

EUROPEAN UNION BILL

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes relate to the European Union Bill as introduced in the House of Commons on 11 November 2010. They have been prepared by the Foreign and Commonwealth Office in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.

2. The Notes need to be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. Where a clause or part of a clause does not require any explanation or comment, none is given.

OVERVIEW

3. The European Union Bill has 3 Parts and 2 Schedules. A short summary of each of the Parts is provided below. This is followed by a section setting out background on the Bill as a whole and then on Parts 1 and 2 in particular. Commentary is provided on individual clauses and Schedules.

SUMMARY

4. A summary of the Bill is set out below.

Part 1: Restrictions on Treaties and Decisions Relating to EU

5. Part 1 of the Bill provides that, in future, a referendum would be held before the UK could agree to an amendment of the Treaty on the European Union ('TEU') or of the Treaty on the Functioning of the European Union ('TFEU'); or before the UK could agree to certain decisions already provided for by TEU and TFEU (also collectively referred to as 'the Treaties' in these Notes) if these would transfer power

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or competence from the UK to the EU. Part 1 also makes provision for the persons who would be entitled to vote in a referendum held as a result of this Bill; provides that a separate question would need to be framed for each issue requiring a referendum; and provides that the Electoral Commission will pursue additional awareness-raising activities in relation to any future referendum held in accordance with this Bill.

6. In addition, Part 1 provides that an Act of Parliament would be required before the UK could agree to a number of other specified decisions provided for in TEU and TFEU, either in the European Council or in the Council of the European Union (referred to as 'the Council' in the Bill and in these Notes); and that certain other decisions would require a motion to be agreed without amendment in both Houses of Parliament before the UK could vote in favour of them in either the European Council or the Council.

Part 2: Implementation of Transitional Protocol on MEPs

7. Part 2 of the Bill provides for the Parliamentary approval, for the purposes of section 5 of the European Union (Amendment) Act 2008, of the Transitional Protocol on MEPs agreed at an Inter-Governmental Conference held on 23 June 2010. This approval would enable the UK to ratify this Protocol. Part 2 also provides for the process for returning the additional MEP gained by the UK as a result of the Protocol.

Part 3: General

8. *Clause 18* of the Bill places on a statutory footing the common law principle of Parliamentary sovereignty with respect to directly applicable or directly effective EU law. The clause provides that directly applicable and directly effective EU law is given effect in the law of the UK only by virtue of an Act of Parliament.

9. Part 3 of the Bill also contains provisions dealing with the territorial extent of the Bill and its commencement.

BACKGROUND

General

10. The provisions contained in the European Union Bill give effect to commitments contained in *The Coalition: Our Programme for Government*. This document can be found online at the following web address:

http://www.cabinetoffice.gov.uk/media/409088/pfg_coalition.pdf

11. This document set out the following Government commitments:

“We will ensure that there is no further transfer of sovereignty or powers [from the UK to the EU] over the course of the next Parliament... Any proposed future treaty that transferred areas of power, or competences, would be subject to a referendum on that treaty – a ‘referendum lock’... The use of any *passerelle* would require primary legislation.”

“We will examine the case for a United Kingdom Sovereignty Bill to make it clear that ultimate authority remains with Parliament.”

12. The Minister for Europe made a statement in the House of Commons on 13 September 2010 (HC Deb, cols 31–33WS) setting out that these commitments would be provided for by this Bill, as would the necessary Parliamentary approval of the Transitional Protocol on MEPs. The Minister for Europe also stated that in specified cases where the existing Treaties provide for decisions that would transfer power or competence from the UK to the EU, these decisions would also be subject to a referendum. This statement was repeated by Lord Howell of Guildford in the House of Lords on 27 September 2010 (HL Deb, cols 170-172WS).

13. Lord Howell of Guildford made a statement in the House of Lords on 6 October 2010 (HL Deb, cols 5–6WS) setting out that the Government had examined the case for a statutory provision on Parliamentary sovereignty, and had decided to include such a provision in the European Union Bill. This statement was repeated by the Minister for Europe in the House of Commons on 11 October 2010 (HC Deb, cols 3-4WS).

Part 1: Restrictions on Treaties and Decisions Relating to EU

14. The European Union (Amendment) Act 2008 (‘the 2008 Act’), which provides Parliamentary approval for the ratification of the Treaty of Lisbon, requires that any amendment to the Treaties of the European Union (TEU, TFEU, and the Treaty Establishing the European Atomic Energy Community) should be approved by an Act of Parliament before the UK can ‘ratify’ (that is, finally approve) the amendment concerned. Part 1 of this Bill provides that an Act of Parliament would continue to be required in the case of any treaty which sought to amend or replace TEU or TFEU, but would in addition require the holding of a referendum if a proposed amendment of TEU or TFEU (including the replacement of TEU or TFEU) sought to transfer power or competence from the UK to the EU.

15. A referendum would only be required if the Government of the day wanted to support the change to the TEU or TFEU in question. If the Government of the day did not want to support the change in question, it would block the proposal at the negotiations stage. As all of the types of treaty change that are to be subject to the referendum provisions will have to be agreed by unanimity at the EU level, the proposal could not form part of a new treaty or a treaty change - and there would then be no need for a referendum - if the Government did not support such a change.

16. Part 1 deals with the situation where a transfer of competence or power from the UK to the EU is proposed in the future through the use of one of the following mechanisms providing for a treaty change:

- a) Use of the Ordinary Revision Procedure set down in Article 48(1) to (5) TEU, which would make a formal amendment to TEU or TFEU following consideration of the proposed changes by a Convention (composed of representatives of national Parliaments, of the Heads of State or Government of the Member States, of the European Parliament and of the European Commission) and/or agreement by an Inter-Governmental Conference (IGC) of representatives of the governments of the Member States. Formal approval, or 'ratification', of the changes is then required by all Member States in accordance with their constitutional requirements before the proposed amendment(s) to the Treaties can enter into force.
- b) Use of part of the Simplified Revision Procedure set down in Article 48(6) TEU. The Simplified Revision Procedure allows the European Council to amend provisions on EU policies and internal actions as set out in Part Three of TFEU without using the formal treaty change procedure provided for in Article 48(1) to (5) TEU, but without increasing the competence of the EU.

17. Article 1 of TFEU provides that TFEU 'determines the areas of, delimitation of, and arrangements for exercising [the EU's] competences' in respect of TEU and TFEU. 'Competence' is conferred on the European Union by the Member States of the EU, and in essence specifies how and to what extent the EU can act in a given area. The EU is bound to act within the confines of the Treaties, as only the Treaties provide the EU with the 'competence' to act in a given area.

18. The UK has previously agreed to confer competence on the EU in a number of areas specified in TEU and TFEU by approving the Treaty of Lisbon, which amended the EU Treaties. The UK agreed to confer on the EEC the competence to act in ways specified in the Treaties at that time, when the UK joined in 1973. The statutory provision which permitted the UK to confer competence on the EEC at that time is the European Communities Act 1972.

19. Articles 2 to 6 of TFEU set out in more detail the categories and areas of EU competence. The EU's competence can be expressed in the following five ways:

- a) Exclusive competence, where only the EU can act. The areas concerned are set out in Article 3 TFEU (examples include the customs union and competition rules).
- b) Supporting competence, where the EU can carry out actions to 'support, coordinate or supplement' the actions of Member States in certain specific areas, on the condition that the EU action does not supersede the Member States' competence in those areas. The areas concerned are set out in Article 6 TFEU (examples include the protection and improvement of human health; culture and education).

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- c) Shared competence, where the EU can legislate in a specific area set out in the Treaties, but where if the EU has not yet acted in a specific area or has stopped acting in that area, the Member States can legislate accordingly. Under Article 4 TFEU, shared competence applies in those areas set out in the Treaties but which are not specified in Articles 3 or 6 TFEU (exclusive or supporting competence).
 - d) The Member States shall also coordinate their economic, employment and social policies within the EU; and the EU can adopt measures and arrangements in order to achieve this end. Specific provisions apply to those Member States who use the European single currency (the Euro).
 - e) The EU also has competence to define and implement a common foreign and security policy, including the ‘progressive framing of a common defence policy’, though this remains largely subject to the unanimous approval of Member State governments in the Council.
20. Unlike ‘competence’, which is described in detail in the Treaties as summarised above, the term ‘power’ is not defined in the Treaties. Part 1 of the Bill stipulates that a transfer of power could take place in three ways:
- a) First, through a move in specified areas set out in Schedule 1 of the Bill to permit qualified majority voting in the European Council or Council in place of unanimity, consensus or common accord. This means that a referendum is needed only before the UK can agree to give up its ability to block or veto legislative proposals made under any of the specified Articles. Mere use of these Articles as a legal basis for proposals for action will not require a referendum.
 - b) Second, through the conferring of a power on an EU institution or body to impose a requirement or obligation on the UK.
 - c) Third, through the conferring of a new or extended power on an EU institution or body to impose sanctions on the UK.
21. As the majority of the changes covered under *clauses 2 to 6* will require the exercise of judgement as to whether a transfer of power or competence is proposed, in those cases the Bill requires that a Minister must make a statement giving an opinion as to whether or not the Treaty or Article 48(6) decision meets the criteria for a referendum, and must give reasons. As with all Ministerial decisions, it would be possible for a member of the public to challenge the decisions of the Minister in such a statement.
22. *Clause 6* of the Bill provides that a number of other decisions, which are considered to transfer competence or power from the UK to the EU in every case, require approval by Act of Parliament and a referendum (but no Ministerial statement is required). When one of these decisions is taken, a referendum will always be

required. These decisions can be classified into three categories:

- a) Use of part of the Treaties' Simplified Revision Procedure set down in Article 48(7) TEU to permit qualified majority voting in the European Council or Council in place of unanimity, consensus or common accord in specified areas in the Treaties. The European Council can use this mechanism to abolish vetoes and move to majority voting in relevant articles in Title V of TEU (which concerns general provisions on the EU's external action and specific provisions on the EU's common foreign and security policy) or the whole of TFEU, except any vetoes with military or defence implications.
- b) Decisions under particular Articles in the existing Treaties which are highly significant for the UK, such as a proposal to join the Euro or give up the UK's border controls and join the Schengen area (the area within which free movement is permitted across internal country borders).
- c) Decisions under certain Articles in the Treaties which are sometimes referred to as 'passerelles' or 'ratchet clauses', which transfer an area of competence or power from the UK to the EU. *Clause 6* lists seven of these that allow for the removal of the UK's ability to veto a decision in an area specified in *Schedule 1* of the Bill, and therefore need to be subject to a referendum for consistency. The other three are one-way, irreversible decisions that would transfer competence from the UK to the EU. These are the Treaty articles on taking a decision to move to a EU common defence; on taking decisions that the UK would participate in a European Public Prosecutor's Office, which can be set up to combat crimes affecting the EU's financial interests; and in that event, an expansion of the powers of the European Public Prosecutor.

23. There are other provisions in the Treaties which also constitute 'passerelles' or 'ratchet clauses', but do not enable the transfer of power or competence from the UK to the EU. There is no one agreed definition of what constitutes a 'ratchet clause' in the Treaties. Some of these provisions provide for a specified modification of the Treaties without using the Treaties' Ordinary Revision Procedure, such as Article 81(3) TFEU, allowing for a move from unanimity to qualified majority voting in respect of specific areas of family law. Some other provisions are in effect one-way options, which EU Member States can together decide to exercise and which allow existing EU powers to expand within the scope of the competence already defined in the Treaties, such as Article 262 TFEU, allowing for an expansion of the jurisdiction of the Court of Justice of the EU (ECJ) in relation to disputes concerning European intellectual property rights.

24. As it is difficult to come up with one definition for such Treaty provisions, Part 1 of the Bill specifies those provisions that the Government considers should require an Act of Parliament to be passed before the Government can agree to their use in the Council or European Council, and those that the Government considers should require other forms of Parliamentary approval.

Part 2: Implementation of Transitional Protocol on MEPs

25. The Treaty of Lisbon provides for an increase of 18 Members to the overall number of Members of the European Parliament ('MEPs'), allocated among 12 Member States (including an increase in the number of UK MEPs from 72 to 73). This change in MEP numbers was not put into effect when the last European Parliamentary elections were held in June 2009 because the Treaty of Lisbon had not yet entered into force. Following the entry into force of the Treaty of Lisbon, the Government agreed to a Transitional Protocol, in an Inter-Governmental Conference on 23 June 2010, to allow the additional MEPs to take up their seats in the European Parliament during the current term of office instead of waiting until the next scheduled European Parliamentary elections in 2014, and without the corresponding reduction in the number of MEPs allocated to Germany (also provided for by the Treaty of Lisbon).

26. Bringing in these extra MEPs before the next European Parliamentary elections needs an amendment to the Treaties, as it temporarily increases the maximum number of MEPs allowed by the Treaties. Section 5 of the European Union (Amendment) Act 2008 provides that any amendment to the Treaties requires an Act of Parliament to be passed before the UK can ratify the amendment of the Treaties. Part 2 of the Bill therefore provides for this approval.

27. Part 2 of the Bill also provides for the election of the additional UK MEP provided for under the Transitional Protocol. The Protocol provides for three options for Member States to choose from in determining how to elect their additional MEPs during the current term:

- by-elections by direct universal suffrage in the Member State concerned, in accordance with the provisions applicable for elections to the European Parliament;
- by reference to the results of the European Parliamentary elections from 4 to 7 June 2009; or
- by designation, by the national Parliament of the Member State concerned from among its members, of the requisite number of members, according to the procedure determined by each of those Member States.

28. The Bill makes the necessary provision to enable the UK to elect an additional MEP in accordance with the second of these options, by reference to the results of the 2009 European Parliamentary elections. Section 5 of the European Parliamentary Elections Act 2002 already allows for a vacancy arising in an *existing* seat to be filled without a by-election, and under the European Parliamentary Elections Regulations 2004, by-elections are not normally required. However, in this case as it is a *new* seat, specific provision is required. In the event that the use of the 2009 results cannot produce a result, the Bill provides as an alternative that a by-election would be held to elect the additional MEP. In June 2014, all 73 UK MEPs will then be elected at the

scheduled ‘general’ elections to the European Parliament.

TERRITORIAL EXTENT AND APPLICATION

29. The Bill extends to the whole of the UK. The subject matter of the Bill is reserved to the Westminster Parliament. This Bill does not contain any provisions falling within the terms of the Sewel Convention, or which would require any Legislative Consent Motions in respect of the devolved legislatures. As the Sewel Convention provides that Parliament will not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament, if there are amendments relating to such matters which trigger the Convention, the consent of the Scottish Parliament will be sought for them.

30. Part 2 of the Bill also extends to Gibraltar, because Gibraltar participates in UK elections to the European Parliament. The electoral data used to determine the UK electoral region that should be allocated the additional MEP provided for by Part 2 incorporated elector numbers in Gibraltar, as they are included in the franchise for the South West electoral region.

31. Where any of the provisions of a proposed treaty or Article 48(6) decision would affect Gibraltar, then any referendum held in accordance with the provisions of Part 1 of this Bill would need to be held both throughout the UK and Gibraltar. The Act approving the treaty or Article 48(6) decision and providing for the referendum would therefore need to extend to Gibraltar.

COMMENTARY ON CLAUSES

Part 1: Restrictions on Treaties and Decisions Relating to EU

Introductory

Clause 1: Interpretation of Part 1

32. *Clause 1* defines certain terms used in Part 1 of the Bill.

Restrictions relating to amendments of TEU or TFEU

Clause 2: Treaties amending or replacing TEU or TFEU

33. This clause requires certain conditions to be met before any future treaty that would amend or replace TEU or TFEU can be approved by the UK. The conditions are: (a) that a Minister has laid a statement before Parliament setting out whether a referendum is required or not, in accordance with *clause 5*; (b) that the proposed treaty has been approved by an Act of Parliament; and (c) that either the ‘referendum

condition' or the 'exemption condition' has been met in each case.

34. These conditions are only relevant where the Government has agreed to the proposed treaty at an Inter-Governmental Conference, at which point the conditions would need to be satisfied before the UK could approve, or 'ratify', the future treaty.

35. The referendum condition is set out in *subsection (2)*. The Act of Parliament that is needed to approve the treaty must include provision for a referendum to be held to determine whether the public support the approval of that treaty. The Act of Parliament would need to specify the treaty to be agreed, and the detailed provisions required to allow a referendum to take place, including the question for the ballot paper and the date of the referendum. The referendum would then be held in accordance with the provisions set out in that Act, and only if a majority of the people who voted in the referendum were in favour of the proposal would the UK be able to ratify the treaty. The provisions of the Act approving the treaty would not come into force until the result of the referendum was known and unless a majority of voters had voted in favour of the change.

36. The exemption condition is set out in *subsection (3)* and would apply if the proposed treaty did not do anything which is set out in *clause 4* (see below) and the approval Act specified that this was the case. In other words, if there would be no transfer of competence or power from the UK to the EU (as set out in *subsections (1) to (3) of clause 4*), then the treaty is exempt from the requirement for a referendum.

37. *Subsection (2)(a)* provides that where the Government considers that any of the provisions of the proposed treaty would affect Gibraltar, then any referendum would need to be held throughout the UK and Gibraltar. Gibraltar is bound by a number of provisions in the Treaties, and while it is not possible to predict whether Gibraltar would be affected by any future treaties, in the event that Gibraltar would be affected, the people of Gibraltar would be entitled to vote in the relevant referendum.

Clause 3: Amendment of TFEU under simplified revision procedure

38. This clause requires certain conditions to be met before any Article 48(6) decision can be approved by the UK. An Article 48(6) decision can amend any aspect of Part Three of TFEU (see paragraph 16 above). The conditions are almost identical to those set out in *clause 2* in respect of proposed treaties, namely that: (a) a Minister has, in accordance with *clause 5*, laid a statement before Parliament as to whether or not a referendum is required; (b) the decision to be approved by the UK has been approved by an Act of Parliament; and (c) either the 'referendum condition', the 'exemption condition' or the 'significance condition' has been met in each case.

39. The requirements of this clause differ from those of *clause 2* in that they include the 'significance condition' provided for by *subsection (4)*. Some Article 48(6) decisions may be proposed which seek to confer on an EU institution or body a new or extended power to require Member States to act in a specified way in

accordance with the EU's existing competence; or to confer on an EU institution or body a new or extended power to impose sanctions on Member States for their failure to act in a specified way already provided for by the Treaties. Such a move would not, in itself, transfer competence (the ability for the EU to act in a given area) from the Member States to the EU – instead, such a proposal would allow an institution or body of the EU to use the competence conferred on it already by the Member States in a different way. These two ‘transfers of power’ from the UK to the EU would be caught by *clause 4(1)(i) or (j)*, and a future proposal to do either of these things would generally require a referendum to be held under *clause 3*.

40. However, there may be instances in the future where the Simplified Revision Procedure might be used to give a new power to a body in an area which is not significant to the UK. In these cases, the Minister's statement under *clause 5*, and the Act of Parliament required by this clause, may state that the proposed Article 48(6) decision would confer on an EU institution or body a new or extended power to require Member States to act in a specified way; or to confer on an EU institution or body a new or extended power to impose sanctions on Member States for their failure to act in a specified way already provided for by the Treaties. This would be a transfer of power from the UK to the EU falling within *clause 4* of this Bill, but the Minister would be able to specify that the proposed changes were not significant, give reasons why this is the case, and therefore decide that a referendum would not be required.

41. The inclusion in this clause of the ‘significance condition’ minimises the risk that a referendum will be required in relation to the transfer of a power considered to be insignificant. As with all Ministerial decisions, it would be possible for a member of the public to challenge the decisions of the Minister in such a statement. Even when the ‘significance condition’ is met, the proposed Article 48(6) decision would still require Parliamentary approval by Act before the UK could approve the Article 48(6) decision which gave rise to the change, and during the passage of that Bill the question of significance could be considered.

42. This ‘significance condition’ only relates to any changes which would fall under the criteria in *clause 4(1)(i) or (j)* and only in those cases where the Minister judges that the proposed transfer of power is not significant to the UK. If any Article 48(6) decision also satisfied another criterion in *clause 4*, a referendum would then be required in accordance with the provisions of this clause and *clause 4*.

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

43. *Clause 4* makes provision for the criteria against which a treaty seeking to amend or replace TEU or TFEU, or an Article 48(6) decision seeking to amend an aspect of Part Three of TFEU, would be assessed in order to determine whether a referendum should be held. *Clause 4(1)* lists the changes that the Government regards as representing a transfer of power or competence from the UK to the EU (see paragraph 19 for further explanation of the different types of competence), and a

treaty which would fulfil one or more of the criteria would require a referendum.

44. *Subsection (1)(a)* provides that a treaty or Article 48(6) decision would require a referendum if it would extend the objectives of the European Union, which are listed in Article 3 TEU. Both an extension of an existing objective and the creation of an entirely new objective would be caught by this criterion. The objectives of the EU include the promotion of peace and well-being; the principle of free movement of persons within an area of freedom, security and justice; the establishment of the internal market and economic and monetary union; and upholding and promoting the values of the EU in the wider world. As Article 352 TFEU can be used as a legal base for legislative proposals to achieve the objectives of the EU where there is no more relevant Treaty article to use, an extension of the EU's existing objectives could also be used to transfer further competence from the UK to the EU. This is why both an addition of a new objective, and the extension of an existing objective, would require a referendum to be held.

45. *Subsection (1)(b) and (c)* provides that a treaty or an Article 48(6) decision which would either create a new exclusive competence, or extend an existing exclusive competence for the EU, would require a referendum to be held before the UK could ratify that treaty or Article 48(6) decision.

46. *Subsection (1)(d) and (e)* provides that a treaty or Article 48(6) decision which would incorporate either a new competence shared between the EU and its Member States, or the extension of an existing competence shared between the EU and its Member States, would require a referendum to be held before the UK can ratify that treaty or Article 48(6) decision.

47. *Subsection (1)(f)* stipulates that a referendum would be required before the UK can approve the extension of any competence of the EU relating to: (i) the co-ordination of economic and employment policies; or (ii) the EU's common foreign and security policy.

48. *Subsection (1)(g) and (h)* provides that a referendum would be required before the UK could agree to the addition of any new, or the extension of existing supporting competence respectively under Article 6 TFEU, where the EU can support, co-ordinate or supplement Member States' approaches. Further detail on supporting competence is provided in paragraph 19 of these Notes.

49. *Subsection (1)(i) and (j)* specifies that approval for proposals to increase the powers of the EU institutions and bodies to impose requirements, obligations or sanctions on the UK would require a referendum, as would proposals to remove any existing limitations on the institutions. It is these two criteria which could be subject to the 'significance condition' in *clause 3*.

50. *Subsection (1)(k)* provides that any proposal to remove the UK's veto over the use of any of the Treaty Articles listed in *Schedule 1* would require a referendum. It

should be emphasised that this means that a referendum is needed only before the UK can agree to any proposed treaty change or Article 48(6) decision, which would remove the UK veto in any of these cases. Agreement to any legislative acts made under these Treaty articles would not require a referendum.

51. *Subsection (1)(l) and (m)* provides that any proposal to remove an ‘emergency brake’ provision in the Treaties would require a referendum before the UK could agree to the removal of such a brake. The emergency brake provision in Article 31(2) TEU, covered by *subsection (1)(l)*, allows a Member State to stop the agreement of a decision by qualified majority voting under the common foreign and security policy by citing ‘vital and stated reasons of national policy’. The High Representative of the EU for Foreign Affairs and Security Policy would then attempt to mediate with the Member State who has used the brake provision, but if they cannot come to an acceptable solution for the Member State concerned, the Council can then decide by qualified majority to refer the matter to the European Council for decision by unanimity. If the Council does not vote to refer the matter to the European Council, then the Member State’s objection shall prevail. *Subsection (1)(l)* provides that any amendment to this mechanism would require a referendum before the UK could agree to the amendment.

52. *Subsections (1)(m) and (3)* similarly provide that the other emergency brake provisions in TFEU, where a Member State can suspend the ordinary legislative procedure in relation to a specified legislative act for reasons set out in the Treaties, cannot be amended without a referendum being held first and a majority of voters agreeing to any such amendment. Article 48 TFEU concerns those social security measures that permit the free movement of workers within the EU. A Member State can suspend the ordinary legislative procedure and refer the proposal to the European Council if it felt that the proposal might affect ‘important aspects of its social security system, including its scope, cost or financial structure, or would affect the financial balance of that system’. In such an eventuality, within four months the European Council has to resolve the issue by unanimity and ask the Council to continue with the negotiation of the legislative act in question, or has to reject the act and ask the European Commission to publish a new proposal.

53. Article 82(3) TFEU concerns rules on the mutual recognition of judicial decisions and police cooperation on cross-border criminal matters and provides for a Member State to use the emergency brake mechanism if a proposed act ‘would affect fundamental aspects of [the Member State’s] criminal justice system’. Article 83(3) TFEU concerns proposals on serious cross-border crime, and similarly allows a Member State to refer a draft decision to the European Council where an act may ‘affect fundamental aspects of its criminal justice system’.

54. *Subsection (2)* stipulates that the removal from the existing Treaties of a limitation on the EU’s ability to act in a given area is, for the purposes of this Bill, equivalent to an extension of the EU’s competence in that area – and would therefore require a referendum to be held and a majority of votes cast in that referendum to be

in support of the removal of that limitation. An example here would be the Protocol on the Position of the UK and Ireland in the Area of Freedom, Security and Justice (referred to in the Bill and in these Notes as the ‘AFSJ Protocol’). As any attempt to repeal that Protocol could be argued to be a removal of a limitation on the EU’s ability to act in this area with respect to the UK, this subsection stipulates that such a move would be subject to a referendum.

55. *Subsection (4)* provides that certain Treaties or Article 48(6) decisions would not require a referendum in the following circumstances: where they codify EU practice under TEU or TFEU in relation to the previous exercise of an existing competence; or they create any provision in the Treaties which does not apply to the UK; or they are designed solely to provide for the accession of a new Member State to the EU. The list in *subsection (4)* is illustrative rather than exclusive. In other words, there may be other types of treaty change which do not transfer competence or power from the UK to the EU and therefore do not trigger a referendum.

56. *Subsection (4)(a)* provides that the codification of practice under TEU or TFEU in relation to the previous exercise of a competence not already covered explicitly by the Treaties would not, in itself, be subject to a referendum so long as the codification goes no further than to make explicit in the Treaty that part of the competence which has actually been exercised, and does not seek to codify the potential full extent of that competence. For example, action may be taken under Article 352 TFEU to achieve the objectives of the EU but where a measure is required for which there is no specific legal base. If a future treaty change then introduces a specific legal base for that action, and that new legal base does no more than codify the existing use, then no referendum would be required. There would be no point in having a referendum on such a codification, because the competence has already been transferred and the EU has already acted in that way. However, if the new legal base does more than codify the existing use, and the UK wants to support that new legal base, then a referendum would need to be held before the UK could ratify that treaty change.

57. *Subsection (4)(b)* provides that a referendum is not required where a treaty or an Article 48(6) decision makes provision that applies only to Member States other than the UK. A treaty or an Article 48(6) decision does not apply to the UK merely because it may have consequences for individuals or organisations within the UK, such as UK businesses. Nor does it apply to the UK merely because the amendment imposes new responsibilities on EU institutions in which the UK participates and which the UK helps to fund.

58. The effect of *subsection (4)(c)* is that an Accession Treaty, agreed in accordance with Article 49 TEU, would not require a referendum if the only changes made by the Accession Treaty would be those necessary for and resulting from the accession, for example by amending the number of Members of the European Parliament to accommodate a delegation from the new Member State. However, the Bill provides that Accession Treaties agreed under Article 49 TEU would require an

assessment as to whether a referendum should be held in accordance with the provisions of Part 1 (see *clause 1(4)*). This is because it is in theory possible that Article 49 might be used to do more than allow for the accession of a Member State, and therefore this eventuality would be covered by the provisions of this Bill.

Clause 5: Statement to be laid before Parliament

59. This clause makes provision about how the first condition in *clauses 2(1)(a)* and *3(1)(a)* is to be met. A Minister of the Crown would need to lay a statement before Parliament within two months of either the agreement of a treaty at an Inter-Governmental Conference, or the agreement of an Article 48(6) decision at a European Council. In either case, the required statement would need to set out the Minister's assessment as to whether the proposed treaty or Article 48(6) decision would fall within *clause 4* of this Bill, namely whether the proposal would transfer power or competence from the UK to the EU. The assessment should set out the Minister's reasoning for this judgement.

60. *Subsection (4)* of this clause refers to the 'significance condition' set out in *clause 3(4)*, in respect of an Article 48(6) decision where the Minister of the Crown judges that the Article 48(6) decision would fall within *clause 4(1)(i)* or *4(1)(j)*, but where the Minister views such a move as not being significant. As set out above, the Minister would in this case judge that a transfer of power would take place between the UK and the EU. *Subsection (4)* provides that in this case, the Minister would need to lay before Parliament a statement making clear that a transfer of power would take place, but that he/she judges that this proposed transfer of power would not be significant, and the reasons for this judgement.

61. As with all Ministerial decisions, it would be possible for a member of the public to be able to seek to challenge in the Courts the judgement of the Minister as provided in the statement required under *clause 5*.

Restrictions relating to other decisions under TEU or TFEU

Clause 6: decisions requiring approval by Act and by referendum

62. This clause provides that a number of specified decisions already provided for in TEU or TFEU would require both an Act of Parliament to be passed, and for a majority of people voting in a referendum of the British people (and where applicable, the people of Gibraltar) to support such a decision before the UK could agree to the decision. These decisions would not involve a new treaty or Article 48(6) decision, and so would not be caught by the provisions of *clauses 2, 3 or 4*.

63. There are two categories of decisions included in this list. The first are decisions that would have the same effect as one or more of the changes which would require a referendum under *clauses 2, 3 or 4*. *Subsections (4)(a), (b), (f), (g), (h), (i)* and *(j)* fall into this category. If a Treaty Article is sufficiently important to the UK

that any treaty change which removed the UK's ability to veto a future use of that Article must be subject to a referendum, it is logical that any other method of removing the UK's ability to veto uses of that Treaty Article must also be subject to a referendum. The second category represents one-way, irreversible decisions which would transfer power or competence from the UK to the EU. These are covered in *subsection (2)* and in *subsections (4)(c), (d), (e) and (k)*.

64. In the case of these decisions, no judgement is required by a Minister as to whether a transfer of competence or power would occur in each case; the Bill provides that any decision to be taken in accordance with the Treaty provisions listed in this clause would require an Act of Parliament and a referendum. No exemptions apply in the case of the decisions to which this clause applies. In each case, the Act of Parliament would need to set out the decision to be agreed and the detailed provisions in order to allow a referendum to take place, such as the proposed question and the date of the referendum.

65. *Subsection (4)* lists those Treaty provisions to which *clause 6* would apply, with the exception of Article 42(2) TEU, which is provided for separately by *subsection (2)*. This is because Article 42(2) TEU, which would permit a move to a common EU defence, requires a two-stage process, unlike the other decisions in this clause. In this case, the European Council may agree to move to a common EU defence, 'subject to the approval of the Member States in accordance with their constitutional requirements'. This makes the decision-making process for Article 42(2) TEU similar to that of an Article 48(6) decision, in that the Act of Parliament and referendum required would take place after the decision has been taken in the European Council, but before the UK can approve the adoption of the decision, which is required before this decision enters into force. In the event that the Act of Parliament was not passed, or the majority of those voting in a referendum voted against approval of the decision, the UK would not adopt the decision to move to a common EU defence, and the decision would not therefore be able to enter into force.

66. In contrast, the other Treaty provisions set out in *paragraphs (a) to (k)* of *subsection (4)* would require both an Act of Parliament to be passed, and for a referendum to be held in which a majority of the votes cast supported the draft decision, before the UK could agree to such a decision in the Council or European Council.

67. *Subsection (4)(a)* requires that an Act of Parliament should be passed and a referendum should be held before the UK could agree to any move from unanimity to qualified majority voting in respect of any decisions taken by unanimity under the EU's common foreign and security policy.

68. *Subsection (4)(b)* requires that any proposed use of Article 48(7) TEU that sought to move a specified area from unanimity to qualified majority voting, or sought to move a specified area from the special legislative procedure to the ordinary legislative procedure, would be subject to the referendum condition if that area is set

out in *Schedule 1*. There are two elements to this which require further explanation.

69. A move from the special legislative procedure to the ordinary legislative procedure in effect alters the role of the European Parliament in determining the final legislative act to be adopted: in general, the special legislative procedure requires the European Parliament to be consulted; whereas the ordinary legislative procedure (previously referred to as ‘co-decision’) requires the agreement of the European Parliament as well as the Council before a legislative act can be adopted. With the exception of a handful of specific areas (none of which are included in the provisions in *Schedule 1*), such a move from the special legislative procedure to the ordinary legislative procedure would also entail a move from unanimity to majority voting in the Council – and so either a proposal to give up a veto on its own, or as part of a change in legislative procedure, would require both an Act of Parliament to be passed and a referendum to be held if the area concerned fell within *Schedule 1*.

70. Only those areas set out in *Schedule 1* would trigger a referendum were there to be a proposal to move from unanimity to majority voting. There are other areas where unanimity presently applies; in the event that the Government had agreed in the European Council that one or more of those other areas could move from unanimity to majority voting, an Act of Parliament would be required before the UK could approve the decision to do this and this is provided for by *clause 7(4)(b)* of this Bill.

71. *Subsection (4)(c)* provides for an Act of Parliament to be passed and a referendum to be held on any proposal for the UK to participate in a European Public Prosecutor’s Office, whether at the outset or after such an Office has been established. *Subsection (4)(d)* provides for an Act of Parliament and a referendum on any proposal to extend the powers of the Office of the European Public Prosecutor if the UK is, at the time of the proposal to extend those powers, a participant in the European Public Prosecutor’s Office.

72. *Subsection (4)(f)* and *(g)* requires an Act of Parliament and a referendum to be held in the event that decisions are proposed under Articles 153(2) TFEU or 192(2) TFEU respectively to move from the special to the ordinary legislative procedure. This change would mean that decisions taken under these Articles would no longer be subject to unanimity in the Council, and would instead being subject to qualified majority voting as explained above. *Subsection (4)(h)* similarly provides for an Act of Parliament to be passed and a referendum to be held in the event of a proposal to move Article 312(2) TFEU from unanimity to qualified majority voting.

73. *Subsection (4)(i)* and *(j)* would apply if the UK is a participant in an area of enhanced co-operation, a mechanism whereby a smaller number of (at least one third of) Member States can decide together to act in a way set out in the Treaties, without all Member States being bound by those decisions. *Subsection (4)(i)* provides that, in the event that the UK participates in an area of enhanced co-operation which touches on one or more of the Treaty provisions listed in *Schedule 1*; and there is a proposal to move from unanimity to qualified majority voting for decisions taken in that area of

enhanced co-operation; then an Act of Parliament would need to be passed, and a referendum would need to be held, and a majority of votes cast would need to be in support of the proposal before the UK can agree to that proposal. Such a move could not be proposed in any area of enhanced co-operation with military or defence implications. This would only apply to areas of enhanced co-operation set up to act in areas set out in *Schedule 1*, and in which the UK is a present participant. As with *subsection (4)(b)* above, any areas not covered by *Schedule 1* would nonetheless require an Act of Parliament as set out in *clause 7(4)(e)*.

74. *Subsection (4)(j)* provides for an Act of Parliament to be passed and a referendum to be held in accordance with all of the conditions set out in the paragraph above, except that the trigger in this case would not be a move from unanimity to qualified majority voting but a move from the special legislative procedure to the ordinary legislative procedure – which usually entails a move from unanimity to qualified majority voting. This is in line with the provisions of *subsection (4)(b)* above. Such a move would not require a referendum, however, if a referendum had already been held to approve a decision to move from unanimity to qualified majority voting in accordance with *subsection (4)(i)* in the same area of enhanced co-operation. To do so would in effect mean holding a referendum on whether to change the role of the European Parliament or not, and would not be a transfer of power or competence.

Clause 7: Decisions requiring approval by Act

75. *Clause 7* provides that in respect of the specific matters set down in *subsections (2)* and *(4)* a Minister may not confirm the UK's approval of a decision; vote in favour of; or otherwise support a decision, unless the decision is approved by an Act of Parliament. The Treaty Articles covered by this clause have been identified as 'ratchet clauses' (also referred to as 'passerelles' or 'bridging clauses'). If an Act of Parliament is not passed, the UK cannot agree to the use of any of these Treaty Articles. All of the decisions covered by *clause 7* are subject to a unanimous vote in either the Council or the European Council, meaning that any Member State can veto the proposal. *Clause 7* therefore applies when the Government has agreed to the use of one of the decisions set out in this clause, and requires Parliamentary approval before the UK can approve formally the decision.

76. The specified decisions have been separated into two subsections because the Act of Parliament necessary to give final UK agreement to their use will be required at different stages in the decision-making process. All of the four decisions listed in *subsection (2)* will require an Act of Parliament *after* the decision to adopt them is taken in Council (in other words, after conditional approval but before formal approval is given by the Member States that the decision can enter into force). *Subsection (1)* stipulates that the UK cannot give final approval to the use of any of the decisions listed in this subsection until the decision has been approved by an Act of Parliament.

77. All of the decisions listed in *subsection (4)* would require an Act of Parliament *before* the UK can vote to agree their use in the European Council or Council (in other words, prior Parliamentary approval is required through an Act of Parliament before the UK can agree to the decision in the European Council or Council). The requirement for an Act of Parliament before the UK can agree to the decision in the European Council or Council is provided for in *subsection (3)*. One of these decisions (Article 17(5) TEU) is subject to a unanimous vote in the European Council, while all the other decisions are subject to a unanimous vote in the Council. *Subsections 7(4)(b), 7(4)(e) and 7(4)(f)* are the equivalent provisions to those in *clauses 6(4)(b), 6(4)(i) and 6(4)(j)*, in respect of any relevant proposals which would not affect any of the Treaty Articles set out in *Schedule 1*.

Clause 8: Decisions under Article 352 of TFEU

78. The Council can use Article 352 TFEU (sometimes referred to as the broad ‘enabling clause’) to adopt measures in order to attain one of the EU’s objectives, but only where the existing Treaties have not provided the necessary powers to do so already, and so long as the measure concerned remains within the confines of the EU’s existing competence. *Subsection (1)* provides that any one of the conditions in *subsections (3), (4) or (5)* needs to be satisfied in relation to an Article 352 decision.

79. *Subsection (3)* contains the general rule which is that the UK may not agree to a decision under Article 352 TFEU unless the decision has been approved by an Act of Parliament, which specifies the decision to be agreed and seeks approval for the UK to vote in favour.

80. *Subsection (4)* provides for the Parliamentary approval of urgent or emergency uses of Article 352 without the need for an Act of Parliament. Article 352 has been used in the past for urgent or emergency uses, where rapid EU action has been agreed but where there was no explicit legal basis on which to base that action. *Subsection (4)(a) and (b)* stipulates that the UK may agree to the adoption of a measure based on Article 352 in urgent or emergency cases if, in each House of Parliament, a Minister moves a motion that the House approve the Government’s intention to support a specified measure on the grounds of urgency, and both Houses of Parliament agree to the motion without amendment.

81. *Subsection (5)* stipulates that an Act of Parliament would not be required for any Article 352 proposal which satisfies any of the exemptions listed in *subsection (6)*. The exemptions in *subsection (6)* seek to prevent unnecessary Acts of Parliament to approve measures which have been agreed in substance under previous measures using the Article 352 TFEU legal base. They cover the following circumstances:

- a) any proposal using Article 352 TFEU as its legal base which is, in substance, the same as a previous measure agreed by the UK;
- b) an extension in time of an existing Article 352 TFEU measure, for example a

measure that has a three-year timeframe but on which it is decided to extend the measure for a further three years;

- c) an extension in breadth of an existing Article 352 TFEU measure to incorporate another Member State or third country, such as a measure that proposes to repeat an existing training programme in a third country to safeguard against counterfeiting of the Euro in another third country;
- d) any proposal to repeal an existing Article 352 measure; and
- e) any proposal to combine a number of existing Article 352 measures into one EU legal instrument or to consolidate several amendments of an existing measure in one text.

82. If a proposed use of Article 352 exclusively relates to one or more of these exempt purposes, *subsection (5)* provides that a Minister may lay a statement before Parliament. This statement must specify the draft decision and state that, in the Minister's opinion, the decision relates only to one or more of the exemptions. As with all Ministerial decisions, it would be possible for a member of the public to challenge the decisions of the Minister in such a statement.

83. *Subsection (7)* provides that, where the Government has previously relied upon the emergency exemption in *subsection (4)* to agree an Article 352 proposal, the Government cannot then seek to rely upon the first two exemptions set out in *subsection (6)*. In other words, the Government would not be able to seek a further exemption to prolong an existing Article 352 measure, if that measure was adopted originally because it was considered urgent. In the case of a subsequent proposal to prolong or renew an 'urgent' measure, an Act of Parliament would be required.

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

84. Title V of Part 3 of TFEU contains provisions relating to the Area of Freedom, Security and Justice ('AFSJ'), which continues to be commonly referred to as Justice and Home Affairs ('JHA'). This part of the Treaty is subject to special arrangements governing the UK and Ireland's participation in any measures, set out in the AFSJ Protocol. The UK can decide to opt into any of the measures agreed under Title V, but otherwise the UK is not bound by any of the measures agreed under this section of the Treaty.

85. This clause provides a series of additional conditions which need to be fulfilled before the UK could agree to participate in three specified decisions in the AFSJ area, considered to be 'ratchet clauses'. If the Government decides against participating in these measures, then none of these conditions would apply. The three decisions are:

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as introduced in the House of Commons on 11 November 2010*

- A decision under Article 81(3) TFEU, which would permit a move from the special legislative procedure to the ordinary legislative procedure (co-decision) in respect of family law measures with cross-border implications. This would in effect mean a move from unanimity to qualified majority voting.
- A decision under Article 82(2)(d) TFEU, which would permit additions to the list of specific aspects of criminal procedure on which the EU can adopt minimum rules.
- A decision under Article 83(1) TFEU, which would permit additions to the list of areas of particularly serious crime with a cross-border dimension on which the EU can act to specify minimum rules on the definition of those offences or sanctions to apply.

86. These three decisions, or any subsequent decision which draws on a previous use of any of these decisions, are to be subject to a two-stage Parliamentary approval process before the UK can: (a) participate in the negotiation or the decision in accordance with the AFSJ Protocol; and (b) give final agreement to the decision. All three decisions above are subject to unanimous agreement in the Council, so if the UK agreed to opt-in, the UK would have the ability to block the measure from entering into force. In such a case, the other EU Member States could then require the UK to opt out of that measure to allow the other Member States to agree the decision, but the act concerned would not then apply to the UK.

87. An example of a subsequent decision in this case would be if the Council decided to use Article 83(1) to add female genital mutilation (FGM) to the list of areas of crime. If the European Commission then proposed a legislative act which concerned FGM, this would be a subsequent measure. The Government could decide not to participate in the original decision to add FGM to the list of areas of crime, thereby not requiring the Parliamentary approval set out in this clause. But the Government could then decide that it wished to participate in the subsequent decision – and as the proposal stems from the original decision to extend the list of areas of crime, the provisions of this clause would need to be fulfilled before the UK could participate in the negotiations on, and agree to, the measure.

88. The first part of this two-stage process is provided for in *subsection (3)*, which requires both Houses of Parliament to pass a motion tabled by a Minister without amendment, before the UK can opt into a proposal to use any of the three decisions above, or any subsequent decision (as explained in the paragraph above). In this case, a positive vote in Parliament to opt into one of these decisions or a subsequent proposal is not the same thing as giving final agreement to the adoption of the decision in the Council. Instead, this first step should be considered as Parliamentary approval to allow the Government to enter into negotiations on a proposal at the EU level, where the precise nature and extent of the proposed use of the measure can be

determined before Parliamentary approval of the adoption of the measure is sought.

89. The second part of the two-stage approval process is provided for in *subsection (4)*, whereby once the negotiations referred to above are complete, the Government cannot give final agreement to adopt any of the three decisions set out above, or a subsequent proposal, unless the decision to do so is approved by an Act of Parliament.

90. *Subsections (5) and (6)* relate to Article 4 of the AFSJ Protocol. Article 4 of this Protocol allows the UK to seek to opt into an AFSJ measure retrospectively, or in other words, at any point after the other EU Member States have adopted it and the final decision has entered into force. The UK can then opt in and participate, but without being able to negotiate the terms of the decision.

91. *Subsection (5)* states that the Government may not subsequently opt into any of the three decisions set out in *subsection (2)*, or any subsequent decision as explained above, unless the decision to do so has been approved by an Act of Parliament. This prevents the UK from opting into a measure without passing an Act of Parliament, merely because the decision has already entered into force. *Subsection (6)(b)* provides explicitly the principle explained above relating to subsequent decisions.

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

92. *Clause 10* provides that seven specified decisions would require a motion to be tabled by a Minister and for both Houses of Parliament to approve the motion without amendment before the UK could agree to any of those decisions. These decisions are subject to qualified majority voting in the Council, with the exception of those in *subsections (1)(c)* (Article 252 TFEU), *(1)(f)* (Article 308 TFEU), and *(2)* (Article 218(8) TFEU), which are subject to a unanimous vote in Council. In the other cases, even if the UK does not vote in favour of, or otherwise support, a decision that is subject to qualified majority voting, the UK may still end up being bound by that decision if there is a qualified majority in the Council in favour of the adoption of that decision.

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

Clause 11: Persons entitled to vote in referendum

93. *Clause 11* defines who is entitled to vote in any future referendum held in accordance with *clauses 2, 3 or 6*. Under *subsection (1)(a)*, a person is entitled to vote in a future referendum if, on the date of the referendum, he or she would be entitled to vote in a parliamentary election. A person who is entitled to vote in a parliamentary election in the UK must be a British citizen, Commonwealth citizen, a citizen of the Republic of Ireland or a British citizen who qualifies as an overseas elector. Such a

person must also be at least 18 years of age, not subject to any legal incapacity, and registered in the register of parliamentary elections of a constituency of the UK. *Subsection (1)(b)* enables a peer, who is disqualified under common law from voting in parliamentary elections, to vote in a future referendum if, on the date of the referendum, he or she would be entitled to vote in a local government election, including a municipal election in the City of London, or if he or she is a British citizen resident abroad and is otherwise entitled to vote in a European Parliamentary election. Other citizens of the EU are excluded from voting in referendums held as a result of this Bill.

94. *Subsection (1)(c)* allows any Commonwealth citizens who are entitled to vote in Gibraltar at a European Parliamentary election on the day of a future referendum, the right to vote in any such referendum that would be applicable to Gibraltar.

Clause 12: Separate questions

95. *Clause 12* provides that if a referendum is to be held under Part 1 of the Bill in relation to two or more treaties or decisions, such as a single polling day for two referendums on two separate issues, a separate question must be framed for each treaty or decision requiring a referendum pursuant to *clauses 2, 3 or 6* of this Bill. This could be two or more questions on one ballot paper, or more than one ballot paper; the details would need to be set out in the Act of Parliament required by *clauses 2, 3 or 6*. It will not therefore be possible for decisions to be combined into the same question on the ballot paper.

Clause 13: Role of Electoral Commission

96. *Clause 13(a)* provides that the Electoral Commission have a duty to promote public awareness of any referendum to be held pursuant to *clauses 2, 3 or 6* and how to vote in it to the extent that the Electoral Commission deem appropriate at the time that any future referendum held in accordance with this Bill is called. *Clause 13(b)* provides that the Electoral Commission may promote public awareness of the subject matter of the referendum. They would do so by providing factual and neutral information on that subject. If the Electoral Commission decide to undertake that role in *clause 13(b)* they shall take whatever steps they deem appropriate at the time of that future referendum.

Supplementary

Clause 14: Consequential amendments and repeals relating to Part 1

97. *Subsection (1)* provides for the consequential amendment of section 5 of the 2008 Act. Section 5 provides that an Act of Parliament is to be passed before the UK can ratify any amendment to the Treaties of the EU (as defined in paragraph 14 of these Notes). This would mean in practice that the provisions of Part 1 of this Bill would supersede section 5 of the 2008 Act, except in relation to the Treaty

Establishing the European Atomic Energy Community ('Euratom Treaty'), as this Bill does not extend to amendments of that Treaty. In the event of any amendment being proposed to the Euratom Treaty, section 5 of the 2008 Act would continue to apply. Similarly, *subsection (2)* updates the Constitutional Reform and Governance Act 2010 so that it refers to the provisions of this Bill where relevant to TEU or TFEU, instead of the 2008 Act.

98. *Subsection (3)* provides for the repeal of a number of existing statutory provisions. Section 2 of the European Communities (Amendment) Act 1993 requires an Act of Parliament to be passed before the UK can agree to join the Euro, and so this provision is superseded by the relevant provisions of this Bill which require an Act of Parliament to be passed, and a referendum to be held.

99. Section 1(2) and (3) of the European Communities (Amendment) Act 2002 provides that an Order must be laid before the UK can agree to a decision under Article 262 TFEU. Section 12 of the European Parliamentary Elections Act 2002 provides that any treaty which provides for an increase in the powers of the European Parliament cannot be agreed by the UK unless an Act of Parliament has been passed. Section 6 of the 2008 Act provides for the parliamentary control of certain decisions. These arrangements are superseded by the provisions of this Bill and so are no longer required.

Part 2: Implementation of Transitional Protocol on MEPs

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

100. This clause provides for parliamentary approval of the Transitional Protocol on MEPs ('MEPs Protocol') for the purposes of section 5 of the 2008 Act. *Subsection (2)* provides that the MEPs Protocol is to be included in the definition of 'the Treaties' contained in section 1(2) of the European Communities Act 1972.

Clause 16: Number of MEPs and electoral regions

101. *Subsection (3)* of this clause makes provision for the West Midlands electoral region to be assigned the additional MEP gained by the UK as a result of the entry into force of the MEPs Protocol. The decision on which UK electoral region should be allocated the additional UK seat was made by the Electoral Commission in its report laid before Parliament on 26 October 2010. In accordance with the European Parliament (Representation) Act 2003, the recommendation is based on the region that has the lowest number of MEPs per head according to the current electoral register.

Clause 17: Election of additional MEP

102. This clause, and *Schedule 2* to this Bill, makes provision for how the additional MEP is to be elected, namely by reference to the results of the last European Parliamentary elections held in the UK on 4 June 2009, as if the additional

seat had been allocated to the West Midlands electoral region at the date of that election. This is one of the three methods of electing the additional MEP provided for by the MEPs Protocol, and is the method being used by the majority of the other Member States gaining MEPs under the MEPs Protocol. This clause and *Schedule 2* are to be the operative provisions governing the initial election of the MEP for this additional seat, and not section 5 of the European Parliamentary Elections Act 2002 ('2002 Act').

103. This clause and *Schedule 2* will only apply until the next 'general' election of Members of the European Parliament, which is expected to be held in June 2014 (see *subsection (3)(a)*). If a subsequent vacancy arises in the same seat, after an MEP has been returned in accordance with the provisions of this clause and *Schedule 2* but *before* the next general election of MEPs, the vacancy will be filled in the same way as any other vacant seat in a UK electoral region would be filled – by reference to section 5 of the 2002 Act (see *subsection (3)(b)*).

Part 3: General

Status of EU law

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

104. *Clause 18* is a declaratory provision which confirms that directly applicable or directly effective EU law only takes effect in the UK as a result of the existence of an Act of Parliament. The words 'by virtue of an Act of Parliament' cover UK subordinate legislation made under Acts, and because of the particular context of this clause, also covers Acts and Measures of the devolved legislatures in exercise of the powers conferred on them by the relevant UK primary legislation.

105. This reflects the dualist nature of the UK's constitutional model under which no special status is accorded to treaties; the rights and obligations created by them take effect in domestic law through the legislation enacted to give effect to them. Although EU Treaties and judgments of the EU Courts provide that certain provisions of the Treaties, legal instruments made under them, and judgments of the EU Courts have direct application or effect in the domestic law of all of the Member States, such EU law is enforceable in the UK only because domestic legislation, and in particular the European Communities Act 1972, makes express provision for this. This has been clearly recognised by the Courts of the UK. As Lord Denning noted in the case of *Macarthy's Ltd v. Smith* ([1979] 1 WLR 1189): "Community law is part of our law by our own statute, the European Communities Act 1972."

106. This clause has been included in the Bill to address concerns that the doctrine of Parliamentary sovereignty may in the future be eroded by decisions of the courts. By placing on a statutory footing the common law principle that EU law takes effect in the UK through the will of Parliament and by virtue of an Act of Parliament, this will provide clear authority which can be relied upon to counter arguments that EU

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law constitutes a new higher autonomous legal order derived from the EU Treaties or international law and principles which has become an integral part of the UK's legal system independent of statute.

107. In the 'Metric Martyrs' case (*Thoburn v. Sunderland City Council* [2002] EWHC 195 (Admin)), attempts were made, but rejected, to run the proposition that the legislative and judicial institutions of the EU may set limits to the power of Parliament to make laws which regulate the legal relationship between the EU and the UK. It was argued that, in effect, the law of the EU includes the entrenchment of its own supremacy as an autonomous legal order, and the prohibition of its abrogation by the Member States. This argument was rebutted by the High Court, who noted that Parliament cannot bind its successors by stipulating against repeal, wholly or partly, of the European Communities Act 1972.

108. Paragraph 59 of the judgment in the 'Metric Martyrs' case illustrates this point. Lord Justice Laws stated:

“59. Whatever may be the position elsewhere, the law of England disallows any such assumption. Parliament cannot bind its successors by stipulating against repeal, wholly or partly, of the ECA. It cannot stipulate as to the manner and form of any subsequent legislation. It cannot stipulate against implied repeal any more than it can stipulate against express repeal. Thus there is nothing in the ECA which allows the Court of Justice, or any other institutions of the EU, to touch or qualify the conditions of Parliament's legislative supremacy in the United Kingdom. Not because the legislature chose not to allow it; because by our law it could not allow it. That being so, the legislative and judicial institutions of the EU cannot intrude upon those conditions. The British Parliament has not the authority to authorise any such thing. Being sovereign, it cannot abandon its sovereignty. Accordingly there are no circumstances in which the jurisprudence of the Court of Justice can elevate Community law to a status within the corpus of English domestic law to which it could not aspire by any route of English law itself. This is, of course, the traditional doctrine of sovereignty. If it is to be modified, it certainly cannot be done by the incorporation of external texts. The conditions of Parliament's legislative supremacy in the United Kingdom necessarily remain in the United Kingdom's hands. But the traditional doctrine has in my judgement been modified. It has been done by the common law, wholly consistently with constitutional principle.”

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

110. This clause is declaratory of the existing common law position and does not alter the competences of the devolved legislatures or the functions of the Ministers in the devolved administrations as conferred by the relevant UK Act of Parliament.

Final provisions

Clause 19: Financial provisions

111. This clause covers the financial provisions, as explained in the section below on financial effects of the Bill.

Clause 20: Extent

112. This clause makes provision for the territorial extent of the Bill. The Bill extends to the whole of the UK. Part 2, and *clauses 20 to 22* where they touch on Part 2, also extend to Gibraltar.

Clause 21: Commencement

113. This clause makes provision about the Bill's coming into force. *Subsection (1)* provides for *clause 15* and Part 3 to come into force on the day of Royal Assent. *Subsection (2)* provides for the other provisions of the Bill to be brought into force by a commencement order made by the Secretary of State.

Schedules to the Bill

Schedule 1: Treaty provisions where amendment removing need for unanimity, consensus or common accord would attract referendum

114. This Schedule lists those Treaty provisions which are covered by the provisions in *clauses 4 and 6*, in the event of a future proposal to remove the need for unanimity, consensus or common accord (through a proposed move to simple or qualified majority voting) when making decisions in the Council or European Council on measures resulting from that Treaty provision. This means that a referendum is needed only before the UK can agree to any proposed treaty change or decision under Article 48(6) or 48(7) TEU which would remove the UK veto over agreeing proposals made under any of the Articles in *Schedule 1*. Actual use of these Articles will not require a referendum. So, for example, the UK could vote in favour of a legislative proposal made under Article 115 TFEU and no referendum would be required. However, if there was a proposal to change the voting on that Article to qualified majority voting, that would mean the UK would lose its veto and a referendum would be required before the UK could agree to such a proposal. If the UK blocked such a proposal during the negotiations because it did not support it, then no referendum would be required.

115. Set out below are those Treaty Articles where further explanation is required and such explanation has not been given in the sections above. These Articles all fall into one of the following areas:

*These notes refer to the European Union Bill
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- common foreign and security policy, or other Treaty Articles with military, defence or national security implications;
- rights of membership and enlargement, including basic structures of the EU;
- association and international agreements;
- national economic, tax, fiscal or energy policy, or the budget and financial management of the EU;
- citizenship and elections;
- social, social security and employment policy.

Part 1: Provisions of the Treaty on European Union

- Article 7(2) – Determination by the European Council of the existence of a serious and persistent breach by a Member State of the values referred to in Article 2 TEU, such as respect for freedom, democracy and respect for human rights.
- Article 15(4) – European Council decisions are taken by consensus, except where otherwise provided in the Treaties. The removal of the provision for consensus in this Treaty Article would change the default decision-making mechanism in the European Council.
- Article 22(1) – European Council decisions on the strategic interests and objectives of the EU specifically in respect of the EU’s external (global) action and common foreign and security policy.
- Articles 24(1) and 31(1) – The default decision-making mechanism for decisions related to the common foreign and security policy is by unanimity, excepted where provided specifically in the Treaties.
- Article 41(2) – Operating expenditure resulting from the common foreign and security policy (except expenditure arising from operations with military and defence implications) is charged to the EU’s budget, except where the Council decides otherwise by unanimity. If the Council decides not to charge such expenditure to the EU’s budget, then it should be charged to Member States in accordance with the agreed scale which calculates expenditure according to Gross National Product, except where the Council again decides otherwise by unanimity.
- Articles 42(2) and 42(4) – European Council decision to move to a common EU defence; and Council decisions relating to the common security and defence policy respectively.

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- Article 46(6) – Decisions and recommendations of the Council by those Member States participating within the framework of permanent structured cooperation in common security and defence policy, other than those provided for elsewhere in that chapter of the Treaty.
- Article 50(3) – Where a Member State has submitted its intention to withdraw from the EU but where that Member State requests more time in order to complete the necessary preparations for withdrawal, the European Council can decide by unanimity to give more time.

Part 2: Provisions on the Treaty on the Functioning of the European Union

- Article 19(1) – Agreement in the Council on measures to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation are taken by unanimity.
- Article 21(3) – Social security or social protection measures, specifically to facilitate the free movement of EU citizens, are decided on by special legislative procedure and by unanimity in the Council.
- Article 77(3) – Provisions concerning passports, identification cards, residence permits or any other such document, specifically to enable EU citizens to exercise their rights of free movement within the EU.
- Article 87(3) – Decisions on measures concerning operational co-operation between police, customs and other law enforcement authorities.
- Article 89 – Decisions on the conditions and limitations under which the competent law enforcement authorities of one Member State may operate on the territory of another.
- Article 113 – Decisions establishing provisions to harmonise legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent necessary to ensure the functioning of the internal market and prevent the distortion of competition.
- Article 115 – Decisions to adopt directives to approximate national laws, regulations or administrative provisions directly affecting the functioning of the internal market, but only applicable in residual areas, such as fiscal measures or measures concerning free movement of persons or rights of employees, where qualified majority voting does not apply.

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- Article 126(14) – Decisions to adopt provisions which would replace the Protocol on the excessive deficit procedure, which details how the EU is to address excessive Member State government deficits.
- Article 127(6) – Conferral of specific tasks on the European Central Bank concerning prudential supervision of credit institutions and other financial institutions except insurance undertakings.
- Article 153(2)(b) – Decisions on measures concerning: (i) social security and social protection of workers; (ii) protection of workers where their employment contract is terminated; (iii) representation and collective defence of the interests of workers and employers; and (iv) conditions of employment for legally resident third country nationals.
- Article 155(2) – Council decision implementing an EU level agreement concluded between management and labour organisations, if it covers an area of social policy set out in Article 153(2)(b) (see bullet point above).
- Article 192(2) – Decisions to adopt measures concerning the environment which: (i) are primarily of a fiscal nature; (ii) affect town and country planning, quantitative management of water resources or the availability of those resources, or land use (except waste management); and (iii) are measures significantly affecting a Member State's choice of energy sources and the general structure of its energy supply.
- Article 203 – Decisions adopting detailed rules and procedures governing the association of third countries and territories with the EU.
- Article 218(8) – Negotiation and conclusion of any agreement that: (i) covers a field in which unanimity is required for the adoption of internal rules as set out in the relevant section of the Treaties; (ii) establishes an association between third countries and the EU; (iii) provides for economic, technical and financial co-operation with a candidate country in the process of negotiating its membership of the EU; and (iv) provides for the accession of the EU to the European Convention on Human Rights.
- Article 222(3) – Decisions to adopt any Council decision under the solidarity clause that has defence implications. The EU and its Member States shall act jointly 'in a spirit of solidarity' if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster – this is known as the Treaties' 'solidarity clause'.

- Article 311 – The Treaties stipulate that the EU shall provide itself with the means necessary to achieve those objectives set out in the Treaties. Any decision setting out how the EU will be financed and how it will manage its ‘own resources’.
- Article 312(2) – Decisions to adopt the EU’s five-year financial framework (how the EU will manage its own expenditure over the five year period).
- Article 332 – Decisions to alter the general rule that expenditure resulting from any area of enhanced co-operation between a smaller group of Member States should be borne by those participating Member States.

Schedule 2: Election of additional MEP

116. This Schedule sets out in more detail how the additional MEP provided for by the Transitional Protocol on MEPs will be elected. It also provides that, in the event that the relevant provisions of this Schedule do not result in the successful appointment of the additional UK MEP, there will be a by-election for the additional seat.

117. *Paragraph 2* provides that the returning officer for the West Midlands electoral region (to which the additional MEP has been allocated in accordance with the recommendation of the Electoral Commission published on 26 October 2010) must first identify which registered party would have won the additional seat in accordance with the results of the European Parliamentary elections held on 4 June 2009 (‘the 2009 elections’), as if the seat has already been allocated to the West Midlands at that time. As there were no individual candidates in the West Midlands region at the 2009 elections, this Schedule only provides for allocation to a registered party.

118. *Paragraph 3(1)* provides that the returning officer must then identify from the registered party’s list of candidates at the 2009 elections, the candidate whose name appears highest on that list. In doing so the returning officer is to disregard those people who have already been returned as MEPs or who have died. For example, if the registered party had proposed six candidates in an electoral region and the first three candidates on that party’s list had been returned as MEPs, the returning officer would identify the fourth candidate on that party’s list as being the next person to be returned as an MEP. That person is referred to as the ‘first choice’.

119. *Paragraph 3(2)* makes provision for the process by which the returning officer is to contact the ‘first choice’ to ask them whether he or she will provide written confirmation of their willingness and ability to be returned as the MEP. The returning officer should also ask the ‘first choice’ to deliver a certificate signed by or on behalf of the nominating officer of the registered party, confirming that he or she may be

returned.

120. *Paragraph 4* makes provision for the process that is to take place if the returning officer is unable to contact the ‘first choice’ candidate, or that person confirms their unwillingness or inability to stand, or if they do not provide the certificate required. It shall be at the discretion of the regional returning officer to determine the length of such a ‘reasonable period’. *Paragraph 4(2)* provides that the returning officer should identify the next name on the registered party’s list of candidates, disregarding any candidate who has died. In the example above, the next candidate may be the fifth candidate on that party’s list, since the first three people have already been returned as MEPs and the fourth candidate was unavailable or could not be contacted within a reasonable period. This candidate is referred to as the ‘subsequent choice’, and the returning officer shall under *paragraph 4(3)* seek confirmation that he or she is willing and able to be returned as an MEP. In doing so the returning officer shall follow the same procedure as provided for in relation to the ‘first choice’.

121. *Paragraph 5* provides that, if the ‘subsequent choice’ cannot be contacted within a reasonable period, or does not provide the certificate required, or is unable or unwilling to be returned as an MEP, the returning officer is to identify the next name on the list, and keep repeating the procedure until either the seat is filled or there are no more names on the registered party’s list of candidates.

122. *Paragraph 6* provides for what is to happen where, after a ‘subsequent choice’ has been invited to fulfil the obligations in *paragraph 3(2)*, a person who was previously asked to do so (‘the prior choice’) then provides the requisite certificate. The statement and certificate of the ‘prior choice’ candidate will have no effect unless and until the ‘subsequent choice’ fails to return the certificate within the period of time deemed reasonable by the regional returning officer, or has indicated that they are unwilling or unable to stand. The justification for this is that ‘the prior choice’ will have previously been given a sufficient opportunity by the returning officer to provide the required documentation within a reasonable time period.

123. *Paragraph 7* makes provision for the process that must take place where a candidate has, on being asked by the returning officer, delivered the statement and the certificate referred to in *paragraph 3(2)*. The returning officer must declare in writing that person to be returned as an MEP, must prepare a statement containing some relevant information concerning the election, and must give a public notice of this declaration and statement and send copies of them to the Secretary of State.

124. *Paragraphs 8 and 9* provide that if the procedures set out in *paragraphs 3 to 7* fail to fill the additional seat, a by-election is to be held to fill the seat. In this case the returning officer must confirm to the Secretary of State that the seat cannot be filled in accordance with the procedure set out in *paragraphs 3 to 7*. *Paragraph 8(4)* provides that the by-election is to take place on a day specified by order of the Secretary of State and *paragraph 8(5)* provides that the by-election is to be conducted in

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accordance with regulations made under the 2002 Act (the European Parliamentary Regulations 2004, SI 2004/293). *Paragraph 9* specifies that the order is to be made by statutory instrument which is to be laid before Parliament after being made.

FINANCIAL EFFECTS OF THE BILL

125. The costs incurred as a result of the provisions of Part 2 will be met from the Consolidated Fund. These costs would consist of the minimal costs arising from the administrative expenditure of the returning officer of the West Midlands electoral region, which has been awarded the additional MEP seat, to ensure that the seat is filled in accordance with *Schedule 2*. There may also be costs involved with the holding of a by-election in that region, in the event that a candidate cannot be returned in accordance with *Schedule 2*, though this is a remote possibility. Additional costs may be incurred as a result of the additional function conferred on the Electoral Commission by *clause 13*, as a result of any future referendum that is held pursuant to this Bill.

EFFECT OF THE BILL ON PUBLIC SERVICE MANPOWER

126. There will be no impact on public service manpower as a result of the Bill.

IMPACT ASSESSMENT

127. The provisions contained within this Bill do not require an Impact Assessment.

EUROPEAN CONVENTION ON HUMAN RIGHTS

128. Section 19 of the Human Rights Act 1998 requires the Minister in charge of a Bill in either House of Parliament to make a statement about the compatibility of the provisions in the Bill with the Convention rights (as defined by section 1 of that Act).

129. The Secretary of State for Foreign and Commonwealth Affairs has made the following statement:

“In my view the provisions of the European Union Bill are compatible with the Convention rights.”

130. Article 3 of Protocol No 1 to the European Convention on Human Rights provides: “The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure free expression of the

opinion of the people in the choice of the legislature”.

131. An effect of *clause 11* of the Bill, which sets out the franchise in referendums triggered under Part 1 of the Bill, is that those prisoners who are currently disqualified from voting in parliamentary elections will also be unable to vote in referendums required by virtue of the Bill. Case law establishes, however, that referendums do not fall within the scope of Article 3 of Protocol 1. It follows that the provision made in respect of the franchise in *clause 11* does not engage Article 3 of Protocol 1 and that no issue of incompatibility with the ECHR arises.

132. An effect of Part 2 and *Schedule 2* of the Bill is that the allocation of the additional UK MEP is by reference to the 2009 European Parliamentary election results. We are confident that this would not infringe Article 3 of Protocol 1 because the proposal is based on the result of the most recent UK-wide elections to the European Parliament. Even if a court disagreed and ruled that the provisions in Part 2 and *Schedule 2* of the Bill do interfere with this right, the measure is justified and proportionate because it is prescribed by law, the UK has a wide margin of appreciation in how it complies with the right, and it represents minimal interference with the ‘free expression of the opinion of the people in the choice of the legislature’.

133. Such an allocation is not arbitrary because it is expressly provided for in the Transitional Protocol on MEPs. It is proportionate because it represents a democratic method of allocating the seat whilst avoiding the potential delay that might follow were the seat to be filled by the holding of a by-election. The allocation represents a time-limited transitional measure which will only have effect up until the end of the current 2009-2014 term of the European Parliament. There will be a new UK-wide election for Members of the European Parliament in June 2014. The Government is therefore satisfied that the proposal to allocate the additional seat by reference to the 2009 results falls within that margin and is therefore compatible with the Convention rights.

COMMENCEMENT

134. Commencement is dealt with in *clause 21*. *Clause 15* and Part 3 will come into force on the day of Royal Assent. The other provisions of this Bill are to be brought into force by commencement order.

EUROPEAN UNION BILL

EXPLANATORY NOTES

These notes refer to the European Union Bill as introduced in the House of Commons on 11 November 2010 [Bill 106]

*Ordered, by The House of Commons,
to be Printed, 11 November 2010.*

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PUBLISHED BY AUTHORITY OF THE HOUSE OF COMMONS
LONDON - THE STATIONERY OFFICE
Printed in the United Kingdom by
The Stationery Office Limited

£x.00