Scrutiny of international agreements

Treaties considered on 5 February 2019

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The European Union Committee

The European Union Committee is appointed each session “to scrutinise documents deposited in the House by a Minister, and other matters relating to the European Union”.

In practice this means that the Select Committee, along with its Sub-Committees, scrutinises the UK Government’s policies and actions in respect of the EU; considers and seeks to influence the development of policies and draft laws proposed by the EU institutions; and more generally represents the House of Lords in its dealings with the EU institutions and other Member States.

On 14 January 2019 the Procedure Committee decided that the European Union Committee should, until the end of the 2017–19 session of Parliament, be responsible for scrutinising Brexit-related treaties or international agreements.

The six Sub-Committees are as follows:
- Energy and Environment Sub-Committee
- External Affairs Sub-Committee
- Financial Affairs Sub-Committee
- Home Affairs Sub-Committee
- Internal Market Sub-Committee
- Justice Sub-Committee

Membership

The Members of the European Union Select Committee are:

- Baroness Armstrong of Hill Top
- Lord Boswell of Aynho (Chairman)
- Baroness Brown of Cambridge
- Lord Cromwell
- Baroness Falkner of Margravine
- Lord Jay of Ewelme
- Baroness Kennedy of the Shaws
- Earl of Kinnoull
- Lord Liddle
- Baroness Neville-Rolfe
- Baroness Noakes
- Lord Polak
- Lord Ricketts
- Lord Risby
- Lord Liddle
- Baroness Suttie
- Lord Teverson
- Baroness Verma
- Lord Whitty

Further information


Committee staff

The current staff of the Committee are Christopher Johnson (Principal Clerk), Stuart Stoner (Clerk), Roberto Robles (Policy Analyst), Tim Mitchell (Legal Adviser), Alex Horne (Legal Adviser), Samuel Lomas (Committee Assistant) and Alasdair Johnston (Committee Assistant).

Contact details

Contact details for individual Sub-Committees are given on the website. General correspondence should be addressed to the Clerk of the European Union Committee, Committee Office, House of Lords, London, SW1A 0PW. Telephone 020 7219 5791. Email euclords@parliament.uk.

Twitter

You can follow the Committee on Twitter: @LordsEUCom.
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SUMMARY

On 14 January 2019 the Procedure Committee decided that, for the remainder of the current session of Parliament, the European Union Committee should scrutinise and report on all Brexit-related treaties, or international agreements, laid before Parliament in accordance with section 20 of the Constitutional Reform and Governance Act 2010. Chapter 1 of this report describes how the EU Committee will approach this task, including the criteria against which it will report on agreements.

On 5 February the Committee scrutinised three such international agreements:

- Protocol (2015) amending the annex to the Agreement on trade in civil aircraft [CP 9]
- Amendment of the TRIPS Agreement [CP 10]
- Protocol amending the Marrakesh Agreement establishing the World Trade Organization [CP 11]

The Committee has reported all three agreements for information.
CHAPTER 1: SCRUTINY OF BREXIT-RELATED INTERNATIONAL AGREEMENTS

Introduction: Brexit and international agreements

1. Under European Union law, the Member States have conferred upon the EU the power to negotiate and enter into certain treaties, or international agreements, on their behalf. These EU international agreements, by which the UK is bound and from which it benefits as a Member State (but not in its own right), could cease to apply to the UK from the moment at which it leaves the EU. They cover a range of important policy areas, such as trade, transport and the environment.

2. To ensure continuity before and after Brexit—for instance, allowing UK businesses to benefit from similar terms of trade with countries that have concluded Free Trade Agreements with the EU—the UK will need to enter into agreements in its own name, thereby replacing these EU agreements.

3. When this process has to be completed depends on whether or not the UK and the EU agree the terms of UK withdrawal. If a deal is reached, Article 129 of the Withdrawal Agreement confirms that the UK “shall be bound” by all EU international agreements for the duration of any transition or implementation period. A footnote to Article 129 further states that the EU “will notify other parties to these agreements that during the transition period the United Kingdom is to be treated as a Member State for the purposes of these agreements”. In these circumstances, assuming that the other parties to the agreements judge that they can continue to treat the UK as an EU Member State, the Government would have until the end of the transition period (currently set at 31 December 2020, with the possibility of extension until 31 December 2022) to conclude replacement agreements.

1 The Constitutional Reform and Governance Act 2010 refers to ‘treaties’; the EU Treaties refer to ‘international agreements’. We use the terms interchangeably.

2 The policy areas in which the EU enjoys ‘exclusive competence’ to enter into international agreements on behalf of the Member States are listed in Article 3 of the Treaty on the Functioning of the European Union (TFEU), and include key components of trade policy, such as customs union and the common commercial policy. Areas in which the EU and its Member States enjoy ‘shared competence’ (and where the EU may, with the agreement of the Member States, negotiate agreements on their behalf) are listed in Article 4 TFEU. Areas of shared competence include transport, the environment and security. Where an agreement touches on both shared and exclusive competences the Council may decide that it should be concluded by the EU alone, or that it should be concluded as a ‘mixed’ agreement, meaning that each Member State, as well as the EU, must ratify it. Where exclusive Member State competences are touched as well as EU competences the agreement must be mixed.


4. If the UK leaves the EU without a deal, and thus without a transition period, these international agreements will need to be ratified by or as soon as possible after 29 March 2019.5 The Government has not disclosed exactly how many such agreements it would seek to conclude by this date in the event of no deal, but the Secretary of State for Exiting the European Union wrote to us on 25 January 2019, annexing a helpful list of 61 agreements that either have been signed or are close to signature.6

5. Hitherto UK international agreements, as instruments subject to parliamentary procedures (for which see the next section) have been scrutinised by the Secondary Legislation Scrutiny Committee (SLSC). That Committee is, however, already scrutinising large numbers of statutory instruments laid under the European Union (Withdrawal) Act 2018, which form another key component of the Government’s preparations for a potential ‘no deal’ Brexit. In recognition of this increased workload, the Procedure Committee has therefore decided that the European Union Committee should, until the end of the 2017–19 session of Parliament, be responsible for scrutinising Brexit-related treaties or international agreements.7

6. In approaching this task, the EU Committee will draw on its long experience of scrutinising EU documents and activities, including documents directly relating to the negotiation and conclusion of the EU international agreements that are now being ‘rolled over’. The remainder of this chapter provides a brief explanation of how the EU Committee will approach its work.

How treaties are ratified: the Constitutional Reform and Governance Act 2010

7. Treaties are negotiated, signed and ratified by the Government, on behalf of the UK, under prerogative powers. Parliament is involved in two ways:

- First, the UK operates a dualist legal system: international treaties must be incorporated in domestic law to have direct legal effect in domestic law. Thus, while a treaty, once ratified, is binding in international law, the domestic courts cannot enforce it directly, unless Parliament has legislated to give treaty provisions domestic legal effect.

- Second, Parliament has a role in scrutinising treaties before the Government ratifies them. This role is set out in Part 2 of the Constitutional Reform and Governance Act 2010 (the ‘CRAG Act’).

8. Section 20 of the CRAG Act states that, with some exceptions, the Government may not ratify a treaty unless it has first laid a copy before Parliament, and, within 21 sitting days of this happening, neither House has passed a resolution that the treaty should not be ratified. A resolution passed by the Lords is advisory: the Government may decide to proceed regardless, but is required to publish a statement explaining its intention, and giving its reasons. A Commons resolution, on the other hand, would prevent the...
Government from proceeding for another 21 sitting days. The Commons could then pass further resolutions, indefinitely postponing ratification.

9. Section 22 provides that the Government may, exceptionally, disapply the procedure set out in section 20. But it cannot do so once either House has passed a resolution under section 20.

The role of the European Union Committee

10. The SLSC retains responsibility for scrutinising any domestic secondary legislation that is required to give legal effect to Brexit-related international agreements. The EU Committee’s role is to support the second limb of parliamentary oversight, that governed by section 20 of the CRAG Act.

11. We will examine the legal and policy implications of all Brexit-related treaties and international agreements published between now and the end of the session. We will also report on all of them, to help Members of the House in identifying those of particular interest, so that they can, where appropriate, table resolutions or motions to debate them.

12. We will report treaties under one of two headings: treaties to which special attention is drawn; and treaties reported for information only. Treaties in the first category will be analysed in some detail, while brief factual summaries will be provided for treaties in the second category.

13. We will use the following criteria in deciding whether to draw a treaty to the special attention of the House:

(a) that it is politically or legally important, or gives rise to issues of public policy that the House may wish to debate prior to ratification;

(b) that it may be inappropriate, in view of changed circumstances since the precursor agreement was concluded by the EU;

(c) that it differs significantly from the precursor agreement to which the UK is party as an EU member state;

(d) that it contains major defects, that may hinder the achievement of key policy objectives;

(e) that the explanatory material laid in support provides insufficient information on the agreement’s policy objective and on how it will be implemented;

(f) that further consultation would be appropriate, including with the devolved administrations.

These criteria are modelled on those contained in the terms of reference of the Secondary Legislation Scrutiny Committee, in respect of statutory instruments, but have been adapted to reflect the different characteristics of international agreements.

Process and timetables

14. After laying, treaties will be reviewed by the EU Committee’s legal advisers, along with our specialist adviser, Dr Holger Hestermeyer, and then sifted to one of the EU Committee’s six subject-based sub-committees. These sub-committees will submit text to the EU Select Committee, analysing the
treaty and recommending whether or not it should be drawn to the special
attention of the House. The Select Committee will then review and publish
a report combining contributions from sub-committees the following week.
The process is summarised in Figure 1.

15. As indicated above, the CRAG Act allows Parliament 21 sitting days, within
which either House may pass a motion calling for the Government not to
ratify a treaty. The sitting days are defined as days on which both Houses
of Parliament are sitting, starting from the day following that on which the
agreement is laid.

16. The Committee’s target, to give Members of the House time to consider	abling motions for debate, is to report well before the deadline is reached.
Where we have drawn special attention to an agreement, that agreement will
be listed, with an italic reference to our report, in each day’s edition of House
of Lords Business, until the expiry of the scrutiny period.

17. This is our first report on Brexit-related international agreements. We
expect to publish further reports each week, and would be grateful for any
feedback from Members of the House or from other stakeholders. Towards
the end of the parliamentary session we will review our work, with a view
to identifying any ‘lessons learned’ that could inform further consideration,
including by the House of Lords Liaison Committee, of how best to conduct
parliamentary scrutiny of treaties in the longer term.
Figure 1: Treaty Scrutiny Flowchart

Treaty laid before Parliament

Week 1
- Treaty reviewed by Legal Advisers
- Treaty allocated to EU Sub-Committee

Week 2
- Sub-Committee scrutinises treaty
- Sub-Committee agrees draft report
- Stakeholders’ views welcome
- Consultation with devolved institutions

Week 3
- EU Select Committee agrees final report

Weeks 4-6
- Report published
- Motion tabled and debated in the House

Treaty ratified

Total of 21 sitting days (about 6 calendar weeks) allowed for scrutiny
CHAPTER 2: TREATIES CONSIDERED ON 5 FEBRUARY 2019

EU competence in respect of trade agreements

18. All three of the international agreements considered in this report are Protocols to earlier multilateral or plurilateral agreements. In each case, the United Kingdom is already party to the original agreement, but party to the Protocol only by virtue of its EU membership. This apparent anomaly is explained in Box 1.

Box 1: The EU and the World Trade Organization

Even though the UK is a Member of the World Trade Organization and also a signatory to the (plurilateral) Agreement on Trade in Civil Aircraft in its own right, it is currently bound by the three Protocols considered in this report only as a Member State of the European Union. The reason for this apparent discrepancy lies in the fact that both the content of international trade agreements and the scope of EU competences have evolved over time.

The EU has long held an exclusive competence with regard to the common commercial policy. Early trade agreements were, however, limited in scope, and when the WTO Agreements were negotiated in the early 1990s, the Commission and Member States disagreed about the extent to which the EU had the competence to conclude the new agreements. The Court of Justice was asked to issue an opinion on this question, and decided that the European Union (at that time still the Community) and its Member States were “jointly competent”, both with regard to the General Agreement on Trade in Services (GATS) and the TRIPS Agreement.

In response to the enlarged scope of international trade negotiations, Member States decided over time also to enlarge the EU’s competences in this area. The three Protocols at issue here fell into these enlarged exclusive competences of the EU. Thus the EU accepted them and they became binding on the Member States without the Member States having to become parties in their own right.

Agreements reported for information

Protocol (2015) amending the Annex to the Agreement on Trade in Civil Aircraft (CP 9, 2019)

19. The Protocol was laid on 11 January 2019, and the scrutiny period is scheduled to end on 18 February. It was considered by the EU Internal Market Sub-Committee at its meeting on 31 January.

20. The UK is an independent signatory to the plurilateral Agreement on Trade in Civil Aircraft (ATCA), which eliminates import duties on aircraft (other than military aircraft) as well as other products such as civil aircraft engines, parts, components of civil aircraft and flight simulators. An Annex to the ATCA lists the products to be accorded duty-free or duty-exempt treatment. Products in the Annex are classified following the Harmonized Commodity

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8 In the WTO, a plurilateral agreement is one which only involves some members, whereas a multilateral agreement involves all members.
Description and Coding System (‘the Harmonized System’), which allows participating countries to classify traded goods on a common basis.

21. A Protocol to the ATCA, which was opened for acceptance on 5 November 2015, amends the Annex to make the product list compatible with a 2007 revision to the Harmonized System. The UK did not accept the Protocol to the Agreement in its own right, but the Council of the European Union, acting on behalf of the Member States, authorised acceptance of the Protocol in March 2017.\textsuperscript{11} The Government’s Explanatory Memorandum (EM) notes that the effects of the Protocol “are bound in our WTO goods schedule”. The Government proposes to lodge an instrument of continued acceptance at the WTO to ensure the UK’s ongoing adherence after leaving the EU.

22. \textbf{We report the Protocol amending the Annex to the Agreement on Trade in Civil Aircraft for information.}

\textit{Protocol amending the TRIPS Agreement (CP 10, 2019)}\textsuperscript{12}

23. The Protocol was laid on 11 January 2019, and the scrutiny period is scheduled to end on 18 February. It was considered by the EU Justice Sub-Committee at its meeting on 22 January.

24. The Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement), which came into effect on 1 January 1995, is a comprehensive multilateral agreement on intellectual property between all the members of the World Trade Organization (WTO). It sets down minimum standards for the regulation by national governments of many forms of intellectual property.

25. The European Union accepted the Protocol Amending the TRIPS Agreement on 30 November 2007 on behalf of the Member States, on the basis that it fell within an area of exclusive EU competence.\textsuperscript{13} The TRIPS Amendment, which entered into force on 23 January 2017 (following its acceptance by two thirds of WTO members), is aimed at improving access to affordable medicines in developing countries. The UK is currently bound by the Amendment, and now proposes to lodge an instrument of continued acceptance at the WTO to confirm its membership after leaving the EU.

26. \textbf{We report the Protocol amending the TRIPS Agreement for information.}


\textsuperscript{13} Council Decision of 19 November 2007 on the acceptance, on behalf of the European Community, of the Protocol amending the TRIPS Agreement, done at Geneva on 6 December 2005 (2007/768/EC), OJ L 311 (29 November 2007), p 35, based on Art. 133(3) in conjunction with Art. 300(2), (3) of the TEC
Protocol amending the Marrakesh Agreement establishing the World Trade Organization (CP 11, 2019)\textsuperscript{14}

27. The Protocol was laid on 11 January 2019, and the scrutiny period is scheduled to end on 18 February. It was considered by the EU External Affairs Sub-Committee at its meeting on 31 January.

28. In July 2004 the General Council of the World Trade Organization (WTO) resolved to improve aspects of the 1994 General Agreement on Tariffs and Trade, to help reduce the administrative burden associated with moving goods across borders. The outcome of the negotiations that followed was the Agreement on Trade Facilitation, incorporated by the Protocol Amending the Marrakesh Agreement establishing the World Trade Organization. As it fell into an area of exclusive EU competence, it was not ratified by the UK, but by the European Union on behalf of all Member States on 5 October 2015.\textsuperscript{15}

29. The Agreement is divided into two sections. The first section is designed to expedite the movement of goods by streamlining customs procedures and removing red tape. The second section contains special and differential treatment provisions for developing and least-developed countries that allow them to either delay implementation of individual provisions, or make the implementation of specific provisions contingent on the receipt of technical assistance and capacity building support.

30. During the original negotiations, the UK Government produced a benefits estimate, which assumed a gain of about £1bn to the UK economy. It noted that, given the efficiency of UK customs procedures, the benefits to the UK were likely to be fewer than for other EU Member States, but that UK traders would benefit from faster clearance times for their goods in other countries.

31. In the Explanatory Memorandum accompanying the Protocol the Government states its strong support for the Trade Facilitation Agreement, noting that the UK is already fully compliant with its obligations.

32. Given the UK is simply seeking to accede to the existing Protocol, with all its benefits and no new obligations, we report the Protocol amending the Marrakesh Agreement establishing the World Trade Organization for information.


\textsuperscript{15} Council Decision (EU) 2015/1947 of 1 October 2015 on the conclusion, on behalf of the European Union, of the Protocol Amending the Marrakesh Agreement establishing the World Trade Organization, OJ L 284 (30 October 2015), p 1, based on Art. 207(4) in conjunction with Art. 218(6)(a) of the TFEU
APPENDIX 1: LIST OF MEMBERS AND DECLARATIONS OF INTEREST

Members of European Union Select Committee

Lord Boswell of Aynho (Chairman)
Baroness Armstrong of Hill Top
Baroness Brown of Cambridge
Lord Cromwell
Baroness Falkner of Margravine
Lord Jay of Ewelme
Baroness Kennedy of The Shaws
The Earl of Kinnoull
Lord Liddle
Baroness Neville-Rolfe
Baroness Noakes
Lord Polak
Lord Ricketts
Lord Risby
Lord Soley
Baroness Suttie
Lord Teverson
Baroness Verma
Lord Whitty

Declarations of interest

Baroness Armstrong of Hill Top

Joint owner of a property in Spain

Lord Boswell of Aynho (Chairman)

In receipt of salary as Principal Deputy Chairman of Committees, House of Lords
Shareholdings as set out in the Register of Lords’ Interests
Income is received as a Partner (with wife) from land and family farming business trading as EN & TE Boswell at Lower Aynho Grounds, Banbury, with separate rentals from cottage and grazing
Land at Great Leighs, Essex (one-eighth holding, with balance held by family interests), from which rental income is received
House in Banbury owned jointly with wife, from which rental income is received
Lower Aynho Grounds Farm, Northants/Oxon; this property is owned personally by the Member and not the Partnership

Baroness Brown of Cambridge

Vice Chair of the Committee on Climate Change
Chair of the Adaptation Sub-Committee of the Committee on Climate Change
Chair of the Henry Royce Institute for Advanced Materials
Chair of STEM Learning Ltd
Non-Executive Director of the Offshore Renewable Energy Catapult
Chair of The Carbon Trust
Council member of Innovate UK
Lord Cromwell

Employment, partnership, business interests and shareholdings as set out in the Register of Lords’ interests
Patron of Wildlife Vets International

Baroness Falkner of Margravine

Member, British Steering Committee: Koenigswinter, The British-German Conference
Member, Advisory Board, Demos

Lord Jay of Ewelme

Trustee (Non-Executive Director), Thomson Reuters Founders Share Company
Vice Chairman, European Policy Forum Advisory Council
Member, Senior European Experts Group
Chairman, Positive Planet (UK)
Trustee, Magdalen College, Oxford Development Trust

Baroness Kennedy of The Shaws

President, Justice, UK arm of International Commission of Jurists
Chancellor, Sheffield Hallam University

The Earl of Kinnoull

Farming interests as principal and as charitable trustee, in receipt of agricultural subsidy
Chairman–Culture Perth and Kinross, in receipt of governmental subsidy
Chairman–United Kingdom Squirrel Accord, in receipt of governmental monies
Director–Horsecross Arts, in receipt of governmental subsidy
Shareholdings as set out in the register

Lord Liddle

Member, Cumbria Country Council
Pro-Chancellor (Chair of Board), Lancaster University
Co-Chair, Policy Network

Baroness Neville-Rolfe

Former Commercial Secretary, HM Treasury
Former Minister of State for Energy and Intellectual Property
Chair, Assured Food Standards Ltd
Non-Executive Director, Capita Plc
Non-Executive Director, Secure Trust Bank
Governor, London Business School
Trustee (Non-Executive Director), Thomson Reuters Founders Share Company
Shareholdings as set out in the register

Baroness Noakes

Director, Royal Bank of Scotland Group plc
Interests in a wide range of listed companies as disclosed in the Register of Interests

Lord Polak

Employment and business as set out in the Register of Lords’ interests

Lord Ricketts

Non-Executive Director, Group Engie, France
Strategic Adviser, Lockheed Martin UK
Charitable activities as set out in the Register of Interests
Dr Holger Hestermeyer, Shell Reader in International Dispute Resolution at King’s College London, is acting as Specialist Adviser supporting the Committee’s scrutiny of international agreements, and declared no relevant interests.

Sub-Committee Members

EU Energy and Environment Sub-Committee

Lord Teverson (Chair)
Lord Cameron of Dillington
Viscount Hanworth
Lord Krebs
The Duke of Montrose
Lord Rooker
Lord Selkirk of Douglas
Baroness Sheehan
The Earl of Stair
Viscount Ullswater
Baroness Wilcox
Lord Young of Norwood Green

EU External Affairs Sub-Committee

Baroness Verma (Chair)
Baroness Armstrong of Hill Top
Baroness Brown of Cambridge
Baroness Chalker of Wallasey
Lord Dubs
Lord Horam
The Earl of Oxford and Asquith
Lord Risby
Lord Stirrup
Baroness Suttie
Baroness Symons of Vernham Dean
Lord Triesman


EU Financial Affairs Sub-Committee

Baroness Falkner of Margravine (Chair)
Lord Bruce of Bennachie
Lord Butler of Brockwell
Lord Cavendish of Furness
Lord Desai
Lord Giddens
Baroness Liddell of Coatdyke
The Earl of Lindsay
Baroness Neville-Rolfe
Lord Thomas of Cwmgiedd
Viscount Trenchard
Lord Vaux of Harrowden


EU Home Affairs Sub-Committee

Lord Jay of Ewelme (Chair)
Lord Best
Lord Haselhurst
Baroness Janke
Lord Kirkhope of Harrogate
Baroness Massey of Darwen
Lord O’Neill of Clackmannan
Baroness Pinnock
Lord Ribeiro
Lord Ricketts
Lord Soley
Lord Watts

For relevant interests see: https://www.parliament.uk/documents/lords-committees/eu-home-affairs-subcommittee/scrutiny-work/Scrutiny-interests.pdf
EU Internal Market Sub-Committee

Lord Whitty (Chair)
Lord Aberdare
Baroness Donaghy
Lord German
Lord Lansley
Lord Liddle
Baroness McGregor-Smith
Baroness Noakes
Baroness Randerson
Lord Rees of Ludlow
Lord Robathan
Lord Russell of Liverpool
Lord Wigley


EU Justice Sub-Committee

Baroness Kennedy of The Shaws (Chair)
Lord Anderson of Swansea
Lord Cashman
Lord Cromwell
Lord Dholakia
Lord Judd
The Earl of Kinnoull
Baroness Ludford
Baroness Neuberger
Lord Polak
Baroness Shackleton of Belgravia
Lord Wasserman


A full list of Members’ interests can be found in the Register of Lords’ Interests: http://www.parliament.uk/mps-lords-and-offices/standards-and-financial-interests/house-of-lords-commissioner-for-standards-/register-of-lords-interests/