

UNITED KINGDOM

1. This note provides the response of the United Kingdom of Great Britain and Northern Ireland to the Committee of Legal Advisers on Public International Law (CAHDI) Questionnaire on Treaties not requiring parliamentary approval, document number CAHDI (2022) 3 rev *Restricted*, Strasbourg, 15 June 2022.

Questionnaire

1. SUBSTANTIVE ASPECTS

1.1. Distinction

- 1.1.1. Does your national legislation differentiate between different categories of treaties? If it does, how are they categorised?

The essential distinction in the United Kingdom is between treaties subject to ratification and those that are not (i.e. primarily treaties which enter into force on definitive signature).

Part 2 of the Constitutional Reform and Governance Act 2010 (CRAG) sets out the legislative framework in the United Kingdom for Parliamentary scrutiny of treaties.

Section 25(1) CRAG contains the definition of “treaty” for the purposes of Part 2 CRAG, as follows: “In this Part “treaty” means a written agreement (a) between States or between States and international organisations, and (b) binding under international law.” This definition closely follows the definition contained in Article 2(1)(a) of the Vienna Convention on the Law of Treaties. Section 25(2) CRAG goes on to provide that the term ““treaty” does not include a regulation, rule, measure, decision or similar instrument made under a treaty (other than one that amends or replaces the treaty (in whole or in part)).”

However, not all treaties (as defined in section 25(1) and (2) of CRAG) are subject to Parliamentary scrutiny under Part 2 of CRAG. Only treaties subject to “ratification” as defined in CRAG are subject to Part 2 of that Act.

“Ratification” is defined in section 25(3) and (4) CRAG as “a reference to an act of a kind specified [below] which establishes as a matter of international law the United Kingdom’s consent to be bound by the treaty.” “The acts are – (a) deposit or delivery of an instrument of ratification, accession, approval or acceptance; (b) deposit or delivery of a notification of completion of domestic procedures.”

In addition, section 23 CRAG provides that Part 2 CRAG does not apply to certain descriptions of treaties. These treaties may generally be described as double taxation treaties. These treaties have a distinct Parliamentary process under separate UK taxation legislation.

Treaties subject to Parliamentary scrutiny under Part 2 CRAG must be laid in both Houses of Parliament for 21 sitting days before they can be ratified by the Government. During the 21 sitting days either House may resolve against ratification. If the House of Lords only resolves against ratification the Government may nevertheless proceed to ratify the treaty. If the House of Commons resolves against ratification the Government may re-lay the treaty for the purposes of Part 2 CRAG, thus restarting the 21 sitting day period.

- 1.1.2. What are the criteria for their classification into specific category (subject matter, scope, financial effects, etc.)? Does the form of the instrument lead to a different category of treaty?

For the purposes of Part 2 CRAG the key criteria is whether or not a treaty is subject to ratification or is a double taxation treaty. See also response to question 1.1.1 above.

- 1.1.3. What is the legal status of treaties not requiring parliamentary approval in the internal hierarchy of norms?

The United Kingdom's dualist system means that treaties do not automatically become part of domestic law. In accordance with Parliamentary sovereignty, entering into international obligations under the Royal Prerogative cannot change domestic law – that can only be done by legislation. The United Kingdom does not distinguish between different categories of treaties.

1.2. Competence

- 1.2.1. Which authority is responsible for drafting the text of each category of treaty?

The responsibility for negotiating and drafting a treaty lies with the lead Government department, closely cooperating with the Foreign, Commonwealth and Development Office (FCDO).

- 1.2.2. In the process of drafting a treaty, which authority is responsible for the assessment of the legal character and category of an agreement?

The responsibility to determine the status of a treaty for the purposes of Part 2 CRAG lies with the lead Government department, closely cooperating with the FCDO.

- 1.2.3. Which authority has the general responsibility for ratification/approval/confirmation procedures for treaties (is it generally the responsibility of the Parliament and only certain categories are confirmed by the government or vice versa)?

The responsibility for acts by which the United Kingdom indicates its consent to be bound in international law by a treaty (i.e. ratification and equivalent acts) lies with the Secretary of State for Foreign, Commonwealth and Development Affairs.

- 1.2.4. What are the responsibilities of the line ministries and the Ministry of Foreign Affairs throughout the procedure of conclusion and ratification of each category of treaty?

See answers to questions 1.2.1-1.2.3, above.

- 1.2.5. What is the competence of autonomous regions/territories for the conclusion of a treaty?

Under United Kingdom devolution legislation, the United Kingdom Government remains responsible for international relations, and the FCDO continues to be responsible for the foreign policy of the United Kingdom of Great Britain and its constituent parts (England, Scotland, Wales and Northern Ireland). As a consequence the United Kingdom Government alone has the power to enter into treaties binding on the United Kingdom of Great Britain and Northern Ireland in international law.

The United Kingdom of Great Britain and Northern Ireland, the Crown Dependencies and Overseas Territories form one undivided realm, with the King as monarch. Unless expressly authorised to do so by the United Kingdom Government acting for the Crown (known as an entrustment), the Crown Dependencies and Overseas Territories do not have treaty-making authority in their own right.

- 1.2.6. Does the Ministry of Foreign Affairs have delegated competence to conclude less significant treaties on its own, by producing full powers signed by the Minister of Foreign Affairs? If it does, what typically characterises these agreements?

No.

2. PROCEDURAL ASPECTS

2.1. Procedure before conclusion/signature

- 2.1.1. What are the procedures required for the conclusion of different categories of treaties? Can a treaty be concluded through a simplified procedure? If yes, please provide a detailed presentation of the circumstances in which such procedures can be applied and describe the procedures.

It is United Kingdom practice not to insist upon the presentation of an instrument of full powers for a treaty concluded in the form of an exchange of notes. Otherwise there is no difference in procedures followed by the United Kingdom for the conclusion of treaties.

- 2.1.2. Do you have a procedure to review the harmonization and compliance of treaties not requiring parliamentary approval with existing national laws? What authority does the review and when?

Not applicable. Responsibility for assessing the compliance of domestic law with a treaty lies with the lead Government department, closely cooperating with the FCDO. Before entry into force of a treaty the lead Government department is required to provide the FCDO a letter of legal assurance approved at senior civil servant level confirming among other things that all necessary implementing legislation and other measures are in place. For treaties subject to ratification there is also a requirement under CRAG (section 24) to lay them in Parliament alongside an explanatory memorandum. CRAG does not prescribe requirements for explanatory memoranda but the FCDO template indicates that the lead Government department should, where applicable, give details of any relevant existing domestic legislation, any legislation required to be enacted, or other necessary implementing measures before the treaty can enter into force and how that legislation or measure will be brought into effect. This template is contained in the FCDO's Treaties and MOUs Guidance on gov.uk.

- 2.1.3. Do these procedures have one or two phases (before and/or after signature)? Can a treaty enter into force upon signature?

The person signing a treaty on behalf of the United Kingdom must have the authority to do so. In all cases this will require FCDO clearance. In addition, for treaties in the form of a single instrument, unless the treaty is signed by the Prime Minister or the Foreign Secretary, the person signing must have full powers. Generally, the Foreign Secretary authorises and signs instruments of full powers.

- 2.1.4. Are there any differences in the procedures when considering multilateral vs bilateral treaties?

No.

- 2.1.5. Are there certain denominations of treaties, which, according to your domestic law, always imply a treaty in simplified form? (for example, "Memorandum of Understanding", "Minutes" etc.)

As noted above the key distinctions in United Kingdom practice are between (i) treaties subject to ratification and those that are not; and (ii) treaties in the form of a single instrument and those in the form of an exchange of notes or letters. The difference in treatment has been described above.

- 2.1.6. Is the procedure for obtaining the mandate for negotiations differentiated according to different categories of treaties? If yes, how?

No. In the United Kingdom there is no specific procedure applicable to treaties. Treaties which may have cross-Government implications would be subject to collective Cabinet clearance in the same way as any Government policy. If the proposed treaty does not have cross-Government implications then it would be a matter for the lead Government department, in close cooperation with the FCDO.

2.1.7. Are the signatories of all categories of treaties required to produce full powers upon signature or just some of them?

As noted above at question 2.1.1, it is United Kingdom practice not to insist upon the presentation of an instrument of full powers for a treaty concluded in the form of an exchange of notes.

2.1.8. Do you allow for electronic signature of treaties? If so, are there certain requirements concerning what type of electronic signature is acceptable? Do you accept the electronic transmission of treaties instead of the exchange of physical copies? What is the procedure?

The United Kingdom does not accept electronic signature of treaties. During EU exit and the Covid-19 pandemic the United Kingdom has relied on electronic transmission of treaties, but strictly on the understanding that original wet ink documents follow by post.

2.2. Procedure after conclusion

2.2.1. Does the internal procedure for expressing consent to be bound change based on different categories of treaties (i.e., ratification, approval, acceptance, etc.)? If so, please explain.

No.

2.2.2. Is entry into force of a treaty possible on the date of the signature? If yes, what are the procedural requirements that enable such entry into force?

Yes. As noted above at question 2.1.2, before entry into force of a treaty the lead Government department is required to provide the FCDO a letter of legal assurance approved at senior civil servant level confirming among other things that all necessary implementing legislation and other measures are in place. As noted above at question 2.1.3, the person signing a treaty on behalf of the United Kingdom must have the authority to do so. In all cases this will require FCDO clearance. In addition, for single instrument treaties, unless the treaty is signed by the Prime Minister or the Foreign Secretary, the person signing must have full powers.

2.2.3. If entry into force is not possible on the date of the signature, is it possible to use provisional application for an earlier application of such treaty?

Treaties subject to ratification can contain a term providing for provisional application pending ratification and entry into force. Provisional application may be either from signature or following notification of the parties' intent to provisionally apply the treaty. The United Kingdom uses provisional application on an exceptional basis. Provisional application is not, and cannot be used as, a means of bypassing Parliamentary procedures (nor is it a substitute for the application of the standard international rules and processes for securing full legal entry into force of treaties). As with ratification, a letter of legal assurance must be provided to the FCDO confirming that all legislative steps will have been completed before the United Kingdom agrees to provisionally apply a treaty. It is essential that departments consult FCDO at the earliest possible opportunity when considering the inclusion of provisions allowing for provisional application in a treaty.

2.3. Form

- 2.3.1. Do different categories of treaties require specific form when the text is prepared for signature (i.e., printing on treaty paper, sealing, treaty folder)?

Yes. For treaties in the form of a single instrument the text (in English and any other authentic language(s)) is formatted in accordance with United Nations guidance and printed on treaty paper. The text is bound, sealed and presented in a signature binder. Larger treaties are printed on treaty paper but in the form of a signature book.

Treaties concluded in the form of an exchange of notes either reflect the format of relevant diplomatic notes, or sometimes are based on a single instrument treaty format. There is no requirement for treaties in the form of an exchange of notes to be printed on treaty paper.

- 2.3.2. Who prepares the text of different categories of treaties for signature?

Treaty Section prepares the text of every treaty in the form of a single instrument. The FCDO directorate or post responsible for the policy and subject matter prepares the text of treaties concluded in the form of an exchange of notes.

2.4. Implementation

How are treaties not requiring parliamentary approval implemented in national legislation in order to ensure respect of the principle of *pacta sunt servanda* in accordance with Article 26 of the VCLT?

The Government always carefully considers whether domestic legislation will be required to implement the UK's international obligations when negotiating a treaty. Not every treaty requires implementing legislation. As noted above, before the United Kingdom indicates its consent to be bound by a treaty the lead Government department is required to provide the FCDO a letter of legal assurance approved at senior civil servant level confirming among other things that all necessary implementing legislation and other measures are in place.

2.5. Publication, Registration and Depository

- 2.5.1. Do all categories of treaties have to be published?

Yes. It is the United Kingdom Government's policy that all treaties to which the United Kingdom is a party are laid in Parliament, published in Treaty Series, and are available on gov.uk. In addition, the FCDO publishes a monthly Treaty Action Bulletin on gov.uk. This includes links to the texts of all treaty command papers laid before Parliament (Country, Miscellaneous and Treaty Series), updates to the status of any treaties for which the UK is the depository, and any UK actions relating to multilateral treaties for which the UK is not the depository.

- 2.5.2. If not, which categories do not need to be published and made available to the general public? Is there room for discretion?

N/A

- 2.5.3. Which authority decides whether a treaty should not be published?

N/A

- 2.5.4. Where is each category of treaty published (Official Gazette, website, database, etc.)?

Treaties subject to ratification are generally published twice: first upon signature in either Country or Miscellaneous Series (for bilateral and multilateral treaties respectively), and then second following entry into force in Treaty Series. Treaties not subject to ratification are published following entry into force in Treaty Series.

- 2.5.5. Which categories of treaties are registered with the UN Secretariat?

It is the United Kingdom Government's policy that treaties to which the United Kingdom is a party are registered with the United Nations Secretariat.

2.5.6. Where are the originals (or certified true copies) of different categories of treaties kept (e.g., MFA, authority responsible for their implementation, state archives)?

It is the United Kingdom Government's policy that treaties to which the United Kingdom is a party are sent for preservation to The National Archives at Kew, London.