



The Treaty of Lisbon: Government and Parliamentary views on a referendum

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This Note looks at the present and past governments' views on holding referendums on the ratification of EC Treaties. It focuses in particular on the *Treaty of Lisbon* and the *Treaty Establishing a Constitution for Europe*. It also looks at parliamentary debate and public opinion on the referendum issue.

"90 per cent of it is still there... these changes haven't made any dramatic change to the substance of what was agreed back in 2004".

Bertie Ahern, Irish Taoiseach, *Irish Independent*, 24 June 2007

"... every provision of the constitutional treaty, apart from the flags, mottos and anthems, is to be found in the reform treaty. We think that they are fundamentally the same ...".

Michael Connarty, Chairman European Scrutiny Committee, 11 December 2007 c 211 at <http://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm071211/debtext/71211-0012.htm>

"... the proposed Reform Treaty may indeed salvage 90 percent of the pragmatic changes to the EU institutions that had been in the Constitutional Treaty. But recent scientific research shows that human beings and mice are genetically 90% identical. However, the 10% difference is crucial - and the same goes for the Reform Treaty!"

Richard Corbett MEP at

<http://www.richardcorbett.org.uk/blog/labels/hague.html>

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1 Treaty ratification in the UK

Treaties are ratified by the Foreign Secretary or his/her representative acting on behalf of the Crown (the 'Royal Prerogative'). Parliament does not have a direct role in treaty ratification but there can be parliamentary activity relevant to it. Starting in the 1920s, and continuously since the 1930s, there has been a constitutional practice (not a law) known as the 'Ponsonby Rule' which requires that treaties subject to ratification should be laid before Parliament for 21 sitting days before ratification, for information and to give Parliament an opportunity (not always taken) to debate them.¹ The formal submission of the treaty text to Parliament as a Command Paper, together with the debates on the Bill, has covered this requirement for European Community Treaties.² The *Treaty of Lisbon* was published as Cm 7294 in December 2007 and the Bill linked to its ratification, the *European Union (Amendment) Bill*, received its first reading on 17 December 2007.

When the UK joined the then European Economic Community in 1973, accession was preceded by the passing of an Act of Parliament which made the obligations under the Treaty and the law deriving from it applicable within the UK. This was the *European Communities Act 1972* (here referred to as the ECA). On all subsequent occasions when new treaties have been agreed, including treaties of accession, there has been new legislation in the UK to amend the ECA so that those parts of the new treaties which are intended to have domestic legal effect are also made applicable within the UK. Similar legislation is required to cover all parts of the *Treaty of Lisbon* which are intended to have direct legal effect in the Member States. In the UK the passage of the implementing legislation has not been formally part of ratification, but necessary for ratification to proceed smoothly and to avoid potential conflicts between national obligations under the Treaty and the domestic legal order.

2 Referendums and EC Treaties

2.1 Constitutional position

There is no constitutional requirement to hold a referendum for any purpose in the UK, but Parliament is free to legislate for a referendum on any question at any time. Parliament cannot be formally bound by the outcome of a referendum, but a referendum could be made to have other legal effects. For example, referendum legislation might stipulate that, depending on the outcome, a minister will lay before Parliament an Order in Council which would either bring into force or repeal an Act of Parliament. Such a provision could, if Parliament had so decided, have been added to the *European Union (Amendment) Bill* relating to the *Treaty of Lisbon* (see below for information on the parliamentary passage of the Bill).

2.2 Party positions

The holding of a referendum on UK entry to the EEC became official Labour policy in April 1972. Labour also supported a referendum on the Maastricht Treaty. However, in government they were against referendums on the Amsterdam and Nice Treaties. The

¹ There is a full description of the Ponsonby Rule on the FCO website at <http://www.fco.gov.uk/Files/kfile/ponsonbyrule,0.pdf>

² For information on the parliamentary procedures linked to previous EC Amendment Bills, see Standard Note SN/IA/3341 *European Treaties: the parliamentary process of bills, official papers and Library information* 10 January 2005.

Labour Government promised a referendum on the constitutional treaty, which was supported by the Conservatives and Liberal Democrats (see also below).

In 1972 the Conservative Prime Minister, Edward Heath, rejected calls for a referendum.

The Conservatives were also against a referendum on the Single European Act and Maastricht Treaty. In opposition they wanted one on the Amsterdam and Nice Treaties. The present Shadow Foreign Secretary, William Hague, maintains that passing the bill on Lisbon without a referendum was in "clear breach" of promises made in the 2005 general election, and ahead of the EP elections on 4 June 2009, the leader of the Opposition, David Cameron, has launched a campaign on Facebook and Youtube calling for the Government to hold a referendum on Lisbon.³

The Liberal Democrats were divided over a referendum on Maastricht and were against referendums on the Amsterdam and Nice Treaties, but are divided over a referendum on the Lisbon Treaty. Their leader, Nick Clegg, has called instead for a referendum on the UK's continued membership of the EU.

2.3 Referendum clauses in earlier EC bills

Treaty of Rome (1972)

Enoch Powell and Neil Marten put down an amendment calling for a referendum on entry to the EEC. This was pursued by Tony Benn in March 1972, who took it to the National Executive.

Single European Act (1986)

No referendum amendments or clauses were debated during the *European Communities (Amendment) Bill* linked to the *Single European Act* in 1986.

Treaty on European Union (Maastricht Treaty, 1992-3)

There was a vote on 21 April 1993 on a new clause proposing a referendum on the Maastricht Treaty. The division was on New Clause 49, Commencement provisions, which stated:

This Act shall take effect on the first day of January 1996 or on such earlier date as may be specified in any subsequent Act of Parliament as the date for the holding of a consultative referendum to establish whether or not majority opinion supports The Treaty on European Union.⁴

The division on the referendum clause was defeated by 363 votes to 124.

Treaty of Amsterdam (1997)

The Leader of the Opposition, William Hague, called for a referendum on the Amsterdam Treaty at the Scottish Conservative Party conference on 27 June 1997, saying that the Treaty had removed the UK veto in 16 areas and extended the powers of the European Parliament in 23 areas.⁵ The demand for a referendum was repeated by the Shadow Foreign Secretary, Michael Howard MP, at the Conservative Party Conference on 8 October.

³ <http://www.facebook.com/pages/Give-us-a-Referendum/78192673370>

⁴ <http://pubs1.tso.parliament.uk/pa/cm199293/cmhansrd/1993-04-21/Debate-31.html>

⁵ *The Times*, 28 June 1997.

The then Prime Minister, Tony Blair, rejected a referendum in parliamentary answers of July 1997:

Apparently, the reason why some people say that there should be a referendum is the extension of qualified majority voting. I have looked carefully at both the Single European Act and the Maastricht Treaty, and there are vastly greater extensions of qualified majority voting in both. Not a word about a referendum did we ever hear from Conservative Members - but then they are consistent at least in their inconsistency. (...)

The idea that this country should have a referendum on the Amsterdam Treaty is one of the most absurd propositions that has been advanced in recent times. What happens in Denmark is a matter for Denmark and does not affect us.⁶

During the Second Reading of the *European Communities (Amendment) Bill* on Amsterdam, the then Foreign Secretary, Robin Cook, answered a question about a referendum amendment as follows:

Mrs. Louise Ellman (Liverpool, Riverside): Does my right hon. Friend have any confirmation that the statements made by the right hon. and learned Gentleman and by the Leader of the Opposition that they would call for a referendum on the treaty of Amsterdam will lead to an amendment being tabled? If my right hon. Friend has no information on that, would he care to ask the right hon. and learned Gentleman if that is the case?

Mr. Cook: The right hon. and learned Gentleman will make his speech in his own good time. It is certainly true that he was loud in his demands throughout the summer for a referendum. Indeed, he was demanding a referendum as late as the Conservative party conference on 8 October. He may have read with interest, as I did, in *The Daily Telegraph* only five days later that his leader had decided quietly to ditch the commitment to a referendum. I can only conclude that the Conservative party is now so weary of being defeated in elections and referendums that it has decided to draw a line under them.⁷

Treaty of Nice

Tony Blair stated that he did not intend to hold a referendum on the Treaty of Nice.⁸ However, amendments were tabled during the passage of the bill. On 18 July 2001 Richard Spring introduced New Clause 12 - Referendum (No. 1) in the Commons Committee stage of the *European Communities (Amendment) Bill* relating to the *Treaty of Nice*:

'This Act shall not take effect prior to the laying before Parliament of the draft of an Order in Council making provision for ascertaining, by means of a referendum, the preponderance of national opinion with respect to the provisions of the Treaty signed at Nice on 26th February 2001, provided that the Order shall not be made unless separate provision has been made by Parliament for defraying out of public funds any

⁶ HC Deb 2 July 1997, c289 and 9 July 1997, 933.

⁷ HC Deb 12 November 1997 c911 at <http://www.publications.parliament.uk/pa/cm199798/cmhansrd/vo971112/debtext/71112-22.htm>

⁸ HC Deb 11 December 2000 c 356.

expenses to be incurred by a Minister of the Crown or Government Department in carrying the Order into effect.'.—[Mr. Spring.]⁹

This was taken with two other amendments tabled on the matter of a referendum:

New clause 37—Referendum (No. 3)—

'This Act shall not take effect until the laying before Parliament of the draft of an Order in Council making provision for ascertaining, by means of referendum, the preponderance of national opinion with respect to the provisions of the provisions of the Treaty signed at Nice on 26th February 2001 amending the Treaty on European Union and the Treaty establishing the European Community, provided that the Order shall not be made unless separate provision has been made by Parliament for defraying out of public funds any expenses to be incurred by a Minister of the Crown or Government departments in carrying the Order into effect.'

New clause 44—Referendum (No. 4)—

'.—This Act shall not take effect prior to the laying before Parliament of a draft Order making provision for the ascertaining by the Government of the preponderance of national opinion with respect to the Nice Treaty by means of a referendum (providing that the Order shall not be made until provision from public funds has been made by Parliament in respect of expenditure incurred in the undertaking of such a referendum).'¹⁰

In the Lords Committee stage Lord Blackwell moved Amendment No. 39:

After Clause 3, insert the following new clause—

REFERENDUM

This Act shall only come into force after the provisions of the Treaty of Nice have been approved in a referendum by the people of the United Kingdom,

3 Government commitment to a referendum on the EU Constitution

The Government announced in April 2004, in what appeared to many observers to be a response to public and media pressure, that the *Treaty Establishing a Constitution for Europe* (the EU Constitution) would be put to a referendum. The 2005 Labour Party election manifesto pledged to “campaign whole-heartedly for a ‘Yes’ vote to keep Britain a leading nation in Europe”.¹¹ Britain would, it stated, “help spread democracy and freedom around the world” and the Government would be “leaders in a reformed Europe”.¹² The EU Constitution was commended as “a good treaty for Britain and for the new Europe” and legislation was introduced in early 2005 to prepare for its ratification and for a referendum.

Following the negative referendum results in France and the Netherlands in May and June 2005 the Government decided to postpone the Second Reading of the European Union Bill “until the consequences of France and the Netherlands being unable to ratify the treaty are

⁹ <http://www.publications.parliament.uk/pa/cm200102/cmhansrd/vo010718/debtext/10718-20.htm>. Division 34 at http://www.publications.parliament.uk/pa/cm200102/cmhansrd/vo010718/debtext/10718-30.htm#10718-30_div34

¹⁰ <http://www.publications.parliament.uk/pa/cm200102/cmhansrd/vo010718/debtext/10718-21.htm>.

¹¹ See: http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/13_04_05_labour_manifesto.pdf

¹² *Ibid*

clarified”.¹³ Mr Straw said that neither future legislation nor a referendum had been ruled out.¹⁴

The Bill was later suspended indefinitely and, although some other Member States continued with their ratification procedures,¹⁵ the British Government’s position remained that there was no point in continuing.¹⁶

4 Government refusal to hold a referendum on the Lisbon Treaty

There were reports in early 2007 that the Government had warned the German Presidency against “too much change” in a new reform treaty, because this would make a referendum necessary.¹⁷ The Government, it was alleged, wanted a slimmed down treaty and preferably one which could be ratified without a referendum.

Although the Government had pledged to hold a referendum on the constitutional Treaty in 2004, its position on Lisbon was that this Treaty was not constitutional, was not the same as the 2004 treaty, and that a referendum was unnecessary as the Government had achieved its “red lines”. Gordon Brown endorsed the EU Commission’s view that Lisbon was not a “constitutional treaty” but an “amending treaty that does not require a referendum”.¹⁸ He insisted that the Government (Tony Blair negotiated the final agreement) had “secured the defence of the national interest in such a way that no fundamental change is taking place in the relationship between the European Union and Britain”.¹⁹

The Prime Minister told the Commons:

I hope that we can proceed on the basis that there will be a full debate in the Chamber in the House of Commons on all the details of the legislation; that every Member of Parliament who has views can contribute to that debate; and that we can look in detail at the provisions that have been agreed as part of the amending treaty. I think that people will come to the conclusion that we have defended the British national interest, and built in the necessary protections for the future.²⁰

He continued:

If we were voting on a decision to join the euro, there would be a referendum; and if we were discussing the old constitutional treaty, there would be a referendum. We have secured the defence of the national interest in such a way that no fundamental change is taking place in the relationship between the European Union and Britain, which is shown in the protocols as well as in the opt-ins that we have achieved.²¹

¹³ HC Deb 6 June 2005 c 992

¹⁴ *Ibid*

¹⁵ Latvia, Cyprus, Finland, Luxembourg and Malta went on to ratify after June 2005.

¹⁶ See also House of Commons Library Research Paper 05/45, *The Future of the European Constitution*

¹⁷ “Blair sees chance to avoid Euro referendum”, *Guardian*, 24 April 2007

¹⁸ HC Deb 22 October 2007 c 28

¹⁹ *Ibid.*, c 30

²⁰ HC Deb 22 October 2007 c28 at

<http://pubs1.tso.parliament.uk/pa/cm200607/cmhansrd/cm071022/debtext/71022-0005.htm>. See also column 36.

²¹ HC Deb 22 October 2007 c30

Gordon Brown conceded that the “decision for a referendum on European Union matters is a decision for this Parliament”.²² In other words, he did not rule out the possibility of ratification being made conditional upon a referendum if Parliament so decided during the passage of the *European Union (Amendment) Bill*.

5 The Government’s response to recent no-votes

5.1 2005

In 2005, when France and the Netherlands voted against the EU Constitution, the then Foreign Secretary, Jack Straw, announced in the Commons that the Government had decided to postpone the Second Reading of the *European Union Bill*²³ because “until the consequences of France and the Netherlands being unable to ratify the treaty are clarified, it would not in our judgment now be sensible to set a date for the Second Reading”.²⁴ Mr Straw said the Government would “keep the situation under review, and ensure that the House is kept fully informed”.²⁵ He insisted that neither legislation nor a referendum had been ruled out: “We reserve completely the right to bring back for consideration the Bill providing for a UK referendum should circumstances change, but we see no point in doing so at this moment”.²⁶ The Government kept its options open, but when the EU decided to ‘bury’ the EU Constitution and to come up with a different solution after a period of reflection, the Bill was not brought back, and it fell at the end of the session.

5.2 2008

After Ireland voted against the Lisbon Treaty in a referendum in June 2008, the British Government came under some pressure, which it resisted, to halt the progress of the *European Union (Amendment) Bill* in the House of Lords. David Miliband announced in a statement on 16 June 2008 that the UK would continue with the ratification of Lisbon after the Irish no-vote. William Hague called the Irish referendum result “an inspiring example of democracy in action”, a “courageous vote”, and asked:

Following as it does the French and Dutch rejections of the original constitution— a treaty that was, in the words of Irish Prime Minister Bertie Ahern, “90 per cent.” the same as the Lisbon treaty—is it not now clear beyond doubt that there is profound opposition among the peoples of Europe to the substance of this treaty? Given that no one would ever call the peoples of France, the Netherlands and Ireland anti-European, is it not now clearer than ever that it is absurd to describe as anti-European disagreement with a treaty that further centralises power away from Europe’s nation states towards remote EU institutions?²⁷

He questioned the Government’s intention to continue with ratification:

²² Ibid c32

²³ The *European Union Bill* [Bill 45 of 2004-05] was introduced on 25 January 2005 and had a Second Reading on 9 February, but it fell on the calling of the general election. The Bill provided for the Constitution to have legal authority in the UK conditional upon approval in a referendum. The Bill was reintroduced on 24 May 2005 [Bill 5, 2005-06]. For information on the Bill, see Library Research Paper 05/12, *The European Union Bill* 3 February 2005, at <http://www.parliament.uk/commons/lib/research/rp2005/rp05-012.pdf>

²⁴ HC Deb 6 June 2005 c 992 at http://pubs1.tso.parliament.uk/pa/cm200506/cmhansrd/cm050606/debtext/50606-05.htm#column_991

²⁵ HC Deb 6 June 2005 c 992

²⁶ Ibid

²⁷ HC Deb 16 June 2008 c 705

Should not the Government now plainly state that Britain will suspend ratification in this country immediately, give a clear message at this week's summit that the treaty is finished, and make the fundamental point that no lasting political institutions can be built in democratic societies without the people's consent? Is that not what real respect for the referendum would mean? Is it not essential that all preparations for implementing the treaty, including on the European External Action Service, are now suspended and that the EU takes no action that is not legally provided for under the current treaties? Does the Foreign Secretary agree that respecting the result means not asking the Irish people to vote again? Will he undertake on the Government's behalf that they will take no part in any bullying of Ireland? Would it not be extraordinary for the Irish to vote twice on this treaty, when British voters have not had the opportunity to vote once?²⁸

Edward Davey, for the Liberal Democrats, suggested that "many in Britain, including the Liberal Democrats, find it difficult to see any way in which to continue with the Lisbon Treaty", but thought it would be "wrong to be seen to anticipate discussions with our European partners[?]"²⁹ He continued:

Whether the European Union's operation is to be based on Nice or Lisbon, is not our immediate challenge to obtain a decision, one way or the other, at the forthcoming summit and thus avoid further delay and uncertainty?

Whatever the frustrations and difficulties caused by the loss of Lisbon, could not the cause of European co-operation be much more seriously damaged by yet another protracted period of member states being distracted by institutional debate or talk of a two or three-speed Europe?

With or without Lisbon, in a world of uncertainty and danger, Britain's national interest remains in the European Union, playing a positive role. It is time for the European Union to focus all its energy on the agenda of economic reform, climate change and tackling terrorism. The Foreign Secretary's job now is to ensure that Britain plays that constructive role in Europe so that Europe's benefits become ever clearer to the peoples of Europe.³⁰

The Foreign Secretary would not be drawn into arguments about a UK referendum and the Prime Minister did not yield to public or parliamentary pressure to hold a referendum on the Treaty.

6 Public and parliamentary calls for a referendum on Lisbon

6.1 Public opinion polls

According to an ICM poll for the *Daily Mail* in mid-August 2007, there was public support for a referendum on Lisbon. This poll found that 82% of voters as a whole and 80% of Labour voters wanted a referendum on the new treaty; also that 24% of Labour supporters might not support the party in a general election if Mr Brown did not offer a referendum.³¹ More recent polls are considered below.

²⁸ Ibid

²⁹ HC Deb 16 June 2008 c 708

³⁰ Ibid c 709

³¹ *Daily Mail* 20 August 2007 at

http://www.dailymail.co.uk/pages/live/articles/news/news.html?in_article_id=476376&in_page_id=1770

Public support for a referendum gathered momentum in 2008. The Government's stand that there were important constitutional differences between the two treaties which made a referendum on the later Treaty unnecessary appeared unconvincing. Anti-Lisbon referendum campaigns were well-organised and highly emotive, exploiting a widening eurosceptic mood and topical reports about MEPs' expenses scandals and the cost of the "Strasbourg shuttle".³²

A poll carried out by Ipsos MORI for the Liberal Democrats in February 2008 showed that over half of British adults thought there should be a referendum on Britain's membership with Europe (54%), while a quarter disagreed (27%). Asked what they would like a referendum, if held, to be about, 38% said they would prefer a referendum on Britain's relationship with Europe, while 18% wanted a referendum only on the details of the Lisbon treaty. 10% did not want a referendum at all and 8% wanted a referendum on both membership and Lisbon. 26% said they did not know.³³ In a *Guardian* poll in July 2008 on whether Britain should have had a referendum on Lisbon 64.5% said yes and 35.5% said no.³⁴

In a BBC "Politics Today" poll in March 2009, when asked if the British people should decide in a vote before Britain transfers any further power to the European Union, 84% agreed, with 13% against.³⁵

6.2 Parliamentary views

Gordon Brown came under pressure from both the Conservative Opposition and Labour Party referendum supporters to put the Lisbon Treaty to a vote. Bill Cash's EDM on the Reform Treaty summarised many of the arguments in favour of a referendum and called for one either before or after ratification:

That this House notes that the impartial European Scrutiny Committee concluded that the Reform Treaty is substantially equivalent to the original Constitutional Treaty; that the Government Manifesto promised a Referendum on the original treaty; that the Conservative Party voted against it in principle on the Second Reading of the Bill implementing that Treaty; that the Prime Minister said that he will reject the Reform Treaty if the Government's Red Lines are not guaranteed on 18th October, but (following the European Scrutiny Committee examination of the Foreign Secretary on 16th October) that these Red Lines do not satisfy UK vital national interests and that the European Court of Justice will determine these matters, not this House; that, contrary to the statements of the Foreign Secretary, parliamentary democracy is enhanced when this House, as the Labour Government in 1975, hands back a Referendum by Act of Parliament to the voters who elect Members of this House; that 27 million voters have been denied a Referendum on any European Question since 1975; that over 70 per cent. of the voters want a Referendum but that the reasons have to be fully explained; that the Reform Treaty is a consolidation of the existing treaties into a merger of the European Community into a European Union involving substantial, fundamental, constitutional and structural change by the Government's own criteria for a

³² See SN/IA/4841 and 4842 for further information on these issues.

³³ EU referendum survey at <http://www.ipsos-mori.com/content/eu-referendum-survey.ashx>

³⁴ 17 July 2008 at <http://www.guardian.co.uk/commentsfree/poll/2008/jul/17/lisbontreaty?gusrc=rss&feed=global>

³⁵ 18 March 2009 at http://news.bbc.co.uk/1/hi/programmes/the_daily_politics/7949104.stm. Full report at http://www.bbc.co.uk/blogs/dailypolitics/andrewneil/images/daily_politics_poll_16Mar09.pdf

Referendum; and insists that the Prime Minister rejects the Reform Treaty on 18th October and holds a Referendum before or after ratification.³⁶

In a Draft Report on the European Scrutiny Committee's EU Intergovernmental Conference follow-up report in November 2007 Mr Cash made more substantial arguments in support of a referendum on the grounds that the reform treaty introduced "substantial constitutional change":

1. The Reform Treaty, as compared to the Original Constitutional Treaty, requires a referendum of the electorate of the United Kingdom because it is the equivalent to the Constitutional Treaty, even if not the same. It is a distinction without a proper difference.

2. A referendum is required for the following constitutional reasons: the Reform Treaty with the merger of the TEC, based on the Treaty of Rome (which was the genesis of the European Economic Community), followed by the Single European Act on the one hand and the TEU (with its genesis in the Maastricht Treaty which deals with European government, followed by Nice and Amsterdam), on the other, into a Union with an overarching single legal personality and a self-amending text is "substantial constitutional change", even "fundamental change" in terms that warrant a referendum according to the government's own criteria.

3. The present Minister for Europe stated to the Foreign Affairs Select Committee on 12 September that a referendum would be required if a Treaty created "substantial constitutional change". The former Prime Minister stated that a new Treaty "should not be proposing the characteristics of a Constitution". The former Foreign Secretary stated to the European Scrutiny Committee on 7 June that the government was intending a Treaty "that was very different from the Constitutional Treaty". The correlation between the Constitutional Treaty and the Reform Treaty in terms of the specific provisions incorporated into the latter demonstrates that this statement can now no longer be substantiated. The government has also stated that a referendum would be required where there is "fundamental change" and where the structure of the relationship between the United Kingdom and the European Union is altered by virtue of the European Treaty. The fundamental nature, not only of the merger of the Treaties, but also the individual proposals in the Reform Treaty, alters the relationship by way of substantial, even fundamental, constitutional change. There are also specific provisions arising in respect of the Charter of Fundamental Rights, the Common Foreign and Security Policy, the legal obligations imposed on the United Kingdom Parliament, measures relating to the criminal law, and measures related to Title IV which are deeply contentious and would require specific exclusion from having effect in UK law which for the avoidance of doubt could only be achieved by excluding their effect by the use of a statutory provision preceded by the words "Notwithstanding the European Communities Act 1972".

Such a formula would be essential but the government, by all accounts, would not be prepared to employ such wording, thereby putting the vital national interests of the electorate in jeopardy.

4. The Reform Treaty on all these tests requires a referendum. It would be a deceit of the electorate (even by the criteria for a referendum set out by the

³⁶ EDM 2143 17 October 2007 at <http://edmi.parliament.uk/edmi/EDMDetails.aspx?EDMID=34018&SESSION=885>

Government) to refuse to hold one, unless the Treaty itself was rejected by the Prime Minister in the IGC on 18/19 October as he should. Unless this occurs, refusal to hold a referendum would be a breach of trust with respect to the Reform Treaty (let alone past promises about the original Constitutional Treaty made in 2004) and would run clearly contrary to the assertions of the present Prime Minister that he is committed to restoring good governance, democracy and trust.

5. The accumulation of the existing Treaties since 1972 combined with the merger described above, has in itself culminated in such fundamental change as warrants a referendum. There are tens of millions of people which have not had an opportunity to express their view on our continuing membership of the European Union. The Labour government to its credit provided a referendum on continuing membership of the then European Economic Community, following its enactment of the Referendum Act of 1975.

6. Contrary to the assertions of the present Foreign Secretary, Parliamentary sovereignty is not diminished but actually is enhanced by the granting of a referendum by parliamentary enactment. The electorate and not Members of Parliament nor the Government are the ultimate source of parliamentary authority, sovereignty and democracy all of which Members of Parliament and members of the Government merely hold on trust subject to re-election at a general election every five years. This Reform Treaty and the merger of all the existing Treaties into a Union of European government, also contains a self-amending text which would effectively obstruct any future referendum arising out of a future IGC. All this clearly requires Members of Parliament to hand back to the voters an impartial question authorised by Parliament and across the political divide a decision in a referendum as to the manner in which the electorate as a whole wishes to be governed.

7. This Reform Treaty therefore must not be put into effect by a Prerogative Act of a former Prime Minister signing the Treaty and departing and then a new Prime Minister implementing into UK law the decision through the Whips in Parliament, without a referendum.

8. It would be a constitutional outrage, in the absence of a rejection of this Treaty to do otherwise.

9. The IGC has not yet taken place so that an opportunity for the Prime Minister and the Government to review the present decision not to have a referendum and even to reject the Treaty is still open. This is particularly the case as the decision expressed and the announcement made by the Foreign Secretary not to have a referendum has been taken without the government even sitting down at the IGC on the latest text on 18/19 October 2007. This announcement was also made even before the European Scrutiny Committee had reported on the text. The Committee is specifically charged by Parliament under its own standing orders to report on the political/legal importance of the proposed Reform Treaty and has not cleared the text (the opinion of the European Commission – COM(07)412) the government's action in seeking to pre-empt the Committee's assessment of this document in its report amounts to the contempt of the Committee. Moreover, this announcement is apparently in compliance with the so-called binding mandate of the Member States of the European Union of 19 June 2007. This certainly cannot constitutionally bind the Prime Minister, the United Kingdom Parliament or the electorate of the United Kingdom. The Government has erroneously accepted the Commission's opinion on the ICG. The Committee therefore calls on the Government either to

reject the Treaty or to hold a Referendum. This is on the basis that on both political and legally important grounds, the Government has misleadingly denied that the Reform Treaty is a Constitutional Treaty of the first order, amounting to substantial and even fundamental change to the Constitution of the United Kingdom and to the structure of the relationship between the United Kingdom and the European Community and the European Union..³⁷

In the Debate on the Address on 7 November 2007 the Conservative Peer, Lord Bowness, put forward arguments against holding a referendum:

I regret that I cannot agree with my noble friend on my Front Bench about a referendum. I did not believe that we should have had a referendum on the original constitutional treaty; I did not agree with the then Prime Minister when he changed his mind, and I do not think we should have a referendum now. If we had a referendum, leaving out the compelling arguments for Parliament to decide these matters, I fear that, on past performance, the case for the treaty would not be advanced with much rigour. As the noble Lord, Lord Wallace of Saltire, indicated at the beginning of this debate, more emphasis would be given to those matters where we have successfully defended ourselves against the combined forces of the Commission and other members, who by the implication of our arguments are apparently so careless with their own sovereignty that they would be prepared to agree to anything. But it certainly will not be portrayed as the successful outcome of discussions between friendly partner states.

In any referendum, what is the question? Are we for or against the abandonment of the rotating presidency? Are we for against the increase in the influence of national Parliaments? Are we for or against attempts to improve the effectiveness of the common foreign and security policy? These issues cannot be answered by a simple question.

To be sure, these questions will not be the subject of balanced discussion in much of what is, as it likes to describe itself, the serious or quality press. Your Lordships will have noticed that the European Union is responsible for the increase in the price of Christmas trees. If you read the detail, it is because the subsidy in Denmark has been withdrawn, something normally that one would support.

By way of example, for months the Daily Telegraph has, in its pages and those of its sister paper, the Sunday Telegraph, been drumming up support for a referendum; the number of signatories now exceeds 100,000. But support is elicited, I would submit, on the strength of a few statements taken out of context and without explanation. It is headed, of course, with a quote from President Barroso: "“What we have is the first non-imperial empire”."

Perhaps the use of the word “empire” was not particularly appropriate but no one goes on to point out that Mr Barroso was highlighting the difference between a European Union built of 27 free and democratic countries, each with its own elected Governments, and past attempts to build a European empire through force. One phrase taken out of context nevertheless makes the headline demanding signatures to the petition.

³⁷ European Scrutiny Committee Third Report of 2007-08, *European Union Intergovernmental Conference: Follow-up report* HC 16-iii, 14 November 2007 at http://www.parliament.uk/parliamentary_committees/european_scrutiny/escfm14112007.cfm

A number of bullet points follow. Readers are told that the treaty wishes to create a European head of state, no doubt in order to create a certain amount of anxiety among the population as to the status of Her Majesty. Of course, neither the mandate for the Intergovernmental Conference nor the draft reform treaty create a state or threaten the position of the Queen or any other monarch or president within the union as heads of state of their individual countries. Do we really believe that our partner states which have recently regained their independence would again act so carelessly with their sovereignty? We know that what is proposed is a president of the European Council for a term of two and a half years, renewable once. Even opponents of the constitutional treaty agree that the six-month rotating presidency needs reform.

The European diplomatic corps and the foreign minister are another boggy man. There is no explanation that the merger of the Commission post and the existing High Representative do away with a situation of two voices, one with influence and no resources and one with resources and rather less influence. There is no explanation that the foreign external active service shall work in co-operation with the diplomatic services of the member states and include staff seconded from the diplomatic services of those member states.

In context it is all quite a different picture. The High Representative is not taking our seat on the Security Council. All that is proposed is that when the Union has a defined position—which will in any event require unanimity—the High Representative should be asked to present the Union's position. This is not taking the UK's or France's seat on the Security Council.

The giving of the European Union legal personality is seen as a huge threat, although no reference is made to the existing Article 281 of the treaty on the European Communities, which also gives the communities legal personality. The changes in voting are inevitable with enlargement and yet opponents of the treaty are often the proponents of enlargement. Are we assuming that we want enlargement only on the basis that new and smaller members should somehow be second-class citizens?

All this and other points were put before the public before even the final form of the treaty was known. For all these reasons—I was but I am no longer, since the beginning of the new Session, a member of the European Union Select Committee—the Select Committee's decision under the chairmanship of the noble Lord, Lord Grenfell, should be welcomed across the House. Whether or not the reform treaty is the constitutional treaty in disguise depends upon the political approach you take to this issue. Of course, it contains significant proposals which were in the constitutional treaty, and for the opponents of both it will remain the constitutional treaty, but this argument gets us absolutely nowhere in informing the House for the debate that will come. Other people see the reform treaty as quite different in style and substance, but it is essentially a political judgment. So is the request for a referendum. I would submit that if the Select Committee were to produce a report which entered into such waters, including whether or not there should be a referendum, it would threaten the objectivity for which the reports of the Select Committee in your Lordships' House are well known and respected. Of course, in the debate members will form views on the matters dealt with by the committee and they will use the findings of the committee to buttress their own arguments, but they will do so against the background of a committee report which is intended to analyse the impact that the reform treaty—which is a fact, as opposed to the constitutional

treaty which is no longer a fact—will have on the United Kingdom and the existing treaties.³⁸

7 The European Union (Amendment) Bill

7.1 House of Commons

The Bill to authorise ratification of Lisbon, the *European Union (Amendment) Bill* was introduced in the Commons on 17 December 2007 and received a Second Reading on 21 January 2008. A group of 20 Labour MPs had tabled, unsuccessfully, a reasoned amendment to the motion for a Second Reading of the Bill, which also had Scottish National Party and Democratic Unionist Party backing, seeking to prevent progress to Second Reading, “as no provision for a referendum on the Treaty of Lisbon is made within it, despite the Labour, Conservative, Liberal Democrat, Scottish National and Plaid Cymru parties all having promised to make provision for a referendum on such a treaty in their manifestos and policy statements in 2005”.³⁹

A referendum was among the first matters to be discussed at Second Reading and many of the familiar arguments for and against were raised during the debate. In his opening remarks the Foreign Secretary, David Miliband, insisted there were salient differences between Lisbon and the EU Constitution:

The real issue is the content of the treaty; and in its structure and consequence, as well as its content, it is different from the constitution and does not meet the bar of whether it constitutes fundamental constitutional change”.⁴⁰

In response to a question from the former Conservative Chancellor, Kenneth Clarke, about the previous Blair Government’s decision to hold a referendum on the EU Constitution, Miliband also made clear that, in his view, a referendum need not have been offered on that Treaty either:

I can certainly confirm that it came as a surprise and a shock to me to learn of the new decision. I certainly agree that there was no way on the basis of its constitutional significance that it merited the decision that was taken.⁴¹

The vote at Second Reading was 362 in favour of Lisbon and 224 against. Three Conservative MPs voted in favour of the Treaty, while 18 Labour MPs voted against it. The Bill went to a Committee of the Whole House on 9 January for 11 days.⁴²

On 26 February 2008 the Liberal Democrat leader, Nick Clegg, tabled an amendment on the holding of a referendum on UK membership, rather than on the Lisbon Treaty, which was held by the Speaker to be irrelevant to the debate.

On the last day in Committee, 5 March 2008, Conservative MPs put down Amendments to Clause 8 of the Bill on commencement.⁴³ Amendments 293, 296 and other amendments and

³⁸ HL Deb 7 November 2007 cc90-2 at <http://www.publications.parliament.uk/pa/ld200708/ldhansrd/text/71107-0010.htm#07110735000156>

³⁹ <http://www.publications.parliament.uk/pa/cm200708/cmagenda/ob80121.htm>

⁴⁰ HC Deb 21 January 2008 c 1242 at <http://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm080121/debtext/80121-0009.htm>

⁴¹ HC Deb 21 January 2008 c 1246

⁴² For full details of the passage of the Bill, see the Parliament website at <http://services.parliament.uk/bills/2007-08/europeanunionamendment.html#2007-08>

New Clauses required a referendum and set out a procedure for holding one. However, in Division 117 on Amendment 293 the House voted by 311 votes to 248 against a referendum. 29 Labour MPs and 13 Liberal Democrats voted with the Conservatives in favour of a referendum, while three Conservatives voted against their party line.⁴⁴ In Division 118 on Amendment 296, 247 voted in favour and 311 against. In Division 119 the Committee divided 355 to 218 in favour of Clause 8 standing unamended. Thus, the majority of MPs voted against making it necessary to hold a referendum before the Lisbon Treaty could be inserted into the list of EU treaties in force in the *European Communities Act 1972*. There was a three-line Liberal Democrat whip to abstain in the referendum vote, which 15 Lib Dem MPs defied by voting in favour of a referendum, and three front bench spokesmen (Alistair Carmichael, Tim Farron and David Heath) resigned from their positions.

7.2 House of Lords

Lords Report on the Lisbon Treaty

On 28 March, just before the EU Bill received its Second Reading in the House of Lords, the Lords European Union Committee published a report on the implications for the UK Constitution of the EU Bill and the Lisbon Treaty.⁴⁵ The Committee's Conclusions on the Treaty and the UK Constitution appeared to support the Government's view that Lisbon would not significantly alter the UK's constitutional relationship with the EU.⁴⁶ Many references were made to this Report during the Second Reading on 1 April and Committee stages of the Bill (22 April for seven days ending 20 May).

Lords Second Reading debate on the Lisbon Treaty

Many commentators thought the chances of a referendum amendment succeeding in the Lords were higher than in the Commons, because the Government has no overall majority there and there are only a few more Labour Peers than the Conservatives. The calculation was that if the Conservatives were joined by crossbench Peers and if the Liberal Democrats abstained, as they had done in the Commons, a referendum amendment could be passed.

The referendum issue was raised in the opening Second Reading speeches by Lord Howell, the Opposition Foreign Affairs Spokesperson,⁴⁷ and was a major area of contention throughout the debate. However, the Liberal Democrat spokesperson for constitutional affairs, Lord McNally, said the Liberal Democrats' general election commitment to a referendum had been on a constitutional treaty, and had "died" when the EU Constitution was rejected by the French and the Dutch; Lib Dem Peers would therefore not abstain in a vote on a referendum.⁴⁸ There were no Lib Dem amendments to the Bill on the marshalled list.

In Committee Lord Howell's amendments concerned the similarity between the Lisbon Treaty and the EU Constitution, the 'constitutional' aspects of the CFSP High Representative and

⁴³ The remaining proceedings on Clause 8 and New Clauses and New Schedules are at <http://www.publications.parliament.uk/pa/cm200708/cmbills/048/amend/pb0480503m.1429-1435.html>

⁴⁴ For a party breakdown of the vote see *Telegraph.co.uk* 6 March 2008 at <http://www.telegraph.co.uk/news/uknews/1580883/How-your-MP-voted-on-the-EU-Treaty.html>

⁴⁵ 6th Report of Session 2007–08 HL Paper 84 at <http://www.publications.parliament.uk/pa/ld200708/ldselect/ldconst/84/84.pdf>.

⁴⁶ Lords Constitution Committee 6th Report 2007-08, "European Union (Amendment) Bill and the Lisbon Treaty: Implications for the UK Constitution" 28 March 2008 at <http://www.publications.parliament.uk/pa/ld200708/ldselect/ldconst/84/84.pdf>

⁴⁷ HL Deb 1 April 2008 cc 863-8 at <http://www.publications.parliament.uk/pa/ld200708/ldhansrd/text/80401-0003.htm>

⁴⁸ *Ibid* c 871

the increase in the powers of the ECJ. Lord Howell also pointed out that the main UK opt-outs, which the Government had said made Lisbon different from the EU Constitution, were in fact almost exactly the same as those in the earlier Treaty, on which the Government had promised a referendum. He tabled an amendment to insert wording saying that Lisbon was a constitutional treaty which amended and altered constitutional arrangements between the EU and the UK.⁴⁹ On the last day in Committee (20 May 2008) Lord Howell sought to move a referendum amendment and the well-rehearsed arguments about the nature of the two EU Treaties and the pros and cons of referendums were debated vigorously. Lord Howell's amendment was followed by one by Lord Pearson, who called for a referendum within six months of the Act receiving Royal Assent to determine whether it should continue in force. On 11 June the House of Lords voted by 280 votes to 218 against a referendum on the Lisbon Treaty. Eight Conservative Peers defied their party whip and voted against a referendum.⁵⁰

The Bill received its Third Reading on 18 June 2008. Lord Howell moved an amendment urging the Lords to delay ratifying the Treaty until October 2008 to allow for more parliamentary discussion and for more clarity about the Irish rejection of Lisbon. This was rejected by 277 to 184 votes and the Bill was passed unamended.

Overall, in the Lords the Government had fewer votes than the Conservatives, but support for the Government from the Liberal Democrats and Crossbenchers meant that all amendments were resisted.⁵¹ The Bill passed through its final stages in the Lords on 18 June and received Royal Assent on 19 June 2008.⁵²

7.3 Legal challenges

Stuart Wheeler

On 22 April 2008 the business tycoon, Stuart Wheeler, brought an action to the High Court against the Prime Minister and the Foreign Secretary in which he sought a judicial review of the Government's refusal to hold a referendum on ratification of the Lisbon Treaty. In a judgment at the High Court on 2 May Mr Justice Owen granted Mr Wheeler permission to apply for judicial review.

Wheeler argued that the Government's promise in 2005 to hold a referendum on the EU Constitution "involved an implied representation that a referendum would be held in relation to any treaty having equivalent effect, giving rise to a legitimate expectation that such a referendum would be held".⁵³ On 19 May the Speaker of the Commons, acting through the Attorney General, intervened to make submissions concerning parliamentary privilege and the *Bill of Rights 1689*. On 10 June there was a hearing of the judicial review by the Divisional Court. Initially, the Government said it would go ahead with ratification, but after directions from Lord Justice Richards to the effect that, pending the outcome of the judicial review, the Government should stay completion of the process, the Government decided not

⁴⁹ HL Deb 22 April 2008 cc1390-93 at <http://www.publications.parliament.uk/pa/ld200708/ldhansrd/text/80422-0002.htm#08042261000002>

⁵⁰ HL Deb 11 June 2008 cc 635-9 at <http://www.publications.parliament.uk/pa/ld200708/ldhansrd/text/80611-0010.htm>

⁵¹ HL Deb 18 June 2008 c 1031 at <http://www.parliament.the-stationery-office.co.uk/pa/ld200708/ldhansrd/text/80618-0002.htm>

⁵² For details of parliamentary stages, see <http://services.parliament.uk/bills/2007-08/europeanunionamendment.html>

⁵³ For the full text of the judgement and further information on the Stuart Wheeler case, see <http://www.stuartwheeler.co.uk/>

to press ahead with the final stage of ratification by depositing the instrument of ratification in Rome. Gordon Brown pointed out that the steps between Royal Assent and actual ratification could take weeks and that the expected date of the judgement fitted in with the Government's timetable.⁵⁴ The High Court judgement of 25 June rejected Wheeler's claim, concluding:

57. For the reasons we have given, we are satisfied that the claim lacks substantive merit and should be dismissed. Even if we had taken a different view of the substance of the case, in the exercise of the court's discretion we would have declined to grant any relief, having regard in particular to the fact that Parliament has addressed the question whether there should be a referendum and, in passing the European Union (Amendment) Act 2008, has decided against one.

58. At a late stage in the proceedings, a few days before we expected to hand down judgment, we were informed by the Treasury Solicitor that, following Royal Assent to the European Union (Amendment) Act 2008, the government "is now proceeding to ratify the Treaty of Lisbon". We were concerned that the government might be intending to pre-judge or pre-empt the decision of the court by ratifying the treaty while the lawfulness of doing so without a referendum was still in issue before the court. The Prime Minister, however, acted promptly to remove our concern by making clear that ratification would not take place before the judgment was handed down.

59. In the event, the decision of the court is itself clear. We have found nothing in the claimant's case to cast doubt on the lawfulness of ratifying the Lisbon Treaty without a referendum.⁵⁵

The FCO issued a press release in which Jim Murphy noted that the judges had confirmed the Government's position that Lisbon was different "in both form and substance from the defunct Constitution". Murphy also thought the judges had "made a number of important points about the boundaries between Parliament, Government and the Courts".⁵⁶

Bill Cash

On 17 June 2008 Bill Cash sought a judicial review in the High Court on the grounds that the Lisbon Treaty was "incapable of ratification" after the Irish vote. The basis of his argument was as follows:

The claimant contends that the legal consequence for the United Kingdom of the 'No' vote on the Lisbon Treaty in the referendum held in the Republic of Ireland notified on Friday 13th June under Article 29 of the Constitution of Ireland 1937 (which is direct binding legislation) against the coming into force of the Treaty of Lisbon in the Republic of Ireland is that as from 13th June, the performance of the Treaty in relation to the UK (because of supervening impossibility and change of circumstances preventing the accomplishment of the original object or purpose and transforming the original consent of the parties to the terms of that Treaty) is now otiose, terminated and therefore no longer an available lawful use of the Prerogative in the UK. Furthermore, under

⁵⁴ *BBC News* 20 June 2008

⁵⁵ Case No: CO/1915/2008 <http://www.stuartwheeler.co.uk/Judgment.pdf>

⁵⁶ FCO press release 25 June 2008

the principles of customary international law the Treaty of Lisbon should be stayed (Clausula Rebus Sic Stantibus).⁵⁷

Mr Justice Collins refused permission, stating:

2. This claim is misconceived. There is no reason why the government should not ask Parliament to continue to deal with the European Union (Amendment) Bill despite the refusal of Ireland to ratify the Lisbon Treaty. It will be for Parliament, not the court, to decide whether the Bill should be passed having regard to the Irish decision. The assertion that the decision to continue the ratification process is an exercise of the prerogative power and so justiciable is not correct. In reality, this claim seeks to prevent the parliamentary process from reaching its conclusion and as such is not justiciable. In any event, there may well be a value in the government knowing that they Treaty in its present form has been ratified by Parliament or by a referendum is a matter of political not judicial decision.

3. It follows that this claim is not arguable. It is indeed totally without merit since it is an attempt to pursue a political agenda through the court.⁵⁸

The UK instrument of ratification was deposited on 16 July 2008.

8 A post-ratification referendum?

8.1 Conservative plans

The Conservative Party stand on a referendum is as follows:

If the Lisbon Treaty is not yet in force at the time of the next general election, and a Conservative Government is elected, we would put the Treaty to a referendum of the British people, recommending a 'no' vote. If the British people rejected the Treaty, we would withdraw Britain's ratification of it.

But if the Treaty is in force we will be in a different situation. In our view, then, political integration would have gone too far, the Treaty would lack democratic legitimacy in this country and we would not let matters rest there.

A Conservative Government would also amend the 1972 European Communities Act so that any future EU Treaty that transfers powers from the United Kingdom to the European Union would be subject to a referendum of the British people. The British people must be in charge of their future in Europe.⁵⁹

As the *Daily Telegraph* noted, Mr Cameron "declined to say what the party would do if the treaty is ratified when the party takes office ... 'If that happens, at the time that that happens we will set out exactly and precisely what we'll do'."⁶⁰ In an interview with the *Daily Telegraph* in April 2009 the Shadow Foreign Secretary still did not clarify Conservative plans for the Treaty should they enter government in the near future:

⁵⁷ *European Journal* July 2008 at <http://www.europeanfoundation.org/docs/July%202008.pdf>

⁵⁸ Ibid

⁵⁹ http://www.conservatives.com/Policy/Where_we_stand/Europe.aspx

⁶⁰ *Telegraph.co.uk* 28 September 2008 at <http://www.telegraph.co.uk/news/newstoppers/politics/conservative/3097376/Conservatives-could-hold-Lisbon-Treaty-referendum-after-ratification.html>

The former Conservative leader refuses to reveal exactly what he plans to do if the Lisbon Treaty is ratified and he becomes Foreign Secretary.

However, he makes it clear the Conservatives would consider calling a referendum retrospectively - which could dominate the party's early months in office if they are elected.

"We will address that if we come to that point," he said. "We would face a treaty that lacks democratic legitimacy and we wouldn't let matters rest there...You can still get a referendum on Lisbon. If that happens we don't have to worry about what we do if it is ratified."⁶¹

In an interview with *The Times* later in April Mr Hague was a little more forthcoming:

He promised immediate legislation for a referendum to reject the treaty if it had not been ratified by the whole of the EU by the time that the Conservatives took power.

He left open the door to the possibility of the Tories promising a referendum in their election manifesto, even if the treaty had been ratified by then. [...]

And for the first time he hinted that a referendum could still be promised in the Tory manifesto, even if the treaty had been ratified. Previously the Tories have said that they would not let matters rest in the event of the treaty being ratified but have declined to expand on what they might do.

Mr Hague said that, if it were not ratified by the time of a Tory victory, there would be a referendum "in the opening months" and a Bill preparing for the vote would be ready. If the treaty had been ratified, the party would, nevertheless, spell out in its manifesto what action it would take to reverse European integration. Pressed on whether in those circumstances a referendum could still be promised in a Tory manifesto, he said: "We would not rule anything in or out."⁶²

An opinion in *The Economist* in July 2008 looked at scenarios for a new Conservative Government if they won the next election:

Lisbon has not been ratified by all 27 countries when a Conservative government takes office. Outsiders assume this would be tricky for the Tory high command, forcing a knotty European dilemma onto their agenda. But insiders say it is quite simple: Mr Cameron would hold a referendum and campaign for voters to reject the treaty. Britain would then withdraw its ratification and Lisbon would be dead. One stunned EU diplomat says that "nuclear is not a strong enough word" to describe this option, and hopes that the Tories do not mean it. Conservatives say that they sincerely want Lisbon stopped.

Vote and be damned?

It is a third scenario that is the trickiest: one in which all 27 countries have ratified Lisbon, including Ireland, so that it is already in force as the union's rulebook when the Tories come to power. Anti-EU absolutists would push Mr Cameron to hold a referendum anyway, as a prelude to Britain renegotiating

⁶¹ 10 April 2009 at <http://www.telegraph.co.uk/news/newstoppers/politics/conservative/5135492/William-Hague-interview-Gordon-Brown-could-be-forced-into-European-referendum.html>

⁶² *Timesonline* 29 April 2009 at <http://www.timesonline.co.uk/tol/news/politics/article6188749.ece>

the treaty. Mr Cameron and his shadow foreign secretary, William Hague, have already promised that if they come to office to find the treaty in force, they will “not let matters rest there”.

This assertion is a bluff. A post-ratification referendum would be a legal nightmare, with open-ended political consequences, and Tory leaders know it. More likely, they will push for something else: a repatriation of powers from Brussels in the field of social and employment laws (ie, more opt-outs). Though awkward, this might be doable given enough political will. But everything has a price in Brussels: Britain could end up losing over the EU budget, say, or its access to the single market might be compromised (it is not a level playing-field, rivals would grumble).⁶³

Dr Andrew Lilico, managing director of Europe Economics, believes a post-ratification referendum would be a mistake for a new Conservative government:

There are those that want Cameron to promise a "post-ratification" referendum on Lisbon itself. They are badly mistaken. Here are a few reasons why.

- First, and most importantly, if we have won a General Election, we should just go ahead and renegotiate. We would have no need of a referendum.
- Second, a referendum would slow matters down unnecessarily, delaying the renegotiation we would so desperately need.
- Third, there is a lot more wrong with our relationship with the EU than just the Lisbon Treaty. Lisbon is the last straw, rather than the largest step. So a referendum, even if won, would not provide any additional mandate for renegotiation (over and above the General Election victory, which is all that is required anyway) concerning those matters not covered by Lisbon. Indeed, the risk is that the renegotiation would of necessity become narrowed onto the Lisbon issues.
- Fourth, there is of course the chance that we might lose a referendum - who knows how matters might pan out over the course of a campaign? This would have three very bad consequences. (A) We would not be able to conduct the fundamental renegotiation required. (B) (probably worst of all) We would have entrenched the passing of sovereignty from Parliament (where it still resides now, for EU measures act *through* the Acts putting the Treaties into UK law) to the EU - it would probably not be practical for Parliament itself to take such powers back without a subsequent referendum. So, whilst at the moment we only need to win once at a General Election for everything to change, after a referendum defeat matters would not be so straightforward. (C) (most obviously) Our first Conservative government in more than a decade would be totally discredited within months of taking office. Why on earth would we want to take such risks?
- Fifth, even if we won a referendum, we would be introducing an alien element into the UK constitution. Could we agree any subsequent treaty on anything without a referendum? What about other measures of constitutional significance? For example, could we introduce our own Lords reforms without a referendum?⁶⁴

⁶³ Charlemagne “Europe’s Tory nightmare: Brussels is not prepared for what might hit it if Britain’s Conservative Party wins the next election”, 10 July 2008 at http://www.economist.com/world/europe/displayStory.cfm?story_id=11707114

⁶⁴ Andrew Lilico., CentreRight blog, 6 March 2008 at <http://conservativehome.blogs.com/centreright/2008/03/why-we-dont-wan.html>

8.2 International law

The holding of a post-ratification referendum poses some interesting questions under international law. Unilateral withdrawal from Lisbon if it is already in force would be unacceptable under international legal norms and a change of government would not affect this principle. However, a post-implementation referendum might still have political force as a lever in any future negotiations by a Conservative government about the UK's relations with the EU.

Two Parliamentary Questions were tabled in July 2008 by David Gauke MP asking whether ratification of Lisbon was revocable prior to the Treaty coming into effect. Responding, Jim Murphy merely set out the UK ratification procedure.⁶⁵ Mr Gauke pursued this matter a week later:

To ask the Secretary of State for Foreign and Commonwealth Affairs ... under what circumstances the Government can withdraw an instrument of ratification in respect of an international treaty once it has been deposited with the treaty depositary; and if he will make a statement.

My Murphy replied:

The EU (Amendment) Bill received Royal Assent on 19 June. We are proceeding to ratification in the usual way; once prepared, the instrument of ratification will be deposited with the Italian Government in Rome. Once deposited, it will not be withdrawn.⁶⁶

This reply did not address the question of whether a Conservative government could or would attempt to rescind its predecessor's ratification of the Lisbon Treaty in the event that not all 27 Member States ratify the treaty and it does not come into force. The Lisbon Treaty itself contains no specific provisions on this matter, but the general international legal principles are set out in the 1969 *Vienna Convention on the Law of Treaties*.⁶⁷ Under Article 2 of the Vienna Convention, the act of ratification (or accession, acceptance, approval) is when "a State establishes on the international plane its consent to be bound by a treaty". A few provisions of the Vienna Convention deal with the transitional period between signature and ratification. Article 18 places an obligation upon signatories not to "defeat the object and purpose of a treaty prior to its entry into force" (the principle known as *pacta sunt servanda*). Article 25 concerns the provisional application of a treaty before its entry into force:

1.A treaty or a part of a treaty is applied provisionally pending its entry into force if:

- (a) the treaty itself so provides; or
- (b) the negotiating States have in some other manner so agreed.

2.Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between

⁶⁵ HC Deb 1 July 2008 c 781-2W

⁶⁶ HC Deb 15 July 2008 c 227W

⁶⁷ *Vienna Convention on the Law of Treaties* at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

which the treaty is being applied provisionally of its intention not to become a party to the treaty.

There is nothing in either the current EC/EU Treaty or the Lisbon Treaty on the provisional application of the latter pending its entry into force, although in the Lords Third Reading debate on the EU Amendment Bill Lord Howell mentioned “some proposals about the so-called provisional application or disapplication of certain parts of the Lisbon treaty, which would not affect the treaty but somehow become internationally binding in law—our law as well as international law”.⁶⁸ Unlike a treaty signed under present Article 300 TEC (Article 218 TFEU in Lisbon), which may be accompanied by “a decision on provisional application before entry into force”, Lisbon has no such general provision, and Article 48 TEU stipulates that an amending treaty can only come into force “after being ratified by all the Member States in accordance with their respective constitutional requirements”.

In *Treaty Law and Practice*, Anthony Aust explains that the issue of whether a state which has consented to be bound may withdraw its consent before a treaty enters force has only arisen very rarely, and that the little legal authority there is on this matter is conflicting. He notes that, in principle, “there would seem to be no reason why it cannot be done given certain circumstances.”⁶⁹

Aust points to an example in 1952 in which Greece withdrew an instrument of acceptance deposited in 1950. However, after the Treaty had later entered force, Greece 'reconfirmed' its acceptance. In 1958 Spain withdrew an instrument of accession two months after it had been deposited, but before the treaty had entered force. More recently, in 1999 and 2000, Italy and Luxembourg respectively withdrew their instruments of ratification of the *Fish Stocks Convention* 1995, which had been deposited prematurely. They later ratified it along with other European states. In each case the UN Secretary-General notified the other States concerned, to which there were no objections. Aust continues:

... it has long been the practice of the Secretary-General to regard as permissible withdrawal of consent before the entry into force of a treaty, on the understanding that until entry into force states are not definitively bound.⁷⁰

These examples are somewhat different from the question vis-à-vis the Lisbon Treaty. The 1952 example involved a subsequent 'reconfirmation' of acceptance, while those involving Italy and Luxembourg were the result of a premature deposit of ratification. It could also be argued that withdrawing consent from a convention relating to fish stocks does not carry the same political weight as would withdrawal from the Lisbon Treaty. Finally, as Aust points out,

...even if there are no legal consequences of withdrawal, it could be damaging politically. The deposit of an instrument of ratification is a solemn act. Even if a new government coming to power does not like the treaty, that may not be a good reason to withdraw consent. The consent given by the previous government was given on behalf of the state, which continues in being despite the change of government. In giving consent to be bound, a government engages the honour not just of itself but also of the state.⁷¹

⁶⁸ HL Deb 18 June 2008 c 1031 at <http://www.parliament.the-stationery-office.com/pa/ld200708/ldhansrd/text/80618-0002.htm>

⁶⁹ Anthony Aust, *Treaty Law and Practice*, 2007, pp119-120

⁷⁰ Ibid

⁷¹ Ibid