Minister for Europe David Lidington talked about the importance of the EU Bill for safeguarding Parliamentary sovereignty in a speech to the UK Association for European Law on 25 November.

Speaker: Minister for Europe David Lidington

"Madam Chairman, Ladies and Gentlemen. Thank you for that introduction. In 18 years in the House of Commons, you hear a great many speeches. One of the speeches which is most etched in my own memory was one I heard many years ago, not in the House, but as a student at Cambridge. The speaker was not a politician, but a lawyer, a judge. In fact, one of the most distinguished judges that England has produced. Lord Denning, 90 years old, and only recently retired (to the undisguised relief of most of the Law Lords of his time) spoke for 50 minutes, without a note, to a hall that was packed to the limits of the fire regulations and some way beyond.

As Denning's soft Hampshire burr recalled the famous cases over which he had presided and the legal principles which he had adduced, you could have heard the proverbial pin drop. Indeed the only interruption to his flow came when the law students in the audience laughed and applauded with delight when their speaker recited, in those short almost staccato sentences that were his trademark, passages from some of his leading judgements. It was a bit like devoted fans cheering with pleasure and recognition when their pop idol launched into a medley of his greatest hits.

One of the judgments which Lord Denning cited that day was from the 1974 case of Bulmer versus Bollinger. His words about the impact of the European Communities Act 1972 are still quoted in political arguments today.

"The treaty does not touch any of the matters which concern solely the mainland of England and the people in it. These are still governed by English law. They are not affected by the Treaty. But when we come to matters with a European element, the Treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back."

He went on:

“Any rights or obligations created by the Treaty are to be given legal effect in England without more ado. Any remedies or procedures provided by the Treaty are to be made available here without being open to question. In future, in transactions which cross the frontiers, we must no longer speak or think of English law as something on its own. We must speak and think of Community law, of Community rights and obligations, and we must give effect to them.”

Now it is, to say the least, quite rare to find anyone who is able to express legal dicta in language which is close to poetry. Few, if any, of us here could lay claim to Tom Denning’s gifts. But I doubt that anybody in this audience would deny that in the 38 years since the European Communities Act became law, we have seen the influence of European law upon our own jurisprudence become greater and more pervasive.

That has been the logical consequence of incorporating the doctrines of direct effect and the primacy of European law into our own system. But I believe it is another aspect of Denning’s judgment in Bulmer v Bollinger which also deserves to be stressed and which is directly relevant to legislation which the Government has introduced into the House of Commons and is due to receive its second reading early next month. Lord Denning was clear that European law was binding because a sovereign Parliament had decided that it should be so. In his words,

“Parliament has decreed that the Treaty is henceforward to be part of our law. It is equal in force to any statute.”

Or,

“The statute is expressed in forthright terms which are absolute and all embracing.”

Or again,

“The supreme tribunal for interpreting the Treaty is the European Court of Justice at Luxembourg. Our Parliament has so decreed.”

The principle of parliamentary sovereignty, the doctrine that European law has effect here for one reason only, namely that that authority has been conferred upon it by Acts of Parliament and that its authority subsists only for as long as Parliament so decides, has been upheld consistently by our courts. In 2003, in the case of McWhirter and Gourier versus, of all people, The Secretary of State for Foreign and Commonwealth Affairs, the Court of Appeal ruled,

“That it is fully open to Parliament to repeal or amend the 2002 Act [that was the Act ratifying the Treaty of Nice], just as it may repeal or amend the

European Communities Act 1972. That is the ultimate guarantee of constitutionality which is in place here."

But what is also true is that, in recent years, the argument has been advanced that we are now in a different legal order and that European law has now acquired an autonomous authority which has superseded the traditional doctrine of parliamentary sovereignty. This argument was advanced most vigorously by the prosecution in the so-called Metric Martyrs case (Thoburn v Sunderland City Council) in 2002. On that occasion, the court rejected the plea, instead asserting, in the words of Lord Justice Laws, that,

"Parliament cannot bind its successors by stipulating against repeal, wholly or partly, of the European Communities Act. It cannot stipulate as to the manner and form of any subsequent legislation. It cannot stipulate against implied repeal any more than it can stipulate against express repeal. Thus there is nothing in the European Communities Act which allows the Court of Justice or any other institutions of the EU, to touch or qualify the conditions of Parliament's legislative supremacy in the United Kingdom."

What the Government has now decided to do is to place beyond doubt that constitutional position and to guard against any risk that common law jurisprudence might drift towards accepting the arguments put by the prosecution in the Metric Martyrs case by placing the principle of parliamentary sovereignty in relation to European law upon a statutory footing. The European Union Bill therefore includes a clause which writes explicitly into statute that EU law continues to have effect in this country because Acts of Parliament have so provided, and as the Foreign Secretary put it in October,

"What a sovereign Parliament can do, a sovereign Parliament can undo."

The doctrine of parliamentary sovereignty is an essential part of this Bill but it is not going to be enough to address the political and constitutional problems between the people of this country and the EU. Let me be clear that this Government believes that it is in the national interest of the United Kingdom to be a member of the European Union and to be a very active and positive participant in its work.

We think that membership of the EU not only brings us enormous economic advantages but that when the 27 countries of the European Union can find a common position on external issues, for example in agreeing earlier this year to a strong package of sanctions against the Iranian nuclear programme, that is something which gives the United Kingdom greater diplomatic leverage globally.

But if we are going to make that case successfully, we need to do more to address the deep felt sense of disconnection which exists between the British people and the institutions and decision-making processes of the EU.

In one recent opinion poll, 47% of the British people said that they would be happy if the UK left the EU altogether, and in a Eurobarometer survey only 20% of our citizens said they tended to trust the European Union.

And before anybody jumps in and says there is something unique about British attitudes towards the EU and that this is all down to the Daily Express and stories in the newspapers or to insufficient enthusiasm amongst British politicians for initiatives from Brussels, let's not forget that referendums in Ireland, in France, and in the Netherlands, not to mention the current mood of public opinion in Germany, have demonstrated in the last few years that this sense of public disaffection is very far from being confined to one country.

The European Union Bill which the Government published a couple of week s ago and which will be debated at Second Reading on 7 December this year sets out quite deliberately to give new powers both to the British people and to Parliament to hold this and future governments to account for how Minsters take decisions on behalf of the United Kingdom within Europe.

The Bill will require that if in the future there is a proposal to amend the EU treaties or to propose a new replacement treaty which would constitute a transfer of power or competence from the UK to the EU, the government of the day would have to have the consent of the British people in a national referendum before that could be agreed and that treaty or treaty amendment ratified. There will be a referendum lock on any such treaty or treaty amendment, a lock to which only the British people will hold the key.

Now I know that the use of referendums in our constitution is still a matter of some controversy but I think that now we are living in a world in which both recent British constitutional practice and the expectations of the British people mean that attitudes and practices need to change. In the years since 1997, we have had referendums in Scotland, Wales, Greater London and the North East of England on proposals for the devolution of power. In Northern Ireland, we have had a referendum on the Belfast Agreement.

In effect, the practice has developed that serious constitutional change, and especially change which affects profoundly the powers exercised on behalf of the people by Parliament, should require the endorsement of the people themselves, and I think that something else reinforces this mood for change in our constitutional practice. That is the development of new technology that make direct democracy a practical, and in the eyes of many people, an

attractive option in polities comprising many millions of citizens. In Periclean Athens, the citizens could all assemble in the market place and cast their votes in person. Today we are very close to the point where it would be possible, at least in theory, for every citizen to assemble online and participate in a virtual meeting to take a decision on behalf of the country. And indeed millions of people now spend their Saturday evenings sitting in front of their television screens and voting by pressing the red button on their handsets usually it seems in order to make certain that Ann Widdecombe is not excluded from Strictly Come Dancing.

And there is a serious point here. That habit of participatory democracy, even if it is confined on Saturday evening to the fairly trivial aspects of life, generates an expectation that this is the right way in which collective decisions should be taken. Conversely, a sense that the really important decisions about the way in which this country is governed are taken by politicians, perhaps with the use of heavy parliamentary whipping and curtailed debate through the use of the guillotine, reinforces public alienation from the political process. There is no doubt in my mind that one reason for the depth of public disaffection from Europe in this country is the powerful sense of resentment felt by British people at having been denied a referendum on the Lisbon Treaty although our nearest neighbours in the Irish Republic were able to have their say.

As many of you here will know, the present government has already stated publicly that we will not agree to any new European treaty or treaty amendment which would transfer powers or competences from this country to the European Union. And that commitment is binding on the coalition for the entire duration of this Parliament.

But we are planning for the long term. As we all know, there are now essentially two ways in which Treaty change can be agreed. First, there is the Ordinary Revision Procedure, under which a Convention and an Inter-Governmental Conference can agree any amendment to the Treaties. We may see the shorter form of this process used for the Protocols which the Irish and Czechs were promised. But in general the complexity, the long duration and frankly the political arduousness of this process means that treaty change under the Ordinary Revision Procedure seems unlikely to be attempted again in its full form unless there is a collective agreement across the EU that some new and very significant package of treaty changes are desirable, in which case it seems to me apparent that such a proposal would be of sufficient importance to justify a referendum.

Under the Lisbon Treaty, we now also have the Simplified Revision Procedure, under which the European Council can decide to amend an aspect of that section of the Treaty on the Functioning of the European Union which deals with internal policies. Under our present law, any such change under the Simplified Procedure would only require an affirmative vote in both Houses of Parliament. And with party discipline and the pressures exercised by party whips, it is easy to see how this process could undermine public confidence still further. So one change we are making in the European Union Bill is to ensure that in future any amendment to the Treaty on the European Union or to the Treaty on the Functioning of European Union, under either revision procedure, would require primary legislation, a full Act of Parliament, before the United Kingdom would be able to ratify that change. That parliamentary lock would apply even to those categories of treaty amendment which would not in addition require a referendum of the British people because they did not transfer any power from this country to the EU. It is a very significant addition to the powers of Parliament to hold to account Ministers for the decisions which they take on our behalf in Brussels.

But, as I have said, where a treaty change would transfer competence or power from this country to the EU, we plan to insist not just on an Act of Parliament but also on a referendum of the British people. Since Lisbon, the different types of EU competence and the extent of each type of competence has been set out clearly in the Treaties and any extension of competence would under our new legislation trigger a referendum. Power, on the other hand, is not so clearly defined, and so I want to draw out here what for the purposes of our Bill the Government means for the purposes of our Bill by a transfer of power. First, it means the giving up of a UK veto in a significant area of policy - because that would mean that the UK would lose, and lose fundamentally, the ability to block a future measure made under that Treaty article. There are a large number of vetoes in the Treaties, and many of them are important and sensitive, for example in areas such as foreign policy, tax, justice and home affairs. It is right that any Treaty change that would transfer from unanimity to qualified majority voting the way in which decisions were taken over those key areas of policy should require the consent of the British people before the Government could agree to such a change.

But it is also clear to us that it would not be in the national interest to hold a referendum over giving up of the veto over more minor or technical measures such as, for example, a proposal to change the numbers of Advocates-General in the European Court of Justice. In order to be clear about when a referendum would be needed we are therefore listing in the Bill those Treaty Articles which would require a referendum before Britain could give up a veto

and these are listed in a Schedule. I should stress that this does not mean that individual measures properly agreed by unanimity under these articles would require a referendum. It means instead that unanimous agreement is currently needed for such legislation, and that any attempt to remove the need for unanimity would require the consent of the British people.

Second, a transfer of power for the purposes of the Bill would also include a Treaty change which conferred on an EU institution or body the ability to impose further obligations or sanctions on the United Kingdom or on individuals and organisations within the United Kingdom.

And it is this particular point which has been the subject of some press attention and claims have been made, inaccurately, that Ministers will be able to use a “significance test” on any future treaty change. That is simply not true. The Bill places an absolute and unqualified referendum lock on the transfer of competence, the creation of new EU competence, or the removal of limits to existing competences and also upon a whole raft of specified policy areas. So, for example, the Government would have no choice about whether to hold a referendum before agreeing to the United Kingdom joining the euro, or joining a common European army, or giving up control of United Kingdom borders.

Where, however, the only reason for a proposed treaty amendment being caught by the referendum lock is that it would, while not transferring or extending competence, confer upon the EU the ability to impose new obligations or sanctions on this country, we do need to be able to distinguish between important and minor changes.

For example, the EU already has competence to act in respect of environmental policy. Let us imagine a situation in which a limited and precise treaty amendment were proposed to establish a new system for the allocation of carbon credits, under a European emissions trading scheme, perhaps with some new institution to carry out that work and set the rules. It would not seem to be sensible to have a national referendum just on that topic. Rather that is something I believe most people would accept ought to be left to be determined by Parliament which of course would still have to authorise such a treaty change by Act rather than just by resolution. What we are not doing is giving Minsters untrammelled powers of discretion. When a Minister, under our Bill, is required to make a statement on whether a proposed change requires or does not require a referendum, that Minister will have to give reasons and those reasons will have to refer to the criteria set out in the legislation itself. Not only that, but, like any executive ministerial decision, that Minister’s judgement will itself be challengeable by way of judicial review. So

there will be very strong incentives for Ministers to stick to both the letter and spirit of the law, and not to sidestep the requirement to seek a referendum.

We have also tried to provide clarity by setting out in precise terms certain categories of treaty change which would not require a referendum. The accession of a new country to the EU doesn't in itself transfer powers from this country to Brussels, so no referendum would be required for any accession treaty if all it did was to provide for the accession of that State - though of course each accession treaty would require approval by Act of Parliament. Nor are we saying a referendum would be required for a treaty change which, while it would have to be agreed and ratified by all Member States, would not apply to this country. Finally, the Bill does not cover any use of the EU's existing competences as defined in the Treaties, as those competences have already been transferred and the extent of those competences is set out clearly in European law.

The Bill will also give Parliament more control over whether the Government can agree to a number of other important EU decisions, sometimes referred to as the self-amending provisions of the Lisbon Treaty. These decisions, known as 'passerelles' or 'ratchet clauses', contain built-in mechanisms, which allow for modifications to the EU Treaties or the exercise of one-way options without recourse to either of the formal methods of Treaty change; though as you will be aware, there is no one agreed, legal definition of what constitutes a passerelle or a ratchet clause.

We have identified three types of clause under this umbrella: clauses which allow for a change of legislative procedure; clauses which allow for changes in voting procedure; and clauses which allow for the expansion of the scope of a particular article allowing the European Union to act. Because of the lack of a definition, and because the Government's aim is to ensure that our proposals are as clear as possible to Parliament and the public, we have set out on the face of the Bill which Treaty articles would require additional levels of control.

The EU Bill will require Parliament to approve each use of a ratchet clause in an Act of Parliament before the Government can agree to their use in the Council or the European Council; an increased level of parliamentary control which will allow both Houses the opportunity to consider each measure carefully.

Articles which add to what can be done within existing areas of EU competence will require approval by an Act of Parliament. Examples include proposals to add to the list of criminal offences on which the EU can legislate or to add to the list of criminal law procedures on which the EU can legislate.

And, as with the treaty changes, if any such measure based on one of the passerelle clauses were to propose a transfer of power or competence, the Bill makes clear that a referendum of the British people will be required.

Where we have decided that giving up a veto is significant, we need to put a referendum lock over any way of giving up that veto in the Treaties. Any other approach would be illogical – there is no point putting a lock on the ability to give up a veto by Treaty change if the British Government of the day could then give up the very same veto without a referendum simply by using a ratchet clause. So this covers the Simplified Revision Procedure, and also six other specific provisions in the Treaties which allow for vetoes to be given up without formal Treaty change, for example in social policy, the environment, common foreign and security policy and European Union finance.

There are also a number of specific, one-way decisions which transfer competence from the UK to the EU. So joining the Euro would require a referendum to be held; as would any proposal to move to a common EU defence; to participate in a European Public Prosecutor; or to extend the powers of that Office if the UK were already a participant.

These provisions provide Parliament and the British people with a key role in determining whether the future use of any of these so-called self-amending provisions in the Treaties can be used; and is a clear demonstration of the Government's commitment to rebuild trust and reconnect the British public with decisions taken in Brussels.

There are some additional proposals which would require a vote rather than a Bill in both the House of Lords and Commons as a result of the EU Bill. These are mostly articles which modify the composition or rules of procedure or statutes of existing European Union institutions or bodies. Examples would include proposals enabling the General Court of the EU Court to organise its workload by establishing specialised chambers to deal with certain types of cases, or proposals which change the rules of the European Investment Bank.

This is, I believe, an ambitious and important piece of legislation. It will give powers to the British people and to Parliament which they have never previously enjoyed in respect of decisions about our engagement with the European Union. The Bill will also give people the assurance they are entitled to expect that the sovereignty of Parliament and the ultimate right of the people themselves to decide which powers should be delegated for collective decisions within Europe and which should be maintained as distinct national competences, are both being properly safeguarded. And given those safeguards, I believe that people in the United Kingdom will be more willing to

support policies and positive work within the EU to defend and promote the interests of our country.

Now, I am not tonight going to talk about the immediate crisis facing the Eurozone, hugely important though that it is. Events are moving very fast. But if I look beyond that immediate crisis what seems to me to be the most urgent task facing every Member State of the European Union is how to restore our competitiveness in a globalised economy, competitiveness which is being eroded not only by the emerging economies of Latin America and the Far East but also by the United States of America. Europe frankly needs to spend less time fretting about institutional relations and treaty changes and devote its energies and its political priorities to policies which are going to promote growth, jobs, investment and competition. We need to both deepen and widen the single market, having a further drive towards a genuine single market in services, and creating single markets in the digital economy and in energy. Europe needs to renew its efforts to secure a multilateral trade deal and complete the Doha round in 2011 and push ahead with bilateral free trade agreements with other countries and regions, following the successful conclusion of the negotiations with South Korea by accelerating work on free trade agreements with India, Canada and the Mercosur countries. And Europe should rediscover its ambition to cut the costs and complexity of the regulations which it imposes on businesses throughout our continent. This is something which President Barroso committed himself to doing when he was first elected as President of the European Commission and the British Government looks forward to working closely with him and his team to make that ambition a reality.

Europe needs to resist the temptation to become introverted. The test of European cooperation and European unity should never be the height of its barriers against the world outside. If I were asked to single out the greatest success of the European Union in the decades since its creation, I would pick even ahead of the single market, the EU's achievement in entrenching democracy, the rule of law and human rights in those parts of our continent - Spain, Portugal, Greece, Central and Eastern Europe – where those values and traditions were crushed for most of the 20th century. And today, it is the hope of EU membership which drives both political and economic reform in the Western Balkans and the countries of the Eastern Partnership and the British government is determined to do all within our power to ensure that that path towards full EU membership remains open to our neighbours.

It is in our interests as a country for the nations of Europe to work together to enhance the prosperity and security of our continent and for us in Britain to be an active player in shaping the priorities of the European Union. But it is for

the British people to determine the nature and extent of the powers that they wish to share with our European neighbours. What our new legislation seeks to do is to ensure that it is the people ultimately who retain the power to decide.