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Standing up for Parliamentary Sovereignty

John Redwood MP

The Crown was sovereign once. Indeed, sovereignty technically still belongs to the Crown in Parliament. We all know about the events that took place over several hundred years, particularly when they were accelerated during the 17th Century revolution and crisis. There was a large transfer of power from the Crown to Parliament. When a sufficiently large transfer of power takes place from someone who was sovereign to those who would be sovereign, a point is reached at which that sovereignty passes because enough power has been surrendered and the arrangements have changed sufficiently.

We need briefly to look at how that very big transfer of power occurred in the 17th Century from the Crown to Crown in Parliament and, in due course, effectively to Parliament standing on its own. One important factor was that Parliament was very good at aggregating power to itself. In those days, it decided to be very nice to bankers, which worked very well for it, because it got the City of London and the men of finance on its side. The English Navy responded to the commands of the English Parliament. Parliament also took the precaution of hiring and training and paying the best army in the country. It got over the problem of competing armies and, in due course, established that it had military power and could command the Army. Paying them on time was a clever innovation, which the City helped them achieve.

Parliament also needed to deal with the judges. It was established during the revolutionary period that judges were necessary and that, according to our current tradition, they had to be independent and should not interfere in parliamentary matters by trying to make the law. They simply had to deal with the law as Parliament provided it. We therefore eventually ended up with a very powerful Parliament.

In the 19th and 20th centuries, Parliament did something that everyone is now united in admiring: it made the exercise of power by Parliament a democratic matter by extending the franchise until practically every adult in this country was able to participate in elections. That gave Parliament the authority of having a democratic voice and mandate. The question that we must now ask is whether that great democratic settlement is now under threat from judge-made law, from European-made law and from other centers of power. Could parliamentary sovereignty come under pressure in the not-too-distant future? Is it being damaged because too much power is being transferred? These questions account for the nervousness from Members of Parliament and the public about the degree of power that has already been surrendered by successive Parliaments over the years, particularly under the previous Government following the treaties of Nice, Amsterdam and Lisbon. Under those treaties, a large number of areas were transferred either to joint decision taking or to sole European decision taking.

That means that the exercise of power in many important areas of activity, including regulation, the expenditure of money and the provision of public services now emanates from the continent. Those powers are trying to establish their own democratic credibility through the European Parliament. They are also trying to establish their own judicial credibility through the European Court of Justice, and their own administrative credibility by strengthening the powers that are exercised around the various collective corporate tables that constitute the ever-evolving, and ever more powerful, European Union settlement.

The main point here is whether there is something that this Parliament could and should do, no matter how much power has passed, how many decisions are taken through the European Union and how much money it now takes to itself and spends on our behalf, to make it clear that, should we want those powers back, we can have them back. If we wish to change or moderate what the European Union is doing, do we have every right to do so because we are still the sovereign?

Some of us fought long and hard to keep the currency under British sovereign control. These arrangements involve a British sovereign and preserve the settlement of the Queen in Parliament, and the Queen's face appears on the banknotes of the realm, but we all know that they are Parliament's notes and that they represent an expression of parliamentary sovereignty. Indeed, it was this very Parliament that, by a majority, approved the previous Government's decision to print a lot more of those notes-or electronic notes-as an expression of what that sovereignty can do for the people of Britain. We can argue about whether that was a good thing or a bad thing, but it was an undoubted expression of sovereignty.

There is also the test of what might arise if or if Britain chooses to renegotiate back areas of competence now partly or wholly controlled by the EU. I would like us to elect a Government in this country who had the necessary majority to go off to Brussels and say, "It is now the settled will of this Parliament that we want different arrangements on this particular policy, and if you will not grant them through the European Union arrangements, we would like to negotiate

our exit from the existing policy." That is exactly the kind of renegotiation that many Conservatives were elected to achieve, and, had we had a majority, we would have wanted our Government to do something like that. There are also a number of other policy areas, some of which are more politically contentious, where we think we can make better decisions here than are being made in our name by the European Union.

If such renegotiations could be achieved, we would clearly have reasserted, or asserted, the sovereignty of our Parliament. If, however, they can never be achieved, it is difficult to see how Parliament could still be sovereign. If we are saying that nothing can ever be changed once it has been agreed under the various procedures in Brussels – including the many measures that the British Government did not want or on which they were outvoted – we cannot say that we are sovereign any longer. We would then be in a relationship with the European Union that would fall short of our preserving parliamentary sovereignty.

The other point I wish to highlight is a narrow, but crucial, legal issue. As I understand it, we have a Government who say that they wish to do all they can to reassure people in this country that we are and intend to remain sovereign. They do not wish to pick a fight with Brussels, and I am not asking them to do so. They say, however, that should a disagreement arise in future that cannot be resolved through the usual channels, it will be settled here. I am very much in favor of that; this seems to me to be a wholly admirable and sensible approach. If that is the intention, it proves that Parliament is still sovereign. However, in the future, we will only remain so if we have the will and determination to shape our own destiny, should the need arise. I hope we can do it by agreement. Any sensible person wishes to do it by agreement, given how far we are in this project with our European partners and what a mess they are in.

Successive Governments have always said that they quite agree with those of us who make these points, but they have never managed to negotiate a better deal. Would it not be wonderful if the Government said, "If we cannot negotiate a better deal next year, we will use British parliamentary sovereignty to pull out of a particular policy area now devolved to Europe"? I would like to do that and I do not think it would be tantamount to leaving the European Union. Although Brussels might be unhappy at this, the EU would probably do a deal with us because it would be more embarrassing to have a sovereign Parliament taking unilateral legislative action than to do a deal. I hope the EU would do a deal; it would be sensible for it to do so.

If we are not prepared at some point to assert our power, we lose our sovereignty. Just as the Crown lost its sovereignty, became the Crown in Parliament and eventually lost practically all its real powers, so the current Parliament is losing its powers. If it goes on losing them, without at some point standing up for a better deal for Britain, this Parliament will no longer be sovereign.

EU authority set to supervise Rating Agencies

Margarida Vasconcelos

In 2009, the European Parliament and the Council adopted a regulation on Credit Rating Agencies and some provisions only became applicable in December 2010. Nevertheless, last June, the European Commission put forward a proposal amending the regulation on credit rating agencies. The Commission has decided to revise the regulation "in order to introduce centralised oversight of credit rating agencies operating in the EU." Hence, the European Securities and Markets Authority (ESMA), the new European supervisory authority would take over from national authorities. In fact, the draft regulation provides very broad powers for the ESMA.

There is no specific legal basis for proposals to create community agencies. Consequently, the present proposal is based on Article 114 TFEU, which allows the Community to harmonise national laws to improve the functioning of the Internal Market. Measures proposed under this provision would have to be adopted by the Council and the European Parliament (ordinary legislative procedure) with QMV required at the Council. Taking into account Merkel and Sakorzy's request for stricter regulation of credit rating agencies, the present proposal is to be adopted in record time. In fact, the European Parliament and the Council have already reached an agreement on the draft regulation on credit rating agencies, which the European Parliament endorsed on 15 December. The Council is expected to formally adopt the text at an upcoming meeting.

From July 2011, the new Authority will directly supervise agencies operating inside the EU. Consequently the Member States' competent authorities would no longer have competences and duties related to enforcement and supervisory activity in the field of credit rating agencies.

The proposal eliminates the existing provisions

conferring on national authorities supervisory competences over credit rating agencies. The ESMA would, therefore, replace national competent authorities, such as the FSA, in charge of the registration and supervision of credit rating agencies, including the European subsidiaries of CRAs. It would also be in charge of matters related to ratings issued by third countries' rating agencies that operate in the EU under the certification or endorsement mechanisms. Whereas under the current regulation the competent authorities of Member States may establish cooperation agreements with third countries. Under the draft proposal, such a competence will be transferred to the new Authority.

Moreover, subject to the Commission's endorsement, the new Authority would be empowered to propose draft technical standards on the registration process, such as on the information that credit rating agencies must provide for the application for certification as well as the presentation of the information that must be disclosed by credit rating agencies. The draft regulation will create a new rule imposing disclosure requirements to issuers of structured finance instruments.

The new Authority will be allowed to require all necessary information from CRAs, financial market participants, as well as to start investigations into the potential breaches of the regulation. National supervisory authorities would be required to ensure that all necessary information is given to ESMA and are under the obligation to provide assistance, particularly when ESMA is carrying out investigations and on-site inspections.

The new Authority would be provided with extensive supervisory powers including examining records and other materials, "requiring oral explanations, hearing a person, requiring records of telephone and data traffic" and to conduct on-site inspections "at the business premises of the legal persons." The European Parliament was able to amend this provision so that ESMA will be allowed to carry out the on-site inspection without prior announcement at the premises of a CRA. At least, the compromise deal provides that if under national rules authorisation from a judicial authority is required for records of telephone and data traffic or for on-site inspection, such authorisation shall be applied for.

Under the current regulation, Member States are required to lay down the rules on penalties applicable to infringements of the regulation's provisions. Under the Commission's draft proposal, ESMA would have been able to propose to the Commission the imposition of "periodic penalty payments" in order to put an end to an infringement and to complete and correct information to be supplied to ESMA. However, at the European Parliament's request the proposal has been amended so that the new Authority has the power to fine credit-rating agencies itself. Hence, under the final text agreed in trialogue meetings, ESMA would have the right to impose fines on agencies in case of breaches of the present regulation. The draft regulation provides for a range of fines according the type of infringement. But, "the amount of the fine shall not exceed 20% of the annual turnover of the credit rating agency concerned in the preceding business year." Moreover, the new Authority will also be able to impose periodic penalty payments in order to put an end to an infringement. The new draft text provides that "the amount of the periodic penalty payments shall be 3% of the average daily turnover in the preceding business year or, in case of natural persons, 2% of the average daily income in the preceding calendar year." The Court of Justice has the jurisdiction to review such decisions.

Furthermore, where a credit rating agency has committed a breach of the regulation, such as breaches related to obstacles to the supervisory activities, or failure to disclosed information, ESMA may also adopt supervisory measures including the suspension of the use of the credit ratings concerned and withdrawal of the registration of a credit rating agency. It may also refer matters for criminal prosecution to the national authorities.

The national supervisors may request ESMA to assess whether the conditions for withdrawal of a credit rating agency's registration are met as well as request the suspension of the use of ratings in case a credit rating agency is deemed to be in a serious breach of the regulation. Nevertheless, national competent authorities would no longer have the power to take supervisory measures towards credit rating agencies where they breach the regulation.

The Commission has estimated the ESMA´s budget in the first three years of operation (2011 – 2013) around €7508.4 and it has pointed out that fees charged to the credit rating agencies shcould covered the ESMA's expenditure necessary for the registration and supervision of CRAs. The Commission will adopted a delegated act determining "the types of the fees, the matters for which fees are due and the amount of the fees" in 2011. Nevertheless, in 2011, resources for direct supervision of CRAs would be advanced by Member States (€1501,68) and Community contributions (€1001,12). The Financial Secretary to the Treasury, Mark Hoban, has said to the European Scrutiny Committee "the proposal implies significant and unmet ongoing costs for national authorities." Under the proposal ESMA may also delegate specific supervisory tasks to competent national authorities. In this case, ESMA will give instructions to the authority to which it has delegated a task. At the UK request the compromise text states that ESMA has to reimburse "competent authorities in respect of any costs they may incur carrying out work under this regulation, in particular as a result of a delegation of tasks."

European Political Union – time to call the undertaker?

Howard Wheeldon

The larger it gets the more bureaucrats and taxpayer money it needs! So it is that despite a protracted Europe wide financial revolution that comes in the form of an unprecedented sovereign debt crisis affecting not only those so easily drawn into joining the single currency but in its wake, sweeping up the rest of the European Union as well we once again hear renewed talk of reviving the dream of full EU political union.

Like a disease that will just not go away it seems that proponents of full political union would have all five hundred million inhabitants within the current twenty-seven member states – the rich and the poor, the weak and the strong all living under similar rules and one political roof. Will these guys never learn that Rome took over a century to build? Why is it that those that favour full EU political union cannot understand that while Maastrict might have marked the peak of EU ambitions the subsequent Treaty of Lisbon marked the beginnings of a protracted fall from grace! Why is that they fail to see that the views of many of the EU's great institutions such as The European Commission, the European Parliament, the European Court of Justice and other appear to out of touch with the wider electorate. The same may well be true of many diehard EU Commissioners too! I wonder, what does one need to do to persuade political union protagonists that one stop policies on agriculture, fisheries, security, foreign policy and defence may no longer be either advisable or affordable.

Neither with no less than seventeen individual EU member states having joined the Euro and with each having many national problems to face let alone often having different economic cycles can it make any sense to be constrained on the basis of a single interest rate. Can these blinkered people not open their eyes and see the real devastation that their ill thought rushed out laws and ideals have done? Are they completely blind to the knowledge that the European Union is already not only too large and too cumbersome in terms of administration but also increasingly in the minds of the younger generation past its sell by date? Do they not understand that the one stop serves all currency that they persuaded so many to embrace a dozen or so years ago may in its present form already be living on borrowed time? The answer to all these points is apparently not! Indeed, like lambs to the slaughter it seems that no matter whatever lessons might be learned from the over zealous expansion of the EU there are those that believe EU wide regulatory control over national budgets, EU wide taxation policy and strategy, EU wide rules governing all public services and of most forms of welfare not only are still urgently required but that these should be pushed through with haste. Forgive them for they know not what damage they do!

Left to their own devices those that hold sway in the EU still appear to believe that no matter what mistakes have been made in the past political union can and still will be achieved within ten years. How sad – why on earth the hurry one may quite reasonably ask? In fact the answer if you really do want one can probably be found looking at the very deep-seated problems that now face the single currency. It is one that says without the promise of eventual political union it is increasingly probable that the Euro as single tier currency could well be doomed. Not yet mind you and there remains some scope for further experiment such as to try a two tier system with different rates.

For now though unless China really does come riding to the rescue of the troubled Euro based nations such as Spain and that might just provide a 'get out of jail free card' for some of those troubled by rising yields, higher borrowing costs and that are seeing the value of bonds sharply decline we are left to conclude that chances of the Euro surviving beyond the next three years in its present form are thin. No matter what, even if the Euro can manage to survive the crisis of confidence beyond three years in probably less than five years from now we should see a currency that might have a few less members not to mention by then this being a two-tier currency that carries with it two very different interest rate spreads and all the complications that would provide.

Greece, Ireland and Spain are but three EU member states that joined the single currency experiment right from the very start. Each of them benefited from vast financial resources that all of a sudden were made available. None it seems understood the pitfalls or even the simplest rules of supply and demand. Sadly they could see only expansion and growth and worse, while Greek and Irish governments spent far too much of the national cake Spain and Ireland failed to see that there economies were being governed by speculators. Each of these economies failed to a greater or lesser extent because quite simply they knew no better. Each had through too many previous decades lived with both economic and sometimes political pain. Can we really blame them that when the Euro injection finally came there should have been such universal relief? No but we can blame those in authority of the Euro meaning EU lawmakers and those charged with running the European Central Bank that allowed so much cheap money to be printed. The golden rule is that for every boom there will at some point always be a bust. Having allowed themselves to be swept away on a something for nothing magic carpet that said sustainable economic growth was around the corner all three nations are today saddled with vast national debt and oversized government deficit. Each of these nations and other EU member states too such as Portugal, Italy and even the UK find themselves in various states of economic misery and disarray. Who knows who might be next knocking the door for even more of all that newly printed money made available through

the European Stability Fund and whose very existence affects each and every one of us as taxpayers?

If all this sounds harsh it is I suppose only because with all the benefit of hindsight one recognises now that had the EU better overseen the single currency that it had so menacingly rushed to conceive, had it laid down more secure foundations and disciplined rules that must at all cost be observed and had it more effectively and properly policed rules on the size of national deficit as opposed to turning a blind eye to the one stop 'do as I say not as I do' nationalistic ideals of some then perhaps we may not be staring at the sovereign debt crisis mayhem that we are now. But we are staring at the problem and it is one that clearly is not easily about to go away! Indeed, had the EU observed history, had it recognised that with so many diverse cultures involved that to secure real free trade even amongst a group of like minded states combined with maybe some partial economic union would take maybe one hundred years to achieve as opposed to just a third of that number perhaps things might look very different today. Indeed, perhaps if those that believed they had the right to be the true lawmakers of the EU had stopped to think and maybe understand what over-fast expansion of the EU might do and had seen the light then we just might have been able to look at Brussels today in a completely different light. But we cannot do that and even worse is that we already know that a vast and fast increasing number of voters spread across many EU member states now believe that its lawmakers have failed.

The costs of a European identity

Glen Ruffle

The recent news that the European Parliament has endorsed the Commissions latest mad idea to create European Heritage Labels in a bid to endorse and highlight places that were important in the making of the European Union comes as no surprise.

Despite opinion polls showing only 21% of the 'non-state' Belgium people, surely the most inclined to feel European, only saying that they 'often' feel European, and nearly 40% saying that thought never crosses their mind; and despite surely even Herman Van Rumpuy himself not wanting to waste his holidays visiting these special tourist sites, still 1.9 million Euros will be wasted on this white-elephant scheme.

The idea for this could easily have originated in one of the EU's Agencies, the Education, Audiovisual and Culture Executive Agency (EACEA), which reports to three of the Commissions Directorate-Generals (DG): DG Education and Culture, DG Communication, and also DG EuropeAid Cooperation Office.

Finding legal backing in the Lisbon Treaty's 'Treaty on the Functioning of the European Union', under Title XIII and Article 167, which states that the EU shall respect cultures but aim to bring to the fore common European cultural heritage, aiming to assist Member States in improving the historical knowledge of European people, the EACEA is actively "contributing to developing a sense of belonging to common European ideals and encouraging the process of European integration".

The EACEA has history with this kind of thing, having already spent taxpayers money on a project researching national Folk-tales in the search for some or any remote link to a common European identity. It also tried to reform history lessons in schools by making teachers reject the national viewpoints that dominated the First World War and teach this seminal historical event as a European incident to be seen from a pan-European point of view.

Receiving nearly 50 million Euros in EU Commission subsidies in 2010, the EACEA is spending nearly 30 million of that on staff salaries, mission and travel expenses, and socio-medical infrastructure, listing 324 people as its contract staff in 2010. That equates for an average spending of over 90,000 Euros a month on each member of staff in terms of expenses, salary and socio-medical infrastructure...nice work if you can get it, especially in a time of crisis...

Projects the EACEA lead include the 2007–2013 'Europe for Citizens Programme', which seeks to award money to projects that bring citizens of member states closer together, for example, town-twinning programmes, or active citizenship (volunteering) that has some kind of European dimension (and so most probably less local use value). And the money allotted for these programmes? 215 million Euros.

This money is to be directed towards projects that, for example, raise the awareness of the EU's impact on society. Citizens should be encouraged to become aware of "the results achieved through European policies and actions in various policy fields" encouraging people to "build opinions on these achievements." And one wonders what opinions might be built if only the results of projects are analysed and no questions asking if they could have been achieved more cheaply, effectively and sensibly without any EU involvement at all...

It seems that the greatest piece of Euro-harmony to be found is the shared wastage of Member States money in the pursuit of this social conditioning and vain attempt to manufacture by force a shared European identity, to justify the existence of the European Commission.

Cutting bureaucracy Brussels-style

Lee Rotherham

Reform of a rotten practice is a wonderful thing to see. It's doubly welcome when the change has been long pledged and is massively overdue. So we should for once have something to be happy about as we observe how (in document 2010/C 336/01) the European Commission has set out a list of regulations it has reviewed and has decided to repeal.

The action is ridiculously overdue, stemming from a pledge made a full Commission ago. Senior Brussels staffers noted how the very scale and complexity of the acquis was a factor that was driving the unpopularity of the EU, and it was getting worse year on year. The response was a commitment to cut the legislative waste.

The initial response from the bureaucrats at the coal face was late and paltry. Amongst one tiny batch of revoked legislation, for instance, could be found items that were being deleted because the cut off date had been reached (rendering the legislation dead in any event, just floating face down in the acquis). A couple even were specifically set up to apply to East Germany, a country that no longer existed.

This new compilation at least has the merit of being a less paltry affair. There are a solid 29 pages of lists of acquis that are being deleted. This is a positive improvement – it means around 400 regulations ditched, and no doubt the Commission's press officers will hail it as a triumph for reform.

They would be wrong.

Items are being deleted because they are "obsolete as an act of temporary nature", or because they have been replaced by another text, or because the country in question then joined the EU. Many are being removed from the books as they have been erroneously kept in the acquis as far back as 1996. All fall within the areas of CAP grants and tariffs, of quotas and licenses, rather than cutting anything that acts as an obstacle and a burden to business or growth.

In terms of volume, 29 pages of lists seems like a lot. But the Commission stopped printing the published volumes of lists making up the whole telephone directory of the acquis when it couldn't find bindings big enough to hold it, and that was already around ten years ago.

This is a exercise to simplify the books, to cut the dead wood rather than to prune in order to grow. While that may be an appropriate measure for a civil service to undertake so that people better understand the rules, it does nothing for the dead hand of bureaucracy, and sadly shows once again that Brussels, like the Bourbons, learns nothing but forgets nothing.

UK liable for Euro bailouts until 2013

Margarida Vasconcelos

On 16 December, the European Council agreed that the Treaty should be amended. The EU leaders agreed, therefore, on the text of a draft decision amending Article 136 TFEU, which covers measures that solely apply to eurozone member states, so that "Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole." The treaty amendment entails adding two sentences to the abovementioned Article to allow the creation of a permanent crisis mechanism. If there is a risk to the stability of the euro area as a whole, the euro area Member States may activate such a mechanism by mutual agreement, but it is specified, "The granting of any required financial assistance under the mechanism will be made subject to strict conditionality." The permanent European Stability Mechanism will replace the European Financial Stability Facility (worth €440bn) and the European Financial Stabilisation Mechanism (worth €60 billion), which will remain in force until June 2013.

As regards the specific details of the stability mechanism, the European Council asked the Commission as well as the Finance Ministers of the eurozone to finish their work by March 2011 and to integrate "the general futures" provided in the Eurogroup statement of last November, which has been endorsed by the European Council. According to the Eurogroup statement, the participation of private sector creditors on any future eurozone bailout would be decided on "a case by case" basis. If a country is considered to be insolvent by the Commission, the IMF and the ECB would have "to negotiate a comprehensive restructuring plan with its private sector creditors, in line with IMF practices with a view to restoring debt sustainability." Then, "If debt

sustainability can be reached through these measures, the ESM may provide liquidity assistance." Private creditors would participate in future eurozone debt restructuring by collective action clauses annexed to eurozone government bonds issued after 2013.

As expected, the European Council has launched the simplified revision procedure provided for in Article 48(6) TEU. It was, therefore, able to avoid long negotiations among the Member States and between the Member States and with the European Parliament. Article 48 (6) allows Treaty amendments to be made, within the TFEU Part III "on internal policies and actions of the Union" solely by European Council, as long as there is unanimity and the amendments do not extend the competences of the European Union. The European Council's decision amending the Treaty cannot enter into force until it is approved by the Member States in accordance with their respective constitutional requirements. All 27 Member States must transpose the Treaty amendment into national law. It does not require ratification in some Member States and it will be possible to avoid referenda.

According to the President of the European Council "This amendment will not increase the competence of the Union and only affect the members of the Eurozone themselves. That's why everybody agreed to use a simplified revision procedure." I am not convinced yet that the European Council decision to amend the treaty does not "increase the competences conferred on the Union in the treaties." Moreover, I believe that any amend to the treaty intend to create a permanent crisis mechanism "to safeguard the financial stability of the euro area as a whole" is incompatible with Article 125 and with the principles of the EMU.

The European Council will formally adopt the decision in March 2011 and it is expecting member states to complete the procedures "for the approval of this Decision in accordance with their respective constitutional requirements" by the end of 2012 so that the Decision can enter into force on 1 January 2013.

The European Stability Mechanism is just for Eurozone Member States and therefore the UK will not participate. According to the European Council's Conclusions, Member States whose currency is not the euro, "may decide to participate in operations conducted by the mechanism on an ad hoc basis."

David Cameron said "Both the Council conclusions and the decision that introduces the treaty change state in black and white the clear and unanimous agreement that from 2013 Britain will not be dragged into bailing out the eurozone." At the UK's request, the EU leaders agreed that Article 122 (2) (provision on natural disasters), once the new mechanism enters into force, will no longer be needed to safeguard the financial stability of the euro area. However, the future crisis mechanism will only be effective from 2013, so consequently, until this happens the UK will contribute to any Eurozone bailout through the European financial stabilization mechanism. In fact, David Cameron stressed, "…In the current emergency arrangements established under article 122 of the treaty, we do have such a liability (for bailing out the eurozone.)" Moreover, he pointed out "That was a decision taken by the previous Government, and it is a decision that we disagreed with at the time."

The Council established the European financial stabilisation mechanism through a Regulation adopted last May based on Article 122 (2) TFEU. The "difficulties caused by national disasters or exceptional occurrences beyond" a Member State control, foreseen in the Article, have been broadly interpreted to be also caused "by a serious deterioration in the international economic and financial environment." Natural disasters are unforeseeable, however, we cannot say the same of debit crisis. Such argument is not clear at all, it is hard to understand how come the Greek, the Irish, the Portuguese, the Spanish crisis has been caused by "…exceptional occurrences beyond [their] control …" Such broad interpretation breaches the spirit of the Maastricht treaty and this provision can be ultimately interpreted by the ECJ. Brussels went much beyond the powers conferred by the treaties to provide a legal basis for the emergency funding. Such mechanism ignores the "no bailout" clause – Article 125 TFEU that forbids Member States for being liable for the debts of another.

The European stabilisation mechanism is therefore a violation of the non-bail out clause and a misuse of Article 122 (2), which is meant for national disasters. Under the European financial stabilization mechanism, the Council, acting by a qualified majority on a proposal from the Commission decides to grant financial assistance to member states in trouble, so consequently the UK cannot veto it. Hence, the emergency funds from the €60 billion pot are easier to release. Such a facility is guaranteed by the EU budget and all EU Member States, including the UK, are jointly liable for any payments due. Hence, if a beneficiary country fails to pay back the loan, all 27 EU Member States would have to pay into the EU budget to cover the default, as a result, British taxpayers would be liable for over 10% of it.

The UK is not part of the eurozone but even so is trapped in the European financial stabilization mechanism, as it is required to contribute to it. Having Article 122(2) as the legal basis, the UK would be required to contribute to a eurozone bailout on the basis of the qualified majority voting system. British taxpayers might be asked to pay for other eurozone bailouts. As Bill Cash pointed out "… much could happen over the next two or three years, between now and 2013, while the mechanism …which I believe to be unlawful, continues…"

The EU Bill: Parliament, judges and the national interest

Bill Cash MP and Bernard Jenkin MP

Ahead of the vote on vital sovereignty amendments to Clause 18 of the EU Bill on 11 January, **Bill Cash MP** and **Bernard Jenkin MP** and others issued the following Memorandum.

Summary of points

• The Sovereignty of Parliament is the democratic basis of the UK constitution but has become increasingly questioned by judicial assertions (see below).

• Prior to the election, the Prime Minister made clear the need for a "Sovereignty Bill", and to restrain "unaccountable judges".

• Clause 18 of the EU Bill is not a "sovereignty clause". It would undermine Parliamentary Sovereignty, by encouraging judicial supremacy.

• The government's Notes on the EU Bill, which the courts can and would use, advance the dangerous notion that Parliamentary Sovereignty is a "common law principle", and therefore subject to judicial authority.

• This reflects the influence of those including certain academics and judges and the Liberal Democrat wing of the coalition, because they support a written constitution which would entrench judicial supremacy.

• An exchange of letters between the Prime Minister and the Chairman of the European Scrutiny Committee, Bill Cash, (attached) fails to provide any reassurance on these points. It is therefore urgent that Parliament reaffirms its Sovereignty as a legal and historical fact by voting for Bill Cash's amendments.

• Bill Cash, and others, have tabled two linked amendments to translate the inadequate Clause 18 into a sovereignty clause, firstly, by expressly reaffirming the sovereignty of Parliament, and, second, by precluding the courts or the Supreme Court from invoking any common law principle under Clause 18.

The Sovereignty of Parliament: the basis of the UK Constitution: under threat

The sovereignty of Parliament is the most important principle of the United Kingdom constitution. This has been the case since the Revolution of 1688 and has been confirmed since by numerous writers, not least Blackstone and Dicey. The greatest judge of our time, the late Lord Bingham, re-confirmed it in his authoritative judgment in the Jackson case in 2005, when he stated that 'the bedrock of the British constitution is … the supremacy of the Crown in Parliament'.

Yet, the sovereignty of Parliament is in the gravest danger. Not all of our judges agree with Lord Bingham, and they have said so plainly. In the same Jackson case, Lord Hope (now Deputy President of the Supreme Court, no less) said that 'parliamentary sovereignty is no longer … absolute'. He added that 'step by step' it 'is being qualified'. In his view, it is now the 'rule of law enforced by the courts' that is 'the ultimate controlling factor on which our constitution is based'. Moreover, in Jackson Lord Hope was not alone: two further law lords agreed with him, including one (Lady Hale) who remains on the Supreme Court alongside him.

The sovereignty of Parliament is under threat, however, not only from the common law radicalism of judges such as these, but also from EU law (which has always regarded itself as having supremacy over the domestic law – including the domestic constitutional law – of the Member States); from European human rights law, which is growing and growing in prominence throughout our legal system.

It is important to be clear as to what is at stake. The sovereignty of Parliament is not merely some arcane matter of dusty constitutional curiosity. It is the very root of British democracy and is at the root of the daily lives of every elector. Its protection by Members of Parliament is an absolutely fundamental duty and to their role on behalf of their constituents. A threat to parliamentary sovereignty is a threat to democracy itself. Parliamentary sovereignty means that the last word in determining matters of public policy lies with Parliament. Removing sovereignty from Parliament means that some other body will have the last word instead. Irrespective of whether this other body is the European Union, the UK Supreme Court or the European Court of Human Rights, it is clear that if we wish to preserve our democratic heritage, it is imperative that sovereignty remains with Parliament. It is our only elected body. There is a chronic democratic deficit in the European Union, and no-one elects judges in this country (and nor should they be: judges are appointed to determine questions of law, not to govern us politically).

Sovereignty, therefore, is about power. And the most beautiful and precious thing about the British constitution is that it gives ultimate power to the people's democratically elected representatives in Parliament. Not to courts. Not to international bodies such as the EU. But to elected representatives on behalf of the voters. This, constitutionally, is what makes Britain a democracy. Take it away, and you strike at the very root of British democracy itself and the freedom of the voters to choose who governs them and how, for which people have fought and died.

The need for a Sovereignty Bill: the words of David Cameron

Before the election David Cameron made it clear that it would be his intention to safeguard, indeed to buttress, parliamentary sovereignty. Two Bills were promised: a Referendum Bill to ensure that the UK could not transfer yet further powers to the European Union without both Parliament and the people positively voting for it; and a Sovereignty Bill. In his speech, 'Giving Power Back to the People' (given at Imperial College on 25 June 2009), David Cameron said this: 'Because we have no written constitution … we have no explicit legal guarantee that the last word on our laws stays in Britain … So, as well as making sure that further power cannot be handed to the EU without a referendum, we will also introduce a new law, in the form of a United Kingdom Sovereignty Bill, to make it clear that ultimate authority stays in this country, in our Parliament.' The Coalition Agreement likewise talked of a 'United Kingdom Sovereignty Bill to make it clear that ultimate authority remains with Parliament.' In a further speech on 8 February 2010, 'Rebuilding Trust in Politics', David Cameron also stated:

"We will push power down not just from the Government to Parliament but from Whitehall to communities, from the state to citizens, from Brussels to Britain, from judges to the people …"

And we need

"to strengthen the place of Parliament at the heart of our democracy, I believe we should be increasing its powers over unaccountable bodies. We will make sure there is proper Parliamentary scrutiny of everything that comes out of the European Union - the laws, the regulation, the spending, the lot."

The Prime Minister's present rejection of the European Scrutiny Committee report flies in the face of this statement. Furthermore, in the same speech he says,

"… we would claw back powers from the EU and make sure no future government can ever give powers away in future without first asking the British people. And it's why we will abolish the Human Rights Act and introduce a new Bill of Rights, so that Britain's laws can no longer be decided by unaccountable judges."

The same applies in the context of this European Union Bill. The pre-election understanding that two Bills would be required to achieve this was correct and sensible, for the reason that the EU is far from the only current threat to parliamentary sovereignty. The sovereignty of Parliament needs safeguarding not only from the EU but also from our own judges.

Clause 18 of the EU Bill: not a "sovereignty clause": the Notes on the EU Bill

The Minister for Europe claimed in his evidence to the European Scrutiny Committee that the agreed "Bill is being introduced by the means of Clause 18". However, As the European Scrutiny Committee unanimously points out, Clause 18 certainly is not a Sovereignty Bill and on the evidence is not a sovereignty clause. Clause 18 is expressly stated to be no more than a declaration about the "Status of EU law".

Unfortunately, the wrong signal which this Bill is sending to the courts is amplified by the misrepresentations and distortions of case law contained in the Bill's Explanatory Notes. These state that the basis of the principle of parliamentary sovereignty is the common law. It is not. The Committee described this as "dangerous". The common law is the judge-made law of this country. The judges are its authors and its guardians. They may change it whenever they judge that it should be changed. The sovereignty of Parliament should not be understood to be a common law principle. To understand it in this way would mean, of course, that the judges would be free to change it whenever they judged it appropriate to do so. As the greatest judges have long since recognised, however, they do not have this freedom.

Is this the Coalition Effect?

It is ironic that a Conservative Prime Minister should be willing to place parliamentary sovereignty in such jeopardy, or to pursue a policy deliberately devised to promote Liberal Democrat ideology. The Coalition attitude to parliamentary sovereignty, judicial supremacy and the EU is part of the disastrous constitutional revolution which is underway. The Liberal Democrats have never troubled themselves to seek to defend parliamentary sovereignty. It is their policy is to destroy it. They seek not only a federal Europe, but also a written constitution for the United Kingdom: a written constitution would be a legal document, enforceable by the courts destroying parliamentary sovereignty and replacing it with judicial supremacy.

The exchange of letters with the Prime Minister

Bill Cash wrote to the Prime Minister on 13th December, who replied on 5th January (letters attached). Throughout his letter, the Prime Minister avoids the fundamental constitutional issue. Given the European Scrutiny Committee's report and the debates in Parliament, there can no longer be any doubt but that the Government are fully apprised of the risks they have created by the partial drafting of Clause 18 and the misleading nature of the Explanatory Notes.

His suggestion that the Foreign Secretary, the Minister for Europe and the Prime Minster agree on the need to assert and defend the sovereignty of Parliament is not supported by the facts of Clause 18 of the Bill or by the Prime Minister's own words. The PM states that all the Conservative ministers were "very much aware during the course of the preparation of the EU Bill of the need to avoid undermining Parliamentary sovereignty". However, he also makes clear that there was never any intention to provide an all embracing doctrine of parliamentary sovereignty. In any case, this does not address the fact that this Clause as a matter of UK constitutional law, in the context of EU law, does undermine parliamentary sovereignty.

The Prime Minister's reply therefore again makes the situation worse. His letter shows how that the whole matter has been misconceived and opens the gateway to the Supreme Court undermining parliamentary sovereignty

Having said, first, that Britain needs a Sovereignty Bill to safeguard Parliamentary sovereignty in the round and, then, to retreat so publicly to the meagre offerings of Clause 18 sends as clear a signal to the judges as it would be possible to concoct that this Government is relaxed about the current questioning of Parliamentary sovereignty. This is precisely the opposite of the signal that the Government should be sending. And it is precisely the opposite of the signal that David Cameron indicated he would send in his speeches of June 2009 and February 2010 (above).

The Government have either been gravely misled or they truly believe that the sovereignty of Parliament is a common law principle. The blunder has been pointed out to them yet the Prime Minister seeks to resist making a correction, asserting that the issue "goes far beyond the scope of this Bill". The letter to him of 13th December was couched in terms indicating that he must have been given bad advice. However, his reply does not deal with this and his Government's course could not be more dangerous – unless of course the Government is prepared to accept the amendments put forward as set out below.

In the last paragraph of his letter of 5th January, the Prime Minister states that he noted with interest Bill Cash's amendments for the Committee stage and "we will consider these proposals carefully and they will properly be debated" and in a hand-written note added that he would come back on specific amendments later. The vote however is on Tuesday 11th January and voting for the amendments is essential.

The Amendments

The amendments would translate the inadequate Clause 18 into a sovereignty clause firstly, by expressly reaffirming the sovereignty of Parliament, and, second, by precluding the courts or the Supreme Court from invoking any common law principle under Clause 18.

These amendments have been on the Order paper for the best part of a month. The only conclusion to be drawn from the Prime Minister's reference to the amendments suggests that everything will turn on the votes on the Committee stage on Tuesday 11th January.

Currently, we have a Supreme Court in name only. The grave danger of this Bill is that it will result in the UK having a judiciary that really is supreme: a judiciary that can quash or set aside Parliament's legislation. At least two current members of the Supreme Court indicated in the Jackson case that they would welcome such a move. And with it, three hundred years of British constitutional law and history will be swept away, as we wave our once-cherished parliamentary democracy goodbye and journey into the age of Rule by Judges.

The Sovereignty Letters: Bill Cash-David Cameron on sovereignty amendments to EU Bill

WILLIAM CASH, M.P.

HOUSE OF COMMONS
LONDON SW1A 0AA

By hand
wa DS.

Rt Hon David Cameron MP
Prime Minister
10 Downing Street,
London,
SW1A 2AA

Monday 13th December 2010

Dear Prime Minister,

The European Union Bill and the Sovereignty of Parliament

I am writing to you as you suggested in the lobby during the tuition fee vote, when I expressed my concern that Clause 18 of the European Union Bill, rather than asserting parliamentary sovereignty would induce judicial supremacy – the opposite of what you and the Government have publicly asserted. I am therefore deeply concerned about the potential implications for the sovereignty of Parliament arising out of the European Union Bill. My fear, shared with other MPs and commentators experienced in these matters, is that the Bill may achieve the opposite of what you yourself, William and David intend: i.e., that *the Bill weakens rather than strengthens the sovereignty of Parliament*. I feel sure that it is not your policy to weaken parliamentary sovereignty and that the Bill's implications are wholly unintended. I am equally sure that, having had detailed discussions with distinguished constitutional experts in EU/UK constitutional law who have seen this letter, the problems can be relatively easily fixed – and without dropping Clause 18 overall, but by amending it with an additional provision as set out below.

All this, as we both know very well, has a history in the recent past as indeed it has for centuries in one form or another. In the more recent context, it runs from your Leadership election and your face to face meetings at the time with myself, David Heathcoat-Amory and others with your specific assurances on sovereignty which led us to vote for you. There were then your hustings speeches, then through your CPS speech in 2005, the whipping of both Houses, in opposition, for my 'Notwithstanding' clause on the Legislative and Regulatory Reform Bill in 2006, on my sovereignty clause on the Lisbon Treaty, followed by the Manifesto, my letter to you of 10th May, the Coalition agreement itself and now the EU Bill for Parliament. All this is clearly a matter of national – rather than Party or Coalition interest – and I believe that it should be sorted out in good time before the Committee stage on Clause 18. I have no desire or intention to address this issue other than as a matter of national interest and I strongly believe that you would take the same view.

I enclose the Report of the European Scrutiny Committee, as requested, with its appendices.

The law of parliamentary sovereignty means simply that there is no source of law in the UK higher than an Act of Parliament, and that Parliament is free to make, amend or repeal any Act. This is hugely important and means, for example, that no UK court – not even the

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Supreme Court – can overturn an Act of Parliament. The Merchant Shipping Act 1988 lacked sufficiently expressed wording to meet the Denning/Diplock test. In this country the last word rests with the people's representatives in Parliament, not with the judges. Thus, the sovereignty of Parliament is no less than the constitutional embodiment of British democracy.

However, parliamentary sovereignty is under grave threat. Immense pressure is being brought to bear not only from EU law but also *from the common law itself* (that is, from the law as developed by our own courts).

The European Union Bill addresses only the first of these challenges. The significant risk is that the Bill will therefore be used by lawyers keen to replace the sovereignty of Parliament with legal/judicial supremacy to argue that "when Parliament legislated so as to safeguard the sovereignty of Parliament its concerns were unique to the EU; it said nothing about the sovereignty of Parliament in other contexts; we may therefore interpret European Union Act as authority for the proposition that Parliament is wholly relaxed about the challenges to its sovereignty which stem from sources other than the EU; there is therefore no parliamentary or legislative impediment to our developing the common law so as to limit parliamentary sovereignty". Prime Minister, there are hundreds of lawyers eager to put arguments such as these, and dozens of judges who would be eager to hear them. The sovereignty of Parliament is not much loved in legal circles.

The second problem, which amplifies the first, is that the Explanatory Notes accompanying the Bill talk about "the common law principle of parliamentary sovereignty". This is extremely dangerous language. Common law principles may be made, re-made and un-made by our judges. If either Parliament or Government were to concede that the sovereignty of Parliament is a common law principle, it would be a clear signal to the judges that they had *carte blanche* to revisit and, in time, to revise that principle as and when they chose. The better view is that the sovereignty of Parliament is not a common law principle, but is judicial recognition of political fact: that is, that it is a doctrine of law which the judges acting alone may not change. The Explanatory Notes should have referred not to "the common law principle" of the sovereignty of Parliament, but to "case law concerning" the sovereignty of Parliament. This may appear to be a subtle change, but the consequences are enormous (and potentially devastating).

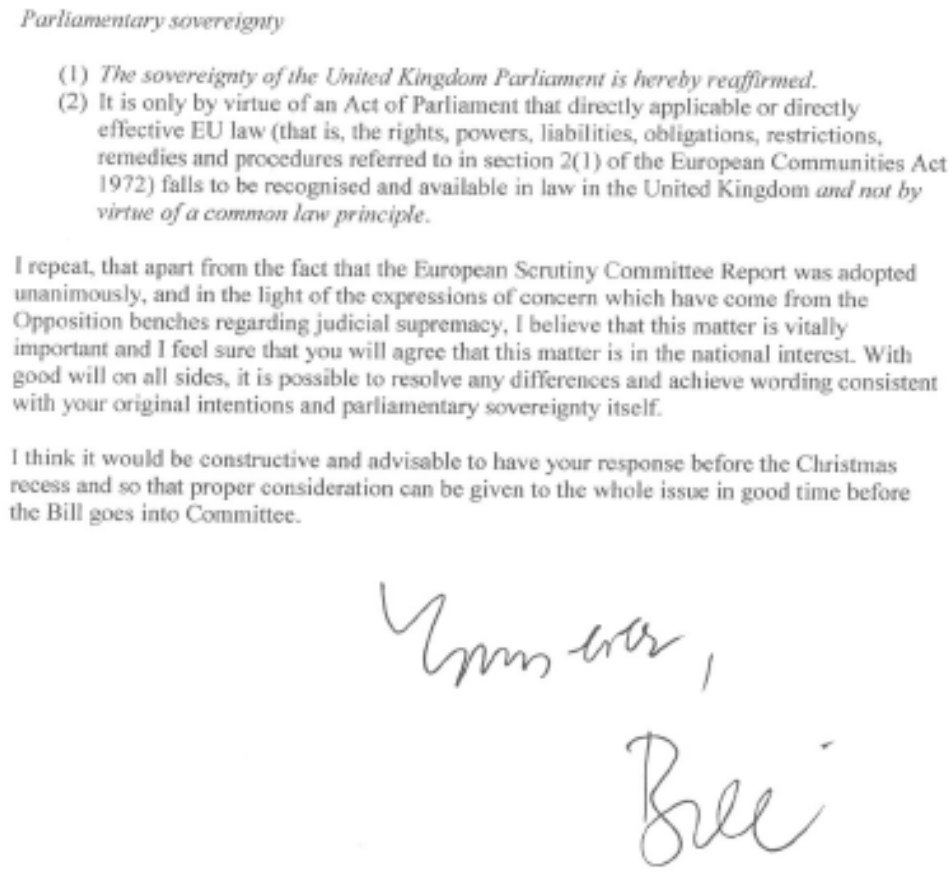
The European Union Bill needs to make it unambiguously clear that it is in no way, directly or indirectly, actually or potentially intended to undermine or weaken parliamentary sovereignty. The difficulty with this of course is that on one view the Bill is a full frontal assault on parliamentary sovereignty: any referendum is a direct appeal to the people over the heads of their representatives in Parliament. When the Blair Government in 2005 found that its ill-thought plans to abolish the office of Lord Chancellor had unintended consequences for the constitutional principle of the Rule of Law an amendment was made to the Constitutional Reform Act 2005 (section 1) to fix the problem. A like amendment urgently needs now to be made to the European Union Bill in respect of the sovereignty of Parliament.

To these ends, I respectfully suggest a new clause, immediately before Clause 18 (amended as I have already proposed on the Order Paper) and which if enacted would read as below, in the following terms:

Saving for existing constitutional law [ ]

> "Nothing in this Part adversely affects or shall be construed as affecting the existing constitutional law of the sovereignty of Parliament."

Clause 18, as amended



Parliamentary sovereignty

(1) *The sovereignty of the United Kingdom Parliament is hereby reaffirmed.*
(2) It is only by virtue of an Act of Parliament that directly applicable or directly effective EU law (that is, the rights, powers, liabilities, obligations, restrictions, remedies and procedures referred to in section 2(1) of the European Communities Act 1972) falls to be recognised and available in law in the United Kingdom *and not by virtue of a common law principle*.

I repeat, that apart from the fact that the European Scrutiny Committee Report was adopted unanimously, and in the light of the expressions of concern which have come from the Opposition benches regarding judicial supremacy, I believe that this matter is vitally important and I feel sure that you will agree that this matter is in the national interest. With good will on all sides, it is possible to resolve any differences and achieve wording consistent with your original intentions and parliamentary sovereignty itself.

I think it would be constructive and advisable to have your response before the Christmas recess and so that proper consideration can be given to the whole issue in good time before the Bill goes into Committee.

William Cash MP, House of Commons, 11th January: "My letter to the Prime Minister of 13 December, which I have sent to a number of colleagues to ensure fairness and transparency, indicated that I thought that in the light of his previous observations and assertions about a sovereignty Bill, not to mention the manifesto and so on, this principle of parliamentary sovereignty was a given and that the drafting of clause 18-this is so in the light of the evidence given to the European Scrutiny Committee and our conclusions-had demonstrated that the Government's intentions had merely produced unintended consequences. I went out of my way to say that I was sure that he did not intend this. However, our European Scrutiny Committee was doing what he has continuously said it should do: improve the scrutiny of European legislation. That is one of our fundamental principles; we are going to make sure that European legislation is looked at properly. That is what we have done, and we have reported. We revealed, after four weeks of taking evidence and engaging in cross-examination, that, unbeknown to others, this clause will have unintended consequences. So our Committee came up with its conclusions, as a result of having followed the Prime Minister's advice to scrutinise as well as we have done, and he then turns around and says, through his Ministers and in letters to me, that *"we looked at this matter very thoroughly"* and that, *"We do not believe that part 3 runs the risk that you are identifying."* Basically, he said that we were wrong. It is a serious matter for a Prime Minister to say that to a Select Committee, which is one of the reasons why I am taking these steps. I hope that I am doing so with a good sense of timing and humour, because it is very important that we do not turn this into something more difficult. However, I have to say that his reply of 10 January shows that the Government stand by the wording, having made sure that they examined the matter "very thoroughly". I must say, on behalf of myself and others, that I am afraid that the consequences remain damaging for parliamentary sovereignty, for all the reasons that I have been setting out."

10 DOWNING STREET
LONDON SW1A 2AA

THE PRIME MINISTER

5 January 2011

Dear Bill

Thank you for your letter of 13 December about the European Union Bill and Parliamentary sovereignty. Thank you also for enclosing the EU Scrutiny Committee's recent report into Clause 18 of the Bill. The Government will of course be responding to this in due course. As you know, the Foreign Secretary, the Minister for Europe and I agree strongly with you on the need to assert and to defend the sovereignty of Parliament.

On your first point, we were all very much aware during the course of the preparation of the EU Bill of the need to avoid undermining Parliamentary sovereignty. As David Lidington said in the oral evidence he gave to your Committee's inquiry on Clause 18, we are not seeking, and never have sought, to provide some all-embracing doctrine of Parliamentary sovereignty.

The purpose of Clause 18 is to reaffirm that directly effective and directly applicable EU law takes effect in the UK's legal order solely by virtue of Acts of Parliament. In other words, the continued application of EU law within the UK legal order remains dependent on the will of Parliament, which reflects the dualist nature of the UK legal system. In doing so, it provides authority which can be relied upon to counter arguments that EU law can become an integral and autonomous part of the UK's legal system independent of statute.

As to your second point about the Explanatory Notes and the references to common law, the Foreign Secretary made clear while opening the Second Reading debate on the EU Bill that the references to the common law are simply a contra-distinction to statute, given that Parliamentary sovereignty is defined nowhere in statute. They are not determinative of its origin, which is an issue that goes far beyond the scope of this Bill.

On your third point about the impact of the referendum provisions on the sovereignty of Parliament, it would of course be for Parliament to legislate on each occasion in future to hold a referendum of the British people, if Parliament supported the ratification of the Treaty change or decision in question and if both Houses were of the view that the Treaty change or decision would transfer further competence or power from the UK to the EU. It would similarly be for Parliament to legislate not to hold a referendum if it ever chose to do so, though it is our firm belief that the provisions of the EU Bill should become part of our enduring constitutional framework. The political price paid by any future Government that sought to take back the powers given to Parliament and voters by this Bill would rightly be high and painful. I do not therefore subscribe to the view that the referendum provisions would represent a weakening of Parliamentary sovereignty.

X I note with interest the amendments you have suggested and which you have also tabled for debate during the Commons Committee stage of the EU Bill. As with all amendments, we will consider these proposals carefully and they will properly be debated at the appropriate point during the Committee Stage of the Bill.

I am copying this letter to William Hague, David Lidington and Desmond Swayne.

Yours

David

X I will come back to you specifically on these amendments.

Mr William Cash MP

United Kingdom Parliamentary Sovereignty Bill

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Reaffirm the sovereignty of the United Kingdom Parliament; and for connected purposes.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1 **Sovereignty of Parliament**

The sovereignty of the United Kingdom Parliament is hereby reaffirmed.

2 **Treaties**

No Minister of the Crown shall sign, ratify or implement any treaty or law, whether by virtue of the prerogative powers of the Crown or under any statutory authority, which—

(a) is inconsistent with this Act; or

(b) increases the functions of the European Union affecting the United Kingdom without requiring it to be approved in a referendum of the electorate in the United Kingdom.

3 **Judicial notice**

This Act shall have effect and shall be construed as having effect and deemed at all times to have had effect by the courts of the United Kingdom notwithstanding—

(a) the European Communities Act 1972;

(b) any exercise of, or rule of prerogative, or rule of international law; and

(c) any Act of Parliament, whenever enacted, unless in that Act it is expressly stated that, subject to a referendum under section 4, it is to have effect without regard to the United Kingdom Parliamentary Sovereignty Act 2010.

4 **Royal Assent**

Her Majesty the Queen shall not signify her Royal Assent to any Bill which contravenes this Act or to any future Bill amending this Act or which purports so to do except and until the Bill, having been approved by both Houses of Parliament, has also been approved in a referendum of the electorate in the United Kingdom pursuant to an Act of the United Kingdom Parliament.

5 **Short title**

This Act may be cited as the United Kingdom Parliamentary Sovereignty Act 2010.

Presented by Mr William Cash,
supported by
Mr John Redwood, Mr Peter Lilley,
Mr David Heathcoat-Amory,
Mr Edward Leigh, Mr Bernard Jenkin,
Mr Graham Brady, Sir Peter Tapsell,
Mr Richard Shepherd, Mr Christopher Chope,
Mr John Whittingdale and Mr Brain Binley.

Remember this proposed Bill?

The Sovereignty Act that never was

The Sovereignty of the United Kingdom Parliament is hereby reaffirmed

Bill Cash MP

On 11 January, **Bill Cash MP** made the following speech in the House of Commons on the Committee stage of the European Union Bill.

Mr William Cash (Stone) (Con): I beg to move amendment 41, page 11, line 25, at end insert-

'(1) The sovereignty of the United Kingdom Parliament in relation to EU law is hereby reaffirmed.'.

…

Mr Cash: The group relates specifically to clause 18, and I shall explain a little of the amendments' purpose.

Amendment 41 would insert at the beginning of the clause, which covers the status of EU law, the simple words:

"The sovereignty of the United Kingdom Parliament is hereby reaffirmed."

Amendment 10 would add to the end of the clause the simple phrase,

"and not by virtue of a common law principle".

The effect of that would be to prevent the courts from applying a common law principle, which has become entrenched in certain thinking in influential academic and legal circles, and in the Supreme Court. The explanatory notes suggest that it has also become entrenched in the Government's thinking. I understand that the explanatory notes may be in the course of being corrected, as the European Scrutiny Committee and one of its main witnesses suggested. However, precisely what effect that will have remains to be seen. Perhaps we can debate that this afternoon. After all, the explanatory notes may have been prepared to aid interpretation of the statute – statute law is open to interpretation by the courts – but will the removal of the relevant words necessarily have the effect of preventing those most distinguished and eminent Supreme Court judges from departing from principles and doctrines to which they have apparently become wedded?

The two new clauses are directly relevant to clause 18 to ensure parliamentary sovereignty in view of the continuing trend towards judicial interpretation along the lines that I have already expressed. It is a matter of grave concern to many of us – far more than may turn up in the Lobbies today – that the courts, on a range of matters, have accumulated greater and greater influence, and, indeed, action, in relation to their judgments on Acts of Parliament. I refer not merely to interpretation or construction of the words but the underlying judicial activism, sometimes of a quasi – political nature. That has caused a great deal of concern, which has arisen particularly in the case of the Human Rights Act 1998. Although we are not discussing that today, there is an analogy because the charter of fundamental rights, which mirrors the Human Rights Act, is part and parcel of the arrangements under the Lisbon treaty. In that area of law, if there were any inconsistency between legislation – many centuries old and based on well established democratic principles – passed in this Westminster Parliament, would the judiciary presume to make judgments about the nature or legal effects of parliamentary sovereignty?

Mr Edward Leigh (Gainsborough) (Con): Will my hon. Friend deal with the canard put around by Foreign Office lawyers that if his amendment is passed and we add talk of sovereignty to the statute, judges will be given a chance to intervene because it is not mentioned elsewhere? Surely the issue is clear: Parliament is sovereign, so why do we not just pass this amendment?

Mr Cash: My hon. Friend is right and I am grateful to him. Indeed, I suspect that many other colleagues, not only on the Back Benches but among the ministerial ranks, agree with me strongly. I also suspect that many Opposition Members feel exactly the same way. I hope, although without too much confidence, that one or two Liberal Democrats might take a similar view, although I would not wish to over-egg the pudding on that score.

Mr Bernard Jenkin (Harwich and North Essex) (Con): I happened to be doing a television interview earlier today with Mr Chris Davies, who is a Liberal Democrat MEP. When I asked him what the problem was with incorporating this amendment in the Bill, he said he could not possibly disagree with it. So there are Liberal Democrats who agree, and I simply do not understand why the Government object.

Mr Cash: I am grateful to my hon. Friend for that point. Indeed, I would be fascinated to know what would happen if any hon. Member were to appear before their local association and say, for example, "I just want to inform you that the sovereignty of the United Kingdom Parliament in relation to EU law is not reaffirmed." I think they would get a dusty answer from their constituents, especially as they elected that person to represent them in Parliament.

I am concerned to ensure that the courts are excluded from the construction or interpretation of the nature or legal effect of parliamentary sovereignty. It is of course still inherent in the arrangements, even after the Constitutional Reform Act 2005, that the judiciary are not only quamdiu se bene gesserint, as the Latin has it – in other words, they hold their position during good

behaviour – but, in exceptional circumstances, it would be possible for judges to be removed, by an address by both Houses of Parliament, if they were to depart from that dictum. I would have said that some of the remarks relating to the sovereignty of Parliament that have emanated from some judicial circles in recent years have trespassed closely on the question of whether Parliament is the supreme law-making body in this country. I include that new clause because I want to exclude the courts in relation to section 3 of the European Communities Act 1972, but I am not attempting to extend its range beyond that.

I find it strange that the Government say that the Bill does not attempt to embrace the whole doctrine of parliamentary sovereignty. Of course it could not have done so, because the scope of the Bill would prevent that. For practical purposes, my amendments are all devised and worded in relation to EU law, but without prejudice to my concern about the fact that justices of the Supreme Court should not pick and choose between the different kinds of statute to which they apply these attitudes if they were to gain critical mass.

New clause 4 states:

"Nothing in Part 3" –
the provision relating to the status of EU law –
"adversely affects or shall be construed as affecting the existing constitutional law of the sovereignty of Parliament".

I then add, for the purposes of the scope of the Bill, the words *"in relation to EU law."*

I have provided a fail-safe mechanism and firewall against any attempt by the judiciary to interfere with the sovereignty of the House. I have done that not simply because that sovereignty is centuries old in its derivation, but because, certainly since the mid-19th century, our democratic representation, which leads Members of Parliament to convene in this Chamber and pass laws, has derived its supremacy exclusively from that democratic right.

…

Mr Cash: The amendments, if passed, would enable us to deal with those questions. In point of fact, I intend to come on to the implications of my new clauses and amendments in relation to a number of matters, including what I regard as the totally unnecessary and unacceptable jurisdiction being given to the European Court and other European institutions over the City of London. I have been talking about that in national newspapers for the best part of two and a half years.

Mr Jenkin: Does the previous intervention not underline why we need my hon. Friend's amendment? There might be no doubt in our minds that Parliament is sovereign and that the functions and powers to which he has just referred are simply delegated to the European Union by this sovereign House, but because such misunderstandings exist, it is time for the House to make a clear declaration that sovereignty and ultimate legal authority still rest with the House of Commons.

Mr Cash: I am deeply grateful to my hon. Friend for his intervention, because he is exactly right. Since 1972, there has been an accumulation that has now turned into a tsunami – a sort of Pied Piper of Hamelin, whom we all remember from our childhoods-as the accumulated rumbling and tumbling has gone on and on. We are now faced with a continuous stream of legislation divesting the House of its right to legislate, and this is an opportunity-one not invented by me in terms of the clauses proposed by the Government – to enable us to regain the sovereignty that belongs to the people of this country, the voters in general elections and Members of Parliament elected to the House for the purposes of protecting those voters' interests.

Mr Denis MacShane (Rotherham) (Lab): Will the hon. Gentleman give way?

Mr Cash: I certainly will. I am always glad to see the hon. Gentleman.

Mr MacShane: Just as we start this interesting debate, I would like to know whether the hon. Gentleman accepts the broad principle of pacta sunt servanda.

Mr Cash: To which I would simply reply:

"Et sine lite loquax cum Palladis alite cornix".

Mr MacShane rose –

The Chairman: Order. We cannot have two hon. Members on their feet at the same time.

Mr Cash: I was talking about the crow that was quacking on the fence.

Martin Horwood (Cheltenham) (LD): Is the hon. Gentleman now in favour of establishing a common European language?

Mr Cash: As long as it subscribed to the classical arrangements that were provided for when we all actually spoke Latin properly, the answer would be yes.

There is obviously-we all know it in this Committee, and so do those outside this place, because it has been well publicised – a disagreement between the Government, the European Scrutiny Committee, of which I have the honour to be the elected Chairman, and me personally, regarding the meaning, nature and effect of clause 18. The disagreement falls into several categories, all of which can be categorised as matters of national interest. That is why I trust that Members of Parliament from all parts of the Committee will listen carefully to the arguments and vote according to these, and not according to any instructions that have been issued by the Whips.

Mr MacShane rose –

Mr Cash: With the greatest respect, we have already had one intervention from the right hon. Gentleman. Perhaps he would be kind enough to wait.

It would be ironic to say the least if the slogan "Working together in the national interest", which we saw at our party conference, were to become "Working together against the national interest". I do not believe that any Member of Parliament or any Minister would agree that the coalition – a "temporary alliance", according to the "Oxford English Dictionary" – should be employed in any way to pass legislation that would undermine parliamentary sovereignty. Incidentally, I am somewhat appalled at the lack of coverage not of this debate but of the European Scrutiny Committee report when it came out, given the fundamental nature of the issues at stake, and the quality of analysis not only in the report itself but in the evidence given to us by probably the most distinguished constitutional experts in the land.

I will turn first to the constitutional and legal issues that clause 18 raises and which were carefully considered for several weeks by the European Scrutiny Committee, which received evidence on a completely even-handed basis, which, because of the fundamental importance of the issues to our constitution and our democracy, was well worth doing. In the course of the proceedings it became clear that many of the constitutional experts concerned felt that, at the very least, clause 18 was completely unnecessary. The most compelling evidence – the evidence that we received from Professors Tomkins and Goldsworthy, along with a number of others – was that clause 18 was hazardous and dangerous, particularly in the light of the Government's assertions.

The issue of parliamentary sovereignty has been a matter of fundamental concern, importance and action since the 17th century. However, parliamentary sovereignty acquired a special and fundamental significance with the extension of the franchise in the mid-19th century, from the Reform Act of 1867 onwards – for example, through the Reform Acts of 1885 and 1884 – and is undoubtedly the democratic basis of the United Kingdom constitution. However, irrespective of its now democratic basis, parliamentary sovereignty has become increasingly questioned recently – and only very recently – by reason of judicial assertions. Although on the tin, as well as in many repeated statements, we were told – I refer now to my hon. Friends on the Conservative Benches-that we would be getting a sovereignty clause or even a sovereignty Bill, clause 18 is emphatically not a sovereignty clause. For reasons that I will explain, the clause will actually undermine parliamentary sovereignty by encouraging judicial supremacy. The explanatory notes put forward the dangerous notion that parliamentary sovereignty is a "common law principle", and therefore subject to judicial authority. However, even if the explanatory notes were disavowed on this matter, the problem of judicial assertions relating to parliamentary sovereignty would not disappear.

Mr Kevan Jones (North Durham) (Lab): The hon. Gentleman and his Conservative colleagues stood in the election on a manifesto that said on page 114:

"We will introduce a United Kingdom Sovereignty Bill to make it clear that ultimate authority stays in this country, in our Parliament."

Is he therefore disappointed that the Government have binned that part of the manifesto that he stood on?

Mr Cash: Not disappointed-absolutely appalled.

The sovereignty of Parliament is the most important principle of the United Kingdom constitution, and has been since 1688, as confirmed by constitutional authorities without question until very recently. Indeed, the greatest judge in recent times, the late Lord Bingham, who died only a few months ago, stated in the Jackson case in 2005:

"The bedrock of the British constitution is...the supremacy of the Crown in Parliament."

I fear that the sovereignty of Parliament is in grave danger, however. There are judges in the Supreme Court whom Lord Bingham himself felt it necessary to name in black and white in chapter 10 of his book "The Rule of Law", published shortly before his death. He publicly criticised their judgments and their attitude to parliamentary sovereignty. In the Jackson case, Lord Hope, who is now deputy president of the Supreme Court, said that

"parliamentary sovereignty is no longer...absolute".

He went on to say that, "step by step", it "is being qualified". In his view, the rule of law, enforced by the courts, is the ultimate controlling factor on which our constitution is based. Lady Hale, who also remains on the Supreme Court, agreed with Lord Hope.

The fact that that case did not relate specifically to EU law does not alter the fact that the views expressed by Supreme Court judges can be as easily applied to cases involving EU law as to another judicial matter, contrary to the suggestions being put forward by the Minister in evidence earlier. It is not an answer to the question, as the Prime Minister has sought to suggest in a letter to me, for the Minister for Europe to state in his evidence to the European Scrutiny Committee that the Government are not seeking, and have never sought, to provide

"an all-embracing doctrine of Parliamentary sovereignty."

The Supreme Court justices, who have a process of selection outside the Judicial Appointments Commission, have a significant critical mass of those with profoundly Eurocentric credentials. I mention this because the sovereignty of Parliament, which is a constitutional doctrine of the United Kingdom, is also under threat by virtue of the European Communities Act 1972. The construction placed on legislation emanating from that Act affects the daily lives of the electorate in almost every sphere of present-day activity. According to the Government themselves, such legislation affects at least 50% of all economic laws in the United Kingdom, including those that impose burdens on businesses small and large that, according to the best estimates, have cost £124 billion since 1998.

The threat comes not only from the common law radicalism of such judges but from the EU law itself, which claims constitutional supremacy over member states' constitutions. We have also seen cases of terrorists appearing to get away with things and people not being deported when they should have been, as well as a whole range of other matters occurring under the European Human Rights Act, which, as I have said, is mirrored by the new charter of fundamental rights in the Lisbon treaty. We are witnessing a vast increase in the volume and impact of such legislation on the British people, and this is resulting in the anxieties I have described. Those anxieties could be allayed by my amendments, however, and it is time for us to turn the tide and make it clear exactly where we stand.

Sir Malcolm Rifkind (Kensington) (Con): My hon. Friend is undoubtedly correct to say that the role of the courts has increased significantly, but is not the ultimate test of the sovereignty of Parliament whether Parliament can amend the law, either on domestic matters, when the courts have interpreted the law to our dissatisfaction, or in relation to our international treaty obligations, from which Parliament should always have the right to withdraw if it so chooses? Given those circumstances, the sovereignty of Parliament ultimately remains available to us.

Mr Cash: I am extremely grateful to my right hon. and learned Friend for that. I agree with the sentiment; the problem is the practice. The difficulty is not only the tsunami of laws: attitudes within the Supreme Court, particularly since the Constitutional Reform Act 2005, have so enhanced its independence that, in conjunction with the arguments it is beginning to present, very serious questions are raised. It was the same with the Bill of Rights of 1688 – it was not an Act, but it is regarded as one of the central

instruments of our constitution – when Parliament said that it was going to put its foot down and set down a marker that Parliament was sovereign. That is what I am saying in my amendments.

Dr Julian Lewis (New Forest East) (Con): Our right hon. and learned Friend the Member for Kensington (Sir Malcolm Rifkind) is surely correct in saying that there is always what the Business Secretary would perhaps call the nuclear option of withdrawing completely. Is not one of the reasons why we, as a sovereign Parliament, are feeling more and more repressed by this sort of judicial activist legislation that things are so often put forward as if they were absolute rights whereas they should be viewed as qualified rights? That is why a common-sense Parliament would say that someone had abrogated some of their rights by bad behaviour, for example, but these courts say that the rights are absolute so that no matter how badly people behave, they cannot, for example, be deported.

Mr Cash: My hon. Friend makes a very important point, which I think all Members will want to take into account. As a lawyer myself – there are many other lawyers in the Chamber – I know that there always exists within the framework of the judicial or court system the adversarial nature of arguments based on words. One reason I came into this House after a fairly lengthy career in the law was that having had so much exposure to parliamentary legislation and its impact on people, I was conscious of the fact that however clever or adroit a lawyer might be in expressing his opinion in court or in his practice, the impact of law on the people who receive it – the voters – was quite a different matter. The common sense mentioned by my hon. Friend the Member for New Forest East (Dr Lewis) provides a salutary reminder of the necessity to remember that we in this House are Members of Parliament. We are legislators; we are not lawyers. We are seeking to apply principles that will enable this country's people to be better governed.

Unfortunately, much of our legislation emanates from the European Union, for example, on issues such as food labelling. My hon. Friend the Member for South Norfolk (Mr Bacon) has just proposed a private Member's Bill to deal with that issue, but his Bill has no chance of becoming law unless we disapply the European element and pass it in this House. That is the problem, and it is, in part, what the supremacy of Parliament debate is all about.

Martin Horwood: I would like to question the hon. Gentleman on one of these principles. He is presenting this as a competition between European and British law and between judges and Parliament, yet he himself has said that these debates are happening and this authority has been conferred on British courts because of the European Communities Act 1972, which, unless I am very much mistaken, was an Act of this British Parliament. That rather reinforces the principle of supremacy.

Mr Cash: If I may say so, that is not only true but precisely what I am seeking to deal with in new clause 1, which I tabled because the courts have been allowed this unwarranted intrusion the legislative process by judicial activism. Much of the European Communities Act 1972 invokes regulations, which come into effect in a different way from directives. In the new clause, the interpretation and the construction put on legislation by the judiciary should not under section 3 of that Act extend to the nature or legal effect of parliamentary sovereignty. What I am doing is exactly what the hon. Member for Cheltenham (Martin Horwood) highlighted – dealing with the mischief, as I see it, created for that ultimate source of authority, which lies in this House as a sovereign Parliament, to be able to make and unmake laws as it wishes.

That does not necessarily mean that we would automatically take extreme positions. Some academic lawyers – very distinguished they are, too – have gone to extraordinary extremes in trying to demonstrate, in print, the necessity for their case, and have not done themselves a service in so doing. It is at a much more mundane level that the people of this country are unreasonably affected by some of the legislation that needs to be dealt with in Parliament, and which can be dealt with only by the sovereignty of Parliament in its traditional sense.

The sovereignty of Parliament is not an arcane constitutional curiosity or a theology; it is an essentially practical question. We in the House of Commons are elected. I am elected. We are all, individually, elected in our constituencies. What does that mean? It means that we are voted for by people who go into polling booths and register their votes for us individually. It is exclusively on that basis that our authority to legislate is derived. It is the very root of British democracy, and its Members of Parliament have an absolute duty to protect it on behalf of their constituents. A threat to parliamentary sovereignty is a threat to democracy.

Removing sovereignty from Parliament would pass that sovereignty to some other body, whether it be the European Union, the Supreme Court or any other organisation. Sovereignty is about giving ultimate power to the people's democratic representatives in Parliament, not to the courts and not to international bodies such as the European Union. It is that democracy which gives voters freedom to choose who governs them and how, and for which people have fought and died.

Martin Horwood: The hon. Gentleman is being extremely generous with his time. According to a report from his own European Scrutiny Committee,

"the term 'Parliamentary sovereignty' bears a number of meanings which can get confused."

Does not the risk posed by his amendment lie in the fact that it is so simple that it allows for wide and different interpretations that might be exploited by the very courts about which he seems to be so worried?

Mr Cash: I should be more than happy to show the hon. Gentleman a book that is entirely devoted to the issue of the sovereignty of Parliament. The point is that there is no need to define parliamentary sovereignty. The Constitutional Reform Act 2005, which gave greater independence to the judiciary and the whole of which ultimately turns on the rule of law, does not contain any definition of the rule of law. Certain fundamental principles, and methods whereby we are governed, do not require definition for that purpose. They are applied, in the case of both sovereignty and the rule of law. There is a natural constructive tension between the two, but it is our job to protect the element that involves the sovereignty of Parliament.

Mr MacShane: I do not disagree with what the hon. Gentleman has been saying, but the fundamental rule of international law in regard to treaties is "pacta sunt servanda". Those who sign a treaty must abide by it. If Parliament does not like a treaty, it has a sovereign right to withdraw from it. We can withdraw from the European convention on human rights, which is concerned with

deporting people and so forth, and we can do the same in regard to the European Union. That is not a nuclear option; it is a perfectly fair choice that this Parliament could take. I rather wonder whether that is the speech that the hon. Gentleman should be making.

Mr Cash: I shall deal with that point shortly, but – with respect to the right hon. Gentleman – he will have to be a little patient.

As Members will have noticed, I have sought only to strengthen clause 18, which, as it stands, merely refers to the "Status of EU law". We were promised a sovereignty clause, and my amendment would achieve that. The clause as it stands would be subject to statutory interpretation, and it would be strange, uncertain and hazardous not to insert this provision in the framework of the European Communities Act 1972 itself. Clause 18 is a stand-alone clause. It refers to the "Status of EU law" and to section 2 of the European Communities Act, but it does not amend the Act. I am talking here about section 2 through section 3, when the judges apply themselves to any law. The clause is only six lines long, but it incorporates and absorbs within it every single piece of European legislation, so it applies to everything. However, although we know that law from the European Union emanates through from the 1972 Act, this measure does not amend the Act when incorporating the status of EU law. I am extremely concerned about that and find it very strange. In fact I will go further and say that I think the measure is deliberately contrived to make sure it is not an amendment to the 1972 Act.

Mr John Redwood (Wokingham) (Con): I am grateful to my hon. Friend for drawing the House's attention to this crucial matter. As I understand it, he, like many of us, rightly wants to reassert the sovereignty of Parliament and make it clear that Parliament remains sovereign in all circumstances, and as I understand it, those on the Treasury Bench have the same aim. Given that his proposal seems to be stronger in this regard, can he think of any good reason why they should refuse it?

Mr Cash: No, I cannot. I am a bit puzzled by that, but as I develop my speech I hope to be able to explain where I think the origin of the problem lies.

The Government and the Prime Minister fail either to explain why the 1972 Act was not amended in the way I have just suggested or to follow the route I have provided in my sovereignty Bills, and which has also been provided by the Bills that have followed from colleagues over the past few years. I have to say, however, that my sovereignty proposals of 2006 in relation to the Legislative and Regulatory Reform Bill were accepted by the current Prime Minister when he was Leader of the Opposition and by the party Whips. Indeed, I might add that the Minister for Europe voted for those arrangements. I am glad that he smiles, because the smile is on the face of the tiger.

The fact is that we went through the Lobby then. The Whips came up to me in the middle of the afternoon and said, "Bill, will you please be good enough to allow us to adopt your amendments and put in Tellers?" I was extremely impressed, and slightly flattered. They decided to do that, and then, having accepted that and having faced down the then Government with such incredible force, they went off to the House of Lords and whipped it through the Lords six weeks later. A degree of conviction clearly lay behind that, and it matches up rather nicely with the manifesto promises about the sovereignty Bill and so forth. We were nearly getting there – we were on the brink, it might be said. The question is: where are we now?

As I have said, it is well-established that there is an historical and constitutional tension between the courts and Parliament because of the democratic basis of parliamentary sovereignty, not by virtue of a common law principle, and I have also proposed an amendment to prevent that principle from being subject to judicial application. It is also necessary to include the reaffirmation of Parliament so that the courts would not be able to ignore those words, which are lacking in clause 18 as it is currently drafted, and in order to address the problem relating to the 1972 Act.

In one of the Prime Minister's letters to me – he has written two letters in the last few days – he claims:

"I can, of course, assure you not only that we have no intention to affect adversely the principle of Parliamentary sovereignty, but also that we do not believe that Part 3" –

that is a reference to clause 18 –

"runs this risk. As you would expect, we made sure we looked at this matter very thoroughly."

My letter to the Prime Minister of 13 December, which I have sent to a number of colleagues to ensure fairness and transparency, indicated that I thought that in the light of his previous observations and assertions about a sovereignty Bill, not to mention the manifesto and so on, this principle of parliamentary sovereignty was a given and that the drafting of clause 18 – this is so in the light of the evidence given to the European Scrutiny Committee and our conclusions – had demonstrated that the Government's intentions had merely produced unintended consequences. I went out of my way to say that I was sure that he did not intend this. However, our European Scrutiny Committee was doing what he has continuously said it should do: improve the scrutiny of European legislation. That is one of our fundamental principles; we are going to make sure that European legislation is looked at properly. That is what we have done, and we have reported. We revealed, after four weeks of taking evidence and engaging in cross-examination, that, unbeknown to others, this clause will have unintended consequences.

So our Committee came up with its conclusions, as a result of having followed the Prime Minister's advice to scrutinise as well as we have done, and he then turns around and says, through his Ministers and in letters to me, that

"we looked at this matter very thoroughly"

and that,

"We do not believe that part 3 runs the risk that you are identifying."

Basically, he said that we were wrong. It is a serious matter for a Prime Minister to say that to a Select Committee, which is one of the reasons why I am taking these steps. I hope that I am doing so with a good sense of timing and humour, because it is very important that we do not turn this into something more difficult.

However, I have to say that his reply of 10 January shows that the Government stand by the wording, having made sure that they examined the matter "very thoroughly". I must say, on behalf of myself and others, that I am afraid that the consequences remain damaging for parliamentary sovereignty, for all the reasons that I have been setting out. He goes on to say that

"the words you have suggested would create uncertainty, because the term 'Parliamentary sovereignty' is not defined. There are no precedents for...referring to Parliamentary sovereignty in Acts of Parliament."

He also says that attempts to define it will be "difficult and complex".

With respect, that does not take us anywhere, because the expression "sovereignty of Parliament", which is the one I have used, does not require definition in statute, as any examination of constitutional authorities makes abundantly clear. Some of those authorities prefer to use the expression "legislative supremacy of Parliament", by which is meant that there are no legal limitations on the power of Parliament to legislate. I return to the words of the late Lord Bingham:

"The bedrock of the British constitution is...the supremacy of the Crown in Parliament".

In the words of one of our greatest constitutional authorities – according to Dicey – under our constitution, Parliament has the right to make or unmake any law whatever and, furthermore, no person or body has the right to override or set aside the legislation of Parliament. There is no definition of "the primacy of European law", nor, as I have just said, is there any definition in the Constitutional Reform Act 2005 of "the rule of law". The fact is that certain expressions do not require that degree of definition, so I do not agree with the Prime Minister or with the Ministers on that point.

One of our witnesses, whose evidence the Committee did not accept, argued that Dicey's exposition of sovereignty has been based on assumptions about representative democracy that, in his view, were flawed even in 1885 and could not be made today. That witness happens to be proponent of and is in agreement with the views of other witnesses who promote the common law principle, such as Professor Trevor Allan. We rejected that view, distinguished as those people are, as we rejected the common law principle as set out by the Government in their explanatory notes – but merely removing them from the notes will not influence this kind of thinking in the Supreme Court or in influential academic circles. One has only to see the amount of time and effort that has been expended on this in learned journals to realise that they are not going to be pushed out of thinking the way they do merely because we correct them in the explanatory notes.

The same could be said of Lord Justice Laws' views on constitutional statutes, which do not have special status in the traditional sense against any other statute. All are subject to repeal where Parliament so decides in the national interest. That is an advantage of our organic, unwritten constitution, so that we can, in a Burkean sense, adapt as and when necessary on firm and principled foundations. As Bradley and Ewing indicate by contrast to written constitutions such as that of the United States, the legislative supremacy of Parliament amounts to a fundamental rule of constitutional law and this supremacy includes the power to legislate on constitutional matters.

Under the short clause 18, which applies to all European laws, the vast array and impact of which are set out chapter by chapter throughout the Lisbon treaty, there is endless scope for the judiciary to apply principles that are alien to the traditional doctrine of parliamentary sovereignty where, as is the case with clause 18, there is a failure to incorporate the clause into the European Communities Act 1972 and a failure to reaffirm explicitly the sovereignty of Parliament and to eradicate by express words from judicial judgments the common-law principle. There is more to this than is apparent in clause 18 as it stands, and the Foreign and Commonwealth Office lawyers know that very well. I was persuaded that Ministers and the Prime Minister did not appreciate that, but I am now deeply concerned by the manner in which they have fallen for these new fancy notions with hazardous and dangerous consequences for parliamentary sovereignty and I urge hon. Members to take note.

It is important to make the statement that the sovereignty of Parliament is reaffirmed. It is at last necessary to stem the tide to which Lord Denning referred in his famous judgment in McCarthy's v. Smith, and that is what my amendment would do. This was omitted from the original explanatory notes and is now included in the Government's reply to the Committee, which is surprising. For too long, we have witnessed further seamless and ceaseless integration and it is time we took a stand, removing ambiguity, uncertainty and the gradual absorption of the EU into our own constitutional DNA – that is the point. This is about not just the European Court but our constitutional law, of which Parliament is an integral part.

On compliance with international obligations being obligatory if we were expressly to legislate inconsistently with the 1972 Act or with legislation made under it, the Minister for Europe has stated on several occasions that he does not regard it as a matter of policy. I must emphatically refute that assertion as being entirely inconsistent with the legislative supremacy of Parliament and its sovereignty. That was clearly stated in Mortensen v. Peters in which it was held that the courts may not hold an Act void on the ground that it contravenes general principles of international law. Let me mention the right hon. Member for Rotherham (Mr MacShane) at this stage as he raised this question. Furthermore, the courts may not hold an Act invalid because it conflicts with a treaty to which the United Kingdom is a party. Statute is superior to prerogative in law and any treaties or legislation flowing from those treaties, even within legislation passed under the 1972 Act, is subject to parliamentary sovereignty and to repeal.

Suppose that we decided to disapply a provision on matters close to the Prime Minister, such as social and employment legislation, as he promised in 2005, or declined to bail out Portugal or Spain as part of the unlawful financial stability mechanism, or insisted on legislating within the United Kingdom for the City of London or decided to disapply investigative orders? On that and a vast range of other matters, if we thought it was in our national interests to do so, we could and should disapply EU law and require the judiciary to give effect to that law provided that it was clearly and expressly stated, whether or not it came from an international treaty or a European law. That includes repatriation, which has been specifically rejected by the Deputy Prime Minister. Furthermore, if we were to do that, we could not allow the judiciary flagrantly to contradict Acts of Parliament. That has never been accepted in our constitutional law, and the vagueness of clause 18 is, in the words of one of the distinguished witnesses, "an invitation to litigate". The uncertainty and ambiguity that would arise as a result of the need for interpretation would invite that part of the judiciary that does not accept the traditional view of parliamentary sovereignty to prevail. That is why I am being so specific in the wording that I have used: it is a marker of the same kind as the Bill of Rights, and it says, "You do not touch the sovereignty of the United Kingdom Parliament."

Sir Malcolm Rifkind: Is my hon. Friend not in danger of being so learned as to confuse himself about his own amendment? The

sovereignty of Parliament was not created by an Act of Parliament, and it has never depended on an Act of Parliament. How can its restatement in an Act of Parliament given any real added value to its legitimacy?

Mr Cash: Precisely because the courts have moved further and further down that route, as I explained when quoting Lord Hope's speech. The Supreme Court has been given independence under the Constitutional Reform Act 2005. I see a slight smile appearing on my right hon. and learned Friend's face.

Sir Malcolm Rifkind: Not for that reason.

Mr Cash: Ah. He knows that he may have to answer that question during the debate. Judicial trends have recently moved along that route, and that movement is firmly entrenched, so it is time to call a halt to them, and that is what the amendments would achieve.

…

Mr Cash: That would be the case if it were accepted by the judges in the Supreme Court. It is precisely because we know that they are not inclined to take that view that the amendments are necessary. We are extremely grateful for the evidence that we have received from distinguished witnesses, but the problem is not what they have said, because they aided us in arriving at conclusions in the light of our need to defend parliamentary sovereignty. The problem does not lie in Parliament or with the witnesses; it lies in the assertions of a circle of certain judges and lawyers.

Mr Jenkin: I am intrigued by the intervention of my right hon. and learned Friend the Member for Kensington (Sir Malcolm Rifkind), who appears to be suggesting that Parliament can simply assert its authority over the judges by some means other than statute. I would like to know by what means it can do so. In the 17th century, it was violence, and I would prefer that Parliament should not have to resort to violence. I think that we should resort to statute, which would govern the judiciary, and we can direct them to behave according to statute.

Mr Cash: I am grateful to my hon. Friend, because as I mentioned earlier, under the Constitutional Reform Act, there is no displacement of the doctrine and, indeed, the constitutional principle that judges may be removed by an address of both Houses of Parliament. Furthermore, as my hon. Friend has mentioned the 17th century, the 1610 case of Dr Bonham continues to apply, up to and including the 2005 Act. Lord Chief Justice Coke asserted that the common law could usurp Acts of Parliament – I am paraphrasing, but he was specific – but he was dismissed by Parliament for making such assertions. My hon. Friend's point is therefore well made, and was part of the constitutional settlement in the Act of Settlement 1701 and is still part of that settlement by virtue of the Constitutional Reform Act 2005.

…

Mr Cash: What is simple is that the concept of parliamentary sovereignty requires some explanation, and Jeffrey Goldsworthy does that. The question is not merely about parliamentary sovereignty; it is also about the manner in which the courts apply themselves to that doctrine. That is where the mischief lies and that is what my amendments would deal with.

I should like to respond to the Government's reply, published only yesterday, to the European Scrutiny Committee. The Government say that they have never claimed that parliamentary sovereignty is under threat from EU law, but a problem remains for them. The evidence to the Committee was that that could well change in future, given current judicial trends; that is exactly what we were told.

The Government claim that disapplying EU law, an issue that has just been raised, would have unacceptable consequences – with infraction proceedings, and so on. But I make the point clearly that according to the evidence that we received, not only are several countries already in breach of EU law – France's deportation of Roma immigrants, for example; no action was taken – but there is non-compliance on a massive scale. We know all about that, with the stability and growth pact.

There has also been the more recent failure to comply even with EU law itself in respect of the financial stability mechanism. Anybody with two brains to rub together would know that article 122 could not possibly justify – [Interruption.] Well, "Two Brains" could. No one could justify the use of article 122 for the purposes of that mechanism. If in the national interest, Parliament decides to do so, that is that. We obey EU law only in so far as it is a matter of statute and continues to be regarded as a matter of national interest.

As to the background of all this, my right hon. Friend the Prime Minister made several speeches before the general election that clearly demonstrated that we would no longer allow Britain's laws to

"be decided by unaccountable judges."

He said that their role was to interpret not to make law and that the sovereignty of Parliament needed to be safeguarded not only from the EU but from current trends in judicial thinking. We were promised last year:

"you can be assured that you have a Conservative prime minister who will act in the national interest. And putting your country first is about the most important Conservative value there is."

The Prime Minister also said:

"The Conservative Party has always been a party that puts the national interest first."

I absolutely and entirely agree. By the way, it was Disraeli who said that the Conservative party was a national party or it was nothing; I agree with that, too.

The tragedy is that the coalition and the Liberal Democrat influence in the formulation – and subsequent discussions, I suspect – of clause 18 and the Bill as a whole have gone a long way towards undermining the commitment to putting the national interest first. I fear that, far from working together in the national interest – and it is not just on this one clause – we are now witnessing policies that in relation to matters as important as the sovereignty of Parliament are actually working against the national interest.

That could be remedied very simply by dealing with the omissions, dangers, ambiguities and hazards that the clause throws up and by accepting my simple and modest amendments. My challenge is this: will hon. Members vote down an amendment that says:

"The sovereignty of the United Kingdom Parliament in relation to EU law is hereby reaffirmed"?

We all know that it is not possible to constrain the judiciary in relation to EU law except by using clear words. Those are lacking in clause 18, and I have substituted words that have the appropriate effect.

Mr Peter Bone (Wellingborough) (Con): On my hon. Friend's point, is he saying that if we had a Conservative Government, we would have a totally different Bill?

Mr Cash: I congratulate my hon. Friend on that extremely perceptive remark. I entirely agree with him. If that were the case, we would not be where we are now. That is part of the lesson. [Interruption.] That might be true too, but who knows.

My new clauses and amendments to clause 18 would put the matter beyond doubt and I cannot for the life of me see why they cannot be accepted in the national interest. I believe firmly that they would have been accepted under a Conservative Government and we know that in 2006 we were almost there. The very fact that the Government might obtain a majority for the legislation should be of no comfort or satisfaction to anyone in the country, inside or outside Parliament.

In that past, those of us who have been criticised or perhaps underestimated for our predictions on Europe need only to look at the record to see how often some of us have been proved right in the national interest. Winning a vote does not always come into that category. I can only hope that failure to accept the clarification that my amendments would give will not, in a few years' time, have seemed in retrospect a price worth paying, rather than seeking to uphold on every score a coalition of parties that on matters relating to judicial supremacy, the European Union, a written constitution and the national interest are often fundamentally poles apart.
"The fault, dear Brutus, lies not in our stars,
But in ourselves, that we are underlings."

…

I am very glad to see that the Prime Minister is in his place for these final moments. He and I have had some interesting correspondence. I thank all the hon. Members who have participated in this debate, which included some brilliant speeches from my hon. Friends the Members for Harwich and North Essex (Mr Jenkin), for Hertsmere (Mr Clappison), for Aldridge-Brownhills (Mr Shepherd) and others.

In the brief time that I have left, I confirm that I will press amendment 41 and I would be astonished if anybody voted against it. However, I am certain that they will. The difficulty that they will then be in is that, although I will not move the other amendments because of a lack of time and because the issues have been encapsulated in the debate, I have demolished the argument put up against the amendment that the status clause should not be by virtue of a common-law principle, both in respect of the academic arguments and of those that have been put forward by the Foreign Office in the explanatory notes. I have, I believe, demolished the argument relating to the question of parliamentary sovereignty, and I refer the Minister to the State Immunity Act 1978, which clearly deals with the question of the sovereign or other head of state in his public capacity. It is already in an Act of Parliament and, by the way, it is not defined, any more than "the rule of law" is defined in the Constitutional Reform Act 2005. It does not need definition: the statement and the principle stand.

The sovereignty of Parliament is inviolate, but requires to be reaffirmed, as the Prime Minister has repeatedly told us in the past, but unfortunately will not do through this Bill. With respect to the question about section 3, it eliminates the impact of the courts seeking to use the European Communities Act 1972 to achieve their objectives in relation to parliamentary sovereignty. The other provision in new clause 4 reaffirms the existing constitutional law on the sovereignty of the United Kingdom Parliament in relation to EU law, and I am glad that the Minister has said that he agrees with the sentiments, which I believe are justified.

Having said all that, I believe that we have had thoroughly good debate, and that, above all else, we have proved our point. We know that we are not going to win the vote. The Labour party has completely reneged on its principles, as expressed by the leader of the party when he said that their rubbish amendment was a matter of principle in defending parliamentary sovereignty. He must be joking! The fact is that clause 18 does not defend parliamentary sovereignty either.

Debate interrupted (Programme Order, 7 December).
The Chair put forthwith the Question already proposed from the Chair (Standing Order No. 83D), That the amendment be made.

The Committee divided: Ayes 39, Noes 314.

Must read: 'The EU Bill: Parliament, Judges and the National Interest' on page 9, 'The Sovereignty Letters: Bill Cash-David Cameron on sovereignty amendments to EU Bill' on page 11, and 'The sovereignty of the United Kingdom Parliament is hereby reaffirmed' on page 17.

European Commission – less than picture perfect

Carolina Bracken

The question may have confounded many of the most learned minds and passionate of experts, yet it appears that only the European Commission is able to provide a definitive answer: what counts as art?

At the end of December, the European Commission determined that, as the work of the late sculptor, Dan Flavin, has "the characteristics of lighting fittings … [it] is therefore to be classified … as wall lighting fittings," rather than art. The new decision equally impacts fellow American, Bill Viola, whose video-sound installation, according to the European Commission, cannot be classified as a sculpture "as it is not the installation that constitutes a 'work of art' but the result of the operations (the light effect) carried out by it".

Downgrading the artwork to mere electrical hardware will not only enrage devotees of the artist, but will have more tangible, potentially devastating consequences on its continued exhibition. Yet this outpouring of wisdom from the European Commission comes not in the context of its cultural heritage policy, but to bolster a far more pecuniary agenda. Pilfering the work of its status as 'art' hikes its VAT levy from 5% to the new level of 20%, brought into force on 1 January 2011.

Identifying what counts as art is undoubtedly elusive, in some cases more than others; in 2004, a cleaner at the Tate threw out an overflowing rubbish bag, unaware that it was part of a Gustav Metzger installation, and three years later a London art storage company was ordered to pay £350,000 to a collector after his Anish Kapoor sculpture was discarded in a skip. Such confusion serves only to further undermine the Commission's reasoning. The European Commission would do well to abandon its self-styled role of critic-come-tax-man and heed the lament of Toby Kamps (the Menil Collection curator): "There's some kind of crazy literalness going on in both instances. If it wasn't art, it was trash at best."

The European Commission's decision rankles on several levels. Firstly, the ruling explicitly overturns the judgement of the UK's VAT and duties tribunal. In 2006, London's Haunch of Venison art gallery faced a £36,000 VAT bill from the British tax authorities for importing component pieces by Flavin and Viola. After two years of arduouslegal battles, in a ground-breaking decision, Haunch of Venison won its case against the UK Customs, and its bill was substantially reduced. Not only that, but Pierre Valein, the lawyer who acted for both artists during the 2008 case and is currently advising them on the Commission's latest ruling, contends that the "absurd" decision "conflicts with the jurisprudence" of the EU's own court, the European Court of Justice.

The decision also betrays a deep hypocrisy at the heart of the EU's Culture programme. The EU cannot fairly claim to promote the awareness of cultural items of European significance without accepting that art, of whatever form, should not conform to arbitrary territorial boundaries. Appreciation and recognition of European art is in no way enhanced by effectively placing an embargo on art originating elsewhere.

The Commission has adopted an intolerably Eurocentric attitude, seemingly insensible to the consequences. Any museum or gallery bringing works by these renowned sculptors into the country from outside the EU will have no choice but to pay this higher levy, and galleries may have to raise prices to cope. That is, of course, if it remains viable to show such works at all. And it is not just museums that will be affected; St Paul's Cathedral has commissioned two altar pieces from Viola, due to be unveiled early this year. Pricing non-European art out of the market in this way cannot but impede the flow of culture and inspiration across international borders. Moreover, more than seven million Europeans are employed by cultural industries within the EU, and many would be directly affected were galleries forced to close.

Thirdly, the ruling demonstrates the Commission's seemingly rapacious desire to have its cake and eat it. Indeed, its reasoning seems farcically incongruous. On the one hand the Commission says that the pieces as "wall lighting fittings", such as one might find in any European home; on the other, it wants to value them at £180,000. It is improbable to the point of absurdity that any fluorescent tubes would be worth £180,000 unless they were in fact art.

Chief conservator at the Menil Collection, Brad Epley, described Flavin's work as "irreplaceable". Each of Flavin's light-based works are accompanied by an official certificate, guaranteeing that the Flavin estate will reconstitute a piece if needed. "Without the certificate", he says, "it's not considered a Flavin, so you can't just take a fluorescent bulb off a shelf." Whilst perhaps Duchamp's 'Fountain', (a mass-produced china urinal) would need almost no alteration, ultimately, all art could potentially be deconstructed into its constituent components (though dismissing a Renoir as merely paint and canvass may stretch even the unfathomable sagacity of the European Commission). Practicalities aside, however, a Renoir is indisputably more valuable as a Renoir than as a tin of Dulux. The Commission wishes to value Flavin's pieces as art, but tax them as lights. However, this deception is unnecessary; taking a more honest approach, it would be more financially beneficial for the Commission to accept 5% of the art's true value than 20% of the cost of regular light fitments.

Eastern Promise?

Natalie Hamill

The new Hungarian Presidency of the EU Council of Ministers has successfully shifted attention to Eastern Europe. However, so far, the focus has been for all the wrong reasons. After just two weeks at the helm, Hungary has set the Presidency on a very different course to its Belgian predecessor, clashed horns with EU heavy-weights France and Germany and rolled out a 'welcome mat' (a series of 'carpet maps' in the Council of the European Union building) that harps back to the Hungarian empire.

The Hungarian Parliament's decision to push through a law that supposedly curtails national media rights mere days before taking over an EU leadership position was ill-judged at best. The Hungarian foreign minister believes their national policy should be separate to EU presidential issues. However, the EU frequently justifies its raison d'être on its normative power base (particularly its democratic values) and its leading by example doesn't work so well when the new 'face' of this agenda is simultaneously imposing restrictions on the freedom of its national press.

The EU Commission admitted that it is 'uneasy' about the media law and France and Germany didn't waste any time in publicly criticising Hungary, condemning the law as incompatible with 'EU values' – criticism to which Hungarian President, Viktor Orbán, reportedly retorted 'get real!'

Perhaps President Orbán may have some call to be indignant (pot... kettle... black… springs to mind, recalling France's unpopular round of Roma evictions last summer); nevertheless he is foolish to let the row continue when Hungary has the EU's undivided attention for the first time since its accession in 2004, and an extensive list of pressing priorities.

Hungary's main priority is consistent with the EU's long-term goal towards improving economic stability across the Eurozone. It will have to navigate previously unchartered waters to develop the permanent bailout fund (the European Stability Mechanism), due to be established by 2013. Outside of economic stability, the Energy Summit in February will also be an important opportunity for Hungary, who will be looked on to guide the negotiations regarding gas flows. Security of supply is an issue long in need of ironing out.

But it is progress in the east where Hungary's leadership could hold real promise. In May, Hungary will host the second Eastern Partnership Summit, facilitating discussion with Armenia, Azerbaijan, Georgia, Moldova, Ukraine and Belarus. The next six months should see the accession of Croatia to the EU, and Hungary will also revive discussion on Serbia's potential accession, mapping its path to official candidate status. Furthermore, Hungary will be expected to preside over Bulgaria and Romania's entrance to the Schengen zone (due by March 2011). On top of all this, Hungary has declared itself ready to try to resolve the bitter name dispute between Macedonia and Greece, should talks be required.

Arguably, however, since the rotating presidential role has been altered by the introduction of the permanent EU Council Presidency (currently Herman Van Rompuy), results are better realised when the rotating president adopts more of a mediator role, smoothing ruffled feathers and fostering consensus. From this perspective, the key priorities for the next six months involve divisive issues (enlargement towards the east still engenders polarised opinions) and it is clear that tact, diplomacy and perseverance are the skills most in demand to achieve results – skills that, over the last two weeks, Hungary has appeared to be somewhat lacking.

But... all is not lost. Belgium endured its fair share of critical headlines when it took over the role in July last year (the collapse of its government a month earlier and its inability to establish a new one didn't bode well for the 6 month term). In spite of the tumultuous events, however, it still managed to fade quietly into the background and get things done. If there is one area in which the Belgians excel, it is effectively managing long, drawn out discussions, and during their time at the helm, they umpired a satisfactory solution to the lengthy 2011 EU budget negotiations, an agreement on amending the Lisbon Treaty, as well as improvements in regulating the banking sector.

So the important question now must be whether Hungary is capable of similar transformations? Its bullish national programme so far, and refusal to backtrack, would suggest not. Bludgeoning the national press and introducing brutal new taxes on European firms in Hungary, does not sit well on the world stage. But, if Hungary redirects this energy into the current challenges facing the EU, the presidency could deliver some trailblazing results. Let's not forget, Hungary has one big advantage; a far cry from the arguably Western/Central Europe centric stance of the last year, the new presidency moves the focus eastwards. Here Hungary has credibility, together with an inside knowledge more likely to wring satisfying results out of a number of pending discussions.

There is no doubt that Hungary has the enthusiasm for the role; now they just need the political finesse – and judgement – to succeed.

Brussels polticians endorse EU 'Heritage' rubber stamp

Margarida Vasconcelos

The European Parliament has, recently, endorsed the European Commission's proposal for a Decision creating a "European Heritage Label." To Brussels, neither the UNESCO World Heritage List nor the Council of Europe's European Cultural Routes are enough, as it has to have its own Heritage Label. Unlike the World Heritage sites, the European Heritage sites would not be chosen according to their beauty or arquitecture but "on the basis of their European symbolic value."

It is important to recall that such an initiative already exists at an intergovernmental level. The proposal transforms the existing intergovernmental European Heritage Label into EU formal action. The Member States' participation will continue to be voluntary.

According to the Commission, having the "European Heriage Label" as an EU initiative "would bring clear added value and produce benefits that could not be achieved by Member States acting alone, even with financial support from the European Union." The Commission believes that the European Label will "enhance the value and the profile of sites which have played a key role in the history and the building of the European Union (…)" This is another disguise to brainwash people about EU integration. The label is aimed at highlighting "sites that celebrate and symbolize European integration, ideals and history", promoting "new opportunities to learn about Europe's cultural heritage and the democratic values underpinning European history and integration" as well as "increased awareness of European cultural tourism, bringing economic benefits." The initiative's main aim is to "strengthen European citizens' sense of belonging to Europe and to promote a sense of European identity by improving knowledge of Europe's shared history and heritage, especially among young people." One thing is promoting knowledge of Europe's shared history and heritage other is using it as an excuse to promote EU integration. Yes, there is a gap between the EU and its citizens but this is not due, as Brussels is trying to say, to a "a lack of knowledge of the history of Europe, of the role of the European Union and of the values on which it is based."

The Commission's proposal introduces a new selection criteria and new selection and monitoring procedures. Under the Commission proposal the "European Heritage Label" would be awarded to sites that "have a symbolic European value" and "have played a key role in the history and the building of the European Union." Member States would have to justify the cross-border or pan-European nature of the sites as well as their role "in European history and European integration" or their role "in the development and promotion of the common values that underpin European integration such as freedom, democracy, respect for human rights, cultural diversity, tolerance and solidarity."

No one can deny the significance of the House of Robert Schuman in France, in EU history. However, having a look at the list of sites in the framework of the intergovernmental European Heritage Label one could say that most of the sites have nothing to do with EU history but European history whilst others just have a national dimension. Consequently, awarding an EU label to such sites may well give misleading information, particularly to targeted young people. When applying for the label Member States must commit to promoting the "European Dimension" of the site including "raising awareness on the European significance of the site" by organising "information and educational activities." Moreover, the label candidates must commit to undertake "the promotion of sites as tourist destinations" and "developing a coherent and comprehensive communication strategy highlighting the European significance of the site."

The pre-selection stage would take place at national level, and each Member State may select two sites per year. The MEPs have voted for selection to take place every two years and not once per year, as proposed by the Commission. The final selection would take place at EU level. A "panel of independent experts" composed of members nominated by the European Parliament, the Council and the Commission would be set up to choose, each year, between the pre-selected sites, one site per Member State. Then, the European Commission would officially award to those sites the "European Heritage Label." However, several Member States would prefer the decision of which sites are to be awarded the label to be taken by the Council.

The sites awarded the label in the framework of the intergovernmental European Heritage Label would have to submit another application on the basis of the new criteria and procedures laid down in the present proposal. Nevertheless, the Commission has proposed a transitional procedure to cover the situation of sites awarded a label under the intergovernmental initiative. However, the European Parliament voted against the Commission's original proposal. Therefore, according to the MEPs Member States must re-apply for the new label. But, several Member sSates would prefer to have existing sites included in the new scheme without the need to reapply again.

The UK Government has not showed an interest in participating in such scheme. The European Heritage label initiative has a low budget, but, even so, EUR 1.975.000 will come out of the EU budget for the period from January 2011 until December 2013. It is foreseen that EU taxpayers will pay around €1 million a year for the costs of the European panel of experts, for the promotion of the label including EU propaganda, as well as for the employment of officials and temporary agents at the European Commission.

Another point of controversy is the source of the funds to be allocated to the scheme for 2013. According to the European Commission such funds would come from the margins of the EU budget whereas several Member States believe that the margins should only be used in exceptional circumstances.

The proposal goes through the ordinary legislative procedure and the Council will now examine the Parliament's amendments. Whereas before the Lisbon Treaty, unanimity was required at the Council to adopt measures in the cultural field, now it is just through QMV.

Reformed "Comitology", the route to a dominating EC

Margarida Vasconcelos

The European Commission is in charge of implementing legislation at the EU level. The Commission has been assisted by committees, while executing legislation delegated to it by the Council. Such a procedure is known as comitology and involves a series of complex procedures and four types of committees (advisory, management, regulatory and regulatory committees with scrutiny), working according to different procedures and different levels of legislative control over the Commission. The comitolgy procedure is a fast track procedure and it is well known for not being transparent, for lacking democratic oversight and for giving too much power to unaccountable committees composed of Commission officials and civil servants from Member States. The system is extremely complex. There is little information about the Committees' meetings and their documents are not easily accessible to citizens. Has this situation changed with the Lisbon Treaty? No.

The Lisbon Treaty introduced new provisions for procedures for implementing EU legislation, which replace the comitology procedure. It has substantially modified the framework for the Commission's implementing powers and, unsurprisingly, it has given more powers to the European Commission and the European Parliament.

The Treaty on the Functioning of the European Union (TFEU) now distinguishes between "legislative acts" and "non-legislative acts." It also makes a distinction between the delegation of powers to the Commission, meaning the Commission's delegated and implementing powers, which before the Lisbon Treaty entry into force were all subject to the comitology procedure. There are, therefore, two different legal frameworks, Article 290 (delegated acts) entails no comitology procedures, but the committee proceedings will continue to apply to implementing acts, provided in Article 291.

Under the EC treaty the Council was in charge of conferring implementing powers on the Commission, but under the Lisbon Treaty this is a direct obligation deriving from the Treaty. Article 291 confirms that the main responsibility for implementing EU laws belongs to the Member States, nevertheless a basic act must confer implementing powers to the Commission when there is a need for uniform implementing conditions.

The Lisbon Treaty has put the European Parliament and the Council on an equal footing as regards the conferral of delegated and implementing powers.

The Member States are responsible for controlling the implementation by the Commission where such control is required by a legally binding act. Hence, a legal framework is required to set up the mechanisms of such control. Formerly, the Council acting unanimously, through the consultation procedure, decided the rules governing the exercise of the Commission implementing powers. But, as abovementioned, the Lisbon Treaty has increased the role of the European Parliament and such rules are now decided through the ordinary legislative procedure with QMV required at the Council.

Last March, the Commission presented a proposal for a regulation "laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers." It did not take long for the Council, the European Parliament and the European Commission to reach an agreement to reform the EU's comitology system that establishes the rules governing how thousands of decisions are taken annually by the European Commission. The European Parliament endorsed such an agreement just before Christmas. The Regulation will enter into force on 1 March 2011 and will replace the Comitology Decision. If the aim of the reform was to clarify and make the procedure simpler and more democratic this aim was not achieved. The system continues to be very complex, untransparent and gives even more decision-making powers to the Commission.

The new regulation maintains the committee structure as established in the Comitology Decision, but the European Parliament and the Council will no longer participate in the committee proceedings. Whereas before the Lisbon treaty, there were four types of procedures, under the new regulation the Commission's exercise of implementing powers will be subject to the advisory procedure or to a new examination procedure, which replaces the management and regulatory procedures. The Regulation provides for common rules to the advisory and examination committees. Hence, as presently, both types of committee would be comprised of representatives of Member States (civil servants) chaired by a Commission representative.

Under the advisory procedure the relevant committee delivers its opinion on a draft-implementing act by a simple majority of its component members. Such opinion is not legally binding for the Commission, which has full discretion whether to adopt, amend or withdraw the proposed implementing act. Up till now the Council could have decided on the basis of non binding criteria which committee proceedings had to be applied, but from now on, the advisory procedure is set as the rule. Having this procedure as a general rule, obviously it would be easier to adopt implementing measures. Member States are put at a disadvantage, as under this procedure they have no relevant impact on the adoption of implementing measures and cannot prevent them, in the other hand the Commission has gained an unjustified power.

The advisory procedure can be applied to all policy areas and for all types of binding implementing measures. In the other hand, the examination procedure can only be used in exceptional cases and if certain criteria are met, where the implementing measures are "of general scope", or relate to the common agriculture and fisheries policies, the environment and

the common commercial policy and taxation. Nevertheless, the advisory procedure may also apply, "in duly justified cases," for the adoption of the implementing acts referred to these areas.

However, the Regulation provides no definitions of "general scope" or "duly justified cases", consequently there are no limits to discretion. The Commission may try to enforce the non-binding advisory procedure whereas the Council has interest in ensuring that Member States have a right to veto provided in the examination procedure. However, the regulation provides for several procedural rules that confer on the Commission a considerable room for manoeuvre at the Member States expenses.

Under the examination procedure, the relevant committee is required to deliver its opinion on a draft implementing measure by QMV. The Commission will adopt the draft acts if the committee delivers a positive opinion. Under the new examination procedure it is not the Council, as it used to be under the regulatory and management procedures, but the committee itself (composed of member states civil servants) that may prevent the adoption of the draft measures by the Commission if a qualified majority is against it. If the committee delivers a negative opinion, the Commission cannot adopt the draft measures. However, in "exceptional circumstances", incomprehensibly, the Commission is able to adopt the draft measures notwithstanding a negative opinion of the relevant committee. If according to the Commission the non-adoption of an implementing act would create a significant disruption of the markets or a risk for the security or safety of humans or the EU's financial interests, the Commission would be able to adopt the draft measures despite a negative opinion. In this case, the Commission must submit the adopted acts to the appeal committee for a second opinion. If the appeal committee delivers a negative opinion on the adopted acts, the Commission must repeal the measure adopted, but, if the appeal committee delivers a positive opinion or delivers no opinion, those acts will remain in force.

If the committee in charge delivers no opinion, the Commission may adopt the draft acts. If there is no qualified majority against or in favour of a Commission draft-implementing act, the Commission may decide whether to adopt the act or review it. Under the Comitology Decision, the Commission was obliged to adopt the draft measures where the management committee was unable to deliver any opinion, and where the Council has not taken a decision under the regulatory procedure. The new regulation abolishes this obligation. The Commission is completely in charge as proposals would no longer be referred to the Council.

The European Commission has been trying to reduce member states' influence on the EU's decision-making on implementing acts, particularly as regards trade issues. The UK and other member states have tried, without success, to remove trade policy from the comitology reform. Consequently, they will see their ability to influence trade policy reduced. In the other hand, the Commission has acquired more influence over issues such as trade defence instruments or anti-dumping measures.

Implementing measures in trade defence measures such as anti-dumping duties have been submitted to special procedures whereby the Council had the last word however the new regulation provides that such measures will be included in the normal regime. Hence, trade measures, including anti-dumping and "countervailing definitive measures," are now subject to the new standard comitology rules, therefore only a qualified majority vote in a comitology committee against a draft implementing act can prevent the Commission from adopting it. There is only one exception to the normal rules, which the Commission regrets, as it is required to have a positive opinion from the relevant committee to adopt implementing acts related to "definitive multilateral trade safeguard measures."

Under the new system there can be no intervention from the Council as an appeal body, but the regulation provides for an "appeal committee." However, as the Commission pointed out "this is just a "normal" committee, chaired by the Commission." The Commission will adopt the draft acts if the appeal committee delivers a positive opinion or delivers no opinion, but it cannot adopt them if the appeal committee delivers a negative opinion.

The Regulation also provides for specific procedures to apply to "immediately applicable acts." Hence, "on duly justified imperative grounds of urgency", the Commission "shall adopt acts which shall apply immediately and shall remain in force for a period not exceeding six months unless the basic act provides otherwise." Then, the Commission submits such acts to the committee in charge to obtain its opinion. If the examination procedure applies and the committee delivers a negative opinion, the Commission must repeal the acts adopted. However, the Commission may maintain the acts in the "exceptional cases" above mentioned.

The new regulation has kept the comitology decision's provisions regarding public access to information on committee proceedings. The commission will keep the existing comitology register, which would be adapted to the new procedures, containing information on committee proceedings such as: a list of committees, the agendas of committee meetings, the voting results, information concerning the final adoption of the acts by the Commissions. The European Parliament and the Council will have access to all committee documents. However, public access to information on committee proceedings would continue to be limited to references of documents only, hence all citizens will remain in the dark

The new regulation provides for a right of scrutiny for the European Parliament and the Council. The European Parliament or the Council may indicate, at any time, to the Commission that they consider a draft-implementing act exceeds the implementing powers provided for in the relevant EU legislation. In these cases, the Commission is required to review the draft act in question, "taking account of the positions expressed", but it just has to inform the European Parliament and the Council of what it intends to do, meaning "whether it intends to maintain, amend or withdraw the draft implementing act." So, it seems that the Commission may adopt an implementing act even if the Council or the European Parliament considers it has exceeded the implementing powers.

Economic opportunities for a new kind of Global Britain

Katharine West

When their area of responsibility was a trans-regional colonial empire, British decision-makers were systematically obliged to adopt the kinds of *Global* perspectives that unfortunately have not been effectively carried over into post-colonial Britain. This was recently acknowledged by Britain's Secretary of State for Business, Dr Vince Cable when, as leader of a British delegation to India, he observed: 'There is no future for Britain looking inward and backward, or being trapped in a Eurocentric world. Our country must be open for global business.'

The risk of Britain being 'trapped in a Eurocentric world' that it could not control was dramatically demonstrated last year in the eurozone debt crisis, publicly characterised as a 'game of chicken' between the European Central Bank and Germany as to who protects the relevant financial system. Germany's dominance over the sixteen other eurozone member states has reflected not only the size of her economy but also her vital advantage in being the largest creditor nation with the best sovereign credit. Within this context, Germany has clearly emerged as the central European power, not only in geographical but also in political and economic terms. Understandably, this has frequently given rise to the query: 'Does Germany want a more European Germany or a more German Europe?'

In view of the demonstrably increasing power of Germany within the eurozone (to which Britain does not belong) and the consequent rise in the status and influence of Germany within the wider 27-member European Union (to which Britain does belong), the terms of British participation in the EU need to be carefully reassessed and unambiguously defined. The reassessment requires not crude sloganeering but measured and intellectually imaginative debate about how best to protect and promote British interests through the intelligent design and implementation of effective eurozone and EU budgetary reform, involving at least an enforceable insistence on greater budgetary thrift on the part of member countries. Of course this is extremely difficult, if not impossible, to achieve unless there is a shared understanding and open admission by all concerned that the unresolved chaos within the eurozone is the product of a liquidity crisis that has occurred in the worst possible kind of environment: one where the unrestrained profligacy of some irresponsible member countries was possible because of the absence from the eurozone and EU operational framework of the essential *fiscal* counterpart to the monetary union.

Given the complexity and scale of Europe's financial and consequent social problems, Britain's economic interests are unambiguously best served by British decision makers devoting a greater proportion of their time and energy to identifying and cultivating new and, in many cases, far more lucrative economic opportunities elsewhere. In this context, British business interests have cause to regret the failure of the British imperial power to encourage, on independence, a continuity of mutually beneficial involvement in an Indian economy that is now displaying a potential for highly impressive economic growth. Within the last decade, the primary locus of global growth has switched from West to East, in part a reflection of the transition of both India and China from rural economies to what Westerners often describe as service and manufacturing 'powerhouses'. In the context of what has variously been called an actual or potential global economic 'revolution', the major challenge for Britain is to interpret the rise of China, India and other 'emerging' economies as presenting, in a highly competitive environment, a rare opportunity for British decision-makers to identify and capitalise on at least some of the major new trans-regional opportunities from which Britain is well placed to profit.

The origin of such potentially profitable trans-regional opportunities can be illustrated in the highly impressive set of statistics provided by the Chairman of the United States Federal Reserve, who noted that in the second quarter of 2010 the aggregate real output of 'emerging' economies was 41% higher than at the beginning of 2005. (Significantly, this statistic includes the even more impressive real output statistics of 55% higher for India and 70% higher for China, that in 2010 overtook Japan as the world's second-largest economy.) In stark contrast with the economic performance of the 'emerging' economies, the aggregate real output of advanced economies in the so-called 'rich' world was a mere 5% higher in mid-2010 than at the beginning of 2005.

In the context of a 2010 economic growth rate of 9.5% for China and 8.5% for India, China's Premier, Wen Jiabao told business leaders during a visit to the Indian capital: 'The 21st century is the Asian century...where China and India can make great achievements.'

The challenge for British decision-makers is to avoid the negative reaction of fear or resentment at the prospect of such Chinese and Indian achievements. Instead, the positive and rational response would be to make every effort to ensure that, wherever possible, Britain is a creatively active participant in facilitating those achievements in such a way as to secure mutual economic – and possibly also mutual political – gain.

Currently, the European Union is China's largest export market with two-way trade valued at $434 billion in the first eleven months of 2010. This gives China a strong vested interest in supporting European regional stability, as illustrated in China's promise to take further 'concerted action' to support European financial stabilisation, including continuing to buy the bonds of countries at the centre of the sovereign debt crisis.

A less rosy picture emerges from an examination of Britain's trading relationship with India. As acknowledged by Britain's Secretary of State for Business on his visit to India in July 2010, there is an urgent need to restore Britain to its former position of being, as it was as recently as 2005, the fifth largest exporter to India. By 2010 Britain's share had dropped to eighteenth position, with the value of merchandise falling from $6.5 billion in 2008 to $4.5 billion in 2009. This rapid decline in the strength of the Indian-British trade relationship might strike the historian as an ironic form of role-reversal, in view of the depth and length of Britain's imperial association with colonial India.

There is, however, a more significant observation to be made about Britain's failure to build and sustain a sufficiently close and soundly-based relationship with India after, as well as during, colonial rule. The outcome might have been more positive and mutually more economically beneficial if the potential of Asia had been fully comprehended by British decision-makers, who chose instead to be almost completely preoccupied with the complexities of the European Union.

A significant side-effect of this concentration on Europe was Britain's failure to recognise and fulfil the enormous potential of the global and trans-regional links that were available to be used to great effect within the functional framework of the Commonwealth association of nations, each of whose member states had been exposed during British colonial rule to what I have described elsewhere as 'a common business culture'. To the extent that Commonwealth links have in fact been used, they have been important in facilitating and consolidating bilateral and multilateral trade and investment contacts between and among Commonwealth countries in different parts of the world.

While 'a common business culture' has been a defining feature of the modern Commonwealth, it does not apply to relations between two key economic players outside the Commonwealth such as China and India. Those asked about the difference between doing business with China and doing business with India typically make the same point, if not in the same words: 'In China you're dealing with the government. In India you're dealing with companies.' Some, however, controversially elaborate upon the distinction by saying that in the former case there is the risk that it might lead to global capitalism being radically changed to a system where resources are allocated by government rather than by the market, and the driving force becomes politics rather than profit.

Brussels visitor centre – a waste of taxpayer money?

Margarida Vasconcelos

Back in 2005, the European Parliament decided to establish a new public Visitors' Centre at its premises in Brussels, the so called "Parlamentarium." According to Marjory Vanden Broeke, a parliament spokeswoman at the time, the existing visitor centre "…is too small to meet the fast-growing demand from individuals and visitor and school groups." Hence, the European Parliament felt the need to have the 6,000 square metre space to accommodate 500,000 visitors annually. But one could ask why is the European Parliament spending taxpayer's money on another visitors centre.

Unsurprisingly, the answer is to increase citizens' interest in the institution. It is interesting to note that the European Parliament since the first elections in 1979 has been acquiring more powers through the treaties whereas the voter turnout has been declining over the years.

The Centre's purpose is to explain the European Parliament's role in EU decision making and "in representing citizens and their concerns." Moreover, it will also inform the so called 500,000 annual visitors, in the EU's 23 official languages, "on the historical development and impact of European integration on European societies" and "on each citizen's daily life." The European Parliament is therefore spending taxpayers' money in a EU propaganda centre.

The centre was initially estimated to cost €15m and it was due to open before the European Elections in June 2009. However, as the majority of Brussels' projects, it is delayed and over budget. The construction has only started last August and the European Parliament has already spent €23m in this state-of-the-art venue, which will have interactive features allowing visitors to simulate the work of an MEP.

The Parlamentarium has now been estimated to cost €31.6 million and is expected to open its doors next October. However, the costs are likely to be higher.

Once again the European Parliament has missed the point, it will never get closer to citizens spending their money in a project that, in fact, it does not need. Who can trust the EU institutions?