c.12

Current Law

Statutes Annotated

European Union Act 2011

(chapter 12)

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EUROPEAN UNION ACT 2011*

(2011 c.12)

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An Act to make provision about treaties relating to the European Union and decisions made under them, including provision implementing the Protocol signed at Brussels on 23 June 2010 amending the Protocol (No. 36) on transitional provisions annexed to the Treaty on European Union, to the Treaty on the Functioning of the European Union and to the Treaty establishing the European Atomic Energy Community; and to make provision about the means by which directly applicable or directly effective European Union law has effect in the United Kingdom. [19th July 2011]

PROGRESS OF BILL

Hansard HC Vol.518 col.470 (1R); Vol.520 col.191 (2R), col.277 (Programme Motion), col.278 (Money Resolution); Vol.521 col.171 (Committee); Vol.522 col.25 (Programme Motion), cols 35, 171, 332 & 741 (Committee); Vol.524 col.779 (Report), col.845 (3R); Vol.531 col.58 (Programme Motion), col.60 (Lords' Amendments), col.824 (Royal Assent); HL Vol.725 col.1614 (1R); Vol.726 col.357 (Motion), cols 599, 645 & 693 (2R), col.1248 (Motion), col.1632 (Committee); Vol.727 cols 20, 339, 359, 709, 1222, 1334, 1594 & 1825 (Committee); Vol.728 col.11 (Motion), cols 275, 341, 551, 621 & 790 (Report), col.1392 (3R); Vol.729 col.744 (Commons' Amendments), col.1191 (Royal Assent). Royal Assent: July 19, 2011.

INTRODUCTION AND GENERAL NOTE

Summary: European Integration?

The European Union Act 2011 (c.12) ("the Act")—one of the early constitutional measures of the Cameron/Clegg coalition Government—is another milestone in the United Kingdom's reluctant membership of, what is now simply, the European Union.

The legal effect of the Act may be more symbolic than substantive: it does provide, in Pt 1, for mandatory (not advisory) referendums on EU decisions; but the declaration regarding parliamentary sovereignty, in Pt 3, is, mainly, a gesture. Unsupportive MPs, but mainly peers, contrasted adversely the emphasis upon referendums with the highlighting of parliamentary sovereignty.

The foreign secretary, William Hague MP, in contrast, had claimed, at second reading on December 7, 2010, that the Bill:

> "mark[ed] a fundamental shift in power from Ministers of the Crown to Parliament and the voters themselves on the most important decisions of all: who get to decide what." (*Hansard* HC Vol.520, col.193).

Yvette Cooper MP, for the Labour opposition, was scathing:

> "According to the Foreign Secretary, we are talking about referendums that he says we will not need and sovereignty that he says we already have...This Bill is just smoke and mirrors to distract us from the fact that the Government has no strategy for Europe and no way of handling their own Eurosceptics." (*Hansard* HC Vol.520, col.208)

And the leading Eurosceptic, the Tory William Cash MP, said (eliding the dualist character of law in the United Kingdom):

> "The European Union claims sovereignty over our democratic Parliament, and this mouse of a Bill does little to preserve it." (*Hansard* HC Vol.520, col.224)

Relevant documents and reports

One, or two, facts account for the European Union Bill 2010-11 ("the Bill"). The 2005 Labour manifesto had promised a referendum on the 2004 Constitutional Treaty for the European Union. When that was replaced by the amending 2007 Lisbon Treaty, the Government argued there was no need for a referendum. Those facts influenced Conservative policy making in 2009-10.

(1) Martin Howe QC's pamphlet

Martin Howe is a leading Conservative lawyer. In 2009 (actually, January 2010), Politeia (a forum for social and economic thinking) published his: *Safeguarding Sovereignty* (20pp). There was a forward from William Hague MP (who had promised a referendum lock at the party conference in October 2009). Martin Howe advocated a Sovereignty Bill, in the absence of a written constitution, to defend the sovereignty of Parliament from, ultimately, the UK Supreme Court.

The following cases caused especial concern: *Thoburn v Sunderland City Council* [2002] EWHC 195 Admin [2002] 3 WLR 247 and *R(Jackson) v AG* [2005] UKHL 56 [2005] 3 WLR 733.

(2) The Conservative Party Manifesto 2010

In *Invitation to join the Government of Britain*, published in April 2010, David Cameron promised "an open and democratic Europe":

> "We will ensure that by law no future government can hand over areas of power to the European Union or join the Euro without a referendum of the British people. We will work to bring back key powers over legal rights, criminal justice and social and employment legislation to the UK." (p.113)

The then official opposition was, perhaps surprisingly, pro-European, while anti-federalist, with the emphasis upon restoring democratic control (by periphery resistance to the centre). But future non-handover came quickly to overshadow the idea of repatriating powers from the European Union.

(3) The Coalition Programme, May 2010

The Conservative and Liberal Democrat leaders, the latter being strongly European, agreed a text on May 12, 2010, and a fuller document, entitled *Freedom, fairness, responsibility*, on May 20, 2010. The coalition decided to "strike[s] the right balance between constructive engagement with the European Union to deal with the issues that affect us all, and protecting our national sovereignty."

There were six anti-federalist proposals: no transfer of powers during the Parliament; a "referendum lock" by amending the European Communities Act 1972 (c.68) ("ECA"); consideration of a UK Sovereignty Bill; no joining of the Euro; reductions in the EU budget; and a case-by-case approach to EU criminal justice legislation.

Constitutional observers noted that, if there was to be no transfer of powers until 2015, when the next general election would be held, this Bill would be seeking to impose the referendum lock on any subsequent Government and Parliament, contrary to the doctrine of parliamentary sovereignty!

Eurosceptics later queried: why a separate statute and not amendments to the ECA 1972?; and why no separate Sovereignty Bill? The Government's answer to the first question was: other statutes—such as the Equality Act 2006 and the devolution legislation—also give effect to EU law; the only answer to the second question was: convenience (though turning parliamentary sovereignty into statute law, in the absence of a written constitution, was also proving problematic).

(4) The Queen's Speech, May 25, 2010

The two legislative proposals in the coalition programme were announced five days later: "My Government will introduce legislation to ensure that in future this Parliament and the British people have their say on any proposed transfer of powers to the European Union."

(5) The European Scrutiny Committee Report, December 7, 2010

This select committee in the House of Commons, which has long been overshadowed by the committee in the Lords, entered the fray at second reading, under the chairmanship of William Cash MP, and eight Conservative, two Liberal Democrat and six Labour members, with its *Tenth Report of Session 2010-11* (HC 633-I & II). This dealt with the European Union Bill and parliamentary sovereignty, cl.18 of the Bill.

The committee concluded that: the doctrine of parliamentary sovereignty was not under threat from EU law; domestic courts could apply another statute dis-applying the ECA 1972; and, if parliamentary sovereignty was seen as a doctrine of the common law, it was at risk from the judges.

The written evidence, in the second volume, from mainly academic lawyers (with a loan practitioner, Martin Howe QC), contains an extremely useful discussion of EU law.

The Government responded on five issues, on January 10, 2011: *First Special Report of Session 2010-11*, HC 723.

(6) The European Scrutiny Committee report, January 24, 2011

The select committee followed, with its *Fifteenth Report of Session 2010-11* (HC 682), dealing with Pt 1 of the European Union Bill.

(7) Research Papers

On December 2, 2010, the House of Commons library published research Paper 10/79 on the Bill.

(8) The Select Committee on the Constitution Report, March 17, 2011

Interestingly, the House of Lords EU Select Committee did not report on the Bill. Instead, the Constitution Committee, chaired by Baroness Jay of Paddington, reported just before second reading. It criticised the very detailed specification of the referendum lock, as hindering transparency and accessibility.

Un peu d'histoire

The United Kingdom is a long-established state, which expanded domestically in the eighteenth and nineteenth centuries, only to lose its empire in the second half of the twentieth century. It occupies islands to the west of the continental mass. Its relationship with Europe—dominated by Germany and France—remains troubled by the allied victory in the Second World War, the United Kingdom having difficulty subsequently in finding a role.

The United Kingdom (under the Treaty of London) joined the Council of Europe in 1949, and, ten years later, helped establish the European Court of Human Rights at Strasbourg. The Council's concerns are geopolitical, the rule of law and human rights. The Council of Europe now has 47 members, including Russia and Turkey.

The European Union, in contrast, has 27 Member States. This began, in the 1950s, as an economic co-operation body, of six founding members (Belgium, France, Germany, Italy, Luxembourg and the Netherlands). It is based in Brussels. The United Kingdom did not join until 1973 (when there were nine members). It had applied unsuccessfully in 1961 and 1967, but was vetoed by France. In 1975 its people voted—by 17,378,581 to 8,470,073 on a 64.5 per cent turnout—to stay in Europe (as it was understood); this was the first, and only, referendum on the question in the United Kingdom.

Mention needs to be made of the European Free Trade Association ("EFTA"). The United Kingdom had joined this in 1960, with Austria, Denmark, Norway, Portugal, Sweden and Switzerland. It never rivalled the European Economic Community / European Communities. In 1992, EFTA agreed a European Economic Area ("EAA") with the European Communities, with the effect that, today, Iceland, Liechtenstein and Norway (plus Switzerland bilaterally) are associated with the European Union.

The European Union has emerged from the following institutions: the European Coal and Steel Community (1952); the European Economic Community ("EEC") and the European Atomic Energy Community (both 1958); the European Communities ("EC") (1987); and, from 1993, the European Union, with the EC disappearing in 2009.

Its legal basis has been the following treaties (plus various accession agreements): Paris 1951, Rome 1957, the Single European Act ("SEA") 1986; Maastricht 1992; Amsterdam 1997; Nice 2001; (not the Constitution for Europe 2004); and Lisbon 2007.

European integration has been articulated as a series of objectives: a common market (from 1957); the internal market (from 1986); European political co-operation (from 1986); the free movement of goods, persons, services and capital (from 1992); economic and monetary union—-with a UK opt out—(from 1992); and a common foreign and security policy (1992). (The idea of a Constitution for Europe— which would have been a new EU Treaty, starting again—was, despite ratification by 18 other Member States, rejected in referendums in France and the Netherlands in 2005.)

Within the United Kingdom, Conservative Prime Ministers—Edward Heath in 1972, Margaret Thatcher in 1986 and John Major in 1992—kept the European project going. Labour's contribution (Harold Wilson's referendum and Gordon Brown's lone signing of the Lisbon Treaty) has been relatively less significant.

Today (since 2009), the European Union is based upon: the Treaty on European Union ("TEU"); and the Treaty on the Functioning of the European Union ("TFEU"). These confer competencies on the European Union, to be governed by the principles of subsidiarity and proportionality. There is a Commission in Brussels (with a President, José Manuel Barroso). There is a directly elected Parliament (also with a President), in Strasbourg but increasingly Brussels. There is an inter-governmental European Council (with an international President: Herman Van Rompuy, a Belgian). There are different Ministerial Councils. There is a High Representative for Foreign Affairs and Security Policy, the United Kingdom's Baroness Ashton, with an external action service. There is the Court of Justice of the European Union ("ECJ"), in Luxembourg. And, for the Eurozone countries—17 of the 27 Member States—there is the European Central Bank (President: Jean Claude Trichet) in Frankfurt.

The European Union characterises itself as follows:

> "The European Union is not a federation like the United States. Nor is it simply an organisation for co-operation between governments, like the United Nations. It is, in fact, unique. The countries that make up the European Union (its 'Member States') remain independent sovereign nations but they pool their sovereignty in order to gain a strength and world influence none of them could have on their own." (*http://www.europa.eu/institutions/index.en.htm*)

Within the United Kingdom, opposition to the European Union, originally a left-wing cause, became, in the 1980s and 1990s, a right-wing one. The common basis, despite ideological difference, is English / British nationalism (which is strongest in Northern Ireland). The terminology of the positions has shifted: for and against European membership; Europhiles and Europhobes; Euro pragmatists on the left and right; federalists (very few) and anti-federalists (many); and Euro-sceptics (numbering about 40 MPs: *Hansard* HC Vol.521, col.253) versus Euro-realists (namely those finding themselves with governmental responsibilities).

The United Kingdom and EU Law

States are monist or dualist, meaning: there is one body of law; or a distinction between national and international law. Dualism reigns in the United Kingdom, with Parliament and the courts as sources of law. But there are monist aspects: customary international law may be applied directly by the courts (after proof); not so with treaties, which have to be transformed (or incorporated) into rules of domestic law, by Parliament (to stop the crown legislating abroad); EU law is different again: existing treaties have continuing effect, due to the ECA 1972, but new trea-

ties have to be ratified, in the United Kingdom, by the executive (acting internationally), and there is a role for the legislature (acting domestically).

The distinction between national and international law—two legal systems—is crucial to any legal analysis of the European Union in the United Kingdom, but political debate since the 1960s has been pitched adversely, and inadequately, as "us" versus "them", the United Kingdom (or Britain) versus Europe, or the Westminster Parliament (which is "sovereign") versus the Commission and Council (but not Parliament) in Brussels, which exercise international public powers.

One view of the relationship between the two legal systems has come from Luxembourg. The ECJ has, since the early 1960s, interpreted the treaties purposively to create a new legal order: *Van Gend en Loos* (26/62) [1963] E.C.R. 1; [1963] C.M.L.R. 105 (direct effect, or applicability, of EU law); *Costa v ENEL* (6/64) [1964] E.C.R. 585; [1964] C.M.L.R. 425 (supremacy of EU law); *Marleasing* (106/89) [1990] E.C.R. I-4135; [1992] C.M.L.R. 305 (indirect effect in EU law, but not horizontality); *Factortame* (213/89) [1990] E.C.R. I-2433; [1990] 3 C.M.L.R. 1 (United Kingdom required to grant interim relief, by suspending the operation of a statute); *Francovich* (6/90) [1991] E.C.R. I-5357; [1993] 2 C.M.L.R. 66 (state liability for damages).

A qualified, alternative view has been articulated in the United Kingdom. This turns on ECA 1972 s.2, which provides for the general implementation of the treaties, in the past, present and future (subs.(2) dealing with domestic implementation by delegated legislation).

The leading cases in the United Kingdom are: *Macarthys Ltd v Smith* [1979] 1 W.L.R. 1189; (the supremacy of EU law in the United Kingdom depends upon the ECA 1972); *R. v Secretary of State for Transport Ex p. Factortame Ltd (No.2)* [1991] 1 A.C. 603; (House of Lords grants injunction following above ECJ decision); *R v SOS, ex parte Equal Opportunities Commission* [1995] 1 A.C. 1 (House of Lords disapplies Employment Protection (Consolidation) Act 1978, as discriminatory); *Thoburn v Sunderland City Council* [2002] EWHC 195 Admin; [2002] 3 W.L.R. 247 (no implied repeal of a constitutional statute, such as the ECA 1972—a first instance decision).

Considerable emphasis has been placed on the argument of Eleanor Sharpston QC (now an Advocate General in the ECJ), in *Thoburn*, for one of the four local authorities, which was rejected by Laws L.J..

The point is well made that the United Kingdom knew about the supremacy of EU law, when it joined in 1973, but the following is also true: the United Kingdom did not surrender its unique—uncodified—constitutional instincts, as has been shown.

It is fundamentally erroneous to identify (express) repeal of the ECA 1972, with withdrawal from the European Union. The United Kingdom joined through an accession Treaty. It is theoretically conceivable that the European Union could collapse, with or without agreement. But, as a result of Lisbon, there is an express route to withdrawal, on terms: art.50 TEU. Repeal of the ECA 1972 would follow, as an exercise of parliamentary sovereignty, but would only be consequential upon the un-pooling of sovereignty, whether planned or not, on the EU terrain.

There are, therefore, two unrelated sovereignties (or supremacies), one in domestic law and the other in international law. The first is about UK courts not striking down primary legislation, in domestic law: it governs the relationship between two of the three branches of government. The second is about the same courts applying EU law, against even Acts of Parliament, and that, because it concerns the relationship between states, is more credibly related to the concept of sovereignty.

Dicey—who survives as the theorist of the UK constitution—wrote in 1885 (following Coke and Blackstone, makers of the common law):

> "The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament...has, under the English (sic) constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England (sic) as having a right to override or set aside the legislation of Parliament." (*The Law of the Constitution*, pp.39-40).

Insofar as the United Kingdom has an uncodified constitution, its *Grundnorm* is parliamentary sovereignty. That remains the position, despite *Factortame* (which decided a point of EU law under ECA 1972 s.3(1)), and *Equal Opportunities Commission* (which granted a declaration of domestic law being contrary to EU law).

The UK Supreme Court cannot strike down a statute, because of parliamentary sovereignty in domestic law, but the same courts, applying EU law (but not the European Convention on Hu-

man Rights), may do that or something approaching it, because of the supremacy of EU law. The real issue is the relationship between UK law and EU law, the first having begun here a long time ago and the second flowing in since January 1, 1973; and, in particular, the answer to the question: if Parliament dis-applied the ECA 1972 regarding say an EU Directive, would the courts of the United Kingdom enforce the domestic statute or supreme EU law? Some take comfort in the courts continuing to bend the knee to Parliament (if not the executive); I would not be so sure: the courts might well require, not just an anti-EU statute, but also international acts of the United Kingdom within the European Union (and most likely one or more decisions of the ECJ).

Lord Kilmuir, the Lord Chancellor, had advised Edward Heath, in 1960:

> ''Adherence to the [1957] Treaty of Rome would, in my opinion, affect our sovereignty in three ways: Parliament would be required to surrender some of its functions to the organs of the Community; the Crown would be called on to transfer part of its treaty-making power to those organs; our courts of law would sacrifice some degree of independence by becoming subordinate in certain respects to the European Court of Justice...In the long run we shall have to decide whether economic factors require us to make some sacrifice of sovereignty...'' (quoted in HC Research Paper, pp.75-76).

That remains the principle legal use of sovereignty, a concept of international law.

Is Dicey's parliamentary sovereignty a rule of the common law? That might seem to follow from its absence in statute law (though it echoes in the Human Rights Act 1998 (c.42) ss.3-4). Arguably, that is the premise of Martin Howe QC's concern, given his fear that the Supreme Court might—under pressure from the European Union—qualify parliamentary sovereignty, currently an absolute doctrine.

But there is another view, which chimes with the United Kingdom's uncodified constitution, and the flexibility of the senior judiciary, in the face of Parliament and the people, as mediated by the executive, first articulated by William Wade in 1955 (and endorsed extra-judicially by Lord Bingham more recently):

> ''The true foundation of the doctrine...is general consensus among senior officials 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...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.'' (Jeffrey Goldsworthy, HC 633-II, Ev 31)

Parliamentary sovereignty, therefore, might be a constitutional norm (not convention), existing in the space of an absent written constitution for the United Kingdom. The solution, in the medium term, is a written constitution, providing for the three branches of government, rather than an ideological legal battle between (English) parliamentary sovereignty and the supremacy of the law of the European Union.

Following the parliamentary debate on the Bill, while it is clear from the Act that there is a statutory rule, or recognition, it is less certain where that rule has come from. Constitutional theory is more confused, even if the senior judiciary may have been deterred, for a time, from interfering with parliamentary sovereignty.

The Bill in Parliament

The Bill was introduced in the House of Commons on November 11, 2010. It began—and finished—with 22 sections (in three parts), and two schedules. Second reading was on December 7, 2010; the Labour opposition objected, seemingly because of an increased role for the courts. There were five committee days on the floor. It passed the Commons on March 8, 2011.

First reading in the House of Lords was on the following day. Second reading was on March 22, 2011, and there were eight committee days, followed by three sittings on report. The Lords amended cll.1, 2, 3, 6 and 18, and added a clause after 21. The Commons mainly rejected these amendments, but not on cl.18 (status of EU law), on July 11, 2011. Ping pong came to an end in the House of Lords on July 13, 2011. Royal assent followed on July 19, 2011, one day before the scheduled end of the parliamentary session.

Proper legislative scrutiny had been replaced by the repetitive debate about Europe, driven by the Euro-sceptics (with a few masochistic Labour Europhiles). Few if any considered the EU treaties (which were not available in either House, seemingly). Even ministers, with a team of officials, especially in the Lords, struggled with the statutory provisions for referendums. The parliamentary sovereignty clause, in contrast, required little legal knowledge, the Diceyan theory being integral to constitutionally minded MPs' sense of Englishness / Britishness.

A new clause, proposed by Peter Bone MP, providing for a referendum on withdrawal if the Government should lose on a treaty amendment (the *Daily Express* having collected 373 thousand signatures in support), was lost by 26 votes (including former Europe minister Keith Vaz MP) to 295, on the last committee day, on February 1, 2011.

At third reading on March 8, 2011, William Hague MP, replying to William Cash MP, articulated for the first time the significance of the Bill for the European Union:

> ''In any future negotiations about the EU, British Ministers will be in the European Council saying very clearly that, under a vast range of provisions set out in the Bill, proposals that may be put to them in the European Council would require a referendum in the United Kingdom. That does change the negotiating position in Europe and the freedom of manoeuvre of British Governments, and it means that Governments have to be very alert to that point—not just British Governments, but all the Governments of the European Union.'' (*Hansard*, HC Vol.524, col.848)

The Bill would, contrary to what the Foreign Secretary proclaimed, empower UK ministers in the European Union, eliminating the likelihood of referendums, even if the parliamentary sovereignty clause provoked, rather than appeased, the Conservative Euro-sceptics.

The contrast between the two Houses was more pronounced than normal; the House of Commons had an ideological debate on the European Union; the Lords, in contrast, saw a parade of Euro-realists, with former UK representatives, EU Commissioners and others, all doubting the idea of a referendum lock and piling in to assert the sovereignty of Parliament. Lords Kerr of Kinlochard and Hannay of Chiswick were more than a match for ministers.

COMMENCEMENT

Section 15 (Protocol on MEPs) and Pt 3 came into force on July 19, 2011. All the remaining sections may be brought into force by the Secretary of State by Statutory Instrument. A minister referred to two months.

ABBREVIATIONS

"the Act":	European Union Act 2011 (c.12)
"the Bill":	European Union Bill: Bill 106 (November 11, 2010); 139 (February 1, 2011); HL Bill 55 (March 9, 2011); HL Bill 74 (June 15, 2011); Bill 209 (June 23, 2011); HL Bill 84 (July 11, 2011)
"EC":	European Communities (later, Community) (1987-2009)
"ECA":	European Communities Act 1972 (c.68)
"ECJ":	European Court of Justice
"EEA":	European Economic Area (1994 -)
"EEC":	European Economic Community (1958-1987)
"EFTA":	European Free Trade Association (1960 -)
"EU":	European Union (1993 -)
"IGC":	inter-governmental conference
"SEA":	Single European Act
"TEU":	Treaty on European Union
"TFEU":	Treaty on the Functioning of the European Union
"UK":	United Kingdom of Great Britain and Northern Ireland

PART 1

RESTRICTIONS ON TREATIES AND DECISIONS RELATING TO EU

Introductory

1. Interpretation of Part 1

(1) This section has effect for the interpretation of this Part.
(2) "TEU" means the Treaty on European Union.
(3) "TFEU" means the Treaty on the Functioning of the European Union.
(4) A reference to a treaty which amends TEU or TFEU includes a reference to-
  (a) a treaty resulting from the application of Article 48(2) to (5) of TEU (ordinary revision procedure);
  (b) an agreement under Article 49 of TEU (admission of new members).
(5) An "Article 48(6) decision" means a decision under Article 48(6) of TEU (simplified revision procedure).
(6) Except in a reference to "the European Council", "the Council" means the Council of the European Union.
(7) A reference to a Minister of the Crown voting in favour of or otherwise supporting a decision is a reference to a Minister of the Crown-
  (a) voting in favour of the decision in the European Council or the Council, or
  (b) allowing the decision to be adopted by consensus or unanimity by the European Council or the Council.

GENERAL NOTE

Part 1 of the Act deals with the referendum lock, an idea which may be traced from the—-post-Lisbon—European Union (Amendment) Act 2008 (c.7), in which the Brown Government started to impose conditions on EU ratification.

This is the first of 14 sections on: restrictions on treaties and decisions relating to the European Union. Sections 2 to 5 deal with the European treaties, and ss.6 to 10 with "other [EU] decisions".

This section is purely interpretative, in accord with a drafting practice to define terms before deploying them. Subsection (7) was amended belatedly by the Government, at report in the House of Lords on June 8, 2011. This was in spite the drafter having followed the phraseology of s.6(1) of the European Union (Amendment) Act 2008 (c.7).

Subsection (1) limits the definitions to Pt 1 of this Act.

The TEU and TFEU—the successors to the EU Treaty and the EC Treaty (discussed in the introduction above)—are the principal parts of the seven-article Treaty of Lisbon of December 13, 2007 (Cm.7294), which comprises, in the consolidated version published by the Foreign Office in January 2008 (Cm.7310): the Treaty on European Union; the Treaty on the Functioning of the European Union; the Protocols; and the Final Act (including Declarations). Also relevant is the comparative table of current EC and EU treaties as amended by the Lisbon Treaty (Cm.7311). (subss.(2) & (3))

Subsection (4) is not strictly a reference to all future European treaties. Articles 47-55 TEU are "final provisions". Article 48 deals with: ordinary revision procedure (paras (2)-(5)); and simplified revision procedure (paras (6)-(7)). And art.49 deals with the admission of new members of the European Union. The use of the word "includes" suggests all future treaties, but the failure

to list art.48(6)-(7) may be construed as the exclusion of the simplified revision procedure (on which see subs.(5) below).

Article 48, it is important to note, is about amending the treaties (as happened when Nice in 2001 was replaced by Lisbon in 2007). The ordinary revision procedure turns on a broadly based convention but more likely a conference of representatives of Member States, any amendments agreed by common accord being subject, of course, to ratification. The simplified revision procedure, in contrast, relates only to Pt 3 TFEU (Union Policies and Internal Actions)—which is a considerable subject. The procedure involves the European Council acting by unanimity: "That decision shall not come into force until it has been approved by the Member States in accordance with their respective constitutional requirements."

Subsection (5) takes up the lacuna of the simplified revision procedure, but only in part. It deals with art.48(6) but not art.48(7). Decisions under para.(6) are amendments of TFEU. The third subparagraph reads: "The decision referred to in the second subparagraph shall not increase the competences conferred on the Union in the Treaties." Paragraph (7) is distinct from para.(6), covering TFEU in whole and even title V TFEU (external action and common foreign and security policy). It permits downgrading in decision making: from acting by unanimity to qualified majority; and from special, to ordinary, legislative procedure; but with the option of a veto by a national parliament.

Paragraph (6), then, is substantive; while para.(7) may be considered procedural. Both involve amending the European treaties, but para.(7), of course, is a part of TEU.

Lord Kerr of Kinlochard, a former UK permanent representative to the European Union (1990-95), moved a probing amendment to delete this subsection (and cl.3), at the first committee day on April 5, 2011, arguing that art.48(6) could not move a competence or power from the United Kingdom to the European Union.

The minister, Lord Howell of Guildford, concluded, conceding the point on competence, that:

> "We are talking about transfers of powers, which is a different matter. I described the kinds of powers and said that, in order to be comprehensive and logical and gain the public confidence, it is our belief that the procedure should cover the transfers of both competences and powers." (*Hansard*, HL Vol.726, col.1674)

The powers—an English legal term—seemed to be the abolition of vetoes, again a concept that does not exist in the EU treaties.

Subsection (6) refers to the difference between European Council and Council (without the adjective). The former comprises heads of state or government. The latter comprises ministers, according to the list of council configurations (essentially portfolios). They are defined effectively in art.10(2) TEU, but more directly in arts 235-243 TFEU.

Subsection (7)—which defines the UK voting in favour of/or otherwise supporting a decision in the European Union—referred originally to: "voting in favour of or otherwise supporting the decision in the European Council or the Council." This has now been split into paras (a) and (b), dealing with voting and with supporting. Supporting is now effectively defined as: "allowing the decision to be adopted by consensus or unanimity".

This required, ironically, a detailed knowledge of EU law and practice. The point was not raised by backbenchers or others in the Commons or Lords, between January and June 2011: the Government amendment went through without any debate.

Restrictions relating to amendments of TEU or TFEU

2. Treaties amending or replacing TEU or TFEU

(1) A treaty which amends or replaces TEU or TFEU is not to be ratified unless-

(a) a statement relating to the treaty was laid before Parliament in accordance with section 5,

(b) the treaty is approved by Act of Parliament, and

(c) the referendum condition or the exemption condition is met.

(2) The referendum condition is that-

(a) the Act providing for the approval of the treaty provides that the provision approving the treaty is not to come into force until a referendum about whether the treaty should be ratified has been held throughout the United Kingdom or, where the treaty also affects Gibraltar, throughout the United Kingdom and Gibraltar,

(b) the referendum has been held, and

(c) the majority of those voting in the referendum are in favour of the ratification of the treaty.

(3) The exemption condition is that the Act providing for the approval of the treaty states that the treaty does not fall within section 4.

DEFINITIONS

s.1(2): "TEU"

s.1(3): "TFEU"

s.1(4): "amends TEU or TFEU"

GENERAL NOTE

Section 2 is likely to be the most important in Pt 1. It relates back to s.1(4), and on to ss.4 and 5. But it may be used less frequently. This section was not amended by Parliament.

Subsection (1) elides amending and replacing the EU treaties. Amending, it is submitted, means in the sense of s.1(4). Query the position under s.1(5), which also involves amending, temporarily or permanently?

This subsection provides for three conditions precedent (using a private law term), before the United Kingdom may ratify a European treaty amendment or replacement, an act historically of the UK state in international law.

The European Union (Amendment) Act 2008 (c.7), however, added a requirement of parliamentary approval for ratification, where the treaty amends the founding European treaties (but only under the ordinary revision procedure).

(Note: Pt 2 of the Constitutional Reform and Governance Act 2010 (c.25), which deals with the ratification of treaties generally. This was enacted on April 8, 2010. It came into force on November 11, 2010. However, under s.23(1), Pt 2 does not apply to the European treaties.)

The three conditions precedent are: (i) a s.5 (written) ministerial statement to Parliament; (ii) parliamentary approval of the treaty; and (iii) the referendum condition (under subs.(2)) or the exemption condition (under subs.(3)).

Subsection (2) is relatively unproblematic, even though there were many attempts to amend it. There is a simple majority of those voting principle. The Government resisted all attempts to impose a threshold or quota. Interestingly, Gibraltar—a colony or overseas dependent territory—is (at least) attached to the United Kingdom, not just for elections to the European Parliament, but when European treaty amendments affect Gibraltar uniquely.

The word "also" in subs.(2)(a) was added by the Government, at report in the House of Lords on June 8, 2011. Subsection (3) refers to s.4 (below).

William Hague MP said, during second reading on December 7, 2010:

> "There is no scope for Ministers to decide that a decision to join the euro, to subscribe to a European army, to give up our veto on the financial framework, to give up our veto on foreign policy or to give up control or our borders does not require a referendum. Let us be absolutely clear about that." (*Hansard* HC Vol.520, col.201)

At report in the House of Lords on June 8, 2011, on an amendment moved by Lord Williamson of Horton, a subsection was added, by 221 votes to 216, providing for: a 40 per cent of the electorate threshold for all EU referendums.

The House of Commons disagreed, on ping pong, on July 11, 2011: "because the outcome of the referendum should be determined by those who vote in it and should not depend on how many do not vote." The point was lost that the result would be advisory, with less than 40 per cent rather than mandatory, with 40 or more per cent. The House of Lords backed down on the point, on July 13, 2011.

3. Amendment of TFEU under simplified revision procedure

(1) Where the European Council has adopted an Article 48(6) decision subject to its approval by the member States, a Minister of the Crown may not confirm the approval of the decision by the United Kingdom unless-

(a) a statement relating to the decision was laid before Parliament in accordance with section 5,

(b) the decision is approved by Act of Parliament, and

(c) the referendum condition, the exemption condition or the significance condition is met.

(2) The referendum condition is that-

(a) the Act providing for the approval of the decision provides that the provision approving the decision is not to come into force until a referendum about whether the decision should be approved has been held throughout the United Kingdom or, where the decision also affects Gibraltar, throughout the United Kingdom and Gibraltar,

(b) the referendum has been held, and

(c) the majority of those voting in the referendum are in favour of the approval of the decision.

(3) The exemption condition is that the Act providing for the approval of the decision states that the decision does not fall within section 4.

(4) The significance condition is that the Act providing for the approval of the decision states that-

(a) the decision falls within section 4 only because of provision of the kind mentioned in subsection (1)(i) or (j) of that section, and

(b) the effect of that provision in relation to the United Kingdom is not significant.

DEFINITIONS

s.1(3): "TFEU"

s.1(5): "simplified revision procedure" (art.48(6) TEU)

GENERAL NOTE

This section complements s.2. It was not amended by Parliament. Section 1(4) leads to s.2. And s.1(5) leads to this section. It refers to art.48(6) TEU decisions (and not also to para.(7), which forms part of the simplified revision procedure). This section addresses the last sentence: "That decision shall not come into force until it has been approved by the Member States in accordance with their respective constitutional requirements."

Again, there are three conditions precedent to a UK minister confirming approval: (i) a s.5 statement; (ii) parliamentary approval; and (iii) either the referendum condition, the exemption condition or the significance condition (subs.(1)).

Subsection (2) is similar to s.2(2).

The word "also" in subs.(2)(a) was added by the Government, at report in the House of Lords on June 8, 2011.

Subsection (3) is similar to s.2(3).

Subsection (4)—the significance condition—is additional: it relates only to s.4(1)(i) or (j); and it does not have a significant effect on the United Kingdom. This allows for ministerial discretion, as to whether something is not significant. And such a determination substitutes for a referendum or an exemption.

David Lidington MP, the Europe Minister, stated during second reading on December 7, 2010, that the Government had rejected the idea of a legal test:

> "We took the view that that would have left far too much discretionary power in the hands of Ministers. What we have done instead is to

introduce a Bill that quite deliberately limits ministerial discretion by specifying those changes that would trigger a referendum and also those limited categories of treaty change that would be exempt from the referendum requirement.'' (*Hansard* HC Vol.520, col.273)

However, at committee on January 24, 2011, he referred to the significance test:

''The significance test can be used only in very specific circumstances. Clause 4 identifies 13 instances when a treaty change transferring competence or power to the European Union would attract a referendum. The significance test applies not to 13, but to two of those instances. Moreover, it can be used only when a decision under article 48(6) is being taken. It cannot be used for treaty amendments adopted under the ordinary revision procedure.'' (*Hansard* HC Vol.522, col.123)

4. Cases where treaty or Article 48(6) decision attracts a referendum

(1) Subject to subsection (4), a treaty or an Article 48(6) decision falls within this section if it involves one or more of the following-

(a) the extension of the objectives of the EU as set out in Article 3 of TEU;

(b) the conferring on the EU of a new exclusive competence;

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

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

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

(f) the extension of the competence of the EU in relation to-

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

(ii) common foreign and security policy;

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

(h) the extension of a supporting, co-ordinating or supplementing competence of the EU;

(i) the conferring on an EU institution or body of power to impose a requirement or obligation on the United Kingdom, or the removal of any limitation on any such power of an EU institution or body;

(j) the conferring on an EU institution or body of new or extended power to impose sanctions on the United Kingdom;

(k) any amendment of a provision listed in Schedule 1 that removes a requirement that anything should be done unanimously, by consensus or by common accord;

(l) any amendment of Article 31(2) of TEU (decisions relating to common foreign and security policy to which qualified majority voting applies) that removes or amends the provision enabling a member of the Council to oppose the adoption of a decision to be taken by qualified majority voting;

(m) any amendment of any of the provisions specified in subsection (3) that removes or amends the provision enabling a member of the Council, in relation to a draft legislative act, to ensure the suspension of the ordinary legislative procedure.

(2) Any reference in subsection (1) to the extension of a competence includes a reference to the removal of a limitation on a competence.

(3) The provisions referred to in subsection (1)(m) are-

(a) Article 48 of TFEU (social security),
(b) Article 82(3) of TFEU (judicial co-operation in criminal matters), and
(c) Article 83(3) of TFEU (particularly serious crime with a cross-border dimension).

(4) A treaty or Article 48(6) decision does not fall within this section merely because it involves one or more of the following-
(a) the codification of practice under TEU or TFEU in relation to the previous exercise of an existing competence;
(b) the making of any provision that applies only to member States other than the United Kingdom;
(c) in the case of a treaty, the accession of a new member State.

DEFINITIONS

s.1(5): "simplified revision procedure" (art.48(6) TEU)

GENERAL NOTE

This section revisits ss.2 and 3, from a different direction. Whereas they set out conditions precedent, this section takes a case, or circumstances, approach. It is in effect a checklist of 13 cases. This section was not amended by Parliament.

Subsection (4) is the most important. It contains three significant exclusions: codification (which could be the rewriting of the European treaties); other Member States; and accession of a new Member State (Turkey being mentioned most frequently).

Subsection (1) is subject to those exclusions. Article 4(1) TEU reads: "In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States." The 13 cases involve variously increasing EU competences.

Cases (i) and (j) refer exclusively to EU actions against the United Kingdom.

Case (k) introduces Sch.1: procedural treaty provisions attracting referendum.

Article 31(2) TEU occurs in Ch.2 of Title V: specific provisions concerning the common foreign and security policy. It permits qualified majority voting in the European Council/Council, as a derogation from the principle of unanimity (case (l)).

Case (m) introduces subs.(3). Modern drafting style presumably explains the extra subsection.

5. Statement to be laid before Parliament

(1) If a treaty amending TEU or TFEU is agreed in an inter-governmental conference, a Minister of the Crown must lay the required statement before Parliament before the end of the 2 months beginning with the date on which the treaty is agreed.
(2) If an Article 48(6) decision is adopted by the European Council subject to its approval by the member States, a Minister of the Crown must lay the required statement before Parliament before the end of the 2 months beginning with the date on which the decision is adopted.
(3) The required statement is a statement as to whether, in the Minister's opinion, the treaty or Article 48(6) decision falls within section 4.
(4) If the Minister is of the opinion that an Article 48(6) decision falls within section 4 only because of provision of the kind mentioned in subsection (1)(i) or (j) of that section, the statement must indicate whether in the Minister's opinion the effect of that provision in relation to the United Kingdom is significant.
(5) The statement must give reasons for the Minister's opinion under subsection (3) and, if relevant, subsection (4).

(6) In relation to an Article 48(6) decision adopted by the European Council before the day on which this section comes into force ("the commencement date"), the condition in section 3(1)(a) is to be taken to be complied with if a statement under this section is laid before Parliament before the end of the 2 months beginning with the commencement date.

GENERAL NOTE

This section is introduced by ss.2(1)(a) and 3(1)(a). A s.5 statement is a condition precedent to all amending (as defined in this Act) of the European treaties. Subsection (6) was added by the Government at committee in the House of Commons, on January 24, 2011, without debate.

Subsection (1) refers to an inter-governmental conference (or "IGC"). This is anterior to the European treaties, and is not to be equated with the European Council. This subsection refers back to s.2(1)(a).

Subsection (2), in contrast, refers back to s.3(1)(a).

Subsection (3) defines a s.5 statement. It relates solely to s.4.

Subsection (4) indicates the discretion involved in deciding whether a case (i) or (j) is significant, or rather, not significant.

Subsection (5) requires reasons, but not necessarily for subs.(4).

Subsection (6) is transitional, for art.48(6) TEU decisions made before commencement of this section. Presumably, older decisions will be no longer challengeable by the United Kingdom.

At second reading in the House of Commons, on December 7, 2010, William Hague MP said:

> "The reasoned statement set out in cl.5 makes any such ministerial decision as amenable to judicial review as is possible. That provides a powerful reason for Ministers to stick to both the letter and spirit of the law, and not to seek to sidestep the requirement for a referendum. We have ensured that we are as precise as possible about what would require a referendum." (*Hansard* HC Vol.520, col.200).

The point only emerged incrementally in the debates in the Commons and Lords. The original political ideas of ministers were handed over to the civil service. There, parliamentary counsel was instructed. He/she turned to the European Union (Amendment) 2008 (c.7), and then to the EU treaties (with or without a EU law expert). These lawyers systemically mined EU law, coming up with cll.1 to 14. Thus, the Bill, as spotted by the Lords' select committee on the constitution, was lawyers' law and not legislators' law. It was impossible for MPs and peers to do their job of legislative scrutiny, without a detailed knowledge of EU law and practice.

Restrictions relating to other decisions under TEU or TFEU

6. Decisions requiring approval by Act and by referendum

(1) A Minister of the Crown may not vote in favour of or otherwise support a decision to which this subsection applies unless-
  (a) the draft decision is approved by Act of Parliament, and
  (b) the referendum condition is met.

(2) Where the European Council has recommended to the member States the adoption of a decision under Article 42(2) of TEU in relation to a common EU defence, a Minister of the Crown may not notify the European Council that the decision is adopted by the United Kingdom unless-
  (a) the decision is approved by Act of Parliament, and
  (b) the referendum condition is met.

(3) A Minister of the Crown may not give a notification under Article 4 of Protocol (No. 21) on the position of the United Kingdom and

Ireland in respect of the area of freedom, security and justice annexed to TEU and TFEU which relates to participation by the United Kingdom in a European Public Prosecutor's Office or an extension of the powers of that Office unless-

(a) the notification has been approved by Act of Parliament, and

(b) the referendum condition is met.

(4) The referendum condition is that set out in section 3(2), with references to a decision being read for the purposes of subsection (1) as references to a draft decision and for the purposes of subsection (3) as references to a notification.

(5) The decisions to which subsection (1) applies are-

(a) a decision under the provision of Article 31(3) of TEU that permits the adoption of qualified majority voting;

(b) a decision under Article 48(7) of TEU which in relation to any provision listed in Schedule 1-

(i) adopts qualified majority voting, or

(ii) applies the ordinary legislative procedure in place of a special legislative procedure requiring the Council to act unanimously;

(c) a decision under Article 86(1) of TFEU involving participation by the United Kingdom in a European Public Prosecutor's Office;

(d) where the United Kingdom has become a participant in a European Public Prosecutor's Office, a decision under Article 86(4) of TFEU to extend the powers of that Office;

(e) a decision under Article 140(3) of TFEU which would make the euro the currency of the United Kingdom;

(f) a decision under the provision of Article 153(2) of TFEU (social policy) that permits the application of the ordinary legislative procedure in place of a special legislative procedure;

(g) a decision under the provision of Article 192(2) of TFEU (environment) that permits the application of the ordinary legislative procedure in place of a special legislative procedure;

(h) a decision under the provision of Article 312(2) of TFEU (EU finance) that permits the adoption of qualified majority voting;

(i) a decision under the provision of Article 333(1) of TFEU (enhanced co-operation) that permits the adoption of qualified majority voting, where the decision relates to a provision listed in Schedule 1 and the United Kingdom is a participant in the enhanced co-operation to which the decision relates;

(j) a decision under the provision of Article 333(2) of TFEU (enhanced co-operation) that permits the adoption of the ordinary legislative procedure in place of a special legislative procedure, where-

(i) the decision relates to a provision listed in Schedule 1,

(ii) the special legislative procedure requires the Council to act unanimously, and

(iii) the United Kingdom is a participant in the enhanced co-operation to which the decision relates;

(k) a decision under Article 4 of the Schengen Protocol that removes any border control of the United Kingdom.

(6) In subsection (5)(k) "the Schengen Protocol" means the Protocol (No. 19) on the Schengen *acquis* integrated into the framework of the European Union, annexed to TEU and TFEU.

DEFINITIONS

s.1(7): "voting in favour of or otherwise supporting"

GENERAL NOTE

Whereas ss.2-5 deal with amendments to TEU and TFEU, ss. 6-10 relate to "other decisions" under the European treaties. Strangely, other decisions is not defined in s.1, nor in an interpretation clause in this sub-part. Sections 6-10 are the most difficult in the Act. Subsection (3) was added by the Government at committee in the Commons, on January 25, 2011, and was followed by a debate but no vote (the reason for the amendment being a perceived gap in what became subs.(5)(c) and (d)).

The minister, David Lidington MP, stated that the European public prosecutor had been singled out, in the United Kingdom's possible opt-ins in justice and home affairs, because it had been expressly stated in the coalition agreement of May 2010.

Subsection (5) contains a list of other decisions. This is eleven-strong, with decision (e) being the adoption of the Euro by the United Kingdom.

Subsection (1) imposes two conditions precedent: (i) parliamentary approval; and (ii) a referendum decision.

Subsection (2) is particular to art.42(2) TEU. This is in s.2 of Ch.2 of Title V. It reads:

> "The common security and defence policy shall include the progressive framing of a common Union defence policy. This will lead to a common defence, when the European Council, acting unanimously, so decides. It shall in that case recommend to the Member States the adoption of such a decision in accordance with their respective constitutional requirements."

Subsection (3) is also particular, and something of an afterthought. The United Kingdom and the Republic of Ireland are two EU Member States off the coast of the continental landmass. They have a common travel area. They declined to join the Schengen area, which has existed since 1995. The Protocol on the position of the United Kingdom and Ireland dates from the 1997 Amsterdam Treaty. It was amended by the Lisbon Treaty in 2007, and 'in respect of the area of freedom, security and justice' has been added to the title.

Article 4 of the Protocol reads:

> "The United Kingdom or Ireland may at any time after the adoption of a measure by the Council pursuant to Title V of Part Three of the Treaty on the Functioning of the European Union notify its intention to the Council and to the Commission that it wishes to accept that measure. In that case, the procedure provided for in Article 331(1) of the Treaty on the Functioning of the European Union shall apply mutatis mutandis."

This subsection, however, is related only to the European public prosecutor's office, and not to all the measures under art.4 of the Protocol.

Subsection (4) refers to subs.(1)(b), and back to s.3(2).

Subsection (6) is definitional. The Schengen Protocol also dates from the 1997 Amsterdam Treaty: Protocol Integrating the Schengen *acquis* into the Framework of the European Union. Article 4 now reads:

> "Ireland and the United Kingdom of Great Britain and Northern Ireland, may at any time request to take part in some or all of the provisions of this *acquis*. The Council shall decide on the request with the unanimity of its members referred to in Article 1 and of the representative of the Government of the State concerned."

Note: this section does not refer to the Protocol on the application of certain aspects of art.26 of the Treaty on the Functioning of the European Union (an internal market without internal frontiers), which also first appeared in the 1997 Amsterdam Treaty.

At report in the Lords on June 13, 2011, on an amendment moved by Lord Hannay of Chiswick, UK Permanent Representative to the European Union (1985-90), by 213 votes to 209 (leading to some tactical wrangling), the House voted to remove the referendum condition from this section. The Commons, at ping pong on July 11, 2011, disagreed: "Because the decisions concerned would involve an increase in the competences or powers of the European Union in relation to the United Kingdom and should therefore require approval by referendum as well as by Act." The Lords backed down on July 13, 2011, but only after a Labour amendment was lost by 210 votes to 244.

A new clause on the Euro, moved by Lord Kerr of Kinlochard, also on June 13, 2011, failed to be carried, by 187 votes to 188.

7. Decisions requiring approval by Act

(1) A Minister of the Crown may not confirm the approval by the United Kingdom of a decision to which this subsection applies unless the decision is approved by Act of Parliament.

(2) The decisions to which subsection (1) applies are-

(a) a decision under the provision of Article 25 of TFEU that permits the adoption of provisions to strengthen or add to the rights listed in Article 20(2) of that Treaty (rights of citizens of the European Union);

(b) a decision under the provision of Article 223(1) of TFEU that permits the laying down of the provisions necessary for the election of the members of the European Parliament in accordance with that Article;

(c) a decision under the provision of Article 262 of TFEU that permits the conferring of jurisdiction on the Court of Justice of the European Union in disputes relating to the application of acts adopted on the basis of the EU Treaties which create European intellectual property rights;

(d) a decision under the third paragraph of Article 311 of TFEU to adopt a decision laying down provisions relating to the system of own resources of the European Union.

(3) A Minister of the Crown may not vote in favour of or otherwise support a decision to which this subsection applies unless the draft decision is approved by Act of Parliament.

(4) The decisions to which subsection (3) applies are-

(a) a decision under the provision of Article 17(5) of TEU that permits the alteration of the number of members of the European Commission;

(b) a decision under Article 48(7) of TEU which in relation to any provision not listed in Schedule 1-

(i) adopts qualified majority voting, or

(ii) applies the ordinary legislative procedure in place of a special legislative procedure requiring the Council to act unanimously;

(c) a decision under the provision of Article 64(3) of TFEU that permits the adoption of measures which constitute a step backwards in European Union law as regards the liberalisation of the movement of capital to or from third countries;

(d) a decision under the provision of Article 126(14) of TFEU that permits the adoption of provisions to replace the Protocol (No. 12) on the excessive deficit procedure annexed to TEU and TFEU;

(e) a decision under the provision of Article 333(1) of TFEU (enhanced co-operation) that permits the adoption of qualified majority voting, where the decision relates to a provision not listed in Schedule 1 and the United Kingdom is a participant in the enhanced co-operation to which the decision relates;

(f) a decision under the provision of Article 333(2) of TFEU (enhanced co-operation) that permits the adoption of the ordinary

legislative procedure in place of a special legislative procedure, where-

(i) the decision relates to a provision not listed in Schedule 1,

(ii) the special legislative procedure requires the Council to act unanimously, and

(iii) the United Kingdom is a participant in the enhanced co-operation to which the decision relates.

DEFINITIONS

s.1(7): "voting in favour of or otherwise supporting"

GENERAL NOTE

This section refers to further decisions, requiring approval only by Act of Parliament. It was not amended by Parliament.

Subsections (2) and (4) once again simply list the decisions. Subsection (2), referring back to the condition precedent, in subs.(1), of parliamentary approval for ministerial confirmation, lists four TFEU decisions. Subsection (4), referring back to the condition precedent, in subs.(3), of parliamentary approval for voting/supporting, lists a further six TEU and TFEU decisions. Decision (b) refers again to Sch.1.

8. Decisions under Article 352 of TFEU

(1) A Minister of the Crown may not vote in favour of or otherwise support an Article 352 decision unless one of subsections (3) to (5) is complied with in relation to the draft decision.

(2) An Article 352 decision is a decision under the provision of Article 352 of TFEU that permits the adoption of measures to attain one of the objectives set out in the EU Treaties (but for which those Treaties have not provided the necessary powers).

(3) This subsection is complied with if a draft decision is approved by Act of Parliament.

(4) This subsection is complied with if-

(a) in each House of Parliament a Minister of the Crown moves a motion that the House approves Her Majesty's Government's intention to support a specified draft decision and is of the opinion that the measure to which it relates is required as a matter of urgency, and

(b) each House agrees to the motion without amendment.

(5) This subsection is complied with if a Minister of the Crown has laid before Parliament a statement specifying a draft decision and stating that in the opinion of the Minister the decision relates only to one or more exempt purposes.

(6) The exempt purposes are-

(a) to make provision equivalent to that made by a measure previously adopted under Article 352 of TFEU, other than an excepted measure;

(b) to prolong or renew a measure previously adopted under that Article, other than an excepted measure;

(c) to extend a measure previously adopted under that Article to another member State or other country;

(d) to repeal existing measures adopted under that Article;

(e) to consolidate existing measures adopted under that Article without any change of substance.

(7) In subsection (6)(a) and (b), "excepted measure" means a measure adopted after the commencement of this section and resulting from a decision in relation to which a Minister of the Crown had relied on compliance with subsection (4).

DEFINITIONS

s.1(7): "voting in favour of or otherwise supporting"

GENERAL NOTE

This section deals with art.352 TFEU. It was not amended by Parliament. It is most unlikely to be used.

Article 352 TFEU occurs in Pt 7: General and Final Provisions. It permits the Council to adopt appropriate measures, to attain one of the objectives in the European treaties, where no necessary powers have been granted. This is defined, in domestic law, in subs.(2), but with no implications for EU law.

Subsection (1) lays down three conditions precedent, in the alternative: (i) Act of Parliament (subs.(3)); (ii) parliamentary motions (on an urgency basis) (subs.(4)); and (iii) a ministerial statement of exemption (as defined) (subs.(5)). Subsections (6) and (7) define exemption.

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

(1) A Minister of the Crown may not give a notification to which this subsection applies unless Parliamentary approval has been given in accordance with subsection (3).

(2) Subsection (1) applies in relation to a notification under Article 3 of Protocol (No. 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice annexed to TEU and TFEU (the "AFSJ Protocol") that the United Kingdom wishes to take part in the adoption and application of a measure proposed under any of the following-

(a) the provision of Article 81(3) of TFEU (family law) that permits the application of the ordinary legislative procedure in place of a special legislative procedure;

(b) the provision of Article 82(2)(d) of TFEU (criminal procedure) that permits the identification of further specific aspects of criminal procedure to which directives adopted under the ordinary legislative procedure may relate;

(c) the provision of Article 83(1) of TFEU (particularly serious crime with a cross-border dimension) that permits the identification of further areas of crime to which directives adopted under the ordinary legislative procedure may relate.

(3) Parliamentary approval is given if-

(a) in each House of Parliament a Minister of the Crown moves a motion that the House approves Her Majesty's Government's intention to give a notification in respect of a specified measure, and

(b) each House agrees to the motion without amendment.

(4) Despite any Parliamentary approval given for the purposes of subsection (1), a Minister may not vote in favour of or otherwise support a decision under a provision falling within any of paragraphs (a) to (c) of subsection (2) unless the draft decision is approved by Act of Parliament.

(5) A Minister of the Crown may not give a notification under Article 4 of the AFSJ Protocol that the United Kingdom wishes to accept a

measure to which this subsection applies unless the notification in respect of the measure has been approved by Act of Parliament.

(6) The measures to which subsection (5) applies are-

(a) a measure adopted under a provision described in any of paragraphs (a) to (c) of subsection (2), or

(b) a measure established under Article 81(3), 82(2)(d) or 83(1) of TFEU by virtue of a previous decision adopted, without the participation of the United Kingdom, under a provision falling within any of those paragraphs.

GENERAL NOTE

This section deals with title V of part 3 TFEU. It was not amended by Parliament.

Part 3 of TFEU is: Union policies and internal actions. It comprises 24 titles (arts 26-197). Title V is: Area of Freedom, Security and Justice.

The section refers back to the Protocol referred to in s.6(3). It has been described above. It is unclear on what basis the drafter has referred to it as "No.21". It may be described as the UK/Irish opt out of Schengen (with opt in possibilities). Here, the drafter—without an interpretation clause—decides to refer to it as the "AFSJ Protocol", in subs.(2).

Subsection (2) refers to an art.3 notification. Article 3 refers to a proposal or an initiative under Title V. It permits either of the two states to participate in the adoption and application of a proposed measure. However, this subsection limits the waiving of the rule to three areas.

Subsection (1) states that approval is dependent upon the condition precedent of parliamentary approval, which is defined in subs.(3) as parliamentary motions.

Subsections (4)-(6), however, revert to Acts of Parliament for: anything more than subs.(1) notification; and notifications under art.4 of the Protocol (consider s.6(3) above).

10. Parliamentary control of certain decisions not requiring approval by Act

(1) A Minister of the Crown may not vote in favour of or otherwise support a decision under any of the following unless Parliamentary approval has been given in accordance with this section-

(a) the provision of Article 56 of TFEU that permits the extension of the provisions of Chapter 3 of Title IV of Part 3 of that Treaty (free movement of services) to nationals of a third country;

(b) Article 129(3) of TFEU (amendment of provisions of the Statute of the European System of Central Banks or of the European Central Bank);

(c) the provision of Article 252 of TFEU that permits an increase in the number of Advocates-General;

(d) the provision of Article 257 of TFEU that permits the establishment of specialised courts attached to the General Court;

(e) the provision of Article 281 of TFEU that permits the amendment of the Statute of the Court of Justice of the European Union;

(f) the provision of Article 308 of TFEU that permits the amendment of the Statute of the European Investment Bank.

(2) A Minister of the Crown may not vote in favour of or otherwise support a decision to which this subsection applies unless Parliamentary approval has been given in accordance with this section.

(3) Subsection (2) applies to a decision under Article 48(7) of TEU which in relation to a provision of TFEU applies the ordinary legislative procedure in place of a special legislative procedure not requiring the Council to act unanimously.

(4) A Minister of the Crown may not confirm the approval by the United Kingdom of a decision under Article 218(8) of TFEU for the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms in accordance with Article 6(2) of TEU unless Parliamentary approval has been given in accordance with this section.

(5) Parliamentary approval is given if-

(a) in each House of Parliament a Minister of the Crown moves a motion that the House approves Her Majesty's Government's intention to support the adoption of a specified draft decision, and

(b) each House agrees to the motion without amendment.

GENERAL NOTE

This section deals with the final set of other decisions, where there is parliamentary control but no Acts of Parliament much less referendums. Subsections (2) and (3) were added by the Government at report in the Commons on March 8, 2011.

Subsection (1) lists six decisions. The nature of parliamentary approval is specified in subs.(5).

Subsections (2) and (3) were not incorporated in subs.(1), presumably because it is a procedural issue.

Further provisions about referendums held in pursuance of section 2, 3 or 6

11. Persons entitled to vote in referendum

(1) The persons entitled to vote in any referendum held in pursuance of section 2, 3 or 6 are to be as follows-

(a) the persons who, on the date of the referendum, would be entitled to vote as an elector at a parliamentary election in a constituency in the United Kingdom;

(b) the persons who, on that date, are disqualified by reason of being peers from voting as electors in parliamentary elections but-

(i) would be entitled to vote as electors at a local government election in any electoral area in Great Britain,

(ii) would be entitled to vote as electors at a local election in any district electoral area in Northern Ireland, or

(iii) would be entitled to vote as electors at a European Parliamentary election in any electoral region by virtue of section 3 of the Representation of the People Act 1985 (peers resident outside the United Kingdom);

(c) if the referendum is also held in Gibraltar, the Commonwealth citizens who, on the date of the referendum, would be entitled to vote in Gibraltar at a European Parliamentary election in the combined electoral region in which Gibraltar is comprised.

(2) In subsection (1)(b)(i) "local government election" includes a municipal election in the City of London (that is, an election to the office of mayor, alderman, common councilman or sheriff and also the election of any officer elected by the mayor, aldermen and liverymen in common hall).

GENERAL NOTE

This is the first of three sections on the modalities of the referendums provided for in ss.2, 3 and 6. This section was not amended by Parliament. The Political Parties, Elections and Referendums Act 2000 (c.41) remains the principal statute.

Subsection (1) defines those persons eligible to vote in a EU referendum: (i) parliamentary electors; (ii) disqualified peers who are entitled to non-parliamentary franchises; and (iii) Gibraltarians (voting under the European Parliament (Representation) Act 2003 (c.7)).

The minister, David Lidington MP, told the House of Commons that the chief minister of Gibraltar was content with the provisions of the Bill as regards his overseas territory.

He also told the house that there was no requirement to permit sentenced prisoners a right to vote in referendums.

12. Separate questions

If a referendum is to be held in pursuance of any of sections 2, 3 and 6 in relation to two or more treaties or decisions, or in relation to one or more treaties and one or more decisions, a separate question must be included on the ballot paper in relation to each treaty or decision.

GENERAL NOTE

This section is straightforward. It was not amended by Parliament. However, it is possible to foresee disputes about separate questions. The European Union would, most likely, define the treaty question or the decision issue in its decision making. Euro-sceptics in the United Kingdom might well wish to focus on a particular issue.

The minister, David Lidington MP, in answer to a question during committee on January 25, 2011, made clear that questions would not be disaggregated: if a package of measures had been negotiated en bloc, there would be one vote on the package: "The negotiation would have resulted in a compromise among Member States on something to which they all felt able to give their assent, and they would all have to be accountable to their respective electorates for that overall decision." (*Hansard* HC Vol.522, col.258)

13. Role of Electoral Commission

Where an Act provides for a referendum to be held in pursuance of section 2, 3 or 6, the Electoral Commission-

(a) must take whatever steps they think appropriate to promote public awareness of the referendum and how to vote in it, and

(b) may take whatever steps they think appropriate to promote public awareness of the subject-matter of the referendum.

GENERAL NOTE

This section was not amended by Parliament. Again, it appears straightforward, but could be the subject of controversy.

The Electoral Commission was established under the Political Parties, Elections and Referendums Act 2000 (c.41). Referendums are provided for in part VII (ss.101 to 129). There is no reference to a role for the Electoral Commission. Its general functions are specified in ss.5-13. This section contains a new power, which remains in this Act.

The areas of controversy may well relate to public awareness of the referendum and not just public awareness of the subject-matter. The Electoral Commission's opening, or default, position—though it is not specified—might well be equal treatment for "yes" and "no" camps. That could be very lop-sided, given the actual range of views on any particular EU matter.

14. Consequential amendments and repeals relating to Part 1

(1) In section 5 of the European Union (Amendment) Act 2008 (amendment of founding treaties)-
  (a) in subsection (2), for the words from "amends" onwards substitute "amends the Treaty establishing the European Atomic Energy Community (signed at Rome on 25th March 1957).", and
  (b) accordingly, in the heading, for "founding treaties" substitute "Euratom Treaty".

(2) In section 23 of the Constitutional Reform and Governance Act 2010 (section 20 of that Act not to apply to certain descriptions of treaties), in subsection (1)-
  (a) omit paragraph (a),
  (b) in paragraph (b), for "founding Treaties" substitute "Treaty establishing European Atomic Energy Community", and
  (c) at the end insert-
    "(c) a treaty that is subject to a requirement imposed by Part 1 of the European Union Act 2011 (restrictions on treaties and decisions relating to EU)."

(3) The following enactments (which are superseded by the provisions of this Part) are repealed-
  (a) section 2 of the European Communities (Amendment) Act 1993,
  (b) section 1(2) and (3) of the European Communities (Amendment) Act 2002,
  (c) section 12 of the European Parliamentary Elections Act 2002, and
  (d) section 6 of the European Union (Amendment) Act 2008.

GENERAL NOTE

This section concludes Pt 1. Frequently, a statute contains amendments, and consequential amendments, usually placed in Schedules. Here, they are contained in one section. This section was not amended by Parliament.

The European Union (Amendment) Act 2008 (c.7) is referred to under s.2 above. Section 5 is: Amendment of Founding Treaties. It provides that: an Act of Parliament is a condition precedent to ratification, if: it involves any amendment of the Euratom Treaty, signed at Rome on March 25, 1957.

Effectively, subs.(1) removes the Lisbon Treaty (less the Euratom Treaty) from s.5 of this 2008 Act. That is because this Act now provides generally for the European treaties. In other words, the 2008 Act, passed after the Lisbon Treaty was agreed on December 13, 2007, and being the first to require parliamentary approval for ratification, has now been superseded.

Subsection (2) deals with the Constitutional Reform and Governance Act 2010 (c.25), also referred to above under s.2 above. It continues to provide that s.20 of that 2010 Act does not apply to inter alia the European treaties. The section: (i) omits the reference to the European Parliamentary Elections Act 2002 (c.24), under which an Act of Parliament was necessary for any increase, by the European Union, of the powers of the European Parliament; (ii) replacing the founding treaties with the Euratom Treaty only; and (iii) by adding the new provision in s.23(1)(c) of the 2010 Act, making this Act the lead statute.

Subsection (3) repeals other domestic provisions dealing with EU law, now held to be superseded. Section 6 of the European Union (Amendment) Act 2008 (c.7) is: parliamentary control of decisions. It prefigures aspects of this Act. But parliamentary control of decisions is now provided for in ss.8, 9 and 10.

PART 2

IMPLEMENTATION OF TRANSITIONAL PROTOCOL ON MEPS

15. Protocol on MEPs: approval, and addition to list of treaties

(1) The Protocol amending the Protocol (No. 36) on transitional provisions annexed to the Treaty on European Union, to the Treaty on the Functioning of the European Union and to the Treaty establishing the European Atomic Energy Community, signed at Brussels on 23 June 2010, is approved for the purposes of section 5 of the European Union (Amendment) Act 2008 (amendment of founding Treaties: approval by Act of Parliament).

(2) In section 1(2) of the European Communities Act 1972, in the definition of "the Treaties", after paragraph (s) insert-

"and

(t) the Protocol amending the Protocol (No. 36) on transitional provisions annexed to the Treaty on European Union, to the Treaty on the Functioning of the European Union and to the Treaty establishing the European Atomic Energy Community, signed at Brussels on 23 June 2010;".

GENERAL NOTE

The Lisbon Treaty of December 13, 2007 provided for an increase in the size of the European Parliament, but also a cap of 750 Members plus the President (art.14(2) TEU). It also contained a Protocol on Transitional Provisions, from the date of entry into force. As things were to turn out (the Irish rejection of the Treaty in a referendum), this was not before the next European Parliament elections in June 2009.

On June 23, 2010, representatives of the Member States (in fact, officials) signed another Protocol at Brussels, amending the earlier Protocol: [2010] OJ C263/1. The reason was: the Lisbon Treaty did not enter into force (on December 1, 2009) until after the European Parliament elections in June 2009. It was therefore necessary, through another Protocol, to lay down transitional provisions on the composition of the European Parliament until the end of the 2009-14 term (but not the reduction from 99 to 96 members for Germany).

Several Member States would have had better allocations, if the Lisbon Treaty had been in force in June 2009. The Parliament was increased, by this amending Protocol (itself intended optimistically to enter into force on December 1, 2010), from 736 to 754 seats, the additional 18 being allocated to twelve Member States: the United Kingdom obtained another seat.

The amending Protocol is caught by s.5 of the European Union (Amendment) Act 2008—pre amendment by s.14(1) of this Act—which provides for any amendment to the founding treaties (which the amending Protocol is). It therefore requires parliamentary approval by Act of Parliament, which this section—by enactment—does. And that explains why this section, under s.21(1)(a), entered into force at royal assent (July 19, 2011).

Subsection (2) simply adds this amending Protocol to the list of treaties in s.1(2) of the European Communities Act 1972 (c.68).

16. Number of MEPs and electoral regions

(1) Section 1 of the European Parliamentary Elections Act 2002 is amended as follows.

(2) In subsection (1) (number of members of the European Parliament) for "72" substitute "73".

(3) In subsection (3) (electoral regions) for the entry relating to the West Midlands substitute-

"West Midlands 7"

GENERAL NOTE

This follows from s.15. The one extra member of the European Parliament has to be recorded in domestic legislation. This member is allocated, by subs.(3), to the West Midlands electoral region.

17. Election of additional MEP

(1) The additional seat allocated to the West Midlands electoral region by virtue of section 16 is to be filled by applying subsections (5) to (9) of section 2 of the 2002 Act (voting system in Great Britain and Gibraltar) to the results of the poll at the general election of members of the European Parliament held on 4 June 2009, as if the seat had been allocated to the region at that date.

(2) Subsection (1) is subject to Schedule 2 which makes further provision about the filling of the additional seat.

(3) This section and Schedule 2-

(a) cease to have effect on the date appointed under section 4 of the 2002 Act as the date of the poll at the next general election of members of the European Parliament after the passing of this Act, and

(b) do not affect the procedure to be followed in accordance with regulations made under section 5 of the 2002 Act if, after being filled in accordance with this section and Schedule 2, the additional seat subsequently becomes vacant before that date.

(4) In this section and in Schedule 2 "the 2002 Act" means the European Parliamentary Elections Act 2002.

GENERAL NOTE

This also follows from s.15.

Section 2 of the European Parliamentary Elections Act 2002 (c.24), a consolidation measure, is: voting system in Great Britain and Gibraltar. The section provides for a regional list system (permitting an elector to vote for a registered party or a named candidate). Subsections (5)-(9) provide for a proportionate system, starting with the party/candidate with the largest number of votes.

This section provides that the exercise conducted on the West Midlands results from June 4, 2009, should be resumed to fill the additional seat assigned.

Subsection (2) introduces Sch.2.

Subsection (3) is a sunset clause, this section and Sch.2 surviving only until the next European Parliament election in 2014.

PART 3

GENERAL

Status of EU law

18. Status of EU law dependent on continuing statutory basis

Directly applicable or directly effective EU law (that is, the rights, powers, liabilities, obligations, restrictions, remedies and procedures referred to in section 2(1) of the European Communities Act 1972) falls to be recognised and available in law in the United Kingdom only by virtue of that Act or where it is required to be recognised and available in law by virtue of any other Act.

GENERAL NOTE

This was the principal clause of the Bill, when it was introduced. It was considered on the first committee day in the Commons, on January 11, 2011. The House of Lords considered it in order, on its seventh committee day (May 23, 2011).

The original text, in Bill 106, was: "It is only by virtue of an Act of Parliament that directly applicable or directly effective EU law (that is, the rights, powers, liabilities, obligations, restrictions, remedies and procedures referred to in section 2(1) of the European Communities Act 1972) falls to be recognised and available in law in the United Kingdom."

The clause was amended, first on report, in the House of Lords, on June 15, 2011, and second on ping pong, by the House of Commons, on July 11, 2011.

The first amendment, moved by Lord Mackay of Clashfern, a former Conservative Lord Chancellor, altered the obscure beginning to the clause: "By virtue of the European Communities Act 1972 directly applicable or directly effective EU law (that is, the rights, powers, liabilities, obligations, restrictions, remedies and procedures referred to in section 2(1) of the European Communities Act 1972) falls to be recognised and available in law in the United Kingdom."

Lord Mackay had heard the Government argument that other acts, of which examples were given, had the same effect as the ECA 1972. He had a meeting with the ministers, Lords Howell of Guildford and Wallace of Tankerness (a fellow Scot). He countered: all these other statutes use definitions based upon the ECA 1972:

> "I therefore submit that it is amply sufficient to mention the 1972 Act.... For myself, I do not think that the Government intended any sinister meaning, but they have used an extraordinary shorthand in saying 'an Act' when apparently they meant a list of Acts. It is much clearer and more effective to alter 'an Act' to the Act that we know is responsible; namely, the 1972 Act." (*Hansard* HL Vol.728, col.791)

On June 15, 2011, Lord Wallace of Tankerness maintained that the other statutes, while borrowing, did not refer expressly to the ECA 1972. That, however, was not an argument to impress the Supreme Court, as Lord Mackay, a former Law Lord appreciated; the repetition of words might be enough. He succeeded on his amendment, by 242 votes to 209.

The particular problem for the Government was: Company Directors Disqualification Act 1986; where s.9A refers to arts 81 and 82 EC (now arts 101 and 102 TFEU), but not to the ECA 1972. (No one referred to what parliamentary counsel might have been doing, when they cited Treaty provisions without reference to the ECA 1972.)

The second amendment was moved by the Government, as two amendments, leading to the enacted form of this section, in the House of Commons. The Government secured its position, by 485 votes to 22: the opening reference to the ECA 1972 was removed; and there was added at the end: "only by virtue of that Act [the ECA 1972] or where it is required to be recognised and available in law by virtue of any other Act." The House of Lords, on July 13, 2011, accepted the two House of Commons amendments. Lord Mackay was said to be content with the two amendments. However, he raised a doubt, perhaps inadvertently: "The amendments restrict the matter to directly applicable and directly effective EU law." (*Hansard* HL Vol.729, col.774) Lord Wallace of Tankerness had explained the Government's continuing concern about other statutes: "the amendment agreed by your Lordships' House could have created a significant risk that the courts

might interpret the clause as restricting the ability of the other Acts of Parliament to incorporate directly applicable or directly effective EU law into our United Kingdom law." (*Hansard* HL Vol.729, col.773)

Section 2(1) of the ECA 1972 reads (following amendment in 2008): "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 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 followed accordingly; and the expression 'enforceable EU right' and similar expressions shall be read as referring to one to which this subsection applies."

The Government, in the explanatory notes accompanying Bill 106 (November 11, 2010), had, as regards cl.18, referred to the common law principle of parliamentary sovereignty (paras 104-110). The notes were criticised by the House of Commons European Scrutiny Committee, in its tenth report of session 2010-11 (above): "The Explanatory Notes present as fact what the evidence we have received tells us is disputed, viewed from any perspective." (para.87) The committee referred to the evidence of Professor Tomkins, of the University of Glasgow. The notes were redrafted, in time for HL Bill 55 (March 9, 2011). The principle of the supremacy of EU law was now emphasised: "Community law is now part of our law: and whenever there is any inconsistency, Community law has priority. It is not supplanting English [!] law. It is part of our law which overrides any other part which is inconsistent with it." (para.114)

On the first committee day in the Commons (January 11, 2011), William Cash MP, on the back of his select committee report (which, as noted, had concluded that cl.18 was not a sovereignty clause, because it did not deal with EU law), revealed that he was even more concerned, than Martin Howe QC, about future judicial activism: "I am concerned to ensure that the courts are excluded from the construction or interpretation of the nature or legal effect of parliamentary sovereignty." (*Hansard* HC Vol.521, col.173)

The ministerial answer, from David Lidington MP, was:

> "We have taken advice from lawyers across Government, not just from those in the Foreign and Commonwealth Office .... The Government's analysis had led us to the conclusion that to date there is no persuasive legal authority to support the contention that the doctrine of parliamentary sovereignty in relation to EU law is no longer absolute. However, there is a need to put the matter beyond speculation for the future. By confirming in statute that directly effective and directly applicable EU law takes effect in this country only by virtue of an Act of Parliament, we are putting the matter beyond doubt for the future." (*Hansard* HC Vol.521, col.245)

Lord Hannay of Chiswick proposed an amendment, drawing on the explanatory notes, and adding EU law to the clause, at the seventh committee day on May 23, 2011:

> "...at end insert - '( ) This section does not alter the existing relationship between EU law and United Kingdom domestic law; in particular, the principle of the primacy of EU law. ( ) This section does not alter the rights and obligations assumed by the United Kingdom on becoming a member of the EU.'"

He was scornful of the *raison d'etre*, namely Eleanor Sharpston QC in *Thoburn*: "If this Parliament legislates every time a prosecuting attorney makes a bosh like that and it is dismissed by the judge, we would be here every of the year for about 20 years. " (*Hansard* HL Vol.727, col.1670)

Final provisions

19. Financial provisions

(1) There is to be paid out of money provided by Parliament any increase attributable to this Act in the sums payable under any other Act out of money so provided.

(2) There is to be charged on and paid out of the Consolidated Fund any increase attributable to this Act in the sums charged on and paid out of that Fund under any other Act.

GENERAL NOTE

This is a standard financial provision.

20. Extent

(1) This Act extends to the whole of the United Kingdom.

(2) Part 2 (and this section and sections 21 and 22 so far as relating to that Part) extend also to Gibraltar.

GENERAL NOTE

There is a presumption that the Parliament of the United Kingdom of Great Britain and Northern Ireland legislates for the whole United Kingdom. However, it legislates principally for England, and secondarily for Scotland, Northern Ireland and Wales. Given this Act concerns the European Union, it is likely that it should be a part of UK law.

Subsection (2) is consequential upon: the European Parliament (Representation) Act 2003 (c.7), which included Gibraltar in the United Kingdom for the purpose only of the European Parliament elections, in 2004 and subsequently.

The minister, David Lidington MP, said during the fifth committee day, on February 1, 2011:

> "The clause provides that the Bill extends to the whole United Kingdom. The subject matter of the Bill is reserved to the Westminster Parliament and it contains no provisions that fall within the terms of the Sewel Convention, or that would require any legislative consent motions in respect of the devolved legislatures. In any case, I can confirm to the Committee that the devolved Administrations were consulted on the Bill prior to its introduction, and are content with its provisions." (*Hansard* HC Vol.522, col.761)

He went on to say, regarding Gibraltar: "The referendum will extent to Gibraltar where the treaty matter that is subject to the referendum is a matter that includes Gibraltar. If it is a treaty matter from which Gibraltar is excepted, the referendum will not include the people of Gibraltar." (*Hansard* HC Vol.522, col.764)

21. Commencement

(1) The following provisions come into force on the day on which this Act is passed-

(a) section 15;

(b) this Part.

(2) The other provisions of this Act come into force on such day as the Secretary of State may by order made by statutory instrument appoint.

(3) Different days may be appointed for different purposes.

GENERAL NOTE

At report in the Lords on June 15, 2011, on an amendment moved by Lord Kerr of Kinlochard, the House, on a vote of 209 to 203, inserted a new clause after s.21, subjecting Pt 1 of the Act and Sch.1 to a sunset clause, with expiry on the dissolution of the 2010 Parliament in, as expected, 2015. The Commons disagreed, by 301 votes to 212, on July 11, 2011: "Because Part 1 and Schedule 1 are not provisions to which it is appropriate to apply a sunset provision." The Lords backed down on July 13, 2011.

22. Short title

This Act may be cited as the European Union Act 2011.

SCHEDULES

SCHEDULE 1 Sections 4 and 6

Treaty Provisions Where Amendment Removing Need for Unanimity, Consensus or Common Accord Would Attract Referendum

Part 1

Provisions of the Treaty on European Union

Article 7(2) (determination by European Council of existence of serious and persistent breach by member State of values referred to in Article 2).
Article 14(2) (composition of European Parliament).
Article 15(4) (decisions of European Council require consensus).
Article 17(5) (number of, and system for appointing, Commissioners).
Article 19(2) (appointment of Judges and Advocates-General of European Court of Justice).
Article 22(1) (identification of strategic interests and objectives of the EU).
Chapter 2 of Title V (specific provisions on the common foreign and security policy).
Article 48(3), (4), (6) and (7) (treaty revision procedures).
Article 49 (application for EU membership).
Article 50(3) (decision of European Council extending time during which treaties apply to state withdrawing from EU).

Part 2

Provisions of the Treaty on the Functioning of the European Union

Article 19(1) (measures to combat discrimination based on sex, racial or ethnic origin, religion or belief, age or sexual orientation).
Article 21(3) (measures concerning social security or social protection).
Article 22(1) (arrangements to enable EU citizens living in another member State to stand and vote in local elections in the State in which they reside).
Article 22(2) (arrangements to enable such persons to stand and vote in elections to the European Parliament in the State in which they reside).
Article 25 (provisions to strengthen or add to the rights of EU citizens listed in Article 20(2) of TFEU).
Article 77(3) (provisions concerning passports, identity cards, residence permits etc.).
Article 82(2)(d) (minimum rules on criminal procedure).
Article 83(1) (decision identifying other areas of crime to which provision is to apply).
Article 86(1) and (4) (European Public Prosecutor's Office).
Article 87(3) (police co-operation).
Article 89 (cross-border operation by competent authorities).
Article 113 (harmonisation of indirect taxes).
Article 115 (approximation of national laws affecting internal market).
Article 121(2) (broad guidelines of economic policies), so far as relating to a conclusion of the European Council.
Article 126(14) (adoption of provisions replacing the protocol on the excessive deficit procedure).
Article 127(6) (conferral on European Central Bank of specific tasks relating to prudential supervision).
Article 153(2)(b) (measures on working conditions, social security etc.).
Article 155(2) (agreements at EU level between management and labour).
Article 192(2) (adoption of certain environmental measures).

Article 194(3) (energy measures that are primarily of a fiscal nature).
Article 203 (decisions establishing procedure for association of countries and territories with the EU).
Article 218(8) (certain international agreements).
Article 222(3) (decisions on implementation of solidarity clause having defence implications).
Article 223(1) (uniform procedures for elections to European Parliament).
Article 311 (own resources decisions).
Article 312(2) (laying down of multi-annual financial framework).
Article 332 (decisions to allow expenditure on enhanced co-operation to be borne by member States other than those participating).
Article 333(1) and (2) (enhanced co-operation).
Article 346(2) (changes to list of military products exempt from internal market provisions).
Article 352(1) (measures to attain objectives of EU in cases where treaties have not provided the necessary powers).

GENERAL NOTE

This Schedule is introduced by ss.4(1)(k) and 6(5)(b) (it is also referred to in s.7(4)(b), negatively). It comprises all those provisions in the European treaties, where an amendment removing the need for unanimity, consensus or common accord would attract a referendum.

The Schedule was amended by the Government, without debate, at committee in the House of Commons, on January 25, 2011, substituting the reference to "Chapter 2 of Title V...".

SCHEDULE 2 Section 17

Election of Additional Mep

Interpretation

1. In this Schedule-
"list of candidates", in relation to a registered party, means the list of candidates that accompanied the party's nomination paper for the general election of members of the European Parliament held on 4 June 2009, in accordance with rules 6 and 7 of the European Parliamentary elections rules in Schedule 1 to the European Parliamentary Elections Regulations 2004 (S.I. 2004/293);
"MEP" means a Member of the European Parliament;
"nominating officer", in relation to a registered party, has the meaning given by section 5(5) of the 2002 Act;
"registered party" has the meaning given by section 2(10) of the 2002 Act.

Allocation to a registered party

2.
(1) The returning officer for the West Midlands electoral region must ascertain the registered party to which the additional seat provided for by section 16 falls to be allocated in accordance with section 17(1).
(2) In the following provisions, that registered party is referred to as "the qualifying party".

3.
(1) The returning officer must ascertain from the qualifying party's list of candidates the name and address of the person whose name appears highest on that list ("the first choice"), disregarding the name of any person who has been returned as an MEP or who has died.
(2) The returning officer must take such steps as the returning officer considers reasonable to contact the first choice to ask whether he or she will-
(a) state in writing that he or she is willing and able to be returned as an MEP, and
(b) deliver a certificate, signed by or on behalf of the nominating officer of the qualifying party, stating that he or she may be returned as that party's MEP.

4.

(1) This paragraph applies where-

(a) within such period as the returning officer considers reasonable, the returning officer decides that steps taken to contact the first choice have been unsuccessful,

(b) the first choice has not provided to the returning officer, within such period as the returning officer considers reasonable, the statement and certificate referred to in paragraph 3(2), or

(c) the first choice has provided to the returning officer a statement in writing that he or she is not willing or able to be returned as an MEP.

(2) The returning officer must ascertain from the qualifying party's list of candidates the name and address of the person whose name appears next in the qualifying party's list of candidates ("the subsequent choice"), disregarding the name of any person who has died.

(3) The returning officer must take such steps as the returning officer considers reasonable to contact the subsequent choice to ask the question in paragraph 3(2)(a) and (b).

5.

(1) This paragraph applies where-

(a) within such period as the returning officer considers reasonable, the returning officer decides that the steps taken to contact the subsequent choice have been unsuccessful,

(b) the subsequent choice has not provided to the returning officer, within such period as the returning officer considers reasonable, the statement and certificate referred to in paragraph 3(2), or

(c) the subsequent choice has provided to the returning officer a statement in writing that he or she is not willing or able to be returned as an MEP.

(2) The returning officer must repeat the procedure under paragraph 4(2) and (3) until-

(a) the seat is filled, or

(b) there are no more names on the qualifying party's list of candidates.

6. Where-

(a) the returning officer has, in accordance with this Schedule, asked a subsequent choice the questions in paragraphs 3(2)(a) and (b), and

(b) a person who was previously asked those questions ("the prior choice") then provides the statement and certificate referred to in that paragraph,

the statement and certificate provided by the prior choice are to have no effect unless and until any of the circumstances described in paragraph 5(1)(a), (b) or (c) apply in respect of the subsequent choice.

7.

(1) Where, on being asked under paragraphs 3 to 5 by the returning officer, a person whose name appears on the qualifying party's list of candidates provides the statement and certificate referred to in paragraph 3(2)(a) and (b), the returning officer must-

(a) declare in writing that person to be returned as an MEP, and

(b) prepare a statement containing the information specified in sub-paragraph (2).

(2) The statement must specify-

(a) the total number of valid votes (as notified to the returning officer) given to each registered party at the general election of members of the European Parliament held on 4 June 2009, and

(b) the number of votes which each party to which a seat has been allocated had after the application of subsections (5) to (9) of section 2 of the 2002 Act (including that section as applied by section 17(1)) at any stage when a seat was allocated to the party.

(3) The returning officer must-

(a) give public notice of a declaration given and a statement prepared under this paragraph, and

(b) send a copy of the notice and statement to the Secretary of State.

By-election if seat not filled from qualifying party's list of candidates

8.

(1) This paragraph applies where the additional seat cannot be filled in accordance with paragraphs 3 to 7.

(2) The returning officer must notify the Secretary of State that the seat cannot be filled in accordance with paragraphs 3 to 7.
(3) A by-election is to be held to fill the seat.
(4) The by-election is to take place on a day specified by order of the Secretary of State.
(5) The by-election is to be conducted in accordance with regulations made under the 2002 Act.

9.
(1) An order under paragraph 8(4) is to be made by statutory instrument.
(2) A statutory instrument containing such an order is to be laid before Parliament after being made.

GENERAL NOTE

This Schedule is introduced by s.17(2). The Schedule is described as making further provision-after s.17(1)-about the filling of the additional, West Midlands, seat.