Select Committees and future treaty scrutiny

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Summary

The Liaison Committee’s inquiry into select committee effectiveness asks, “How will the UK’s future relationship with the EU have an impact on the departmental select committee system?” This memo describes the current treaty scrutiny procedures and assesses their effectiveness. It then presents a range of options for strengthening existing committees’ treaty roles.

Treaty actions such as negotiation and ratification are undoubtedly matters for the Government under the royal prerogative. Many treaties are uncontroversial, but some have significant impacts on daily life across the UK. After Brexit, more UK policy will be set at the international level because responsibility for transnational topics such as trade, security, the environment and fisheries will return from the EU to the UK. Whether or not a Withdrawal Agreement is implemented alongside negotiations on future UK-EU relations, hundreds of EU agreements reached with third countries (not just on trade) must be replicated, and new deals will be sought with the EU and beyond.

Parliament has a legitimate role in scrutinising the Government’s treaty actions, but it has few structures or procedures for doing so. The new provisions of the Constitutional Reform and Governance Act 2010 (CRAG Act) that give limited statutory effect to parliamentary objections to treaties have yet to be used, debates on any implementing legislation cannot influence the aim or content of treaties, and committees rarely engage with non-EU treaties.

After Brexit, the UK will lose the scrutiny of EU treaties that is currently carried out through its EU scrutiny mechanisms and the European Parliament (EP). Many Commons and Lords committees are now interested in whether the remaining treaty scrutiny procedures are enough on their own. There is a growing sense that greater parliamentary scrutiny would not only hold the Government to account for its treaty actions but also help it achieve well-supported foreign policy goals.

There is a range of options for increasing treaty scrutiny. The option that has generated most attention is a new, permanent, specialist Joint Treaty Committee. Such a committee would need a broad and flexible remit covering a range of major and minor Government treaty actions, to avoid either overwhelming Parliament or hamstringing the Government. It could be involved at a number of stages, from setting negotiating aims, through ratification and implementation, to withdrawal. A new treaty committee could sift the Government’s treaty actions and recommend which need further scrutiny. Detailed scrutiny could be carried out by specialist committees or sub-committees, with input from the devolved assemblies where appropriate. This sifting and scrutiny should be supported by clear treaty information requirements, and a specialist treaties secretariat.

A major question is the relationship between a new treaty committee and any existing/developing scrutiny of treaties. The Lords EU Committee is already sifting and scrutinising the UK treaties intended to replace EU-third country agreements after Brexit. The Commons International Trade Committee has asked for a specific role on trade treaties. A number of committees are looking into Parliament’s role in scrutinising how a Withdrawal Agreement is implemented as well as the negotiations on future UK-EU relations. Although the Government has taken varying stances on these issues, they are all interconnected, and should at the very least be closely coordinated.

Some changes should be put in place in time for Exit Day, and few require legislation. Many could be implemented relatively quickly through ministerial statements, orders and standing orders of each House, committee terms of reference and administrative arrangements. The Procedure Committee could be invited to take forward any recommendations of by the Liaison Committee. It would be important to liaise with the House of Lords which is also developing its treaty scrutiny.
Key decisions

1. **How to expand, clarify and strengthen existing committees’ treaty roles.** This could include creating a new treaty scrutiny reserve, allowing treaties and implementing legislation to be scrutinised and debated together, involving devolved legislatures, and/or establishing a new specialist treaty secretariat.

2. **Whether to establish a new dedicated parliamentary Treaty Committee.** It could be a Joint Committee of both Houses, or a Commons Committee, and good coordination with other committees would be crucial. It should have a broad and flexible remit, and could sift and/or scrutinise treaties.

3. **What treaty information the Government should provide,** when and on what terms, and how this should be agreed.

4. **How a parliamentary treaty approval requirement might be developed in future.**

5. **How to develop prioritised plans for implementing the options selected,** including any interim measures that could be in place before Exit Day. For instance, the Procedure Committee could be asked to take this on, in consultation with the House of Lords.
1. Current treaty scrutiny and its effectiveness

1.1 Parliament’s role is limited

1. Whilst the UK is ahead of many comparable countries in having statutory provisions relating to Parliament and treaties, its lack of treaty scrutiny information, procedures and mechanisms mean that in practice the Government can set and change policy at the international level with no input from Parliament.

2. The table below outlines the general roles of Government and Parliament in UK treaty-making, and more detail is given in the following paragraphs.

Outline of treaty-making in the UK

- The Government negotiates a treaty, which for multilateral treaties is often a lengthy process involving a series of inter-governmental meetings.
- The Government signs the finalised treaty. Signing usually shows only that the State agrees with the text and puts it under an obligation to refrain from acts that would defeat the object and purpose of the treaty. The UK Government does not usually sign a treaty unless it has a reasonably firm intention of ratifying it. Sometimes, however, a treaty itself provides that it enters into force on signature alone.
- The Government lays the signed treaty before Parliament along with a brief Explanatory Memorandum. The relevant select committee is notified of the treaty, and the Government may not ratify it during the following 21 sitting days.
- Parliament makes any necessary domestic legislative changes, either before, after or at the same time as the treaty is laid before Parliament.
- Parliament does not have to do anything further: but if either House resolves against ratification during that period, the Government must explain why it wants to ratify anyway. The House of Commons may then pass another resolution against ratification, and that process can continue indefinitely.
- If there are no outstanding resolutions, the Government can ratify the treaty. Ratifying is when a State confirms that it is bound by a treaty that it had already signed.
- The treaty enters into force for the UK according to the provisions in the treaty – for example six months after ratification, or once the treaty has been ratified by 20 States.

The Government makes treaties

3. The UK Government carries out all treaty actions (including negotiating, signing, ratifying, amending, and derogating or withdrawing from international treaties) under its prerogative powers on foreign relations. A range of Government departments is responsible depending on subject matter. The Foreign and Commonwealth Office has a Treaty Section which advises other departments on treaty practice and procedure, and provides information on UK treaties including guidance on procedures and a monthly Treaty Action Bulletin.

4. But treaties cannot automatically change domestic law or rights, and – as the Supreme Court ruled in the 2017 Miller case – Government treaty actions cannot make major changes to the UK’s constitutional arrangements or to individual rights without Parliamentary authority.

Parliament makes any implementing legislation

5. Parliament (and/or the devolved legislatures) is involved if domestic law needs to be changed to implement a Government treaty action.

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1 See Parliament’s role in ratifying treaties, Commons Library Briefing Paper 5855, 17 February 2017

2 R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5
6. But many treaties — even some with major policy implications — require only minor adjustments to domestic law, or none at all. For example, the 2013 Arms Trade Treaty needed only adjustments to secondary legislation. Invoking derogations from a treaty may be of political and legal interest and yet require no domestic legislation.

7. And for those treaties that do require new legislation, that looks only at how the UK would implement (at least parts of) the treaty, rather than whether the UK should ratify it. It does not even touch on whether the UK should make reservations or interpretative declarations. This still can create room for debate in Parliament – and sometimes the devolved assemblies – about exactly what legislative change is needed to give effect to a new obligation. But to the extent that implementing legislation should not conflict with the treaty obligations that the Government has already signed up to, Parliament’s hands are tied.

Parliament is not required to scrutinise, debate or approve treaties

8. The Government has no obligation to inform Parliament when it starts negotiations, to provide updates in public or private, or to take into account any views expressed by Parliament. Parliament is formally notified only when the Government lays a signed treaty that it wishes to ratify, and even at that point it is not required (or supported) to scrutinise, debate or approve treaties. It has no formal role in setting negotiating aims, scrutinising progress on negotiations, or derogating or withdrawing from treaties.

9. Parliament has no specific mechanisms for scrutinising the Government’s treaty actions. There is no committee to which treaties must be referred, and no requirement for any committee to report on a treaty at any stage.

10. The Joint Committee on Human Rights has committed to assessing treaties with human rights implications, and it sometimes reports on them. And since 2013, the Lords Secondary Legislation Scrutiny Committee (SLSC) has undertaken systematic scrutiny of signed treaties subject to ratification, though it rarely does more than publish a short ‘information note’.

11. There is no comparable systematic scrutiny structure in the Commons. No Commons committee has treaty scrutiny explicitly within its remit, and whether the remit of the European Scrutiny Committee covers international agreements that do not derive from EU obligations is unclear.

12. The Government has since 2000 agreed to alert the relevant Departmental Select Committee when a treaty is laid, and but this commitment does not appear in the FCO's treaty guidance, and it is not clear how it works in practice. Few if any committees have scrutinised treaty provisions.

13. The Government has also committed to allowing debates on some treaties on the floor of the House. The original Ponsonby Rule said “if there is a formal demand for discussion forwarded through the usual channels from the Opposition or any other party, time will be found for the discussion of the Treaty in question.” Then in 2000 it agreed to a proposal from the Procedure Committee on debating treaties:

The Government is happy to undertake normally to provide the opportunity for the debate of any treaty involving major political, military or diplomatic issues, if the relevant select committee and

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3 Joint Committee on Human Rights, Protocol No. 14 to the European Convention on Human Rights, HL 8/HC 106 2004-05, 8 December 2004, para 7. The Government has undertaken to send copies of any treaties with ‘significant’ human rights issues to the JCHR.

4 Its responsibility for Brexit-related treaties has now been passed temporarily to the Lords European Union Committee

5 For example its Sub-Committee B published an information paragraph on five nuclear agreements in its 7th Report of 2017-19, HL Paper 239, 29 November 2018

6 “The FCO will ensure that a copy of each Command Paper and accompanying Explanatory Memorandum (EM) for treaties laid before Parliament under the Ponsonby Rule is sent to what the FCO judges to be the relevant departmental select committee. It would then be for the lead committee to decide whether the Command Paper and EM might be more relevant to another committee or relevant to more than one committee and to pass it on accordingly.” Government response to the Second Report of the Procedure Committee: Parliamentary Scrutiny of Treaties (HC 210, 27 July 2000)

7 HC Deb (1924) 171, c1999-2005, 1 April 1924
the Liaison Committee so request. It agrees that this would be a useful development of the Ponsonby Rule. The form of the debate will remain a matter for the Government, although it will of course take the views of the Committee concerned and of the Liaison Committee into account.  

14. This leaves open the possibility that the debate would be on neutral terms and not allow for a vote on a motion that the treaty should not be ratified.

15. In 2007 the Government said “There have been no requests for a debate under this procedure since the undertaking was given”. However, in 2014 it turned down a request from the JCHR for a debate in both Houses on Protocol 15 amending the European Convention on Human Rights. The Minister said: “It would however be for your Committee to propose a motion to take note of your report, and to secure time for this to be debated in either or both House during the extended scrutiny period”.  

16. Further, the UK’s devolved executives and legislatures have very limited involvement in non-EU treaties, even though they may be required to legislate for and implement them.

17. In many other countries (and the EU), parliaments and their committees are actively involved in scrutinising Government treaty actions, and may even need to give their consent before ratification.

The CRAG Act: an opportunity to scrutinise and object

18. The Constitutional Reform and Governance Act 2010 (CRAG Act) gives Parliament a statutory opportunity to scrutinise most non-EU treaties and to object to them being ratified. But it says nothing about how this scrutiny should be done, or about the process for debating or voting on a resolution against ratification. It is only a delaying power, unless repeated resolutions are passed by the Commons. Yet the Government often refers to the CRAG Act as setting out a requirement for parliamentary scrutiny or even “approval” of treaties.

19. The CRAG Act followed an extensive period of consultation on Labour’s Governance of Britain proposals, which were a package of reforms concerning a range of prerogative powers. There was a green paper, a white paper, a draft Bill and a Joint Committee and other pre-legislative scrutiny of the draft Bill. However, the treaty provisions attracted little interest, even during debates on the CRAG Bill itself (which went through Parliament quickly in the ‘wash-up’ period at the end of 2010).

20. Part 2 requires the Government to lay before Parliament most treaties it wishes to ratify, along with an Explanatory Memorandum, for 21 sitting days. During that period, the Government may not ratify the treaty. This gave statutory form to part of a constitutional convention on parliamentary involvement with treaties (the 1924 Ponsonby Rule).

21. The 2010 Act also for the first time gave parliamentary resolutions to disapprove of ratifying non-EU treaties statutory effect. If a resolution is passed in either House, the Government must explain why it nevertheless wishes to ratify. The Commons may then pass another resolution, and that process can repeat indefinitely – if time on the floor of the House can be found for repeated debates and votes. Neither House has yet resolved against ratification of a treaty under these provisions, and there are limited options for how the Commons can do so when the Government controls the timetable there.

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10 Letter from Lord Faulks QC and Rt Hon Simon Hughes MP, Ministers of State for Justice, 25 November 2014
11 See Commons Library Standard Note 4703, Governance of Britain: An update, 16 October 2009
12 As set out in HC Deb 1 April 1924 cc2001-4 and subsequently developed (for example to include Explanatory Memorandums)
13 A search of the Early Day Motions database shows only two EDMs tabled since 2010 with the relevant CRAG wording: on a US-UK mutual defence agreement and on a Transfer of prisoners agreement with Nigeria. Neither was debated on the
22. The treaty provisions of the 2010 Act are limited:

- They do not require Parliament to scrutinise, debate or vote on treaties, or say anything about how this might be done or supported.
- They apply only to ratification or equivalent, not to any other Government treaty actions such as setting negotiating aims or signature, so Parliament is not usually involved at the stage when changes could be made to a treaty.
- They do not apply to measures taken under a treaty (for example by a Joint Committee established under a treaty) unless those measures amend the treaty; nor to derogating or withdrawing from a treaty, even though these can also have profound effects.
- They can be avoided in “exceptional cases” (unspecified, but presumably urgent cases were in mind), after which the Minister must lay an explanatory statement.\(^{14}\)
- The only information requirement is a copy of the signed treaty plus an Explanatory Memorandum explaining the provisions of the treaty and the Government’s reasons for seeking ratification.

23. There have been several proposals for involving and informing Parliament before signature, for example to help minimise disagreements when it comes to ratification. But there is also opposition to such ideas, largely on the grounds that it might cause delay, be unduly burdensome on Parliament, or weaken the Government’s negotiating hand. However, Brexit has re-awakened the debate on how and when Parliament should be involved with treaties.

**EU-negotiated treaties have more scrutiny**

24. One reason for this limited level of treaty scrutiny is that many of the UK’s most important treaties – for example on trade – are currently negotiated on its behalf by the EU. These treaties are subject to scrutiny both by the European Parliament (EP) and its committees, and by the UK Parliament under its European scrutiny procedures.

25. Any decision by UK ministers to vote in favour of a Council of Ministers decision to open or conclude negotiations with a third country is subject to the scrutiny reserve in both Houses. The Commons European Scrutiny Committee and the Lords European Union Committee carry out their scrutiny through correspondence and/or inquiries.

26. Separately, the UK has introduced enhanced procedures for the EU’s internal treaties that set out the powers of the EU. In some cases these require an Act of Parliament or even a referendum before the Government can agree to them.

27. The EP has a veto power over many categories of treaty, and it has used this power to develop extensive information requirements and scrutiny procedures. It must be “immediately and fully informed at all stages of the procedure”,\(^{15}\) “in sufficient time for it to be able to express its point of view if appropriate, and for the Commission to be able to take Parliament’s views as far as possible into account”.\(^{16}\) Detailed scrutiny is carried out throughout the negotiations by the relevant EP committee, which may appoint a small ‘monitoring group’ for each treaty. The Commission will report to the monitoring group and to the whole Committee, which makes a recommendation to the plenary before a vote there.

28. None of these provisions will apply to the UK’s post-Brexit treaties, which may be seen as a loss of democratic scrutiny of treaties after Brexit.

\(^{14}\) CRAG Act s22
\(^{15}\) Treaty on the Functioning of the European Union, Article 218(10)
\(^{16}\) 2010 Framework Agreement between the European Parliament and the Commission, point 24
Devolution

29. Since the UK’s present treaty procedures were devised, and since it joined the EU, the UK has devolved significant power to Scotland, Wales and Northern Ireland. In 1972, fisheries, for example, were the responsibility of the Minister of Agriculture, Fisheries and Food in London. Now the subject is divided between London, Edinburgh, Cardiff and Belfast. However, foreign policy (including treaty actions) is entirely reserved to the UK Government, even when it affects – or even conflicts with – devolved interests.

30. Devolved authorities have some input to EU treaty-making, for example through the UK’s Joint Ministerial Committee (Europe)17 and the EU’s Committee of the Regions18 which includes Members of the Scottish Parliament and the National Assembly of Wales.

31. There is no Joint Ministerial Committee for international treaties, although the mutual benefits of involving devolved executives in UK treaty-making are recognised under a non-binding Concordat on International Relations. Nor is there any domestic mechanism for involving devolved legislatures, which are under a duty to legislate where necessary to implement the UK’s international obligations that relate to their functions. Moreover, the UK retains the competence to block devolved legislation that would be incompatible with any international obligations.19

32. Devolved executives are currently demanding a more formal and substantive role in shaping international agreements that affect them.20 Devolved legislatures also have a clear interest, but mechanisms for them to be involved are even further away from being fully explored. The informal Interparliamentary Forum on Brexit, which allows members of the various legislatures to discuss Brexit-related issues of common concern, could however provide some useful precedents.

1.2 Brexit treaty tensions

33. Political and constitutional tensions around Parliament’s role on treaties have been particularly evident since the Brexit referendum:

- Both the Miller case and the continuing debates over a ‘meaningful vote’ on the Withdrawal Agreement concern the balance of power between Parliament and Government over treaty actions.
- The degree of access to information on the UK’s negotiating position and impact assessments etc has been controversial.
- Brexit has exposed the difficulties of having no established requirements, structures or procedures for scrutinising treaty negotiations. Parliamentarians have frequently complained about the difficulty of getting a real purchase on the Government’s conduct of negotiations and the options available, despite innumerable statements, debates, answers to questions, and Ministerial appearances before committees.
- This may have contributed to the uncertainty over whether the House of Commons would approve the Withdrawal Agreement and Political Declaration, and in turn made the negotiations harder.
- The Government has confirmed that there will be a “marked increase in the number of treaties in the context of EU exit”.21

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17 See Memorandum of Understanding and Supplementary Agreements between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee, Cmnd 5240, October 2013, p30
18 The Committee of the Regions must be consulted whenever new EU proposals are made in areas that have repercussions at regional or local level. It comprises elected representatives serving in local or regional authorities, who have been nominated by each EU Member State for a renewable five-year term.
19 For example Scotland Act 1998 s35
20 See for example Scottish Government, ‘Scotland’s Role in the Development of Future UK Trade Arrangements’, 30 August 2018
• Under post-Brexit treaties, individual rights will be lost and gained, regulation will be altered, and foreign policy issues such as trade and fisheries addressed at a domestic level for the first time in decades.

• The Trade Bill has become a focus for proposals that Parliament should be given an enhanced role in relation to both the negotiating mandate and approval of trade treaties. A European Union (Withdrawal Agreement) Bill is likely to raise equivalent concerns about the negotiations on a future UK-EU relationship.

• Some post-Brexit treaty texts are already being agreed, but there is no parliamentary involvement until the Government seeks to ratify them. For example the Government has agreed treaties with Switzerland and with Iceland, Liechtenstein and Norway on citizens’ rights and some separation issues, but there has been no scrutiny of them yet.

34. On one view, Brexit is such an exceptional case that its treaties need exceptional procedures. But there are overlaps and links between all these categories. Also whether or not there is a withdrawal agreement to monitor, and whatever degree of independent trade policy the UK obtains after Brexit, it is undoubtedly the case that a significantly greater number of UK policies will be set at international level in future. As things stand the Government will be largely unchecked in doing so.

35. The large number of committee inquiries concerning parliamentary scrutiny of treaties since the Brexit referendum (summarised in Appendices 1 and 2 to this memo) shows that there is widespread interest in looking again at the current Parliament/Government balance that was established in the 1924 Ponsonby Rule – and not just for Brexit or trade treaties. On the one hand this means that the issues are being well aired, a wealth of evidence, proposals, views and ideas is emerging, and an indication of the Government’s intentions is starting to appear. But without more coordination, it also risks overlaps and inconsistencies.

Specific treaty challenges for Parliament

36. Particular Brexit-related treaty challenges where Parliament might wish to have a role include:

• ‘Rolling over’ (or more accurately replicating as far as possible) several hundred EU agreements with other countries, on trade and other matters, that will no longer apply to the UK as soon as it leaves the EU (whether or not there is a Withdrawal Agreement). The EU has agreed to ask the third countries to continue to treat the UK as if it were an EU Member State for the purposes of those treaties during a transition period, but the countries concerned might choose not to. The UK is therefore trying to achieve continuity by agreeing new treaties, but this is not always a simple ‘cut-and-paste’ job – for instance new joint committees are being set up under some treaties. A number of agreements have already been signed and the period for parliamentary objection is over for some. Dozens if not hundreds more are likely to be laid before Parliament before Exit Day. Scrutinising these treaties involves both (1) assessing their legal and political implications, and (2) comparing them with the EU external agreements they are replacing. Sometimes what is not in the treaty will be as important as what is, and the connection with UK-EU relations will be crucial in assessing whether gaps are filled.

• How a Withdrawal Agreement is implemented and works in practice, including the membership, working practices and decisions of its UK-EU Joint Committee. For example, as currently drafted this Joint Committee would have the power to extend a transition period and/or trigger the Irish Border backstop.

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21 Foreign and Commonwealth Office, written evidence to the Lords Constitution Committee, 20 December 2018, para 2
22 See for example Foreign and Commonwealth Office, written evidence to the Lords Constitution Committee, 20 December 2018
23 See for example the UK/USA: Bilateral Agreement on Prudential Measures regarding Insurance and Reinsurance
• **UK participation in EU trade and other external policy** during any transition and backstop periods.

• Negotiations towards one or more international treaties governing the **new relationship between the UK and the EU**. These could cover a wide range of areas such as security, data, civil aviation and dispute resolution as well as trade, agriculture, fisheries and the environment, with significant financial, constitutional, legal and other implications. A lot of time and energy will be needed to scrutinise these negotiations over the next few years (the EP’s International Relations Committee has already appointed a rapporteur for its scrutiny). If DExEU is disbanded, there may not be a departmental select committee with specific responsibility for scrutinising these negotiations.

• Negotiations towards **new treaties with other countries** such as the US and New Zealand which are likely to set important policy choices, such as whether to align with EU or with other environmental, food safety and other standards. Many of these treaties are likely to depend on the terms of the future UK-EU relationship.

Recent treaty scrutiny developments

37. Government thinking is further ahead on some of these issues than others. Plans for parliamentary scrutiny of trade treaties are the most advanced. Those for scrutiny of the future UK-EU negotiations are in the early stages and the Liaison Committee’s input has been sought. For rollover agreements, the FCO is working with the Lords EU Committee on its scrutiny. On the general question of treaty scrutiny the Government seems content for Parliament to take the lead.

Trade negotiations

38. The Government has made some commitments to involve Parliament, the devolved administrations, other stakeholders and the public with trade negotiations after Brexit. In July 2018 the International Trade Secretary said he would:

• publish a high-level ‘Outline Approach’ to each trade negotiation accompanied by a ‘scoping assessment’;

• make regular statements and updates on negotiations to the International Trade Committee;

• establish a Strategic Trade Advisory Group; and

• hold a 14-week public consultation period on potential agreements.24

39. However, these announcements contain little detail. For instance, they say nothing about the kind of information that would be provided or how the Government should respond to any recommendations from Parliament.

40. The trade treaty commitments were not enough for the House of Lords, which voted to halt progress on the Trade Bill until the Government produced “proposals for a process for making international trade agreements once the United Kingdom is in a position to do so independently of the European Union, including roles for Parliament and the devolved legislatures and administrations in relation to both a negotiating mandate and a final agreement”.25

Future UK-EU negotiations

41. On 21 January, the Prime Minister told the House of Commons that the Government would **consult** the Commons on its mandate for negotiations on future UK-EU relations, as this would “strengthen the Government’s hand in the negotiations, giving the EU confidence about our position and avoiding leaving the bulk of Parliamentary debate to a point when we are under huge time pressure to ratify”. She also promised regular updates to the Commons, confidential committee sessions, and an “enhanced role” for the devolved administrations.26

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24 Liam Fox, *Creating a transparent and inclusive future trade policy*, 16 July 2018
25 [HL Deb 21 January 2019](https://publications.parliament.uk/pa/ld201819/lddeb/ernationaltrade)
42. The previous week the Prime Minister had written to the Liaison Committee about parliamentary scrutiny of those negotiations. She suggested “considering the configuration and responsibilities of select committees and how frequently Parliament is updated and on what issues” and said it would be helpful to have the Liaison Committee’s input. She also wanted to get new procedures in place quickly to allow negotiations to be completed by the end of the implementation period.27

'Rollover' treaties

43. The FCO is working with the Lords EU Committee on its scrutiny of the ‘rollover’ treaties. There is no equivalent systematic scrutiny in the Commons for the FCO to engage with, although the Commons has more power than the Lords under CRAG. The relevant departmental select committees should be informed of the treaties when they are laid before Parliament but it is not clear whether this is happening.

44. Over the last year or more there have been requests from a number of committees for information on progress with these negotiations, which concern trade but also a wide variety of other matters. On 25 January 2019 the Secretary of State for Exiting the EU wrote to the Chairs of several committees including a list of 61 treaties and Memorandums of Understanding that it hopes to complete in the two months before Exit Day.28 Previously it would have taken the Government about two years to present that many treaties. And this is by no means a complete list.

45. The Government would have to lay treaties by 20 February 2019 if it wishes to honour the 21-sitting-day period in CRAG and to ratify them before 29 March 2019. Alternatively it could invoke the “exceptional cases” provision in s22 of CRAG which allows the Government to ratify a treaty without meeting the usual requirements, as long as the treaty is then laid and the Government makes a statement about why s22 was invoked.

Other post-Brexit treaty scrutiny

46. There is no indication that even the limited scrutiny commitments made so far would be extended to treaties in other areas. In its response to the Lords Constitution Committee inquiry on parliamentary scrutiny of treaties, the Government said that it was for Parliament to decide how to scrutinise treaties, but that it was willing to engage in a dialogue:

   Each of [the Committee’s] questions gives rise to a number of significant issues which the Government believes would be approached most appropriately through a considered dialogue between the executive and Parliament (always recognising that the conduct of parliamentary business is a matter for Parliament itself)

   ... although Parliament will need to consider in the near-term how to deal with a marked increase in the number of treaties in the context of EU exit, the aim of the dialogue should be to look beyond the immediate prism of EU exit to a lasting constitutional solution which meets the needs of the UK outside of the EU

   ... the degree of scrutiny Parliament wishes to give to treaties is primarily a matter for both Houses to determine. In particular, it is for Parliament to determine the desirability of establishing new mechanisms for scrutiny of the UK’s treaties subject to CRaG when current parliamentary arrangements for EU instruments fall away.29

47. It concluded that any changes to parliamentary scrutiny of treaties should be fully debated, and not only a reaction to the challenges of EU withdrawal:

26 PM Statement to the House of Commons on Brexit, 21 January 2019
27 Letter from the Prime Minister to the Chair of the Liaison Committee re Brexit, 14 January 2019
28 Annex to letter from Rt Hon Stephen Barclay MP, Secretary of State for Exiting the EU, on International Agreements, 25 January 2019
29 Foreign and Commonwealth Office, written evidence to the Lords Constitution Committee, 20 December 2018, paras 2 and 6
The Government believes that, should the ultimate view be that changes are needed to the present arrangements for parliamentary scrutiny of treaties, then these should be bespoke for the UK on leaving the EU. They should be the product of full and considered debate and of dialogue between Parliament and Government, and not the narrow product of the UK’s withdrawal from the EU itself. And they should establish appropriate and long-lasting arrangements which respect our constitutional traditions.\textsuperscript{30}

1.3 Wider treaty concerns

48. Brexit holds a mirror to wider concerns about treaty scrutiny that have developed largely as a result of how treaties have evolved over the past century.

49. The traditional view in the UK and other similar systems is that treaty actions are entirely the responsibility of the Government, with Parliament’s role being limited to enacting any necessary implementing legislation. The historic justification for this includes the notions that the executive has an exclusive power in international affairs derived from the royal prerogative, and that international law is entirely separate from domestic law (the ‘dualist’ notion that treaties have force in domestic law only if implemented through domestic legislation). There are also more recent arguments on this side, for example that Parliaments are not well suited to the need for coherence, speed, flexibility, confidentiality and difficult trade-offs in foreign relations; that elected Ministers already have a democratic mandate; and that parliamentary sovereignty is reinforced by the need for Parliament to legislate if a treaty is to have domestic legal effect.\textsuperscript{31}

50. However, in the last 20 years there has been a substantial shift (on paper at least) towards a distribution of foreign affairs power between the Government and Parliament rather than a separation of that power from parliamentary involvement.\textsuperscript{32} The reasons for this include:

- An unprecedented increase in the volume and scope of treaty-making. Treaties cover a much broader range of subjects and have a much bigger impact on the way power is exercised than they did even a few decades ago. For example, human rights and investment treaties\textsuperscript{33} can create individual rights or obligations, and trade treaties can set environmental, food safety, human rights and other standards. The Joint Committee on Human Rights is currently inquiring into Human Rights Protections in International Agreements.

- The indirect domestic impact of treaties that have not been incorporated into domestic law. Where possible, judges interpret legislation and develop the common law in line with the UK’s treaty obligations. For example, the Government’s international law obligations may affect administrative decisions that are subject to judicial review.\textsuperscript{34}

- A perceived democratic deficit. Because treaties now affect large areas of daily life and can have significant constitutional impacts, for instance on dispute resolution, governments should have the fullest possible democratic sanction for their treaty actions, beyond the general mandate granted to governments.

- Parliamentary and public discontent with the levels of information provided on treaty-making. The need for secrecy or confidentiality in treaty actions should be balanced against the advantages of openness and accountability – particularly where the other negotiating party is using transparency as a negotiating tool.

- The advantages for Government of working with Parliament on treaties. Parliamentary scrutiny can help determine how treaty actions affect the national interest, help avoid last-
minute disagreements when Parliament has only a take-it-or-leave-it power, and increase the likelihood of passing any necessary implementing legislation. Obtaining parliamentary support for treaty actions can assist particularly in long-running negotiations that may cross an election.

- The need to take sub-national interests into account. States, provinces or devolved countries may be responsible for implementing treaty obligations concluded by the central government, and their concerns may be different from or even opposed to those of the negotiating power.

- Treaty-implementing legislation can amount to a fait accompli. Treaties often require domestic legislation – even outside the EU up to 40% of domestic legislation may be implementing international obligations – but enacting implementing legislation gives parliaments little if any room for manoeuvre once the treaty obligations are set.

51. The question therefore is not whether Parliament should have a role in treaty-making, but rather the extent of that role.

52. There are five main examples of reforming parliamentary involvement in treaty actions in Westminster-style democracies, each with different approaches:

- As set out above, the UK now has a statutory duty on the Government to lay treaties it wishes to ratify before Parliament along with an Explanatory Memorandum, and there are statutory effects of Parliament resolving against ratification.35

- Australia has a Joint Standing Committee on Treaties (JSCOT) to which all treaties are referred for report, and a three-track approach for treaties with different levels of complexity, importance or controversy. JSCOT can also inquire into any treaty-related matter referred to it by a Minister or by either House of Parliament.

- In New Zealand, all ‘major’ treaties are referred to the Foreign Affairs, Defence and Trade Committee, and either it or another committee must report on them.36 These reports are debated in place of the first debate on any implementing legislation.37

- In Canada and Australia, the provinces and states respectively have a bigger role in treaty actions than the devolved parts of the UK do.

- South Africa’s 1996 Constitution,38 states that most treaties require the consent of Parliament before they can bind the Republic. A parliamentary committee must also report on all those treaties.39

53. Many other European countries also involve their parliaments in treaty-making. For example, under the Norwegian Constitution40 the Storting’s consent is required for (1) treaties on matters of special importance, and (2) treaties whose implementation require a new law or a decision by the Storting (typically a budget decision). In addition, the Storting’s Enlarged Committee on Foreign Affairs and Defence41 must consult with the Government on important foreign, trade and national security policy issues before important decisions are made.42 The Government uses this consultation procedure – which can be confidential – to try to ensure its treaty actions are based on a common understanding with the Storting. This involvement means that most treaties which

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37 Standing Orders of the House of Representatives, 2017, New Zealand Parliament, 26 October 2017, orders 250(2)(a) and 285(4)(c)
38 Article 231
40 Article 26(2)
41 The Enlarged Committee consists of the ordinary members of the Standing Committee on Foreign Affairs and Defence, the President of the Storting and the chairs of the parliamentary party groups (if they are not already members of the Committee)
42 §16 of the Rules of Procedure of the Storting
are put to the Storting for its consent are not controversial or subject to extensive debate. Committees have sometimes, however, recommended that the Storting refuse its consent.43

43 Correspondence with Øyvind Andersen, Special Adviser, Constitutional Department, Norwegian Parliament, 4 July 2017
## 2. Possible solutions

### 2.1 Table of options

54. The [Exiting the EU Committee](#) has asked the Liaison Committee to “examine the role of parliamentary committees in scrutinising treaties after the UK leaves the EU and consider proposals for a dedicated committee on treaties”. In addition, the [Prime Minister](#) has told the Liaison Committee that it would be helpful to have its input into Parliament’s role in developing the negotiating mandate for future UK-EU relations.

55. There is a menu of options, small and larger, that the UK Parliament could choose from if it wishes to maintain or extend the current levels of treaty scrutiny after Brexit. Although the Government has in some instances (notably trade treaties) taken the initiative and set out its own proposals for parliamentary scrutiny, it has in the main considered it Parliament’s responsibility to set out what kind of treaty scrutiny it wants and when, as well as the mechanisms, procedures and structures for doing so.

56. The table below summarises some of the main options – none of which are mutually exclusive, and many of which could develop over time. More detail then follows.

<table>
<thead>
<tr>
<th>Option</th>
<th>Pros</th>
<th>Cons</th>
</tr>
</thead>
<tbody>
<tr>
<td>Treaty scrutiny reserve for starting negotiations / setting negotiating aims</td>
<td>Requires Govt to explain purpose / aims of proposed negotiations</td>
<td>Possible delay</td>
</tr>
<tr>
<td></td>
<td>‘Soft’ way of ensuring Parliament has chance to express its views at early stage</td>
<td>Does not ensure debate</td>
</tr>
<tr>
<td></td>
<td>Familiar and flexible process</td>
<td>Not appropriate for all treaties</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Could be complex without a new Treaty Committee</td>
</tr>
<tr>
<td>Govt actions on all/important treaties to stand referred to a committee</td>
<td>Increases likelihood of committee scrutiny</td>
<td>Committees may have other priorities for their limited time and resources</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Committees might pay only lip service</td>
</tr>
<tr>
<td>Treaties and implementing legislation to be scrutinised and debated together</td>
<td>Allows full range of domestic implications to be understood and considered together</td>
<td>Blurs roles of different types of committee</td>
</tr>
<tr>
<td></td>
<td>Saves time – eg a ‘tagged’ committee treaty report could be debated alongside Commons second reading of implementing legislation</td>
<td>Might be challenging under current timetables</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Not all treaties require new implementing legislation</td>
</tr>
<tr>
<td>Committee(s) to consult, inform and involve devolved legislatures on treaty actions</td>
<td>Allows devolved legislatures to stay informed, and their interests to be represented</td>
<td>Few existing channels of communication to build on</td>
</tr>
<tr>
<td></td>
<td>Could be part of wider coordination, building on existing Inter Parliamentary Forum on Brexit</td>
<td>Might not resolve conflicts</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Might blur lines of accountability</td>
</tr>
<tr>
<td>Ad hoc committees, sub-</td>
<td>Allows flexibility and specialist focus</td>
<td>Requires time and energy to set up committees or sub-</td>
</tr>
</tbody>
</table>
| **committees etc for treaty scrutiny, and/or use ‘guesting’ provisions** | Could be in addition to a new Treaty Committee | committees etc for treaty scrutiny, and/or use ‘guesting’ provisions
Could be disproportionate to have permanent sub-committees of a new Treaty Committee |
|---|---|---|
| **New specialist treaty secretariat** | Builds expertise and good relations with Government | New specialist treaty secretariat
Builds expertise and good relations with Government
Coordinates between committees, and between Parliament and other stakeholders incl devolved authorities
Develops best practice on treaty scrutiny
Supports existing committees, new ad hoc committees etc, and new Treaty Committee |
| **New treaty committee** | Central focus for Parliament’s treaty functions, assisting Parliament, Government, stakeholders and public |
Builds expertise and good practice
Could sift a wide range of treaty actions and recommend appropriate further action, and/or carry out inquiries itself
Maintains oversight of treaty scrutiny across Parliament and encourages wider parliamentary involvement
Functions, powers and practices could develop over time |
| **Parliament-Government agreement on providing treaty information** | Allows Parliament to set out what sort of information it needs and when, for scrutiny |
Allows for different levels of access to more detailed or confidential information
Reduces suspicion
Puts UK on footing equal to/stronger than other negotiating partners
Increases public awareness and engagement, especially if new treaty website developed too |
| **Wider treaty approval requirement for some/all treaties** | Increased democratic legitimacy |
Could stimulate fuller ‘upstream’ engagement
Would ensure vote in Parliament
Even discussions about which treaties or types of treaties should be subject to an approval requirement could be instructive |
| **Post-ratification** | Allows scrutiny of how treaties are implemented, | Post-ratification
Allows scrutiny of how treaties are implemented, |
Open-ended
Could be difficult to reach agreement on treaty information
Putting it in writing could make it harder to amend in future
Providing confidential information could prejudice negotiations
Could delay/frustrate treaty actions
Would need to distinguish between ‘important’ and ‘other’ treaties
Would probably come only at ratification stage |
treaty scrutiny including decisions made by treaty bodies such as Joint Committees

Allows scrutiny of reservations, declarations, derogations and withdrawal from treaties

57. Whatever options find favour, four things should be borne in mind:

- **First, this is urgent.** The UK Government is already making Brexit-related treaties, and a steep increase in number and importance is expected. Many new treaty scrutiny procedures and structures could be introduced quickly, without legislation (see Appendix 3).

- **Second,** any new systems or structures must be flexible enough to deal with a broad range of treaties. For example, there would be different considerations for minor treaty amendments, routine ‘template’ treaties on double taxation or mutual legal assistance, sensitive and urgent bilateral treaties, and wide-ranging plurilateral treaties with significant impact on businesses, individuals, and the constitution that may take years to negotiate.

- **Third,** ratifying new treaties is not the only type of treaty action that can be important. Other treaty actions, such as making reservations or derogations, and withdrawing from or terminating a treaty, can each have significant impacts, as can the actions of bodies established under a treaty, so Parliament should also have opportunities to scrutinize those.

- **Fourth,** the timing of scrutiny is important. The earlier that Parliament is informed about and involved in treaty actions, the greater its role in assisting the Government in the achievement of its foreign policy goals and in holding it to account, but the more confidentiality might be required.

58. Legislatures such as the Australian, New Zealand, and European Parliaments demonstrate a range of ways of combining democratic accountability with sufficient flexibility to allow effective and well-supported deals to be struck. And existing UK parliamentary scrutiny mechanisms such as the European scrutiny process provide useful precedents for Parliament holding the Government to account without unduly tying its hands.

2.2 Expanding existing committees’ treaty roles

59. There are many ways in which existing committees’ treaty roles could be expanded, clarified, and strengthened without any restructuring. For example:

- Committees’ core tasks could include “to examine treaties within their subject areas.”

- There could be a new committee-based ‘treaty scrutiny reserve’ for one or more stages of treaty action, from starting negotiations and agreeing negotiating aims through to concluding treaties, adapted from existing parliamentary EU scrutiny procedures.

- All (or particularly important) Government treaty actions could stand referred to a committee, with reports expected as in Australia, New Zealand, and South Africa. This could cover the full range of treaty actions, including agreeing negotiating aims, opening negotiations, signing, ratifying, amending, derogating, and withdrawing. Reports might be minimal, to say that a batch of proposed treaty actions raised no issues. Or they could, for example, recommend against the proposed treaty action, recommend that the Government add reservations or interpretative declarations, and/or recommend a debate on the treaty in Government time.

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44 See letter from Rt Hon Stephen Barclay MP, Secretary of State for Exiting the EU, on International Agreements, 25 January 2019, and for example Secondary Legislation Scrutiny Committee, written evidence to the Lords Constitution Committee, 6 December 2018

45 The Commons Modernisation Committee recommended this 17 years ago: Select Committee on the Modernisation of the House of Commons, Select Committees, 12 February 2002, HC 224 2001-02, para 34
• Committees could **scrutinise any proposed treaty-implementing legislation** alongside the treaty itself.

• The Government could ensure it adheres to its Ponsonby Rule commitment to making time for **debates** on particularly important treaties during the 21-sitting-day period, and its more recent undertaking to provide the opportunity for the debate of any treaty involving major political, military or diplomatic issues, if the relevant select committee and the Liaison Committee so request.\(^{46}\) For instance, it could commit to scheduling debates in Government time on substantive committee reports on treaties, or where the committee has recommended a debate. Or Committee reports could be debated instead of the first substantive debate on any implementing legislation (as in New Zealand since 2017).\(^{47}\) It would have to be made clear whether this commitment was to a debate on neutral terms, or on a motion that the treaty should not be ratified.

• **Ad hoc committees, sub-committees or joint committees** could be set up to carry out detailed scrutiny of a treaty action. The new “guesting” rule, allowing Members of one Commons Committee to join another for a particular inquiry, could also be invoked, as could the rules on allowing Committees to work together even across the two Houses.

• Committees could agree to **consult and involve the devolved legislatures** wherever a treaty had implications for devolved competences. Consideration could be given to more formalised structures for interparliamentary cooperation on treaties, such as regular meetings of the Chairs of relevant committees, and/or inviting members of committees of the devolved legislatures to join the Westminster committee inquiring into a treaty action.

• A **new specialist treaty secretariat** could be established to support committees in this work and help build relations with Government officials and the devolved institutions. This could also support a new treaty committee, if one was established.

*Decision 1: which options from this list should be taken forward?*

2.3 Specialist Treaty Committee

60. Alternatively, or in addition, a committee could be given specific responsibility for treaties. The advantages of this would include:

• providing comprehensive oversight of treaty actions and scrutiny
• allowing all treaty actions to be sifted
• increasing treaty expertise amongst parliamentarians and officials
• developing and sharing good practice
• encouraging wider parliamentary involvement with treaties
• building trust and good relations with Government treaty-makers and the FCO treaty office
• providing a focus for the involvement of devolved legislatures and the public in treaty actions
• raising awareness of treaty actions and of parliamentary scrutiny of treaties

61. On the other hand, it might reduce other committees’ incentives to engage in treaty scrutiny, and routine treaty scrutiny might not be attractive to Members.

**Existing or new committee?**


\(^{47}\) New Zealand Parliament, Standing Orders of the House of Representatives 2017, 26 October 2017, Standing Orders 250(2)(a) and 285(4)(c)
62. An existing committee could take on this new treaty role. For instance, in New Zealand all major treaties stand referred to the Foreign Affairs, Defence and Trade Committee which then either scrutinises them itself or refers them to another committee.

63. However, there is a risk that this would either overwhelm an existing committee (committees are already under great pressure) or that it would be squeezed out by other committee priorities. It would also be difficult to decide which would be the appropriate committee, or even in which House.

64. Alternatively a new dedicated Treaty Committee could be established, as Australia did over 20 years ago (see below). This would allow a specialist focus to develop, and would help ensure that treaty scrutiny was always carried out. One risk is that a new committee might have an inconsistent volume of work, but this would depend on how broadly the terms of reference were drafted.

**Decision 2: should a new dedicated, specialist Parliamentary Treaty Committee be established?**

**Commons, Lords or Joint Committee?**

65. Given that the Commons has more power over treaties than the Lords, it would not be appropriate for only the Lords to take on this function. So there could be a Commons Committee, or separate Commons and Lords committees, or a Joint Committee.

66. This is largely a political choice. But a Joint Committee would seem the most sensible and practical, even if it would be more complex to establish and run. If there were two separate committees, it is not obvious how their roles would differ and there is a risk of conflicting recommendations. A Joint Treaty Committee would combine the greater perceived legitimacy of the Commons with possibly greater expertise and time available in the Lords. The Joint Committee on Human Rights is an example of a joint committee that works well, though there are other less effective precedents.

**Decision 3: should a new Treaty Committee be a Joint Committee of both Houses?**

**Sifting or scrutinising committee?**

67. If a new treaty committee is established, should it simply **sift** treaty actions and allocate those potentially requiring scrutiny and/or debate to other committees? This would mainstream treaty actions, use current subject expertise, and allow the context to be taken into account; but treaty work could overwhelm some committees, and others might only pay lip service.

68. Or should it **scrutinise** treaties itself? This would risk side-lining treaties and seeing the scrutiny role as more procedural than substantive; but it could be more comprehensive and systematic in its coverage if properly resourced.

69. A more flexible structure may be preferable – either:

- a **hybrid treaty committee** to sift and monitor all treaty actions and develop expertise on treaty processes, which refers as many as possible to other committees for inquiry and report, but has a ‘reserve’ competence to carry out inquiries where that is more practical or appropriate; or
- a **committee with standing sub-committees** like the Lords EU Committee, which similarly carries out a sift and refers the more controversial and important treaty actions to its sub-committees for inquiry and report, but also carries out inquiries and publishes reports itself.

**Decision 4: should a new Joint Treaty Committee sift all treaty actions and refer them to other committees where appropriate, and/or have the power to inquire and report itself?**

**The Australian example**
70. The main example of a dedicated treaty committee is the Australian Parliament’s JSCOT (Joint Standing Committee on Treaties). It was set up by the Government in 1996 as part of a package aimed at increasing treaty information for the public, improving consultation with sub-national institutions and strengthening the role of Parliament.\footnote{Based on the recommendations of the Australian Senate’s Legal and Constitutional References Committee report, \textit{Trick or Treaty? Commonwealth Power to Make and Implement Treaties} (November 1995) Report No. 474}

71. All treaty actions are referred to JSCOT before the Government can take any binding action on them. It must issue a report, but there is a three-track structure with different procedures for major and minor treaty actions, and JSCOT can ask for an action to be moved to a different track. Further, either a Government Minister or either House of Parliament can refer any other treaty-related question to JSCOT for inquiry, for example treaties under negotiation, or whole treaty-based topics such as extradition or nuclear safety.

72. Its recommendations are non-binding, and are usually aimed at minimising problems with a treaty or maximising its benefits, or about the process (eg was the consultation carried out properly? Did the National Impact Assessment include all the appropriate information?). In its first 20 years, it recommended against ratification only in about 1% of the 800 or so treaties it considered; the majority required no further action.

73. JSCOT has received “considerable support” from both the right and the left of the political spectrum, as well as independent observers.\footnote{Kelvin Thompson MP, former chair of JSCOT, ‘20th Anniversary Seminar’, Report 162, May 2016, pp33-34} Its reports are valued and respected, particularly for assessing whether a treaty action is in the national interest, and it has certainly contributed to transparency in treaty actions. There is some pressure for JSCOT to be more involved in the pre-signature phases in order to have more of an impact, but the inherent tensions between confidentiality and accountability remain unresolved.

2.4 Information and consultation requirements

74. Transparency and access to treaty information are vital for proper scrutiny, public interest and the rule of law. But there are also situations in which confidentiality is important, documents could easily be misunderstood, or the sheer volume of information could be overwhelming.

75. Trying to track the progress and status of treaties and parliamentary action on them using the current Government and parliamentary websites is currently very difficult, with some information (such as identifying treaties that have been signed but not ratified) not available even on the FCO’s internal treaty database. The ‘rollover'/replication of EU-third country agreements provides an example of the challenges in obtaining information from the UK Government about the numbers of negotiations in progress and how far they have got.\footnote{A partial list was finally published on 25 January 2019 in the annex to a letter from Rt Hon Stephen Barclay MP, Secretary of State for Exiting the EU, on International Agreements, 25 January 2019} And as the rows over Brexit impact assessments and the Attorney General’s legal advice show, secrecy can breed suspicion (which may not always be warranted).

76. There is undoubtedly a need for confidentiality at times, particularly during the negotiating phase of sensitive treaties when information could prejudice negotiations or simply be misunderstood. Providing all treaty documents could be counterproductively overwhelming, and providing confidential information to committees or chairs would pose challenges as to how that information is handled.

77. But it is possible to envisage a system where increasing amounts of information are provided to progressively smaller audiences. A written agreement between Parliament and the Government on treaty information would provide certainty and clarity on what information should be provided, when, to whom and on what terms. It could include:
• A presumption of disclosure, with the onus on the information owner to justify why it should not be released.

• A regularly updated public list of proposed treaties and those under negotiation.

• Published negotiating aims, both initially and if substantially updated.

• Tiered levels of access to information so that Parliament, committees, smaller groups of Members and perhaps even committee chairs each have access to appropriate information.

• Specifications for Government consultations on proposed treaties, to ensure they are meaningful and timely, and involve all interested parties.

• Detailed templates for Explanatory Memorandums, expanding them on the model of Australia and New Zealand’s National Impact Assessments and potentially including independent impact analysis across a range of areas (equalities, human rights, environment, economy, devolved interests etc).

• The Government’s view of what existing legislation already allows for the treaty action to be implemented, and/or what new legislation the Government proposes to introduce.

• Commitments and structures for informing and consulting devolved legislatures in parallel with Westminster wherever treaties concern devolved interests.

• A comprehensive new public treaties database allowing treaty actions to be tracked right from proposal through negotiation through approval and implementation to amendment, derogation and termination. It should integrate or be seamlessly linked to information on parliamentary scrutiny and any implementing legislation.

78. The EU provides an example of well-developed treaty information requirements for parliament. The EP began setting these out even before it gained treaty veto powers. Now a binding 2010 Framework Agreement on relations between the EP and the Commission requires the EP to be “immediately and fully informed at all stages of the procedure”, including access to negotiating directives and observation rights for MEPs, and more detailed confidential information being available to progressively tighter groups of MEPs (for example the relevant Committee receives briefings from negotiators after each negotiating round). It also requires the Commission to “explain whether and how EP comments were incorporated, and if not, why not”. The EP issues resolutions at various stages in the treaty process setting out its views and indicating any conditions for giving its approval to the concluded treaty.

79. Although the EP is often dissatisfied at the extent to which the Commission marks documents as ‘limité’ (confidential), it still receives vastly more information on EU treaties than the UK Parliament does on UK treaties, and that information allows its committees (for example International Trade, Fisheries, or Constitutional Affairs) to exercise their treaty scrutiny function effectively. Indeed, the EU has in recent years begun using transparency as a negotiating tool that strengthens its position.

80. It would be inappropriate if UK elected representatives had less access to treaty information after Brexit, and if Parliament had to seek its information on UK-EU negotiations from the EU.

Decision 5: How could Parliament and Government reach a written agreement on treaty information and consultation, and what should it include?

2.5 Other potential roles for Parliament

Approval requirement

81. Most OECD countries now require parliamentary approval for ratifying at least some types of treaty. South Africa, which until recently followed the Westminster model, changed its Constitution to require such approval. Often (but not inevitably) this power provides an incentive
for Parliament and its committees to get involved earlier in the process, given that disapproval would have a clear effect. For example, the EP has imposed conditions on its approval of treaties that have led to renegotiation (for example an EU-US agreement on data processing and transfer) or abandoning negotiations (the Anti-Counterfeiting Trade Agreement).

82. Australia, New Zealand and the UK have all considered introducing a treaty approval requirement in recent years. Although the UK has done this for specific treaties or types of treaty (notably the EU Withdrawal Agreement,\(^{51}\) and treaties that amend the main EU Treaties\(^ {52}\)), it would be a major constitutional step to extend it more generally. A number of choices would have to be made. For example, a universal parliamentary approval requirement would be neither necessary nor practicable, so there would have to be a way of determining which treaties or types of treaty were subject to an approval requirement. Also which treaty actions would be covered? Ratification is the obvious one, but what about reservations, derogations and withdrawal, all of which could have extensive implications? How much detail should go in legislation, and what should be set out elsewhere?

83. All these issues would take time to consider and agree.

**Decision 6: what is the best way to explore a possible treaty approval requirement?**

**Post-ratification scrutiny**

84. After a treaty has been ratified and come into force, committees could continue their scrutiny role by examining, for instance:

- How the treaty is being implemented.
- How any treaty bodies are appointed, and how they operate and make decisions.
- Government reporting to treaty monitoring mechanisms and implementation of any recommendations.
- Government proposals for amendments, declarations, derogations, withdrawal or termination, which could have as much impact as ratifying a treaty in the first place.

85. Committees could also examine wider treaty-based policy areas such as extradition or nuclear safety, as Australia’s JSCOT has done.

**Decision 7: how could provisions for post-ratification scrutiny be included in developing new committee treaty scrutiny roles?**

### 2.6 How and when to make changes?

86. If the Liaison Committee decides to support any of the changes outlined above, a practical next step might be to ask the Procedure Committee to work on the details of implementation, perhaps supported by a steering group of officials from Parliament and the Government. Coordination with the House of Lords would be required, especially if joint or parallel mechanisms were envisaged.

87. Appendix 3 provides a table summarising the options described above, with suggestions for how they could be implemented, when (ideally) they should be introduced, and any precedents.

**Decision 8: how could the Commons develop prioritised plans for implementing any proposed changes, along with the Lords?**

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\(^{51}\) European Union (Withdrawal) Act 2018 s13
\(^{52}\) Part 1 of the European Union Act 2011
Appendices

1.Exiting the EU Committee recommendation, June 2018
In June 2018 the House of Commons Exiting the EU (ExEU) Committee recommended that “The Liaison Committee should examine the role of parliamentary committees in scrutinising treaties after the UK leaves the EU and consider proposals for a dedicated committee on treaties or how existing select committees might best approach this work”. 53

In making its recommendation, the ExEU Committee recognised that “Leaving the EU has re-awakened the debate on Parliament’s involvement in scrutinising and approving treaties”. 54 It noted that unless action was taken, after Brexit the level of democratic scrutiny of treaties would actually diminish. In the UK, the opportunity for Parliament to consider treaties lies primarily in scrutinising any legislation which implements the terms of treaties – “scrutiny of the ‘how’, rather than the ‘why’ or the ‘what’ of the treaties themselves”. There are no rights to information during the negotiations, or to a debate in Parliament on treaty provisions, and the Government is not required to provide parliamentary time or a vote even if a motion is tabled against ratification. Parliament can only oppose or accept ratification of a whole treaty and has no power to amend the agreement, and there is no institution which enables devolved legislatures to participate in treaty scrutiny. The ExEU Committee further noted that the EP and other countries’ parliaments have a greater role in relation to treaties than the UK Parliament does.

Its concerns were particularly focused on scrutiny of any future relations agreements with the EU and future trade agreements with non-EU states, including how the views of the devolved governments and parliaments will be fed into the negotiations. 55 But there is likely also to be an increase in UK treaty action after Brexit in other areas such as security, data protection, legal cooperation, fisheries, agriculture and the environment.

The Government’s response to that part of the ExEU Committee’s report was that “The mechanics for Parliament’s endorsement of [the future relations] agreements and for their implementation in domestic law will need to be considered as the form and content of those agreements becomes clearer over time through the process of negotiations”. 56 On the participation of devolved legislatures, the Government simply stated “it is for the UK Government to enter into and sign the Withdrawal Agreement as an international treaty on behalf of the UK. And it is for the UK Parliament, with members representing constituencies in all parts of the UK, to scrutinise and hold the UK Government to account.” 57

56 House of Commons Exiting the EU Committee, ‘Government Response to the Committee’s Sixth Report’, 7th Special Report of 2017-19, HC 1641, 19 October 2018, p6
57 House of Commons Exiting the EU Committee, ‘Government Response to the Committee’s Sixth Report’, 7th Special Report of 2017-19, HC 1641, 19 October 2018, p11
2. Other committee inquiries and reports relating to treaty scrutiny

In addition to the ExEU Committee’s June 2018 report, there have been over a dozen parliamentary committee inquiries relating to parliamentary treaty scrutiny since the Brexit referendum. Recent and current inquiries and reports include:

**Commons committees**

- **Environment, Food and Rural Affairs Committee**: Brexit Trade in Food (report published 18 February 2018)\(^{58}\) – included a recommendation that the Government publish a sector-by-sector analysis of the impact of Brexit before the publication of the Agriculture Bill.

- **European Scrutiny Committee**: EU Withdrawal: Transitional provisions and dispute resolution (report published 20 March 2018)\(^{59}\) – asked for clarification of Parliament’s role in either extension or early termination of the implementation period.

- **Exiting the EU Committee**: The Withdrawal Agreement and Political Declaration (report published 9 Dec 2018)\(^{60}\) – recommended that Parliament has a central role in “agreeing a mandate for the Government for the future relationship negotiations; maintaining oversight of the progress and conduct of the negotiations; and ensuring that the House is given a meaningful and timely role in approving any agreements reached, including the circumstances in which the UK will opt to extend the implementation/transition period”; and that “in order to ensure appropriate scrutiny of the negotiations on the future relationship there must be a select committee dedicated to this task, regardless of any future changes in the machinery of Government”.

- **International Trade Committee**: UK Trade Policy Transparency and Scrutiny (report published 28 December 2018)\(^{61}\) – recommended a presumption of transparency for trade negotiation documents; a parliamentary debate on the Government’s Outline Approach for negotiations before they begin; updates on negotiations; and a yes/no vote on the ratification of trade agreements. Also recommended detailed scrutiny by a parliamentary committee (at present, the International Trade Committee itself), with regular private updates on negotiations, and with enough time to report to the House before a vote on ratification. Called for a statutory UK intergovernmental international trade committee to allow “structured engagement and extensive consultation” with the UK’s devolved executives.

- **International Trade Committee**: Continuing application of trade agreements after Brexit (report published 7 March 2018)\(^{62}\) – recommended that the Government should set out provisions for more extensive parliamentary scrutiny and enhanced involvement by the devolved administrations where substantial changes in trade agreements are implemented through legislation. Argued that a cross-departmental approach on the part of the Government to all of the above issues, which involves DIT, the Exiting the EU Department and the devolved administrations (among others) was urgently needed.

- **Public Administration and Constitutional Affairs Committee**: The Role of Parliament in the UK Constitution (‘umbrella’ inquiry launched 13 September 2018) – will include a short inquiry on treaty negotiation and ratification.

- **Public Administration and Constitutional Affairs Committee**: Devolution and Exiting the EU and Clause 11 of the European Union (Withdrawal) Bill (report published 29 November 2017) – touches on role of devolved institutions in future UK-EU relations.

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\(^{58}\) 3rd report of 2017-19, HC 348, 18 February 2018

\(^{59}\) 19th report of 2017-19, HC 763, 20 March 2018

\(^{60}\) 10th report of 2017-19, HC 1778, 9 December 2018

\(^{61}\) 6th report of 2017-19, HC 1043, 28 December 2018

\(^{62}\) 1st report of 2017-19, HC 520, 7 March 2018
- **Scottish Affairs Committee**: [Scotland and Brexit: Trade and Foreign Investment](https://www.parliament.uk/documents/publications/2017-19/Scottish-affairs-committee/32521/) (likely to report shortly) – includes what influence the devolved administrations should have over future UK trade policy.

- **Welsh Affairs Committee**: [Brexit, trade and customs: implications for Wales](https://www.parliament.uk/documents/publications/2017-19/Welsh-affairs-committee/32522/) (inquiry launched 16 July 2018) – includes how Welsh interests should be represented in trade negotiations with third countries.

**Lords Committees**

- **Constitution Committee**: [Parliamentary Scrutiny of Treaties](https://www.parliament.uk/documents/publications/2017-19/Constitution-committee/32523/) (likely to report shortly) – looks at all aspects of the issue, including the effectiveness of current parliamentary scrutiny of treaties, whether Parliament should approve negotiating mandates and scrutinise negotiations and other treaty actions like withdrawal, the role of committees, whether there should be different levels of scrutiny for different types of treaty actions, whether a parliamentary treaties scrutiny committee is required to examine government treaty actions post-Brexit and if so how it should be composed and supported, what information the government should provide to Parliament on its treaty actions, and what role the devolved institutions should have in negotiating and agreeing treaties.

- **European Union Committee**: [Brexit: the Withdrawal Agreement and Political Declaration](https://www.parliament.uk/documents/publications/2017-19/European-union-committee/32524/) (report published 5 December 2018) – argued that “Members of both Houses may wish to consider the appropriate level of, and structure for, parliamentary oversight of the Joint Committee [under the Withdrawal Agreement], and seek undertakings from the Government on this question”, and that “Members may wish to seek clarification from the Government on the role that Parliament will play in authorising any extension”. Recommended that “the negotiations on the future relationship should be subject to full parliamentary scrutiny … the Government must engage proactively and constructively with Parliament, rather than repeating the mistakes of the last two years”.

- **European Union Committee**: [Brexit: Parliamentary Scrutiny](https://www.parliament.uk/documents/publications/2017-19/European-union-committee/32525/) (report published 20 October 2016) – recommended that “Parliament, while respecting the Government’s need to retain room for manoeuvre, should be able both to monitor the Government’s conduct of the negotiations, and to comment on the substance of the Government’s negotiating objectives as they develop” in order to “play a constructive part in helping the Government to secure the best outcome for the United Kingdom”, to “strengthen the Government’s negotiating position” and to “increase the likelihood that the final agreement will enjoy parliamentary and public support”. It did not recommend a formal treaty scrutiny reserve “at this stage” because scrutiny of treaty negotiations would be a new departure for the UK Parliament and it would “take time for mutual trust to develop and for optimum working practices to be identified”. It added that “Negotiations on trade agreements, with the EU and with third countries, may continue for several years post-withdrawal. Like the negotiations on withdrawal, these will reach deeply into domestic policy-making, and the same considerations in relation to parliamentary scrutiny apply”. Its recommendation that the House of Lords appoint a new committee to consider the negotiation and conclusion of any EU withdrawal agreement and future relations treaties, with the existing scrutiny functions and sub-committee structure of the EU Committee, has not been implemented.

**Liaison Committee**: [Review of Investigative and Scrutiny Committees](https://www.parliament.uk/documents/publications/2017-19/Liaison-committee/32526/) (expected to report in June 2019) – comprehensive review of Lords committees; includes how they might scrutinise treaty actions.

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63 24th report of 2017-19, HL Paper 245, 5 December 2018

64 4th report of session 2016-17, HL Paper 50, 20 October 2016
Joint Committee

- **Joint Committee on Human Rights:** [Human Rights in International Agreements](#) (inquiry launched 13 December 2018) – asks whether the UK Parliament should have better mechanisms for scrutinising the human rights protections contained in international agreements contemplated by the UK, and if so, what processes, information and analysis might be appropriate, and what the JCHR’s role should be.
3. Powers and precedents
The table below sets out in a little more detail some options for increasing parliamentary scrutiny of treaties, along with possible methods of making each change, when it would be needed, and what precedents exist (either in UK scrutiny of other matters, or in other countries’ treaty scrutiny).

<table>
<thead>
<tr>
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<tbody>
<tr>
<td>Treaty scrutiny reserve for negotiating mandates and conclusion of treaties</td>
<td>Scrutiny reserve resolutions, committee’s order of reference and terms of reference agreed by committee</td>
<td>Exit Day</td>
<td>European scrutiny reserve in both Houses</td>
</tr>
<tr>
<td>Treaty actions to stand referred to a committee</td>
<td>Standing Orders (including committee’s order of reference), terms of reference agreed by committee</td>
<td>Exit Day</td>
<td>Australia, New Zealand</td>
</tr>
<tr>
<td>Committee scrutinising a treaty to scrutinise any implementing legislation too</td>
<td>Standing Orders (including committee’s order of reference), terms of reference agreed by committee</td>
<td>Exit Day</td>
<td>Evidence-taking public bill committees; joint committees on draft bills; New Zealand</td>
</tr>
<tr>
<td>Government commitment to substantive debates on treaties and/or on committee treaty reports</td>
<td>Ministerial statement; Standing Orders</td>
<td>Exit Day</td>
<td>Ponsonby Rule commitment to debates on ‘important treaties’; Government response to Procedure Committee report</td>
</tr>
<tr>
<td>Committee reports debated instead of (or alongside) second reading of implementing legislation</td>
<td>Standing Order provision for specific procedures on ‘treaty implementing bills’</td>
<td>Exit Day</td>
<td>New Zealand</td>
</tr>
<tr>
<td>New structures for UK interparliamentary cooperation on treaties</td>
<td>Memoranda of understanding between presiding officers, following preparatory work</td>
<td>Exit Day</td>
<td>Interparliamentary Forum on Brexit</td>
</tr>
<tr>
<td>Establish ad hoc committees, sub-committees or joint committees for treaty scrutiny</td>
<td>Orders and resolutions of both Houses, following political agreement; use of existing Commons SO provisions for joint working and ‘guesting’ between Commons committees</td>
<td>As required</td>
<td>Lords EU Committee; Committee on Arms Export Controls</td>
</tr>
<tr>
<td>Dedicated committee(s) for scrutinising future UK-EU negotiations</td>
<td>Standing Orders (including committee’s order of reference), terms of reference agreed by</td>
<td>Exit Day</td>
<td>Commons EU Exit Committee; Lords EU Committee and sub-</td>
</tr>
<tr>
<td>Committee/Task</td>
<td>Arrangement/Provision</td>
<td>Timeframe</td>
<td>Location</td>
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<tr>
<td><strong>New specialist treaty secretariat</strong></td>
<td>Administrative arrangements by either/each House, to include budgetary and workforce provision</td>
<td>Exit Day</td>
<td>Australia</td>
</tr>
<tr>
<td><strong>New treaty committee</strong></td>
<td>Standing Orders (including committee’s order of reference), terms of reference agreed by committee</td>
<td>Start of next session</td>
<td>Australia’s JSCOT; JCHR; ‘sifting’ committees eg European Scrutiny Committee, Lords EU Committee plus sub-committees, European SI Committee and other SI committees</td>
</tr>
<tr>
<td><strong>Specifications for Government consultations on proposed treaties</strong></td>
<td>Ministerial statement</td>
<td>Exit Day</td>
<td>Australia</td>
</tr>
<tr>
<td><strong>Agreement on providing treaty information (what, how and when)</strong></td>
<td>Written Parliament-Government agreement (eg memorandum of understanding between Leader and Liaison Committee); Resolution of the House moved by Leader</td>
<td>Exit Day</td>
<td>EP</td>
</tr>
<tr>
<td><strong>Public list of proposed treaties and those under negotiation, with regular updates</strong></td>
<td>Expand the FCO’s monthly Treaty Bulletin; add details to a Parliamentary database similar to the new SI Service</td>
<td>Exit Day</td>
<td>Australia, New Zealand</td>
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<tr>
<td><strong>Detailed templates for Explanatory Memorandums / National Impact Assessments</strong></td>
<td>Ministerial statement/ detailed ministerial undertaking (supported by regular exchanges with committee staff to reinforce expected practice)</td>
<td>Start of next session</td>
<td>Australia, New Zealand</td>
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<tr>
<td><strong>Layered arrangements for committee access to more detailed/confidential information</strong></td>
<td>Specific memorandum of understanding with committee and its members, taking into account implications for privilege</td>
<td>Start of next session</td>
<td>Intelligence and Security Committee, EP</td>
</tr>
<tr>
<td><strong>Government to specify what legislation (existing or proposed) will implement each treaty</strong></td>
<td>Ministerial statement; template for Explanatory Memorandums</td>
<td>From Exit Day</td>
<td>New Zealand</td>
</tr>
<tr>
<td><strong>Committments and structures for informing and consulting devolved legislatures</strong></td>
<td>Ministerial statement; Memorandum of Understanding Agreement with devolved legislatures</td>
<td>Exit Day</td>
<td>Australia</td>
</tr>
<tr>
<td>New treaties database</td>
<td>Administrative arrangements by Government in consultation with Parliament</td>
<td>Next session</td>
<td>SI Service, Australia, New Zealand, EU</td>
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<tr>
<td>Treaty approval requirement</td>
<td>Primary legislation</td>
<td>Next Parliament</td>
<td>South Africa, Norway, EP</td>
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<tr>
<td>Post-ratification treaty scrutiny</td>
<td>Committee order of reference and terms of reference agreed by committee</td>
<td>Next Parliament</td>
<td>JCHR, Australia’s JSCOT</td>
</tr>
</tbody>
</table>
4. Acknowledgements

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Any errors of course remain my own.