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EU External Agreements: EU and UK procedures

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EU Treaty bases for concluding international agreements

The EU has legal personality, which means it can negotiate and enter into international agreements and become a member of international organisations. This finds expression in Articles 216 and 217 of the *Treaty on the Functioning of the European Union* (TFEU). The EU negotiates a range of agreements with third states or organisations, most commonly Association Agreements, Free Trade Agreements, Partnership and Cooperation Agreements and Economic Partnership Agreements. In this activity the EU must respect the limits of its competence. Article 21 of the *Treaty on European Union* (TEU) sets out broad general principles governing EU international action: democracy, rule of law, universal human rights and fundamental freedoms, respect for human dignity, principles of equality and solidarity, respect for the principles of the United Nations Charter and international law.

Competences

The EU Treaties define competences as either exclusive to the EU (only the EU can act) or shared with Member States (either the EU or the Member States can act). Where the EU has supporting and parallel competence, both may act to complement and reinforce each other. EU action must not preclude Member State action. The extent of EU exclusive competence to ratify or accede to international agreements is often a matter of legal dispute. The EU Court of Justice has established that the EU has exclusive competence where entering into the international agreement 'may affect' EU internal legislation.

Many EU international agreements are 'mixed agreements': they cover subject matters in respect of which both the EU and the Member States have competence. The extent to which the EU is exercising competence should be made clear, particularly with regard to matters of shared competence, although this is often not the case. Mixed agreements can give rise to legal dispute if the Commission claims the EU has exclusive competence; or to legal uncertainty, because neither the agreement nor the EU Decisions on ratification or accession make clear which party (the EU or the Member States in their own right) is exercising competence over what part of the agreement. For mixed agreements to take effect, both the EU and the Member States must sign and conclude/ratify them. The process of ratification in the 28 Member States is an entirely domestic affair, and follows the national procedures for ratification of international agreements. If one or more of the Member State does not ratify the agreement, the agreement will not enter into force (but it can still be provisionally applied – see below).

EU negotiating process

Article 218 of the *Treaty on the Functioning of the European Union* (TFEU) contains the EU's procedures for negotiating and concluding international agreements:

- The Council authorises the negotiation of an international agreement on the recommendation of the Commission or the High Representative (HR) for Foreign and Security Policy (CFSP), if subject matter is linked to CFSP.
- The Council provides negotiating directives (the 'mandate') to the Commission/other EU negotiator.
- The Council acts by qualified majority or unanimity depending on subject matter.
- The European Parliament (EP) must be informed immediately at all stages of the procedure.

- Once agreement has been reached, the text of the international agreement is usually initialled by the negotiators. This does not commit the parties but signifies that the initialled text is an accurate statement of what has been agreed.
- A Council Decision authorises the EU to sign an international agreement, on a proposal from the EU negotiator (usually the Commission; HR for CFSP matters). Signing the agreement signifies an intention to be bound by it.
- A Council Decision on a proposal from the negotiator authorises the EU to conclude an international agreement (the equivalent of ratification), after which it becomes binding on the EU.
- The EP is formally consulted on a proposal to conclude an agreement and gives its consent, depending on the subject matter.

Provisional application

The international agreement can give the EU the power to trigger its provisional application, pending full ratification. This is normally achieved by including provisional application in the Decision authorising the EU to sign the agreement. There may be an element of 'competence creep' if provisional application is not limited to matters of exclusive EU competence or for which the EU has clearly been authorised to exercise shared competence.

UK scrutiny and ratification

The UK Parliament scrutinises various aspects of making EU external agreements. Where they need ratification in the UK, this is formally a matter of Royal Prerogative, but also involves a process of parliamentary scrutiny.

- Ministers should inform the EU Scrutiny Committees in both Houses of the 'mandate' approved by the Council, but the contents of the Commission's draft negotiating mandate is usually confidential and is not deposited in Parliament.
- A proposal for a Council Decision authorising the EU to sign, provisionally apply or conclude an international agreement is deposited in Parliament and is subject to the Scrutiny Reserve.
- In the Commons, the proposal may be debated on the Floor of the House or in European Committee, depending on the European Scrutiny Committee's recommendation. A motion of either House can influence how a Minister votes in the Council. Even if s/he votes against a proposal, it may still be adopted by a qualified majority.
- Under the *Constitutional Reform and Governance Act 2010* (CRAGA), mixed agreements requiring ratification in the UK must be laid before Parliament for at least 21 sitting days once they are signed, along with an Explanatory Memorandum. At this point they are published as a Command Paper in the European Union Treaty series. After ratification they are re-published in the UK Treaty Series.
- For mixed agreements which include provisions that need to have effect in UK law, the agreement is 'designated' as an EU treaty for the purposes of the *European Communities Act 1972* (ECA). This means that the ECA applies to it 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.
- Under CRAGA, either House can object to ratification of a treaty. The Government must then give reasons why it nevertheless wants to ratify. If the House of Commons objects, it has another 21 days to consider the Government's reasons for ratifying, and can object again. This can continue indefinitely, effectively giving the Commons the power to block ratification. The House of Lords has only one opportunity to object, and so can only delay ratification briefly.

- Designation of the agreement as an EU Treaty is via secondary legislation: a draft Order in Council is laid before Parliament and may be debated and/or approved by both Houses by the affirmative procedure.
- Further UK legislation may be needed to implement an EU agreement. This must be in place before ratification/accession is completed.

The negotiation, conclusion and implementation of EU external agreements can raise legal, political and practical questions about competence, authority, scrutiny, implementation and jurisdiction which are often confusing. This note looks at these activities at the EU and UK levels.

1. Introduction

1.1 EU Treaty bases for concluding external agreements

Article 47 of the *Treaty on European Union* (TEU) as amended by the *Treaty of Lisbon*, gives the European Union (EU) **legal personality**. This means the EU is a subject of international law and can negotiate and conclude international agreements on its own behalf. Article 21 TEU sets out broad general principles governing EU international action:

> … democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

Articles 216-218 TFEU are on **International Agreements**. The procedures by which the EU can negotiate and conclude (ratify) international agreements with third countries or organisations are set out in Articles 207 and 209 TFEU, in conjunction with Article 218(6) TFEU.

Under Article 8 TEU, to develop a special relationship with neighbouring countries the EU may conclude specific agreements with them.

Under Article 37 TEU the EU may conclude agreements with one or more States or international organisations in the areas covered by the Common Foreign and Security Policy (CFSP).

Article 3(2) of the *Treaty on the Functioning of the European Union* (TFEU) enables the Union to exercise internal competence. This is a codification of the 'Rhine Navigation Doctrine': an EU external competence can be exercised on the basis of an internal competence, even if internal EU measures have not been adopted yet – but only if EU participation in an international agreement is necessary to fulfil an internal objective mentioned in the EU Treaties.[1]

The EU Court has held that external competence may flow from other provisions of the TFEU and measures adopted within the framework of those provisions. The existence of internal rules or of unexercised Treaty powers to adopt such rules confers external competence to the EU. This 'implied power' is referred to as the AETR doctrine.[2]

The EU also **accedes** to international treaties and agreements. 'Accession' is the act by which a State becomes a party to a treaty which has already been negotiated, signed and ratified by other States. It has the same legal effect as ratification, but it is not preceded by initial signature and usually happens after the treaty has entered into force.[3]

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1 Opinion 1/76 (1977) ECR 741 at 759

2 Case 22/70, judgment 31 March 1971 concerning European Agreement concerning the Work of Crews of Vehicles Engaged in International Road Transport (AETR),

3 http://ec.europa.eu/world/agreements/glossary/glossary.jsp#summary. The EU has acceded to several international agreements, e.g. *Constitution of the Food and Agriculture Organisation of the United Nations* (FAO), *International convention on*

Under a United Nations (UN) General Assembly Resolution adopted in May 2011,[4] the EU has participating rights at the UN: EU representatives may present EU common positions, make interventions, present proposals and circulate EU communications as official documents. The EU is party to over 50 UN multilateral agreements and conventions as the only non-State participant.

1.2 Types of EU agreements

The EU concludes many kinds of external agreements with third countries and international organisations. The majority are concerned primarily with trade and investment, but include a range of aims and objectives, depending on the third party concerned, such as strengthening democracy, good governance and human rights, economic development, cooperation and political dialogue, energy, transport, education and immigration.

Examples of EU agreements include:

- Association Agreement (eg Moldova)
- Comprehensive Partnership and Cooperation Agreement (eg Vietnam)
- Trade, Development and Cooperation Agreement (eg South Africa)
- Regional Trade Agreement (eg European Free Trade Association)
- Comprehensive Trade and Economic Agreement (eg Canada)
- Cooperation Agreement (also called Development Association Agreement) (eg Maghreb; Cotonou)
- Cooperation and Customs Union Agreement (eg San Marino)
- Customs Union (eg Turkey)
- Deep and Comprehensive Free Trade Agreement (eg Ukraine)
- Economic Partnership Agreement (eg Africa, Caribbean and Pacific)
- Economic Partnership, Political Coordination and Cooperation Agreement (eg Mexico)
- Economic Integration Agreement (eg Central America; Serbia)
- Europe Agreement (eg Central and Eastern European countries pre-accession)
- Euro-Mediterranean Association Agreement (eg Israel; Tunisia)
- Free Trade Agreement (eg Association of Southeast Asian Nations - ASEAN)
- Partnership and Cooperation Agreement (eg Russia)
- Framework Agreement (to participate in EU programmes – eg Kosovo)
- Framework Agreement on Partnership and Cooperation (eg Mongolia)
- Stabilisation and Association Agreement (eg Bosnia and Herzegovina)
- Agreement on Trade and Commercial and Economic Cooperation (eg Poland pre-accession)

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the simplification and harmonisation of customs procedures (Kyoto Convention). The Lisbon Treaty provided for the EU to accede to the *European Convention on Human Rights*.

4 UN Resolution GA/65/276

- Agreement on Trade and Economic Cooperation (eg China)
- Political Dialogue and Cooperation Agreement (eg El Salvador, Guatemala etc)
- Treaty of Amity and Cooperation (eg ASEAN)

EU external agreements can be bilateral (between the EU/Member States and a third party), or multilateral (between the EU/Member States and some or several other parties). There is a list of 881 EU bilateral treaties and 259 EU multilateral treaties on the Europa Treaties Office website. The UK has signed 239 bilateral and multi-lateral EU treaties. UK Command Papers in the European Union Series (2013 to present) and their Explanatory Memorandums are on the gov.uk website. Earlier ones are on the archived FCO website.[5]

These agreements can have legal effects in the internal law of the EU and Member States, including, in certain circumstances 'direct effect' (which means that individuals can directly invoke EU provisions before a national or EU court).[6] The direct effect 'test' for EU agreements is that a provision has direct effect when it 'contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure'.[7]

5 The European Union Series replaced the European Communities Series after 1 April 2011, for treaties between Member States or between Member States and non-member states or group of states.

6 In the *Demirel* Judgment of 30 September 1987, the EU Court of Justice recognised the direct effect of certain agreements in accordance with the same criteria identified in the *Van Gend en Loos* judgment in 1963.

7 C-12/86 *Demirel.*

2. Competency questions

Box 1: Competences

Exclusive Competence

Areas in which only EU can adopt legal acts. (Articles 2(1) and 3 TFEU).

Shared Competence

Areas in which either EU or Member States can adopt legal acts. To the extent that EU exercises its shared competence, Member States are not free to exercise their competence, but may do so once EU ceases to exercise competence (e.g. by repealing a legislative act without replacing it). (Articles 2(2) and 4 TFEU).

Parallel Competence

Where the EU has competence to carry out activities and conduct a common policy, but the Member States have competence as well. The EU's and Member States' policy in these areas "should complement and reinforce each other". (Article 4(3) and (4) TFEU) - similar to supporting competence (see below)

Supporting Competence

Action by the EU is limited to supporting that of the Member States (Articles 2(5) and 6 TFEU).

Adapted from: EU law and the balance of competences: A short guide and glossary, 21 March 2013

2.1 Division of competences between the EU and Member States

The TFEU lists a division of competences between the EU and the Member States. This division is also expressed at international level, and the EU must respect the limits of its competence. [8] Article 21 TEU sets out broad general principles governing EU international action.

> The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations charter and international law.

Where the EU negotiates and concludes an international agreement, it has either exclusive competence (only it can act) or competence which is shared or parallel with that of the Member States.

[8] In accordance with Article 3(6) TEU: "6. The Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties" and Article 5(2) TEU: "Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States".

Under Article 3(1) TFEU the EU has exclusive competence in the following areas: customs union, competition rules for the functioning of the internal market, monetary policy for Eurozone States, conservation of marine biological sources and the common commercial policy.[9] Under Article 3(2) TFEU the EU also has exclusive competence to conclude an international agreement if the agreement would 'affect' EU internal rules. The extent of EU exclusive competence to conclude or accede to international agreements is often a matter of legal dispute.[10]

Article 24 TFEU defines the EU's competence under the CFSP. It 'shall cover all areas of foreign policy and all questions relating to the Union's security, including the progressive framing of a common defence policy that might lead to a common defence'. In general CFSP matters are handled more inter-governmentally than other EU policies, with less involvement from the Commission and the European Parliament, more involvement of the High Representative of the Union for Foreign Affairs and Security Policy (the HR) and a greater requirement for unanimity in the Council.

The areas in which competences are shared between the EU and the Member States, or are 'parallel', are defined in Article 4 TFEU. Where competence is shared or parallel, either can act, but EU action does not prevent Member States exercising their competence, as long as they comply with any relevant EU legislation and international commitments. Development cooperation is an example of an area of parallel competence: the EU has the competence to carry out and conduct a 'common policy', but under Article 4.4 TFEU, 'the exercise of that competence shall not result in Member States being prevented from exercising theirs'.

2.2 Mixed competence agreements

Many EU external agreements contain elements of both EU exclusive and shared competence, and are called 'mixed competence' agreements or just 'mixed agreements'. Mixed agreements can be bilateral (eg the EU-Turkey Association Agreement and TTIP) or multilateral (eg the *UN Convention on the Rights of Persons with Disabilities*). They must be signed and concluded/ratified both by the EU and by all Member States in accordance with their constitutional traditions.

Although many agreements contain a mixture of subject matters, it is not always clear whether an agreement is an exclusive EU matter or of mixed competence. One expert has pointed out that 'there are situations in which EU Member States insist on the mixed character of the agreement for political reasons, even if from a pure legal point of

9 In Opinion 1/75 the ECJ held that Member States lack the competence to enter into international agreements or legislate on matters covered by the common commercial policy.

10 See, for example, Opinion1/13 concerning EU accession to the Hague Convention on the civil aspects of international child abduction, 14 October 2014.

view there is no need to make the agreement mixed'.[11] The EU-Turkey Association Agreement is an example.

The previous UK Government emphasised that the EU cannot 'override' Member States' ability to take external action where the Treaties provide that they have competence to do so. The Member States must, however, act in accordance with the duty of sincere cooperation which is laid down in Article 4(3) TEU 'when considering their own external action'.[12]

'Mixity', as it is called, 'blurs the extent of the rights and obligations governed by the agreement'.[13] To address any uncertainty and clarify the distribution of competences, the EU sometimes makes a declaration when concluding a mixed agreement, delimiting the extent to which it falls within EU competence. See, for example, the Commission Communication 'on the role of the EU in the Food and Agriculture Organisation (FAO) after the Treaty of Lisbon: Updated Declaration of Competences and new arrangements between the Council and the Commission for the exercise of membership rights of the EU and its Member States'.[14]

However, these declarations are not legally binding and they do not necessarily clarify responsibilities or deal with competency concerns.[15] The Commons European Scrutiny Committee (ESC) commented on the EU-Ukraine Association Agreement: 'it is clear that the UK has, contrary to usual practice, acquiesced in the exercise by the EU of shared competence in respect of the provisions of the Agreement on the basis of declarations that, not being legally binding, can only alleviate, not remove, competence concerns'.[16]

The competence issue tends to arise in most mixed agreements. EU 'competence creep' can arise where the Commission seeks to extend the scope of the EU's exclusive external competence, or where uncertainty over whether the EU or Member States are acting in a shared competence area gives the Commission the opportunity to claim that the EU is exercising shared competence.[17]

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11 The Law of EU External Relations: Cases, Materials, and Commentary on the EU as an international legal actor, Pieter Jan Kuijper, Jan Wouters, Frank Hoffmeister, Geert de Baere, Thomas Ramopoulos, 2013. See also: M. Gatti and P. Manzini, External Representation of the European Union in the Conclusion of International Agreements (2012), 49 *Common Market Law Review*, pp. 1703-1734.

12 Letter from David Lidington to Sir William Cash, 13 September 2012 regarding the ASEAN Treaty of Amity and Cooperation.

13 EU Declarations of Competence to Multilateral Agreements: A Useful Reference Base? Andrés Delgado Casteleiro, *European Foreign Affairs Review* 17, no. 4 (2012): 491–510.

14 COM(2013) 333 final, 29 May 2013.

15 EU External Relations Law: Text, Cases and Materials, Bart Van Vooren, Ramses Wesse,2014, p. 57. See ESC's concerns about the FAO Declaration of Competences, 17 December 2014.

16 ESC Thirteenth Report, Documents considered by the Committee on 15 October 2014

17 The ESC noted this risk in respect of the Draft Council Decision on the conclusion of the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or otherwise Print Disabled. ESC 37th Report, 27 March 2015.

The EU Court of Justice has been asked to give Opinions on competence questions. For example, in November 1994 the Court opined that the World Trade Organisation (WTO) Agreement could only be concluded as a mixed agreement.[18] It added (citing its own previous ruling and opinion) that for mixed agreements 'it is essential to ensure close cooperation between the Member States and the Community institutions, both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into'.[19]

In December 1996 in a case concerning the EU Cooperation Agreement with India, the Court of Justice concluded:

> The mere inclusion of provisions for cooperation in a specific field does not … necessarily imply a general enabling power to serve as the basis of a competence to undertake any kind of cooperation action in that field, with the result that it does not predetermine the allocation of spheres of competence between the Community and the Member States or the legal basis of Community acts for implementing cooperation in such a field.[20]

In October 2014 the Commission decided to ask the EU Court for an Opinion on the EU's competence to sign and ratify a free trade agreement with Singapore. The Commission wanted to clarify which provisions of the FTA fell within the EU's exclusive or shared competence and which remained in the Member States' remit and require national approval.[21] The current Commission decided in March 2015 to go ahead with this request, and an Opinion is expected by the end of 2016.

2.3 Provisional application of agreements

The EU Council tends to wait for ratification to be completed in all Member States before concluding (ratifying) a mixed agreement on behalf of the EU. But because of the length of time this can take, the EU has taken to introducing interim agreements which provisionally apply elements or all of the agreement.

Provisional application happens after the EU and all the Member States have signed the agreement. Signature indicates an undertaking not to frustrate the object and purpose of the agreement before its entry into force (Article 18 of the 1969 Vienna Convention on the Law of Treaties).[22]

Provisional application of an agreement normally applies to matters which are within EU exclusive competence, i.e. the trade and trade-related matters, not the political or institutional framework. The Treaty base for these agreements is normally Article 207 TFEU (common commercial policy) and there is no requirement for national ratification.

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18 Opinion 1/94, 15 November 1994: the Community had sole competence to conclude the multilateral agreements on trade in goods; the EC and Member States were jointly competent to conclude GATS and TRIPS.

19 *Ibid* para 108

20 Case C-268/94.

21 See Commission press release, 30 October 2014.

22 Article 25 of the *Vienna Convention* provides for the provisional application of a treaty or part of a treaty pending its entry into force, if the treaty in question provides for this or if the negotiating States agree to it.

They are brought into effect by a qualified majority decision of the Council, subject to EP consent.

But there have been some recent exceptions (Ukraine, Moldova, Georgia AAs – see below) where provisional application applied to matters where Member States exercise competence. This resulted in a flurry of declarations and minute statements.[23]

Even where an external agreement was only provisionally applied, the EU would still need to make any amendments to EU laws, rules or regulations required under the external agreement.

2.4 Member States' bilateral accession to EU agreements

Member States may in their own right accede 'bilaterally' to an international agreement which the EU also accedes to, even where the EU has some exclusive competence.[24]

For example, in 2012 the EU acceded to the Treaty of Amity and Cooperation (TAC) in Southeast Asia by means of a Council Decision. The European External Action Service (EEAS) confirmed a 2006 Council Declaration that the EU's accession to the TAC in relation to CFSP areas was:

> without prejudice to Member States' right to accede to the TAC, and to act independently in relation to the same areas, save where they are required to comply with a Joint Action or Common Position' adopted under the TEU. Future EU accession to international agreements would be considered 'on a case by case basis having regard to the nature and content of the agreements concerned.

The UK supported EU accession to the Treaty in areas in which it had competence to do so, but also acceded to the TAC bilaterally in a separate but parallel process on 12 July 2012, 'to demonstrate that the UK is committed to intensifying its own relationship with a region which includes six priority countries considered by the FCO to be emerging powers'[25] and because there would be areas where the EU did not have competence to act on behalf of Member States.[26]

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23 See ESC 8th Report, 1 August 2014 for criticism of provisional application of EU – Ukraine AAT

24 See *Intertanko* ruling, June 2008.

25 FCO Explanatory Memorandum, 14 March 2012.

26 Letter from David Lidington to Bill Cash MP, 16 April 2012

3. EU procedures for negotiating and concluding external agreements

Article 218 TFEU sets out the general or 'ordinary' procedure for the EU to negotiate, sign and conclude treaties

The Council

The Council – comprising Member State governments – plays a central role: it opens negotiations, adopts negotiating directives (usually called a 'mandate', though they are strictly speaking non-mandating), authorises the signing of agreements and concludes them.

The Council generally acts by a Qualified Majority (QM) during the Article 218 TFEU procedure, but there are four exceptions when it acts by unanimity:

- when unanimity is required for internal EU measures in the areas in question;
- association agreements;
- agreements referred to in Article 212 TFEU (economic, financial and technical cooperation agreements);
- EU accession to the European Convention on Human Rights (Article 218(8)).

Under Article 218(4) the Council can address directives (the 'mandate') to the EU negotiator, and/or designate a special committee which must be consulted during the negotiations. This is usually the Council's Trade Policy Committee (TPC). The TPC is the main forum for dialogue between the negotiators and the representatives of Member States.[27]

When the Council, by means of a special unanimous Decision of the Member State governments, authorises the Commission as the EU negotiator, it also controls the conduct of the Commission during the negotiations. The Commission is therefore not autonomous and must deal both with the third party and Member State governments in the Council. Commission negotiators keep the TPC informed about progress in the negotiations and in turn receive information from the TPC about Member States' positions, interests, issues etc.

Under Article 218(5) and (6) the Council signs and concludes the agreement on a proposal by the EU negotiator, usually by means of a Council Decision in each case.

The European Commission

Under Article 218(3) the Commission has the general right to make recommendations to the Council, which then adopts a decision authorising the opening of negotiations and where necessary nominating the EU negotiator or the head of the EU's negotiating team.

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[27] European Commission Factsheet: Transparency in EU trade negotiations, June 2013.

The European Commission negotiates trade agreements with non-EU countries on behalf of the EU and the Member States. But the Commission is not always the Union negotiator: there are other possibilities when the negotiations are on areas outside EU competence, as Frank Hoffmeister (Institute for European Studies) points out:

> The member states could either designate the Commission to negotiate on matters of national competence as well. This has been the traditional approach, in particular in bilateral negotiations. Alternatively, the member states would appoint the Presidency to represent their negotiating positions vis-à-vis the third country. This model has been more used in the general multilateral context of the EU's external relations, for example for environmental negotiations at the UN. For trade, the member states usually relied on the Commission as sole negotiator for the entire range of topics with the remarkable exception of the criminal enforcement chapters for IPR [intellectual property rights].[28]

For CFSP agreements, it is not the Commission which submits recommendations to the Council but the CFSP High Representative (currently Federica Mogherini).

Under Article 101(2) of the Euratom Treaty, the Commission concludes agreements on nuclear energy on behalf of the Euratom Community.[29]

The Commission is also available to answer questions from MEPs or to attend the meetings of MEPs involved in the International Trade Committee (INTA).[30] The Commission usually briefs the EP before signature of agreements with third countries, but formal consultation under Article 218 TFEU takes place later.

The European Parliament

The EP does not take part in treaty negotiations, but under Article 218(10) it is 'immediately and fully informed at all stages of the procedure'.[31] The EP questions the Commission or invites it to meetings of the INTA. The Commission usually briefs the EP before signature of agreements with third countries, but formal consultation comes later.

Under Article 218(6) the EP's involvement before the conclusion of non-CFSP agreements is either by way of consent or consultation. The EU Treaty lists five types of agreements, often the more 'political' ones, which require EP consent before the Council can formally conclude them:

- Association agreements

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28 'The European Union as an International Trade Negotiator', in The European Union as a Diplomatic Actor, edited by Joachim Koops, Gjovalin Macaj, 2015

29 For example, Commission Decision 2006/890/Euratom, 4 December 2006, concerning the conclusion of a Framework Agreement on a Multilateral Nuclear Environmental Programme in Russia and of the Protocol on Claims, Legal Proceedings and indemnification to the Framework Agreement.

30 European Commission Factsheet: Transparency in EU trade negotiations, June 2013.

31 For example, see ANNEX XIII of EP Rules of Procedure, Framework Agreement on relations between the EP and Commission. Under Annex 3 para. 3, "the Commission shall take due account of Parliament's comments throughout the negotiations".

- Agreement on EU accession to the European Convention on Human Rights
- Agreements establishing a specific institutional framework
- Agreements with important budgetary implications for the EU
- Agreements in areas where the Ordinary Legislative Procedure (co-decision) normally applies or a special legislative procedure where EP consent is required.

Because formal EP involvement comes after signature, the EP cannot suggest amendments – it can only agree or disagree to the whole treaty. In July 2012 the EP refused to give its consent to the proposed Anti-Counterfeiting Trade Agreement (ACTA). Its rejection meant that neither the EU nor the Member States could join the agreement. This was the first time the EP had exercised its power to reject an international trade agreement.

The Court of Justice

Under Article 218(11) any Member State, the EP, Council or Commission can ask the EU Court of Justice, before an agreement is concluded, whether the draft agreement is "compatible with the Treaties". The 2013 UK Government-commissioned Balance of Competences Review on EU foreign policy noted the important role of the EU Court in this area:

> The Court of Justice plays an important role under the TFEU: under Article 218(11) TFEU its Opinion can be sought prior to the EU entering into an external agreement. Under Article 263 TFEU, it can be asked to review the legality of acts of the EU's institutions, and has frequently been asked to do so in relation to the terms of external agreements or negotiating mandates.[32] The Commission may also bring proceedings against Member States if they act externally on their own behalf in breach of EU law.[33]

An adverse Opinion from the Court will prevent a draft agreement from coming into force for the EU, unless it or the EU Treaty is amended. This happened in 1996 when the Court stated in Opinion 2/94 that the EC could not accede to the *European Convention on Human Rights*. The 2009 *Treaty of Lisbon* amended the EU Treaties to give the EU an express competence in Article 6(2) TEU to accede to the Convention.[34]

Special provisions

Trade agreements under the Common Commercial Policy

Under Article 207(3) TFEU the Commission has enhanced powers in relation to trade agreements. It conducts negotiations in consultation with a special committee appointed by the Council to help it and in accordance with any directives the Council may issue.

Agreement on exchange-rate system for the euro

There is another special procedure under Article 219(1) TFEU for agreements on an exchange-rate system for the euro in relation to the currencies of third States. Here the Council acts on a recommendation

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32 Footnote 16: e.g. Case C-411/06 Commission v Council (Waste Shipments) [2009] ECR I-7585.
33 Footnote 17: e.g. Case C-45/07 Commission v Greece [2009] ECR I-701.
34 Opinion 2/13 of the Court, 18 December 2014, is currently blocking EU accession.

from the Commission or the European Central Bank, unanimously, after consulting the EP in accordance with specific arrangements.

4. UK scrutiny and ratification of EU agreements

The UK Parliament scrutinises various aspects of making EU external agreements. Where they need ratification in the UK, this is formally a matter of Royal Prerogative, but also involves a process of parliamentary scrutiny.

4.1 What is deposited for scrutiny?

The Commission's draft negotiating mandate is usually confidential, is not deposited in Parliament and is not subject to parliamentary scrutiny. These documents include draft proposals for Council decisions authorising the Commission to participate in bilateral or multilateral negotiations.[35] They are not intended for publication because this could prejudice the EU's negotiating position, and they are not deposited in Parliament.

But under 2013 Cabinet Office (CO) guidelines,[36] Ministers are required to inform the Scrutiny Committees in both Houses of the 'mandate', which the Government will have approved in the EU Council.

For example, the Europe Minister wrote to the ESC in December 2014 about the adoption of a Negotiating Mandate for proposed EU AAs with Andorra, Monaco and San Marino. Although there was little on the substance of the mandate, the Minister was able to divulge that the mandate contained recitals confirming UK policy positions on legal base, 'mixity' and Justice and Home Affairs (JHA) matters. Typically, there is little the ESC can do at this stage, other than ask to be kept informed, emphasise the need for transparency and anticipate the deposit of the draft Council Decision on the signing and conclusion of the agreement.

The CO guidelines highlight a particular problem when neither a detailed negotiating mandate nor a simple authority to open negotiations has been submitted to the Council:

> …. there is a difficult balance to be struck between preserving the confidentiality of the negotiating process and keeping Parliament informed of events in good time. Where it appears likely that an important negotiation will be concluded within about six months, with rapid submission of formal proposals to the Council thereafter, you should consider writing to the Committees about the opening of negotiations and their scope, although without providing details of EC or partners' negotiating positions.

Proposals which do not contain detailed negotiating mandates, but simply authorise the Commission to participate in negotiations, and which are issued in the Commission's ordinary 'COM' series, are deposited in Parliament and scrutinised in the usual way.

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35 They are usually issued in the Commission's 'COM (or SEC) Confidential/Restreint' series.

36 Cabinet Office, Parliamentary Scrutiny of European Union Documents Guidance for Departments August 2013.

The stage when the Commission or other EU negotiator negotiates with the third party and initials the resulting agreement with the approval of Member States is not subject to parliamentary scrutiny. But Departments are supposed to keep the Committees informed as much as possible about the scope and development of negotiations prior to signature and/or conclusion of an agreement.

Under international treaty law (Vienna Convention on the Law of Treaties, Article 10), **initialling** an agreement demonstrates that the treaty text is authentic and definitive, ready for signature or provisional application, but it does not impose legal obligations on the parties.

When the Commission/EU negotiator issues a proposal to the Council for signature of an agreement, or a proposal which combines proposals for signature and possible conclusion, these documents are deposited, are subject to the Scrutiny Reserve and can be made the subject of debate. **Signature** of a treaty means that a country enters into an obligation not to defeat its object and purpose prior to its entry into force (Article 18 of the *Vienna Convention*). The CO guidance states:

> The proposal may be debated on the Floor of the House or in European Committee, depending on the European Scrutiny Committee's recommendation. A motion of either House can influence how a Minister votes in the Council. Even if s/he votes against a proposal, it may still be adopted by a qualified majority.

Proposals for decisions on **provisional application** by the EU are usually submitted to the UK Parliament for scrutiny along with the main agreements, but there can be scrutiny problems (see the EU-Ukraine Association Agreement example in Section 5.4 below).

If Commission briefings are given to the EP, a ministerial letter or unnumbered Explanatory Memorandum (EM) on them is submitted to Parliament.

4.2 Timing

Ministers have agreed that the Scrutiny Committees should be informed at the same stage as the EP about prospective EU external agreements. But the Cabinet Office guidance notes problems with the timing of Council approval of an agreement and national parliamentary scrutiny:

> In practice the Commission sometimes secures a broad political agreement that exploratory talks should begin, without a formal mandate but on the basis of clear informal indications of objectives from member states. In these circumstances, it is only after substantive negotiations and on the eve of clinching a deal for initialling that the Commission seeks approval of a mandate. Thus, the first piece of paper available for scrutiny will be the text of the final agreement, which only appears at a stage when Council approval is urgently needed.

4.3 Confidentiality issues

Because of confidentiality issues, the timing of the submission of a Government EM on an external agreement varies from case to case, and is dependent on a document being publicly available to deposit in

Parliament. The CO guidance encourages Government Departments to consider writing to the Scrutiny Committees at an early stage in the negotiations to keep them informed, if no document can be deposited.

There have been instances when documents have retained a *limité* classification[37] which has impeded, though not necessarily prevented, scrutiny. For example, the Council kept the *Draft Council and Commission Decision on the Conclusion of a Partnership and Cooperation Agreement (PCA) with Turkmenistan* classified as 'limité'.[38] Some EU national parliaments obtain access to such documents 'by virtue of specific arrangements with their governments'[39] and the previous UK Government made such an arrangement for the Turkmenistan PCA, noting the conditions attached: namely that the documents could not be published or reported on in any way which would bring their details into the public domain. The ESC noted in its Report on the PCA in December 2014 that the 'limité' classification was 'not justified' and called on the Government to seek its removal. Confirmation of the declassification of the document was received on 15 January 2015.[40]

4.4 Agreements where the UK opt-in applies

Under EU Treaty Protocol 21, the UK can opt into EU legislation in Title V, Part III, TFEU, the *Area of Freedom, Security and Justice* (AFSJ – formerly Justice and Home Affairs). Under Article 2 of the Protocol, this arrangement also applies to external agreements concluded by the EU which contain Title V provisions (eg civil justice, criminal justice, police cooperation, immigration and asylum).

The text of an external agreement is often annexed to the Decision for signature and conclusion. Although the text of an agreement containing Title V provisions is included with the EM, the negotiation mandate, which is classified, is not. The CO guidance advises the Government to write to the Scrutiny Committees about the existence of a negotiating mandate.

UK scrutiny of agreements to which the opt-in applies, or might apply, has faced some difficulties, not least legal uncertainty (which the previous Government denied) as to what obligations the UK will and will not apply. With recent trade agreements, for example, there has been a question mark as to whether the UK opt-in is engaged in respect of Mode 4 trade in services.[41] The previous Government's view was that it is the subject matter rather than the Title V legal base that dictates whether the UK opt-in applies. Thus, Mode 4 provisions engage the

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37 *Limité* documents are "sensitive unclassified documents" and are not made publicly available. They can contain information on internal deliberations about important legislative and non-legislative matters, including draft Council decisions on treaties.

38 See Statewatch Analysis: Constructing the secret EU state: "Restricted" and "Limité" documents hidden from view by the Council, Tony Bunyan, March 2014.

39 How limited are LIMITE documents for national parliaments in the EU? Ronny Patz, Ideas on Europe blog, citing Deidre Curtin, 10 June 2014.

40 Letter from David Lidington to Sir William Cash, 16 January 2016.

41 According to the WTO, Mode 4 is "the temporary movement of natural persons [as opposed to corporate entities] across borders".

opt-in because they involve the right of third country nationals to enter the UK to provide services, even when this is not reflected in the legal base of the Decision. The Government's approach was examined in the ESC's 2011 report, Opting into international agreements and enhanced scrutiny of opt-in decisions.[42] The ESC was critical:

> … we cannot agree with the Government's assertion that a Title V legal base is unnecessary for it to assert that the opt-in Protocol applies to provisions of an international agreement. Rather, we think that the source of the power in EU law not to be bound by a provision of an EU international agreement has to be clearly stated.[43]

The ESC has reiterated this view on numerous occasions. The Lords EU Committee has published a report in which it recommends that the UK Government 'abandons its policy of applying the opt-in Protocol on the basis of its own assessment of the content of a measure, rather than the citation of a Title V legal base, or else risk damaging the UK's reputation with EU partners, and misleading the public'.[44]

The UK Government has not generally asserted the opt-in in cases which relate to measures to which exclusive external competence applied as a result of an internal exercise of EU competence.[45] The ESC does not agree that the UK opt-in is not engaged if the EU has acquired exclusive competence under the AETR doctrine (see section 1.1 above) and the UK has opted into the relevant internal rules.[46]

Where provisions of a mixed agreement contain Title V content, although Protocol 21 applies to the Council Decision to sign the agreement, the previous Government's view was that it is open to the UK to participate in these elements of the agreement in its own right rather than to opt in and participate in them as part of the EU. The PCA with Singapore, for example, was the subject of two Decisions: the Main Decision concerning signature of the entire agreement with the exception of matters related to readmission (UK opt-in applies), and a second Readmission Decision, citing a Title V legal base. The Government EM set out its position on the Main Decision and the Readmission Decision (where it did not concede EU competence) as follows:

> In Article 19(6) of the Agreement, covered in the Main Decision, the Union assumes an obligation, upon request, to negotiate a readmission agreement with Singapore. This would require the EU to seek to negotiate in an area covered by Title V of the TFEU. The Government therefore considers that the JHA opt-in applies to this provision, even though the Main Decision does not cite a Title V legal base.

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42 ESC 30th Report, 25 May 2011.
43 EU-Philippines relations, documents considered by the Committee 9 February 2011.
44 The UK's opt-in Protocol: implications of the Government's approach, 9th Report of 2014-15, 24 March 2015. The Lords report also looks in some detail at how the choice of legal base is made and relevant EU Court of Justice case law.
45 See ESC 20th Report of Session 2010-11, 10 March 2011, para. 3.13
46 See, for example, ESC 33rd Report, Inland waterways: freight, considered 11 February 2015, and ESC 28th Report, Forced labour, considered 7 January 2015 and 32nd Report, 4 February 2015.

> The draft Readmission Decision, which covers Article 19(5) of the Agreement, does have a Title V legal base. However, the obligations in Article 19(5) are clearly directed at the Member States themselves and we do not think it appropriate for the EU to exercise competence in this area. The Government has therefore decided not to opt in to the draft Readmission Decision, and instead to assume the obligations in Article 19(5) in its own right, rather than as a Member of the EU.

The Council's Legal Service believes, like the ESC, that if an international agreement of mixed EU/Member State competence includes Title V matters, the acts concerning signature and conclusion must refer explicitly to the Title V legal base.[47] If the UK considers that a Title V legal base ought to be in a Decision from which it is absent, it could bring a case to the Court of Justice.[48]

Where the UK applies its opt-in in part of an EU agreement, the Council uses recitals to clarify the position. However, recitals have been known not to refer to the UK opt-in, as in the case of draft Decisions in 2013 to authorise the EU to sign and conclude an Arrangement with Iceland, Liechtenstein, Norway and Switzerland establishing the basis for their participation in the European Asylum Support Office (EASO). Although the substantive legal bases for the draft Decisions fell within Title V, the UK's opt-in was not reflected in the recitals, which noted that the UK and Ireland were already bound by the Regulation establishing the EASO and that they were therefore participating in the Decisions.[49]

4.5 Consultations and impact assessments

During negotiations on free trade agreements, the Department for Business, Innovation and Skills (BIS) is usually actively engaged, consults with business and represents agreed UK policy to the European Commission. Other Government Departments that might be consulted on EU agreements include the Foreign and Commonwealth Office, Treasury, and, depending on the content, the Transport, Environment and Rural Affairs Departments and the Home Office. UK representatives based in the third country or countries are also consulted.

The Government may carry out and publish an Impact Assessment which it attaches to the EM on the agreement and makes available on-line (see for example the EU-Ukraine AA Impact Assessment). Or it may decide that an Impact Assessment is not necessary. For example, with regard to the Stabilisation and Association Agreement with Serbia, the Government EM stated: 'The Impact Assessment has not been prepared for this instrument as it will have no impact on business, charities or voluntary bodies'.[50]

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47 For agreements to be ratified by the EU and the third party only, the Title V position of the UK, Ireland and Denmark – which has a complete opt-out – must be reflected in the agreement itself in the territorial scope of application.

48 See House of Lords European Union Committee Ninth Report 2014-15: The UK's opt-in Protocol: implications of the Government's approach, Chapter 8: The Government's Litigation Strategy, 10 March 2015.

49 Draft Decision concerning Switzerland and the EASO.

50 Explanatory Memorandum to European Union (Definition of Treaties) (Stabilisation and Association Agreement) (Republic of Serbia) Order, S.I. 2011 No 742.

4.6 UK Parliament's role in ratifying mixed agreements

For a 'mixed' agreement, both the EU and each individual Member State need to sign and 'conclude' it (for the EU) or ratify it (for Member States). Each Member State follows its own domestic procedures for ratification.

In the UK, treaty-making is a Royal Prerogative, which means that officially the Queen ratifies treaties. In practice, the Government or plenipotentiary ratifies on behalf of the Queen. Ratification is completed when the instrument of ratification has been deposited in Rome and the EU Council notified.

But for many treaties, the UK Parliament has a formal role before the Government can ratify.

Laying and publishing treaties

Under the *Constitutional Reform and Governance Act 2010* (CRAGA), mixed agreements requiring ratification in the UK must be laid before Parliament once they are signed, along with an Explanatory Memorandum (EM) which describes the key features of the treaty and their meaning. Although some EU treaties are excluded from the treaty provisions of CRAGA,[51] this exception does not apply to mixed treaties.[52]

Both the treaty and the EM are laid before Parliament for 21 'sitting days' (days on which both Houses of Parliament are sitting).[53]

At this point the treaty is published as a Command Paper in the European Union Treaty series. After ratification it is re-published in the UK Treaty Series.

Power to object to ratification

During the 21-sitting-day period, Parliament has the right to scrutinise the treaty, table questions, and ask for a debate or extra time to report on it.

And, crucially, either House can pass a resolution objecting to ratification of a treaty. The Government must then give reasons why it nevertheless wants to ratify. If the House of Commons objects, it has another 21 days to consider the Government's reasons for ratifying, and can object again. This can continue indefinitely, effectively giving the Commons the power to block ratification. The House of Lords has only one opportunity to object, and so can only delay ratification briefly.

Parliament cannot amend the agreement itself in any way: it can only object to (or tacitly approve) ratification of the entire agreement.

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51 s23(1)

52 Personal communication from the FCO Treaty Section, 10 March 2016

53 CRAGA provided a new basis for Parliamentary oversight of treaties. It largely replaced – and expanded upon – the constitutional practice known as the 'Ponsonby Rule'. See *Parliament's new statutory role in ratifying treaties*, Commons Library Standard Note 5855, 8 February 2011

Implementing legislation

Under the UK's 'dualist' approach to treaty implementation, according to which treaties do not automatically become part of domestic law, ratification may depend on passing new primary or secondary legislation in order to ensure that UK law is consistent with the international agreement. The Government EM on an agreement states whether its implementation requires any new legislation other than the Order to designate it as an EU treaty under the ECA (see below).

Designation as an 'EU treaty'

For mixed agreements which include provisions that need to have effect in UK law, the agreement must be 'designated' as an EU treaty for the purposes of the *European Communities Act 1972* (ECA). This means that the ECA applies to it 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.

Designation of the agreement as an EU treaty is done by secondary legislation: a draft Order in Council is laid before Parliament and may be debated and/or approved by both Houses by the affirmative procedure.

Similarly, when the EU accedes to an international agreement, an Order is needed to add this agreement to the list of EU treaties within the meaning of section 1(2) ECA.[54]

Section 1(2) ECA lists the EU acts and treaties that are known as Community/EU treaties. The list includes amending treaties (eg Lisbon, Maastricht, Single European Act) and accession treaties, and there is also a general statement on other treaties the EU has entered into. ECA section 1(3) and (4) provides:

> 3) If Her Majesty by Order in Council declares that a treaty specified in the Order is to be regarded as one of the Community Treaties as herein defined, the Order shall be conclusive that it is to be so regarded; but a treaty entered into by the United Kingdom after the 22nd January 1972, other than a pre-accession treaty to which the United Kingdom accedes on terms settled on or before that date, shall not be so regarded unless it is so specified, nor be so specified unless a draft of the Order in Council has been approved by resolution of each House of Parliament.
>
> (4) For purposes of subsections (2) and (3) above, "treaty" includes any international agreement, and any protocol or annex to a treaty or international agreement.

[54] For example, the *European Communities (Definition of Treaties) (1996 Hague Convention on Protection of Children etc.) Order 2010* provided for section 2 ECA (general implementation of the EU Treaties) to apply to it.

5. Further reading

EU External Relations Law: Text, Cases and Materials, Bart Van Vooren, Ramses A. Wessel, 2014

House of Lords European Union Committee Ninth Report, The UK's opt-in Protocol: implications of the Government's approach, 10 March 2015

European Commission Factsheet, Transparency in EU trade negotiations, June 2013

External Powers: Competences and Procedures, Robert Schutze

Competence Review: Trade and Investment, Michael Waibel

EU Declarations of Competence to Multilateral Agreements: A Useful Reference Base? Andrés Delgado Casteleiro, *European Foreign Affairs Review*, 2012

The EU-Ukraine Association Agreement: Assessment of an Innovative Legal Instrument, Guillaume Van der Loo, Peter Van Elsuwege and Roman Petrov, European University Institute. Working Paper, Department of Law, LAW 2014/0.

Direct Effect of International Agreements of the European Union, Francesca Martines, *European Journal of International Law*, Volume 25, Issue 1, February 2014, pp 129-147

Frequently Asked Legal Research Questions. Researching Treaties, Inner Temple Library, 2014

House of Commons Library Standard Note 6688, The Transatlantic Trade and Investment Partnership (TTIP), 13 January 2015.

FCO treaty Guidance

Mixed Agreements Revisited: The EU and its Member States in the World, edited by Christophe Hillion, Panos Koutrakos, Hart Publishing Ltd, 2010

Alan Dashwood and Christophe Hillion, 'The General Law of EC External Relations', Sweet and Maxwell, 2000.

Ian McLeod, I.D. Hendry, Stephen Hyett, 'The External Relations of the European Communities: A Manual of Law and Practice', 1996

Appendix: examples of EU treaty negotiation, scrutiny, accession and ratification

This section looks at examples of EU agreements and their scrutiny and ratification processes. They illustrate the kind of issues that can arise at the treaty negotiation, signature and conclusion/ratification stages.

5.1 Accession treaties

EU process

Once a country has made a formal application to join the EU, it becomes a 'candidate country' and goes through an evaluation process, which includes 'screening' by the Commission to ascertain the differences between national legislation and the *acquis communautaire* (the body of EU laws and rules). There is a unanimous decision by the European Council to open formal negotiations, and opening benchmarks are set for each of the negotiating 'chapters' of the *acquis.*

The European Commission issues regular progress reports on each candidate country and potential candidate country. It takes into account information provided by the candidate countries themselves, assessments made by the Member States, EP reports and resolutions, reports from other international organisations and international financial institutions, and progress made under existing association and other agreements. The Commission reports usually include a forward-looking analysis of expected progress.

Closing benchmarks are set for the provisional closing of chapters. The accession treaty (listing all transitional arrangements and deadlines, as well as details of financial arrangements and any safeguard clauses) is agreed by the European Council, the European Commission and the European Parliament.

The candidate country and all existing Member States ratify the Accession Treaty according to domestic procedures – which might include a referendum.

UK process

The European Scrutiny Committee considers and usually reports on the pre-accession documents, including the Commission's Opinion on applications for accession. These may be referred to a European Committee for further consideration. In addition, there is likely to be parliamentary activity linked to accession, such as debate and select committee consideration.

An EU accession bill covers amendments to the EU Treaties to take account of the new accession. Typically, a short 'technical' bill allows Parliament to approve an accession treaty and gives effect to the treaty in UK law. Another clause concerns transitional restrictions to the right

of citizens of the new Member State to work in the UK, for up to seven years after accession.

For the big EU accession in 2005 (10 new States), the following documents were provided to Parliament and debated:

- FCO Explanatory Memorandum on the Accession Treaty
- Regulatory Impact Assessment on the EU Accessions Bill. FCO, 29 April 2003
- European Union (Accessions) Bill 2002/03. Bill 98. 30 April 2003
- Explanatory notes on the EU Accessions Bill. FCO. 30 April 2003

Accession treaties do not in principle trigger a UK referendum under the European Union Act 2011.

5.2 Hague Convention on the Protection of Children

This was a treaty to which the EC could not accede.

In the area of judicial cooperation in civil matters, the EU Council has authorised the Member States (or some of them) to sign, ratify or accede to mixed agreements 'in the interest of' the Community/Union.

The 1996 Hague Convention on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children (Hague Convention on the Protection of Children) is an international convention to which only sovereign States may be party. The (then) European Community could not sign, ratify or accede to it, but the Council supported its provisions, which fell partially within EU competence. A 2003 Council Decision 2003/93/EC and a 2008 Council Decision 2008/431/EC authorised the EU Member States, in the interest of the Community, to sign, ratify or accede to it.

The UK's opt-in applied and the Decision stated that the UK (and Ireland) were taking part in the adoption and application of the Decision.

UK accession

The European Communities (Definition of Treaties) (1996 Hague Convention on Protection of Children etc.) Order 2009 was debated in Delegated Legislation Committee on 8 December 2009, and was debated in Grand Committee on 15 December 2009. The purpose of the Order was to allow the Government to give effect to elements of the Convention.

The Order was a necessary step towards implementation of the Convention as an EC treaty. In order to be defined as an EC treaty under section 1(2) ECA, the Order needed approval by a resolution of each House.

The FCO Explanatory Memorandum pointed out that not all matters covered by the Convention were matters for which the EC had competence, but that such matters were subordinate to the EC Treaty provisions on judicial cooperation in civil matters.

The Convention entered into force for the UK on 1 November 2012.

5.3 Association Agreements with Georgia and Moldova

EU process

The Commission began negotiations with Georgia and Moldova (and Ukraine) in May 2010 on Association Agreements including a Deep and Comprehensive Free Trade Area (DCFTA). Negotiations were completed in July 2013. Moldova and Georgia initialled the AAs in November 2013. The agreements were signed at the European Council meeting on 27 June 2014. Moldova ratified its AA on 2 July and Georgia on 18 July 2014.

As mixed agreements they had to be ratified by all EU Member States as well as the EU. Council Decisions were adopted on 16 June 2014 to enable the EU to sign – and provisionally apply part of – each agreement, and to conclude each agreement. Most of the provisions in the DCFTA section and some of the other provisions have been applied provisionally since 1 September 2014.

The EP debated the implementation of the AAs/DCFTAs with Georgia, Moldova and Ukraine on 15 January 2016 and adopted a resolution on the AAs on 20 January.

UK process

The ESC considered the Agreements (signing, provisional application, conclusion) in reports in 2014 (50th report, 14 May 2014, 46th report, 9 April 2014 and 47th report, 30 April 2014). The AAs were debated on 9 June 2014 in European Committee B and cleared from scrutiny by a Resolution of the House on 10 June 2014 (under Standing Order No. 119(11)). The Lords EU Committee cleared the documents on 5 June 2014.

In a report on 11 June 2014 the ESC expressed concerns about competence issues, and recommended the draft Decisions on the AAs for debate "in light of developments following a similar Association Agreement between the EU and Ukraine, and because they raised similar legal issues to those raised in that earlier Agreement".[55]

On 16 July 2014 the ESC considered four draft decisions on the signing and provisional application, and on the conclusion, of the AAs. The ESC raised concerns about "potential EU competence creep" and whether the UK opt-in applied. The previous Government considered that two provisions in each AA were subject to the UK opt-in: the re-admission provisions and the provisions concerning the supply of Mode 4 services. The ESC was concerned whether the UK opt-in was engaged, in the absence of a Title V legal basis for the EU Decisions on signature/provisional application and conclusion of the Association Agreements. The previous Government set out its view in EMs of 27 June 2014 (Cm 8942 and 8943).

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55 ESC Meeting summary, 11 June 2014.

The *Draft European Union (Definition of Treaties) (Association Agreement)* Orders were laid before the UK Parliament on 13 January 2015. The Orders for Georgia and Moldova (along with the Ukraine Order) were debated in Grand Committee on 26 February 2015.

The Orders were needed to declare the AAs to be EU treaties as defined in section 1(3) ECA. The Orders allow the Government to give effect to those elements of the AAs which need to have legal effect in the UK.

The EP ratified the AAs on 18 December 2014, but to date they have not been ratified by all national governments/parliaments.

5.4 Association Agreement with Ukraine

A complicated chronology

Article 486 of the EU-Ukraine AA provides for its entry into force and provisional application.

Four decisions authorising the EU to sign and provisional apply the AA and subsequently to conclude/ratify it, were cleared from scrutiny by a debate in European Committee B on 11 November 2013 and by a resolution of the House the following day. The Lords EU Scrutiny Committee had cleared the documents on 15 October 2013.

EU Heads of State and Government, at the request of the Ukrainian Prime Minister, agreed to bring forward signature of the political chapters of the EU's AA with Ukraine. On 21 March 2014 EU Heads of State and Government signed two documents comprising parts of the AA which would be applied provisionally: the preamble and Article 1 (outlining the objectives of the Agreement); Title I (General Principles); Title II (Political Dialogue and reform, Political Association, Cooperation and Convergence in the field of Foreign and Security Policy); Title VII (Institutional, General and Final Provisions).

A separate Final Act of the Summit confirmed the parties' intention to proceed to signature and conclusion of the rest of the Agreement. This process was **not** subject to separate parliamentary clearance from scrutiny. The FCO describes a Final Act in the context of EU treaties as follows: "When a Final Act is mentioned in the context of a European Communities Agreement, […] it usually covers a series of declarations made by one or more parties relating to specific articles of the Agreement. It is often appended to the Agreement itself".

The UK Government maintained that what they signed on 21 March contained nothing new or additional to the text of the AA that the ESC had cleared from scrutiny in 2013. In letters to the ESC, David Lidington set out what the Government had signed and what had not been included. He wrote on 21 March 2014 that the political parts of the text that were signed were identical to what had been agreed in 2012 and cleared in 2013. Confirming this was difficult, however, as the texts the Government had signed were not publicly available.

After the election of President Poroshenko on 25 May 2014, he and the EU Council wanted to go ahead with the signature and provisional application of the other elements of the AA: Title III (Freedom, Justice

and Security); Title IV (Trade and Trade-related Matters); Title V (Economic and Sector Cooperation); and Title VI (Financial Cooperation, with Anti-fraud Provisions).

The Government told the ESC that the Council Decisions on the signature and conclusion of the EU-Ukraine AA were essentially the same as those which had already cleared scrutiny in 2013, and that there was "an important political imperative" to sign the AA as soon as possible so the EU could strengthen its support for Ukraine. David Lidington asked the Committee to exempt the documents from scrutiny.

In June 2014 the ESC asked for the documents to be deposited and to provide all the texts agreed on 21 March, and all associated statements or declarations, but in view of the urgency of the matter, agreed to waive scrutiny clearance for the purposes of agreeing the Decisions at the Foreign Affairs Council on 23 June 2014. The Agreement was signed in Brussels on 27 June 2014 in the margins of the European Council.

In September 2014 the EU Council agreed under Article 218(9) TFEU to delay until 1 January 2016 the provisional application of the trade related parts of the EU-Ukraine AA, following consultations with Ukraine, and as part of the overall efforts towards a comprehensive peace process in the country. The EU would continue the application of its autonomous trade measures for the benefit of Ukraine. The ESC asked that the Council Decision amending the earlier Decision on the signature and provisional application of the EU-Ukraine AA be debated on the Floor of the House. The Government asked the ESC to consider rescinding this referral as there was to be a Backbench Business debate on the Floor of the House on Ukraine (UK Relations with Russia) on 11 December.

Ukraine ratified the AA on 16 September 2014 and all EU Member States have now deposited their instruments of ratification.[56] In the UK, Statutory Instrument 2015 No. 844, The European Union (Definition of Treaties) (Association Agreement) (Ukraine) Order 2015 was made on 19 March 2015, in accordance with Section 1(3) ECA, having been approved by a resolution of each House. The UK Government ratified it on 8 April 2015.

On 6 April 2016 a referendum will be held in the Netherlands on ratification of the EU-Ukraine AA. This followed an initiative by a satirical news website, GeenStijl, which collected over 450,000 signatures (300,000 signatures are needed under Dutch law to trigger such a vote).[57]

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[56] See Council ratification information at http://www.consilium.europa.eu/en/documents-publications/agreements-conventions/agreement/?aid=2013005.

[57] For comment, see Open Europe, What to make of the Dutch referendum on the EU-Ukraine Association Agreement? Pieter Cleppe, 29 September 2015.

5.5 Transatlantic Trade and Investment Partnership (TTIP)

Transparency and scrutiny issues

The *Transatlantic Trade and Investment Partnership* (TTIP) agreement with the US has not been published yet as a UK Command Paper. However, TTIP has already been the subject of two Commons Scrutiny Committee evidence sessions, in June 2014 and February 2015[58], and a House of Lords EU Committee report and Government response, July 2014. The Business, Innovation and Skills Committee,[59] the Environmental Audit Committee[60] and the Health Committee have also been scrutinising its progress.

In July 2014 the UK Government said Parliament would "receive the complete draft text of the agreement in good time and have an opportunity to scrutinise it through debates in both Houses".[61] Then Secretary of State for Business, Innovation and Skills, Vince Cable, confirmed this in a letter to all MPs on 22 September 2014: "The UK Parliament, including the House of Lords […] will have a full opportunity to scrutinise the deal before it is finalised".

But the ESC was unhappy about the availability of important documentation and information, noting in a report in March 2015:

> 55. One outstanding issue arising from TTIP is the scrutiny process from now until the conclusion of the agreement, and potentially beyond that during the ratification of any Agreement by individual Member States.
>
> 56. Much criticism of the TTIP process in 2014 centred on the lack of transparency and poor availability of information, with—for example—the negotiating mandate only being made publicly available in October 2014, after a leaked version being available online for over a year. The new Commission has taken a series of steps to address this but its efforts regarding parliamentary scrutiny have, so far, centred on MEPs not national parliamentarians.[62]

In February 2015 the European Commission announced that these TTIP negotiating texts were available online: negotiating mandate, position papers with accompanying explanatory material, and EU textual proposals in nine of expected twenty-four chapters of the agreement. The Commission has continued to publish TTIP documents on the TTIP website.[63]

The then Trade and Investment Minister, Lord Livingston, told the ESC the Commission was making additional restricted material available to MEPs, such as draft textual proposals, and that the Government "would

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58 The ESC held an evidence session with the Trade and Investment Minister, Lord Livingston of Parkhead, to discuss TTIP on 11 June 2014 and 26 February 2015.
59 11th Report of 2014–15 of the Business Skills and Innovation (BIS), Transatlantic Trade and Investment Partnership, 25 March 2015.
60 9th Report, Environmental Audit Committee. Environmental risks of the Trans-Atlantic Trade and Investment Partnership, 10 March 2015.
61 PQ 206925 on EU External Trade: USA, 22 July 2014.
62 ESC 38th Report, Scrutiny Reform follow-up and Legacy Report, 25 March 2015.
63 Documents added, 21 March 2016.

like to see equivalent access extended for UK parliamentarians and will explore the scope and methods by which this information can be shared while still preserving the confidentiality of sensitive documents". The Minister said they were taking steps to improve transparency with the public by creating a new Ministerial Advisory Board on Trade, which would include representatives of business, trade unions, civil society groups and consumers; and the publication of explanatory notes on key aspects of the negotiations and progress.[64] The ESC concluded:

> **61. We recommend that our successor Committee hold a session with the relevant Minister early in the new Parliament to take forward our scrutiny of TTIP. We agree that MPs and Peers should have equivalent access to documents as MEPs (as should Parliamentarians of other EU Member States) and urge the Government to secure this important commitment.**
>
> **62. We ask the Government to inform all Members of the House about the progress of negotiations during the period before Select Committees are appointed, when there is no mechanism for our Committee secretariat to publish incoming correspondence.**

The previous Government hoped the new Agreement would come into force in 2015, but conclusion of the Agreement is still some way off and several contentious issues remain.[65]

The Government has arranged for MPs to see classified documents, including consolidated texts, relating to TTIP in a room in the Department for Business Innovation & Skills (BIS). A Parliamentary Answer on 3 March 2016 said Members of both Houses would "be informed of the process and details of how to access the room shortly, once these have been finalised".

The twelfth round of TTIP negotiations took place in Brussels from 22 to 26 February 2016. It is still not clear whether TTIP will be a mixed agreement requiring UK ratification. The Business Minister Anna Soubry said in a Parliamentary Answer on 9 March 2016 that this decision will be taken when the agreement is signed.

64 ESC Report, chapter 6: TTIP scrutiny.
65 For information on TTIP, see Commons Briefing Paper 6688, Transatlantic Trade and Investment Partnership (TTIP) last updated 4 December 2015.

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