Hansard Society evidence to the House of Commons Procedure Committee:

Motions under section 13(1) of the European Union (Withdrawal) Act 2018

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Summary

- We know of no other case in which:
    - it has been a statutory requirement for the House of Commons to approve a treaty prior to UK ratification by resolution;
    - failure to achieve a ratified treaty by a specified date does not result in the continuation of the *status quo*;
    - the House of Commons was asked to approve by a single resolution not only a treaty but also a non-legally binding international 'Political Declaration'.

- The possibly unique nature and extraordinary political circumstances of the section 13(1) vote justifies an extraordinary and imaginative remedy.

- It is not unreasonable for the government to wish to test the House on its own proposal first, before any alternative proposals are put. However, securing a 'clean' decision in this way would be at the expense of the opportunity for other views to be not only debated but also tested in a vote.

- The memorandum from the Secretary of State to the Committee argues what is essentially a political case for an 'unequivocal decision', rather than a legal or procedural case.

- If it was the government's intention to deviate from normal procedures for the section 13(1) vote, MPs could and arguably should have been told this at the time the issue was debated during the scrutiny stages of the EU (Withdrawal) Bill.

- Views on the Withdrawal Agreement clearly do not follow party lines and therefore the circumstances do not lend themselves to the normal practice of permitting the selection of one amendment.

- Given the exceptional circumstances, there is a case for permitting a number of votes, to take into account all alternative propositions that are judged to command a degree of support in the House. For example, any proposition that was deemed likely to attract the support of at least 10% of the House or 65 Members could be aired and tested.

- To protect the Speaker and underpin the confidence of the House and the watching public in the decisions made, provision should be made for an express requirement to consult the Deputy Speakers or the Panel of Chairs on the sequence in which amendments are voted on. The reasons for those decisions should also be set out.

- If selection of amendments is not based on those that are likely to command a certain threshold of support, the consultation requirement above should also apply to the amendment selection process, as well as the sequencing.

I. Broader context and precedents

A. Parliamentary amendments and treaty ratification

1. The underlying issue engaged by the question of amendments under section 13(1) of the EU(W)A is not new. The issue is the extent to which parliamentary amendments to a government text approving a treaty, made after international agreement on the treaty has been reached, may render the treaty unratifiable by the UK. This question has arisen in UK parliamentary debates on a number of treaties, going back many years.

2. One issue which may be relevant to the relationship between amendments to the section 13(1) approval motion and the ratifiability of the Withdrawal Agreement is whether the section 13(1) motion is taken *before the Withdrawal Agreement is signed, or afterwards*. A treaty text is often initialled by the prospective signatories once political agreement is reached, before the text is subject to legal 'scrubbing' and clean copies prepared for a formal signing ceremony. It is not clear whether this will apply to the Withdrawal Agreement.

When a treaty is subject to ratification, it is that step that signifies the UK's 'consent to be bound' by the treaty under international law. However, according to the FCO's treaty practice guidance, the UK does not sign a treaty "unless it has a reasonably firm intention of ratifying", and "by signing a treaty a state shows that it is in agreement with the text".[1] According to Anthony Aust, the FCO's former Deputy Legal Adviser, a prospective party to a treaty is "free to suggest technical, or even substantive, changes at any time before signature".[2] Arguably, therefore, there might be somewhat more scope to seek changes to the agreed Withdrawal Agreement before it is signed than afterwards.

As far as we are aware, there is nothing in section 13(1) of the EU(W)A or in government statements that would preclude the 'meaningful vote' on the Withdrawal Agreement being taken before signature. The fact that section 13(16) of the EU(W)A refers explicitly to the 'draft' Withdrawal Agreement may be relevant here.

B. To what extent is the Withdrawal Agreement approval procedure under section 13(1) of the EU(W)A unique?

[1] FCO, 'Treaties and Memoranda of Understanding (MOUs): Guidance on Practice and Procedures', March 2014, https://www.gov.uk/government/publications/treaties-and-mous-guidance-on-practice-and-procedures

[2] Anthony Aust, *Modern Treaty Law and Practice*, Third Edition (Cambridge University Press, 2013), pp. 80, 83

3. As the Committee considers arrangements for the section 13(1) vote, it may be useful to be aware of relevant precedents.

Although the underlying issue is not new, in three respects the approval process under section 13(1) may be unique:

i) We know of no other case in which it has been a statutory requirement for the House of Commons to approve a treaty prior to UK ratification by resolution.

This may be significant because in previous cases when the House has been asked to give pre-ratification approval to a treaty by resolution, it would - at least in principle - have been legally open to the government to ignore any resolution against ratification, or any resolution making approval for ratification unclear, and ratify anyway using the prerogative. Compared to these cases, the fact that the section 13(1) procedure establishes a statutory requirement arguably places a greater premium on the resolution providing clear approval for ratification.

The previous cases we know of when the House of Commons has given pre-ratification approval to a treaty by resolution, but not as a statutory requirement, are: the 1945 UN Charter, the 1949 North Atlantic Treaty, the 1984 Sino-British Joint Declaration on Hong Kong and the 1985 Anglo-Irish Agreement.

In these cases, no amendments to the approval motion were selected for debate.[3]

There have also been cases in which it *has* been a statutory requirement for the House of Commons to approve a treaty prior to UK ratification, but in these cases the requirement was that approval be given by Act of Parliament, not resolution.

These cases are the EU Treaties (amending the founding Treaties) which successive UK EEC/EC/EU-related Acts of Parliament[4] specified could not be ratified by the UK until they had been approved by a further Act of Parliament, certainly where the new EU Treaties expanded the competences or objectives of the EU or the powers of its institutions.

When pre-ratification treaty approval had to be given by Act of Parliament, by definition the relevant Bill was amendable.

In these cases, the question has arisen quite commonly of whether proposed amendments to the Bill might, if made, render the treaty unratifiable. In the debates on the European Communities (Amendment) Act 1993 (to approve and implement the Maastricht Treaty), for example, the government famously u-turned with respect to one of the opposition amendments which sought to remove the UK's Social Chapter opt-out (amendment 27), announcing that the legal advice had changed

[3] HC Deb 22 August 1945 cc659-755, 23 August 1945 cc861-950; HC Deb 12 May 1949 cc2011-2131; HC Deb 5 December 1984 cc389-472; HC Deb 26 November 1985 c747

[4] European Assembly Elections Act 1978, s 6(1); European Parliamentary Elections Act 2002, s 12; European Union (Amendment) Act 2008, s 5; European Union Act 2011, Part 1

such that the amendment was no longer regarded as incompatible with ratification. With respect to one of the other amendments (amendment 443), the situation remained unclear on the ratifiability question, but the Deputy Speaker in any case ruled the amendment out of order.[5]

As this example suggests, when the compatibility of proposed amendments with ratification has arisen in debates on primary legislation to approve a treaty, the issue has been dealt with mainly through the chair's decisions on scope.

In the case of the Withdrawal Agreement, one difficulty is that questions about the compatibility of particular amendments with ratification may well reoccur when the House debates the Withdrawal Agreement Bill. Of course, the scope to try to change the Withdrawal Agreement may have been reduced even further by the time the House debates the Bill, if the Agreement has been signed by then (if it was not signed at the time of the 'meaningful vote'), and if it has been submitted to the European Parliament and laid before Parliament in the UK under the Constitutional Reform and Governance Act 2010 for consent to ratification.

ii) We know of no other case in which failure to achieve a ratified treaty by a specified date does not result in the continuation of the status quo.

Under Article 50(3) of the Treaty on European Union (TEU), the EU Treaties - and therefore all EU law made under them - automatically cease to apply to the UK on 29 March 2019 by virtue of the notification the UK made to the EU on 29 March 2017 (under Article 50(1) and (2) TEU) of its intention to withdraw.

The 'sunset clause' nature of Article 50 has generated demands from parliamentarians that a no-deal Brexit be made subject to dedicated parliamentary approval, rather than take place by default if the Withdrawal Agreement is not approved and ratified in time. This aspect of the Article 50 process has also generated greater uncertainty over the consequences of a vote not to approve the Withdrawal Agreement than would apply to a vote not to approve a 'normal' treaty. This uncertainty arises not least because of the government's repeated statements that it seeks to avoid a no-deal Brexit. And the nature of the hard Article 50 deadline, combined with the non-amendable nature of the motions provided for by subsequent sub-sections of section 13, has among some parliamentarians also generated greater urgency about being able to use the first and only guaranteed opportunity they will have to influence subsequent developments under the processes set out in the EU(W)A, namely the section 13(1) 'meaningful vote'.

These are all considerations that push in favour of arranging the section 13(1) vote such that MPs might express and test views about what should happen if the Withdrawal Agreement is not approved.

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[5] David Baker, Andrew Gamble and Steve Ludlam, 'The Parliamentary Siege of Maastricht 1993: Conservative Divisions and British Ratification', *Parliamentary Affairs*, Vol. 47, No. 1, 1994, pp. 37-60

In the three days of 'ping-pong' proceedings in the House of Commons on 12, 13 and 20 June 2018 that, among other things, saw section 13 reach its final form, there was no mention of the arrangements for voting on amendments to the section 13(1) motion. It is therefore reasonable to suppose that Members would have assumed that the default arrangements would apply, *i.e.* that votes would be taken first on amendments to the motion and then on the motion (potentially, the motion as amended).

iii) We know of no other case in which the House of Commons was asked to approve by a single resolution not only a treaty but also a non-legally binding international 'Political Declaration'

The considerations outlined above about the difficulties of amending a treaty by this stage in the process, and about the need for a clear indication of approval for ratification, do not apply to the Political Declaration.

Compared to the Withdrawal Agreement itself, this might leave greater scope for parliamentarians to seek changes to the Political Declaration through amendments to the section 13(1) approval motion.

However, it may well be that the Political Declaration is referenced in the Withdrawal Agreement. In this case, amending the former could also be seen to amend the latter, and thus potentially render it unratifiable.

II. Procedures for the 'meaningful vote' under section 13(1) of the EU(W)A

4. The preceding discussion suggests that the possibly unique nature and extraordinary political circumstances of the section 13(1) vote justifies an extraordinary and imaginative remedy set out in a Business of the House motion.

C. Order of the votes: government motion first?

5. A decision about how the vote should proceed depends on how broadly one interprets the purpose(s) of the motion, plus the delicate interplay between high politics, law and procedure.

6. Understandably, the government wishes to secure a clear indication of approval for ratification. The consistent and understandable demand that MPs should be able to express a view is equally desirable.

It is not unreasonable for the government to wish to test the House on its own proposal first, before any alternative proposals are put. If agreed to, then any amendments would fall. This would give the government the advantage of securing a 'clean' vote in favour of ratification of the Withdrawal Agreement.

However, securing a 'clean' decision in this way would be at the expense of the opportunity for other views to be not only debated but also tested in a vote. The only way other views could be tested would be for Members to reject the government's motion and to do so without knowing whether there was a majority for any other alternative. The government's approach thus confronts the House with a clear question concerning its appetite for risk.

7. The memorandum from the Secretary of State to the Committee argues what is essentially a political case for an 'unequivocal decision', rather than a legal or procedural case. As noted above, section 13(16) of the EU(W)A states explicitly that the 'negotiated withdrawal agreement' which will be the subject of the approval motion means 'the draft of the withdrawal agreement' on which political agreement has been reached. The word 'draft' implies that it is not necessarily the final version and therefore, contrary to the assertion in the government's memorandum, that it is arguably not the only legal option. Suggestions that the courts might question proceedings in Parliament also need to be treated cautiously given awareness by the courts of Article 9 of the Bill of Rights.

8. If it was clear that *any* amendment to the motion would put ratification in doubt, there would be a strong case in favour of the government's proposition that its motion should be considered first. However, this is not necessarily the inevitable outcome of any and all potential amendments. And if an amendment were to receive support which the government concluded called into question its ability to ratify, this might, for example, be remedied by a provision in the subsequent Bill. Alternatively, a further motion could be put to the House at a later date to revisit the matter and secure the necessary comfort and clarity as to ratification. In this context, it is important to recall that the government will not need to ratify the Withdrawal Agreement immediately after the 'meaningful vote': by definition, ratification cannot take place until proceedings have been completed on the Withdrawal Agreement Bill, and the Withdrawal Agreement has been laid before Parliament under the Constitutional Reform and Governance Act for at least 21 sitting days.

9. The question of legitimate expectations also comes into play: if it was the government's intention to deviate from normal procedures for the section 13(1) vote, MPs could and arguably should have been told this at the time the issue was debated during the scrutiny stages of the EU (Withdrawal) Bill. As noted above, the issue was not raised in the House of Commons at any point during 'ping-pong' on the Bill.

D. Selection of, and voting on, amendments

10. Views on the Withdrawal Agreement clearly do not follow party lines. The circumstances therefore do not lend themselves to the normal practice of permitting the selection of one amendment in the name of the Official Opposition.

11. An important consideration, although not necessarily the most important one, is the way in which this vote will be perceived both within and beyond the confines of

Parliament. If it is possible to facilitate debate and votes in such a way that all shades of opinion within the House are heard and tested, this would be preferable to an exclusionary approach.

12. More amendments are permitted in the debate on the Queen's Speech in order to allow other parties to have their policies voted on. There is a case for a similar approach on this motion.

Indeed, given the exceptional circumstances, there is a case for permitting a number of votes, to take into account all alternative propositions that are judged to command a degree of support in the House. For example, any proposition that was deemed likely to attract the support of at least 10% of the House or 65 Members could be aired and tested.

13. The sequence in which amendments are voted on is also important. This would normally be a matter for the Speaker, and he is not required to give reasons for his decision. On any given day, the Speaker may be required to make decisions which have a significant impact on the passage of government business. However, the politically contentious nature of this vote is of a wholly different order to that of normal day-to-day government business. Given this, it would be judicious to do everything possible to protect the Speaker and the independence of his office, thereby underpinning the confidence of the House and the watching public in the decisions made.

There is precedent for this. Before certifying a Money Bill, the Speaker may consult two members of the Panel of Chairs. Standing Orders would not expressly prevent the Speaker consulting anyone about his decisions on selection of amendments, if he wished to do so. But, in the case of the section 13(1) vote, given the polarised political environment in which such consequential decisions will have to be made there would be merit in expressly making provision for a requirement to consult - perhaps the Deputy Speakers or several members of the Panel of Chairs - before the Speaker reaches his decision. There would similarly be merit in requiring him to set out the reasons for those decisions.

The argument in favour of expressly requiring the Speaker to consult and set out his reasons applies with even greater force if the Business of the House motion does not allow for the selection of all amendments that are likely to command a certain threshold of support, and the Speaker thus has the responsibility of deciding which amendments are to be debated, as well as the order in which they are taken.

III. Further steps

14. It is disappointing that 21 months after the term 'meaningful vote' was first used in the House of Commons in reference to the prospective Withdrawal Agreement,[6] four months after the EU (Withdrawal) Act (EU(W)A) reached the statute book and possibly only weeks before the vote is held, critical elements of its nature remain unclear.

15. In this context we recall that the House of Lords resolved in April 2017 in favour of the creation of a Joint Committee to report by October 2017, a year ago, on "the terms and options for any votes in Parliament on the outcome of the negotiations on the United Kingdom's withdrawal from the European Union, including how any such votes be taken before any agreement is considered by the European Parliament".[7] As far as we are aware this resolution received no follow-up.

16. We would therefore urge the government to set out as soon as possible its plans for the parliamentary approval and implementation of the agreement or agreements with the EU, governing the long-term UK-EU relationship, which it hopes to reach during the implementation period after March 2019. We would similarly urge the Committee to press the government to this effect. Early provision of this information might allow more considered decision-making than occurred in the hurried amendment process during 'ping-pong' on what is now section 13 of the EU(W)A.

17. In approval debates on previous treaties, when the question of the compatibility of possible amendments with ratification has arisen, MPs have expressed frustration that they are being asked to debate and vote on their approval of a treaty when it is too late to change its content. This is an issue outside the scope of the Procedure Committee's current inquiry, and one which is being considered by other committees. However, as the UK enters a period of potentially intense and consequential post-Brexit treaty-making, with both the EU and non-EU states, parliamentarians might wish to consider ways of inserting themselves into the process of shaping treaty content at the start, to lessen the risk of experiencing frustrations at the end.

[6] Sir Keir Starmer, HC Deb 24 January 2017 c163
[7] HL Deb 4 April 2017 c1044