamentary sovereignty has a much broader and more democratic foundation than is entailed by the false view that it is a doctrine of judge-made common law.

7. Parliament (which includes the Crown) is perfectly entitled to express its principled commitments in provisions such as s.18 of the proposed EU Bill. This can help to fortify and stabilise the consensus on which the doctrine of parliamentary sovereignty rests, by making the commitments of Parliament (and the Crown) unambiguously clear—especially for the benefit of the judiciary, in case of future uncertainty. But this cannot become the sole basis on which that doctrine rests.

8. If the judges were to abandon their principled commitment to the doctrine of parliamentary sovereignty, a very dangerous situation would arise in which the legal system of the U.K. would no longer rest on a stable consensual footing. Parliament would not be obligated to meekly acquiesce in the judges' change of mind, because it would not have to accept that the doctrine of parliamentary sovereignty is one of "common law" that they have unilateral authority to modify or repudiate. As explained, the constitution of the UK has a much broader and more democratic foundation than that.

9. To seek to bind future parliaments by prohibiting the enactment of legislation without a referendum first being held is not consistent with the doctrine of parliamentary sovereignty.

10. This could not be effective without the prohibition being "self-entrenched". In other words, the prohibition would have to apply to any future legislation seeking to bring about its own amendment or repeal.

11. But even then, it is not clear that the prohibition would be enforced by the courts in resolving a future clash between the will of the earlier Parliament (enacting the prohibition) and the will of a later one (ignoring the prohibition). The enactment of such a prohibition would amount to an attempted renunciation by Parliament

²⁹ Please see passages referred to at pages 10–12 of the "Safeguarding Sovereignty" paper.

of a portion of its own sovereignty. But if a later Parliament were to ignore the prohibition, and repudiate that renunciation by reasserting its sovereign authority to legislate without a referendum, the judges would have to decide whether to accept the earlier renunciation, and enforce the prohibition, or to accept Parliament's later repudiation of that renunciation. If the judges took the latter path, the consensus that constitutes the doctrine of parliamentary sovereignty would have been re-established despite Parliament's own previous attempt to alter it.

11. To make it more likely that, in this scenario, the judges would enforce the earlier statute prohibiting the future enactment of legislation without a referendum first being held, that statute should itself be put to a referendum. The support of a majority of voters for such a referendum requirement would greatly add to the strength of the case in favour of its future enforcement notwithstanding Parliament later change of mind, indicated by its attempt to legislate without complying with that requirement. This is because obtaining the support of the voters for a requirement that their support be required in the future overcomes a principled objection to the imposition of a referendum requirement by ordinary legislation. The objection is this: if an earlier Parliament can use ordinary legislation to implement its preferred policies, why should a future Parliament not have the same liberty? To put it another way, why should the later Parliament be bound by the expression of a will that has no higher authority than its own will? This is the main justification of the orthodox view that Parliament cannot bind itself. But if a referendum requirement is enacted with the support of a majority of voters in a referendum, the objection is overcome. A future Parliament could then be said to be bound, not by an earlier will of no higher authority than its own will, but by an earlier will that does have such a higher authority—the expressed will of the people.

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Written evidence from Michael Dougan, Dean of the Liverpool Law School and Professor of European Law, University of Liverpool

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

1. The question of when to insist (in particular) upon the use of a referendum for the approval of certain changes to the EU Treaties, or for the adoption of various decisions provided for thereunder, is essentially a political one to be determined by Parliament.

2. Nevertheless, that political judgment will be informed by various relevant policy considerations. On the one hand, there is the Government's desire for both legal clarity and political accountability in defining the circumstances when a referendum should be required for the approval of EU changes. That objective favours employing an exhaustive legislative definition, so that the decision about insisting upon the use of a referendum has effectively been made *a priori*. On the other hand, there is a broader constitutional concern that the use of referenda should be reserved for issues appropriate to be determined through an instrument of direct (as opposed to representative) democracy. Establishing the appropriateness of using a referendum may well be largely a matter of reaching an *a priori* decision in the design of the Bill; but it might also and quite rightly involve the exercise of subsequent discretion according to the circumstances prevailing during the operation of the final Act.

3. Furthermore, the exercise of political judgment about when to insist upon the use of a referendum for the approval of certain EU changes should (preferably) result in a legislative scheme which can be accepted as coherent and consistent even by those who disagree with its subjective political underpinnings. Indeed, it is clearly desirable that different forms of democratic scrutiny (whether by referendum, Act of Parliament, or some lesser form of Parliamentary approval) are matched to different types of EU changes so as to ensure that decisions of equivalent constitutional significance are at least treated in a comparable manner.

4. As one might expect, the EU Bill resolves those tensions based upon a compromise.

Some EU changes will require approval by both Act of Parliament and popular referendum. Others will require approval by Act of Parliament alone. Still other EU changes are to be subject to a Parliamentary approval procedure.

To a large degree, the Bill seeks to provide an *a priori* definition of which EU changes are to be approved according to which form of democratic scrutiny, i.e. maximising the objectives of clarity and accountability. Nevertheless, the treatment of certain EU changes—in particular, the question of whether they may only be approved after a popular referendum—is based either implicitly or explicitly upon the exercise of some degree of subsequent political judgment.

5. This Written Evidence focuses upon three of the main (inter-related) questions which arise from that draft legislative compromise, and which are referred to in the Terms of Reference for the European Scrutiny Committee's EU Bill Inquiry:

- are the criteria for the exercise of subsequent political judgment about the need for a referendum in themselves clear and accountable?;
- is the matching of different types of EU changes to different mechanisms of democratic scrutiny executed in a coherent and consistent manner?; and

— what might be the impact of those choices upon future UK-EU relations?

6. The core conclusions of my investigation into those questions may be summarised as follows:

(a) On

the surface, the criteria for making subsequent political judgments about the need for a referendum on certain EU changes—in particular, those falling within the “significance condition” provided for under Clause 3—appear to leave much to the discretion of the competent minister and to be ill-suited to act as a yardstick for close judicial review. However, that concept of “significance” could, in principle, acquire greater objective definition when located within the broader scheme of the Bill, i.e. by means of comparison with the treatment of other EU changes where there is a clear *a priori* decision about whether a referendum is either required (and thus assumed to be significant) or unnecessary (and thus assumed to be not significant). Yet it is difficult, in practice, to identify a coherent approach in that regard: some of the EU changes which are potentially subject to a referendum are of at least dubious significance, especially when compared to the range of EU changes which may clearly be approved by Act of Parliament alone.

(b)

There is therefore a good case for reviewing the Bill’s current matching of different EU changes to the available mechanisms for democratic scrutiny. In particular, one might argue that the exercise of subsequent judgment about the use of referenda, based upon the concept of “significance”, should play a greater role across the operation of the Bill. So as to meet concerns about clarity and accountability, that subsequent judgment need not necessarily be based upon ministerial discretion: it could be exercised politically by Parliament itself; or entrusted to an independent panel or tribunal.

(c) In

any event, although the coverage of the Bill in terms of democratic scrutiny (by one means or another) of EU changes is generally comprehensive, it is possible to identify one potential loophole. That loophole concerns the UK’s decision to join an existing enhanced cooperation initiative, as regards which the participating Member States have already made use of the “internal” passerelle clause, so as to convert decision-making within the Council (acting in its restricted formation) from unanimity to QMV. In such a situation, the Bill makes no provision for a referendum, or an Act of Parliament, or even Parliamentary approval—despite the fact that such a decision by the UK could be seen as having effects, in terms of a “transfer of power” from the UK to the EU, entirely comparable to an equivalent proposal to shift from unanimity to QMV outside the context of an enhanced cooperation, or where the UK is already a participant in an existing enhanced cooperation at the time of the proposal to make use of the “internal” passerelle clause, in which situations the Bill does clearly provide for an Act of Parliament and in some cases also for a referendum.

(d)

The final conclusion concerns the potential impact of the Bill on UK-EU relations. If the UK is perceived to have created a constitutional mechanism which has an in-built tendency to block EU changes—even if generally perceived to be marginal, even if generally considered to be valuable—then there is a serious risk that the UK’s influence within the EU as a whole will be appreciably diminished and furthermore that the EU’s capacity for future reform will be significantly inhibited. Nor should one neglect the potential impact of the Bill upon the UK’s internal politics and constitution: consider, for example, the likely pressure for “spillover” in the use of referenda from EU issues to a broader range of domestic decisions; the appreciable risk that both direct and representative democracy will be damaged, rather than enhanced, by the Bill’s system of “referendum locks”; and the uncertain implications of those “referendum locks” for the fundamental principle of Parliamentary sovereignty that the Bill otherwise claims to respect.

7. The remainder of my Written Evidence will substantiate those conclusions by more detailed reference to the provisions of the Bill and of the EU Treaties.

(a) *subsequent political judgments as to the need for a referendum and the importance of the concept / criterion of “significance”*

8. As stated above, the Bill seeks largely to provide an *a priori* definition of which EU changes are to be approved by means of both an Act of Parliament and a popular referendum. As regards only a relatively small number of EU changes would the decision about whether to hold a referendum be based upon the exercise of subsequent political judgment.

9. In some cases, the exercise of subsequent political judgment is implicit in the operation of the Bill.

Consider, for example, Clause 4(4) and the question of whether a Treaty or Article 48(6) decision involves merely the codification of practice under the TEU or TFEU in relation to the previous exercise of an existing competence (in which case, it should be exempt from the requirement to hold a referendum that would otherwise be required pursuant to either Clause 2 or Clause 3 read together with Clause 4). 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.

10. In other situations, the Bill is more explicit about preserving the exercise of subsequent political judgment as to whether the conditions are fulfilled in practice for the mandatory holding of a referendum.

The most obvious situation here concerns Clause 3(4) read together with Clause 4(1)(i) or (j). Their combined operation depends upon a ministerial judgment about whether the relevant Article 48(6) decision (conferring either a power to impose a requirement or obligation upon the UK, or a new / extended power to impose sanctions upon the UK) “is not significant” in relation to the UK.

The Terms of Reference for the European Scrutiny Committee’s EU Bill Inquiry draw specific attention to this decision-making power. The Bill does not lay down expressly any 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.

The situation might appear different, however, if one understands the Bill as *implicitly* providing various criteria to structure the exercise of ministerial discretion pursuant to Clause 3(4). In the first place, one might see the scheme of the Bill in general, and of Clause 3 in particular, as effectively creating a presumption in favour of holding a referendum, with the burden falling upon the minister to justify otherwise. In the second place, there are a range of well-defined situations where a referendum is clearly required (and can be assumed *per se* to be “significant”). Conversely, there are a range of well-defined situations where a referendum is clearly not required (and can be assumed *per se* to be “not significant”, even if an Act or Parliament or Parliamentary approval are still called for). An evaluation of the significance of any given Article 48(6) decision falling within Clause 4(1)(i) or (j) may thus be undertaken (essentially by analogy) within the broader scheme of the Bill.

11. From that perspective, one might say that the concept of “significance” is not limited to the specific operation of Clause 3(4). Rather, the concept of “significance” underpins the entire Part 1 of the Bill: it serves to match different EU changes to different forms of democratic scrutiny in an appropriate and consistent manner. In particular, one might say that the necessity to hold a referendum is *always* determined by whether the proposed EU changes are significant for the UK in terms of a “transfer of competence / power” to the EU. For those purposes, some EU changes are to be treated *per se* as significant on the basis of an *a priori* political judgment as defined in the Bill itself. Other EU changes, however, are to be considered significant only in the light of a subsequent political judgment; but that judgment, far from conferring a wide discretion upon the Government, must be informed by the criteria implicitly provided by the Bill.

12. Difficulties arise with that understanding, however, because it assumes that the *a priori* political judgments enshrined in the Bill, concerning the necessity to hold a referendum, are indeed appropriate / consistent and would thus prove capable of structuring subsequent political judgments pursuant to Clause 3(4) in a way that would be more readily amenable to objective external scrutiny and, in particular, to close judicial review. Yet the strength of that assumption may legitimately be questioned.

13. The current text of the Bill treats all the issues falling within Clause 4(1) (apart from measures under (i) and (j) when contained in an Article 48(6) decision; and also those situations falling under Clause 4(4)) as “significant” *per se*, i.e. automatically triggering the requirement to hold 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.

14. Issues arise, in particular, with Clauses 4(1)(b)-(h) dealing with the conferral of new or the extension of existing EU competences according to the various “competence categories” defined in Article 2 TFEU.

15. The referendum condition referred to in Clauses 2(2) and 3(2) of the Bill would clearly be activated in the event of the creation of an entirely new field of EU activity within any of the Article 2 TFEU categories of competence, or the wholesale transfer of an existing field of EU competence “upwards” across the Article 2 TFEU categories of competence, e.g. upgrading from mere complementary to shared competence; or from shared to exclusive competence.

16. However, the existing wording of Clause 4(1) would also appear to catch the transfer (in whole or in part) of an existing field of EU competence “downwards” across the Article 2 TFEU categories of competence, e.g. downgrading from exclusive to shared competence; or from shared to complementary competence. Such situations would still, after all, involve an expansion of shared or of complementary EU competence as referred to in Clause 4(1)(e) or (h) (respectively). Yet it would run entirely counter to the purpose of the Bill to require a referendum for the approval of Treaty changes that would reduce (rather than increase) the EU’s existing regulatory powers and fall outside the spirit (as opposed to the letter) of the Bill. One assumes that, in such a situation, common sense would prevail: the interpretation and application of Clauses 4(1)(b)-(h) again depends *implicitly* upon the exercise of subsequent political judgment about whether an EU change should really be considered significant within the intended scheme of the Bill.

17. Conversely, the current wording of Clause 4(1) would seem always to catch the partial transfer of an existing field of EU competence “upwards” across the Article 2 TFEU categories of competence, i.e. through amendment of the detailed legal bases contained in Part Three of the TFEU, in implementation of / derogation from the highly generalised lists of competence fields provided for under Part One of the TFEU. Yet such a reform might well envisage only a very minor change to the division of competence between the EU and its Member States: for example, the limited conferral of a narrowly defined power to harmonise national laws as regards a specific aspect of a policy field which would otherwise remain categorised as one of merely

complementary EU competence. Consider, by analogy, Article 168 TFEU on EU action in the field of public health: EU competence in that field is generally of a purely complementary nature, but there are a few specified issues (such as the quality and safety of organs and substances of human origin) where the EU does enjoy the power to harmonise national laws.

18. Moreover, Clause 4(1) would also catch any expansion of the scope of EU action within one of the existing competence categories (even if that does not involve a transfer “upwards” per se). If such an extension concerned a field of exclusive EU competence, the political objectives of the Bill might well justify treating such a change as significant enough to warrant an intensive degree of democratic scrutiny. But the situation might appear different when it comes to an extension in the scope of an existing EU complementary competence, i.e. the power merely to adopt recommendations or incentive measures, excluding any harmonisation of national law, in a field such as education, public health, tourism or cultural policy.

19. One might legitimately query the *a priori* political judgment that a referendum should be considered mandatory in each and every such situation, without any room for the exercise of subsequent political judgment as to the appropriateness of holding a national plebiscite, taking into account the scale, scope and significance of the proposed “transfer of competence” from the UK to the EU.

20. That is particularly true when one considers some of the other “transfers of competence / power” from the UK to the EU which, according to the *a priori* political judgment enshrined in the Bill, clearly do not attract a referendum and may be approved by Act of Parliament alone: for example, the abolition of national vetoes within the Council as regards EU legislation concerning the introduction of restrictions on third country capital movements (Article 64(3) TFEU); as regards the negotiation and conclusion of certain international agreements within the context of the common commercial policy (Article 207(4) TFEU); or as regards the languages used by the EU institutions (Article 342 TFEU). Such reforms may seem comparable in significance to minor alterations to the existing state of EU competence, yet the latter would always fall within the scope of Clause 4(1).

21. 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.

(b) *towards a more coherent / consistent approach to the use of referenda?*

22. The solution to those problems surely lies in a critical reappraisal of the *a priori* political judgments offered by the Bill about the need to hold a referendum; and more generally, of the balance currently struck between reliance upon *a priori* and the opportunity for subsequent political judgments as a means of determining the appropriateness of a referendum in respect of any given EU change.

23. For example, the “significance” test currently applied, pursuant to Clause 3(4) only as regards Article 48(6) decisions relating to Clause 4(1)(i) or (j), might be extended so as to cover other measures falling within the scope of Clause 4(1) for the purposes of both Clause 2 and Clause 3 of the Bill.

Such an extension might not be considered at all appropriate (say) in the case of Clause 4(1)(k), (l) or (m)—all of which can justifiably be considered “significant” per se.

But a “significance” threshold could well be employed in respect of Clauses 4(1)(b)-(h)—as regards which it is possible to foresee proposals for minor amendment where a national plebiscite would seem unnecessary or even inappropriate.

For the sake of completeness, the same “significance” test could also be applied in respect of EU changes falling within the scope of Clause 4(1)(a), i.e. an extension of the EU’s objectives as set out in Article 3 TEU. It is well-established that the objectives contained in Article 3 TEU do not in themselves create any decision-making powers and cannot per se provide the source of any binding rights or obligations. They serve primarily as a guide to the exercise of the more specific competences conferred upon the EU elsewhere in the Treaties. The only situation in which an extension of EU objectives under Article 3 TEU might be regarded as problematic in competence terms relates to the “flexibility clause” contained in Article 352 TFEU, i.e. which permits the EU to adopt measures in furtherance of its objectives where the Treaties have not otherwise provided the necessary powers. But the exercise of EU competence under Article 352 TFEU always requires unanimity in the Council and, in addition, would always be subject to the Parliamentary controls outlined in Clause 8 of the Bill. Viewed against that background, any proposal to extend the EU’s objectives *in a significant way* could still justify a referendum pursuant to Clause 2 or Clause 3 of the Bill; but other more minor amendments to extend the EU’s objectives under Article 3 TEU need not require a national plebiscite.

24. Such a system—based on a broader application of the “significance condition” for the purposes of Clause 2 and Clause 3—would not only improve the coherence and consistency of the broad scheme of the Bill; to

the same degree, it would also help make application of any “significance” test in practice better suited to external scrutiny, including through the medium of judicial review.

25. One might add that, if Parliament were to feel uncomfortable about leaving to a minister (subject only to the possibility of judicial review, which might well prove limited in nature) the exercise of subsequent political judgment about whether to treat an EU change as “significant”—whether in respect of matters covered only by Clause 4(1)(i) or (j) (as under the current Bill) or as regards a broader range of issues falling within the scope of Clause 4(1) (as suggested above)—then it is possible to envisage alternative methods of scrutiny. For example, if the judgment were to remain essentially within the political domain, it could be reserved to Parliament itself; or if it were preferred to minimise the political nature of any subsequent judgment as to the necessity of a referendum, the matter could be referred to an independent panel or tribunal, for either a definitive decision or the delivery of an advisory opinion.

(c) coherence and completeness of democratic scrutiny mechanisms

26. When it comes to evaluating the coherence of the mechanisms for democratic scrutiny over various EU changes, as proposed under the Bill, attention should not only focus upon the scope of the “referendum locks”, but extend also to the other forms of control provided for under the Bill (Act of Parliament and Parliamentary approval) as well as the inter-relationship between them.

27. For example, it would be appropriate to compare for consistency the range of matters listed in Schedule 1 (referendum thus required for change to QMV) with those falling outside the scope of Schedule 1 (Act of Parliament alone required for change to QMV). Similarly, one should cross-check those matters falling outside the scope of Schedule 1 (for the purposes of changing the applicable voting rules to QMV) but where a substantive decision under the relevant legal basis would of itself require an Act of Parliament, against those where a substantive decision would be subject only to Parliamentary approval, and those where no specific form of additional scrutiny / control would be applicable.

28. Listing the full results of such comparisons and cross-checks would perhaps unreasonably prolong this Written Evidence. Suffice to say that, apart from the issues highlighted in section a) above, the approach of the Bill to the matters falling within its scope of application appears to be both consistent and comprehensive.

29. However, the Terms of Reference for the European Scrutiny Committee’s EU Bill Inquiry ask specifically whether certain “transfers of competence / power” are not covered by the Bill. The answer is that there does indeed appear to be a potential loophole in the system of democratic control mechanisms proposed under the Bill.

30. That potential loophole relates to the operation of enhanced cooperation under the Treaties. Enhanced cooperation is, in essence, the possibility that a group of Member States may be authorised to make use of the institutions, powers and instruments of the EU so as to pursue initiatives / adopt measures which will be binding only upon the participating countries—both those which originally launched the enhanced cooperation and those which decide subsequently to join an existing enhanced cooperation. 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 / a special into the ordinary legislative procedure, specifically for the purposes of the relevant enhanced cooperation.

31. Under the Bill, the “internal” passerelle clauses contained in Article 333 TFEU are listed in Schedule 1 for the purposes of Clauses 2 and 3 read together with Clause 4: any proposal to amend the Treaty so as to abolish the requirement of unanimity within the Council, as regards a potential future exercise of the “internal” passerelle clauses, would thus require approval by both an Act of Parliament and a national referendum.

Furthermore, in accordance with Clause 6, approval by both an Act of Parliament and a national referendum would also be required before actual use could be made of the “internal” passerelle clauses, where this would have the effect of substituting QMV for unanimity in Council, provided that (first) the legal basis within the Treaties to which the proposed use of the “internal” passerelle clause relates falls within the scope of Schedule 1 and (secondly) the UK already participates in the relevant enhanced cooperation (and thus forms part of the Council’s restricted formation for the purposes of voting on the “internal” passerelle proposal).

Finally, in accordance with Clause 7, approval by Act of Parliament alone would be required before actual use could be made of an “internal” passerelle clause, where this would have the effect of substituting QMV for unanimity in Council, in situations where (first) the legal basis within the Treaties to which the proposed use of the “internal” passerelle clause relates does not fall within the scope of Schedule 1 and (secondly) the UK already participates in the relevant enhanced cooperation (and so again forms part of the Council’s restricted formation for the purposes of voting on the “internal” passerelle proposal).

32. Those 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. Consider the following situation. 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 thereunder, including the “internal” passerelle decision to abolish unanimity in 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: there is no question of amending the Treaty so as to abolish the requirement of unanimity for future potential exercise of the “internal” passerelle clauses. Moreover, a referendum need not be held / Act of Parliament adopted in accordance with Clause 6 (as regards Schedule 1 matters) and an Act of Parliament need not be adopted pursuant to Clause 7 (as regards non-Schedule 1 matters): the UK was not a participant in the enhanced cooperation at the time the relevant “internal” passerelle decision was adopted by the Council.

33. In such situations—where the UK joins an existing enhanced cooperation after the Council has already decided to abolish the national veto—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, regardless of whether or not one agrees with its subjective political underpinnings, that omission is perhaps surprising. 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).

34. It is quite possible that, based upon actual experience of the enhanced cooperation provisions (which after all were used for the first time only in 2010), the Bill’s drafters had in mind the situation where enhanced cooperation is intended to be used only for the adoption of a single measure or small package of pre-identified measures. In such a situation, at the point of the UK’s possible subsequent participation, the relevant measure(s) would already exist and the pertinent decision for the UK would be to either opt in or remain outside the “end product” of the enhanced cooperation; there would be no relevant issue of giving up the national veto for the Government to decide upon, or for the Bill to control, only the substantive policy choice about whether the relevant measure(s) serve(s) the UK’s national interest.

However, insofar as such an understanding does explain the current design of the Bill, it has arguably failed to take full account of the reforms to enhanced cooperation contained in the Treaty of Lisbon. It was clearly intended by the Convention on the Future of Europe—whose original proposals form the basis of the current Treaty provisions—that it should be possible for enhanced cooperation to be used not only for the adoption of a single measure or small package of pre-identified measures; but also to facilitate the wish of a group of Member States to embark upon additional forms of cooperation as regards an entire policy field or issue (e.g. tax harmonisation, environmental policy or employment rights) for the foreseeable future—indeed, if so desired, on a scale emulating that of Economic and Monetary Union or the Area of Freedom, Security and Justice. Indeed, the “internal” passerelle clauses contained in Article 333 TFEU are part of a reform package intended precisely to facilitate such a broader and more systematic use of the enhanced cooperation provisions.

If enhanced cooperation were indeed to evolve in that direction in the future, the Bill’s approach to the UK’s subsequent participation in an initiative which had already converted the relevant legal basis from unanimity into QMV would surely amount in practice to a significant loophole in the Bill’s system of democratic scrutiny over “transfers of competence / power” from the UK to the EU.

35. Furthermore, that omission can be contrasted with the approach of the Bill to ensuring democratic scrutiny as regards certain comparable situations. Consider, in particular, Clause 9: should the UK wish to participate from the outset in the adoption of a Council decision under Article 81(3) TFEU, to replace a special with the ordinary legislative procedure as regards family law measures with cross-border implications, the Government must both obtain Parliamentary approval (for the initial negotiations) and secure an Act of Parliament (for the final decision); but in addition, where a decision under Article 81(3) TFEU has *already* been adopted by the other Member States without the UK’s participation, any notification by the UK that it wishes *subsequently* to opt-into that decision must also be approved by an Act of Parliament. As the Explanatory Notes observe, “[t]his prevents the UK from opting into a measure without passing an Act of Parliament, merely because the decision has already entered into force” (para 91).

Consider also Clause 6: any decision of the UK to opt-into a future European Public Prosecutor’s Office requires both an Act of Parliament and a national referendum; in addition, any decision to extend the powers of a future European Public Prosecutor’s Office, where the UK already participates, would depend upon both an Act of Parliament and a national referendum. Thus, a decision of the UK to opt-into a future EPPO, where the latter’s powers have already been extended, would trigger a referendum / require an Act of Parliament based *also* upon the extension decision.

(d) *potential implications for UK-EU relations*

36. The Terms of Reference for the European Scrutiny Committee’s EU Bill Inquiry ask specifically what the effect of Part 1 of the Bill might be upon future relations between the UK and the EU—a speculative question, of course, but one which is nevertheless of crucial importance and warrants stepping back from the essentially technical issues, discussed above, about the Bill’s internal consistency or the identification of potential loopholes.

37. It should be stressed immediately that the referendum requirements proposed under the Bill go *significantly* further than the corresponding regimes in force in any other Member State. Indeed, if the Bill were enacted in its current form, there would simply be no comparison between the position of the UK and that of any other Member State (including Ireland, France and Denmark) so far as concerns the obligation to hold a referendum on EU matters.

38. Furthermore, under the current version of the Bill, it is also undeniable that the UK could be obliged to hold national referenda on EU changes which many of our EU partners would regard as politically marginal. As stated above, that follows from the current drafting of Clause 4 of the Bill, i.e. which leaves relatively little room for the exercise of a meaningful political judgment (other than the *a priori* choices enshrined in the Bill itself) as to whether a referendum is really necessary or even appropriate in any given situation.

39. Moreover, one suspects that a significant proportion of the UK population would share that assessment and be unlikely to participate in a referendum that was essentially felt to be minor / technical in nature. The risk is therefore that the outcome of any such vote would effectively be dependent upon a small minority of the electorate, including a relatively large number of citizens predisposed to cast their vote primarily on ideological grounds, rather than in the light of any considered reflection upon the specific issues at stake.

40. If the UK is perceived to have created a constitutional mechanism which has an in-built tendency to block EU changes—even if generally perceived to be marginal, even if generally considered to be valuable—then there is a serious risk that the UK's influence within the EU will be diminished: both tangibly, as the UK participates in any relevant negotiations; and more intangibly, if the UK becomes viewed as an inherent obstruction to EU reform and (more generally) to have placed itself even further from the fulcrum of EU governance.

41. That diminishment could persuade other Member States to view greater use of enhanced cooperation as a valid alternative to more generalised reform of EU decision-making procedures, i.e. as a means to avoid the risk of the UK blocking changes because of its “referendum locks”. Such reliance upon enhanced cooperation should not be seen as neutral to British interests: although the UK might formally stand on the sidelines of an enhanced cooperation, the policies pursued thereunder may in practice exert an important influence upon the UK's own regulatory choices. Furthermore, under the current version of the Bill, increased use of enhanced cooperation could risk undermining the spirit of the Bill, i.e. if the UK decides to join the enhanced cooperation, after use has already been made of the latter's “internal” passerelle clauses, free from the sorts of scrutiny otherwise provided for under the Bill.

42. Those dangers should of course be considered in their proper political perspective. There is little appetite across Europe for significant Treaty reform: the Lisbon Treaty is generally accepted to have provided the basic framework for the EU's functioning into the foreseeable future. Even more limited changes to the Treaties, or the adoption of decisions possessed of constitutional importance as provided for under the Treaties, are likely to be relatively uncommon phenomena (witness the ongoing reluctance of many Member States to endorse the idea of a formal Treaty amendment to provide for the establishment of a permanent bail-out fund).

43. Nevertheless, the dangers remain real enough. Even if it is true that major Treaty reform is a distant prospect, and lesser changes will hardly be a frequent occurrence either, it is still quite possible that we will see a regular programme of limited Treaty amendments / decisions of constitutional importance: after all, within only a year of the Treaty of Lisbon entering into force, we have already had one IGC to adopt an amending protocol (on the MEPs envisaged under the Lisbon Treaty over and above those elected in the 2009 elections) and are seriously debating another (for the bail-out fund). In such a scenario, where minor Treaty changes / decisions of constitutional importance replace major packages of amendments as part of the normal cycle of EU business, the Bill could (in its current form) exert an appreciable chilling effect upon the EU's capacity for future reform; and for that reason could, right from the very outset, prompt adverse assessments of the UK's leadership within and influence over EU affairs.

44. Nor should one overlook the ways in which this Bill might impact upon the UK's internal constitutional and political system. In the first place, there is the potential for “spillover” from EU matters into purely domestic ones: if a referendum must be used potentially for even very minor / marginal EU issues, then the question could easily arise as to why referenda should not also be used for a much greater range of purely domestic issues as well.

In the second place, there is the risk that (despite its good intentions) the Bill could ultimately undermine rather than help restore faith in politics. If a referendum on a relatively marginal EU issue produced a low turnout driven primarily by ideological voting, it could have the effect of devaluing in the eyes of the general public the utility of referenda as a tool of direct democracy. In any case, the overall message of the Bill remains that the British people have good cause to mistrust the ability of our representative democracy to protect and serve our interests: elected politicians should not be left to decide even on relatively minor EU issues, for fear that they will fail to exercise their power responsibly.

In the third place, there are the possible implications of the Bill for the principle of Parliamentary sovereignty. As stated in my previous Written Evidence concerning Part 3 of the Bill, the system of “referendum locks” proposed under Part 1 of the Bill could be seen as a direct challenge to the traditional doctrine that no Parliament can bind its successors. Even if it were possible formally to reconcile the enactment of those

“referendum locks” with some version of the principle of Parliamentary sovereignty (the subject of a more detailed submission to the Inquiry by my colleague Michael Gordon of the University of Liverpool), such a reconciliation would still represent a matter of profound constitutional importance which should surely be the subject of thorough reflection and debate.

45. Such considerations might serve to reinforce the argument that—if Parliament is to attempt to impose binding “referendum locks” at all—the Bill should be more focused upon (first) a small number of issues which are indisputably of fundamental national concern and can indeed be treated *a priori* as requiring a national plebiscite (e.g. joining the euro); and (secondly) allowing greater scope, in other situations, for the exercise of subsequent judgment (by a minister, by Parliament or through an independent panel / tribunal) about whether any given proposed EU change is really significant enough to justify holding a referendum.

Liverpool
November 2010

Written evidence from Jean-Claude Piris, Director-General of the Legal Service, Legal Adviser to the European Council

LETTER TO THE CLERK OF THE COMMITTEE

Thank you for your e-mail of 17 November 2010 regarding the European Union Bill and the invitation to give evidence to the European Scrutiny Committee of the House of Commons on the Bill. As I will not be able to travel to London, owing to a busy schedule before I retire on 30 November from my present functions of Legal Counsel, Director General of the Council Legal Service, I take up your suggestion to furnish a brief written response. This response is made in a personal capacity. It does not represent the views of the Council of the European Union or of its Legal Service.

You suggest that my response could usefully focus on the possible effect which Part 1 of the Bill could have on the future relationship between the UK and the EU. I would also like to make a comment on Part 3 of the Bill.

Part 1 of the Bill

In the Lisbon Treaty, as in previous Treaties, the Contracting Parties agreed to insert, in addition to ordinary revision procedures which require ratification procedures by all Member States “*in accordance with their respective constitutional requirements*”, other specific provisions which provide for easier procedures in certain cases. These provisions enable the European Council or the Council, for example, to adopt a decision changing a given area or case from unanimity to qualified majority voting (QMV).³⁰ They were inserted in the Treaty in order to achieve a balance between the different views of the Contracting Parties. The Parties ratified the Treaty of Lisbon, thereby mutually committing to implement it *bona fide*—a principle of overriding importance under international law³¹—which implies preserving the purpose and effect of all its provisions.

It 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*, respects 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.

Part 3 of the Bill

The coexistence of the principle of the sovereignty of Parliament and the principle of the primacy of EU law is assured in the UK by the fact that the recognition and availability of directly applicable and directly effective EU law stems from the European Communities Act 1972. As long as the 1972 Act remains on the statute book, EU law applies in the UK in full with the consequence that no further legal step is necessary to ensure the recognition and availability in law of directly applicable or directly effective EU law. Clause 18 is

³⁰ 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, two of these *passerelles* (the so-called general *passerelles* in Article 48(7) TEU) providing for a six month period during which any national parliament can oppose the draft decision. 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).

³¹ 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.

presented as being declaratory of that situation. It states the doctrine of UK constitutional law whereby, in application of the principle of the sovereignty of Parliament, EU law has effect in the UK by virtue of an act of the UK Parliament. That interpretation is confirmed by some of the Explanatory Notes to the Bill³². Similarly, the EU Bill Factsheet³³ states: *"This is a declaratory provision and does not change the existing relationship between EU and UK law or the rights and obligations applying to the UK as a Member State of the EU."* And, in answer to the question whether the Bill will affect the primacy of EU law, the Factsheet states categorically: *"No. ... The principle of primacy was established prior to the UK joining the European Communities. By approving UK membership of the European Communities Parliament accepted this."*

Against that background, the intention behind the second sentence of paragraph 104 of the Explanatory Notes is not crystal clear: *"The words 'by virtue of an Act of Parliament' cover UK subordinate legislation made under Acts, and because of the particular context of this clause, also covers [sic] Acts and Measures of the devolved legislatures in exercise of the powers conferred on them by the relevant UK primary legislation."* My understanding is that it is section 2 of the European Communities Act 1972 that gives effect in the UK to directly applicable and directly effective EU law. The 1972 Act has been amended from time to time, in particular to take account of new treaties, but the far-reaching effect of section 2 is such that it has not been necessary, for directly applicable and directly effective EU law to continue to have effect, to pass other legislation in the UK to take account of developments in EU law.

So long as Clause 18 does not change the present situation, which I assume to be the case, it is therefore consistent with Declaration No. 17 annexed to the Final Act of the Intergovernmental Conference which concluded the Treaty of Lisbon, and with the case law of the Court of Justice of the European Union.

Brussels
November 2010

Written evidence from the Foreign and Commonwealth Office to the European Scrutiny Committee inquiry on Clause 18 of the EU Bill

What is the basis for concerns that Parliamentary sovereignty "may in the future be eroded by decisions of the courts" (paragraph 106 of the explanatory notes), given the differences of opinion on this issue?

In its chapter on Government policy towards the EU, the Coalition Programme for Government set out that the Government would examine the case for a United Kingdom Sovereignty Bill affirming that ultimate authority remains with Parliament.

The common law principle that Parliament is sovereign and that directly applicable and directly effective EU law takes effect in the UK by virtue of Acts of Parliament (principally the European Communities Act 1972) has been well recognised by our Courts and upheld in their judgments most notably in the Court of Appeal judgment in the case of *Thoburn v. Sunderland City Council* [2002] 4 All ER 156 (the so called "Metric Martyrs" case).

As the Minister for Europe told the House of Commons on 15 June, the Government assessed whether the common law provides sufficient ongoing and unassailable protection for the principle of Parliamentary sovereignty in relation to EU law.

Some commentators take the view that the doctrine of Parliamentary sovereignty may not be unassailably absolute and may be qualified. Their argument is that the doctrine is part of the common law, judge-made and therefore susceptible to being altered by the courts in the future. They suggest that the EU constitutes a new legal order which has become an integral part of the UK's legal system and which the UK courts are bound to apply. It follows that they argue that the primacy of EU law might no longer operate by virtue of the 1972 Act but could become the basic norm underlying the UK legal system (or so called "Grundnorm") to be applied by the UK courts. That is, EU law could apply directly as a part of UK law as it would have a higher autonomous status deriving from the EU Treaties or international law and principles. This, the argument goes, would result in the UK courts holding that legislation which made provision purposefully contrary to EU law and expressly overrode the 1972 Act would not be applicable in the UK and therefore the doctrine of Parliamentary sovereignty would be modified.

In taking this view they point not only to the arguments run in the *Metric Martyrs* Case but also to obiter remarks made by Lord Hope and Lord Steyn in *R (Jackson) v. Attorney General* [2005] UKHL 56 on the supremacy of Parliament. It should be noted that this case concerned whether the Parliament Act 1949 was lawfully made given that it was made under the procedure set out under the Parliament Act 1911, without the consent of the House of Lords and the implications that might arise if it was not for other legislation (the

³² For example:

- Paragraph 104: *"Clause 18 is a declaratory provision which confirms that directly applicable or directly effective EU law only takes effect in the UK as a result of the existence of an Act of Parliament."*

- Paragraph 109: *"This clause does not alter the existing relationship between EU law and UK domestic law; in particular, the principle of the primacy of EU law. The rights and obligations assumed by the UK on becoming a member of the EU remain intact."*

- Paragraph 110: *"This clause is declaratory of the existing common law position ... "*

³³ <http://www.fco.gov.uk/resources/en/pdf/3052790/2010/fivepage-factsheet>.

Hunting Act 2004) made pursuant to it. No issues relating to the relationship between UK and EU law arose in this case. Furthermore, so far these obiter statements have not received wider approval in the courts and are thus not regarded as authoritative. However, they do raise the question whether there are some judges whose thinking might be moving away from the absolute doctrine of Parliamentary sovereignty.

For completeness Lord Steyn said (paragraph 102):

“This is where we may have to come back to the point about the supremacy of Parliament. We do not in the United Kingdom have an uncontrolled constitution as the Attorney General implausibly asserts. In the European context the second Factortame decision made that clear: [1991] 1 AC 603. The settlement contained in the Scotland Act 1998 also point to a divided sovereignty. Moreover, the European Convention on Human Rights as incorporated into our law by the Human Rights Act, 1998, created a new legal order. One must not assimilate the ECHR with multilateral treaties of the traditional type. Instead it is a legal order in which the United Kingdom assumes obligations to protect fundamental rights, not in relation to other states, but towards all individuals within its jurisdiction. The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the general principle of our constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism.”

Lord Hope added (paragraphs 104 and 105)

*“104. I start where my learned friend Lord Steyn has just ended. Our constitution is dominated by the sovereignty of Parliament. But Parliamentary sovereignty is no longer, if it ever was, absolute. It is not uncontrolled in the sense referred to by Lord Birkenhead LC in *McCawley v The King* [1920] AC 691, 720. It is no longer right to say that its freedom to legislate admits of no qualification whatever. Step by step, gradually but surely, the English principle of the absolute legislative sovereignty of Parliament which Dicey derived from Coke and Blackstone is being qualified.*

105. For the most part these qualifications are themselves the product of measures enacted by Parliament. Part I of the European Communities Act 1972 is perhaps the prime example”.

In his 2009 pamphlet *“Safeguarding Sovereignty: A Bill for UK Constitutional Rights in the UK”* Martin Howe QC, concludes in his final chapter entitled *“Parliamentary Sovereignty and the EU: The Way Forward”*:

It is on fundamental questions like the sovereignty of Parliament that a drift of judicial opinion can occur over time. Judge-made doctrines accepted today may in the future reach the stage of no longer being accepted, not because they have been expressly altered or abrogated by a specific piece of legislation or a conscious change, but because of a general change in the judicial or political climate. The continued accretion of powers to EU institutions and the passage of time together may result in such a change of climate, coupled possibly with greater judicial assertiveness and reduced deference to Parliament, now that the highest judges have moved from the House of Lords to the Supreme Court. Could our judges one day decide that they owe their allegiance to some higher system of law deriving from the EU treaties, or from international treaties and principles, instead of to Parliament.

Our own analysis has led us to the conclusion that there is no persuasive legal authority to support the contention that the doctrine of Parliamentary sovereignty is no longer absolute. Our assessment is that, to date, case law since 1972 has consistently upheld the principle of Parliamentary sovereignty. There is no uncertainty here.

However, by providing by statute that directly applicable and directly effective European Union law takes effect in the UK by virtue of an Act of Parliament, Parliament will be affirming the existing position under the common law, and making a clear and unambiguous statement of its intention. As paragraph 106 of the Explanatory Notes says, this will ‘provide clear authority which can be relied upon to counter arguments that EU law constitutes a new higher autonomous legal order derived from the EU Treaties or international law and principles which has become an integral part of the UK’s legal system independent of statute.’ It will deal with the main concern expressed by the commentators which is that there may be future judicial drift on the question of how the primacy of EU law is achieved domestically in UK law.

How far does Clause 18 address those concerns? In particular:

What (if any) is the likely effect of putting the principle of parliamentary sovereignty with respect to directly applicable or directly effective EU law on a statutory footing on the constitution of the UK? What additional protection does a statutory provision, which can be repealed, confer on the principle and practice of parliamentary sovereignty beyond the common law?

Setting out categorically that directly applicable and directly effective European Union law takes effect in the UK by virtue of an Act of Parliament puts the matter beyond speculation and will assist the courts by providing clarity about Parliament’s intentions.

Repeal of this statutory provision would not affect the common law. Parliament would remain sovereign. It would just mean that this would no longer be written into statute, and the courts would lose this additional

clarity about Parliament's intentions. An opportunity to guard against the future problem of judicial drift would have been removed.

The then Lord Chancellor, Lord Hailsham, said during the debates on the European Communities Bill (8 August 1972):

"It would be impossible to devise an Act of Parliament . . . which destroyed the sovereignty of Parliament, because theoretically the Act which destroyed it could always subsequently be repealed or amended by a subsequent Parliament. That doctrine remains absolutely unaffected by anything in the Act".

What (if any) is the likely effect of putting the principle of parliamentary sovereignty on a statutory footing on the interpretation of the European Communities Act 1972, particularly sections 2(4) and 3(1)? Does this Clause apply to future as well as present and past Acts of Parliament?

Clause 18 will not affect the interpretation of the European Communities Act 1972 since the clause is declaratory. The clause will not alter the existing relationship between UK and EU law in particular the clause does not cast doubt on the primacy of EU law which had already been well established as a key principle of EU law by the time that the UK acceded to the European Communities. In agreeing to membership of the EEC the UK Parliament through the European Communities Act 1972 accepted this position and this clause does not change the position.

It will apply to future Acts of Parliament since Acts of Parliament apply unless and until they are repealed.

What (if any) is the likely effect of putting the principle of parliamentary sovereignty with respect to directly applicable or directly effective EU law on a statutory footing on UK judges reviewing the acts of public authorities and/or national legislation for consistency with EU law? Paragraph 106 of the explanatory notes says that this Clause "will provide clear authority which can be relied upon to counter arguments that EU law constitutes a new higher autonomous legal order derived from EU Treaties or international law and principles which has become an integral part of the UK's legal system independent of statute". Relied upon by whom? And in what circumstances?

Clause 18 makes clear that directly applicable and directly effective EU law takes effect in the UK domestic legal order by virtue of the will of Parliament and through the acts it has adopted, principally the European Communities Act 1972. As stated the clause is declaratory in nature and purpose and does not change the requirement on UK Courts to have regard to the EU Treaties. However, what it does do is make clear that directly applicable and directly effective EU law do not have an autonomous status within the UK but take their authority from the fact that Parliament has through its Acts decided to import them into the domestic legal order.

In the event of any litigation arising where a party sought to claim that directly applicable or directly effective EU law had an autonomous legal existence in the UK, the other party would be able to counter this argument by referring to this clause. Similarly, judges could take this into account in addressing the arguments raised in their judgments.

The 'Metric Martyrs' Case is an illustration of a case where a party to the proceedings sought albeit unsuccessfully to raise an argument that EU law existed independently of the will of Parliament.

Is Clause 18 consistent with Declaration 17 to the Lisbon Treaty on the primacy of EU law, and the case of law of the Court of Justice that supports it?

The principle of the primacy of EU law (then EC law) was established before the United Kingdom joined the European Community in 1973.

Parliament gave effect to the principle of the primacy of Community law through the 1972 Act, in particular sections 2(1) and 2(4).

During the debates in Parliament in 1972 on the European Communities Bill the then Lord Chancellor, Lord Hailsham explained the position as follows:

"There is of course a potential conflict in every member country between the municipal and constitutional law of that country and the new source of law provided by the Treaty and regulations... If it arises here... it will arise not because of conflict with our written Constitution, because we have not a written Constitution, but in relation to the doctrine which we do possess and which to some extent takes the place of a written Constitution—the doctrine of the sovereignty of Parliament and its corollary (I believe judge-made) the doctrine of the priority of later Acts over previous Acts: that rule of construction whereby when two Acts conflict the latter is construed as amending or repealing the earlier one. It is to meet this difficulty that clause 2(4) has been inserted as an express provision in the Bill in so far as it provides that obligations arising under clause 2(1) (Community obligations) have precedence over subsequent enactments. This therefore provides a new rule of construction of Statutes to substitute in the appropriate case, but only in the appropriate case, for the judge-made rule to which I have referred. It is not inconsistent with the sovereignty of Parliament. It is, as... Lord Gardiner pointed out in 1967, an application of the doctrine of the sovereignty of Parliament."

Declaration 17 to the Lisbon Treaty does not change the position on primacy; it merely reaffirms the existing doctrine of primacy and does not affect the incorporation of directly applicable and directly effective EU law into UK law through section 2(1) of the European Communities Act.

As the Explanatory Notes to Clause 18 make clear, it does not alter the existing relationship between EU law and UK domestic law, in particular, the principle of the primacy of EU law. However, it does reaffirm the position taken by Lord Hailsham, namely that it is only through the application of the doctrine of the sovereignty of Parliament—ie through an Act of Parliament—that the principle of primacy takes effect in the UK.

**Written evidence from Professor Richard Rose FBA, Director, Centre for the Study of Public Policy,
University of Aberdeen**

THE EU BILL'S "REFERENDUM LOCK" FROM A EUROPEAN PERSPECTIVE.

1. The absence of a reference to referendums in the Lisbon Treaty shows the ambivalence of EU member states about the practice of holding national referendums on EU treaty changes. There is no desire in the European Council to add to the existing complexity of expanding EU powers by introducing a referendum. However, member states cannot object to national referendums being held on EU measures, because 18 member states have done so.

2. Although most Members of the European Parliament consider referendums an unnecessary or undesirable feature of representative democracy, this view is not shared by Europe's citizens. When the 2009 European Election Study asked *Do you agree or disagree that EU treaty changes should be decided by referendum?*, 63% voiced agreement, 18% were negative and 19% had no opinion. In every EU country most respondents were positive. In Britain, 81% endorsed the principle of referendums on treaties, 9% were against, and 10 had no opinion.

3. While the expansion of European Union powers in the past 25 years has increased the use of referendums, national referendums on EU matters remain relatively rare occurrences. However, the scope of the pending British bill raises the prospect of referendums dealing with many policy areas and the volume of new EU policies is not in the hands of the UK Parliament. Hence, to avoid the risk of "referendum fatigue", the Committee should consider how to ensure that provisions for securing approval through a Resolution or Act of Parliament may be deemed sufficient.

4. The co-decision process of the EU involves substantial negotiations between member states to arrive at an agreement. The pending bill will alter the position of the British government in this process. It faces other governments with the choice of adopting a measure that would trigger a British referendum or limiting changes to measures that will not require a ballot or if they do, be reasonably sure of British endorsement. However, the greater the majority in favour of a transfer of powers, the less weight that other countries are likely to give to a British referendum.

5. The bargaining that occurs among 27 countries in the negotiating process leading up to a treaty change can produce a document that bundles together a variety of alterations, some acceptable to Parliament while others are not. However, a referendum ballot reduces choice to a simple Yes or No to the package as a whole.

6. The Committee may want to consider whether a British referendum should be binding or advisory. A binding referendum has finality but also eliminates the possibility of re-opening negotiations in order to remove objectionable clauses in an otherwise acceptable policy package. There are precedents regarding Denmark and Ireland for the EU to modify a measure to make it more acceptable to a member state that has initially rejected it. If a referendum result was advisory, provision could be made that, with or without renegotiation, an affirmative vote of Parliament would be required for acceptance.

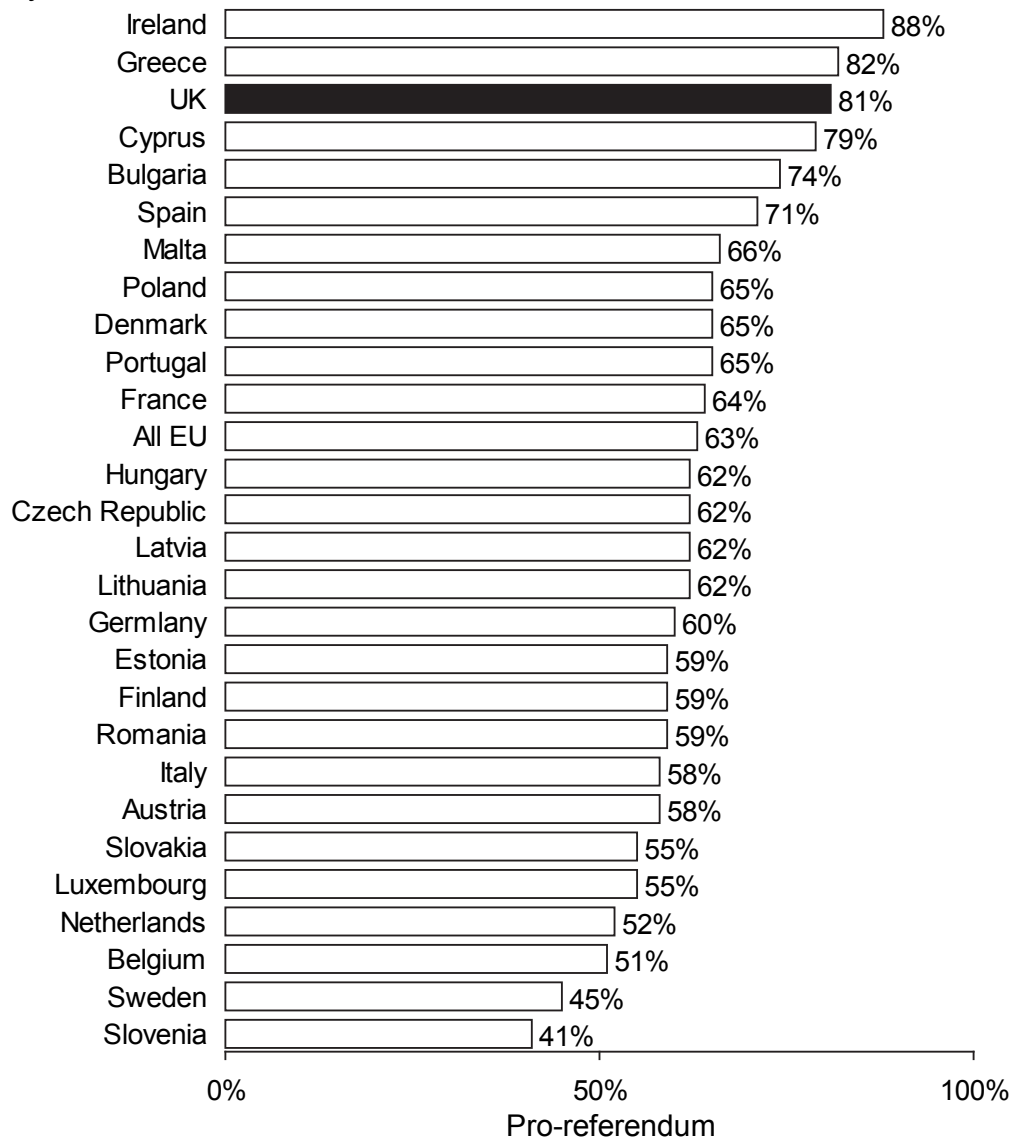
7. The political authority of a referendum result depends on the turnout and size of the majority. The Committee may want to consider whether the categorisation of a vote as binding or advisory should depend on the percentage of the electorate voting and/or on the size of a majority.

8. Because the EU referendum bill is concerned with procedures rather than the transfer of specific national powers to the EU, it is not inherently anti-integration. When the European Election Study asked whether European integration should be furthered or had already gone too far, across Europe the median group, 30%, gave replies that indicated it depended on the issue. In Britain, 24% said integration has already gone too far, 49% were in favour of more integration and 27% had no clear opinion. This indicates that in a referendum on a treaty change, the median Briton is likely to take a view related to what its specific aims are rather than treat a referendum as a vote for or against EU membership.

(This memorandum draws on research being conducted by the author as the Principal Investigator in a study of REPRESENTING EUROPEANS funded by the British Economic & Social Research Council. The opinions expressed are exclusively those of the author.)

2 December 2010

Q. Do you agree or disagree that EU treaty changes should be decided by referendum?



Source: European Election Survey, summer, 2009 ; www.piredeu.eu;
number of respondents: 27,069.