The *European Union Bill 2010-11*: Lords Committee and Report Stages

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Section IADS & PCC

The European Union Bill went to the House of Lords on 10 March 2011 (HL Bill 55 2010-2011). It was debated in Committee for eight days and was sent unamended to the Lords as HL Bill 74 2010-2012 for Report Stage on 8, 13 and 15 June. The Lords 3rd Reading of the Bill was on 23 June and it returns to the Commons on 11 July 2011 (HL 209 2010-12).

The Lords amendments:

- reduced the compulsory requirement for referenda on 56 issues to three
- clarified the sovereignty clause
- introduced a 40% turnout threshold for a referendum to be binding
- passed a sunset clause that will require a future Parliament by positive resolution to revive the Bill.

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1 Committee stage

The EU Bill went unamended to the House of Lords on 10 March 2011 as HL Bill 55. It was debated in a Committee of the Whole House for eight days.[1] A number of pro-EU Peers, mainly Lords Hannay, Dykes, Tomlinson and Richard (who had had direct experience of the EU in UKREP, the European Parliament and the Commission respectively), sought to amend the Bill to make it less restrictive and cumbersome with regard to the adoption of certain EU decisions and treaties. A group of eurosceptic Peers, Lords Willoughby de Broke (UKIP), Stoddart of Swindon (Campaign for an Independent Britain) and Pearson of Rannoch (UKIP), tabled a number of probing amendments which provoked debate on issues such as the erosion of UK sovereignty and the UK contribution to the EU budget.

The first day in Committee on 5 April 2011 concerned Clause 1, "restrictions on Treaties and decisions relating to the EU". Lord Kerr of Kinlochard, former UK Permanent Representative to the EU and former head of the Diplomatic Service, attempted to remove from Clause 1 subsection (5) defining an "Article 48(6) decision".[2] It was, he said, intended as a "technical amendment designed to probe why we need to have a Clause 3" (on how the UK will deal with amending the TFEU by the simplified revisions procedure). The amendment was withdrawn, as was an amendment introduced by Baroness Symons of Vernham Dean (Amendment 3) which sought to insert in clause 2 that "Where the treaty is the subject of a challenge in a court of the United Kingdom, it is not to be ratified until the proceedings in court are completed" and another one (Amendment 4) which extended the clause 2

[1] See Bill stages European Union Bill 2010-11

[2] Article 48(6) of the *Treaty on European Union*, as amended by the Lisbon Treaty, provides a simplified revision procedure to change the internal policies and action in Part 3 of the *Treaty on the Functioning of the European Union.* The European Council acts by unanimity and Member States must approve such a decision in accordance with their own constitutional requirements before it can come into force.

referendum condition to cover Gibraltar; British overseas territories and Crown dependencies.

Day 2 of the Committee stage was on 26 April 2011 and concerned Clauses 3 and 4: amendment of the TFEU using the simplified revision procedure and cases where treaty or Article 48(6) decision attracts a referendum. The simplified revision procedure allows the internal policy areas in part 3 of the *Treaty on the Functioning of the European Union* to be amended by a unanimous decision of the European Council, subject to ratification by all Member States "in accordance with their respective constitutional requirements". It is controversial because it does not require the full Intergovernmental Conference (IGC) procedure and is therefore seen by critics as a possible means by which the EU could extend its powers more easily.

Amendments 9, 10, 11 concerning clause 3 sought both to remove and add to the requirements for the approval of an Article 48(6) decision; to extend the remit of the referendum to include Gibraltar, British Overseas Territories and Crown Dependencies (Amendment 12); to change the voting procedures for the referendums and the role of the Electoral Commission (Amendments 13, 14, 15, 16) and to change the list of conditions under which an Article 48(6) referendum would be held (Amendments 17, 18, 19). The four pro-EU Peers sought to amend clause 4 by removing Article 48(6) from the referendum lock provision (Amendment 20, see also Amendment 23 on clause 5).

At the third sitting on 3 May 2011 on Clause 4 (where treaty or Article 48(6) attracts a referendum), the eurosceptic Peer, Lord Stoddart of Swindon, sought in Amendment 20A to make the referendum provision apply to decisions on the accession of a new member State. He was particularly concerned about several poor, aspiring EU members (Albania, Bosnia-Herzegovina, Kosovo, Montenegro and Serbia), and Turkey, whose entry to the EU would geographically turn it, he said, into a "Eurasian union".[3] Lord Pearson of Rannoch was worried about the effects of an influx of new Eastern European EU citizens on the UK labour force, predicting a rise in unemployment. Baroness Brinton assured the sceptics that if a particular candidate country joining were likely to cause serious issues, then a referendum could be called under the provisions of the Bill, but that a specific provision was not needed.

In the ensuing debate there were opposing views as to the merits of further EU enlargement, a matter which has generally speaking not been contentious in the UK Parliament until recently. Some suggested the UK's power of veto would diminish and its weighted voting power in the Council would be weakened by the entry of new members. For EU supporters this was not obvious, and would be a small price to pay for the economic benefits of enlargement and for a "peaceful European Union" (Lord Triesman, c 369). On the veto and QMV issues, the Foreign Office Minister, Lord Howell of Guildford, replied that:

> It does not alter the fact that the United Kingdom will continue to have a veto, as other countries will, unless we surrender positions of unanimity by abandoning our veto. That would be the position. It is perfectly true that there would be very marginal and small changes in the pattern of weighting, but there is no particular reason why they should involve a loss of power or a transfer of competence.[4]

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3 HL Deb 3 May 2011 c 341

4 Ibid c 371

Lord Dykes spoke of Parliament being undermined by "this obsession - this referendumitis" (c 364). The amendment was withdrawn.

Lord Liddle sought to remove the requirement in clause 4(3) for a referendum if the EU were to propose amending the terms of the Treaty under which the so-called "emergency brake" could be used in the areas of social security, judicial cooperation in criminal matters and serious crime with cross-border implications. His argument was that flexibility might be needed so that the UK could "meet new circumstances if necessary" (c 376). After some debate about the need for flexibility for decisions in sensitive areas, the amendment was withdrawn.

Amendment 23ZB moved by Lord Waddington provoked a debate on EU "competence creep" and was then withdrawn. In Amendments 23B and 23C the former Foreign Office minister, Lord Triesman, sought to add to the Article 48(6) decisions that would not require a referendum "provisions that strengthen the effectiveness of the European Union single market" and "provisions that strengthen the effectiveness of the European Union to mitigate the effects of climate change". He withdrew both amendments and Clause 4 was agreed.

On 9 May 2011 the Committee agreed Clause 5 without debate and then, over three days of debate, discussed a series of amendments to Clause 6: "decisions requiring approval by an Act of Parliament and by a referendum". Lord Liddle wanted to provide the Government with more flexibility within the EU Council. He proposed in Amendment 29A to remove the requirement for a referendum if the Government supported an EU decision, and in Amendment 32A, he added text that would allow a Government minister to "indicate support in principle for a decision" in the Council, while making clear that a vote in favour would be subject to parliamentary and public approval.

In Amendment 30 Lord Kerr of Kinlochard sought to give prominence to the requirement for both an Act of Parliament and a referendum before a decision to adopt the euro. This Amendment gave rise to a lengthy debate on some of the 56 areas of EU decision-making on which a mandatory referendum could overturn an Act of Parliament.

On 16 May Lord Liddle's Amendment 39A proposed the establishment of a joint committee of both Houses to decide whether a referendum was required, instead of the Government deciding. He also spoke to Amendment 39B on the establishment of an independent review committee to advise Parliament on matters it regarded as requiring a referendum. Disappointed in the Government's reply to these probing amendments, Lord Liddle withdrew his amendment.

On 17 May there was further debate on clause 6. In Amendment 41, Lord Pearson of Rannoch sought to add to the list of decisions that would require an Act and a referendum "a decision under Article 311 of TEU which would result in the net contribution of the United Kingdom to the European Union's own resources exceeding £10 billion".[5]

Lord Pearson made no bones about the aim of his amendment:

> This amendment gives the British people a referendum on the economic cost of our EU membership. This would discover whether they want to go on paying through the nose to be bossed around by an organisation which is of absolutely no use to them. The amendment is targeted on the net cash we send to

[5] The Own Resources Decision lays down the basic provisions for financing the EU budget. It is adopted unanimously by the EU Council and is 'ratified' by each Member State.

> Brussels every year. It does not address the gross cash we send, which is roughly double, although many Eurosceptics argue that we should concentrate on that gross amount because so much of what Brussels sends back to us of our own money goes on projects designed to enhance the EU's image which we could certainly spend more fruitfully elsewhere.[6]

The debate focused on the cost of the EU and included calls for a cost-benefit analysis of the UK's EU membership, and the amendment was withdrawn. Clause 6 was agreed and the debate turned to amendments to Schedule 1.

Schedule 1 lists the Treaty provisions where amendment removing the need for unanimous decision-making would attract a referendum, was debated. In Amendments 45-47 Lord Goodhart sought to remove from this list a number of Treaty Articles which he considered were not "remotely appropriate for a referendum" because they are either too specialist (e.g. Court of Justice appointments) or already subject to a national veto (e.g. Justice and Home Affairs matters). In his opinion, referendums "should be used only for matters which are of real interest and importance to the community which is called upon to vote. None of the provisions that these two amendments would delete can be said to fall into that category".[7] For Lord Liddle the "essential problem" with Schedule 1 was that it was "the most extraordinary apples-and-pears mix comprising all kinds of different issues which it seeks to subject to precisely the same treatment-the requirement for a referendum" (c 1366). He suggested the Bill needed "a mechanism to measure proportionality in terms of what issues should be put to a referendum" (see previous day's debate). Lord Howell insisted that "The list in Schedule 1 is not there by chance, accident or lottery; it is there because each has been evaluated and covers very sensitive issues where there would be a transfer of power" (c 1369). Lord Howell was more sympathetic to Lord Flight's Amendment 47A which sought to remove from the referendum requirement Article 207(4) decisions on concern certain types of EU trade agreements and require unanimity in the Council. Lord Goodhart withdrew Amendment 45 and Amendments 46 to 47A were not moved. Schedule 1 was agreed.

On 23 May the Lords debated Clause 7, "EU decisions requiring approval by an Act of Parliament". Lord Kerr was worried that the wording of the Bill, in particular the meaning of "or otherwise support", which could mean there was a risk "that the negotiator would be accused of having broken the law by supporting the idea or a particular form of the draft decision".[8] He proposed a form of words that would prevent a minister from taking part in or allowing the final decision in the Council; but would not prevent him/her "taking part in the negotiation of the terms of that decision, or a prior discussion of principle about the possible decision". Baroness Williams of Crosby was also puzzled by the Bill's provision which appeared to mean a UK minister would be "unable to support in discussions in the Council a view that may be in the interests of this country, and that he or she genuinely believes to be in the interests of this country, because he or she is expressing that support before a draft decision has been approved by Parliament" (c 1597). Other Peers suggested clarifying the phrase by adding to "otherwise support" the words "a decision", which would remove the ambiguity surrounding UK approval, without an Act of Parliament, for a draft decision, an idea or a concept under discussion in the Council. This prompted further debate on draftsmanship. Lord Howell conceded "or otherwise support" raised "some difficult questions" (c 1603) and said "Reflections on the words as they appear here will be bound to have cross-

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6 HL Deb 17 May 2011 c 1334
7 HL Deb 17 May 2011 c1359
8 HL Deb 23 May 2011 c 1595

reading repercussions. I will put it like that: that is what I am saying that I will seek to do" (c 1604).

There was also a discussion of flexibility in decisions to allow some Member States to proceed with an action on their own in an "enhanced cooperation" arrangement. Lord Howell dismissed concerns that the Bill's provisions on enhanced cooperation would hold up decision-making because the Bill provision was about removing the veto, not taking that decision (c 1605). Lord Howell agreed to write to Lord Kerr to "try to clarify the Government's understanding of the reasoning and the reason why primary legislation would be justified against his clearly very strongly held view that it would not be justified and might hold things up" (c 1605). He concluded by saying he was sure the requirement for an Act of Parliament for clause 7 decisions "surely can only be a bonus for the public trust and accountability that we are all working towards in this legislation and in our work on the European Union generally" (c 1606).

Clause 7 was agreed and the debate moved on to whether Clause 8, on decisions taken under the contentious "catch-all" Article 352 TFEU, should stand part of the Bill. Apart from another brief mention of the problem with the wording of "or otherwise support", this clause did not provoke much debate and was swiftly agreed.

Clause 9 concerns the form of approval required for decisions in Title V of Part 3 TFEU, the Area of Freedom, Security and Justice, which deals with border checks, asylum, immigration, judicial cooperation in civil and criminal matters, and police cooperation. The UK has a Treaty Protocol opt-in provision for decisions in these areas. The Bill provides that the Government cannot notify the Council of its intention to participate unless parliamentary approval is given by means of a motion in each House to a motion without amendment.

Lord Pearson began by reminding the House of David Cameron's intention expressed in 2009 with regard to Article 3 of the UK opt-in Protocol: "We will want to prevent EU judges gaining steadily greater control over our criminal justice system by negotiating an arrangement which would protect it. That will mean limiting the European Court of Justice's jurisdiction over criminal law" (c 1609). He followed this with a reminder of what the Minister for Europe, David Lidington, said in January 2011: ""The UK has until 31 May 2014 to choose whether to accept the application of the Commission's infringement powers and jurisdiction of the ECJ over this body of instruments or to opt out of them entirely, in which case they will cease to apply to the UK on 1 December 2014", and "Parliament should have the right to give its view on a decision of such importance. The Government therefore commit to a vote in both Houses of Parliament before they make a formal decision on whether they wish to opt out". The ensuing exchange considered the opt-in Protocol and Treaty mechanisms for changing from unanimous voting to voting by QMV (via so-called *passerelles*). Lord Wallace assured the House that Clause 9 gave Parliament control over the two decisions involved in the opt-in process "by requiring a positive vote in both Houses to approve the Government's proposal to opt in to the negotiation, and then parliamentary approval through primary legislation once the UK has opted into the negotiation and that negotiation is complete" (c 1611). There was one further comment from Lord Pearson about the force of a vote in both Houses if, at the end of May 2014, when the UK has to choose whether to accept the application of the Commission's infringement powers and jurisdiction of the ECJ in this area or to opt out of them entirely, there is nothing much left to opt into. Clause 9 was then agreed.

In the debate on Clause 10 (parliamentary control of decisions not requiring approval by Act), Lords Kerr, Bowness (served on the EU Committee of the Regions) and Dykes were concerned about cumbersome delays that might affect the appointment of Advocates-General. There was also a suggestion that "the scope of Clause 7(4) would be more than met if the Government would consider moving some of the less significant items in Clause 7 to the procedures that we are now looking at in Clause 10" (i.e. a motion of both Houses rather than an Act of Parliament) for "the fairly inconsequential and urgent matters that I was talking about under enhanced co-operation" (c 1612). Lord Wallace summarised the aim of clause 10 as:

> ... a proposal for light-touch parliamentary scrutiny of decisions taken in the European Union. The requirement for each House to pass a Motion is either an invitation for each House to accept that this is not significant, or so clearly in Britain's national interest that we should let it go by, or it is an invitation for the scrutiny committees to pay some attention and then bring a Motion to each House.[9]

In Amendment 53 Lord Willoughby de Broke sought to insert after clause 12 (separate questions), a new clause on repeat referendums, stating that "Where a referendum has been held in pursuance of any of section 2, 3 or 6, a further referendum on the same treaty or decision, or treaties or decisions, cannot be held until a period of 5 years has expired". This amendment, which was withdrawn after some debate, aimed to prevent the situation that occurred in Denmark and Ireland, where no-votes in referendums were followed, after some adjustments to the treaties in question, by further referendums which turned out to be positive and therefore authorised ratification.

Clause 13 on the role of Electoral Commission was agreed on 23 May. The pro-EU Lord Radice moved Amendment 55B, which sought to insert a new clause after clause 13, on the promotion of the UK's membership of the EU: "In participating in a campaign for any referendum held in pursuance of section 2, 3 or 6, or in taking other steps required by this Act, Ministers of the Crown must have regard to the desirability of promoting the United Kingdom's membership of the EU". Other Peers found the idea of a legal obligation on the Government to promote the EU a strange concept; one called it "absurd" (c 1630). Lord Howell said the Government "have no difficulty in supporting the main sentiment behind this amendment" (c 1646) but the Amendment was withdrawn.

Finally, on the seventh Committee day, the debate focussed on Clause 18, the status of EU law being dependent on a continuing statutory basis. This clause had been one of the most contentious in the second reading debates in the Commons and the Lords, and was the subject of a European Scrutiny Committee report on the Bill.[10] The debate is around the For some, the clause was too vague – a mere declaration was not enough to guarantee UK sovereignty in the face of potential EU hegemony; for others it was unnecessary as it merely confirms the status quo – that the UK is bound to enact EU law because of the statutes, the 1972 Act in particular, which authorise this. The two amendments in this group sought to clarify clause 18 and the legal process by which EU law can have direct effect[11] in the UK.

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[9] C 1613

[10] "The EU Bill and Parliamentary sovereignty", Tenth Report 2010–11, Volume I: Report, with formal minutes and Volume II Written evidence, 6 December 2010

[11] The principle of direct effect enables individuals to immediately invoke an EU provision before a national or EU. This principle only relates to certain EU acts and is subject to several conditions. It was defined as a principle of EU law by the Court of Justice in the judgment of *Van Gend en Loos*, 5 February 1963.

Amendment 57 moved by Lord Hannay sought to add to Clause 18:

> "( ) 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."

Amendment 59 in the names of Lord Kerr of Kinlochard and Lord Mackay of Clashfern, changed the clause by making explicit that it is by virtue of the *European Communities Act 1972* (ECA) that the UK Parliament has recognition of availability in law of EU legislation.

Lord Howe of Aberavon, who as deputy prime minister in the Thatcher government resigned after taking a principled position on the EU in the face of what he described as "conflicts of loyalties" and a UK government "fearfully and negatively detached",[12] pointed out that the direct effect principle had been well known long before the UK joined the EEC. He also underlined that the 1972 Act provided for certain types of EU law to become UK law "without further enactment", i.e. have direct effect. Lord Howe thought "this central provision was absolutely fundamental. It has been fundamental from the outset and has been part of our membership of the European Community. It is not a burden upon us; it is beneficial to us but within the framework of the European Union" (c 1653). Lord Howe called for the elimination of Clause 18 from the Bill (Armstrong-Howe amendment), because it was, he believed, unnecessary, but of the two others in this group, he preferred the Mackay/Kerr amendment "because it recites the foundation and makes it clear that we are merely endorsing for the sake of the future that which we can rehearse from the past".

Lord Stoddart opposed the clause and the amendments because he thought the clause would undermine the indivisible concept that one Parliament cannot bind its successor by qualifying it in the manner of the declaratory clause 18. Lord Pearson thought Clause 18 as it stood was better than nothing (c 1663).

For the Government, Lord Howell thought the wording of clause 18 "add to the precision of the legislation rather than to the vagueness of it", and:

> It confirms that the second stage of the dualist system, whereby the rights and obligations taken on by the UK are given effect in UK law and can therefore be enforced through the UK courts, must always be done by an Act of Parliament. Any suggestion that EU law constitutes a new, higher autonomous legal order and has or can develop into part of the UK's legal system independent of statute are thereby refuted.[13]

Lord Howell insisted "there is no way in which Clause 18 alters the commitment or position of the primacy of European Union law, which in turn rests as it always must on the will and Act of Parliament supported by the courts" and asked the Peers to withdraw the amendments.

[12] HC Deb 13 November 1990

[13] HL Deb 23 May 2011 c 1666

On the last (8th) day in Committee, the Lords debated Amendment 61 moved by Lord Taverne, which sought to introduce a sunset clause after clause 21 to the effect that Part 1 and Schedule 1 would "expire on the day on which the Parliament in which this Act is passed dissolves" (c 1825). Lord Taverne considered the argument that "the existence of the numerous referendum blocks will restore trust and will reconnect and re-engage the British people because it will assure them that, in future, they will have a say" was "a preposterous argument" (c 1826). Lord Richard set out three reasons why there should be a sunset clause in the Bill:

> ... my first point is that the controversy surrounding the Bill is one of the issues to justify a sunset clause and reconsideration by the next Government.
>
> Secondly, not only has it been controversial; it is distinctly novel. However one looks at the Bill, the idea that you can import into the British constitution a requirement for a mandatory referenda in 56 different cases-in a way that is perceived not to be novel but almost revolutionary, if I may say so-is, frankly, beyond me. If it were to be introduced, the British constitution would be turned upside down. If we had referenda of this type and on this scale, in these numbers, it would transform the whole parliamentary processes of our democracy.[14]

2 Report Stage

The Bill was considered at Report Stage on 8, 13 and 15 June.

2.1 Report stage, 8 June 2011

Report stage day 1

Clause 1 : Interpretation of Part 1
Amendment 1
Amendment 2
Clause 2 : Treaties amending or replacing TEU or TFEU
Amendment 4
Amendment 5
Clause 2: Treaties amending or replacing TEU or TFEU
Amendment 5A
Clause 3 : Amendment of TFEU under simplified revision procedure
Amendment 6
Amendment 7
Amendment 8
Amendment 9

On the first day, Clauses 1 – 3 of the Bill were debated.

Amendments 2, 4, 7, 8 were agreed without a vote.

The Lords agreed by 221 votes to 216 to Amendment 5.

Amendment 5A was defeated by 208 votes to 158.

Amendment 2 moved by Lord Howell of Guildford:

> Clause 1, page 2, line 4, leave out from "Crown" to end of line 6 and insert-

[14] HL Deb 25 May 2011, c 1830

> "(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."

The effect of this amendment would be to clarify the actions of the Government in the Council, particularly when unanimity is required for the adoption of a decision. The default voting procedure under the Lisbon Treaty is qualified majority voting (QMV), but unanimity is still required for a few decisions in the Council and for the majority of decisions in the European Council (meeting of heads of state or government). The Amendment was agreed without a vote.

Clause 2 of the Bill provides for a national referendum to be held before the Government can agree to any change to the EU Treaties that transfers power or internal policy areas from the UK to the EU.

Amendment 4 moved by Lord Wallace of Saltaire

> Clause 2, page 2, line 18, after "treaty" insert "also".

The "also" applies to a referendum being held in the UK and Gibraltar if the treaty in question affects Gibraltar *as well as* the UK, rather than either the UK or Gibraltar, which the present wording implies. The Amendment makes clear that the UK would not be required to hold a referendum if a Treaty change was proposed for Gibraltar alone (c 280). The Amendment was agreed without a vote.

Amendment 5 (40% referendum threshold)

Library Standard Note 2809 *Thresholds in Referendums* gives background to previous attempts to introduce a minimum turnout, or threshold to a referendum to ensure that the results are not binding unless a certain proportion of the electorate vote.

Amendment 5 moved by Lord Williamson of Horton sets a turnout threshold of 40% of the electorate to ratify Treaty changes by referendum and sets out a process for ratifying Treaty changes in Parliament when fewer than 40% of the electorate votes. On introducing the amendment, Lord Williamson stated that:

> The effect of Amendment 5 is quite simple. The Government have proposed that, if, as a consequence of the referendum lock set up in the Bill, a national referendum were to be held on any of the about 50 cases covered by the Bill, that referendum result would be mandatory and Parliament would have no role. This amendment would not change that situation if at least 40 per cent of the persons entitled to vote had voted in the referendum. However, if there were a poor turnout and a smaller percentage of the electorate voted, the result would remain valid but would have to be confirmed by a Motion in each House of Parliament. This will give Parliament its proper representative role if there were, for example, a derisory turnout.

Unless, therefore, a sunset clause is inserted - the subject of later amendments - or, if it becomes an Act, a future Parliament repeals the Bill, the legislation has the potential to require national referendums for many years ahead[15].

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[15] HL Deb 8 Jun 2011, c282

On Amendment 5, Lord Howell stated:

> If the threshold is not met, regardless of the result, hey presto, the referendum would become advisory and not mandatory. This proposition has a whole string of disadvantages, which are not all obvious but become clear if you think about them. First, as many of your noble Lords have pointed out, instead of it being mandatory on the Government, it leaves the British people in real doubt about what the effect of their vote will be. The noble Lord, Lord Triesman, is incidentally entirely wrong that it will be mandatory on Parliaments; it will be mandatory on Governments, though it is true that Governments often, but not always, control Parliaments. However, this goes by the board if we pass the amendment. It will be the end of the British people's mandatory certainty and they will be back where they started, passing the ball back to Parliament and the party and Government controlling parliament. This is where the record has, frankly, not been brilliant or reassuring.

Lord Williamson said in reply:

> What we are discussing is what sort of referendum regime we want to build into our constitution for the medium term and what role we think Parliament should play in that. I think Parliament should play some part, particularly in those cases where the British public has shown a complete lack of interest in-or even their disagreement or contempt for-the Government's attempt to hold a referendum by voting in negligible numbers. I think it is perfectly reasonable, in those circumstances, for Parliament to take responsibility. That is the basic approach and I stand by it.[16]

Amendment 5 was agreed in the Lords 221 to 216. The Government is likely to attempt to overturn this amendment when the Bill returns to the Commons.

Amendment 5A moved by Lord Liddle

The Lords voted by 208 votes to 158 against Amendment 5A, which sought to stop referendums from being held in accordance with a process set out in a consequential amendment (Amendment 5B). Lord Liddle explained: “If you are seriously committed to Britain's participation in the European Union, you want a British Government to be able to respond flexibly to events and to be a good partner to our partners in the Union. We cannot completely tie our hands in advance when we do not know the future-as the example of the European stability mechanism shows”.[17]

Amendment 6 moved by Lord Triesman

> Clause 3, page 2, line 32, after second "condition" insert "the urgency condition"

This amendment sought to provide another condition, an “urgency condition”, to restrain the Government from confirming approval of a decision made under the simplified revision procedure. Lord Triesman described the urgency condition as “where an amendment under the simplified revision procedure is considered to be urgent and in the national interest”.[18] The aim of the amendment would be “to take account of circumstances where the Government conclude that it is in the interests of the people of the United Kingdom to act

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16 HL Deb 8 Jun 2011, c307

17 Ibid c 311

18 See amendment 10, Marshalled list of amendments to be moved on report, marshalled in accordance with the Order of 6th June 2011

with greater dispatch than would occur if the whole of the processes set out in other parts of this Bill were gone through”.[19] The amendment was withdrawn.

Amendment 7 moved by Lord Howell
See note on Amendment 4; agreed without division:

> Clause 3, page 2, line 38, after "decision" insert "also"

Amendment 9 moved by Lord Liddle

> Clause 3, page 3, line 4, leave out "(1)(i) or (j)" and insert "(1)"

This amendment concerned the “significance condition”, which is that the UK Act providing for the approval of the EU decision states that the effect of the provision in relation to the UK is not significant. Under clause 5(4) of the Bill the minister must lay a statement before Parliament indicating whether, in his/her opinion, a decision under clause 4(1)(i) or (j)[20] is significant. In these cases no referendum, but only an Act of Parliament, would be required. The amendment seeks to remove the application of this condition to just the two Articles and make it applicable to the whole of clause 4(1). Lord Liddle said of his amendment: “It is designed to extend the scope of the significance clause in order precisely to give our Government, because we want to support them and make them effective in the European Union, the flexibility to cope with the unforeseen”.[21] The amendment was withdrawn.

2.2 Report stage, 13 June

Report stage day 2

Clause 4 : Cases where treaty or Article 48(6) decision attracts a referendum
Clause 6 : Decisions requiring approval by Act and by referendum
Amendment 14
Amendments 15 to 21
Amendment 22
Schedule 1 : Treaty provisions where amendment removing need for unanimity, consensus or common accord would attract referendum
Amendment 22A
Clause 7 : Decisions requiring approval by Act
Clause 8 : Decisions under Article 352 of TFEU
Clause 9 : Approval required in connection with Title V of Part 3 of TFEU
Clause 10 : Parliamentary control of certain decisions not requiring approval by Act
Amendment 30
Amendment 31

Amendments covered Clauses 4 – 10 and Schedule 1.

Amendments 15 to 21 were agreed.

Amendment 22 was disagreed.

Amendments 11, 12, 12A, 13, 23, 24, 25, 26, 27, 28 and 29 were not moved.

Amendments 22A, 30, 31 were withdrawn.

Amendments 15 to 21

[19] HL Deb 8 June 2011 c 341
[20] These Articles concern decisions to confer on an EU institution or body a power to require the UK to act in a particular way, or to impose sanctions on the UK for failing to act in such a way.
[21] HL Deb 8 June 2011 c 352

Amendments 15 - 21, moved by Lord Hannay of Chiswick, were all agreed without a vote; they concerned Clause 6, "decisions requiring approval by Act and by referendum". The amendments concerned decisions on a single integrated military force, the euro and the Schengen protocol.

> 15: Clause 6, page 4, line 38, after "defence" insert "that permits a single, integrated military force"
>
> 16: Clause 6, page 4, line 41, at end insert-
>
> "( ) 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 which is not covered by subsection (2), a Minister of the Crown may not notify the European Council that the decision is adopted by the United Kingdom unless the decision is approved by Act of Parliament."
>
> 17: Clause 6, page 5, line 4, leave out from "Parliament" to end of line 5
>
> 18: Clause 6, page 5, line 5, at end insert-
>
> "( ) A Minister of the Crown may not vote in favour of or otherwise permit a decision under Article 140(3) of TFEU which would make the euro the currency of the United Kingdom unless-
>
> (a) the draft decision is approved by Act of Parliament, and
>
> (b) the referendum condition is met."
>
> 19: Clause 6, page 5, line 5, at end insert-
>
> "(3A) A Minister of the Crown may not vote in favour of or otherwise permit a decision under Article 4 of the Schengen Protocol that removes any border control of the United Kingdom unless-
>
> (a) the draft decision is approved by Act of Parliament, and
>
> (b) the referendum condition is met.
>
> (3B) In subsection (3A) "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."
>
> 20: Clause 6, page 5, line 22, leave out paragraph (e)
>
> 21: Clause 6, page 5, leave out lines 45 to 49

Amendment 14 (decisions subject to referendum)

Amendment 14 sought to remove the referendum condition from Clause 6 with respect to certain decisions.

Lord Hannay believed "that the long list of potential referendums is excessive and disproportionate, that it does real damage to the structure of representative parliamentary democracy and that it needs to be shortened" (c 552). The aim of the amendments was to "reduce the number of areas that would be subject to a referendum mandatorily if they were pursued separately, one by one".

Lord Hannay said of the grouped amendments:

> The broad case for this group of amendments remains that which was referred to by many noble Lords at Second Reading and in our debates in Committee: it is the belief that the long list of potential referendums is excessive and disproportionate, that it does real damage to the structure of representative parliamentary democracy and that it needs to be shortened. I do not know how on earth the Government arrived at a list as long as 56.[22]

He proposed amendments that would limit the referendum requirement to the following circumstances:

- The UK joining the euro
- The creation of a "single, integrated military force" in the EU
- Changes to border controls by removing the UK opt-out from the Schengen Agreement

Lord Hannay's amendments were co-sponsored by the Liberal Democrat QC, Lord Goodhart, the Conservative former European Commissioner, Lord Tugendhat, and the Labour front bench. Lord Hannay agreed with Lord Howell that the other areas in Clause 6 (apart from the euro, Schengen or military cooperation) might well arise in the context of Treaty changes as a package of changes, rather than as individual amendments and tackled the issue of whether there would be a referendum on a package containing only one of the required areas:

> In the circumstances where a package was taking shape and being supported in principle by a British Government, and where one or other of these issues which we are suggesting should not be the subject of a separate referendum requirement were part of that package, it would be caught by Clause 2, which we are not suggesting should be changed. If one of these issues, such as the question of the public prosecutor or all the other list of issues which it is suggested should be dropped from being dealt with individually as a referendum, were to become part of a package, that would not then mean that it was exempt from a referendum-quite the contrary. Because it was part of a package being taken forward under the normal treaty revision process, as it is called, it would be caught by Clause 2. The exemption from a referendum is merely if it is dealt with individually.

His second point was that the proposed amendments did not mean the requirement for an Act of Parliament would disappear but that Parliament's role would still be strengthened by having to pass primary legislation or reject a proposed Clause 6 change.

> I think that is pretty important. Those who move these amendments argue that we are strengthening Parliament's powers over the handling of changes to the treaty, not weakening Parliament's powers-as the Government would-by giving referendums the possibility of overruling a view reached not only by the British Government but by both Houses of Parliament. Frankly, that is a pretty radical constitutional innovation. The amendments move in the opposite direction, towards a strengthening not a weakening of the powers of both Houses.

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22 HL Deb 13 June 2011 c 552

His third point was that “nothing in these amendments cuts across or undermines any commitments by any of the major parties in the last election or those contained in the coalition agreement”, but that they were “trying to introduce a bit of the proportionality” and do something to “limit the damage to the system of representative parliamentary democracy-which all of us, not only those who tabled these amendments, hold dear-if this Bill passed unamended”.[23]

Lord Stoddart thought that watering down the referendum requirement defeated the object of the Bill: “It is because the people of this country have felt let down by the Government, and indeed by Parliament, for not involving them in very important decisions which affect their lives and the future of our country” (c 569).

Lord Howell insisted the Clause 6 provisions were “directly wired into and relate back to the major red-line issues that concern the public and the nation” (c 585). He dismissed the amendments as "a thoroughly retrograde step, that would serve to undermine the direct and frank and honest commitment that we wish to make to the British people".

Amendment 14 was agreed by 213 votes to 209.

Amendment 22 moved by Lord Kerr of Kinlochard

This Amendment sought to introduce a new clause requiring a referendum to be held before the UK could adopt the euro:

> After Clause 6, insert the following new Clause-
>
> "Decision to join the euro
>
> (1) No notification shall be given to the Council of the European Communities that the United Kingdom intends to move to the third stage of economic and monetary union (in accordance with the Protocol on certain provisions relating to the United Kingdom adopted at Maastricht on 7th February 1992) unless-
>
> (a) the notification is approved by Act of Parliament, and
>
> (b) the referendum condition is met.

The amendment was defeated by 188 votes to 187.

The following amendments were withdrawn

Amendment 22A moved by Lord Davies of Stamford

This amendment concerned Schedule 1, the list of Treaty Articles where amendment removing the need for unanimous voting or consensus in the Council would attract a referendum. Lord Davies sought to remove from the list Article 346(2) on changes to the list of military products exempt from internal market provisions. He said the Bill provision: “does exactly the opposite of what I suggest is the obvious thing to be done in the national interest. It makes it impossible for us to agree to, let alone to propose, QMV to decide the future of that derogation from the single market without a referendum. We are putting a ball around

[23] HL Deb 13 June 2011 cc 554-5

our own necks, we are shooting ourselves in the foot, with that provision. It makes no sense at all" (c 623).
Amendment 30 moved by Lord Willoughby de Broke

Lord Willoughby's new clause sought to prevent the holding of repeat referendums on the same matter until a three-year period had expired.

Amendment 31 moved by Lord Triesman
This amendment sought to insert a new clause on promoting the UK's membership of the EU.

2.3 Report stage, 15 June 2011

On the final day of report stage the House of Lords defeated the Government twice, voting for two amendments on new clauses.

Report stage day 3
Clause 18: Status of EU law dependent on continuing statutory basis
Amendment 33
Amendment 35

Amendments 32 – 36 concerned clauses 18 (the 'sovereignty clause') to 22.

Three amendments from pro-EU Peers that sought to strengthen the confirmation of the relationship between EU and UK law were not moved.

Amendment 35 (sunset clause)

Lord Kerr of Kinlochard introduced amendment 35. This was drafted in the form of a sunset clause and sunrise clause, and now forms clause 22 of the bill as amended in the Lords. This means that Part 1 and Schedule 1 would expire on the dissolution of the Parliament in which the Bill becomes law and would require an affirmative order, approval by vote in the both Lords and the Commons, to come back into effect in subsequent Parliaments.

Lord Kerr introduced his amendment as a Hemingway amendment and set out the reasons why the clause was necessary:

> **Lord Kerr of Kinlochard:** My Lords, this is the Hemingway amendment-because the sun also rises. This amendment is really rather important. I wish to speak for it on constitutional grounds and on grounds of foreign policy. I shall make an argument about parliamentary sovereignty, and an argument about the national interest.
>
> I begin with the constitutional argument. I see two of them. First, the provisions of this Bill are all otiose in this Parliament. The coalition has made it clear that there will in this Parliament be no treaty changes, no transfers of power and no extensions of qualified majority voting. Therefore, there will be no referenda and none of the matters which have engaged us through all these days and nights are of any relevance to this Parliament; they apply only in the next Parliament. I cannot think of any previous constitutional Bill which has had that effect. I can think of no precedent for a Bill that is designed solely to influence future Parliaments. Of course, the letter of the doctrine that one Parliament cannot bind its successor will remain the case, because a new Government could repeal the Act. In my contention, however, the spirit of the doctrine would be much better honoured if there were a requirement for an affirmative decision as a first act of each new Parliament that the provisions of this Act should continue.
>
> My second constitutional argument concerns the fact that the referenda called for in the Bill would in every case be asking-whatever the substance of the issue -the

> question, "Do you wish to overrule your Government and your Parliament?". Before the referendum stage was reached the Government must by definition be in favour of the measure, because they all require unanimity in Brussels and both Houses of Parliament would have voted for the measure before the referendum question. The result of the referendum, if it was no, would be that an Act of Parliament was thereby revoked. I can think of no precedent for that. It has not applied to any past referendum in this country. In my contention, a referendum called for in this Bill is a direct undercutting of parliamentary sovereignty.[24]

He also alluded to foreign policy consequences:

> My fear is that other member states, seeing how much concrete we have poured over our feet, will be tempted or forced to bypass our perceived rigidity by excluding us from the debate and proceeding by what is known as "enhanced co-operation" or acting outside the treaties without us.[25]

There followed a lively debate on the merits or otherwise of a sunset clause which might create uncertainty for other EU states at the start of a new Parliament. Several peers expressed their frustration at the unreality of the Bill's provisions, and others that the sunset clause was inappropriate for this type of legislation.

Amendment 35 was agreed to by 209 votes to 203 – a defeat for the Government by six votes.

Amendment 33 (status of EU law)

Lord MacKay of Clashfern moved Amendment 33, to replace Clause 18, which would make the "Status of EU law dependent on continuing statutory basis". He found the present Bill wording ambiguous, and wanted to make very clear that although the Bill referred to UK membership being dependent on a UK statutory basis, it was specifically the *European Communities Act 1972* that established the status of EU law in UK law, and that EU law is "here by virtue of the sovereignty of our Parliament in enacting the 1972 Act".[26] Lord Pannick supported the amendment, because it "removes the obscurity and the uncertainty in Clause 18"[27] and was of the opinion that "If Clause 18 has any purpose at all it is to emphasise that just as Parliament created this status for EU law by the 1972 Act-and it was only by the 1972 Act-so Parliament may take it away".[28] Both he and Lord Kerr (as well as several experts who gave evidence to the European Scrutiny Committee which discussed this clause) had doubts as to whether clause 18 were needed at all, as there is no "real doubt" on the subject.

Moving the amendment Lord Mackay explained it was a 'declaratory measure' that sought to 'make it plain' that EU law in the UK did not derive from Treaties alone: 'It is useful to make clear that in our country the law of the European Union is here by virtue of the sovereignty of our Parliament in enacting the 1972 [European Communities] Act,' he said. 'To water it down or make it ambiguous by referring to "an Act" is unfortunate.' Seeking to test the opinion of the House, Lord Mackay explained:

[24] HL Deb 15 June 2011 c809
[25] HL Deb 15 June 2011 c811
[26] Ibid c 791
[27] Ibid c 793
[28] Ibid c 794

> I suggest that the European Community treaty of itself would not be meaningful in our statutes until it was given effect by the 1972 Act; and when the 1972 Act ceases to operate, that goes along with it.[29]

The House of Lords agreed to Amendment 33 by 242 votes to 209, defeating the Government by 33 votes.[30]

3 Third reading

At Lords third reading on 23 June 2011, Lord Lea of Crondall asked for a further amendment to clause 18, which listed all the post-1972 Treaty amendments, "which are the basis on which Parliament here in Westminster has enacted laws to give effect to EU legislation in this country".[31] Lord Howell was positive about the "excellent amendment", not least because it gave him the opportunity to affirm:

> ... that this Government strongly believe that it is absolutely essential that we continue to respect the rights and obligations that we have as a member state of the European Union under the treaties to which we have committed ourselves. This is because we recognise the benefits of EU membership. This Bill does not do anything to alter our current active engagement within the existing powers and competences of the EU.

Baroness Quin supported Lords Jopling, Deben and Brittan in opposing a move "towards this plebiscitary form of democracy, rather than a representative one" (c 1395).

Summing up, Lord Howell said the Bill was "part of a jigsaw of processes to reinforce the relationship between the general public and the entire European Union project in a thoroughly positive way" (c 1398).

Withdrawing his amendment, Lord Lea said that based on Lord Howell's words, "we will not have a blinkered or blindfolded ping-pong on the basis of asserting the primacy of the House of Commons" (c 1400).

Speaking to the motion that the Bill do now pass, Lord Pearson regretted, as he had done at second reading, that certain Peers who had spoken in debates or on amendments had not declared that they were in receipt of an EU pension. The comment was directed at the authors of three amendments which "together emasculate it entirely and deny the British people any chance of a meaningful referendum on our relationship with the failing project of European integration, which they do not like". Lord Pearson called on the Privileges Committee to revisit "this subject before the Bill returns from the Commons and does the obvious thing" (c 1401).

Lord Howell of Guildford concluded by noting that Peers had made some amendments the Government would be "unable to support", but which he did not doubt the Commons would consider carefully. He thought that "overall the thrust, aims and intentions of this Bill are clear, despite some of the amendments that will obviously water it down" and was grateful to the House for its "detailed scrutiny of this complex legislation". The Bill was passed and returned to the Commons with amendments.

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[29] HL Deb 15 Jun 2011 c805
[30] HL Deb 15 June 2011 c806
[31] HL Deb 23 June 2011 c 1393

4 Documentation and further reading

- House of Lords Select Committee on the Constitution, 13th Report 2010–11 "European Union Bill", 17 March 2011, HL Paper 121. The Committee concluded that the EU Bill represents a radical step-change for the UK in adopting referendum provisions on such a large scale. It found that this was inconsistent with the Government's statement that referendums are most appropriately used to decide fundamental constitutional issues.

- All Bill documents on Parliamentary website

- Explanatory Notes on Lords Amendments to the European Union Bill, as brought from the House of Lords on 23 June 2011

- European Scrutiny Committee, "The EU Bill and Parliamentary sovereignty", Tenth Report 2010–11, Volume I: Report, with formal minutes and Volume II Written evidence, 6 December 2010

- ePolitix, "EU Bill Clears Lords Stages",24 June 2011

- The Public Whip, Report stage votes on amendments

- Electoral Commission briefings on European Union Bill:

  - Briefing to MPs on the Second Reading in the House of Lords of the European Union Bill (22 March 2011) (PDF)
  - Briefing to MPs on the Committee Stage in the House of Lords of the European Union Bill - Day 1 (5 April 2011) (PDF)
  - Briefing on House of Lords Report stage of the European Union Bill (15 June 2011) (PDF)
  - Briefing to MPs on the Third Reading in the House of Lords of the European Union Bill (23 June 2011) (PDF)