

EUROPEAN UNION ACT 2011

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1: Restrictions on Treaties and Decisions Relating to EU

Introductory

Section 1: Interpretation of Part 1

39. *Section 1* defines certain terms used in Part 1 of the Act.

Restrictions relating to amendments of TEU or TFEU

Section 2: Treaties amending or replacing TEU or TFEU

40. This section requires certain conditions to be met before any future treaty that would amend or replace TEU or TFEU can be approved by the UK. The conditions are: (a) that a Minister has laid a statement before Parliament setting out whether a referendum is required or not, in accordance with *section 5*; (b) that the proposed treaty has been approved by an Act of Parliament; and (c) that either the ‘referendum condition’ or the ‘exemption condition’ has been met in each case. These conditions are only relevant where the Government has agreed to the proposed treaty at an Inter-Governmental Conference, at which point the conditions would need to be satisfied before the UK could approve, or ‘ratify’, the future treaty.
41. The referendum condition is set out in *subsection (2)*. The Act of Parliament that is needed to approve the treaty must include provision for a referendum to be held to determine whether the public support the approval of that treaty. The Act of Parliament would need to specify the treaty to be agreed, and the detailed provisions required to allow a referendum to take place, including the question for the ballot paper and the date of the referendum. The referendum would then be held in accordance with the provisions set out in that Act, and only if a majority of the people who voted in the referendum were in favour of the proposal would the UK be able to ratify the treaty. The provisions of the Act approving the treaty would not come into force until the result of the referendum was known and unless a majority of voters had voted in favour of the change.
42. The exemption condition is set out in *subsection (3)* and would apply if the proposed treaty did not do anything which is set out in *section 4* (see below) and the Act providing for Parliamentary approval of the decision specified that this was the case. In other words, if there would be no transfer of competence or power from the UK to the EU (as set out in *subsections (1) to (3)* of *section 4*), then the treaty would be exempt from the requirement for a referendum.
43. *Subsection (2)(a)* provides that where the Government considers that any of the provisions of the proposed treaty would affect Gibraltar, then any referendum would need to be held throughout the UK and Gibraltar. Gibraltar is bound by a number of provisions in the Treaties, and while it is not possible to predict whether Gibraltar would

be affected by any future treaties, in the event that Gibraltar would be affected, the people of Gibraltar would be entitled to vote in the relevant referendum.

Section 3: Amendment of TFEU under simplified revision procedure

44. This section requires certain conditions to be met before any Article 48(6) decision can be approved by the UK. An Article 48(6) decision can amend any aspect of Part Three of TFEU (see paragraph 22 above). The conditions are almost identical to those set out in [section 2](#) in respect of proposed treaties, namely that: (a) a Minister has, in accordance with [section 5](#), laid a statement before Parliament as to whether or not a referendum is required; (b) the decision to be approved by the UK has been approved by an Act of Parliament; and (c) either the ‘referendum condition’, the ‘exemption condition’ or the ‘significance condition’ has been met in each case.
45. The requirements of this section differ from those of [section 2](#) in that they include the ‘significance condition’ provided for by [subsection \(4\)](#). Some Article 48(6) decisions may be proposed which seek to confer on an EU institution or body a new or extended power to require Member States to act in a specified way in accordance with the EU’s existing competence; or to confer on an EU institution or body a new or extended power to impose sanctions on Member States for their failure to act in a specified way already provided for by the Treaties. Such a move would not, in itself, transfer competence (the ability for the EU to act in a given area) from the Member States to the EU – instead, such a proposal would allow an institution or body of the EU to use the competence conferred on it already by the Member States in a different way. These two ‘transfers of power’ from the UK to the EU would be caught by [section 4\(1\)\(i\) or \(j\)](#), and a future proposal to do either of these things would generally require a referendum to be held under [section 3](#).
46. However, there may be instances in the future where the Simplified Revision Procedure might be used to give a new power to a body in an area which is not significant to the UK. In these cases, the Minister’s statement under [section 5](#), and the Act of Parliament required by this section, may state that the proposed Article 48(6) decision would confer on an EU institution or body a new or extended power to require Member States to act in a specified way; or to confer on an EU institution or body a new or extended power to impose sanctions on Member States for their failure to act in a specified way already provided for by the Treaties. This would be a transfer of power from the UK to the EU falling within [section 4](#) of this Act, but the Minister would be able to specify that the proposed changes were not significant, give reasons why this is the case, and therefore decide that a referendum would not be required.
47. The inclusion in this section of the ‘significance condition’ minimises the risk that a referendum will be required in relation to the transfer of a power considered to be insignificant. As with all Ministerial decisions, it would be possible for a member of the public to challenge the decisions of the Minister in such a statement. Even when the ‘significance condition’ is met, the proposed Article 48(6) decision would still require Parliamentary approval by Act before the UK could approve the Article 48(6) decision which gave rise to the change, and during the passage of that Bill the question of significance could be considered.
48. This ‘significance condition’ only relates to any changes which would fall under the criteria in [section 4\(1\)\(i\) or \(j\)](#) and only in those cases where the Minister judges that the proposed transfer of power is not significant to the UK. If any Article 48(6) decision also satisfied another criterion in [section 4](#), a referendum would then be required in accordance with the provisions of this section and [section 4](#).

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

49. [Section 4](#) makes provision for the criteria against which a treaty seeking to amend or replace TEU or TFEU, or an Article 48(6) decision seeking to amend an aspect of Part Three of TFEU, would be assessed in order to determine whether a referendum should

be held. *Section 4(1)* lists the changes that the Government regards as representing a transfer of power or competence from the UK to the EU (see paragraph 19 for further explanation of the different types of competence), and a treaty which would fulfil one or more of the criteria would require a referendum.

50. *Subsection (1)(a)* provides that a treaty or Article 48(6) decision would require a referendum if it would extend the objectives of the European Union, which are listed in Article 3 TEU. Both an extension of an existing objective and the creation of an entirely new objective would be caught by this criterion. The objectives of the EU include the promotion of peace and well-being; the principle of free movement of persons within an area of freedom, security and justice; the establishment of the internal market and economic and monetary union; and upholding and promoting the values of the EU in the wider world. As Article 352 TFEU can be used as a legal base for legislative proposals to achieve the objectives of the EU where there is no more relevant Treaty article to use, an extension of the EU's existing objectives could also be used to transfer further competence from the UK to the EU. This is why both an addition of a new objective, and the extension of an existing objective, would require a referendum to be held.
51. *Subsection (1)(b)* and *(c)* provides that a treaty or an Article 48(6) decision which would create either a new exclusive competence, or extend an existing exclusive competence for the EU, would require a referendum to be held before the UK could ratify that treaty or Article 48(6) decision.
52. *Subsection (1)(d)* and *(e)* provides that a treaty or Article 48(6) decision which would incorporate either a new competence shared between the EU and its Member States, or the extension of an existing competence shared between the EU and its Member States, would require a referendum to be held before the UK can ratify that treaty or Article 48(6) decision.
53. *Subsection (1)(f)* stipulates that a referendum would be required before the UK can approve the extension of any competence of the EU relating to: (i) the co-ordination of economic and employment policies; or (ii) the EU's common foreign and security policy.
54. *Subsection (1)(g)* and *(1)(h)* provides that a referendum would be required before the UK could agree to the addition of any new, or the extension of existing supporting competence respectively under Article 6 TFEU, where the EU can support, co-ordinate or supplement Member States' approaches. Further detail on supporting competence is provided in paragraph 25 of these Notes.
55. *Subsection (1)(i)* and *(j)* specifies that approval for proposals to increase the powers of the EU institutions and bodies to impose requirements, obligations or sanctions on the UK would require a referendum, as would proposals to remove any existing limitations on the institutions. It is these two criteria which could be subject to the 'significance condition' in *section 3*.
56. *Subsection (1)(k)* provides that any proposal to remove the UK's veto over the use of any of the Treaty Articles listed in *Schedule 1* (which includes any relevant Articles in Chapter 2 of Title V TEU (Specific Provisions on the Common Foreign and Security Policy)) would require a referendum. It should be emphasised that this means that a referendum is needed only before the UK can agree to any proposed treaty change or Article 48(6) decision which would remove the UK veto in any of these cases. Agreement to any legislative acts made under these Treaty articles would not require a referendum.
57. *Subsection (1)(l)* and *(m)* provides that any proposal to remove an 'emergency brake' provision in the Treaties would require a referendum before the UK could agree to the removal of such a brake. The emergency brake provision in Article 31(2) TEU, covered by *subsection (1)(l)*, allows a Member State to stop the agreement of a decision by qualified majority voting under the common foreign and security policy by citing 'vital

and stated reasons of national policy'. The High Representative of the EU for Foreign Affairs and Security Policy would then attempt to mediate with the Member State who has used the brake provision, but if they cannot come to an acceptable solution for the Member State concerned, the Council can then decide by qualified majority to refer the matter to the European Council for decision by unanimity. If the Council does not vote to refer the matter to the European Council, then the Member State's objection shall prevail. *Subsection (1)(l)* provides that any amendment to this mechanism would require a referendum before the UK can agree to any such amendment.

58. *Subsections (1)(m)* and *(3)* similarly provide that the other emergency brake provisions in TFEU, where a Member State can suspend the ordinary legislative procedure in relation to a specified legislative act for reasons set out in the Treaties, cannot be amended without a referendum being held first and a majority of voters agreeing to any such amendment. Article 48 TFEU concerns those social security measures that permit the free movement of workers within the EU. A Member State can suspend the ordinary legislative procedure and refer the proposal to the European Council if it felt that the proposal might affect 'important aspects of its social security system, including its scope, cost or financial structure, or would affect the financial balance of that system'. In such an eventuality, within four months the European Council has to resolve the issue by unanimity and ask the Council to continue with the negotiation of the legislative act in question, or has to reject the act and ask the European Commission to publish a new proposal.
59. [Article 82\(3\)](#) TFEU concerns rules on the mutual recognition of judicial decisions and police cooperation on cross-border criminal matters and provides for a Member State to use the emergency brake mechanism if a proposed act 'would affect fundamental aspects of [the Member State's] criminal justice system'. [Article 83\(3\)](#) TFEU concerns proposals on serious cross-border crime, and similarly allows a Member State to refer a draft decision to the European Council where an act may 'affect fundamental aspects of its criminal justice system'.
60. *Subsection (2)* stipulates that the removal from the existing Treaties of a limitation on the EU's ability to act in a given area is, for the purposes of this Act, equivalent to an extension of the EU's competence in that area – and would therefore require a referendum to be held and a majority of votes cast in that referendum to be in support of the removal of that limitation. An example here would be the Protocol on the Position of the UK and Ireland in the Area of Freedom, Security and Justice (referred to in [section 9](#) and in these Notes as the 'AFSJ Protocol'). As any attempt to repeal that Protocol could be argued to be a removal of a limitation on the EU's ability to act in this area with respect to the UK, this subsection stipulates that such a move would be subject to a referendum.
61. *Subsection (4)* provides that certain Treaties or [Article 48\(6\)](#) decisions would not require a referendum merely because they fall within one of the following circumstances: where they codify EU practice under TEU or TFEU in relation to the previous exercise of an existing competence; or they create any provision in the Treaties which does not apply to the UK; or where a treaty has the sole purpose of providing for the accession of a new Member State to the EU.
62. *Subsection (4)(a)* provides that the codification of practice under TEU or TFEU in relation to the previous exercise of a competence not already covered explicitly by the Treaties would not, in itself, be subject to a referendum so long as the codification goes no further than to make explicit in the Treaty that part of the competence which has actually been exercised, and does not seek to codify the potential full extent of that competence. For example, action may be taken under [Article 352](#) TFEU to achieve the objectives of the EU but where a measure is required for which there is no specific legal base. If a future treaty change then introduces a specific legal base for that action, and that new legal base does no more than codify the existing use, then no referendum would be required. There would be no point in having a referendum on such a codification,

because the competence has already been transferred and the EU has already acted in that way. However, if the new legal base does more than codify the existing use, and the UK wants to support that new legal base, then a referendum would need to be held before the UK could ratify that treaty change.

63. *Subsection (4)(b)* provides that a referendum is not required where a treaty or an Article 48(6) decision makes provision that applies only to Member States other than the UK. A treaty or an Article 48(6) decision does not apply to the UK merely because it may have consequences for individuals or organisations within the UK, such as UK businesses. Nor does it apply to the UK merely because the amendment imposes new responsibilities on EU institutions in which the UK participates and which the UK helps to fund.
64. The effect of *subsection (4)(c)* is that an Accession Treaty, agreed in accordance with Article 49 TEU, would not require a referendum if the only changes made by the Accession Treaty would be those necessary for and resulting from the accession, for example by amending the number of Members of the European Parliament to accommodate a delegation from the new Member State. However, the Act provides that Accession Treaties agreed under Article 49 TEU would require an assessment as to whether a referendum should be held in accordance with the provisions of Part 1 (see *section 1(4)*). This is because it is in theory possible that Article 49 might be used to do more than allow for the accession of a Member State, and therefore this eventuality would be covered by the provisions of this Act.

Section 5: Statement to be laid before Parliament

65. This section makes provision about how the first condition in *sections 2(1)(a)* and *3(1)(a)* is to be met. A Minister of the Crown would need to lay a statement before Parliament within two months of either the agreement of a treaty at an Inter-Governmental Conference, or the agreement of an Article 48(6) decision at a European Council. In either case, the required statement would need to set out the Minister's assessment as to whether the proposed treaty or Article 48(6) decision would fall within *section 4* of this Act, namely whether the proposal would transfer power or competence from the UK to the EU. The assessment should set out the Minister's reasoning for this judgement.
66. *Subsection (4)* of this section refers to the 'significance condition' set out in *section 3(4)*, in respect of an Article 48(6) decision where the Minister of the Crown judges that the Article 48(6) decision would fall within *section 4(1)(i)* or *4(1)(j)*, but where the Minister views such a move as not being significant. As set out above, the Minister would in this case judge that a transfer of power would take place between the UK and the EU. *Subsection (4)* provides that in this case, the Minister would need to lay before Parliament a statement making clear that a transfer of power would take place, but that he/she judges that this proposed transfer of power would not be significant, and the reasons for this judgement.
67. As with all Ministerial decisions, it would be possible for a member of the public to be able to seek to challenge in the Courts the judgement of the Minister as provided in the statement required under *section 5*.
68. The December 2010 European Council agreed in principle to amend Article 136 of TFEU, by means of an Article 48(6) decision, to allow for a permanent mechanism to replace the European Financial Stabilisation Mechanism and the larger European Financial Stability Facility. The Article 48(6) decision itself was agreed at the Spring European Council in March 2011. The Government made clear that it intended that the provisions of this Act should apply in full to this Article 48(6) decision, which requires approval by all Member States of the EU, even though the decision was adopted by the European Council before the Act comes into force.

69. *Subsection (6)* would enable this Article 48(6) decision to be considered in accordance with the provisions of this Act by providing that the statement required by this section should be laid no later than two months after the commencement date rather than two months after the decision at EU level.

Restrictions relating to other decisions under TEU or TFEU

Section 6: decisions requiring approval by Act and by referendum

70. This section provides that a number of specified decisions already provided for in TEU or TFEU would require both an Act of Parliament to be passed, and for a majority of people voting in a referendum of the British people (and where applicable, the people of Gibraltar) to support such a decision before the UK could agree to the decision. These decisions would not involve a new treaty or Article 48(6) decision, and so would not be caught by the provisions of *sections 2, 3 or 4*.
71. There are two categories of decisions included in this list. The first are decisions that would have the same effect as one or more of the changes which would require a referendum under *sections 2, 3 or 4*. *Subsections (5)(a), (b), (f), (g), (h), (i) and (j)* fall into this category. If a Treaty Article is sufficiently important to the UK that any treaty change which removed the UK's ability to veto a future use of that Article must be subject to a referendum, it is logical that any other method of removing the UK's ability to veto uses of that Treaty Article must also be subject to a referendum. The second category represents one-way, irreversible decisions which would transfer power or competence from the UK to the EU. These are covered in *subsection (2)* and in *subsections (5)(c), (d), (e) and (k)*.
72. In the case of these decisions, no judgement is required by a Minister as to whether a transfer of competence or power would occur in each case; the Act provides that any decision to be taken in accordance with the Treaty provisions listed in this section would require an Act of Parliament and a referendum. No exemptions apply in the case of the decisions to which this section applies. In each case, the Act of Parliament would need to set out the decision to be agreed and the detailed provisions in order to allow a referendum to take place, such as the proposed question and the date of the referendum.
73. *Subsection (5)* lists those Treaty provisions to which *section 6* would apply, with the exception of Article 42(2) TEU, which is provided for separately by *subsection (2)*. This is because Article 42(2) TEU, which would permit a move to a common EU defence, requires a two-step process, unlike the other decisions in this section. In this case, the European Council may agree to move to a common EU defence, 'subject to the approval of the Member States in accordance with their constitutional requirements'. This makes the decision-making process for Article 42(2) TEU similar to that of an Article 48(6) decision, in that the Act of Parliament and referendum required would take place after the decision has been taken in the European Council, but before the UK can approve the adoption of the decision, which is required before this decision enters into force. In the event that the Act of Parliament was not passed, or the majority of those voting in a referendum voted against approval of the decision, the UK would not adopt the decision to move to a common EU defence, and the decision would not therefore be able to enter into force.
74. In contrast, the other Treaty provisions set out in *paragraphs (a) to (k) of subsection (5)* would require both an Act of Parliament to be passed, and for a referendum to be held in which a majority of the votes cast supported the draft decision, before the UK could agree to such a decision in the Council or European Council.
75. *Subsection (3)* makes specific provision regarding any future decision to participate in a European Public Prosecutor's Office, where one has already been established by the other Member States of the EU. The effect of *subsections (5)(c) and (5)(d)* is to require a referendum and an Act of Parliament before the UK could participate from the outset in proposals to create and extend the powers of a European Public Prosecutor, under

*These notes refer to the European Union Act 2011
(c.12) which received Royal Assent on 19 July 2011*

Article 86(1) and Article 86(4) TFEU. Under Article 4 of the AFSJ Protocol, however, the UK can also seek to opt into Justice and Home Affairs measures after they have been adopted by other Member States. *Subsection (3)* provides that such a notification under Article 4 of the AFSJ Protocol may not be given, in order to participate in a European Public Prosecutor's Office or to agree an extension of the powers of that Office if the UK is already a participant, without prior Parliamentary approval by Act and the consent of the British people in a referendum.

76. *Subsection (5)(a)* requires that an Act of Parliament should be passed and a referendum should be held before the UK could agree to any move from unanimity to qualified majority voting in respect of any decisions taken by unanimity under the EU's common foreign and security policy.
77. *Subsection (5)(b)* requires that any proposed use of Article 48(7) TEU that sought to move a specified area from unanimity to qualified majority voting, or sought to move a specified area from the special legislative procedure to the ordinary legislative procedure, would be subject to the referendum condition if that area is set out in *Schedule 1*. There are two elements to this which require further explanation.
78. A move from the special legislative procedure to the ordinary legislative procedure in effect alters the role of the European Parliament in determining the final legislative act to be adopted: in general, the special legislative procedure requires the European Parliament to be consulted; whereas the ordinary legislative procedure (previously referred to as 'co-decision') requires the agreement of the European Parliament as well as the Council before a legislative act can be adopted.
79. With the exception of a handful of specific areas (none of which are included in the provisions in *Schedule 1*), such a move from the special legislative procedure to the ordinary legislative procedure would also entail a move from unanimity to majority voting in the Council – and so either a proposal to give up a veto on its own, or as part of a change in legislative procedure, would require both an Act of Parliament to be passed and a referendum to be held if the area concerned fell within *Schedule 1*. In those eight areas in the EU Treaties where such a move would not involve the giving up of a veto, a proposal to use Article 48(7) TEU to effect a change in legislative procedure would require Parliamentary approval in accordance with *section 10*.
80. Only those areas set out in *Schedule 1* would trigger a referendum were there to be a proposal to move from unanimity to majority voting. There are other areas where unanimity presently applies; in the event that the Government had agreed in the European Council that one or more of those other areas could move from unanimity to majority voting, an Act of Parliament would be required before the UK could approve the decision to do this and this is provided for by *section 7(4)(b)* of this Act.
81. *Subsection (5)(c)* provides for an Act of Parliament to be passed and a referendum to be held on any proposal for the UK to participate in a European Public Prosecutor's Office, whether at the outset or, as provided by *subsection (3)*, after such an Office has been established. *Subsection (5)(d)* provides for an Act of Parliament and a referendum on any proposal to extend the powers of the Office of the European Public Prosecutor if the UK is, at the time of the proposal to extend those powers, a participant in the European Public Prosecutor's Office.
82. *Subsection (5)(f)* and *(g)* requires an Act of Parliament and a referendum to be held in the event that decisions are proposed under Articles 153(2) TFEU or 192(2) TFEU respectively to move from the special to the ordinary legislative procedure. This change would mean that decisions taken under these Articles would no longer be subject to unanimity in the Council, and would instead being subject to qualified majority voting as explained above. *Subsection (5)(h)* similarly provides for an Act of Parliament to be passed and a referendum to be held in the event of a proposal to move Article 312(2) TFEU from unanimity to qualified majority voting.

83. *Subsection (5)(i) and (j)* would apply if the UK is a participant in an area of enhanced co-operation, a mechanism whereby a smaller number of (at least one third of) Member States can decide together to act in a way set out in the Treaties, without all Member States being bound by those decisions.
84. *Subsection (5)(i)* provides that, in the event that the UK participates in an area of enhanced co-operation which touches on one or more of the Treaty provisions listed in *Schedule 1*; and there is a proposal to move from unanimity to qualified majority voting for decisions taken in that area of enhanced co-operation; then an Act of Parliament would need to be passed, and a referendum would need to be held, and a majority of votes cast would need to be in support of the proposal before the UK can agree to that proposal. Such a move could not be proposed in any area of enhanced co-operation with military or defence implications. This would only apply to areas of enhanced co-operation set up to act in areas set out in *Schedule 1*, and in which the UK is a present participant. As with *subsection (5)(b)* above, any areas not covered by *Schedule 1* would nonetheless require an Act of Parliament as set out in *section 7(4)(e)*.
85. *Subsection (5)(j)* provides for an Act of Parliament to be passed and a referendum to be held in accordance with all of the conditions set out in the paragraph above, except that the trigger in this case would not be a move from unanimity to qualified majority voting but a move from the special legislative procedure to the ordinary legislative procedure – which usually entails a move from unanimity to qualified majority voting. This is in line with the provisions of *subsection (5)(b)* above. Such a move would not require a referendum, however, if a referendum had already been held to approve a decision to move from unanimity to qualified majority voting in accordance with *subsection (5)(i)* in the same area of enhanced co-operation. To do so would in effect mean holding a referendum on whether to change the role of the European Parliament or not, and would not be a transfer of power or competence.

Section 7: Decisions requiring approval by Act

86. *Section 7* provides that in respect of the specific matters set down in *subsections (2) and (4)* a Minister may not confirm the UK's approval of a decision; vote in favour of; or otherwise support a decision, unless the decision is approved by an Act of Parliament. The Treaty Articles covered by this section have been identified as 'ratchet clauses' (also referred to as 'passerelles' or 'bridging clauses'). If an Act of Parliament is not passed, the UK cannot agree to the use of any of these Treaty Articles. All of the decisions covered by *section 7* are subject to a unanimous vote in either the Council or the European Council, meaning that any Member State can veto the proposal. *Section 7* therefore applies when the Government has agreed to the use of one of the decisions set out in this section, and requires Parliamentary approval before the UK can approve formally the decision.
87. The specified decisions have been separated into two subsections because the Act of Parliament necessary to give final UK agreement to their use will be required at different stages in the decision-making process. All of the four decisions listed in *subsection (2)* will require an Act of Parliament *after* the decision to adopt them is taken in Council (in other words, after conditional approval but before formal approval is given by the Member States that the decision can enter into force). *Subsection (1)* stipulates that the UK cannot give final approval to the use of any of the decisions listed in this subsection until the decision has been approved by an Act of Parliament.
88. All of the decisions listed in *subsection (4)* would require an Act of Parliament *before* the UK can vote to agree their use in the European Council or Council (in other words, prior Parliamentary approval is required through an Act of Parliament before the UK can agree to the decision in the European Council or Council). The requirement for an Act of Parliament before the UK can agree to the decision in the European Council or Council is provided for in *subsection (3)*. One of these decisions (Article 17(5) TEU) is subject to a unanimous vote in the European Council, while all the other decisions

are subject to a unanimous vote in the Council. *Sections 7(4)(b), 7(4)(e) and 7(4)(f)* are the equivalent provisions to those in *sections 6(5)(b), 6(5)(i) and 6(5)(j)*, in respect of any relevant proposals which would not affect any of the Treaty Articles set out in *Schedule 1*.

Section 8: Decisions under Article 352 of TFEU

89. The Council can use Article 352 TFEU (sometimes referred to as the broad ‘enabling clause’) to adopt measures in order to attain one of the EU’s objectives, but only where the existing Treaties have not provided the necessary powers to do so already, and so long as the measure concerned remains within the confines of the EU’s existing competence. *Subsection (1)* provides that any one of the conditions in *subsections (3), (4) or (5)* needs to be satisfied in relation to an Article 352 decision.
90. *Subsection (3)* contains the general rule which is that the UK may not agree to a decision under Article 352 TFEU unless the decision has been approved by an Act of Parliament, which specifies the decision to be agreed.
91. *Subsection (4)* provides for the Parliamentary approval of urgent or emergency uses of Article 352 without the need for an Act of Parliament. Article 352 has been used in the past for urgent or emergency uses, where rapid EU action has been agreed but where there was no explicit legal basis on which to base that action. *Subsection (4)(a) and (b)* stipulates that the UK may agree to the adoption of a measure based on Article 352 in urgent or emergency cases if, in each House of Parliament, a Minister moves a motion that the House approve the Government’s intention to support a specified measure on the grounds of urgency, and both Houses of Parliament agree to the motion without amendment.
92. *Subsection (5)* stipulates that an Act of Parliament would not be required for any Article 352 proposal which satisfies any of the exemptions listed in *subsection (6)*. The exemptions in *subsection (6)* seek to prevent unnecessary Acts of Parliament to approve measures which have been agreed in substance under previous measures using the Article 352 TFEU legal base. They cover the following circumstances:
 - a) any proposal using Article 352 TFEU as its legal base which is, in substance, the same as a previous measure agreed by the UK;
 - b) an extension in time of an existing Article 352 TFEU measure, for example a measure that has a three-year timeframe but on which it is decided to extend the measure for a further three years;
 - c) an extension in breadth of an existing Article 352 TFEU measure to incorporate another Member State or third country, such as a measure that proposes to repeat an existing training programme in a third country to safeguard against counterfeiting of the Euro in another third country;
 - d) any proposal to repeal an existing Article 352 measure; and
 - e) any proposal to combine a number of existing Article 352 measures into one EU legal instrument or to consolidate several amendments of an existing measure in one text.
93. If a proposed use of Article 352 relates only to one or more of these exempt purposes, *subsection (5)* provides that a Minister may lay a statement before Parliament. This statement must specify the draft decision and state that, in the Minister’s opinion, the decision relates only to one or more of the exemptions. As with all Ministerial decisions, it would be possible for a member of the public to challenge the decisions of the Minister in such a statement.
94. *Subsection (7)* provides that, where the Government has previously relied upon the emergency exemption in *subsection (4)* to agree an Article 352 proposal, the

Government cannot then seek to rely upon the first two exemptions set out in *subsection (6)*. In other words, the Government would not be able to seek a further exemption to prolong an existing Article 352 measure, if that measure was adopted originally because it was considered urgent. In the case of a subsequent proposal to prolong or renew an ‘urgent’ measure, an Act of Parliament would be required.

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

95. Title V of Part 3 of TFEU contains provisions relating to the Area of Freedom, Security and Justice (‘AFSJ’) (which continues to be commonly referred to as Justice and Home Affairs (‘JHA’)). This part of the Treaty is subject to special arrangements governing the UK and Ireland’s participation in any measures, set out in the AFSJ Protocol. Using the provisions of the Protocol, the UK can decide whether to participate in any of the measures agreed under Title V, but otherwise the UK is not bound by any of the measures agreed under this section of the Treaty.
96. This section provides a series of additional conditions which need to be fulfilled before the UK could agree to participate in three specified decisions in the AFSJ area, considered to be ‘ratchet clauses’. If the Government decides against participating in these measures, then none of these conditions would apply. The three decisions are:
- A decision under Article 81(3) TFEU, which would permit a move from the special legislative procedure to the ordinary legislative procedure (co-decision) in respect of family law measures with cross-border implications. This would in effect mean a move from unanimity to qualified majority voting.
 - A decision under Article 82(2)(d) TFEU, which would permit additions to the list of specific aspects of criminal procedure on which the EU can adopt minimum rules.
 - A decision under Article 83(1) TFEU, which would permit additions to the list of areas of particularly serious crime with a cross-border dimension on which the EU can act to specify minimum rules on the definition of those offences or sanctions to apply.
97. Participation by the UK in any measure brought forward under these provisions would be subject to a two-stage Parliamentary approval process. This would require: (a) Parliamentary approval before the UK could participate in the negotiation of the measure in accordance with the AFSJ Protocol; and (b) an Act of Parliament before the UK could give final agreement to the measure. All three Treaty articles above are subject to unanimous agreement in the Council, and so if the UK agreed to opt-in from the outset (within the three month period provided for by the AFSJ Protocol), the UK would then have the ability to block the measure from entering into force. In such a case, where the UK blocks the adoption of a measure to which the Protocol applies, the other Member States can (after a reasonable period of time has passed) proceed to adopt the measure without the UK’s participation, but the act concerned would not then apply to the UK.
98. The first part of this two-stage process is provided for in *subsection (3)*, which requires both Houses of Parliament to pass without amendment a motion tabled by a Minister, before the UK can opt into a proposal to use any of the three decisions above, or any subsequent decision (as explained in the paragraph above). In this case, a positive vote in Parliament to opt into one of these decisions or a subsequent proposal is not the same thing as giving final agreement to the adoption of the decision in the Council. Instead, this first step can be regarded as Parliamentary approval to allow the Government to enter into negotiations on a proposal at the EU level, where the precise nature and extent of the proposed use of the measure can be determined before Parliamentary approval of the adoption of the measure is sought.
99. The second part of the two-stage approval process is provided for in *subsection (4)*, whereby once the negotiations referred to above are complete, the Government cannot

give final agreement to adopt any of the three decisions set out above, or a subsequent proposal, unless the decision to do so is approved by an Act of Parliament.

100. *Subsections (5) and (6)* relate to Article 4 of the AFSJ Protocol. Article 4 of this Protocol allows the UK to seek to opt into an AFSJ measure at any point after the other EU Member States have adopted it and the final decision has entered into force (a ‘post-adoption opt-in’). The European Commission would then consider whether it is possible for the UK to take part in the measure in question, and if not, to specify the conditions which it would be necessary for the UK to meet, before the UK could then participate. Subject to the fulfilment of any such conditions, the UK can then opt in and participate in the measure concerned, but in doing so would accept the terms of the measure already agreed by the other Member States.
101. *Subsections (5) and (6)(a)* state that the Government may not subsequently opt into any of the three decisions set out in *subsection (2)*, or any subsequent decision brought forward under these three Treaty articles, unless the decision to do so has been approved by an Act of Parliament. This prevents the UK from opting into a measure without passing an Act of Parliament, merely because the decision has already entered into force. The first part of the approval process, namely that both Houses of Parliament should pass a motion tabled by a Minister without amendment, would not be required in the case of a post-adoption opt-in, as the process of opting into the measure would be combined with the agreement to the measure in full.
102. *Subsection (6)(b)* also provides that the UK cannot seek a post-adoption opt-in in respect of any measure brought forward that relies upon an earlier use of the three Treaty articles listed in *subsection (2)*, in which the UK has not participated to date, without an Act of Parliament. This provision is necessary because the UK could decide not to opt into a measure brought forward under any of the three Treaty articles in *subsection (2)*, but then decide it wishes to opt into a proposed legislative act drawing on that earlier measure. By opting into the proposed legislative act, the UK would in effect opt into the earlier measure, and so the provisions of *section 9* should apply in this scenario.
103. An example of this would be if the Council decided to use Article 83(1) TFEU to add female genital mutilation (FGM) to the list of areas of particularly serious crime with a cross-border dimension, and the European Commission then proposed a legislative act which concerned FGM. The Government could decide not to participate in the original decision to add FGM to the list of areas of crime, thereby not requiring the Parliamentary approval set out in this section. But the Government could then decide that it wished to participate in the subsequent legislative act – and as the proposal stems from the original decision to extend the list of areas of crime to include FGM, the provisions of this section would need to be fulfilled before the UK could participate in the negotiations on, and agree to, the measure.

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

104. *Section 10* provides that eight specified decisions would require a motion to be tabled by a Minister and for both Houses of Parliament to approve the motion without amendment before the UK could agree to any of those decisions. These decisions are subject to qualified majority voting in the Council, with the exception of those mentioned in *subsections (1)(c)* (Article 252 TFEU), *(1)(f)* (Article 308 TFEU), *(3)* (Article 48(7) TEU, in relation to a provision of TFEU not requiring the Council to act unanimously), and *(4)* (Article 218(8) TFEU), which are subject to a unanimous vote in Council. In the other cases, even if the UK does not vote in favour of, or otherwise support, a decision that is subject to qualified majority voting, the UK may still end up being bound by that decision if there is a qualified majority in the Council in favour of the adoption of that decision.

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

Section 11: Persons entitled to vote in referendum

105. *Section 11* defines who is entitled to vote in any future referendum held in accordance with *sections 2, 3 or 6*. Under *subsection (1)(a)*, a person is entitled to vote in a future referendum if, on the date of the referendum, he or she would be entitled to vote in a parliamentary election. A person who is entitled to vote in a parliamentary election in the UK must be a British citizen, Commonwealth citizen, a citizen of the Republic of Ireland or a British citizen who qualifies as an overseas elector. Such a person must also be at least 18 years of age, not subject to any legal incapacity, and registered in the register of parliamentary elections of a constituency of the UK. *Subsection (1)(b)* enables a peer, who is disqualified under common law from voting in parliamentary elections, to vote in a future referendum if, on the date of the referendum, he or she would be entitled to vote in a local government election, including a municipal election in the City of London, or if he or she is a British citizen resident abroad and is otherwise entitled to vote in a European Parliamentary election. Other citizens of the EU are excluded from voting in referendums held as a result of this Act.
106. *Subsection (1)(c)* allows any Commonwealth citizens who are entitled to vote in Gibraltar at a European Parliamentary election on the day of a future referendum, the right to vote in any such referendum that would be applicable to Gibraltar.

Section 12: Separate questions

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

Section 13: Role of Electoral Commission

108. *Section 13(a)* provides that the Electoral Commission has a duty to promote public awareness of any referendum to be held pursuant to *sections 2, 3 or 6* and how to vote in it to the extent that the Electoral Commission deems appropriate at the time that any future referendum held in accordance with this Act is called. *Section 13(b)* provides that the Electoral Commission may promote public awareness of the subject matter of the referendum. They would do so by providing factual and neutral information on that subject. If the Electoral Commission decides to undertake that role in *section 13(b)* it shall take whatever steps it deems appropriate at the time of that future referendum.

Supplementary

Section 14: Consequential amendments and repeals relating to Part 1

109. *Subsection (1)* provides for the consequential amendment of section 5 of the 2008 Act. Section 5 provides that an Act of Parliament is to be passed before the UK can ratify any amendment to the Treaties of the EU (as defined in paragraph 20 of these Notes). The provisions of Part 1 of this Act supersede section 5 of the 2008 Act, except in relation to the Treaty Establishing the European Atomic Energy Community ('Euratom Treaty'), as this Act does not extend to amendments of that Treaty. In the event of any amendment being proposed to the Euratom Treaty, section 5 of the 2008 Act would continue to apply.
110. *Subsection (2)* updates the Constitutional Reform and Governance Act 2010 so that the exemption provided by section 23 of that Act applies to a treaty to which any of the provisions of Part 1 of this Act applies.

*These notes refer to the European Union Act 2011
(c.12) which received Royal Assent on 19 July 2011*

111. *Subsection (3)* provides for the repeal of a number of existing statutory provisions. Section 2 of the European Communities (Amendment) Act 1993 requires an Act of Parliament to be passed before the UK can agree to join the Euro, and so this provision is superseded by the relevant provisions of this Act which require an Act of Parliament to be passed, and a referendum to be held.
112. Sections 1(2) and 1(3) of the European Communities (Amendment) Act 2002 provide that an Order must be laid before the UK can agree to a decision under Article 262 TFEU. Section 12 of the European Parliamentary Elections Act 2002 provides that any treaty which provides for an increase in the powers of the European Parliament cannot be agreed by the UK unless an Act of Parliament has been passed. Section 6 of the 2008 Act provides for the parliamentary control of certain decisions. These provisions are superseded by the provisions of this Act and are no longer required.