The role of the EU Committee

1. I make this submission as Chair of the European Union Select Committee, which agreed it at its meeting on 11 December 2018. While the domestic arrangements for treaty scrutiny do not fall within the EU Committee’s remit, this submission takes account of our longstanding responsibility for scrutinising EU documents (including, for example, Council Decisions authorising the opening of negotiations, or final ratification of EU international agreements). We have also drawn on our close engagement with the European Parliament (which has a role in the EU treaty making process, underpinned by Article 218 of the Treaty on the Functioning of the European Union), and our experience of scrutinising the UK’s negotiations with the EU on UK withdrawal from the EU, under Article 50 of the Treaty on European Union.

The UK constitution and EU membership

2. Over the last 45 years membership of the EU has become an integral component part of the United Kingdom’s constitutional settlement. Nowhere is this more clearly demonstrated than in the devolution settlements of the late 1990s, which were predicated upon EU membership and respect for EU law. Here, as in other areas, the process of disengaging ourselves from our EU membership has exposed just how intertwined domestic and EU law have become. We cannot simply turn the clock back to 1970s: as the debate over UK-wide ‘common frameworks’ demonstrates, our constitution will, for better or worse, retain the marks of EU membership for many years to come.

3. The last Labour Government’s ‘Governance of Britain’ programme of constitutional reform, which gave rise to the treaty provisions in the Constitutional Reform and Governance Act 2010, also seems to have taken the extent of EU competence in respect of international agreements largely for granted. Indeed, the consultation paper War powers and treaties: limiting Executive powers, published in October
2007, made no reference at all to the EU’s role in negotiating international agreements on behalf of the UK.¹

4. Not surprisingly, therefore, the output of the ‘Governance of Britain’ initiative was limited in scope: the codification of the ‘Ponsonby Rule’ in the CRAG Act 2010, supplemented by provision that the House of Commons could, by passing repeated motions resolving that the treaty should not be ratified, indefinitely delay (though not technically prohibit) ratification.²

5. Perhaps the only reason successive Governments have been able to get away with limiting Parliament’s role in this way is because the treaties that matter most—particularly trade agreements—have been negotiated on our behalf by the EU. Operating in accordance with EU law, the European Commission has conducted negotiations, while the European Parliament has provided increasingly effective democratic oversight. Meanwhile, our domestic procedures for scrutinising treaties have languished.

6. Our exit from the EU institutions on 29 March 2019 creates a real risk that a post-Brexit UK will have to fall back on out-dated and inadequate domestic conventions and procedures. I therefore hope that the Constitution Committee will underline that the mechanisms for treaty scrutiny that have evolved during the period of UK membership of the EU should be regarded as part and parcel of the UK’s constitutional settlement. Failure to replicate comparable arrangements domestically post-Brexit would be a retrograde step, reducing transparency and democratic accountability.

**Scrutiny of treaties at EU level**

7. This section gives a brief overview of the process for scrutinising international agreements negotiated at EU level.

8. Article 218 of the Treaty on the Functioning of the European Union sets out the procedure for negotiating EU international trade

² Section 22 of the CRAG Act allows Ministers in exceptional cases to bypass the parliamentary scrutiny provisions contained in section 20.
agreements. As a preliminary stage, the Commission typically considers whether an agreement is desirable, and engages in a public consultation. It then makes a recommendation to the Council of Ministers, made up of representatives of Member State governments. The recommendation is a public document, though it is not in itself legally binding.

9. The first legally binding stage is for the Council of Ministers, in response to the Commission’s recommendation, formally to authorise the opening of negotiations. It does so by adopting a legally binding Decision, which is first published in draft and is subject to scrutiny by national parliaments. The Decision may include negotiating directives to the Commission, though these are not binding.

10. Any decision by UK ministers to vote in favour of a Decision by the Council of Ministers is subject to the Scrutiny Reserve Resolution, according to which no Minister of the Crown may give agreement in the Council to any document while it is subject to scrutiny by the Committee. Ministers may, however, over-ride this scrutiny reserve if they consider there are “special reasons” that justify them in so doing.

11. The European Union Committee enjoys considerable flexibility in how it exercises this scrutiny function. In most cases, scrutiny is conducted by means of correspondence with Ministers. But for important agreements, the Committee may engage in more wide-ranging scrutiny. In the case of the Transatlantic Trade and Investment Partnership, negotiations on which began in mid-2013, the EU Committee’s External Affairs Sub-Committee undertook an inquiry from late 2013 to early 2014, publishing a detailed report on the proposed agreement in May 2014.

12. Once the Council has adopted its Decision authorising negotiations, the negotiations themselves are normally led by the Commission,

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3 The EU’s exclusive competence to negotiate and conclude international trade agreements is set out in Article 207 TFEU; Article 218 outlines the process. Other legal bases may be used for other types of international agreement.


5 EU Committee, The Transatlantic Trade and Investment Partnership, 14th Report, session 2013-14, HL Paper 179. Negotiations on TTIP have stalled since the election of President Trump.
represented by a nominated negotiator (often the EU Trade Commissioner). The Commission reports back to the Council after each negotiating round, and its conduct of the negotiations is also scrutinised by the European Parliament (typically through its International Trade (INTA) Committee), which, under Article 218(10) TFEU, must be “immediately and fully informed at all stages of the procedure”.6

13. More detailed arrangements for parliamentary oversight are contained in a binding 2010 Framework Agreement on relations between the European Parliament and the Commission, according to which the Parliament is guaranteed an opportunity “to express its point of view if appropriate”. The Commission is in turn required “to take Parliament’s views as far as possible into account”.7

14. Once the Commission has completed the negotiations, the Council formally concludes them,8 in most cases having first secured the consent of the European Parliament.

15. To illustrate how this works in practice, in 2013 the Council adopted a Decision instructing the Commission to commence negotiations on an EU-Japan economic partnership agreement. The negotiations were closely followed by the INTA Committee, which appointed its own ‘monitoring group’: in 2016-17, for instance, the Commission held six meetings with the INTA Committee (three involving Commissioner Malmström) and seven with the monitoring group.9 In July 2018, following completion of the negotiations, the Council adopted the agreement. The INTA Committee then held further hearings, visited Japan in September, and on 5 November agreed a report recommending that the European Parliament vote in favour of the agreement.10 The Parliament is expected to vote on the agreement at its December plenary meeting.

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6 Different procedures apply where the agreement envisaged relates exclusively or principally to common foreign or security policy.
8 The legislation providing for the conclusion of negotiations, and for the EU’s signature and ratification of international agreements, is also deposited for scrutiny by committees in both Houses.
Drawing lessons for the UK

16. The events of the last two and a half years show that we need to raise our game in Westminster. Without established structures and procedures, parliamentary scrutiny of the Brexit negotiations has been diffuse, and lacking teeth. There have been innumerable statements and answers to questions, written or oral, and Ministers have made many appearances before committees. But the committees directly tasked with scrutinising UK-EU relations (notably the EU Committee in the Lords, and the Exiting the EU Committee in the Commons) have, in the absence of clearly defined processes or powers, found it difficult to get any purchase on the Government’s conduct of the negotiations, or to get beyond the bland generalisations offered up on the floor of the House.

17. This is illustrated by the fact that no complete text of the draft Withdrawal Agreement was made available to committees between 19 March and 22 November 2018, leaving the EU Committee just nine working days in which to analyse and report on the 585-page document, and its accompanying Political Declaration (which appeared only on 25 November), ahead of the House of Lords debate on 5 December. In marked contrast, the European Parliament’s Brexit Coordinator, Guy Verhofstadt MEP, and its Brexit Steering Group, have been given regular and detailed confidential updates on negotiations.

18. The institutions of the European Union are very different from those of the United Kingdom, and the EU’s scrutiny model cannot simply be transplanted to Westminster. But some lessons are clear. First, effective parliamentary scrutiny of treaty negotiations requires trust—a willingness to engage in frank discussion, to give access to documents, and to share and respect confidences. Such trust cannot easily be built up in plenary debate, so we need a dedicated select committee, with a clear mandate from the House. That committee and its staff would work with Government over time to build up good channels of communication and close working relationships. We express no view on what kind of committee this should be, whether Lords, Commons or Joint. But whatever the precise model, a concentration of effort, by means of committee working, appears to be the best way forward.

19. The next lesson is that committee scrutiny should engage three key stages of the process: before commencement of negotiations, when a negotiating mandate is being drawn up; during negotiations; and
after agreement has been reached, when parliamentary approval for ratification is sought.

20. Of these three stages, the third is already a formal, public process, which engages Parliament’s statutory role under the CRAG Act. But given that Parliament is excluded from stages one and two, and its role is merely to approve ratification, it is no surprise that scrutiny at this final stage is largely technical, or that the Secondary Legislation Scrutiny Committee, which is tasked with scrutinising treaties laid under the terms of the Act, has shown so little inclination to bring them to the attention of the House.

21. As for the earlier stages, a degree of formality could be built into the first, pre-commencement stage. Even if there is no appetite for requiring parliamentary approval before the commencement of negotiations, there could be a formal process, involving committee hearings, to bring transparency and accountability to the Government’s actions, and to its setting of objectives for the forthcoming negotiations.

22. The second stage, scrutiny during the negotiations, might have to be less formal, given the fluidity of negotiations and the need, at certain stages, for confidentiality. But there could still be private discussions with Government, including exchanges of documents and correspondence, alongside occasional public hearings, to ensure that committees, stakeholders and the wider public are kept appropriately informed.

23. As to how to implement such procedures, much could be done by setting clear terms of reference for any committee. But this will not be enough in itself: the experience of 45 years of scrutiny of EU laws shows that several layers of guidance are needed, including committee terms of reference, a scrutiny reserve resolution that has been formally adopted by the House, and detailed internal guidance for departments, covering the processes to be followed, the categories of document to be deposited, and so on. Such well-established processes may shed light on the best way to approach scrutiny of treaties, as do elements of the European Parliament’s 2010 Framework Agreement with the Commission.

24. The Constitution Committee may also wish to reflect on the possibility of liaison between Westminster and the devolved legislatures, given that so many international agreements cover areas of both reserved
and devolved responsibility. This kind of liaison is already happening at an informal level, as the success of the Interparliamentary Forum on Brexit (within which the Constitution Committee is represented) demonstrates. While more formal structures for such dialogue will need to form part of an agreed over-arching structure for interparliamentary relations post-Brexit, and to be developed in the context of a wider conversation about the impact of Brexit on the devolution framework, I have no doubt that they should figure in any long-term model for scrutiny of treaty-making powers.

**Conclusion**

25. Parliament, even where it does not hold direct power, can exercise influence for good: research by the Constitution Unit suggests that simply having to explain its decisions and actions to select committees in public is an important factor in improving the performance of Government.\(^{11}\) It would be unfortunate if, as we left the EU, the Government were to reassume the extensive prerogative power to negotiate treaties on the part of the UK that has been exercised on our behalf by the EU, without any effective and counter-balancing parliamentary oversight,\(^{12}\) and I therefore hope the Constitution Committee will agree that establishing this oversight should be a priority in the coming months.

14 December 2018

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\(^{12}\) The case of *Miller* demonstrates, however, that in certain cases the courts may take an interest in the use of prerogative powers, particularly where they affect individual rights.