

Written evidence to the External Affairs and Additional Legislation Committee of the National Assembly for Wales

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1. I am writing in relation to the Committee's inquiries on *UK-wide common policy frameworks: scrutiny of non-legislative framework agreements and international agreements: a suggested approach to engagement and scrutiny*. In this submission I make a number of observations based my experience of analysing the Brexit process in the UK Parliament.
2. In order to scrutinise both non-legislative framework agreements and international agreements – it is vital that the National Assembly Wales develops bespoke procedures which are designed to address the specific challenges associated with each form of agreement. The major challenge is respect of both is that these are both new challenges for the National Assembly for Wales and there is limited experience to draw upon and so that makes it vital to engage with the experience of equivalent legislatures in other countries when devising the relevant procedures.
3. If Assembly Members are to influence the executive's approach to negotiations on both non-legislative framework agreements and international agreements, the National Assembly Wales' scrutiny structures must be in place well in advance of the relevant negotiations beginning.
4. Just as in the legislative process, the primary moment for substantive influence for Assembly Members is before the Executive's negotiating position has been finalised and anything has been formally presented. As a result, the scrutiny framework should ensure that it grants opportunities for the executive's position to be analysed well in advance of the relevant negotiations starting. The structure should ensure that there are opportunities for scrutiny and formal consent: before formal negotiations have begun, during the negotiations and after the negotiations have concluded and the final agreement has been published. The experience of the meaningful vote veto in the House of Commons highlights the value of having a scrutiny structure which front-loads the process so that it can established whether there is a majority on the executive's negotiating position at the early stages of the process.
5. For each of the different phases of the process, there is a difficult balance to be struck between formal veto powers for the legislature, for example for Assembly Members to approve or reject the executive's negotiating mandate, and informal scrutiny processes such as regular scrutiny sessions with the relevant minister. In my view, in both the contexts of scrutiny of non-legislative framework agreements and international agreements, it is vital that the National Assembly for Wales is granted formal veto powers in order to ensure that informal scrutiny mechanisms are effective. There are at least three formal veto powers that should be considered: a scrutiny reserve for relevant committees to clear the positions of the executive on negotiations on matters within their remit; a formal power for the National Assembly to approve or reject the executive's negotiating mandate; and a power to approve or reject any agreement after it has been concluded but before it has been formally adopted or ratified.
6. There will be understandable reluctance from the executive to agree to grant the National Assembly any of these legally binding veto powers. However, it should be stressed that if

these veto powers are built around a scrutiny framework which facilitates early engagement and consensus building, then some of these concerns can be assuaged. In fact it may be in the executive's interest to grant these veto powers to ensure that Assembly Members are engaged in the relevant negotiations and are then committed to the process of legislative implementation, which they are almost certainly going to be required to participate in.

7. The National Assembly for Wales will need legally binding veto powers in relation to some of the executive's positions on both non-legislative framework agreements and international agreements because otherwise it is unlikely that the informal scrutiny structures described in the committee's briefing documents will be effective. Written and oral questioning of ministers in relation to both non-legislative framework agreements and international agreements will be much more effective if the executive knows it is reliant on the consent of the National Assembly or a committee of the National Assembly in order to deliver its preferred outcome in the relevant negotiations.
8. Legally binding vetoes are particularly important for incentivising the executive to share information that can enable effective parliamentary scrutiny. In the absence of a legally binding veto, there is little incentive for the executive to share detailed information on its position at the early stages of negotiations. As part of any scrutiny framework, it is important that the National Assembly for Wales secures particular rights to be granted information in relation to the negotiations on both non-legislative framework agreements and international agreements. The European Parliament's right, set out in Article 218(10) of the TEFU that it 'shall be immediately and fully informed at all stages of the procedure' on negotiations agreements with non-Member States, is an example that the National Assembly could seek to replicate. That treaty right reflects the fact that there is political agreement within the EU that it is important the European Parliament is engaged in, and consents to, any agreement negotiated by the European Commission.
9. A broadly-framed right to be informed would be a good starting point for negotiating a detailed, and non-legally binding, framework to govern how and when the executive shares information with the National Assembly and its committees.¹ I would argue that such a framework is a necessary pre-condition for committees to efficiently organise and arrange effective subject-based inquiries that can inform and supervise the negotiations. As part of this framework, the National Assembly should specify exactly how the explanatory material it requests from the executive, should be presented and what issues it should address. To do this I would suggest that National Assembly agrees a list of standards which must be addressed by the relevant explanatory material.² For example, in the context of non-legislative frameworks, it may be important that any explanatory material specifies in detail

¹ I discussed the role of such a framework in the context of Westminster here: Oral evidence to [the Liaison Committee's inquiry on the effectiveness and influence of the select committee system inquiry](#) 8 May 2019; [written evidence on the effectiveness and influence of the select committee system inquiry: scrutinising Brexit](#) to the Liaison Committee 1 May 2019.

² For examples of the standards that could be specified and the debate around standards see: '[The Constitutional Standards of the House of Lords Select Committee on the Constitution](#)' Constitution Unit University College London (Third Edition) (2017) (with R Hazell and D Oliver); 'Public legal information and law-making in Parliament' in A Horne and G Drewry (eds) *Parliament and the Law* (2nd edition) (Oxford: Hart 2018); 'Parliament's Constitutional Standards' in A Horne and A Le Sueur (eds) *Parliament: Legislation and Accountability* (Oxford: Hart 2016) (with D Oliver).

the extent to which the frameworks will rely on legislation which is already in place and whether they will require legislation to be enacted in order to be effective.

10. Delegated powers to make secondary legislation are central to how Brexit is being managed and implemented by the UK Government.³ There are already a number of broadly framed powers on the statute book to legislate in areas formerly covered by the EU's competences. If the Withdrawal Agreement is ratified and a Future Relationship treaty is negotiated, the number of delegated powers in these areas is likely to increase through implementing legislation. The difficulties this presents for parliamentary scrutiny are well-established, however, the problems are particularly acute in the context of the role of the devolved legislatures in implementing non-legislative framework agreements and international agreements. It is a major technical challenge to analyse the substance of delegated legislation and evaluate its implications for non-legislative framework agreements, international agreements and how they relate to devolved competences. This sort of work is resource intensive and low-reward in the sense that by the time the secondary legislation has been proposed there is almost no chance to influence the policy to which they relate. The net result is that it is vital that the National Assembly, in relation to both non-legislative framework agreements and international agreements, focuses on acquiring powers that can ensure meaningful scrutiny at the early stages of the process where they can have meaningful input.

³ I have covered this issue in the Westminster context here: Written evidence to the House of Commons EU Scrutiny Committee – on [Post Brexit Parliamentary Scrutiny](#) 30 August 2019; Oral evidence to the House of Commons EU Scrutiny Committee – on [Post Brexit Parliamentary Scrutiny](#) 4 September 2019.