Written evidence from the European Union Committee - RIS0012

Attached you will find an interim submission from the European Union Committee to the Liaison Committee review of investigative and scrutiny committees. This was agreed by the Select Committee at its meeting on 13 March 2018. It reflects our emerging understanding of the way in which Brexit will unfold, and of the implications of Brexit for committee work, both during any transition period and in the longer term.

This is an interim submission, because negotiations themselves are incomplete. The terms of the Withdrawal Agreement could well change between now and the end of the year, with implications for committee work. We will continue to monitor developments, and may make a further submission later in the year.

I hope you will find our submission useful. I would of course be happy to discuss the issues further, if you have any questions.

Lord Boswell of Aynho
Chairman of the European Union Committee

March 2018
European Union Committee: interim submission to the Liaison Committee review of investigative and scrutiny committees

Introduction

1. This submission was agreed by the European Union Select Committee at its meeting on 13 March 2018, but has been updated where necessary to reflect the agreement reached by UK and EU negotiators on 19 March.

2. The European Union Committee is appointed to “consider European documents … and other matters relating to the European Union”; to “assist the House in relation to the procedure for the submission of Reasoned Opinions”; and to “represent the House as appropriate in interparliamentary cooperation within the European Union”.

3. This submission reflects the limits of our remit, focusing on Question 2 in the list of detailed questions: “What changes are needed in the wake of Brexit? Are committees needed to scrutinise the UK-EU relationship in future, and if so how?” Given our responsibility for representing the House in interparliamentary cooperation within the EU, we have also addressed the question, “How can House of Lords Committees promote inter-parliamentary dialogue both within and outside the UK?”

4. This submission reflects our current understanding of the likely shape and timing of Brexit, based on our continuing scrutiny of the process, which began in the weeks following the June 2016 referendum. Brexit is, however, still subject to profound uncertainties, some of which we briefly explain in this note. Our views are thus provisional, and our central conclusion is that it is too early to decide definitively on the changes that will need to be made in the wake of Brexit. Assuming that a Withdrawal Agreement is finalised, pending parliamentary votes, in October 2018, the Liaison Committee will be better placed to take final decisions towards the end of the year.

5. A further key consideration is the nature and duration of a post-Brexit transition period. The UK will cease to be an EU Member State on 29 March 2019, but the UK and EU have now agreed the terms of a transition or implementation period, lasting until the end of 2020. In other words, ‘Brexit’, rather than being a single event, will be a phased process. It follows that changes to the House’s committee structure, rather than taking place all at once in spring 2019, may also need to be phased. One model may be appropriate for transition, and another for 2021 onwards.

Transition: March 2019–December 2020

Scrutiny of EU laws during transition

6. The draft transition agreement, incorporated as Articles 121–126 of the draft withdrawal agreement published by the European Commission on 28 February, and
agreed by the UK and EU negotiators on 19 March, will mean EU laws continuing to apply in full in the UK throughout transition. As Article 122 states: “Union law shall be applicable to and in the United Kingdom during the transition period”.

7. There are some exceptions to this general principle. Article 123 of the draft agreement, for instance, states that during transition “the parliament of the United Kingdom shall not be considered to be a national parliament of a Member State”. It follows that the EU Committee’s current role in relation to the submission of Reasoned Opinions will lapse in March 2019.

8. More important, though, is the fact that UK Ministers will not attend or vote in meetings of the Council, and the UK will cease to elect Members of the European Parliament—there will be no opportunity for the UK’s elected representatives to participate in the adoption or review of EU laws, even though those laws will continue to apply. Transition could thus lead to a significant, if short-term, ‘democratic deficit’.

9. We, along with colleagues in the House of Commons and in Government, have begun reflecting on this issue. The Secretary of State for Exiting the EU, David Davis MP, in a letter to Lord Boswell dated 21 February, outlined the Government’s proposal that the joint committee established to oversee the Withdrawal Agreement should, during the transition period, be tasked with ensuring “mutual good faith”. In evidence to the House of Commons European Scrutiny Committee the following day, DExEU Minister Robin Walker MP developed the point, arguing for “a mechanism for raising UK concerns through a joint system”. He saw a role for a continuing scrutiny process that would “feed into that”; he said that he would “come back to the [European Scrutiny] Committee and indeed to the Lords EU Committee to discuss how that scrutiny relationship could work during the implementation period”.¹

10. We have yet to receive firm proposals from the Government, and Mr Walker acknowledged that “it is for Parliament, rather than Government, to determine the scrutiny process”. But we note that the latest text of the transition agreement, agreed on 19 March, -provides that, even though the United Kingdom Parliament will not be considered as a “national parliament of a Member State”, it will continue to be treated as such for the purpose of Articles 1 and 2 of the Protocol (No 1) on the role of national parliaments in the European Union—with the result that draft legislative acts will continue to be forwarded to the UK Parliament, as at present. The regular supply of draft legislation is a prerequisite for effective scrutiny, and we welcome the Government’s success in including this provision in the Agreement.

11. We note also that the current system of parliamentary scrutiny is underpinned by the Scrutiny Reserve Resolution, according to which Ministers are not to agree in the Council of Ministers to any proposal that is being held under scrutiny by one or other scrutiny committee. Given that UK Ministers will no longer have voting rights after exit day, the Scrutiny Reserve Resolution will cease to have effect. Depending on

¹ Robin Walker MP, evidence given to the European Scrutiny Committee, 22 February 2018, QO 153, 166
how negotiations and our own discussions with Government progress, we may in due course make proposals to the Procedure Committee for replacing or amending the Resolution, so as to support scrutiny during transition.

12. **In summary, it is now clear that during the transition period the UK will continue to be bound by EU laws, including new laws as they come into force. We therefore believe that some form of continuing parliamentary scrutiny of those laws will be essential.** One objective of this scrutiny could be, as the Government has suggested, to raise concerns over EU proposals, which Ministers will then raise through the UK-EU joint committee—this would be analogous to the current ‘reasoned opinion’ procedure, but without the same force in EU law. More broadly, scrutiny committees would contribute to transparency, reporting significant changes and developments to the House and helping to inform the wider public. Depending on what domestic legislative process is adopted for giving effect to EU laws during transition, scrutiny committees could also have a role in contributing to parliamentary scrutiny of those domestic laws (while respecting the existing role of the Secondary Legislation Scrutiny Committee).

**Scrutiny of ongoing UK-EU negotiations**

13. Since the 2016 referendum the EU Committee has sought to scrutinise the Government’s conduct of the Brexit negotiations. We are grateful to Mr Davis, who has appeared before the EU Select Committee approximately quarterly, and acknowledge that, as the UK’s chief negotiator, he faces a heavy burden in supporting parliamentary scrutiny.

14. But notwithstanding Mr Davis’ appearances, the Government has been slow to share confidential material with Committees—it only shared its sectoral assessments, and more recently its leaked economic analysis, after motions calling for the documents to be released had been agreed by the House of Commons. Nor have officials been available to meet the Committee, either on or off the record. This reluctance to engage with committees contrasts with the steady flow of information and briefing provided by the European Commission to the European Parliament’s Brexit Steering Group, creating, in effect, an ‘inequality of arms’ between the Westminster and Brussels parliaments. This has made it difficult for us to undertake structured and informed scrutiny.

15. Hitherto the negotiations have focused on ‘withdrawal issues’, the most important being citizens’ rights, the financial settlement, and the UK-Irish border issue. But during transition they will turn to long-term future relations, covering such issues as trade (covering not just tariffs, but the arrangements for ongoing regulatory alignment, which reach deep into domestic policy), internal and external security, and ongoing cooperation in areas such as aviation or data protection. We assume (although it is too early to confirm) that rather than being conducted by the Secretary of State for Exiting the EU, the negotiations during transition will be made up of many strands, with departmental ministers playing a more direct role.
16. These negotiations will have significant long-term implications for the United Kingdom, and we therefore, notwithstanding the difficulties we have encountered thus far, reaffirm the conclusion reached in our October 2016 report *Brexit: parliamentary scrutiny*:

“Parliament, while respecting the Government’s need to retain room for manoeuvre, should be able both to monitor the Government’s conduct of the negotiations, and to comment on the substance of the Government’s negotiating objectives as they develop. Only if these principles are accepted will Parliament be able to play a constructive part in helping the Government to secure the best outcome for the United Kingdom.”

17. We therefore hope that the Liaison Committee, in considering the House’s committee structure during the transition period, will prioritise effective committee scrutiny of the negotiations with the EU.

*Trade negotiations with third countries*

18. The Government will also use the transition period to begin negotiations with third countries, both those with whom the UK, as an EU Member State, has already concluded agreements, all of which will have to be renegotiated post-Brexit, and those with whom the UK may wish to conclude agreements on trade or other matters in future. These negotiations will in due course give rise to numerous treaties—though they are unlikely to come into force until after transition, once the UK is no longer bound by EU law.

19. Hitherto the negotiation of many international agreements, including trade agreements, has been an exclusive EU competence. In other words, the European Commission, represented in most cases by the EU Trade Commissioner, has negotiated treaties on behalf of the United Kingdom, following guidelines adopted by the European Council. Such negotiations are conducted under Article 218 of the Treaty on the Functioning of the European Union (TFEU).

20. Article 218(10) TFEU provides that “The European Parliament shall be immediately and fully informed at all stages of the procedure”, and in recent years the European Parliament has played an increasingly influential and active part in monitoring trade negotiations. The detailed arrangements are set out in a binding 2010 Framework Agreement on relations between the European Parliament and the European Commission, according to which the Parliament “shall be immediately and fully informed at all stages of the negotiation and conclusion of international agreements”. This allows enough time for the Parliament “to express its point of view if appropriate, and for the Commission to be able to take Parliament’s views as far as possible into account”.

21. In other words, an elaborate system of parliamentary oversight of the conduct of negotiations on international agreements now exists in Brussels—and UK MEPs play
an important part. There is thus a risk that this layer of democratic oversight and accountability could be lost post-Brexit.

22. It follows that the question of parliamentary scrutiny of treaty-making powers, debated many times over the last 20 years, will acquire new urgency from March 2019. At the moment parliamentary oversight of treaties is limited to the process of ratification, where, under the procedures set out in the Constitutional Reform and Governance Act 2010, parliamentary votes are possible. In the House of Lords, the Secondary Legislation Scrutiny Committee may report on treaties falling within the terms of the CRAG Act, but in practice has rarely done so.

23. But by the ratification stage treaties are a ‘done deal’. There is an argument that Parliament should have much earlier input, scrutinising and commenting on negotiating objectives and guidelines, so as to bring a measure of democratic accountability and transparency to the whole process. This issue falls outside the remit of the EU Committee, but we hope that the Liaison Committee will make it a priority in considering committee work during transition and beyond.

Interparliamentary relations during transition

24. As we have noted, the EU Committee is charged with representing the House in interparliamentary cooperation within the EU. This task will, we believe, be more important than ever during the transition period. If UK Ministers are not able to vote on EU laws in the Council, and the UK has no MEPs, then the exercise of ‘soft power’ will be crucial. Indeed, it will be all the more important, once the UK longer has a formal voice in the EU institutions, that we nurture relationships with EU institutions and with the remaining EU Member States.

Summary: committee work during transition

25. As we indicated at the outset, the Brexit negotiations are subject to significant uncertainties. It is therefore too early to confirm exactly what kind of committee structure will be appropriate to scrutinise the UK-EU relationship during transition, let along in the longer term. But with that important qualification, we believe that, if a transition agreement is concluded, a committee or committees will be needed—

- To monitor and report on significant changes in EU law, and to make recommendations to Ministers on when to make representations on or object to such changes;
- To scrutinise the ongoing negotiations with the EU, and to report on any draft agreements that emerge from those negotiations, so as to inform debates or votes in the House;
- To scrutinise negotiations with third countries, and to report on any draft agreements that emerge from those negotiations;
• To represent the House in interparliamentary fora within the EU, with a particular view to developing the structures for ongoing UK-EU interparliamentary cooperation.

26. These are significant tasks, and the Liaison Committee may wish to reflect on what level of resource they will require. In our view, the tasks we have outlined, if all undertaken by one committee, would demand a structure comparable to that of the existing EU Committee—namely, a Select Committee supported by a number of Sub-Committees with sectoral remits. This does not necessarily mean six sub-committees, nor does it mean that the remits of those sub-committees would be those of the existing EU sub-committees. It would also be possible to divide the tasks between committees, for instance with one committee focusing on EU-related matters, and another on negotiations with third countries.

27. We note, however, that the Members and staff of the EU Committees possess substantial expertise and experience, well-established working practices, and a wide range of networks and contacts. The Liaison Committee may therefore conclude that there would be benefit in a phased approach, drawing on existing structures during the transition period, rather than undertaking a disruptive reorganisation in 2019 for a period that is unlikely to last more than two years.

Committee work in the long term

28. It is too early to come to firm conclusions on committee scrutiny of the post-transition UK-EU relationship. The Prime Minister set out her position in her Mansion House speech on 2 March, and the European Council (EU 27) is likely to adopt negotiating guidelines in late March. But these are high-level documents, and our expectation is that when the Withdrawal Agreement is finalised in October 2018, it will be accompanied only by a political declaration describing in broad terms the relationship that the two sides are committed to implementing. That relationship could be ‘deep and special’, entailing continuing close cooperation on trade, internal security and foreign policy, or it could be relatively detached.

29. Detailed negotiations will begin in earnest after October—possibly not until after 29 March 2019, when the UK will become a ‘third country’ under EU law, enabling the European Council to adopt a negotiating mandate, probably under Article 217 or 218 TFEU. Those negotiations could then continue until at least the end of 2020, and only then will the final terms of the UK-EU relationship be confirmed.

30. The Liaison Committee may therefore conclude that a further ‘mini-review’ would be useful in or around 2020, as negotiations with the EU approach their conclusion, to inform further changes to the committee structure. But with that caveat in mind, we offer the following observations:

• The scrutiny of negotiations on international agreements, already touched on, will remain a key issue.
• It is already apparent that Brexit will lead to an expansion of what might be called the UK’s ‘regulatory state’—many functions of the European Commission, in upholding and enforcing EU rules, and of EU regulators and agencies, will be replicated domestically. Hitherto these EU bodies have been scrutinised by the European Parliament, which is formidably well-resourced. The Westminster Parliament does not possess comparable resources, and the Liaison Committee may therefore wish to begin a process of reflection on how the House of Lords, through its committees, can contribute to ensuring the accountability of regulators and rule-makers in the post-Brexit UK.

• The Government is seeking agreement with the devolved administrations on UK-wide ‘frameworks’. These will replace the binding rules of the EU Single Market, and ensure long-term consistency within the UK’s own internal market, preventing damaging divergence of regulatory standards across the nations and regions. Those frameworks will cut across reserved and devolved competences; they will also presumably be dynamic, not static. The over-riding priority at present is for the Government and the devolved administrations to reach agreement, so as to avoid a damaging stand-off. But in the longer term, assuming agreement is reached, the Liaison Committee may wish to consider how such UK-wide frameworks will be scrutinised. The EU Committee, with the support of the Senior Deputy Speaker, has taken the lead in organising the first two meetings of a new ‘Interparliamentary Forum on Brexit’, within which chairs and convenors of committees with an interest in Brexit from across the UK can come together to discuss issues of common concern. But this dialogue needs to be developed further: in a post-Brexit world, without the EU to hold the ring between devolved and reserved competences, there may be a case for enhanced committee scrutiny of UK-wide frameworks, feeding in turn into closer intra-UK dialogue.

• There is also a long-term question over external interparliamentary relations. The EU Committee currently represents the House “in interparliamentary cooperation within the EU”, and Members routinely attend conferences and take part in bilateral meetings with other EU parliaments; the UK’s National Parliament Office in Brussels also falls within the EU Committee team. Assuming that the UK-EU relationship remains close in the long term, a Select Committee with specific responsibility for monitoring and, at an interparliamentary level, nurturing UK-EU relations may still be needed post-transition; this could be supplemented by an ongoing NPO function based in Brussels. In reflecting on this question, the precedents from non-EU national parliaments with a close relationship with the EU (such as Switzerland, Norway, Iceland, Turkey or Ukraine) may be useful.

31. These questions extend beyond the EU Committee’s current remit, and other committees across both Houses—not to mention the Government—will have an interest. Nevertheless, we plan to begin consideration of the last of these issues—the ongoing UK-EU relationship, and its parliamentary dimension—in coming months, and we will of course share our findings with the Liaison Committee.