How effective is Parliament's current scrutiny of treaties in both holding the Government to account and helping it get the best agreements possible?

1. Treaty making falls under the Royal Prerogative and as such Parliament’s ability to hold the Government to account is limited.\(^1\) Under the Constitutional Reform and Governance Act (2010), treaties are laid before parliament for a period of twenty-one days before being ratified, saving for the exceptions to this procedure provided under this Act.\(^2\) Thus, MPs are generally afforded the possibility of debating and delaying treaties. Treaties that give rise to legislation will also require the approval of Parliament.

2. Whether parliamentary accountability leads to better treaty making is a matter of debate among political scientists. Robert Putnam’s seminal theory of two level games suggests that governments generally prefer low levels of accountability in the domestic arena when negotiating international agreements.\(^3\) However, on occasion, Putnam suggests, governments may choose to tie their hands at home through more stringent parliamentary procedures to drive a harder bargain in negotiations. This argument appeals to the so-called paradox of weakness, whereby states that face greater challenges in approving international agreements will be able to extract more concessions.\(^4\) Tying hands, as Putnam acknowledges, can lead to the rejection of treaties if domestic constraints prove more stringent than anticipated.

3. Our study of EU treaty making in the EU-28 since 1950 finds that parliaments have assumed a more prominent role in the approval stage of treaty making in a majority of member states (see below).\(^5\)

\(^1\) This evidence is submitted in a personal capacity and does not necessarily reflect the views of Birkbeck College or University College Dublin.

\(^2\) See Part 2, Constitutional Reform and Governance Act (2010).


We find no evidence, however, that the increased role of parliaments was an attempt to tie hands in EU treaty negotiations. Instead, our findings point to the importance of legitimacy rather than leverage. More specifically, EU member states with low levels of trust in national governments are more likely to adopt constitutional rules and norms that give parliaments a greater role in treaty making.

**What challenges does Brexit pose for Parliament's consideration of treaties?**

4. Brexit is undoubtedly a major challenge for Parliament's consideration of treaties. The Withdrawal Agreement is a complex and highly contested exercise in treaty making that leaves few areas of the UK economy and society untouched. Nor is Brexit limited to this treaty and the agreement governing the UK’s future relationship with the EU. By one measure, the Government will need to negotiate at least 750 treaties with 168 states if it wishes to recover the agreements on trade, regulatory, nuclear and other issues that it will forego by leaving the EU.6

5. Brexit also reflects the tension between representative (Parliament) and direct (referendum) democracy in legitimating EU treaties. In the 2000s, EU treaties were singled out as subject to special Parliamentary approval.7 Nonetheless, the European Union Bill (2004-05) provided for a referendum on the European Constitution which was cancelled after this treaty was set aside. The European Union Act (2011) specified that in addition to an Act of Parliament certain categories of EU treaties would also require a referendum, although the fact that no such treaty materialised added to political pressure from opponents of EU membership.

6. In committing to hold a referendum in his Bloomberg speech in January 2013, Prime Minister David Cameron alluded to the problems of legitimacy facing EU treaty making, arguing that ‘democratic consent for the EU in Britain is now wafer thin’.8 The contested process through which the UK is leaving the EU and mounting pressure for a referendum on the Withdrawal Agreement shows that the challenge to Parliament’s consideration of treaties...

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6 McClean (2017).
7 EU (Amendment) Act 2008.
To what extent, if at all, does the judgment of the Supreme Court in the Miller case on triggering Article 50 have implications for the government's future treaty actions?

7. The Supreme Court’s ruling in the Miller case confirms what has already been clear from four decades of EU treaty making in the UK: although Parliament exercises limited oversight over treaty making, its role cannot be set aside by the executive where the prerogative would take away statutory rights. The Treaty on European Union gives any member state the right to withdraw from the EU in accordance with its own constitutional requirements but the Government’s decision to give notice to trigger Article 50 without prior parliamentary approval overstepped the Royal Prerogative. That the Government sought to rely on prerogative powers in this case was not without constitutional irony. The UK’s referendum on leaving the EU was, as noted above, premised on pressure for a more participatory approach to treaty making. That the Government’s responded to this vote by exerting the executive’s traditional role in treaty making rested uneasily with this state of affairs.

8. Miller can be seen as addressing a *sui generis* constitutional moment for the UK. It is likely the support for Parliamentary approval in that case leads to a wider role for Parliament in treaties seen as constitutionally significant. The challenge will be to define that term which could arise under the procedure allowing for Ministerial explanation in the 2010 Act.

Should different types of treaties be subject to different levels of scrutiny? If so, how should these be differentiated?

9. It is common practice in EU member states to subject different types of treaties to different levels of scrutiny. Under the Constitutional Act of Denmark of 1953, for example, the Danish government cannot enter into any obligation in the domain of foreign affairs without the consent of the Danish parliament (*Folketing*), this provision covering instances in which the approval of the legislature is formally required and cases that are otherwise of ‘major importance’.9 Treaties that do not transfer sovereignty – or more accurately that do not delegate powers ‘vested in the

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9 Section 19, The Constitutional Act of Denmark (1953).
authorities of the Realm under this Constitution’ – are passed by a simple majority. Treaties entailing such a transfer can be approved by parliamentary channels alone by five-sixths of the members of the Folketing.\textsuperscript{10} Constitutional amendments must be passed twice by parliament by a simple majority after an intervening election before being subject to a referendum.\textsuperscript{11}

\textbf{Should different types of treaties be subject to different levels of scrutiny? If so, how should these be differentiated?}

10. In an era where the benefits of globalisation are being publicly questioned as never before, parliamentary approval for treaties is arguably a minimum requirement for ensuring legitimacy. Beyond this, there is an argument for differentiating according to the type of approval required depending on the scope and ambition of the treaty. For more ambitious treaties, as in a decision to delegate powers to an international organisation, approval via a three-fifths majority or higher helps to signal the significance of the agreement.

11. Many EU member states distinguish between different types of treaty. In Finland, for example, treaties that concern the constitution, national borders or the transfer of authority to the EU or an international body of significance to Finnish sovereignty must be approved by a two-thirds majority.\textsuperscript{12} Otherwise, only a simple majority is required.\textsuperscript{13} Latvia’s constitution requires the approval of the state’s parliament (\textit{Saeima}) for all international agreements that ‘settle matters that may be decided by the legislative process’.\textsuperscript{14} A simple majority vote after two readings is required for this purpose.\textsuperscript{15} Where international agreements delegate ‘State institution competencies’, or parts thereof, to international institutions, two-thirds of members present must vote in favour of this agreement in a sitting of the Saeima in which two-thirds of all members participate.\textsuperscript{16} It could be argued that provisions of this sort make little sense now that the UK is leaving the EU. However,

\textsuperscript{10} Section 20, The Constitutional Act of Denmark (1953).
\textsuperscript{11} Section 88, The Constitutional Act of Denmark (1953).
\textsuperscript{13} Section 94, Constitution of Finland Constitution of Finland (1999, amended to 2011).
\textsuperscript{14} Article 68, Constitution of Latvia of 1922 (reinstated 1991, amended to 2014).
\textsuperscript{15} Article 114(2) (3), Rules of Procedure of the Saeima (1994).
Brexit affords an opportunity to reconsider how the UK might join international organisations in the future and the most appropriate way to legitimate such decisions.

Is a parliamentary treaties scrutiny committee required to examine government treaty actions post-Brexit? If so, how should it be composed and supported, and what powers should it have? Or would another model be appropriate?

12. In deciding on the nature of a treaties scrutiny committee, regard should be had to the interplay of credibility (at the international level of negotiation), and legitimacy (at the domestic level) where government is both responsible and accountable. Such a committee emphasizes deliberation at the domestic level. Such deliberation is also likely to make the committee more of an agenda-setter in negotiations. 17

What models of treaty scrutiny in other countries are most effective and what might the UK Parliament learn from them?

13. Our research on EU treaty making showed that the UK is in a minority among EU member states in requiring a simple majority vote for the approval of EU treaties. Fifteen EU member states require a three-fifths majority or higher for major treaty amendments, giving parliaments a significant say over the future of the EU. It is difficult to say whether these different models of treaty scrutiny are more or less effective than the approach followed in the UK. Concerns over effectiveness should also be viewed alongside increasing concerns over legitimacy.

14. Germany is an example of a member state that increased parliamentary oversight of EU treaty making. The Treaties of Paris and Rome were approved by the Bundestag on the basis of a simple majority vote and without formally consulting the Bundesrat. Since the Maastricht Treaty, the constitutional norm is that all major EU treaties are approved on the basis of a two-thirds majority in both houses even in cases where the constitution is not amended. As such, rules governing the parliamentary approval of

EU treaties in Germany are effectively on a par with those for constitutional amendment.

What role should the devolved institutions have in negotiating and agreeing treaties?

15. In June 2016, 62% of voters in Scotland supported remaining in the EU. The corresponding figure in Northern Ireland was 56%. The UK’s exit from the EU consequently reveals significant tensions among the four countries of the UK in relation to this particular episode of treaty making.

16. Belgium’s federal model is a clear – though not unproblematic – model for giving devolved institutions a full say in treaty making. This state’s subnational parliaments have been routinely involved in EU treaty making since the early 1990s. A cooperation agreement between the federal government, the communities and the regions sets out the modalities for this multilevel approach to treaty making. Under this agreement, it falls to a working group of the Inter-Ministerial Conference for Foreign Policy to decide on whether a treaty is ‘mixed’, in which case the agreement is forwarded by the Minister of Foreign Affairs to the regions and committees for their approval. In practice, most treaties are treated as mixed because they touch upon the competences of all tiers of government.\(^{18}\) Belgium’s federal approach sometimes impedes treaty making, as occurred in October 2016 when the Parliament of the Walloon Region withheld its consent for the EU-Canada Comprehensive Economic and Trade Agreement (CETA) shortly before this agreement was due to be signed.

17. Austria provides an alternative model of devolved treaty making that warrants consideration. Under the Constitution of Austria, treaty making powers are shared between the federal government and the Länder, insofar as the treaty in question concerns the competences of the latter. The Länder also have treaty-making powers within their own autonomous sphere of competences, as regards agreements with each other and with states and regions bordering Austria.\(^{19}\) Where such competences are affected, the federal government is required to consult with the Länder, who, if


\(^{19}\) Article 16(1), Austria Constitution of 1920 (reinstated in 1945 and amended in 2013).
they act in concert, can require the federal government to take account of their comments, unless there are compelling foreign policy reasons to do otherwise.\textsuperscript{20}

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\textsuperscript{20} Article 10(3), Austria Constitution of 1920 (reinstated in 1945 and amended in 2013).