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BRIEFING PAPER

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Parliament's role in ratifying treaties

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Summary

The Government makes treaties…

The UK Government is responsible for negotiating, signing and ratifying the 30 or so international treaties involving the UK each year.

The starting point for treaty ratification in the UK is that the Government has the power to make international treaties under its prerogative powers. But this cannot automatically change domestic law or rights, and – as the Supreme Court recently ruled in the Miller case – it cannot make major changes to the UK's constitutional arrangements without Parliamentary authority.

…but Parliament has a limited role

Parliament (and/or the devolved legislatures) is therefore involved if domestic law needs to be changed in order to implement a treaty – but this does not give Parliament the power to approve, reject or amend the treaty itself. It also now has the opportunity to say that a treaty should not be ratified, but it does not have to debate or vote on most treaties.

This is in contrast to some other countries, where parliaments are involved in treaty-making and may need to give their consent before ratification (often because treaties can automatically be part of domestic law that can be relied on in domestic courts).

The 2010 Act: new power for the Commons to block ratification

Part 2 of the *Constitutional Reform and Governance Act 2010* requires the Government to lay before Parliament most treaties it wishes to ratify, along with an Explanatory Memorandum. This gave statutory form to part of a previous constitutional convention on parliamentary involvement with treaties (the Ponsonby Rule).

The 2010 Act also for the first time gave parliamentary disapproval of treaties statutory effect, and effectively gave the House of Commons a new power to block ratification. The process is this:

- The Government may not ratify the treaty for 21 'sitting days' (ie days when both Houses were sitting) after it was laid before Parliament.
- If within those 21 sitting days either House resolves that the treaty should not be ratified, by agreeing a motion on the floor of the House, the Government must lay before Parliament a statement setting out its reasons for nevertheless wanting to ratify.
- If the Commons resolves against ratification – regardless of whether the Lords did or not – a further 21 sitting day period is triggered from when the Government's statement is laid. During this period the Government cannot ratify the treaty.
- If the Commons again resolves against ratification during this period, the process is repeated. This can continue indefinitely, in effect giving the Commons the power to block ratification.

Neither House has yet resolved against ratification of a treaty under these provisions, and there are limited options for how they can do so.

Despite looking like a major change, the provisions of the 2010 Act have several exclusions and limitations.

Exclusions

Some types of treaty are excluded from the 2010 Act:

- exceptional cases
- Memorandums of Understanding, and treaties that do not require ratification
- some EU Treaties which already require an Act of Parliament or even a referendum
- 'double taxation' agreements which require an Order in Council

Devolved executives and legislatures

The devolved executives and legislatures have very limited involvement in treaties, even though they may be responsible for applying them.

Treaty-making remains the exclusive responsibility of the UK Government, but it has agreed to cooperate on treaty negotiation and implementation

No requirement for debates or votes

Although the 2010 Act puts on a statutory footing Parliament's opportunity to scrutinise treaties, it does not require Parliament to scrutinise, debate or vote on them (and it rarely does so).

There have been some calls for a process that results in more debates and votes on treaties, perhaps involving the committees, but Parliament has so far been reluctant to set up new mechanisms for treaties.

This is in contrast to many other countries where parliamentary approval is required at least for certain defined categories of treaty. Even some other 'dualist' countries have incorporated some kind of parliamentary scrutiny of treaties, for example Australia which has a dedicated Joint Standing Committee on Treaties.

Parliament can only oppose (or tacitly accept) a treaty in full – it cannot amend treaties.

Parliament cannot amend treaties

There is no general requirement or mechanism for parliamentary scrutiny of (non-EU) treaties while the Government is negotiating them. So Parliament is not usually involved at the stage when changes could still be made to the text of a treaty.

This is fairly typical; the US is rare in allowing the Senate Committee on Foreign Relations to propose amendments to treaties.

There have been several proposals for parliamentary involvement before signature, to minimise disagreements when it comes to ratification, but there is also considerable opposition to such ideas.

However, Brexit has re-awakened the debate on how Parliament should be involved with treaties. Many of the proposed amendments to the European Union (Notification of Withdrawal) Bill concerned Parliament's role in the negotiating process or approving the final agreement. Although none of them passed, the Government did agree to give Parliament a vote on a withdrawal agreement before it is signed. And the likelihood of subsequent treaties having a major effect domestically, for instance on trade, might reignite calls for more parliamentary scrutiny of treaties.

1. The Government makes treaties…

Treaty-making – 'traditionally an executive power par excellence'[1] – was once fairly infrequent, and usually concerned war and peace, territory and trade.

Now treaties are made in their hundreds every year, covering practically every area of government. Despite this increase in volume and scope over the last century or two, treaty-making is still generally seen as a matter for governments. However, a range of domestic mechanisms for reviewing them has developed, often involving parliaments.

In the UK, the Government negotiates, signs and ratifies treaties (around 30 a year) under the Royal Prerogative, with only a limited role for Parliament.[2] Box 1 below outlines the process.

Box 1: 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 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.
- Parliament makes any necessary **domestic legislative changes**.
- The Government **lays the signed treaty before Parliament**, along with an Explanatory Memorandum. It may not ratify the treaty during the following 21 sitting days.
- Parliament does not have to do anything, but if either House **resolves against ratification** during that period, the Government must explain why it wants to ratify anyway. The House of Commons can effectively block ratification by passing repeated resolutions.
- 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.

There is detailed information about how the UK Government signs and ratifies treaties on the gov.uk website.[3]

1 Mario Mendez, 'Constitutional Review of Treaties: Lessons for Comparative Constitutional Design and Practice', Jean Monnet Working Paper 8/16, 2016

2 Prerogative powers were once exercised by the reigning monarch but are now exercised largely by the Government on the monarch's behalf, without any parliamentary authority. For background information see Library Standard Note SN/PC/3681, The Royal Prerogative, 30 December 2009

3 Foreign and Commonwealth Office, Treaties and MOUs: Guidance on Practice and Procedures, updated March 2014

2. … but treaties cannot change UK domestic law

2.1 The UK is a 'dualist' state

The corollary of the Government's dominant role in making and ratifying treaties is the fact that treaties cannot change UK domestic law.

The UK is a 'dualist' state, which means that treaties are seen as automatically creating rights and duties only for the Government under international law. When the Government ratifies a treaty – even with Parliamentary involvement – this does not amount to legislating. For a treaty provision to become part of domestic law, the relevant legislature must explicitly incorporate it into domestic law.

2.2 The Miller judgment

This constitutional feature was central to the Supreme Court's January 2017 judgment in the Miller case (about whether the UK Government needed the prior authority of Parliament in order to trigger the UK's notification of withdrawal from the EU Treaties). The majority judgment set out 'two features of the United Kingdom's constitutional arrangements':

> … The first is that ministers generally enjoy a power freely to enter into and to terminate treaties without recourse to Parliament … The second feature is that ministers are not normally entitled to exercise any power they might otherwise have if it results in a change in UK domestic law unless statute, ie an Act of Parliament, so provides.[4]

The ruling made it clear that the Government cannot make or withdraw from a treaty that amounts to a 'major change to UK constitutional arrangements' without an Act of Parliament:

> We cannot accept that a major change to UK constitutional arrangements can be achieved by ministers alone; it must be effected in the only way that the UK constitution recognises, namely by Parliamentary legislation.[5]

Applying the principle to this case, the judgment held that the UK Government could withdraw from the EU Treaties only if Parliament 'positively created' the power for ministers to do so.[6] This was because the EU Treaties are a source of domestic law and domestic rights that ministers cannot alter using the prerogative alone.

2.3 Legal effect of treaty provisions

Treaty provisions that are not incorporated into domestic law can have only indirect domestic legal effect at best. For example, where

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4 R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5, 24 January 2017, para 5

5 R (on the application of Miller and another) v Secretary of State for Exiting the European Union [2017] UKSC para 82

6 Ibid para 86

legislation is capable of two interpretations, one consistent with a treaty obligation and one inconsistent, then the courts will presume that Parliament intended to legislate in conformity with the treaty and not in conflict with it.[7]

A recent post on the UK Human Rights blog gives more examples:

> Customary international law is considered to form part of the common law (see *Keyu*). It has been established that an international convention may be used as an aid to statutory interpretation (see *Assange* at [122]), particularly when it comes to human rights (see *Stevens* at [55ff]), or be something to which the court can have regard in the exercise of judicial discretion (see *Morgan v. Hinton Organics*, concerning the Aarhus Convention principle that costs in environmental litigation should not be prohibitively expensive). An international obligation may also have become part of EU law and thus have some direct effect in the UK via that route, although this is a path that will presumably be closed down following Brexit.[8]

But usually, before the UK Government ratifies a treaty, it seeks to ensure that any domestic legislation needed to implement it is already in place (see below). Where this incorporates a treaty right into domestic law, private parties who are harmed by a violation of their treaty-based rights may be able to obtain a domestic legal remedy – but the courts are applying the domestic law, not the treaty directly (see the example in Box 2 below).

Box 2: Best interests of the child

The 1989 UN Convention on the Rights of the Child says that 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration' (article 3).

This 'best interests of the child' principle appears in several pieces of domestic UK legislation including the Children Act 1989 (England and Wales) and the Children (Scotland) Act 1995. It is therefore applied by the courts under that legislation. But it cannot be applied directly in other contexts, as the UK has not incorporated the Convention itself into UK law.

2.4 'Monist' states

By contrast, in 'monist' states (such as the Netherlands, for example) the act of ratifying an international treaty can automatically incorporate it into domestic law. International law is domestic law – or may even take precedence over it – and treaties may even be enforceable in the national courts as soon as they are ratified.

This approach usually involves the legislature in the ratification of treaties, as treaties are another form of domestic law.

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7 Lord Bingham of Cornhill, in his maiden speech in the House of Lords, set out this and five further ways in which treaties can have indirect effect in the UK: HL Deb 3 July 1996 c1465 ff

8 Alasdair Henderson, 'War remains inside the court room – Part 2: the Torture Convention', UK Human Rights Blog, 14 September 2016

3. Parliament makes any implementing legislation

UK domestic legislation is often needed before the Government ratifies a treaty, to give effect to treaty-based rights and to make sure that the Government will not be immediately in breach of any new treaty obligations under international law.

This gives Parliament an opportunity to consider how treaty rights and obligations will be implemented in domestic law. But it does not necessarily mean that the whole treaty will be incorporated into domestic law, and does not give Parliament the power to approve, reject or amend the treaty itself.

3.1 Domestic law may be adjusted before ratification

Treaties increasingly impose positive obligations on states, for instance stating that they must create new criminal offences. Or they set out new concrete rights, for instance the right to a periodic review for children who have been placed in residential care for their protection or their physical or mental health (UN Convention on the Rights of the Child, Article 25).

Because these rights and obligations do not automatically become part of UK law, the UK Government's practice is to try to ensure that the necessary legislation is in place before ratifying. This can be a stand-alone Bill (see the example given in Box 3 below), some clauses in a wider Bill, or secondary legislation such as a Statutory Instrument. Sometimes a treaty-related Bill will include the text of the treaty in its Schedules, but it does not have to. Indeed, there might be no reference at all to the treaty in the Bill.

Box 3: Legislating for the Cultural Property Convention

The Cultural Property (Armed Conflicts) Bill 2016-17 is intended to create new offences and search and seizure powers to enable the United Kingdom to ratify the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and accede to its 1954 and 1999 Protocols.

The Bill was amended slightly in the Lords to ensure that the language used in the Bill is consistent with the language used in the Second Protocol ('violation', rather than 'breach'). Some other points were raised, for example the maximum penalty of 30 years' imprisonment for some offences, but otherwise the Bill received cross-party support.

The text of the Convention and its Protocols is set out in Schedules to the Bill.

Any such legislation must follow the usual parliamentary procedures for passing legislation.

In considering treaty-related legislation, Parliament looks at **how** the UK would implement (at least parts of) the treaty, rather than **whether** the UK should ratify it. But 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.

For example, the Joint Committee on Human Rights (JCHR) looked at whether Parliament should create a new criminal offence of coercive behaviour in order to allow the Government to ratify the Council of Europe Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention).[9]

Parliament can amend any Government Bill relating to a treaty, and as long as it does not hinder the Government from fulfilling its obligations under the treaty this will not block ratification. For example Parliament might insist that the Government report to Parliament on the implementation of the treaty, even if there is no such requirement in the treaty itself. This of course does not amend the treaty itself.

If however Parliament rejected the legislation, the Government would be unable to fulfil its international obligations under the treaty.

3.2 Not all treaties require domestic legislation

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.

This can result in even a major treaty being ratified with little if any Parliamentary involvement.

[9] Joint Committee on Human Rights, Violence against Women and Girls, HL 106, HC 594 2014-15, paras 130-40.

4. Parliament has a new statutory role

4.1 Context of the 2010 Act

Whether or not implementing legislation is needed, it is usually accepted nowadays that Parliament has a legitimate interest in treaties, and this is now reflected in statute.

There have long been circumstances in which Parliament debates treaties. And under the informal 'Ponsonby Rule' (a 1924 government undertaking which crystallised into the constitutional practice for parliamentary scrutiny of treaties) the Government laid before Parliament most treaties that it wanted to ratify.

But Parliament previously had no statutory role in the ratification of treaties, and little power to overcome the will of the executive to ratify a particular treaty (unless it required a change in UK legislation or the grant of public money). Parliament could only express disapproval and rely on political pressure to change the mind of ministers or, in extreme cases, withdraw its confidence from them.

Years of proposals in private members ' Bills, a royal commission report, select committee reports, the Governance of Britain consultation and a draft Bill (whose proposals on treaties generally met with cross-party support) sought to increase Parliament's role on treaties.[10]

Then part 2 of the Constitutional Reform and Governance Act 2010, which came into force on 11 November 2010, gave Parliament a statutory role on treaties that includes a new power for the Commons to block ratification. How does it work?

4.2 The Government must lay treaties before Parliament

Under the 2010 Act, the Government now has a general statutory requirement to lay before Parliament any treaty that is subject to ratification or its equivalent. (This puts one aspect of the Ponsonby Rule on a statutory footing.)

The Government must also include an Explanatory Memorandum (EM) on the treaty.[11] Although the 2010 Act provides little detail on what the EM should contain, it will usually place on public record:

- the name of the minister with primary responsibility for a treaty;
- its financial implications;
- the means required to implement it;

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10 See *Parliamentary Scrutiny of Treaties: up to 2010*, Library Standard Note SN/IA/4693, 25 September 2009

11 2010 Act s24: 'In laying a treaty before Parliament under this Part, a Minister shall accompany the treaty with an explanatory memorandum explaining the provisions of the treaty, the reasons for Her Majesty's Government seeking ratification of the treaty, and such other matters as the Minister considers appropriate.'

- the outcome of any discussions which have taken place within and outside government; and
- any UK reservations or declarations to the treaty.[12]

The Government had been producing Explanatory Memorandums on treaties as a matter of course for some years before the 2010 Act.

Since November 2000, the FCO has also ensured that a copy of each treaty laid before Parliament is sent to the relevant departmental Select Committee. The Joint Committee on Human Rights has been particularly active, scrutinising all treaties with a significant human rights aspect and often reporting on them to Parliament.

4.3 The Commons could block ratification

More radically, the 2010 Act for the first time gave Parliamentary disapproval of treaties statutory effect, even giving the Commons the power to block ratification indefinitely by repeatedly passing motions that a treaty should not be ratified.

The process is as follows:

- The Government may not ratify a treaty for 21 sitting days after it was laid before Parliament.
- If that 21 sitting day period ends without either House resolving that the treaty should not be ratified, then the Government may go ahead and ratify (this is what has always happened so far).
- If during the 21 sitting day period either House resolves that the treaty should not be ratified, the Government must lay before Parliament a statement setting out its reasons for nevertheless wanting to ratify.
- If only the Lords and not the Commons resolves against ratification, the Government may then go ahead and ratify (after laying its statement).
- If the Commons resolves against ratification – regardless of whether the Lords does or not – a further 21 sitting day period is triggered from when the Government's statement is laid. During this period the Government cannot ratify the treaty.
- If the Commons again resolves against ratification during this 21 sitting day period, the process is repeated.
- This could continue indefinitely, in effect giving the Commons the power to block ratification.

A 'sitting day' means a day on which both Houses of Parliament sit.[13]

The 2010 Act provides that the Minister can extend the 21 sitting day period by up to 21 further sitting days, by laying a statement about the extension before Parliament during the original 21 sitting day period. If

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12 J Harrington, 'Scrutiny and Approval: The Role for Westminster-Style Parliaments in Treaty-Making', 55 International and Comparative Law Quarterly 121 (2006), pp131-32

13 2010 Act s20(9)

the Minister does so, a resolution against ratification will have legal effect in this extended period.[14]

Neither House has yet resolved against ratification under these new provisions.

4.4 What is the procedure for the Commons to resolve against ratification?

In order for the Commons to resolve that a treaty should not be ratified, a motion would need to be agreed on the floor of the House. The Labour Government in 2008 said that this would be left to the 'usual channels' (in other words the party whips) and for 'people to make a noise'.[15]

What are the options?

Government time

The Government could provide time for debate and decision.

A few treaties are debated under the Government's undertaking to submit 'important Treaties' to the House for discussion within the 21 sitting days for which they are laid. This was part of the Ponsonby Rule.

The Government has also undertaken since 2000 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. As far as we are aware it has not received any requests for a debate under this procedure.[16]

Opposition time

The Opposition could provide time for debate and decision.

Currently 20 opposition days are made available in each session – 17 for the leader of the opposition and 3 for the leader of the second-largest party.[17]

Delegated Legislation Committee?

The Government might be able to refer the motion to a Delegated Legislation Committee (DLC) for a debate, after which either the Government or the Opposition could provide time for a decision (if necessary, a vote) on the floor of the House.

Although this has not been done for treaties, there examples of matters being referred to the equivalent of a DLC for a debate before a decision is taken on the floor of the House.

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14 2010 Act s21

15 Jack Straw, Evidence to the Joint Committee on the Draft Constitutional Renewal Bill, 1 July 2008 (Q750)

16 *The Governance of Britain - War Powers and Treaties: Limiting Executive Powers*, CM 7239, 25 October 2007, para 138

17 House of Commons Standing Order 14(2)

Backbench Business Committee time?

It is unlikely that a motion could be debated in Backbench Business Committee time, because Standing Order No 14(6) says that the Committee cannot provide time to debate 'proceedings under any Act of Parliament'. A resolution that a treaty should not be ratified is likely to be considered a 'proceeding' under the 2010 Act.

4.5 Limits of the 2010 Act

Although the 2010 Act's provisions on treaties look like a major change, in fact they are quite limited:

- Some types of treaty are excluded from the 2010 Act (although in some cases – EU treaties and 'double taxation' agreements – this is because they have specific procedures which give Parliament a greater role).
- There is no legal requirement to consult the devolved executives and legislatures, which have very limited involvement in treaties.
- Parliament does not have to debate or vote on ratification – and it rarely does so.
- The 2010 Act does not give Parliament the power to amend a treaty or be involved in treaty negotiation – it can only oppose (or tacitly accept) ratification of the whole treaty.

Each of these issues is addressed below.

5. Exclusions from the 2010 Act

5.1 'Exceptional cases'

In 'exceptional cases' the Government can ratify treaties without laying them before Parliament, as long as it then publishes the treaty and its reasons for not following the normal rules.[18]

There is no indication in the 2010 Act of what might constitute an exceptional case. Emergencies are likely to be the main examples, but the Government is free to designate anything an exceptional case.

5.2 Memorandums of Understanding

The 2010 Act covers only treaties that are 'binding under international law'[19] and subject to ratification (or equivalent).

Not all international commitments are 'binding under international law'. The UK has for example concluded many Memorandums of Understanding (MOUs) that include obligations but are not legally binding and so are not covered by the 2010 Act.

Furthermore, some treaties simply come into force when they are signed. Because they do not require ratification or equivalent, they are not subject to the provisions of the 2010 Act.

The Ponsonby Rule included a commitment to inform the House of Commons of all other binding agreements which involve serious international obligations, but this is not reflected in the 2010 Act.

5.3 Some EU Treaties

Treaties that amend the EU Treaties

Certain types of EU Treaties are excluded from the 2010 Act[20] because they have a higher degree of Parliament scrutiny and involvement. The excluded treaties are:

- treaties that amend the main EU Treaties (these cannot be ratified unless approved by Act of Parliament; and if they increase the competences of the EU they must be approved in a referendum);[21] and
- treaties adopted under the Ordinary Revision Procedure that amend the Euratom Treaty (these cannot be ratified unless approved by Act of Parliament).[22]

Treaty amendments that change the membership or redefine the rules of the EC/EU have always required implementing legislation in the form of an Act of Parliament. These Acts add the new Treaty to the list of EU Treaties in section 1(2) of the European Communities Act 1972 (ECA).

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18 2010 Act s22
19 2010 Act s25(1)
20 2010 Act s20(1)
21 Part 1 of the European Union Act 2011
22 European Union (Amendment) Act 2008 s5

Since 1978, no new treaty that increases the powers of the European Parliament can be ratified by the UK Government unless approved by an Act of Parliament.[23]

UK legislation in 2008[24] and 2011[25] specified that treaties amending or replacing the Treaty on European Union (TEU) or the Treaty on the Functioning of the European Union (TFEU) could not be ratified by the Government unless approved by Act of Parliament. The later Act also requires a referendum in certain cases where competences are to be transferred from the UK to the EU.

Of the six Bills linked to EC/EU Treaties, Parliament spent most time on the Maastricht Treaty (41 days), closely followed by the original membership process (39 days). Lisbon came third with 25 days. Lisbon gave rise to the largest number of divisions, although a number of these were not on the Bill itself but concerned government policy in various policy areas relevant to the Lisbon Treaty.

The Parliamentary process for treaties that amend the EU Treaties is discussed in more detail in another Commons Library briefing, EU Treaty change: the parliamentary process of bills.[26]

Not EU external agreements

Agreements concluded by the EU with third parties (as well as treaties entered into by the UK that are 'ancillary to' any of the EU Treaties) are subject to the normal procedures under the 2010 Act if they need to be ratified by the UK. A major example is EU free trade agreements with countries outside the EU.

EU external agreements with provisions that need to have effect in UK law must also be 'designated' as an EU Treaty for the purposes of the ECA. This is done by secondary legislation: a draft Order in Council is laid before Parliament and must be approved by both Houses by the affirmative procedure before it can come into force.[27]

Designation means that the ECA applies to the agreement as if it were one of the EU Treaties. It enables UK courts to recognise any direct effect arising from provisions of the agreement and gives a Minister the power to adopt UK subordinate legislation to implement the agreement in the UK.

Proposals for an EU external agreement may be examined by the House of Commons European Scrutiny Committee, and may be debated in one of the European Committees or even on the Floor of the House, as well as by the House of Lords EU Committee or one of its sub-committees.

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23 European Assembly elections Act 1978 s6, re-enacted as s12 of the European Parliamentary Elections Act 2002

24 section 5 of the European Union (Amendment) Act 2008 (repealed and replaced by Part 1 of the European Union Act 2011)

25 Part 1 of the European Union Act 2011

26 CBP 3341, 15 June 2015

27 ECA 1972 s1(3)

There is more information in another Commons Library briefing, EU external agreements: EU and UK procedures.[28]

Not the UK-EU withdrawal agreement

If a withdrawal agreement is concluded between the UK and the EU under Article 50 of the Treaty on European Union, it is likely to require ratification by the UK. In that case, the 2010 Act would apply.

This would be in addition to the pre-signature vote that the Government has promised[29] (see below).

5.4 Double taxation agreements

Treaties with direct financial implications, which are most commonly bilateral agreements to avoid double taxation, require the assent of the House of Commons as they affect revenue.

Primary legislation states that a double taxation agreement has effect if the Commons has passed a resolution approving an Order in Council about the arrangements.[30] A delegated legislation committee will scrutinise and debate the draft Order. These agreements are therefore excluded from the 2010 Act.[31]

This procedure effectively rolls together the amendment of domestic legislation required for the UK to meet its international obligations under the treaty, and parliamentary consent to ratification. It is a relatively attenuated procedure, like other delegated legislation. But it does at least mean that every UK tax treaty receives some Parliamentary scrutiny (even if the effectiveness of that scrutiny may be questioned).

During a December 2016 House of Commons debate on Roger Mullin's Private Member's Bill on double taxation agreements, the Treasury Minister Jane Ellison commented on the procedure for Parliamentary scrutiny:

> We have a system whereby tax treaties are subject to parliamentary scrutiny and debate before they can enter into force. That means scrutiny through a Delegated Legislation Committee. There is a gap of several months between signature and debate, which gives hon. Members ample time to acquaint themselves with the contents of a treaty and to inform robust debate. There is also both the power and the precedent for referring treaties to the Floor of the House. That has not been done since 1984, but I would be delighted to discuss any of these on the Floor of the House if Members were moved to bring them forward.[32]

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28 CBP 7192, 29 March 2016

29 David Jones MP, Minister of State for Exiting the EU, HC Deb 7 February 2017 c274

30 Section 158 of the Inheritance Tax Act 1984 (double taxation conventions); section 2 of the Taxation (International and Other Provisions) Act 2010 (double taxation arrangements); section 173 of the Finance Act 2006 (international tax enforcement arrangements).

31 2010 Act s20(2)

32 HC Deb 16 December 2016 c1146. The reference would appear to be a debate held on the floor of the House in February 1984 approving an updated agreement with the Falkland Islands: HC Deb 22 February 1984 cc925-38.

6. Limited role for devolved executives and legislatures

There is no legal requirement under the 2010 Act or other legislation for the UK Government to consult the devolved executives or legislatures on treaties. It has however undertaken to cooperate with them on negotiating and implementing treaties.

Under devolution arrangements, international relations including treaty-making remain the exclusive responsibility of the UK Government. But it is recognised that the devolved administrations in Northern Ireland, Scotland and Wales need to be involved where a treaty might have implications for devolved areas of responsibility.

Rules governing the cooperation between Whitehall and the devolved administrations are set out in a Concordat on International Relations, which is one of five concordats supporting an MOU.[33] This Concordat is explicitly intended to be binding in honour only rather than in law, but promises cooperation on exchanging information, formulating UK foreign policy, negotiating treaties and implementing treaty obligations. It also provides for ministers and officials from the devolved administrations to form part of UK treaty-negotiating teams and for apportioning any quantitative treaty obligations, as well as imposing penalties should the devolved bodies default on any agreed liability.

A recent example is Protocol 15 to the European Convention on Human Rights, on which the UK Government consulted all three devolved administrations before ratifying.[34]

Nevertheless, as Joanna Harrington has pointed out:

> It is both implicit and explicit in the nature of the devolved arrangements that Westminster retains the ability to override the actions of any devolved body and it could do so to ensure the State's compliance with its international commitments.[35]

The Scottish Parliament has a Committee on European and External Relations to monitor developments (though most of its work currently involves EU scrutiny). Scotland has even acted before Westminster in enacting legislation relating to a treaty: when ratifying the 2000 Hague Convention on the International Protection of Adults, the UK Government made a formal declaration that the Convention applied to Scotland alone until implementing legislation was passed for the rest of the UK.

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33 *Memorandum of Understanding and Supplementary Agreements between the United Kingdom Government, Scottish Ministers, the Cabinet of the National Assembly for Wales and the Northern Ireland Executive Committee*, October 2013

34 Ministry of Justice, *Explanatory Memorandum on Protocol No 15 Amending the Convention on the Protection of Human Rights and Fundamental Freedoms*, Cm 8951, 2014

35 J Harrington, 'Scrutiny and Approval: The Role for Westminster-Style Parliaments in Treaty-Making', 55 International and Comparative Law Quarterly 121 (2006), p150

7. No requirement for Parliamentary debates or votes

Although the 2010 Act puts on a statutory footing Parliament's opportunity to scrutinise treaties, and gives the Commons the power to block ratification of treaties, the Act does not require either House to debate or vote on them.

7.1 Debates and votes are rare

Although there are various mechanisms for securing a debate, not all of these would allow for a resolution on ratification, and even those that would can be hard to obtain, particularly within the 21 sitting days:

- As mentioned above, if the UK needs to change its domestic legislation in order to ratify a treaty, debates on that legislation can provide another avenue for debating the treaty itself. But these debates would not allow for a resolution against ratification.
- Other mechanisms for securing a debate in the Commons, such as adjournment debates, Westminster Hall debates, topical questions, EDMs and ten-minute rule bills, would not allow for a resolution against ratification.
- It is very rare for treaties to be debated in Government time.
- Opposition Day debates are limited. It is possible that the 21 sitting days in which the motion has to be passed could occur without an Opposition Day debate or without a Day being available to an Opposition Party that was willing to provide time for it.

There have been very few Parliamentary debates on non-EU treaties that did not require implementing legislation. Box 4 provides one example.

Box 4: Case study – the US-UK Mutual Defence Agreement

A rare example of a Parliamentary debate on a non-EU treaty was the poorly-attended Westminster Hall debate on the 2014 revision and renewal of the US-UK Mutual Defence Agreement, in Backbench Business Committee time.[36]

The revised Agreement extended the existing design cooperation to the nuclear reactors powering the UK's new Trident submarines, leading some to question whether the UK remained sufficiently independent of the US.[37]

The debate was secured by Jeremy Corbyn (then a backbench Labour MP) who opposes nuclear weapons and Dr Julian Lewis (a backbench Conservative MP) who supports the UK's nuclear deterrent. Despite their opposing views on the substance, the two Members were united in their desire for more debate and were disappointed by the 'struggle' to get more Members to participate.[38]

This debate had no legal significance as it was on a motion to adjourn.

An Early Day Motion that called for the amended Agreement not to be ratified was signed by 57 MPs,[39] but no resolution against ratification materialised during the 21-sitting-day period, and there was no debate or vote on the floor of the House. The Government therefore ratified the Agreement.

36 HC Deb 6 November 2014, c291WH ff
37 J Doward, 'Trident Treaty May Be Renewed without Parliamentary Scrutiny', Observer, 25 October 2014
38 Dr Julian Lewis MP, HC Deb 6 November 2014 c300WH
39 EDM 459 2014-15, tabled 3 November 2014

7.2 Affirmative resolution procedure?

At one stage, it had seemed as if the 'affirmative resolution' procedure might be introduced for at least some treaties (as in several other countries). This would have meant that the Government could not ratify a treaty until it had a resolution in favour of doing so from both Houses.[40]

This stronger procedure tends to produce more debates and votes than the 'negative resolution' procedure in the 2010 Act. Debates over which treaties should require active parliamentary approval could also in themselves have raised awareness.

But the procedure did not make it into the 2010 Act, so the Government can proceed with ratification unless Parliament is stirred to object.

7.3 Other formal requirements for a debate?

There have been calls for a formal requirement for a debate or vote if requested by a committee or a well-supported Early Day Motion.[41]

In 2008, Jack Straw (who was then Lord Chancellor and Minister for Justice) also suggested that an appropriate mechanism might be to make provision in the Standing Orders of each House that if a certain number of Members said they wanted a debate and vote, then this would have to happen.[42] He noted that the Government tends to resist fettering the discretion of the business managers.[43]

7.4 Committees?

It has often been suggested that Parliamentary committees could play a greater role in scrutinising treaties.

Although the Government has committed to sending treaties laid before Parliament to the relevant select committee, only the Joint Committee on Human Rights has taken much advantage of this. The timing can be difficult, with the Government reluctant to extend the 21 sitting day period to allow a committee to conduct an inquiry into a treaty.

Parliament could choose to use its committee system to greater effect in examining treaties at any stage. It could for example set up a dedicated treaty scrutiny committee either to conduct inquiries or to sift treaties to identify the most important ones for other committees to inquire into. Or a treaty sub-committee with a specialised secretariat could do sifting.

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40 Jack Straw introducing the draft Constitutional Renewal Bill, HC Deb 25 March 2008 c32. See also the report of David Cameron's Conservative Democracy Task Force, *Power to the People: Rebuilding Parliament* (6 June 2007), proposing the affirmative resolution procedure for 'significant' treaties.

41 Joint Committee on the Draft Constitutional Renewal Bill, *Draft Constitutional Renewal Bill*, HL 166 HC 551 2008-09, para 237. See generally Parliamentary scrutiny of treaties: up to 2010 (Standard Note 4693, 25 September 2009.

42 Joint Committee on the Draft Constitutional Renewal, *Draft Constitutional Renewal Bill*, HL 166, HC 551 2007-08, para 331

43 Ibid

But Parliament has so far been reluctant to set up new committee mechanisms for treaties.

7.5 Other countries

Many countries give their Parliaments a greater role in relation to treaties than the UK does.[44] Often this is because they are 'monist' countries where treaties automatically become part of their domestic law. A typical approach requires parliamentary approval for certain defined categories of treaty.

But even some other 'dualist' countries have incorporated some kind of parliamentary scrutiny of treaties.

For example, Australia's large all-party Joint Standing Committee on Treaties (JSCOT) can inquire into treaties even during the negotiation stage and recommend against ratification (although this does not bind the Government).

In New Zealand, although the House of Representatives does not need to consent to the Government ratifying treaties, the Government now presents some treaties to the House before ratification. They are referred to the Foreign Affairs, Defence and Trade Committee, which then decides whether to examine them itself or refer them to another committee. The committees occasionally make recommendations to the Government, even going as far as to recommend against ratification.[45] Typically, any domestic legislation needed to implement the treaty will then be submitted to parliament after this scrutiny process.

Similarly in Canada any implementing legislation will follow the laying of a treaty before Parliament.

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44 See A Lang, 'Parliament and International Treaties', in A Horne and A Le Sueur (eds), Parliament: Legislation and Accountability, 2016; Mario Mendez, 'Constitutional Review of Treaties: Lessons for Comparative Constitutional Design and Practice', Jean Monnet Working Paper 8/16, 2016

45 New Zealand Parliament, Parliamentary Practice in New Zealand, Chapter 43: International Relations, 14 Oct 2010

8. Parliament cannot amend treaties

8.1 Introduction

Although the aim of the Governance of Britain proposals that led to the 2010 Act was 'to hold power more accountable', the Act does little to help Parliament actually scrutinise treaties effectively.

In other words, there is nothing in the Act to help Parliament look at treaties in a systematic way, decide which are significant or controversial and present its democratic opinions on them to the Government at a point where it could make a difference. Nor does the 2010 Act give Parliament the power to amend a treaty – it can only oppose (or tacitly accept) ratification of the whole treaty.

Brexit has re-awakened the debate on how Parliament should be involved with treaties. The Government has so far agreed only to give Parliament a vote on a withdrawal agreement before it is signed. But the likelihood of subsequent treaties having a major effect domestically, for instance on trade, might reignite calls for more parliamentary scrutiny of treaties.

8.2 No formal involvement in negotiations

There is no general requirement or mechanism for parliamentary scrutiny of (non-EU) treaties while the Government is negotiating them. So Parliament is not usually involved at the stage when changes could still be made to the text of a treaty.

Debates do sometimes happen at this stage, but they have only political rather than legal significance (see Box 5 below for one example).

Box 5: Case study – TTIP

In July 2013 the Commons Backbench Business Committee arranged an (over-subscribed) debate[46] on 'the biggest bilateral trade agreement in the history of the world': the EU-US trade and investment agreement, or TTIP.

This debate came just after the two parties had begun formal negotiations on the treaty.

It aired some information that had not previously come to light, and the European Scrutiny Committee and the House of Lords EU Committee then continued their investigations into negotiating the agreement.

Apparently Ministers will commonly 'communicate with the relevant select committee' before signing a treaty,[47] but the content and effect of this are not clear.

Public consultation has on occasion given parliamentarians the opportunity to contribute to negotiations on a treaty (see the example in Box 6 overleaf), but again this does not bind the Government.

46 HC Deb 18 July 2013 c1342ff
47 HL Deb 31 January 2008 c796

Box 6: Case study – the Biological Weapons Convention

Between April and September 2002, the UK carried out a public consultation on the position to be adopted during negotiations on amending the 1972 Biological and Toxin Weapons Convention. The consultation document expressly sought views from MPs, non-governmental organisations (NGOs) and other organisations and individuals with an interest in the subject.[48]

8.3 Changing a concluded treaty

Multilateral treaties are usually negotiated and finalised by inter-governmental conferences. Once they have been concluded and opened for signature and ratification, neither individual governments nor parliaments can amend them.

A government can however submit declarations and/or reservations to treaties when it signs or ratifies them, stating for example its understanding of particular treaty provisions or that it does not consider itself bound by a certain provision.

Also treaties can usually be amended by a subsequent treaty or protocol.

8.4 Other countries

In the US, for example, treaties are sometimes renegotiated or have a protocol added to respond to amendments proposed by the legislature – see Box 7.

Box 7: The US example

In the US, the Senate Committee on Foreign Relations can propose amendments to a treaty. The President and the other countries involved must then decide whether to accept the conditions and renegotiate the treaty or to abandon it.

According to a 2001 US Congressional Research Service report,[49] it is rare for a treaty to be renegotiated after Senate consideration, and in the case of multilateral treaties renegotiation is 'usually considered infeasible because of the number of countries involved'.

But the report does identify some treaties, particularly bilateral treaties, that have been renegotiated, or negotiated further and amended by protocol, as a result of Senate consideration. One example is a UK-US tax treaty which had a protocol added to deal with reservations raised by the Committee on Foreign Relations.

Other treaties never entered into force because the Committee's reservations or amendments were not acceptable, either to the President or to the other country or countries that were party to the treaty.

But in general parliaments are not usually involved in shaping the treaty text:

> The expanded parliamentary role in relation to treaty approval articulated in constitutional texts, including through increased approval thresholds, is not however to be mistaken for actual input into the content of treaty-making. The language of "advice" in the US constitutional clause on treaty approval has certainly not been replicated in later constitutional texts, and indeed famously

[48] FCO, Strengthening the Biological and Toxin Weapons Convention: Countering the Threat from Biological Weapons, Cm 5484, 2002

[49] US Congressional Research Service, 'Treaties and Other International Agreements: The Role of the United States Senate', January 2001, 112

> even in the US the senate advice dimension quickly became a dead letter. To be sure, in practice we do have constitutional systems in which the parliamentary role goes well beyond simply voting yes or no to a purely executive negotiated agreement over which they have had no previous say. The US, and increasingly the EU, is perhaps the most prominent example of a legislature using its treaty approval powers to seek to directly shape the emerging treaty text itself. But we should certainly not assume that using the treaty approval power as a potential mechanism to shape treaty text is the norm, and indeed if anything it is the opposite that seems to be the case.[50]

8.5 Arguments for some parliamentary involvement

Michael Bowman, Director of the University of Nottingham Treaty Centre, has suggested that where signature of a treaty is essentially a preliminary to ratification, parliamentary involvement before signature could minimise the risk of disagreements between Parliament and the Government over the desirability of ratification.[51]

Some commentators have called for a non-statutory 'soft mandating' mechanism, allowing Parliament to have some influence on the negotiation of a treaty or at least immediately before signature.[52] This would involve, say, the minister and officials meeting the relevant select committee before international negotiations on a treaty to agree a 'soft mandate' or general bargaining position and desirable outcome. The minister would then report back to the committee and explain any departures from the agreed position.

Joanna Harrington, in a 2006 article, considered that 'there should be a mechanism that enables Parliament to draw attention to a future treaty action that has strong opposition and this mechanism should not rest on executive goodwill or discretion'. She suggests that a negative resolution procedure could be invoked within the time period assigned for scrutiny, which would 'not overly tie the hands of the executive during treaty negotiation':

> Such a procedure might also encourage greater cooperation between the levels and branches of government to avoid a lobby for triggering the negative resolution mechanism at a later stage. It is also a middle ground position that balances the various interests at play, admittedly sacrificing some efficiency for some accountability.[53]

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50 Mario Mendez, 'Constitutional Review of Treaties: Lessons for Comparative Constitutional Design and Practice', Jean Monnet Working Paper 8/16, 2016, pp12-13

51 Joint Committee on the Draft Constitutional Renewal Bill, 341

52 See Joint Committee on the Draft Constitutional Renewal Bill, Draft Constitutional Renewal Bill, HL 166 HC 551 2007-08, para 236

53 Joanna Harrington, 'Scrutiny and Approval: The Role for Westminster-Style Parliaments in Treaty-Making', 55 International and Comparative Law Quarterly 121, 2006, at 158

8.6 Arguments against

But the idea of introducing a system of parliamentary scrutiny of treaty negotiations before signature has not generally been popular in the UK.[54] For example:

- In early 2000, a Royal Commission on the Reform of the House of Lords agreed with the FCO that the large number and variety of treaties, and the political and diplomatic circumstances in which they are negotiated, would preclude a general commitment to compulsory pre-conclusion scrutiny.[55]
- Sir Michael Wood, former legal adviser to the FCO, argued in 2007 that this was not a matter to be dealt with by legislation. Moreover, he pointed out that treaty negotiations are often conducted in secret, making parliamentary scrutiny at that stage difficult if not impossible.[56]
- The Labour Government in 2008 considered that a formal mechanism for scrutinising treaties before signature was neither practical nor workable, 'given the diverse circumstances and timeframes in which treaty negotiations are conducted'.[57]

8.7 Parliament and the Brexit treaties

Brexit has stimulated many debates on Parliament's role in negotiating treaties.

Government view

The Government maintains that disclosing its negotiating position would be damaging, and that parliamentarians should not 'micromanage' the process of leaving the EU.

And although the Government sees parliamentary accountability as a good thing, the Secretary of State for Exiting the EU, David Davis, has argued that this should be largely retrospective.

He has agreed that Parliament committed to ensuring that Members of Parliament are 'at least as well informed as the European Parliament (EP) as negotiations progress'. But it is not yet clear how well-informed the EP will be. Under an inter-institutional agreement with the European Commission, it has for instance been granted access to the 'consolidated negotiating texts' of the Trans-Atlantic Trade and Investment Partnership (TTIP) negotiations.

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54 See Parliamentary scrutiny of treaties: up to 2010, Commons Library Standard Note 4693, 25 September 2009

55 Royal Commission on the Reform of the House of Lords (the Wakeham Commission), A House for the Future, Cm 4534, 2000, paras 8.37– 8.42

56 Joint Committee on the Draft Constitutional Renewal Bill, Draft Constitutional Renewal Bill, HL 166-II, HC 551-II 2007–08, 434

57 Ministry of Justice, The Governance of Britain – Constitutional Renewal, Cm 7342-I, 2008, para 165

Select Committee views

Several Parliamentary Committee reports have looked at how UK Parliament will or should be involved at different stages in the process, including:

- House of Commons Exiting the European Union Committee, The process for exiting the European Union and the Government's negotiating objectives, 14 January 2017
- House of Lords European Union Committee, Brexit: parliamentary scrutiny, 20 October 2016
- House of Lords Constitution Committee, The invoking of Article 50, 13 September 2016

The House of Lords EU Committee set out why it considered that Parliament should be able to monitor the Government's conduct of the negotiations, and to comment on the substance of the Government's negotiating objectives as they develop:

> 16.The forthcoming negotiations on Brexit will be unprecedented in their complexity and their impact upon domestic policy. The direction of many key areas of policy, affecting core national interests, will be heavily influenced, if not determined, by the outcome of the negotiations. While the Government has an obligation, following the referendum, to deliver Brexit, it seems to us inconceivable that it should take the many far-reaching policy decisions that will arise in the course of Brexit without active parliamentary scrutiny.
>
> 17.We agree with the Government, and all our witnesses, that Parliament should not seek to micromanage the negotiations. The Government will conduct the negotiations on behalf of the United Kingdom, and, like any negotiator, it will need room to manoeuvre if it is to secure a good outcome.
>
> 18.At the same time, we do not regard the principle of accountability after the fact, however important in itself, as a sufficient basis for parliamentary scrutiny of the Brexit negotiations. Instead, we call on the Government to recognise a middle ground between the extremes of micromanagement and mere accountability after the fact.
>
> 19.Within this middle ground, 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. Only if these principles are accepted will Parliament be able to play a constructive part in helping the Government to secure the best outcome for the United Kingdom. Such scrutiny will also contribute to a greater sense of parliamentary ownership of the process, strengthening the Government's negotiating position and increasing the likelihood that the final agreement will enjoy parliamentary and public support.[58]

But it rejected the idea of a formal 'scrutiny reserve' for the Brexit negotiations as it would be a 'new departure' for the UK Parliament:

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[58] House of Lords European Union Committee, Brexit: parliamentary scrutiny, 20 October 2016, paras 16-19

> We have considered whether [the proposed general principles on scrutiny by the Westminster Parliament of the forthcoming negotiations on Brexit] should be embodied in a formal scrutiny reserve resolution. On balance, however, we are persuaded that a formal and prescriptive scrutiny reserve could restrict the Government's room for manoeuvre, thereby acting against the national interest. We are also conscious that scrutiny of treaty negotiations will be a new departure for the UK Parliament: it will take time for mutual trust to develop and for optimum working practices to be identified. We therefore do not recommend the adoption of a formal scrutiny reserve at this stage.[59]

Debates on the Notification of Withdrawal Bill

Parliament's role in scrutinising the withdrawal negotiations and any resulting agreement(s) was the subject of many amendments tabled in the Commons to the Bill authorising the Government to trigger Brexit (the European Union (Notification of Withdrawal) Bill 2016-17).

Although none of these amendments was passed, the Government has now committed to giving Parliament a vote on an EU withdrawal agreement before it is concluded and signed:

> The Government have committed to a vote on the final deal in both Houses before it comes into force. This will cover both the withdrawal agreement and our future relationship with the European Union. I can confirm that the Government will bring forward a motion on the final agreement, to be approved by both Houses of Parliament before it is concluded. We expect and intend that that will happen before the European Parliament debates and votes on the final agreement.[60]

This commitment does not appear in legislation. The Government has stated that a 'no' vote would mean the agreement(s) would fall and the UK would leave the EU without any agreement. It does not intend to re-negotiate the agreement(s) in the event of Parliament voting no.

Future treaties

The withdrawal agreement and future relationship agreement are of course likely to be only the first of a series of major treaties resulting from Brexit.

The potential impact of these treaties – for instance trade treaties allowing states to be sued by foreign investors – might well lead to more calls for greater Parliamentary scrutiny of at least some important categories of treaty.

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59 House of Lords European Union Committee, Brexit: parliamentary scrutiny, 20 October 2016, para 61

60 David Jones MP, Minister of State for Exiting the EU, HC Deb 7 February 2017 c274

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