



HOUSE OF LORDS

Select Committee on the Constitution

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4th Report of Session 2013–14

# European Union (Referendum) Bill

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To examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution.

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### *Committee staff and legal advisers*

The current staff of the committee are Nicolas Besly (clerk), Dr Stuart Hallifax (policy analyst) and Helen Gibson (committee assistant). Professor Maurice Sunkin and Professor Adam Tomkins are legal advisers to the committee.

### *Contact details*

All correspondence should be addressed to the clerk of the Select Committee on the Constitution, Committee Office, House of Lords, London, SW1A 0PW.

The telephone number for general enquiries is 020 7219 5960.

The committee's email address is [constitution@parliament.uk](mailto:constitution@parliament.uk)

# European Union (Referendum) Bill

1. The European Union (Referendum) Bill is a private member's bill. It was brought from the House of Commons on 2 December 2013 and is due to have its second reading in the House of Lords on 10 January 2014. The peer in charge of the bill in the House of Lords is Lord Dobbs.
2. Clause 1 of the bill provides that a referendum is to be held on the United Kingdom's membership of the European Union. Clause 1(2) specifies that the referendum is to be held before the end of 2017. Clause 1(4) provides that the question to appear on the ballot paper is: "Do you think that the United Kingdom should be a member of the European Union?"

## Background

3. In January 2013 the Prime Minister undertook that in his party's manifesto for the 2015 general election he would seek "a mandate from the British people ... to negotiate a new settlement with our European partners."<sup>1</sup> He further undertook that, once that settlement had been negotiated, there would be an "in-out" referendum in which the British people could choose "to stay in the EU on these new terms; or come out altogether". He undertook that all this would be done "in the first half of the next Parliament", that "legislation will be drafted before the next election" and that "if a Conservative Government is elected we will introduce the enabling legislation immediately and pass it by the end of that year".<sup>2</sup>
4. This bill accelerates that last part of the process: this is the "enabling legislation" of which the Prime Minister spoke, albeit that it comes to the House as a private member's bill and not as a government bill.
5. In our 2010 report on *Referendums in the United Kingdom*<sup>3</sup> we concluded that "if referendums are to be used, they are most appropriately used in relation to fundamental constitutional issues". Among the fundamental constitutional issues which we identified was "any proposal ... to leave the European Union".<sup>4</sup>

## Process

6. The bill's second reading was passed by the House of Commons by 304 votes to 0. It then had six days in a Public Bill Committee and three days of consideration on report. Its third reading was passed without a division.
7. Under House of Commons standing order 14(9), 13 Fridays each session in the House of Commons are allocated for consideration of private members' bills. On the first seven such Fridays priority is given to those bills which were drawn in the private members' bills ballot. James Wharton MP, who introduced the European Union (Referendum) Bill, finished top in the ballot for this session, so the bill was considered on the first private members'

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<sup>1</sup> Rt Hon. David Cameron MP, *EU speech at Bloomberg*, 23 January 2013.

<sup>2</sup> *Ibid.*

<sup>3</sup> Constitution Committee, *Referendums in the United Kingdom* (12th Report, 2009–10, HL Paper 99).

<sup>4</sup> *Ibid.*, para 94.

Friday. On the eighth and subsequent such Fridays, priority is given to those bills that are most advanced in their parliamentary passage. Therefore, consideration of Lords amendments to Commons private members' bills takes precedence over other stages of Commons private members' bills.

8. Three further private members' Fridays are scheduled in the House of Commons this session: on Fridays 17 January, 24 January and 28 February 2014. So if the Lords were to pass any amendments to the bill, in order for it to become law in this session it would have to return to the Commons in time for the Lords amendments to be considered on Friday 28 February 2014. The requirement in the House of Lords for minimum intervals between stages of a bill<sup>5</sup> may make it unlikely that the bill would finish the Lords in time for any amendments passed by the Lords to be considered by the Commons on Friday 28 February 2014.

### The referendum question

9. The Political Parties, Elections and Referendums Act 2000 confers on the Electoral Commission a range of powers and duties with regard to referendums. Among these is the duty in section 104 to "consider the wording" of a referendum question and to report on its "intelligibility". In doing so the Electoral Commission considers whether the question presents the options to voters "clearly, simply and neutrally".<sup>6</sup> The duty in section 104 applies to a referendum question proposed in any bill introduced into Parliament, including a private member's bill.
10. The Electoral Commission published a report on the question proposed in the bill in October 2013. It recommended that the question be amended and offered two alternatives for Parliament to consider. The first would provide "yes" and "no" as the available answers and would ask: "Should the United Kingdom remain a member of the European Union?" Replacing the "Do you think ...?" formulation with a question starting with "Should ...?" is similar to the recommendation made by the Electoral Commission as regards the question which the Scottish Government had proposed in 2012 for the Scottish independence referendum. Their proposed question "Do you agree that Scotland should be an independent country?" was changed to "Should Scotland be an independent country?" The Scottish Government accepted the Electoral Commission's advice and the question to be asked on 18 September 2014 is that which was recommended by the Electoral Commission.
11. The Electoral Commission's recommendation regarding the present Bill that the verb in the referendum question is changed from "be" to "remain" contrasts with its recommendation regarding the Scottish independence referendum question (when, despite receiving some evidence to the contrary, the Electoral Commission concluded that the question, "Should Scotland be an independent country" was preferable to the question "Should Scotland become an independent country"). Further, in the 2011 AV referendum

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<sup>5</sup> Paragraph 8.04 of the *Companion to the Standing Orders* (2013) provides that there should be a minimum interval of 14 days between second reading and the start of committee stage; "on all bills of considerable length and complexity" there should be 14 days between the end of committee stage and the start of report stage; and there should be three sitting days between the end of report stage and third reading.

<sup>6</sup> Electoral Commission, *Our approach to assessing the intelligibility of referendum questions*.

there was a preambular statement followed by a question<sup>7</sup> yet, as regards the Scottish independence referendum and the present bill, the Electoral Commission has recommended against that. Likewise, the Scottish independence referendum is a “yes/no” question, yet the Electoral Commission have suggested in the context of the present bill that “Parliament should consider very carefully whether it wishes to retain the approach of a referendum question which uses ‘Yes’ and ‘No’ as response options, taking into account the risk of a perception of bias which might be associated” with such wording.<sup>8</sup>

12. On 29 November 2013 the House of Commons rejected by 244 votes to 3 an amendment to clause 1(4) of the bill, which would have replaced the proposed question with the first alternative proposed by the Electoral Commission.
13. The Electoral Commission’s second alternative was that the referendum question be: “Should the United Kingdom remain a member of the European Union or leave the European Union?” The available answers to this question, instead of “yes” and “no”, would be “remain a member of the European Union” and “leave the European Union”.
14. In our most recent report on the Scottish independence referendum we expressed our view that the “any departure from the Electoral Commission’s recommendations on the wording of the referendum question [should] be robustly scrutinised” and that, ideally, there should be “no such departure”.<sup>9</sup> Taking account of the circumstances described in paragraphs 6–8, the House will wish to consider the case for following or rejecting the advice offered by the Electoral Commission on the referendum question proposed in the bill.

### Regulation of the referendum

15. Clause 3(1) provides that the Electoral Commission shall publish a report setting out its recommendations for the rules under which the referendum is to be conducted. Under clause 3(2) the rules themselves are to be made by the Secretary of State, who must have regard to the Electoral Commission’s recommendations. The making of the rules will be subject to the affirmative resolution procedure (clause 3(4)).
16. The legislation which authorised the Alternative Vote referendum in 2011 and that which authorises the Scottish independence referendum in 2014, by contrast, does not delegate the power to set rules on the conduct of those referendums. The Parliamentary Voting System and Constituencies Act 2011 set out in detail (in a 50-page Schedule to the Act) the rules for the conduct of the AV referendum. Likewise, the Scottish Independence Referendum Bill (which, at the time of writing, has been passed by the Scottish Parliament but has yet to receive Royal Assent) sets out in a series of Schedules the detailed rules that will govern the referendum campaign and

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<sup>7</sup> The Electoral Commission recommended that the question in the AV referendum be re-worded as follows: “At present, the UK uses the ‘first past the post’ system to elect MPs to the House of Commons. Should the ‘alternative vote’ system be used instead?” This advice was accepted and this is the question that was used in the 2011 referendum.

<sup>8</sup> Electoral Commission, *Referendum on the United Kingdom’s Membership of the European Union: Advice on the Referendum Question* (October 2013), p 28.

<sup>9</sup> Constitution Committee, *The Agreement on a referendum on independence for Scotland* (7th Report, 2012–13, HL Paper 62), para 36.

the conduct of the referendum itself (including rules as to voting, counting, etc.). That legislation runs to 165 printed pages. By contrast the European Union (Referendum) Bill is three pages long, though it is common for private members' bills to be short and not to contain detailed Schedules.

17. If power is delegated to the Secretary of State to make the rules on the conduct of the referendum, those rules could be subject to challenge in the courts in the way that primary legislation could not be. Taking account of the circumstances described in paragraphs 6–8, the House may wish to consider whether the conduct of the referendum is a matter which should be decided by a process that is set out in full in the Act of Parliament which authorises the referendum. Alternatively, the House may wish to seek clear undertakings whilst the bill is before it as to how the Secretary of State would intend to fulfil the duty imposed by clause 3(2) to have regard to the Electoral Commission's recommendations for the rules under which the referendum is to be conducted.

## APPENDIX: DECLARATION OF INTEREST

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The following interest was declared in respect of this report—

Baroness Falkner of Margravine

*Member of the advisory board of the Centre for British Influence through Europe.*