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The *European Union Bill*

Bill 45 of 2004-5

The *European Union Bill* was introduced on 25 January 2005. It paves the way for UK ratification of the *Treaty Establishing a Constitution for Europe*, which was signed on 29 October 2004, on condition that the Treaty is approved in a referendum. A Sewel motion is expected in the Scottish Parliament.

This Paper looks at the Bill, treaty ratification in the UK, the referendum question and arrangements, progress towards ratification in the other EU Member States, and possible future scenarios in the event of a no-vote in one or more Member States.

The four-part Treaty on the Constitution is discussed in Library Research Papers 04/66 (Part I), 04/85 (Part II), 04/75 (Part III) and 04/77 (Part IV), which are available on the Library website.

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Summary of main points

- The *European Union Bill* [Bill 45 of 2004-5] was introduced in the Commons on 25 January 2005 and published on 26 January 2005.

- The Bill is divided into four parts, with ten clauses and four schedules. It has two distinct purposes. One is to amend the *European Communities Act 1972* to the extent that is necessary for the *Treaty Establishing a Constitution for Europe*, signed on 29 October 2004, to have legal effect in the UK, and thus to pave the way for ratification of the Treaty. The other is to provide for a referendum to be held on the European Constitution.

- Ratification is made conditional upon approval of the Treaty in a referendum.

- The Bill seeks to amend the *European Communities Act 1972* by making numerous substitutions, modifications and additions that provide for new Treaty elements and for legal continuity between the old and new Treaties. However, the 1972 Act remains the statutory basis for the UK's relations with the EU.

- The Bill seeks to provide for all possible consequences and effects following implementation of the Constitution. It gives the Government wide-ranging powers to implement EU measures by subordinate legislation.

- The main amendments to the 1972 Act that relate to the Constitution concern

  - the definition of "the Treaties"
  - a mechanism for parliamentary approval of Treaty changes
  - a procedure for Government statements on subsidiarity and draft EU legislation
  - changes to terminology under existing UK legislation to take account of the new Treaty and to provide legal continuity between the old and new Treaties
  - procedures for decisions relating to the Common Foreign and Security Policy

- Implementation procedures are set out for the devolved legislatures where appropriate.

- The Bill requires a referendum to be held in the UK and Gibraltar approving the Treaty. It does not set the date for the referendum. It has the following provisions:

  - the referendum question
  - entitlement to vote in the UK and Gibraltar
  - applying the campaign expenditure restrictions and limitations on government information campaigns in the *Political Parties, Elections and Referendums Act 2000*

- limiting circumstances to challenge the result
- allowing for the combination of the referendum poll with another election

- The Bill can be amended, but amendments should not be such as to prevent ratification of the Treaty.

- Two Member States have already ratified the Treaty by a parliamentary method. Ten States intend to hold a referendum on ratification.

- The four most recent Library Research Papers on the *Treaty Establishing a Constitution for Europe* are:

- RP 04/66, *The Treaty Establishing a Constitution for Europe: Part I*, 6 September 2004, at http://hcl1.hclibrary.parliament.uk/rp2004/rp04-066.pdf
- RP 04/85, *The Treaty Establishing a Constitution for Europe: Part II (The Charter of Fundamental Rights)*, 25 November 2004, at http://hcl1.hclibrary.parliament.uk/rp2004/rp04-085.pdf
- RP 04/75, *The Treaty Establishing a Constitution for Europe: Part III*, 8 October 2004, at http://hcl1.hclibrary.parliament.uk/rp2004/rp04-075.pdf
- RP 04/77, *The Treaty Establishing a Constitution for Europe: Part IV and Protocols*, 21 October 2004, at http://hcl1.hclibrary.parliament.uk/rp2004/rp04-077.pdf

- The following acronyms are used.

- **ECA** = European Communities Act 1972
- **IGC =** Intergovernmental Conference
- **TEC** = Treaty Establishing the European Communities
- **TEU** = Treaty on European Union
- **QMV** = Qualified Majority Voting
- **OLP** = Ordinary Legislative Procedure
- **CFSP** = Common Foreign and Security Policy
- **CSDP** = Common Security and Defence Policy

CONTENTS

I Treaty Ratification in the UK

Treaties are ratified by the Foreign Secretary or his/her representative, acting on behalf of the Crown (the so-called Royal Prerogative). Parliament does not have a direct role in treaty ratification but there can be parliamentary activity relevant to it. This must be qualified to be applied to the *Treaty Establishing a Constitution for Europe*.

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, have covered this requirement for European Community Treaties. The *Treaty Establishing a Constitution for Europe* was published as Cm 6429 in December 2004.

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* (henceforth 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. Consequently, similar legislation is required to cover all parts of the *Treaty Establishing a Constitution for Europe* (henceforth referred to as the "European Constitution" or the "Constitution") which are intended to have direct legal effect in the Member States. The passage of the implementing legislation is not formally part of ratification, but it is necessary if ratification is to proceed smoothly. Without legislation, the Government might be faced with a conflict between its obligations under the Treaty and the domestic legal order.

II The European Constitution

A. Content and purpose of the Bill

The Bill is divided into four parts, with ten clauses and four schedules. It has two distinct purposes. One is to amend the ECA to the extent that is necessary for the European Constitution to have legal effect in the UK. The other is to provide for a referendum to approve the European Constitution.

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[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

The Bill is not identical with the Constitution, but consists of provisions consequential on, or in connection with, its implementation. At first glance, the parts of the Bill relating to the Constitution appear complex and incoherent. This is because they are mostly amendments to the ECA, and do not form a cohesive text. The Bill contains expressions such as "for [this] substitute [that]", [this] "means" [that], [things] "will be construed as" or "treated as meaning" [something else].

Successive European Community (Amendment) Bills have excluded the intergovernmental elements of new treaties in the so-called second and third "pillars" of the European Union (Common Foreign and Security Policy and Justice and Home Affairs respectively), because these are not subject to the EC legislative and institutional framework and do not require the ECA to be amended for their implementation. Like other international treaties, the intergovernmental elements are binding externally on the UK, but not enforced internally by UK courts. In the Constitution the present European Community (EC) pillar and the second and third intergovernmental pillars are merged into one EU pillar. This largely removes the distinction between decisions taken by the Community and those taken by Member State Governments acting intergovernmentally. The Bill takes account of the merging of the three pillars by making acts of the European Union, rather than just the European Community, subject to UK law. The Bill makes special provisions to implement measures relating to the Common Foreign and Security Policy (CFSP), because these retain their intergovernmental character, with decision-making by the Council of Ministers and possible referral to the European Council.

For some time the term "EU" has been commonly used to describe the EC, but technically and legally this may be incorrect. The EU does not currently have legal personality. That is to say, strictly speaking, it does not have the capacity to make laws, conclude or accede to legally binding treaties. Only the EC or its individual Member States can do these things. The Constitution gives the European Union legal personality, which will enable its institutions to act in areas in which they could not previously have done.

The Bill provides for the new European Union established by the Constitution to become the successor to the present European Community and European Union, and its clauses provide for both transition and legal continuity. The Bill, if passed, will amend the ECA by making numerous substitutions, modifications and additions, but it will not repeal the ECA. The ECA will remain the statutory basis for the UK's relations with the EU.

B. The devolved legislatures

The Government of Wales Act 1998, the *Scotland Act 1998* and *Northern Ireland Act 1998* introduced devolution into the UK. As well as devolution of the power to make law, executive powers previously exercised solely by UK Ministers were devolved. As part of this legislation, the new devolved administrations took on duties to implement EC law in devolved areas. Section 57 of the *Scotland Act*, for example, distributes executive power between Ministers of the Crown and Scottish Ministers. Scottish Ministers are therefore empowered to use Section 2(2) ECA to implement obligations under EC law.

This power is shared with Ministers of the Crown. Section 57(2) prohibits any member of the Scottish Executive from doing anything incompatible with EC law. In a similar fashion, section 29(2)(d) prohibits the Scottish Parliament from legislating in a manner incompatible with EC law, and Schedule 4, paragraph 1 prevents modification of the principal terms of the ECA.[2]

The position in Wales is not identical, because the Assembly does not possess primary law-making powers. However, the Welsh Assembly Government does have similar duties to implement EC law.[3] Devolution has been suspended in Northern Ireland, but when in operation the Northern Ireland Executive has responsibilities in respect of implementation of EC law.[4]

Therefore, any modifications to the ECA involve the devolved administrations and parliament/assemblies. In Scotland, a Sewel motion is expected, which will enable the UK Parliament to legislate on behalf of the Scottish Parliament.[5]

C. Revising the Meaning of "the Treaties"

Section 1(2) ECA contains a list of texts which are defined as "Treaties" for the purpose of that Act, i.e. for the purpose of their enforcement in the UK by Section 2 ECA. Previous EC Amendment Bills have added new treaties to this list in parts, rather than as a whole.[6] To have added them as a whole would, in some respects, have been tidier, but this would have breached the principle upheld by British Governments that it was important to maintain the distinction between the "intergovernmental" and "Community" aspects of any European treaty. Only the latter was of consequence with regard to UK law.

1. The Bill

In **Clause 1 subsection 1** the list of "Community Treaties" in Section 1(2) ECA is amended to include "EU Treaties". The Constitution is referred to as the "EU Treaty" and Orders in Council may declare treaties to be "EU Treaties", instead of "Community Treaties". The list of Treaties adds the Constitution (except for its CFSP elements, which are covered elsewhere in the Bill), and retains the Euratom Treaty, which will continue in

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2 For an extended discussion, see Chapter 5 of CMG Himsworth and CM O'Neill *Scotland's Constitution: Law and Practice* 2003

3 See s29 of *The Government of Wales Act*

4 See s24 of the *Northern Ireland Act 1998*

5 See Library Standard Note 2084, *The Sewel Convention*, at http://hcl1.hclibrary.parliament.uk/notes/pcc/snpc-02084.pdf

6 For example, the *European Communities (Amendment) Act 2002* concerning the Treaty of Nice added to Section 1(2) ECA only Articles 2 to 10 and other provisions "so far as they relate to those Articles" and any new Protocols.

force alongside the Constitution.[7] It is listed as an EU Treaty, in addition to the Constitution. The list sets out precisely which "own resources decisions"[8] are defined as EU Treaties and a new **subsection 2C** contains a more detailed definition of the two categories of agreements (external or ancillary agreements) that belong in the new list.

Subsection 1(6) refers to requirements under the *European Parliamentary Elections Act 2002*. This arises from a requirement originally enacted under the *European Parliamentary Elections Act 1978* when the UK Parliament introduced a specific limitation on the freedom of the Government to ratify treaties on the basis of the prerogative power. Section 6 of the 1978 Act required that "no treaty which provides for any increase in the powers of the European Parliament (EP) shall be ratified by the United Kingdom unless it has been approved by an Act of Parliament". Since 1978 Parliament has had to give its explicit approval (by Act of Parliament) to any treaty or other international agreement which increases the powers of the EP. The extension of co-decision in the "Ordinary Legislative Procedure" (OLP), which becomes the default decision-making procedure in the Constitution (giving the EP co-legislative powers with the Council) makes the Constitution such a treaty, and therefore it must be approved by the UK Parliament for this purpose.

D. Parliament and Treaty Revision

At present the EC Treaties can be amended only by a process set out in Article 48 TEU, which requires an Intergovernmental Conference (IGC) to be convened and any amendments to be agreed unanimously by the Member State governments and then ratified by Member States according to their constitutional traditions.

A process requiring Member State ratification is retained for future revision of the Constitution, but Articles IV-444 and 445 of the Constitution also provide for simplified treaty revision procedures. Article IV-444 allows decision-making that is subject to unanimity in Part III of the Constitution (policy areas) to be changed to Qualified Majority Voting (QMV), and to make decisions subject to a special legislative procedure subject, instead, to the Ordinary Legislative Procedure and QMV. Article IV-445 allows internal EU policies and actions in Part III title III of the Constitution to be amended by the European Council and "approved by the Member States in accordance with their respective constitutional requirements", but without recourse to an IGC or national ratification processes.

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7 Amendments to Euratom are contained in Protocol 36, appended to the Constitution. The European Coal and Steel Community Treaty expired on 23 July 2002

8 These are decisions taken by the European Council on the revenue of the European Union

1. The Bill

Clause 2 relates to the new EU system for approving Treaty changes. In order for Article IV-444 decisions to be recognised in UK law, they must first be approved by Parliament in the way set out in **subsection 4**. This involves the Commons sending a message to the Lords asking for its opinion on whether it should approve the initiative, and the approval by a resolution of the Commons at least 20 sitting days after the message is received in the Lords. Article IV-445 decisions may be approved by Order in Council as EU Treaties under Section 1(2) ECA (**subsection 5**), provided they have been laid before Parliament and approved by a resolution of each House (**subsection 6**). **Subsection 7** provides for the possibility (the probability, in fact, as most of these revisions would be moves to the OLP) of such decisions increasing the powers of the EP and it therefore approves them for the purposes of the *European Parliamentary Elections Act 2002* (see above).

E. Subsidiarity

Protocol 2 of the Constitution concerns the application of the principles of subsidiarity and proportionality.[9] Protocols appended to the Constitution are legally binding and their provisions may need to be given legal effect. Article 4 of the Protocol requires that draft EU legislation should be forwarded to national parliaments, which may, under Article 6, send to the EU institutions a reasoned opinion stating why they consider a draft does not comply with the principles of subsidiarity and/or proportionality.

This "early warning system" presents the UK Parliament with new responsibilities in relation to the EU legislative process. The method of its implementation is left to the Member States to decide. The parliamentary involvement in this process has yet to be established. The Commons Modernisation Committee is conducting an inquiry into the *Scrutiny of European Matters in the House of Commons*, which is to include specific consideration of the subsidiarity early warning system. The Committee is likely to report within the next few months. The House of Lords Procedure Committee has also considered how Parliament's involvement in European affairs might be reformed and has in principle agreed to the Government's proposal for a joint European Grand Committee.[10]

1. The Bill

Clause 3 requires the relevant Government Minister (or Ministers, if the draft EU law relates to more than one subject matter) to lay before Parliament, within the six-week

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9 The presumption that matters will be dealt with at national level in those areas that are not within the exclusive competence of the Union, unless it can be demonstrated that action at EU level would be better or more efficient; and that EU action should be the lightest and most appropriate action necessary to achieve EU objectives.

10 2nd Report 2003-4, at http://www.publications.parliament.uk/pa/ld200304/ldselect/ldprohse/99/9903.htm

deadline set by the Protocol, a statement on whether it believes the draft legislation complies with subsidiarity.

F. "European Community" becomes "European Union"

Under Article IV-437 of the Constitution, the current TEC and the TEU, and all subsequent amending treaties and accession treaties, are repealed and replaced by the Constitution, except for protocols on aspects of the legal position of certain current Member States. Their provisions will remain in force, however, and their legal effects are preserved under that Article. Article IV-438(2), "Succession and legal continuity", establishes the EU as the successor to the present EC and EU, while preserving their existing legal effects until or unless they are repealed or amended by implementation of the Constitution.[11] Under this Article the validity of ECJ jurisprudence is also maintained and applied to the Constitution. Legal continuity is:

> … the need to ensure that when a legal entity ceases to exist or to operate, the rights and obligations, assets and liabilities, which had been attached to it or assumed by it and which continue to be relevant, do not cease to have legal force as a result of the entity's demise but instead are taken over and continued in being under a new legal entity which succeeds to the role and functions of the defunct body.
>
> In the context of the Constitutional Treaty, this relates to the proposed repeal of the previous treaties and their replacement by the proposed Constitutional Treaty and the consequent absorption of previous entities by the European Union and the need to ensure that the latter continues to be vested with rights and obligations, assets and liabilities arising from the previous treaties.[12]

1. The Bill

Legal continuity at EU level must be reflected in UK domestic law. **Schedule 1 (Definitions relating to the European Union)** substitutes Schedule 1 ECA with new definitions. The new terms are not intended to mean something different from the old ones. Thus, in **Schedule 1 Part I** "EU" replaces "EC" in expressions such as "enforceable EU right", "EU instrument" and "EU institution", but the meaning of "rights", "instruments" and "institutions" remains the same as in the ECA. Paragraph 3 provides the legal continuity link between the old and new Schedules.

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[11] Legal continuity was also vital for the successful transition from the ecu (European currency unit) to the euro. The ecu basket disappeared and, from 1 January 1999, any reference to the ecu was automatically replaced by a reference to the euro in a ratio of one to one.

[12] National Forum on Europe at http://www.forumoneurope.ie/index.asp?locID=109#Continuity

The new terminology must also be applied to UK Acts generally, which means that the *Interpretation Act 1978* (defined expressions) must also be amended. **Schedule 1 Part II** does this by designating that the new terms (EU institution, EU instrument, EU obligation etc) have "the same meanings as" in the ECA. The *European Economic Area* (EEA) *Agreement* and "EEA state" are also defined for the first time in the revised Schedule. There is a new simplifying rule of interpretation, by which references to EU instruments that have been amended will be construed as references to the amended instrument.

Similar revisions are extended to provisions applicable in Scotland and Northern Ireland in paragraphs (3) and (4) of the Schedule.

Schedule 4 (Repeals and Revocations) lists those Acts or parts of Acts that will be repealed as a consequence of the entry into force of the Constitution. Most of the repeals are of provisions in earlier legislation giving effect to the EC Treaties. These Treaties will be repealed and the UK provisions giving effect to them can also be repealed.

G. Legal Continuity in the implementation of EU Law

The implementation of EC law in the UK is currently achieved by section 2(1) ECA, to the effect that where a statute refers to the law of any part of the UK, the reference includes EC law.

> All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression "enforceable Community right" and similar expressions shall be read as referring to one to which this subsection applies.[13]

Section 2(4) ECA provides that past or future laws shall be construed and have effect, subject to the provisions of section 2 (i.e. including those providing for the direct effect of EC law). EC legislation which is not directly applicable (e.g. directives and decisions) can be enacted either by primary or secondary legislation. Section 2(2) ECA confers authority on Ministers, Government Departments or Her Majesty in Council to make, with certain exceptions contained in Schedule 2 ECA, subordinate legislation:

> (a) for the purpose of implementing any Community obligation of the United Kingdom, or of enabling any rights enjoyed or to be enjoyed by the United Kingdom under or by virtue of the Treaties to be exercised; or

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[13] *European Communities Act 1972*, 1972 c 68, *Halsbury's Laws of England* Vol 17

> (b) for the purpose of dealing with matters arising out of or related to any such obligation or rights or the coming into force, or the operation from time to time, of subsection (1) above.

Subordinate legislation made under this section can repeal or amend existing legislation if it is incompatible with EC law. In this way the ECA has provided a reliable, if not always transparent, method of transposing EC law into UK law.

1. The Bill

Clause 4, together with **Schedule 2**, concerns changes to terminology and the way in which the Constitution and EU legislation are to be given effect in the UK.

Part 1 of Schedule 2 revises terminology ("EC" to "EU" etc) in *General implementation of Treaties* and modifies the methods by which EU law can be implemented, using subordinate legislation under sections 2(2) and 2(4) ECA.

Section 2(2) ECA is amended to include additional means of implementation by "order, rules, regulations or scheme". The ECA currently provides only for "regulations". The Explanatory Notes comment that this addition is designed to "allow section 2(2) to be used in combination with delegated powers in other legislation which allow for orders, rules and schemes". For example, the power under Section 15 of the *Fisheries Act 1981* is the power to make a "scheme". It is possible that the inclusion of "scheme" will help avoid complications in the future.

The insertion in section 2(4) ECA makes provision for Orders made on the recommendation of the Scottish Executive and for Acts of Parliament to be read as Acts of the Scottish Parliament.

Modifications in *Decisions on Treaties, instruments etc and their proof* provide for legal continuity and the replacement of old terms with new ones (e.g. "Official Journal of the European Communities" becomes "Official Journal of the European Union"; "Community Customs duty" becomes "EU Customs duty" etc).

The removal of references to "any other court attached thereto" (to the Court of Justice) takes account of Constitution Article I-29, which states that "The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts". Article 220 TEC currently provides for the Court of Justice and the Court of First Instance, with separate jurisdictions. There will no longer be other courts "attached to" the Court of Justice; they will be part of the one European Court.

Paragraph 3(2) inserts terminology changes into section 2(2) ECA concerning the jurisdiction of the European Court in CFSP decisions under Article III-376, monitoring compliance with Article III-308 (on the exercise of Union competences) and Article III-322(2) (reviewing the legality of European decisions providing for sanctions against third

parties). The rest of paragraph (3) contains continuity provisions applying to Section 3 ECA.

Paragraphs (4), (5), and (7) on *Customs duties*, *Agriculture* and *Furnishing information to the Communities* respectively, make minor technical adjustments to take account of new terminology, and Paragraph (6) on *Community offences* distinguishes between references to the European Court made before and after the entry into force of the Constitution.

In the ECA Schedule 2 para (1)(d) prevents the Government from implementing by way of affirmative instrument any Community obligation which creates any criminal offence punishable with imprisonment for more than two years. Paragraph (8) would have the effect of disapplying that restriction so that new offences punishable with longer terms may be created for implementing framework laws which may be adopted to establish minimum rules in relation to criminal offences and penalties.[14] It refers to imprisonment "for a term of a particular length", which suggests that provisions applying indeterminate sentences such as life imprisonment could not be authorised. When the House of Lords Select Committee on Delegated Powers and Regulatory Reform considered a proposed general power to create new offences for implementing Third Pillar obligations, it commented that "it has always been considered that delegated legislation should be used sparingly, if at all, for creating criminal offences.[15] It also emphasized that not only was the ECA concerned with social and economic measures, rather than criminal justice, but it had deliberately limited itself to permitting offences punishable by under two years.

Under Paragraph 9 the new paragraph 1A inserted into Schedule 2 ECA allows for legislation implemented under Section 2(2) ECA (subordinate legislation) to pick up subsequent amendments to the EU instrument. The Explanatory Notes suggest that these amendments would be of a technical nature, while the language of the Bill suggests that this will be at the discretion of the legislator:

> Where -
> (c) it appears to the person making the legislation that it is necessary or expedient (whether or not for that purpose) for the reference to be construed as a reference to the EU instrument as amended from time to time, …

This would not be the first time that an EC/EU Bill has provided for future amendment using delegated powers, although the general nature of the provision is new. The *European Parliament (Representation) Act 2003* established a mechanism by which the UK would be able to adjust the number of UK MEPs as and when required by further EU enlargement, and provided an order-making power to enable this and any future changes to be made.[16]

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14 Constitution Article III-271

15 Seventh Report 2002-03

16 See Library Research Paper 02/78, *The European Parliament (Representation) Bill* [Bill 7 of 2002/03], 4 December 2002 at http://hcl1.hclibrary.parliament.uk/rp2002/rp02-078.pdf

Paragraph 10, *Procedure for subordinate legislation in Great Britain*, concerns the Parliamentary procedure for implementing EU measures on cooperation in criminal matters and police cooperation by subordinate legislation under section 2(2) ECA. In the procedure set out in sub-paragraph 1A, to be added to Schedule 2(2) ECA, the secondary legislation is laid in draft before Parliament and approved by a resolution of each House. This procedure is required in the cases set out in new sub-paragraph 1B:

- when the legislation provides for imprisonment of more than two years, when this would not have been the case under UK law other than by consolidating an existing offence; or
- where it increases imprisonment by two years or more.

Under sub-paragraph 1C in Schedule 2 the new procedure will also apply where secondary legislation is used to implement measures on judicial cooperation in criminal matters, police cooperation and related matters, under Articles III-270 to III-227 of the Constitution. The exception to this is set out in new sub-paragraph 1D, when the secondary legislation relates to an obligation under Article III-271(2) of the Constitution. This Article allows for the approximation by means of framework laws of minimum rules for criminal penalties and offences to achieve harmonisation in an area subject to harmonisation measures. Decision-making is by QMV, although an "emergency brake" provision has been added to Article III 271(3).[17] If legislation adopted by the EU under this article imposes or increases a penalty of more than two years' imprisonment, the UK legislation to implement it will be subject to the affirmative procedure.

A new sub-paragraph 1E allows secondary legislation to implement measures restricting capital movements or imposing economic sanctions against third parties, with a requirement for criminal penalties of more than two years, to be made without using the affirmative procedure. Such legislation would have to be accompanied by a declaration that the urgency of the matter made it necessary for the instrument to be adopted without the approval of each House, as set out in sub-paragraph 1A. Sub-paragraph 1F makes provision for such an instrument to be laid before Parliament after it is made and to lapse if not approved by a resolution of each House after 40 days. Sub-paragraph 1G provides that anything already done under this instrument will remain valid.[18]

Sub-paragraph 4 clarifies what is meant by "40 days", with reference to the *Statutory Instruments Act 1946*, and relates this definition to SIs made by the Scottish legislature.

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17 This means that where a Member State considers that a draft framework law would affect fundamental aspects of its criminal justice system, it may request that the draft be referred to the European Council, which would decide by unanimity.

18 There are parallel provisions for the CFSP in Clause 5(5) and (6).

Paragraph 11 sets out the procedures for subordinate legislation in the Northern Ireland Assembly. Paragraph 12 provides legal continuity for subordinate legislation made under the ECA.

Part 2 of Schedule 2 paragraphs 13-22 sets out specific modifications to primary legislation other than the ECA. These consist of terminology changes and references to the relevant Constitution Articles instead of TEC articles in

- the *Civil Jurisdiction and Judgments Act 1982*
- the *European Communities (Amendment) Act 1993*
- the *Government of Wales Act 1998*
- the *Scotland Act 1998*
- the *Financial Services and Markets Act 2000*
- the *Export Controls Act 2002*
- the *European Union (Accessions) Act 2003*
- the *Criminal Justice Act 2003*

Paragraph 23 provides a list of TEC Articles and their equivalent Part III Constitution Articles relating to competition, together with the UK Acts to which they refer and their validity in the event of "pre-commencement contravention" (i.e. before the entry into force of the Constitution).

Paragraph 24, on *references to specific treaty articles relating to EU citizenship*, provides that Constitution Article I-10 on Citizenship of the Union is to have the same effect as Article 17 TEC in a number of UK Acts, which are listed. Paragraph 25 makes minor technical amendments to apply to the Isle of Man and the Channel Islands.

Part 3 of Schedule 2 (paragraphs 26-33) provides for legal and administrative continuity by modifying terminology such as "the Communities", "Community law", "Community Treaties", "Community institutions", "Community instruments" etc in UK Acts and subordinate legislation. Paragraph 34 is a general provision to implement Article IV-438 of the Constitution (succession and legal continuity) by allowing existing UK law to be construed in such a way as is necessary after entry into force of the Constitution to achieve legal and administrative continuity. The Explanatory Notes state that these amendments "are designed to deal with the majority of references based on the Communities in existing legislation and should minimise the need for use of the related powers in Clause 4 of the Bill".

Clause 4 creates a new delegated power to supplement the Schedule 2 modifications. Under subsection 2 a Minister may amend by order or regulations a UK Act or subordinate legislation, in order to give effect to the legal continuity requirement in Article IV-438 of the Constitution. Subsection 3 (a) - (f) aims to facilitate the transition from EC to EU in all the relevant contexts (treaties, laws, institutions, rights, obligations, restrictions etc), preserve the validity of measures or actions linked to the Community Treaties, secure continuity of laws enacted under the ECA, and make other transitional provisions.

Under subsection 4 these delegated powers may also disapply or modify Acts or subordinate legislation made under Schedule II Part 3 (see above)**.** Under subsection 5 (a) - (d) a Minister will also have the power to make retrospective or future provisions, different provisions for different cases, provisions subject to exemptions and exceptions, and "incidental, supplemental, consequential and transitional" provisions "as he thinks fit". These delegated powers are similar to, but extend, those set out in Section 2(2) ECA.

Subsection 6 makes provision for Scottish Ministers, a Northern Ireland Department and the National Assembly of Wales to have the same powers in relation to a devolved competence.

Subsection 8 sets out the parliamentary procedure for legislation made using delegated powers. SIs containing an order or regulation made by a Minister of the Crown (including in the Treasury) or a Scottish Minister will be subject to annulment on a resolution of either House of Parliament or of the Scottish Parliament, respectively. If made by a Northern Ireland department the S.I. will be subject to a negative resolution (within the meaning of the *Interpretation Act (Northern Ireland) 1954*). Subsection 9 provides that subsection 8 will not apply if the S.I. is laid in draft for approval by a resolution of each House (or by the Scottish Parliament or the Northern Ireland Assembly).

H. Common Foreign and Security Policy (CFSP)

Clause 5 in **Part 2** of the Bill concerns the implementation of the EU's Common Foreign and Security Policy (CFSP), and the provisions within that for a Common Security and Defence Policy (CSDP).

As CFSP remains a separate, intergovernmental element, outside the EU's institutional framework, those provisions in the Constitution that relate to it are excluded from the new definition of the EU Treaties set out in **Clause 1, subsection 1(2)** of the Bill. Consequently the UK's CFSP obligations under the Constitution, such as delivering on the objectives of the European Defence Agency (Article III-311), or CFSP operational action, as defined under Article III-297, can not be implemented under that Clause.

Part 2, which consists of only one clause (Clause 5), does not seek to amend the ECA, but is an addition to it, and provides a new delegated power for implementation of the Constitution's CFSP provisions, as defined below.

1. Definition of the CFSP Provisions

The CFSP provisions to which Clause 5 refers are outlined in sub-section 12 and are as follows:

- **Article I-16** – defining the competence of CFSP, including "the progressive framing of a common defence policy which might in time lead to a common defence".
- **Article I-28** – defining the role and mandate of the Union Minister for Foreign Affairs.
- **Articles I-40, I-41 and III-294 to III-313** – setting out the specific objectives, principles and provisions of the CFSP and CSDP.
- **Article III-376** – setting out the jurisdiction of the European Court in relation to CFSP matters.
- **Articles I-41 (6) and III-312** – setting out Protocol 23 of the Constitution, which outlines the arrangements for CSDP permanent structured co-operation.
- **Other Provisions of the Constitution** – only insofar as they apply for the purposes of CFSP or relate to the provisions set out above and are not provisions relating to the resources of the EU.

More detailed information on the specific provisions of these articles is available in Library Research Papers 04/66 on Part 1 and 04/75 on Part III of the Constitution.

Under **Clause 5 sub-section 13** the CFSP provisions are also extended to "related agreements", which are defined as treaties that are entered into by the UK or the EU on the basis of their CFSP obligations under the Constitution. However, the extent to which a treaty is to be regarded as a "related agreement" for the purposes of Clause 5 is to be determined by section 1(3) ECA. As such, a treaty may not be regarded as a "related agreement" for the purposes of this Clause, unless it has been specified by an Order in Council under section 1(3) ECA.

2. New Delegated Powers

Clause 5 sub-sections 1-4 set out the parameters of the new powers to be conferred onto the Secretary of State to make or amend regulations enabling the implementation of a UK obligation created by, or arising from, the CFSP provisions, specifically:

- Under sub-section 1, those powers also extend to "related agreements", as outlined above.

- Sub-section 2 allows regulations made under sub-section 1 to amend primary or secondary legislation. This reflects the position with regard to implementing legislation already set out under Section 2(2) ECA.

- Under sub-section 3, the powers conferred in Clause 5 also include the ability to create new criminal offences carrying a maximum prison term of 10 years. Under the Constitution's CFSP provisions this power is likely to be used for implementing sanctions that impose restrictions on either third countries or individuals. The maximum prison term set out in this sub-section reflects current

legislation used to implement international sanctions, such as the *Export Control Act 2002* and the *United Nations Act 1946*.

This power is likely to be used, for example, for controlling arms exports or policing EU arms embargoes imposed under the CFSP provisions. Indeed, under Part 2 of Schedule 2, outlining changes to existing legislation other than the ECA, Section 5(3) of the *Export Control Act 2002*, which sets out the application of EU decisions to the UK's "international obligations" under the Act, will be altered to reflect the provisions of Clause 5.

However, these delegated powers are not entirely without restriction. Under Sub-section 14 the powers conferred under Clause 5 are not intended to derogate from the Royal Prerogative. The commitment of British troops to an operation conducted under the auspices of the CFSP would, for example, continue to be exercised under the Royal Prerogative. Therefore, parliamentary approval of regulations made under this section of the Bill would not apply in this instance.

Under sub-sections 8-10 the new delegated powers created by Clause 5 will be exercisable by Scottish Ministers, where those regulations made are within devolved competence, and by the Northern Ireland departments, where they relate to a transferred matter.

Sub-section 11 also provides for the extension, by Order in Council, of any provisions or regulations made under this section to a British Overseas Territory.

3. Parliamentary Approval

Under sub-section 5 of this clause, regulations made under this part of the Act will be subject to Parliamentary approval as defined by the *Statutory Instruments Act 1946.* However, that approval may be sought retrospectively if the urgency of the situation to which the regulations relate necessitates such action. In this situation sub-section 6 provides that the regulations must be laid before Parliament after being made. If approval by each House is not achieved within forty days, those regulations would cease to have effect, although all actions previously undertaken under them would remain valid.

I. Omissions from the Bill

Certain omissions from the Bill might seem surprising. For example, while there are provisions on the CFSP, there is no reference to the Charter of Fundamental Rights. There are special procedures for measures on judicial cooperation in criminal matters and police cooperation, but none on asylum and immigration measures. There are provisions relating to the principles of subsidiarity and proportionality, but not on the principles of the primacy of EU law or mutual solidarity. The reason may be that these aspects are

already covered by the Bill in a more general sense, or that there is no need to change UK law to reflect these particular aspects of the Constitution.

Article II-111(1) of the Constitution (the Charter of Rights) states that the Charter provisions are addressed to the EU institutions and to Member States only when implementing EU law. In addition, under 111(2), the Constitution states that the Charter does not modify or extend the powers of the EU. There should therefore be no need to change UK law to reflect the Charter. Asylum and immigration matters in Title IV TEC apply to the UK only on an "opt-in" basis, as set out in a Protocol attached to the Amsterdam Treaty, which remains valid under the Constitution. The Constitution does not alter the present position of the UK with regard to its opt-out and opt-in arrangements and there is therefore no need for specific legal provision in the Bill.

In short, the ECA provides for all the *acquis communautaire*[19] to be given the force of law in the UK. The Bill ensures that this is continued in respect of the Constitution and makes new provisions only where new EU obligations mean that the existing provisions need additional legal enforcement or amendment.

The Bill does not, strictly speaking, have to provide for matters of international treaty law, such as primacy. The principle of the primacy of EC law and the Treaties over national law has been established by the Court of Justice in several rulings.[20] This should not require domestic enforcement beyond the provisions in Section 3(1) ECA (as amended by the Bill) that:

> For the purposes of all legal proceedings any question as to the meaning or effect of any of the Treaties, or as to the validity, meaning or effect of any **EU instrument**, shall be treated as a question of law (and, if not referred to the European Court, be for determination as such in accordance with the principles laid down by and any relevant decision of the European Court).

The subsidiarity/proportionality Protocol establishes new mechanisms for Member State involvement in the legislative process. In the UK these need to be enshrined in domestic law, but primacy and mutual solidarity do not give rise to new procedures.

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19 The whole body of EC Treaty and secondary law, including the case-law of the European Court of Justice

20 See Standard Note SN/IA/3087, *The Draft European Constitution: the primacy debate* 1 June 2004, at http://hcl1.hclibrary.parliament.uk/notes/iads/snia-03087.pdf

III The Referendum

A. The use of referendums

Referendums have become a relatively frequent constitutional device. Since 1973 the following referendums have been held in the UK, but only one, in 1975, has been nation-wide.

- Northern Ireland Border Poll, 8 March 1973
- Terms of continuing UK membership of the EEC, 5 June 1975
- Devolution for Scotland, 1 March 1979
- Devolution for Wales, 1 March 1979
- Establishment of the Scottish Parliament, 11 September 1997
- Establishment of the National Assembly for Wales, 18 September 1997
- Belfast (Good Friday) Agreement, 22 May 1998
- Establishment of the Greater London Authority, 7 May 1998
- Establishment of a regional assembly for the North East, 4 November 2004

Full results for the referendums can be found in Part VIII of Research Paper 04/61 *UK Election Statistics 1918-2004*.[21]

In addition, the *Local Government Act 2000* provides for the holding of referendums to enable electors of individual local authorities to express their preferences for the type of executive arrangements within their council. The Labour Party promised a referendum on electoral reform for the Commons in its 1997 general election manifesto, but so far no such referendum has been planned.[22] A draft bill was published in January 2004 for a referendum on the European single currency.[23]

1. The constitutional theory of referendums

Many states' constitutions contain specific provisions on the circumstances under which referendums must or can be held, and whether they are binding. In the UK, however, each referendum is introduced through separate legisation. A referendum is binding only if the Government so binds itself in that legislation. According to strict constitutional theory, Parliament could pass legislation to revoke the provisions of any act requiring a referendum. However, this would be very unlikely to occur.

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21 For the North East results see Standard Note 3250 *North East Assembly Referendum*, 4 November 2004, at http://hcl1.hclibrary.parliament.uk/notes/sgss/snsg-03250.pdf

22 For details see Research Paper 97/10 *Referendum: Recent Proposals*, 24 January 1997, at http://hcl1.hclibrary.parliament.uk/rp97/rp97-010.pdf

23 For further details see Library Standard Note 2851 *The draft single European currency (referendum) bill* at http://hcl1.hclibrary.parliament.uk/notes/pcc/snpc-02851.pdf

2. Pre-legislative and post-legislative referendums

Referendums can be classified as pre- or post-legislative. Pre-legislative referendums are held before the relevant bill is introduced into Parliament. This is what happened with the devolution referendums in 1997. A short bill was introduced, giving the Government power to hold a referendum on devolution in Scotland and Wales, and then the *Scotland Bill* and the *Government of Wales Bill* were introduced following 'yes' votes in the referendums in September 1997. White Papers were issued allowing voters to see the likely legislative provisions.

A Private Member's Bill introduced by John Maples on 23 April 2004 envisaged a referendum to be held within 6 months of the European Constitution being adopted.

3. Timing of the referendum

The Bill provides for a referendum, but the date of the referendum will be set by order under the Bill.[24]

The matter of timing has been raised on a number of occasions. The Conservatives have emphasised their desire to see a referendum held as soon as possible. For example, the Leader of the Opposition, Michael Howard, when responding to the announcement of a referendum by the Prime Minister, said:

> The Government will have our full support for the speedy passage of the legislation necessary to hold a referendum, but there is no case whatever for asking Parliament to spend months on ratification legislation before obtaining the consent of the British people. *[Interruption.]* After all, it was this Prime Minister who held referendums for the Scottish Parliament and the Welsh Assembly before this Parliament had passed the necessary legislation. He did it, and while at that time many of the details remained unclear, on this constitution all the details will be clear. That is the difference: we shall know what they are. How can the Prime Minister say, "Trust the people—but not just yet"?[25]

The FAQ page on the Bill, to be found on the Foreign Office website, notes:

> It is usual practice to sign international treaties before ratifying them. In many cases the domestic constitutional requirements for ratification then means approval by national Parliaments and/or by referendums. In the United Kingdom, ratification of this Treaty can only happen after the Treaty has been scrutinised by Parliament, and UK citizens have had a chance to vote in a national referendum.[26]

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24 See para 5 of Schedule 3

25 HC Deb 20 April 2004 c159

26 See http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1106074364175#1

In response to a PQ asking whether the referendum would coincide with local elections, the FCO Minister, Baroness Symons of Vernham Dene, noted that secondary legislation would be needed to set the detailed rules for the referendum.[27] The press has speculated that it might be held in the summer of 2006,[28] perhaps coinciding with local elections in 2006,[29] or in September 2006.[30] The Regulatory Impact Assessment in January 2005 notes that combining the referendum with another poll would reduce costs.[31]

There has also been speculation about whether the referendum might be combined with a referendum on the single European currency.[32] The UK takes over the Presidency of the EU on 1 July 2005 and it may difficult be difficult to stage a referendum while holding the Presidency, since the provisions of the *Political Parties, Elections and Referendums Act* (PPERA) 2000 regulate government information during the "relevant period"- the 28 days before the date of the poll. These terms are explained below.

B. The commitment to a referendum on the EU Constitution

A referendum was held in 1975, following renegotiation of the UK's terms of entry into the EEC, but this was not linked to legislation to implement a new treaty. Primary legislation, in the form of the *Referendum Act 1975*, set out the question and the franchise. An unusual feature of the 1975 campaign was the fact that the Government in effect agreed to suspend the normal convention of collective responsibility and individual Cabinet members campaigned on different sides.[33]

Perhaps surprisingly, the *European Communities (Amendment) Act 1987* to implement the *Single European Act* generated little debate on the subject of a mandate for closer European integration. The referendum began to feature as a major issue when the then Prime Minister, Margaret Thatcher, raised the question during the leadership contest of late 1990.[34] But the new Prime Minister, John Major, refused a referendum on the Maastricht Treaty, despite repeated requests.[35] On 3 April 1996 he announced that the Cabinet had agreed to hold a referendum on a single currency under certain circumstances, namely if the Cabinet supported the UK joining and after the passage of the single currency legislation. On 20 November 1996 Mr Blair announced that the

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27 HL Deb 27 January 2005 c1385

28 "Stakes high for Blair as he looks for place in history" 24 January 2005 *Financial Times*

29 "Row over plans to combine EU treaty referendum and local polls" 27 January 2005 *Financial Times*

30 *Financial Times* 1 February 2005 "The poll that really matters to Blair"

31 http://www.fco.gov.uk/Files/kfile/EUBill_RIA.pdf

32 "Blair hints at second EU vote if he loses" *The Times* 22 April 2004, "Ministers want dual vote on EU and euro" *The Times* 24 April 2004, "EU poll delay 'needed to win public" *The Times* 21 June 2004

33 For further details see Research Paper 04/82 *The collective responsibility of ministers: an outline of the issues*, 15 November 2004, at http://hcl1.hclibrary.parliament.uk/rp2004/rp04-082.pdf

34 "Referendum hint as Thatcher vows to fight on" 18 November 2005 *Sunday Telegraph*

35 For full details see Research Paper 95/23 *Referendum*, 21 February 1995, at http://hcl1.hclibrary.parliament.uk/rp95/rp95-023.pdf

Labour Party would also hold a referendum on a single European currency.[36] The Liberal Democrats supported a referendum. The Referendum Party was formed to fight the 1997 election on a platform of a referendum on joining a federal Europe versus returning to "an association of sovereign nations that are part of common trading market".[37] The UK Independence Party (UKIP) also campaigned for a referendum on the terms of the UK's association with the EU.

Referendums did not take place in connection with the Amsterdam and Nice Treaties, because the Government in each case rejected calls for a referendum. The then Leader of the Opposition, William Hague, called for a referendum on the Amsterdam Treaty at the Scottish Conservative Party conference on 27 June 1997. This demand was repeated by the then shadow Foreign Secretary, Michael Howard, at the Conservative Party Conference on 8 October 1997. Mr Hague said that a Conservative government would not ratify the Treaty of Nice as it stood and implied that the party would submit it to a referendum.[38] The Prime Minister rejected calls for a referendum on the Amsterdam Treaty in parliamentary answers of July 1997,[39]and announced that he would not hold one on the Treaty of Nice.[40] The Minister for Europe, Denis MacShane, said in reply to a question from Boris Johnson in February 2003:

> This country does not have a tradition of plebiscites that allow populists to range over plebiscitary politics, using their weekly magazines to pump out endless anti-European propaganda. Every previous treaty from the treaty of accession in 1973 to Maastricht, Nice and Amsterdam has been debated properly in the House, and I think that ratification by Parliament Is the right way forward.[41]

On 30 March 2004 Jack Straw responded to an Opposition Day debate which called for a referendum on a new EU constitution by stating that it was for Parliament to decide whether the treaty became part of UK law.[42] The Government had ruled out a referendum on the grounds that the draft constitution raised no particularly difficult constitutional issues and "the proposed changes, though important, do not involve any fundamental change in the relationship between the European Union and the Member States".[43] A referendum would also be inappropriate, because the decision would be difficult to reduce to a simple yes/no question. However, following press speculation about prospects for

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36 Briefing Note from office of Tony Blair 20 November 1996. For full text see Research Paper 97/10 *Referendums: Recent Proposals* p19

37 For text see ibid p20

38 HC Deb, 11 December 2000, c353.

39 HC Debates, 2 July 1997, c289 and 9 July 1997, 933.

40 HC Deb, 11 December 2000, c356.

41 HC Deb 25 Feb 2003 c114

42 HC Deb 30 March 2004 c1507

43 Government White Paper, *A Constitutional Treaty for the EU: The British Approach to the European Union Intergovernmental Conference*, Cm 5934 p. 24. See also *Guardian*, 19 April 2004 at http://politics.guardian.co.uk/eu/comment/0,9236,1194988,00.html

the Labour Party in the forthcoming European Parliament elections of June 2004,[44] Tony Blair announced the referendum on 20 April 2004:

> It is right to confront this campaign head on. Provided that the treaty embodies the essential British positions, we shall agree to it as a Government. Once agreed—either at the June Council, which is our preference, or subsequently—Parliament should debate it in detail and decide upon it. Then, let the people have the final say. The electorate
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> "should be asked for their opinion when all our questions have been answered, when all the details are known, when the legislation has been finally tempered and scrutinised in the House, and when Parliament has debated and decided."—[*Official Report*, 21 May 1997; Vol. 294, c. 735.]
>
> If Conservative Members object to that, it is a quote from the right hon. and learned Gentleman the Leader of the Opposition, speaking about referendums in 1997.[45]

The Liberal Democrats also supported a referendum on adoption of the proposed EU constitution.[46]

There was some comment about the decision to hold a referendum, when ministerial statements before April had stated that it would be inappropriate. See, for example, the following exchange with the Foreign Secretary, Jack Straw, at a meeting of the Foreign Affairs Select Committee in May 2004:

> Q9 Chairman: It is very easy to quote back at politicians things they have said. You were very adamant indeed in December before this Committee. May I quote what you then said? "I do not happen to believe that having a referendum on changes to the way in which an existing institution operates is either necessary or desirable. I think that is Parliament's job." Why have you changed?
>
> Mr Straw: My analysis about the effect of this Treaty, if it goes through, has not changed. I set it out in here. I do not believe and I defy anybody else to explain how, if this draft Treaty is agreed with the changes which we are seeking, it would fundamentally affect the nature of the relationship between the UK and the European Union.
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> Q10 Chairman: That is not what Peter Hain said.
>
> Mr Straw: Allow me to finish, because we are not doing a disconnected Today interview, if I may put it that way. That view remains the case but for reasons

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44 See for example "Cabinet kept in dark on policy switch" *The Guardian* 20 April 2004

45 HC Deb 20 April 2004 c157

46 HC Deb 20 April 2004 c162. For further information on referendum views, see Standard Note SN/IA/3040, *IGC 2004: issues surrounding UK ratification of the European Constitution* 10 May 2004 at http://hcl1.hclibrary.parliament.uk/notes/iads/snia-03040.pdf

which the Prime Minister spelt out it became clear, not least as a result of some of the comments made around the table when I was here in December, that there was a demand for a referendum which the government felt ought to be met. In terms of our judgment, would this fundamentally affect the nature of the relationship between Member States and the EU? No. Indeed, there is quite a lot to suggest that this would help to strengthen the position of Member States through the subsidiarity principle and also in other legal respects, as the House of Lords Committee was pointing out in respect of the issue of primacy of European law. Was there a mounting demand for a referendum which we felt it appropriate to meet? Yes. Was I in the course of the endless debates that have taken place on this issue, in the House of Commons and in this room, listening? Yes. It would be unfair to others and I am not going to say whose intervention it was which really stuck in my mind.

Q11 Chairman: Mr Pope, I think.

Mr Straw: No, it was not, but that particular intervention stuck in my mind and started me thinking down particular new avenues. Politics is nothing if it is not a proper dialogue and if people are not willing to listen to the arguments that are made.

Q12 Chairman: You are a political realist. You are going to read the opinion polls, more than two to one against. You are effectively, by the decision, going to scupper the Constitution and make it impossible.

Mr Straw: I think that is completely untrue. I remember—how could I forget?—the opinion polls in respect of the referendum in 1975 on whether we were to stay in or leave the European Union. They were showing a similar proportion but as people got closer and closer to the decision and were more and more informed that changed. What we were finding, not least before we announced the decision in respect of the referendum, was that the arguments about what was or was not in this draft and what our position was had been ground out by demands for a referendum. Given the time there will be in any event before there could be a referendum, we will find opinions shifting.

Q13 Mr Pope: When this issue cropped up about the referendum at the December meeting when you were before this Committee, I got the impression that you were not only quite dismissive of it but that it was an issue of principle that you were opposed to it. You were saying that it was neither necessary nor desirable to have a referendum to alter the way an existing institution operates. It was not really a tactic that you were opposed to; it was the principle of the referendum and I wonder what has changed between then and now.

Mr Straw: When I was drafting this bit of the White Paper, I included a very short explanation about why we felt that a referendum was not necessary. It is page 23, for those who are interested. It did seem to me, if you looked back at what amounted to the practice of holding a referendum in the UK, what you could see was that they were held. We have reduced the practice much more. Where there is a question of joining or, in 1975, leaving a new institution or it is a wholly new institutional structure, what as a principle could distinguish the

> proposal for a referendum here from the practice, was that we were not talking about joining a new institution. We were talking about amending an existing treaty. I am pretty sure I said this when we were here in December. If the result of this set of proposals here was to change the fundamental nature of the institution of the EU, I would always have been in favour of a referendum, but our judgment and my judgment in December has not changed as it did not. You have to take account of what the public are thinking as well in politics. It seems to me to be very important. It is the case that we have made far more use of referenda than any other party. It is only the Labour Party who introduced referenda at a national level or for use locally. We had them in 1975. We had them in Scotland and Wales in 1998 and we have had them in Northern Ireland. We are proposing to have them later this year in respect of regional assemblies and they are also available at a local level to change systems of local government. I am on record on behalf of the Labour Government as promising a referendum. There would have been a referendum had we had proposals, for example, to accept the Jenkins Committee's recommendations on voting systems. We made more of a practice of referenda and, frankly, there was an appetite for referenda. If you ask me what has changed, although I happen to believe that this set of principles laid out on page 23 remains valid, what I saw was that people's appetite was being whetted by referenda generally and other matters. This is still a Constitutional Treaty but you are now finding in a single, complete text the arrangements for the European Union. Some are much more transparent. Take primacy. Primacy in European law has been fundamental to our membership since we joined. It is now written up in lights and people wanted to re-examine the basis of our membership. That is why.[47]

IV Regulation of referendums

The *Political Parties, Elections and Referendums Act* (PPERA) 2000 sets out a scheme to regulate expenditure by political parties and campaigning groups in both elections and referendums, following recommendations from the (Neill) Committee on Standards in Public Life.[48] Each referendum held subsequently still requires primary legislation to set the terms of the question and the franchise to be used, amongst other provisions. This part explains the basic scheme of regulation with reference to **Part 3** of the Bill.

A. Expenditure limits

PPERA established maximum expenditure limits for regional and national referendums - which was contrary to the recommendations of the Neill Committee. Its report argued that controls would be impractical and might be considered an unwarranted restriction on freedom of speech.[49]

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[47] Foreign Affairs Committee, Minutes of Evidence, 25 May 2004, at http://www.publications.parliament.uk/pa/cm200304/cmselect/cmfaff/631/4052502.htm

[48] *The Funding of Political Parties in the United Kingdom* Cm 4057

[49] Cm 4057 12.46-12.47

> **12.45** In Chapter 10 above, we rehearsed the arguments for and against the imposing of spending limits on the political parties competing in ordinary elections, and we concluded that, on balance, such limits were appropriate and should be imposed. It goes without saying that some of the same issues arise in connection with referendum campaigns. There is a serious risk of a gross imbalance in resources between one side of a referendum campaign and the other. (In 1975, Britain in Europe vastly outspent the National Referendum Campaign, by a factor of one to 20).[19] There is also the danger, if there is lavish spending on one or more sides, that the impression will be given that the Yes and No campaigns are trying to 'buy' the people's votes. The case, in principle, for imposing spending limits in referendum campaigns is a strong one.
>
> **12.46** We believe, however, that it would be futile and possibly also wrong to attempt to impose such limits in connection with referendums. Ordinary election campaigns bear some resemblance to sporting contests, in the sense that they are fought by competing 'teams' in the form of the political parties. It is known long in advance By contrast, in a referendum campaign the reasons for voting Yes or No may be exceedingly large in number, extremely disparate and possibly even contradictory. The Yes campaign in Northern Ireland, with the Ulster Unionists, the SDLP and Sinn Fein all on one side, and Republican splinter groups and the DUP on the other, provides a vivid illustration. Future referendum campaigns on electoral reform or on joining the European Economic and Monetary Union could easily take the same form (as, to some extent, the European Community referendum campaign did in 1975). Given this possibility, we believe that seeking to impose spending limits in referendums would not only be administratively impracticable but would, or at least might, impose an unwarranted restriction on freedom of speech.

The Government did not accept this aspect of the report, noting:

> 1.14 The Neill Committee recommended against the introduction of limits on what parties and other organisations taking part in referendums should be able to spend on their campaigns. The Government, however, believes that limits are desirable and practicable. It accepts that it is not possible, by the imposition of spending limits on parties and organisations, to ensure a level playing field in terms of spending between those urging one outcome of the referendum and those urging the other. Nevertheless, in the Government's view, there is no reason in principle why spending limits should not operate, in a similar way as at elections, to discourage excessive spending by the political parties and others and to ensure that individual organisations do not obtain disproportionate attention for their views because of the wealth behind them.[50]

Its plans were enacted in PPERA. Briefly, expenditure limits apply during the "referendum period" – a time period set out in the legislation authorising a particular referendum and explained further below. PPERA set maximum limits on expenditure (as

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[50] *The Funding of Political Parties in the United Kingdom: The Government's Proposals for legislation in response to the Fifth Report of the Committee on Standards in Public Life* Cm 4413 July 1999

defined in Schedule 13 of the Act). Groups (including political parties, campaign groups and other bodies) must register with the Electoral Commission if they plan to spend more than £10,000 during the referendum period.

"Permitted participants"[51] (groups and individuals) are subject to limits, as are the "designated organisations"[52] which receive public funding. For a UK wide referendum, expenditure limits for political parties are determined on the basis of their share of the vote at the last General Election. The Electoral Commission website sets out the limits for participants in UK wide referendums:

> For a UK-wide referendum, the expenses limits would be:
>
> | **Type of permitted participant** | **Referendum expenditure limit** |
> |---|---|
> | Designated organisation | £5m |
> | Political party (over 30% of vote) | £5m |
> | Political party (20-30% of vote) | £4m |
> | Political party (10-20% of vote) | £3m |
> | Political party (5-10% of vote) | £2m |
> | Political party (less than 5% of vote) | £500,000 |
> | All other permitted participants | £500,000 |

1. The bill

Clause 6 gives a minister power to order the holding of a referendum on the European Constitution. The referendum must be held throughout the UK and in Gibraltar at the same time. **Clause 6(6)** provides that this order is subject to the affirmative resolution procedure. Schedule 3 sets out the rules of the conduct of the referendum, in line with the provisions of PPERA.

B. The referendum period

Clause 6 also gives the minister power to specify the referendum period. Under PPERA the referendum period will normally begin on the day the bill (or order) providing for the referendum is introduced in Parliament, and end with the date of the poll.[53] Generally, the minimum referendum period for any particular referendum would be ten weeks. The period is important because it is during this time frame that expenditure and donations are

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51 Individuals and organisations (including political parties) that wish to spend more than £10,000 campaigning in a referendum must register with the Electoral Commission as a "permitted participant"

52 The PPERA allows the Electoral Commission to designate a permitted participant campaigning for a specified outcome in a referendum to act as the lead campaign organisation for the outcome they support. These permitted participants are known as "designated organisations".

53 Explanatory Notes, *Political Parties, Elections and Referendums Act 2000*, paragraph 198

regulated. The referendum period must be distinguished from the *relevant period* defined in s125 of PPERA as the 28 days preceding a poll during which there is a restriction on the promotional material produced by central or local government. However, as with this Bill, the enabling legislation will provide the Secretary of State with powers to specify the date of the referendum at a later stage. Such an order will likely trigger the referendum period, which can be broken into three phases.

The Electoral Commission website notes:

> Assuming a referendum period of ten weeks, permitted participants applying for the status of designated organisations must be made to us within the first four weeks of this period. We then have two weeks in which to designate a lead campaign organisation, if any. This would then be followed by a campaign period of four weeks before the day of the poll.
> Financial controls apply throughout the referendum period and all campaign materials must contain details of who has produced and printed them.

C. Permitted participants

Political parties and third parties are required to register with the Electoral Commission if they wish to spend over £10,000 in campaigning for a result in a referendum. The statutory term is 'permitted participant'. The European Union cannot be a permitted participant in the referendum, and therefore can only spend up to £10,000 during the referendum period.[54]

A registered party, as a permitted participant under sections 105 and 106, would need to indicate the policy it intended to adopt. S106(7) defines "outcome" as "a particular outcome in relation to any question asked in the referendum". The declaration must be signed by the "responsible officers of the party", defined in s64(7) as the "registered leader", the "registered nominating officer" and any other registered officer. Under s106, it is necessary to make the declaration in order to become a permitted participant. Campaigners who are not registered as participants cannot spend over £10,000 in a referendum (campaign) period. This presents some difficulties for parties which do not have an agreed line on a referendum issue. Given that Ministers were allowed to campaign on both sides at the last nationwide referendum in 1975, it is quite possible that the major parties could be split on a referendum question.[55]

Permitted participants must submit returns of expenditure to the Electoral Commission, within 6 months of the poll if their expenditure exceeds £250,000, and within three months if their expenditure is below this figure. Independent auditing is required for expenditure over £250,000. Further details are available from the Electoral Commission website at http://www.electoralcommission.org.uk/.

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54 HC Deb 18 January 2005 c903w

55 See Library Research Paper 04/82 *The Collective Responsibility of Ministers: An Outline of the Issues*

The Electoral Commission has expressed concern about the difficulty of regulating expenditure during the short campaign period, when accounts will not be submitted until after the poll.[56] Although established political parties could suffer loss of reputation if found to exceed limits or return expenditure details in time, pressure groups with a more ephemeral life may well be less concerned with breaching the legislation, particularly when the penalties are relatively small fines.

In evidence to the Transport, Local Government and the Regions Select Committee, the Electoral Commission Chairman, Sam Younger, noted that the legislation:

> … did not guarantee that there is an equality of spending in any shape or form. You have not only this limitless number of organizations which could register themselves and spend half a million, you also have a graded list in terms of the parties which can spend £5million maximum if you have more than 30 per cent of the vote downwards.[57]

Mr Younger has also noted that permitted participants could proliferate, causing difficulties in assessing whether expenditure limits had been exceeded:

> There is nothing to stop somebody with, say £5million creating ten permitted participant organisations and spending, as it were, however much money they have available.[58]

D. Controls on donations

PPERA also introduced controls on donations made to permitted participants. Political parties were made subject to separate controls for electoral purposes, but other participants must register donations over £5,000 with the Commission, and refuse donations over £200 if they are from donors not on the UK electoral register, from blind trusts or from unknown sources. These rules apply during the referendum period only. However, during the passage of PPERA, the Opposition expressed concern that non-UK citizens might still be able to influence referendums by taking out advertisements in UK newspapers or using direct mail.[59] The bill contains no relevant provisions in this area. There are no controls over newspaper reportage or editorials either.

E. Designated organisations

PPERA provided for designated organisations to put the case for each side, to be chosen by the Electoral Commission. For a UK referendum, these would benefit from maximum

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56 HC 187-II, Q1327 Session 2002-3
57 HC 1077-1 Session 2001-2, Q85
58 HC 187-II, Q1327 Session 2002-3
59 HL Deb 21 November 2000 c804

grants of £600,000 to each organisation, combined with a free referendum address to every household and referendum campaign broadcasts. The Commission may decide not to designate, where it does not consider that an organisation exists which represents the body of opinion on one side. It cannot designate one side only. Its website explains how it will decide on designation:

> All permitted participants can apply to become the designated organisation for the outcome they are campaigning for. Applicants must show why they best represent those campaigning for the specified outcome. If there is more than one applicant in respect of each outcome, the Commission will designate whichever applicants appears to them to represent to the greatest extent those campaigning for the relevant outcome.

It has developed designation criteria which are available from the Commission website. In general, if more than one applicant meets the adequate representation criteria, the Commission will designate the organisation that appears to represent to the greatest extent those campaigning for that outcome. The statutory underpinning is in section 109(2)(a) of PPERA.

> show that the applicant adequately represents those campaigning for the outcome at the referendum in relation to which the applicant seeks to be designated.

There was a certain amount of controversy over the choice of the designated No campaign for the North East referendum, as there were two umbrella groups. "North East Says No"[60] was designated in preference to "North East No Campaign".[61] The Commission made its announcement on 14 September 2004.

There is a range of campaigning groups in relation to the EU constitution, including "Britain in Europe" and "Vote No".[62] Decisions on designation will not be made until the timetable for the referendum is clear. The Bill provides for the Electoral Commission to provide information to the public, should they decide not to designate anybody in **paragraph 4 of Schedule 3**.

F. The wording of the question

The 1996 report of the independent Commission on the Conduct of Referendums, set up by the Constitution Unit and the Electoral Reform Society, contained the following analysis.[63]

> **9 Wording of the Question**

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60 http://www.northeastsaysno.co.uk/

61 http://www.northeastnocampaign.co.uk/index.html

62 There is also Labour against the SuperState chaired by Ian Davidson. See http://www.politics.co.uk/party-politics/labour-party/labour-rebels-launch-assault-on-eu-constitution-$2404836.htm

63 Report of the Commission on the Conduct of Referendums - summary November 1996

> The wording of the question should be short and simple and should not be open to either legal or political challenge after the result is known. Its significance should be fully understood and it should therefore emerge from a thorough process of Parliamentary and public consultation and media discussion. The exact character of the consultation will depend on the substance of the issue; but the final decision on the wording can best emerge in the context of Parliamentary debate on the legislation which includes the text of the ballot paper.
>
> **10 Multi-Option Referendums**
>
> The choice of a multi-option referendum or a 'Yes' and 'No' referendum will depend on the nature of the issue (or issues) to be put to the electorate; it will be considered by the Government and by Parliament as part of their consideration of the wording of the question. If the electorate is being asked to endorse legislation approved by Parliament, a 'Yes' and 'No' referendum is appropriate. If a multi option referendum is used, it is important that a clear outcome is achieved. Voters could be given the opportunity to record votes in favour of their second or third choice; furthermore, or alternatively, a second confirmatory ballot could used. Multi-option referendums can be confusing for voters., clear instruction on the ballot paper will be essential.

PPERA requires the Electoral Commission to consider the wording of the referendum question and publish a statement of any views it has about the question's intelligibility.[64] This must be done as soon as is practicable after the bill is introduced. The Electoral Commission is not required to consider the wording until the bill is introduced into Parliament. In practice, there are likely to be contacts at official level before the publication of any legislation. In evidence to the Treasury Select Committee, the Commission Chairman noted that the Commission's opinion can be disregarded.[65]

However, the Commission produced its *Question Assessment Guidelines* in November 2002, as an indication of the principles to be used in assessing intelligibility.[66] It has produced an assessment of the question contained in the Private Member's Bill introduced by Lord Blackwell on 8 July 2004, which made no progress.[67]

The Commission saw no need for that Bill's preamble, as the question was already understood by the general public. It agreed with the wording of the question in the Bill, but preferred the term "approve" to "ratify": Its preferred wording was:

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64 Section 104

65 HC 187-II 2002-3, Q1310

66 http://www.electoralcommission.org.uk/files/dms/QuestionAssessmentGuidelines_7509-6664__E__N__S__W__.pdf

67 *Constitution for Europe (Referendum) Bill[HL]* HL Bill 99 of 2003-4. The Bill made no further progress after its second reading on 10 September 2004

> "Should the United Kingdom approve the 'Treaty Establishing a Constitution for Europe?'"[68]

This is almost the wording in the current bill, which does not allow for a preamble. The Electoral Commission have issued its assessment of the question, which is available from the Commission website.

1. The Bill

Clause 6(2) of the Bill sets the question:

> **6 Holding a referendum**
> (2) The question to be asked in the referendum is—
> "Should the United Kingdom approve the Treaty establishing a Constitution for the European Union?"

The Bill also includes the text of the question in Welsh, and allows for the equally prominent use of the Welsh language in ballot papers in Wales.

The Electoral Commission's assessment of the question is summarised as follows:

> The Commission welcomes the brevity of the proposed question, and believes that the question structure prompts an immediate response and encourages each voter to interpret it in the same way.
>
> The Commission is also satisfied that the question makes it immediately clear what decision the voter is being asked to make, and that the level of public awareness surrounding the European Constitution and the referendum process will be sufficiently high to remove any necessity of having an introductory paragraph.
>
> Sam Younger, Chairman of the Commission, says: Having considered the proposed referendum question against our published guidelines, the Commission believes that the question to be put to voters is intelligible.[69]

G. The franchise

The electorate to be used in a referendum is usually a simple choice between the local and parliamentary franchise. The local electorate includes other EU nationals resident in the UK and peers who sit in the House of Lords, but not British citizens who have registered as

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[68] Details of the assessment can be found on the Commission website at http://www.electoralcommission.gov.uk/files/dms/Questionassessmentstatement-EUconstitution-30Sept20041_15101-11297__E__N__S__W__.pdf

[69] Electoral Commission website at http://www.electoralcommission.gov.uk/media-centre/newsreleasereferendm.cfm/news/416

overseas voters. The parliamentary franchise includes these overseas voters, but not EU citizens or members of the House of Lords. In the case of the 1975 EC referendum, the electorate was the parliamentary franchise, with the addition of peers, and special arrangements for the armed forces electorate.[70]

Since 1997, the local electorate has been used for referendums in Scotland, Wales and London, and the parliamentary for the Northern Ireland referendum.

1. The Bill

Clause 7 sets out the franchise as those entitled to vote in a parliamentary election, plus peers who are entitled to vote in local government elections. Entitlement is as follows:

- Anyone aged 18 or over (an elector can register once they are 16 but cannot vote until their 18th birthday)
- British or Commonwealth citizens who are resident in the UK
- British or Commonwealth citizens who are resident in Gibraltar and entitled to vote in Gibraltar as an elector at a European parliamentary election
- Citizens of the Irish Republic who are resident in the UK
- In Northern Ireland, electors must have been resident in Northern Ireland during the whole of the three-month period prior to the relevant date of 15 October each year
- British nationals living overseas are entitled to vote for up to 15 years after moving abroad. An overseas voter should register in the constituency covering the address for where they were last registered within the UK. (Someone who has never been registered as an elector in the UK is not be eligible to register as an overseas voter unless they left the UK before they were 18, providing that they left the country no more than 15 years ago)
- Service/Crown personnel serving overseas in the armed forces or with Her Majesty's Government
- Residents of mental hospitals, homeless people and remand prisoners can register using a declaration of local connection
- Hereditary peers who do not have a seat in the House of Lords

The electoral register in use for a European parliamentary election in Gibraltar will be used to identify those entitled to vote in Gibraltar. **Clause 7(2)** also gives the Minister the power to allow electoral registers to be closed to amendments made after a certain date by affirmative order. This is a common provision in electoral law.

The use of the parliamentary franchise contrasts with the use of the local government franchise in all other referendums held since 1997. On the other hand, the franchise will be broadly equivalent to that for the only other UK wide referendum, on continued EEC membership, in 1975.

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70 *Referendums Act* 1975, s1(3),(5)

According to the Office for National Statistics, 7,850 people are registered as overseas voters in England and Wales in 2004.[71] Approximately 40,500 people are currently registered as EU citizens entitled to vote in EP and local elections in England and Wales. This figure excludes Commonwealth citizens also entitled to vote.[72]

2. Gibraltar

The European Court of Human Rights ruled in February 1999 that the British Government was in breach of the European Convention on Human Rights (ECHR) for failing to provide the right for Gibraltarians to stand for or vote in European Parliament (EP) elections in 1994. Faced with a conflict between two international legal obligations under the EC Treaty and the ECHR, the British Government tried to remedy this by seeking an amendment to the 1976 Act on direct EP elections, which excluded Gibraltar. To amend such an Act required unanimity in the Council of Ministers. The Spanish Government, which has long maintained a sovereignty claim over Gibraltar, rejected the proposal.

In 2001 the British Government decided to take unilateral action in order to fulfil its international obligations under the ECHR and to enfranchise Gibraltarian voters for EP elections. Part 2 of the *European Parliament (Representation) Act 2003* provided for Gibraltar to become part of a UK "combined region" for EP election purposes. There are 17,000 electors in Gibraltar, and this was not enough to form an electoral region for the purposes of European Parliament elections. Therefore Gibraltar was combined with another region. The Electoral Commission identified the South West as most suitable, after consultation with the Gibraltar Governor and Chief Minister. At the EP elections the people of Gibraltar voted at polling stations there.

There has been as yet no official indication about the method of counting for the referendum. It is feasible that votes in Gibraltar will be counted separately but this is likely to be clarified in secondary legislation.

Paragraph 8 of Schedule 3 allows a minister to make an order to extend to Gibraltar the relevant rules on the conduct of the referendum contained in PPERA. The *Explanatory Notes* state:

> 64. The order would enable extension to Gibraltar of the relevant rules on the running of the referendum, including those provided for in the PPER Act or in an order as to the conduct of the referendum made under section 129 of that Act, and appropriate modifications in the light of this.

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71 HC Deb 17 January 2005 c 548. This data is provisional only.

72 Therefore the data refers to 22 EU nationalities only, excluding three out of the 25 EU nationalities (Irish, Maltese and Cypriot citizens, who are also Commonwealth citizens). Again, this data is provisional only and is dated December 2003.

Similar provisions were made in respect of Gibraltar for the *European Parliament (Representation) Act 2003.* This had enabling powers to provide for the conduct of the elections by applying with modifications the provisions of the existing electoral law for UK parliamentary elections.[73]

H. Information campaigns

Government information campaigns are covered by the general guidelines of the Government Information and Communications Service which are available from the Cabinet Office website.[74] The Annex to these guidelines sets out the general conventions in relation to Government publicity and advertising:

> **Propriety - Basic Conventions**
> 2. The main conventions require that Government publicity:
> i. should be relevant to Government responsibilities;
> ii. should be objective and explanatory, not tendentious or polemical;
> iii. should not be, or be liable to misrepresentation as being, party political; and
> iv. should be conducted in an economic and appropriate way, having regard to the need to be able to justify the costs as expenditure of public funds.
> General
> 3. These conventions continue to serve the Government and the public well. They are in general terms but have in practice provided an adequate basis for the exercise of judgement in individual cases. They are consistent with the principles set out in the new Civil Service Code, and complementary principles of Ministerial conduct, including the duty of Ministers to give Parliament and the public as full information as possible about the policies, decisions and actions of the Government, and not to deceive or knowingly mislead, and the duty not to use public resources for party-political purposes.
> 4. More detailed guidance on the application of the conventions to the main kinds of Government publicity is contained in the Guidance Note on the work of the Government Information Service, which also includes specific notes on Government use of public relations consultants, Government use of direct marketing, and value for money issues.
> 5. The conventions apply to both "paid" and "unpaid" publicity. "Paid" publicity includes paid advertising in the press, on radio and on television, government-produced or sponsored software and video material, leaflet campaigns, material placed on the Internet, exhibitions etc. "Unpaid" publicity includes papers presented to Parliament as White and Green Papers and other consultation documents which are sold to the public; press notices; public inquiry unit and other official briefing material (all of which may nevertheless involve some cost to public funds through Civil Service costs) and printed and other information which carries Government support but which may be paid for or sponsored by a third party.

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73 *European Parliament (Representation) Bill Explanatory Notes*, available at: http://www.publications.parliament.uk/pa/cm200203/cmbills/007/en/03007x--.htm

74 http://www.cabinetoffice.gov.uk/propriety_and_ethics/publications/pdf/csg-vol2.pdf

The Government Information and Communications Service (GICS) Handbook (the Red Book) contains detailed guidance for information officers.[75]

The Phillis Review was launched in February 2003, when the Government accepted the central recommendation of the Public Administration Select Committee for a radical and external review of the GICS and media arrangements in the light of its examination of the "unfortunate events" involving the special adviser, Jo Moore, at the DTLR between November 2001 and May 2002.[76] The Phillis Review made recommendations for new rules relating to the conduct of special advisers and defining more clearly the boundaries with the civil service.[77] The Government response accepted the need to remodel the GICS but promised to consider the need for new guidance for special advisers:

> The Permanent Secretary will also consider whether the existing rules and guidance are fit for purpose and whether any additional clarification is required.[78]

The Government Communications Network has now replaced the GICS.[79] In response to a PQ on 27 January 2005, Baroness Symons referred to Foreign Office publications on the Constitution, and said that "the question of what will go to individual households is still a matter for discussion among my right honourable and honourable friends".[80]

1. EU institutions

The following PQ gives details of the regulations surrounding the institutions of the European Union:

> **John Cryer:** To ask the Secretary of State for Foreign and Commonwealth Affairs what provision the *(a)* European Commission, *(b)* European Parliament and *(c)* European Union agencies have made for providing information to the public on the constitutional treaty for the European Union; and what steps he is taking to ensure that it is politically neutral. [208560]
> **Mr. MacShane:** The Institutions of the European Union are responsible for their own activities in terms of providing information to the public, though they have made clear that any activities in the UK will be agreed with HMG. The Staff

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75 Available from http://www.gics.gov.uk/handbook/context/default.htm

76 Public Administration Committee Eight Report, 'These Unfortunate Events' HC303 2001-2002 http://www.publications.parliament.uk/pa/cm200102/cmselect/cmpubadm/303/30303.htm1

77 *An Independent Review of Government Communications* January 2004. For background see Library Standard Note 2594 *Changes to Government Communications Machinery* at http://hcl1.hclibrary.parliament.uk/notes/pcc/snpc-02594.pdf

78 *Cabinet Office* 19 January 2004 'Douglas Alexander publishes report of independent review of government communications' at http://www.cabinetoffice.gov.uk/news/2004/040119_report.asp

79 Letter to Chair of Public Administration Select Committee from Howell James, Permanent Secretary Government Communications 20 January 2005. A new website www.comms.gov.uk went live on 31st January 2005

80 HL Deb 27 January 2005 c1386

> Regulations of Officials of the European Communities, adopted on 1 May 2004, state that staff must act objectively and impartially. Further details can be obtained from the UK Representations of the European Union's Institutions, contact details of which can be found at www.cec.org.uk, www.europarl.org.uk and www.europe.eu.int[81]

The Commission funds the "European Movement" in each Member State through a share of budget line B3-301, "Information Outlets", up to a maximum of €10,820,000 (approx. £6.2m). The EP Constitutional Affairs Committee accepted the total allocation of €17.75 million proposed by the Commission for Information Outlets in the Preliminary Draft Budget (PDB) for 2005, and objected when this was reduced to the 2004 amount of €17.1 million in the Draft Budget for 2005, "in view of the information tasks to be tackled in 2005".[82] In addition to Commission spending, each EU institution has its own public relations activities and some of the pro-European lobbying organisations in the Member States are also part-funded from EU sources. The EP plans to spend €340,000 (approx. £238,000) in 2005 and 2006 on promoting the Constitution in the Member States.[83]

I. The regulation of information during campaigns

PPERA places restrictions on promotional material published during the 28 days (known as the "relevant period") before a referendum by the Government, local authority or other publicly funded body, apart from the Electoral Commission, the BBC and S4C.[84] This has caused some difficulties, according to the Commission. Its Chairman noted:

> 1342 (John McFall). I note that section 125 of the 2000 Act prohibits public bodies publishing information on the referendum up to 28 days prior to the referendum. In the light of the points I have been making to you earlier, is there a way that a neutral document could be produced and given to each household or do you think that would be unlawful?
>
> (*Mr Younger*) I think it is possible. There are problems in law about the way the legislation is at the moment, but it is worth noting—and this goes back to our discussions with Government over the Regional Assemblies (Preparations) Bill, that one of the things that came out of a review that we did on the mayoral referendums a couple of years ago was that because of the 28 day restriction on anything coming out of a local council, if there were not a campaign on either side of the issue and if the local press were not particularly interested in it, you got to referendum day without the public being aware of what the issues were.
>
> Due to a fear that potentially the same might be true on a regional assemblies referendum, we asked that Government put into the Bill, actually at our request, a clause that would allow, if necessary, the Electoral Commission to put out such

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81 HC Deb 19 January 2005 c1020w

82 EP Committee on Budgets motion for a resolution, para. 18. EP Doc FINAL A6-0021/2004, 19.10.2004 at http://www2.europarl.eu.int/omk/sipade2?PUBREF=-//EP//NONSGML+REPORT+A6-2004-0021+0+DOC+PDF+V0//EN&L=EN&LEVEL=5&NAV=S&LSTDOC=Y

83 *EUpolitix*, 11 January 2005

84 section 125

> information if there were circumstances where that information was not getting out properly…As I say, from the Electoral Commission's narrow point of view, I do not regard it as particularly desirable because it is very dangerous territory, frankly. Nevertheless, I can see that there may be circumstances where it might be necessary[85].

On the other hand, the Referendum Commission in Ireland experienced considerable difficulties in publishing neutral material on the Nice Treaty in 2001,[86] and as a result, legislation removed from the Commission the obligation to provide literature to explain both sides of the question.[87]

The Treasury Select Committee called for the Electoral Commission to be given statutory authority to promote participation in referendums, noting the precedent for this in the *Regional Assemblies (Preparations) Act 2003.* It also recommended a power for the Commission to provide 'objective information', while acknowledging the difficulties of preparing such information.[88] The Commission was given power in the *Regional Assemblies (Preparations) Act 2003* to provide voter information where no umbrella organisations had been designated. The same power appears in this Bill.

1. The bill

The Electoral Commission is given power in **Paragraph 2 of Schedule 3** to do anything to improve turnout, as set out in the *Explanatory Notes:*

> 57. *Paragraph 2* allows the Electoral Commission to do anything that it thinks is necessary or expedient to encourage voting at the referendum. This could include publicising the referendum and the voting arrangements, encouraging people to turn out, and promoting optional postal voting.

2. Broadcast facilities

Only designated umbrella organisations can have referendum campaign broadcasts.[89] This is to ensure that, in any referendum, each side of the campaign will have equal access to free airtime for campaign.[90]

TV and radio broadcasting companies have traditionally been expected to operate with political impartiality. Library Standard Note 3354, *Party election broadcasts*, sets out the

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85 Sam Younger, HC 187-II, Session 2002-3, Q1342

86 Karin Gilland *Ireland and the No to Nice: Once is Unfortunate* at http://www.iri-europe.org/reports/York-KarinGilland.ppt.

87 See S3 of the *Referendum Act 2001*, which now requires the Commission to produce explanatory material only

88 HC 187 2002-3, para 117

89 section 127

90 Explanatory Notes, paragraph 223

rules for elections.[91] The coverage of referendums presents particular difficulties to the broadcasters, as political parties do not necessarily fall neatly into Yes and No categories. The duty of the former Independent Broadcasting Authority to maintain a proper balance in its programmes was enforced by the Court of Session in 1979, when the IBA was banned before the devolution referendum in Scotland from transmitting a series of party political broadcasts, three in favour of devolution and one against.

The Neill report reviewed the need for broadcasts in referendums and concluded that they were required despite the reluctance of the broadcasters to allow time for them.[92]

S 333 of the *Communications Act 2003* requires Ofcom to ensure that Referendum Campaign Broadcasts are included in the UK regional ITV, Channel 4, Five, Classic FM, talkSPORT and Virgin 1215 services. This document reflects the rules which Ofcom has determined in accordance with the Act. Within the terms of these rules, the precise allocation of broadcasts is the responsibility of the licensees. Unresolved disputes between any licensee and any political party, as to the length, frequency, allocation or scheduling of broadcasts, should be referred by the party or the licensee to Ofcom.

The BBC Amended Agreement (2003)[93] states that: "…the Corporation shall include, in some or all of the Public Broadcasting Services, party political broadcasts and referendum campaign broadcasts". It is for the Governors to determine "from to time" which of the public broadcasting services shall include party political broadcasts and referendum campaign broadcasts; the basis on which, and the terms and conditions subject to which, such broadcasts are to be so included; the political parties and organisations on whose behalf PPBs and referendum broadcasts may be made; and the length and frequency of such broadcasts. The *Communications Act 2003* places an obligation on the Welsh language channel, S4C, to carry PPBs and referendum campaign broadcasts. Sky TV transmits party broadcasts voluntarily according to the Committee on Standards in Public Life.[94]

3. Guidance for civil servants

In response to a series of questions, the junior Cabinet Minister, David Miliband, stated:

> Guidance to civil servants, including special advisers and members of the Government Information and Communication Service, on their conduct during the referendum on the Treaty establishing a Constitution for the EU, and the

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91 http://hcl1.hclibrary.parliament.uk/notes/pcc/snpc-03354.pdf

92 paras 12.38-40

93 *Copy of the Amendment dated 4th December 2003 to the Agreement of 25th Day of January 1996 (as amended) Between HM Sec of State for Culture, Media and Sport and the BBC* (Cm 6075, December 2003)

94 *The Funding of Political Parties in the United Kingdom*, Fifth Report of the Committee on Standards in Public Life, Cm 4057-I, p177

> period leading up to it, will be issued in due course. It will be made public. In addition Section 125 of the provisions of the Political Parties, Elections and Referendums Act 2000 will apply. The most recent example of guidance issued to civil servants on their conduct during referendums is that issued for the referendum on a regional assembly for the North East (available in the Library of the House and on the Cabinet Office website at http://www.cabinetoffice.gov.uk/propriety and ethics/publications/pdf/nerarg.pdf).[95]

4. Publisher and printer details

PPERA provided that any material to do with the referendum, which is published in a referendum period, must carry the name and address of the printer, together with the name of any person or body on whose behalf it is published.[96] This was intended to help the Electoral Commission identify who was behind publications, and therefore who had incurred referendum expenses. Following enactment, technical difficulties were found with implementation of this requirement and it has not yet been used in a referendum.[97] **Para 10 of Schedule 3** to the Bill disapplies section 126 of PPERA.

5. Challenges to the rules on Government information

The question of a challenge to the operation of s125 has been raised:

> **Lord Stoddart of Swindon** asked Her Majesty's Government:
> Further to the Written Answer by the Baroness Ashton of Upholland on 2 December 2004 (*WA 15*), whether the likely costs to a person alleging a breach of Section 125 of the Political Parties, Elections and Referendums Act 2000 in making a challenge by way of judicial review are likely to be so high as to deter any challenge being made; and whether the Attorney-General has the power to act on a complaint from a person that a Minister has committed a breach of Section 125.]
> **The Parliamentary Under-Secretary of State, Department for Constitutional Affairs (Baroness Ashton of Upholland):** The costs of making a challenge by way of judicial review will depend on the circumstances of the particular case, and whether they would be likely to deter an individual from making a challenge would depend on that person's own circumstances.
> The Attorney-General has no statutory role of enforcing Section 125. A complainant might ask the Attorney-General to bring a relator action to enforce the section. It would be a matter for the Attorney General's discretion whether to bring such an action. He might decline to do so if it were open to the complainant to pursue his complaint by way of judicial review. It would in any event be for the complainant to meet the costs of any relator action. [98]

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95 HC Deb 18 January 2005 c899w
96 section 126
97 For full details see Research Paper 01/40 *The Elections Publications Bill[HL]*
98 HL Deb 25 Jan 2005 : Column WA152

6. The bill

Clause 6 gives the Commission specific authority to promote voter turnout. **Clause 7** allows the Commission to provide information aimed at promoting awareness about the pro- and anti- arguments only where there are no designated umbrella organisations. The wording of both clauses is closely modelled on sections 8 and 9 of the *Regional Assemblies (Preparations) Act 2003.*

J. No threshold for the poll

PPERA did not set any thresholds for referendums. The practice of setting a threshold in a referendum incorporates the idea that major constitutional change is something more important than the result of ordinary elections, and therefore should be the result of something more than a simple plurality of the votes. Thresholds were set for the referendums held in 1979 on devolution in Scotland and Wales, following backbench amendments to the legislation. None has been set since then.

During the launch of the "Your Say" campaign before the referendum on a regional assembly for the North East, the ODPM junior minister, Nick Raynsford, reportedly said that ministers will not approve the creation of assemblies in regions where the turnout has been "derisory".[99] The turnout which would merit the term derisory has not been officially defined.[100]

K. All postal ballots

The most recent referendum, in the North East, on 4 November 2004,[101] was all postal. If the all postal method were used for this referendum, it might affect the working of the 28-day relevant period in practice. PPERA was not designed with postal ballots in mind, as it assumes one polling day. However it is likely that postal votes will be posted over a number of days up to a final cut-off point. This makes campaigning strategies difficult for organisations and parties. It has also affected the requirement for the Government to cease providing information for the 28 day period before the poll. For the regional referendums, the Government undertook to stop their information campaign 28 days before the first postal ballot paper was despatched.[102]

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99 See eg "Parliaments for the north: Prescott takes plans to the people", *The Independent*, 4 November 2003 p8

100 HC Deb 7 July 2003 c620w

101 See Standard Note3250 *North East Assembly Referendum 4 November 2004* http://hcl1.hclibrary.parliament.uk/notes/sgss/snsg-03250.pdf

102 HC Deb 15 March 2004 c61w

1. The Bill

Para 2 of Schedule 3 gives the Electoral Commission power to do anything necessary to encourage voting. The Explanatory Notes state:

> 57. *Paragraph 2* allows the Electoral Commission to do anything that it thinks is necessary or expedient to encourage voting at the referendum. This could include publicising the referendum and the voting arrangements, encouraging people to turn out, and promoting optional postal voting.

This appears to assume that the ballot will not be all-postal. Following controversy about the use of all-postal ballots for the local and EP elections in June 2004, the Electoral Commission produced a report in August 2004 which recommended that all-postal voting should not be pursued for use at UK statutory elections and referendums. The Commission proposed that

> …a new foundation model of voting for statutory elections and referendums should be developed. The Commission will work with all interested stakeholders to design this new approach to voting, which must be capable of offering electors both choice and security.
>
> The Commission will report on a recommended approach to this foundation model by 31 March 2005. The model must by definition and design enable the introduction of additional voting channels as and when appropriate, particularly the various electronic channels that have been trialled in pilots.[103]

The Government responded to the Commission in December 2004 as follows:

> The Commission has recommended that all-postal voting should not be pursued for use at UK statutory elections. As we explain in this document, we do not believe the evidence from the evaluation supports this conclusion. In short we are not persuaded of the case for abandoning all-postal voting. Whilst there will be no all-postal voting in the forthcoming General Election, it is important to keep the option open for future local elections, especially after the implementation of some of the recommended safeguards in this report.[104]

For further information, see Library Standard Note no 2882, *All-postal voting*.

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[103] *Delivering democracy? The future of postal voting*. Electoral Commission, August 2004. Available at http://www.electoralcommission.org.uk/templates/search/document.cfm/10935

[104] T*he Government's response to the Electoral Commission's Report* Preface at ODPM website at http://www.odpm.gov.uk/stellent/groups/odpm_localgov/documents/page/odpm_locgov_033608-02.hcsp

L. The administration of the referendum

1. Costs

The following estimate of costs has been given:

> **John Cryer:** To ask the Parliamentary Secretary, Department for Constitutional Affairs what his estimate is of the cost of the referendum on the constitutional treaty for the European Union. [208564]
> **Mr. Leslie:** No comparative figures are available as the only UK-wide referendum was held in 1975. We would expect the cost of running the referendum to be similar to the cost of a general election. The last general election cost approximately £80 million.[105]

The *Explanatory Notes* state*:*

> 70. The main costs of running the referendum will be the costs of implementing and administering the legislation, and will cover counting officers' fees and expenses (who will carry out the same functions as returning officers), the costs of the Electoral Commission, printing, Royal Mail delivery costs etc. The referendum will not lead to any changes in the staff of Government Departments and their agencies or local authorities

Clause 9 of the Bill makes the appropriate financial authorisations. Expenditure by the Electoral Commission comes from the Consolidated Fund. The Explanatory Notes state:

> In addition, *subsection (2)(b)* will allow for charges on the Consolidated Fund arising under the Bill by virtue of the use of the power in paragraph 8(2)(h) of Schedule 3 to provide for free referendum addresses in Gibraltar.

2. Counting arrangements

PPERA provides that the Chief Counting Officer for the referendum is the chairman of the Electoral Commission, who may delegate responsibility to counting officers for each relevant area. The Commission have pressed for legislation to clarify delegation powers.[106]

There have been different arrangements for counting in referendums in the UK so far. For the Northern Ireland Border Poll in 1973 results were available only on a province wide basis (despite interest in discovering the breakdown by county). For the 1975 EEC referendum the Government decided to use a central count. The Liberals sought to allow for a constituency count, but their amendment was defeated.[107] However a back-bench

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[105] HC Deb 18 January 2005 c903w
[106] HC 1077-I 2001-2
[107] HC Deb vol 890 cc1491, 1492, 23.4.75

Labour amendment, drafted with government encouragement according to Butler & Kitzinger,[108] was moved by Roderick MacFarquhar to provide for a county/regional count (other than in Northern Ireland, which would be treated as a single unit).[109] This amendment was carried by 270-153, despite the opposition of Ted Short, the minister in charge of the bill.[110] Attempts to introduce a count by constituency in the Lords were however, unsuccessful.[111] For the 1979 and 1997 devolution referendums, results were available by local government areas.

The Bill does not provide any details of the counting arrangements, which are expected to be set out in secondary legislation.

3. Combination with other polls

Generic regulations under PPERA govern the administration of the referendum. The question of combining referendums with elections has been controversial internationally on occasion. In New Zealand the question of changing the electoral system was combined with a general election in 1993. The combination increased turnout for the referendum considerably to a figure of 82.6 per cent. A consultative referendum held on electoral systems in 1992 had produced a turnout of 55 per cent in 1992.[112] In evidence to the Transport, Local Government and the Regions Select Committee, the Electoral Commission Chairman has drawn attention to the "danger of an election on a party basis cross cutting with a major issue of principle which is not on a party basis".[113]

A parliamentary answer on 19 January 2005 stated that no decision had been taken on the timing of the referendum.[114] In response to an oral question in the Lords on 27 January 2005, Baroness Symons said that the Government would consider any advice from the Electoral Commission.[115]

Paragraph 5 of Schedule 3 enables the referendum to be held together with other polls, by allowing for an order for the combination of polls.

4. Challenges to referendum results

Clause 8 limits circumstances under which the formal result of the referendum may be challenged in legal proceedings. The *Explanatory Notes* state*:*

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[108] *The 1975 Referendum* David Butler and Uwe Kitzinger 1996 p63
[109] s2(3)-(7) of the *Referendum Act 1975*
[110] HC Deb 23 April 1975
[111] HL Deb 5 May 1975 cc144-154
[112] For further details, see Library Research Paper 98/112 *Voting Systems: The Jenkins Report.*p13-14
[113] Sam Younger, HC 1077-1 Session 2001-2, Q44
[114] HC Deb 19 January 2005 c1020w
[115] HL Deb 27 January 2005 c1385

Clause 8: Legal Challenge

15. Clause 8 limits the circumstances under which the formal result of a referendum under the Act may be challenged in legal proceedings. It does this by prohibiting the courts from considering any challenge to a certificate of the number of ballot papers or votes cast unless the challenge is brought by way of judicial review. There are precedents in electoral law for this type of clause, and most recently the Regional Assemblies (Preparations) Act 2003 contained such a clause as did the draft Single European Currency (Referendum) Bill. The six week period is intended to ensure that there is not an unacceptable delay caused by any challenge to the result

V Amending the Bill

The Bill can be amended like other bills, but with the proviso that, were it to be amended in such a way that it no longer made provision in UK law for those parts of the Constitution which are intended to form part of the EU's legal order, then the Government would be prevented from ratifying. The *European Communities (Amendment) Bill 1992-3*, which made provisions consequential on the *Treaty on European Union* (Maastricht Treaty), was amended quite significantly during its passage through Parliament.[116] The Constitution itself cannot be amended by the action of any Member State or its national parliament during the ratification process. Amendments may be adopted that are relevant to the Constitution, but which would not prevent the Government from fulfilling its obligations under the Constitution.

Giving evidence to the European Scrutiny Committee, Martin Howe QC thought that the principle of primacy could be curtailed by means of an amendment to the Bill.

> The answer as far as the legal issues are concerned is certainly it would be possible to insert in the Act, giving effect to the constitution in the United Kingdom, a clause which explicitly preserved the fundamental doctrine of supremacy of Parliament and Parliament's right to repeal the Act if it so chose. If that were done, that would prevent doubts and would put beyond judicial drift […] the problem of where fundamental sovereignty lies.[117]

With regard to the Charter of Rights, Mr Howe thought:

> I suppose you could envisage an Act of Parliament which gave effect to the constitution and perhaps contained some explicit provisions restricting the ambit of the Charter. One could envisage that. In the absence of such explicit provisions restricting the ambit of the Charter, the general provision (which is now section 3, subsection 1 of the European Communities Act 1972) would apply which is that

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116 See Library Research Paper 93/24, *The Maastricht Debate: Further Developments in the Argument over Ratification*, 3 March 1993

117 Uncorrected evidence to the European Scrutiny Committee, 12 January 2005 at http://www.publications.parliament.uk/pa/cm200405/cmselect/cmeuleg/uc132-ii/uc13202.htm

> […] the courts of the United Kingdom in applying Community law give effect to the principles laid down by the European Court of Justice. So short of an explicit Act of Parliament that would raise the fundamental sovereignty issue that we have been discussing, in general our courts would follow decisions of the European Court regarding the scope of the Charter and the scope of its application to the Member States.[118]

Amendments to the provisions on the referendum are more straightforward in principle. In theory, the Bill could, for example, disapply the PPERA, change the question or impose a threshold.

VI Passage of the Bill in Session 2004-5

The bill which set out the question and franchise for the referendum on the European single currency was published in draft in session 2003-4. In the event, this bill was not subject to pre-legislative scrutiny by any parliamentary committee. In contrast, there has been no suggestion that the referendum aspect of the *European Union Bill* should be published in draft. The European Constitution itself, on the other hand, has been the subject of parliamentary inquiry by the European Scrutiny Committee and the Foreign Affairs Committee at various stages of its drafting and since its conclusion.

There has been speculation that the Bill is unlikely to pass all its stages, should there be an election in spring 2005.[119] The *Financial Times* reported that senior civil servants did not expect the bill to be passed before dissolution, since the Conservatives were expected to oppose the legislation.[120] The FCO website notes that an intervening general election would mean that the Bill would need to be re-introduced if it does not pass both Houses before dissolution:

> A General Election stops all legislation that is under discussion. If a General Election is called before the Bill is given Royal Assent, the Government would have to re-introduce it in the new political term[121]

The FCO website has a Keeling's Schedule which indicates the proposed changes to Part I of the *European Communities Act 1972*.[122] This is a schedule which reproduces the provisions of the earlier measure and shows the effect of the amendments embodied in the

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[118] Ibid

[119] See exchange between Paul Tyler and Peter Hain at business questions HC Deb 27 January 2005 c458-9

[120] "Delayed endorsement of constitution likely" *Financial Times* 4 January 2005

[121] See http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1106074364175#6

[122] http://www.fco.gov.uk/Files/kfile/Amended%201972%20Act%20Final.pdf

bill. The Lords Constitution Committee has recommended that this option should be considered for every bill and published as part of the *Explanatory Notes*.[123]

It has been common practice for bills dealing with EC/EU treaties to be taken on the Floor of the House, as a first class constitutional bill.[124] For instance, the *European Communities (Amendment) Bill 1997/98*, concerning the Amsterdam Treaty, and the *European Communities (Amendment) Bill 2001/2*, concerning the Nice Treaty, were dealt with in this way. The protracted debates over the *European Communities (Amendment) Bill 1992/93* (on the Maastricht Treaty) are unlikely to recur, given the introduction of programming.

There has been no suggestion that the Bill could benefit from the carry-over procedures introduced as part of the modernisation programme, since no public bill has yet been carried over a Parliament.[125]The Lords *Companion to the Standing Orders* states that the carry-over procedure does not apply over a dissolution of Parliament, but there is no specific prohibition in the Commons standing orders.[126]

VII If there is a No-vote …

The European Constitution must be ratified by all 25 Member States under Article 48 TEU before it can come into force. The flexible arrangements for future amendments under Constitution Article IV-444 will only apply once the Constitution has entered into force, not to the initial ratification of the Constitution.

The failure to ratify by one or more Member States will prevent the Constitution from coming into force. Many commentators believe that a straightforward ratification by all 25 Member States is unlikely and that a more likely scenario is one to three States not ratifying the Constitution initially.[127] Referendums are seen as being the most unreliable means of ratifying and a second referendum in some States is possible.

Declaration No. 30, which is appended to the Constitution, concerns the possibility of non-ratification by one or more Member States. It states:

> The Conference notes that if, two years after the signature of the Treaty establishing a Constitution for Europe, four fifths of the Member States have

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123 Lords Constitution Committee 14th report *Parliament and the Legislative Process* HL 179 2003-4 para 86

124 There is no official definition of this term. See Research Paper 97/53 *The Commons committee stage of constitutional bills*

125 Hybrid bills have been carried over. See Library Standard Note 3235 *Modernisation:Carry Over of Public Bills* for details of the procedure at http://hcl1.hclibrary.parliament.uk/notes/pcc/snpc-03236.pdf

126 Lords Companion para 6.08

127 The UK, Ireland and Poland are seen as possible non-ratifiers.

> ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter will be referred to the European Council.[128]

The European Council has tackled non-ratification problems in the past, so this scenario is not new. Professor Jo Shaw considers some historical examples of the consequences of non-ratification of a European treaty. In the case of the 1954 treaty on the European Defence Community, which the French *Assemblée Nationale* alone refused to approve, the treaty initiative was abandoned. European integration efforts "were re-focussed on functional and economic questions, and the result was the Treaty of Rome in 1957".[129] More recent examples are Denmark and the Maastricht Treaty in 1992, and Ireland and the Nice Treaty in 2001. In both cases a second referendum was held. In the first of these the Danish electorate was asked to vote on a slightly different package agreed by all Member States to take account of Danish objections to Maastricht. In the case of Ireland, the electorate voted on the same text, but on the basis of a more informed and more positive debate. In both cases the second referendum was positive. The British Government has not said whether it would reject the Constitution in the event of a 'no' vote, only that it could not be ratified "on that basis".

Shaw and other commentators have considered possible scenarios, should one or more Member States not ratify the Constitution. The following suggestions draw on their findings:[130]

- A second (or even third) attempt at ratification is made within the State(s) in question. A second referendum might be linked to specific issues that could be remedied by protocols agreed by all Member States and attached to the Constitution. Significant factors might include the size of the State, whether it is a founding member or not, the margin percentage of the 'no' vote and the number of non-ratifiers. If only one Member State rejects the Constitution, the others might put pressure on that State to do something about it. If this pressure were resisted, the Presidency might try to persuade the non-ratifying State to enter into negotiations to establish a special arrangement redefining its relations with the EU.

- The Constitutional Treaty is dropped and the current Treaties are retained for the foreseeable future. The Treaty as amended by the Treaty of Nice would continue in force.

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[128] CIG 87/04 ADD 2 REV 2 25 October 2004 at http://europa.eu.int/constitution/download/declarations_EN.pdf

[129] *Failure to ratify the Constitutional Treaty: what next?* Jo Shaw, Senior Research Fellow, Federal Trust for Education and Research, Professor of European Law, University of Manchester

[130] See also Eric Philippart, European Policy Centre, May 2003 at http://www.euractiv.com/cgi-bin/cgint.exe?204&OIDN=250919

- Various steps are taken to introduce aspects of the Constitution by measures short of Treaty amendment, the so-called "Nice Plus" scenario. Not everything in the Constitution requires an amendment to the current Treaties and some measures could be introduced through inter-governmental agreements outside the Treaty structure,[131] by inter-institutional agreements, by legislation under existing Treaty Articles or using the catch-all Article 308 TEC. The current EC Treaty already provides for enhanced cooperation among some Member States. This arrangement has not yet been used formally (Schengen and EMU came about in a different way), but it might be an option for some elements of the Constitution.

- A partial renegotiation might allow for opt-out and opt-in arrangements, as currently exist for EMU, defence and JHA matters. This raises the possibility of a multi-speed Europe with a hard core of integrationist States, which is favoured by some and rejected by other States.

- An IGC is convened to try to amend the Constitution, with a view to making it more likely to be ratified by Member States; or attempts are made to negotiate a completely new text. The latter option would pose a serious credibility problem for the EU, which would already have spent nearly two years preparing the constitutional text.

- By a formal agreement among all Member States, the non-ratifying Member State(s) voluntarily leave(s) the EU and a Constitutional Treaty enters into force between the remaining Member States. Non-ratifying States cannot be expelled from the EU, although some reports maintain that this can be done. Such a move would have to be agreed by all the Member States, including the State(s) wishing to leave. A variation of this would be for a group of States wanting to pursue integration to withdraw from the EU collectively and reconfigure a new EU and a new relationship with the other States.

- Those Member States which have ratified the Constitution agree to enter into a new Treaty without the non-ratifying state(s). The new treaty would be in addition to, not instead of, the current EC Treaty, which would remain in force. This could be messy and unworkable. A variation of this, the so-called "Delors option" of a "treaty within a treaty" would involve refounding the EU with the majority of Member States accepting the

[131] For example, the Council has already approved the establishment of a European defence agency, intended to improve military capabilities in the EU. The Council could decide to have a permanent president. The role of national parliaments could be enhanced to some extent through national reforms. Vetoes might be dispensed with for legislation requiring unanimous agreement.

Constitution, while all Member States remained legally bound by the previous EC/EU Treaties. This too would present serious legal, administrative and institutional problems.

VIII Ratification: state of play in the Member States

The following table sets out the ratification procedures adopted by EU Member States and dates where available:[132]

Country	**Referendum?**	**State of play on ratification**	**Other major EU-related referendums**
Austria	No	National Council has not asked for a referendum	1994 - EU membership
Belgium	No	Prime Minister Guy Verhofstadt was in favour of a non-binding referendum, but has lost political support for one from his social-liberal coalition partner, the Flemish Spirit Party.	
Cyprus	No	To be ratified by national parliament.	
Czech Republic	Yes	A new law must be passed by the Czech legislature authorising a referendum. Possible date of spring or June 2006, to coincide with general elections.	June 2003 - EU membership

[132] This is an up-dated version of a table published by *EurActiv.com* on 15 November 2004.

Country	Referendum?	State of play on ratification	Other major EU-related referendums
Denmark	Yes	Tradition of holding referendums on major EU issues. Likely date: late 2005 or early 2006	1972 – EEC membership 1986 - Single European Act 1992 - Treaty of Maastricht 1993 - Treaty of Maastricht (with opt-outs) 1998 - Treaty of Amsterdam 2000 - EMU membership
Estonia	No	Government proposed on 2 September 2004 that *Riigikogu* (Parliament) should ratify Constitution. Decision expected early 2005.	September 2003 - EU membership
Finland	No	Government Bill around September 2005. Parliamentary approval spring 2006.	1994 – EU membership
France	Yes	Possible dates are 8 May, 5, 12 June or July 2005. Constitutional amendments needed in order to ratify. Debate in Assemblée Nationale 11 January 2005. In debate on approving Constitution on 1 February 2005 450 voted in favour and 34 against. There were 64 abstentions, 56 from Socialist party members opposed to Constitution.	1972 – EEC enlargement 1992 - Treaty of Maastricht
Germany	Unlikely	81% of Germans support a referendum, but Constitution presently rules out such a referendum. Ratification procedure expected to be finished in spring 2005 at the earliest	
Greece	No	Government expected to submit bill to Parliament in February 2005	Tradition of ratifying treaties by parliament
Hungary	No	Parliamentary ratification on 20 December 2004 by 323 votes in favour to 12 against with 8 abstentions.	April 2003 - EU membership
Ireland	Yes	Late 2005 or early 2006	1972 – EC

Country	Referendum?	State of play on ratification	Other major EU-related referendums
			membership 1987 - Single European Act 1992 - Treaty of Maastricht 1998 - Treaty of Amsterdam 2001 - Treaty of Nice 2002 - Treaty of Nice
Italy	Unlikely	The Italian Constitution does not currently permit a referendum on this issue. Lower House voted in favour of ratification on 25 January 2005 by 436 votes to 28 with 5 abstentions. Senate approval still needed.	
Latvia	No	Ratification expected in *Saeima by mid-2005.*	September 2003- EU membership
Lithuania	No	Ratified by the *Seimas* (parliament) on 11 November 2004 by 84 votes to 4 with 3 abstentions.	May 2003 - EU membership
Luxembourg	Yes	Referendum on 10 July 2005, even though the Constitution does not envisage one.	
Malta	No	Prime Minister argued that March 2003 referendum on EU membership had been Decisive.	March 2003 - EU membership
Netherlands	Yes	Both Senate and Lower House in favour of a referendum, which could take place in May or June 2005.	
Poland	Yes	Translation errors in the Polish text mean that the parliamentary process and referendum may be postponed and ratification postponed from autumn 2005 until 2006.	June 2003 – EU membership

Country	Referendum?	State of play on ratification	Other major EU-related referendums
Portugal	Yes	10 April 2005, but date may change	
Slovakia	No	Both Prime Minister Mikulas Dzurinda and President Ivan Gasparovic are opposed to a referendum. Parliamentary approval expected May 2005.	May 2003 – EU membership
Slovenia	No	Parliamentary ratification completed on 1 February 2005. 79 voted in favour with 4 against and 7 abstentions	March 2003 – EU membership
Spain	Yes	20 February 2005	
Sweden	No	Tradition of holding referendums only when there are splits within the parties (e.g. on EMU). Government draft bill expected September 2005. Parliamentary ratification expected by December 2005.	1994 – EU membership 2003 - EMU membership
United Kingdom	Yes	Possibly between June and September 2006	1975 - EEC membership