May I declare my interests as set out in the Register: of particular relevance are:
(1) I am Chairman of the Financial Markets Law Committee
(2) I am Chairman of the Commission on Justice in Wales
(3) I am a member of Executive Committee of the ELI

My submission covers 2 topics:
(1) Scrutiny of legislation
(2) Scrutiny of the operation of justice issues

It is not yet clear what areas formerly dealt with as subordinate legislation under the European Communities Act 1972 will be dealt with by primary legislation and what by subordinate legislation, and what will be the precise procedure for the examination of major pieces of subordinate legislation. However the area of EU legislative activity was, as is well known, vast and covered huge swathes of activity. A large number of pieces of legislation were the subject of detailed scrutiny in the European institutions through
(1) the processes of the Commission which often utilised experts to get the legislation as up to date and as accurate as possible
(2) The detailed consideration by the Council
(3) The detailed consideration by one of the Committees of the European Parliament
(4) The final approval by the Council and the European Parliament

I have been thrice involved in detail in this process through my participation in European Bodies (as President of the European Network for the Councils for the Judiciary and as Chairman of a European Law Institute project); the first involved the Stockholm Programme in relation to rights of those accused of crime; the second involved victims of crime; the third involved an attempt by the Commission to create a Common European Sales Law; although the proposal for a Sales law failed at the Parliamentary stage, some of the work is still being taken forward as part of the digital single market.
The volume and complexity of future legislation is likely to be considerable in the EU. Some of this is driven by the impact of digital development, for example in relation to new ways of doing business on the financial markets (such as Digital Ledger Technology) and for consumers (such as the need to clarify rights and liabilities in respect of intermediary platforms and data harvested from consumers).

In addition, as in the recent past, the UK will have its own ideas for development.

I would envisage that the relevant Committee in respect of a given piece of subordinate legislation which contains matters of substance but which was formerly covered by the EU will have to deal with:

1. Whether it is desirable the UK has its own regime or adopts the regime either as adopted or as developed by the EU. If it is proposed that the UK has its own scheme, the extent to which there is to be equivalence or alignment and how this is to be achieved. This task will involve scrutiny of the policy decision made by HMG and the evidence and analysis that lay behind the decision. This is a new and formidable task.

2. Whether the legislation (whichever policy decision is taken as to the issue described under (1)) meets the objectives or itself throws up further issues. In relation to the pieces of EU legislation in which I was involved, there were numerous conferences organised by interested bodies which were attended by representatives of the Commission, the Council and the Parliament and the taking of expert evidence by the relevant Committee of the Parliament. In relation to the Common European Sales Law, there were also sessions at which the detailed drafting of the text was considered and discussed with the Parliament (in addition to discussions with the Commission). If the level of scrutiny and consultation is to provide something as good as, if not better than, the EU legislative process, this is a formidable task.

3. If the legislation is to be dealt with by primary legislation, then there is a need to examine whether the current processes in the House can deal with the issues in a way that addresses the issues I have set out and provide the detailed consideration that will be needed, given the potential for the
volume to be high, if much is done by primary legislation; I assume this is outside the terms of reference of this inquiry.

(4) If the legislation on such matters is by subordinate legislation, two major changes may be required:

i. The committee structure should enable this to be done by a committee that includes those who have or can acquire the relevant subject matter experience; for instance if the legislation is dealing with issues in the financial markets arising out of the digital revolution, then it would be desirable that a committee should be one which has developed expertise in either the financial markets or technology as the general subject matter of the committee’s work.

ii. The committee should have the ability to suggest amendments in the course of its consideration of the legislation and have a procedure that enables such amendments to be made.

(5) Without an analysis of the likely volume of either primary or subordinate legislation that will require scrutiny and an analysis of the resources that will be required, it is presently not possible for me to express a view on how these tasks are to be shared between the two Houses.

Scrutiny of the operation of major policy in relation to justice

8 Whilst a senior judge, I appeared regularly before Committees of both Houses.

9 The justice system in England and Wales (including the delivery of justice, the prosecution of offenders, probation and prison) now faces many severe problems in part arising out of budgetary constraints, in part arising out of changes to the profession and in part arising out of technological development. In my view, given the expertise in the House, it would be worthwhile considering the formation of a select committee (or expanding the role of one of the existing committees) so that it could examine these issues and possibly related issues (such as, for example, on-going monitoring of the operation of the European Arrest Warrant (and its successor after Brexit) and other judicial
cooperation instruments which will need to be put in place after Brexit).

Lord Thomas of Cwmgiedd

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