

Procedure Committee

Oral evidence: Exiting the European Union: scrutiny of delegated legislation, HC 386

Wednesday 10 October 2018

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Members present: Mr Charles Walker (Chair); Bob Blackman; Mr Peter Bone; Bambos Charalambous; Sir Christopher Chope; Nic Dakin; Sir David Evennett; Mr Ranil Jayawardena; Melanie Onn; Mr William Wragg.

Questions 236 – 271

Witnesses

I: Suella Braverman MP, Parliamentary Under-Secretary of State, Department for Exiting the European Union; and Mr Robin Walker MP, Parliamentary Under-Secretary of State, Department for Exiting the European Union.

Examination of witnesses

Witnesses: Suella Braverman and Mr Robin Walker.

Q236 **Chair:** Thank you very much for coming. We will not keep you here for much more than half an hour because we have honed our questions to exactly where we need them; they are succinct and concise. Unless there are any opening statements you would like to make, my question is this. Initially, we were leaving in 2019, which we still think is on the cards, but there are discussions and rolling eyes about the fact that we will still be implementing EU directives for upwards of two years after that. Can we have your thinking on why that is a good idea, and how this House will scrutinise the good ideas emanating from the EU that we will necessarily have to abide by?

Suella Braverman: Thank you very much for inviting me here today. You are right. To clarify, we are leaving the European Union on 29 March 2019, just so that there is no doubt about that; I do not want to set any hares running. What we have agreed as part of our withdrawal is an implementation period. While we will be leaving the European Union in 2019—we will no longer be a member state, we will no longer be part of the institutions and we will not have Members of the European Parliament—we have agreed an implementation period so that there is time for implementing our future and any other changes.

The policy behind the implementation period means that for the duration of that strictly time-limited period, to end at the end of 2020, we will continue to follow EU rules, regulations and laws that apply as they do now, and we will be legislating for that in the Bill. The mechanism by which that will take place is set out in the White Paper, and it is a transitional provision. The European Communities Act is the pipeline piece of domestic legislation through which EU law currently applies. It will be repealed on 29 March 2019, and the withdrawal agreement Bill will legislate to save the effect of that repeal until the end of the implementation period. The policy behind that is to provide legal certainty, predictability and stability for businesses, individuals and other member states with whom we deal so that we have continuity for the implementation period.

Q237 **Chair:** Just for my benefit, the transition period ends on 31 December 2020, but it seems there is an aspiration for a further period of transition to 2022.

Suella Braverman: Not that I am aware of. I should make it clear that the withdrawal agreement Bill is to implement domestically the withdrawal agreement, which is in the form of a draft international treaty, 80% of which is agreed in legal text between the EU and the UK. There it states in black and white that it is agreed between the EU and the UK that the end of the implementation period is, as you say, the end of 2020.

Q238 **Chair:** The sunset period runs to 2022, doesn't it?

Mr Walker: I think there is a bit of confusion about the sunset period for some of the powers and the arrangements for the implementation period, which is very much designed to come to an end in December 2020, as both parties have agreed.

Suella Braverman: You are right to highlight the sunset period. The EU (Withdrawal) Act provided for a sunset on the powers to amend any deficiencies in our law arising from our departure, and that will come to an end in March 2021. By virtue of the implementation period, it has been considered that we need a bit more time to allow for those deficiencies to be remedied, corrected and amended, and three months from the end of the implementation period to the current end of the sunset would not be sufficient for us properly to remedy any of those deficiencies. You are right that the Bill proposes to extend the sunset to allow time arising at the end of the implementation period.

Q239 **Sir David Evennett:** I am a little confused. What is the date for the end of the sunset? The only reason I ask is that we have some different dates here.

Suella Braverman: The deficiencies power in the withdrawal Act that has been legislated for is sunsetted to two years after exit date, until 29 March 2021. That would, therefore, provide Ministers with only three months from the end of the implementation period in 2020, so that we had three months to correct any deficiencies in retained EU law that became apparent after the conversion of EU law had taken place at the end of the implementation period. That would reduce the time for scrutiny by Parliament of any changes. While we want to make any of the relevant changes before the end of the implementation period, it is possible that there may be some deficiencies that will become apparent only after the end of the implementation period, when that conversion takes place in December 2020.

Q240 **Melanie Onn:** This is really an extension period in case we cannot get through everything legislatively that we need to get through before the end of next year.

Suella Braverman: I would not say that. The withdrawal Act contains the power to remedy any deficiencies. We now have this implementation period. That is really important, because it is not a broad extension and a kind of prolongation; it is a very narrow extension that arises because of the implementation period.

Mr Walker: Another way of putting it is that we always envisaged when we passed the withdrawal Bill that some things might arise in finding deficiencies only after we had actually left the EU. The original objective in having the power sunsetted two years after leaving the EU was that those things could be dealt with during that period. What we are saying now is that when the implementation period is put in place, and we can continue to align dynamically during that implementation period, that period of two years needs to start at the end of the implementation period rather than at the point of withdrawal.

Q241 **Chair:** I think we are all moving towards the conclusion of this part of the questioning. Under the withdrawal Act in 2018, the section 8 power, the principal power authorising correction of UK law and retained EU law, was sunsetted to expire on 29 March 2021. However, subsequently, in the White Paper, the Government propose to extend the operation of this power to 31 December 2022.

Mr Walker: Mirroring the shift of the period of alignment that is delivered through the implementation period. From the point at which we exit and cease to align with EU rules, there will be two years in which the power will be available to correct deficiencies that arise after that point.

The original idea, envisaged in the withdrawal Act, was that those two years would start in March 2019, because that was the period when we left the EU, but clearly once the implementation period is there, the ending of the dynamic alignment has shifted on by 21 months, and, therefore, it makes sense to shift forward the sunset. We are not doing that with all the sunsets in the Bill. It is important to recognise that the sunset on the section 15 powers, for instance, is not being moved forward, because we think that all of those should be able to be used within the implementation period.

Q242 **Chair:** This is really important. We have received evidence from a number of organisations that extending the period to 2022 provides the Government with an extension of their powers under section 9.

Mr Walker: To correct deficiencies.

Q243 **Chair:** Yes, but they are very broad powers. That has created some concerns, because, in essence, the Government have another significant amount of time to do things that cause concern to constitutionalists. Are you sympathetic to those concerns?

Mr Walker: Those powers were heavily constrained in their focus within the withdrawal Act itself, so we are talking simply about the power to correct deficiencies. I think this is where some of the confusion comes from. It is not about trying to align dynamically to EU law after the end of the implementation period; it is saying that things may only come to light in terms of deficiencies that arise in UK law as a result of no longer applying EU rules at that point. Therefore, we think it is important that the powers are available. It is certainly the intention of the Government to use those powers before the end of the implementation period as far as possible.

Suella Braverman: The point arises because, when we were passing the withdrawal Act, 29 March 2019 was going to be the snapshot date when we would capture EU law and transpose it into UK law. That date has now moved to the end of the implementation period in 2020. Therefore, the correcting power that derives from that snapshot, which means you have to go back and correct a few things and which we allowed until 2021, starts at the end of the implementation period. It does not get deployed earlier; it starts then, and that is why the extension is there.

Q244 **Mr Bone:** The Government now seem to have changed the policy, because when the Act was passed, as the Minister said, that was what was sought. When did this new thought come in and when was it ever discussed in Parliament? It seems from what the Brexit Committee was being told this morning that when we get to 29 March all we will have is some fuzzy idea about the future trading relationship, which is why you are asking to extend the sunset clause; you do not know what is going to happen. That is a significant pushing back of Brexit.

Suella Braverman: I would slightly challenge that, although I take the point you are making. The point of all of this is the implementation period. That is part of the policy of withdrawing from the EU. The philosophy behind the implementation period is that we have legal certainty for that period of 21 months after exit day, 29 March 2019. For legal certainty, we need that mechanism. We are committed to providing as much detail as possible for the future economic partnership. You are aware that that is what is being negotiated at the moment. All of it will be put to Parliament, once it is agreed, for a meaningful vote. The Government have committed for the detail about the future to be informative and helpful, and something that is vague and not detailed will not be sufficient.

Q245 **Bob Blackman:** This is probably the meat of the meeting. From what you are saying, we will have a vote in Parliament on the withdrawal agreement. Do the Government then bring forward a withdrawal agreement Bill to be legislated on? When that is passed by both Houses of Parliament—given where we are, no one is expecting anything to happen until maybe the end of next month—there will possibly be a meaningful vote in December. Thereafter, we have a period of only just over three months before we technically leave the European Union for that legislation to go through both Houses of Parliament and to be subject to parliamentary scrutiny. I think we will then come on to some other things that have to flow from that as well.

Suella Braverman: The timeline is similar to what you set out. The withdrawal agreement is in the form of an international treaty. We are near agreement on the legal text of it. The Government are also negotiating on the future economic partnership. That, together with the withdrawal agreement treaty, will be put to Parliament as a holistic package; that is what the deal consists of. Parliament will have a chance to debate and vote on that deal and approve or reject it. If it is approved, we will introduce the Bill as soon as possible and start the usual passage and scrutiny, as we would for any other Bill.

Q246 **Bob Blackman:** In terms of parliamentary time, that is likely to take us until January maybe, or February.

Suella Braverman: The time is definitely tight, and the Bill is contingent on the deal being approved. Only once it is approved do we get to introduce the Bill and debate its clauses, and the Bill needs to receive Royal Assent before exit day.

Q247 **Sir Christopher Chope:** How is this withdrawal legislation going to

incorporate the substantive agreement on a future framework? The Secretary of State has made it quite clear that paying money is dependent on delivery of implementation of the future framework. You are talking about a treaty. Is that going to be a treaty conditional on honouring the future framework? Is that how it is going to work, and will that be incorporated in primary legislation?

Suella Braverman: The Secretary of State and the Prime Minister have been very clear that nothing is agreed until everything is agreed. As I said before, the two go together. The withdrawal agreement covers citizens' rights but also includes the financial settlement. All the matters relating to what the UK is paying the EU, what the EU is paying the UK, and how much that is and what for, are covered in the withdrawal agreement and, therefore, will be covered in the Bill. It goes hand in hand with our agreement on the future economic partnership, but that will not be contained in the Bill; it will be separate from the Bill.

Mr Walker: Subject to future legislation.

Q248 **Sir Christopher Chope:** But the Bill will ensure that, if the future relationship as set out in the framework is not honoured, the money will not be payable. Is that right?

Suella Braverman: You will see that in the White Paper we have dealt with that point. There is a real concern, rightly so, that we are not paying money without reassurance that we are going to get our future economic partnership. The terms of article 50 of the treaty under which we are operating now make it clear that the two are connected. Both the withdrawal agreement and the terms of the future economic partnership have to be agreed for a member state to leave, so, if we have not agreed that future economic partnership, we are not going to be fulfilling the terms of article 50. This Bill, however, legislates only for the financial settlement. We have not reached the totality of the agreement on the withdrawal agreement treaty, so negotiations are ongoing.

Q249 **Sir Christopher Chope:** But the noises coming out of Brussels are that the future economic agreement may take years and years, more than two years or even three or four years, before it is sorted out. How is that going to be reflected in the legislation?

Suella Braverman: We do not want that situation to happen.

Q250 **Sir Christopher Chope:** Will it be a requirement in the legislation, for example, that the agreement must be concluded by a fixed date? That would be one way of covering it, wouldn't it?

Mr Walker: It is really for the negotiations and the agreement itself to set those dates and timelines rather than necessarily our legislation. Obviously, it needs to be agreed between the two parties, but expeditious completion of the agreement is in the interests of all parties. We have always argued that the greatest value of the implementation period is when you know exactly what you are implementing, so that the time can be used for implementation. That is why we have some of the semantic discussions about implementation versus transition, but your point is

absolutely right. We need to press for that, but the time to press for it is during the negotiations on the withdrawal agreement rather than after them when we are legislating. It is something that needs to be agreed between the parties.

Q251 **Mr Wragg:** Could you remind me how many SIs are required to be enacted to correct the statute book by withdrawal day?

Mr Walker: The estimate is between 100 and 1,000 SIs. Steve Baker clarified back in May that he expected the volume to be towards the lower end of that number.

Q252 **Mr Wragg:** We have heard it said that the number is between 800 and 1,000.

Mr Walker: I am sorry; I meant 800.

Q253 **Mr Wragg:** I think 100 have been done, or laid before Parliament at least.

Mr Walker: As of Monday, 53 have so far been laid or made: 38 in July, four in August, nine in September, and two so far in October. That includes 36 proposed draft negatives that have been submitted to the sifting Committee.

Q254 **Mr Wragg:** If the withdrawal agreement is reached, how many of these instruments will not be required to be enacted before the end of the transition period?

Mr Walker: It is a very good question. Clearly, it depends on the nature of the final withdrawal agreement, which is still subject to negotiations, but what we would do in the legislation is take powers to postpone or, if necessary, revoke some of those SIs when they might no longer be appropriate as a result. Of course, that will depend on the final outcome of the negotiations on the withdrawal agreement.

Q255 **Mr Wragg:** As a related question, how many instruments made under the powers of the withdrawal Act are likely to need amendment under the powers to be claimed in the withdrawal agreement Bill?

Mr Walker: Again, it is subject to the outcome of the negotiations on the withdrawal agreement. There is certainly a possibility of them being amended, postponed or revoked as a result of having the withdrawal agreement in place and then legislating for it.

Q256 **Mr Wragg:** Forgive my hypothetical questions. Perhaps I could ask a question that is not beyond the realms of fantasy. Three and a half months have elapsed, although I appreciate that a great deal of time has been spent in recess. You have given the figures; fewer than 100 correcting SIs have been laid before Parliament. The estimate is between 800 and 1,000, come what may. You are really making an assumption, aren't you, about a withdrawal agreement being reached?

Mr Walker: We are not. We are proceeding with the cross-Government work on SIs on the view that you have to have the necessary SIs in place

for exit day in the event that a withdrawal agreement is not reached. That view is being taken, but, clearly, when there is uncertainty about what will be in the Bill, it does not necessarily make sense to rush forward with SIs that may not be required. There is a balance to be struck in that respect.

Q257 **Mr Wragg:** I accept that there is a balance, but is it not the case that it would strengthen the Government's hand in any negotiation if it was seen that Parliament was getting on with making the necessary amendments and changes to the statute book to make sure that we have functioning statutes after 29 March?

Mr Walker: We take that on board. Work is going on to co-ordinate across Government to make sure that we have the necessary legislation in place. We have the PBL Committee that meets to discuss these matters and plan the pipeline to try to avoid a situation where we would have a rush of SIs, and ensure that we have a proper scrutiny process throughout.

Q258 **Mr Wragg:** But inevitably if an eventuality were to be reached that there was not a withdrawal agreement, there would have to be a rush of SIs, so what contingency plans have been made for that?

Mr Walker: As I say, the Government are proceeding on the basis that we want a pipeline of SIs through the period between now and exit day. It is not something for which we see a need for contingency plans at this stage. We will ensure that the necessary SIs are brought forward and laid in an orderly manner.

Q259 **Chair:** This is not a trick question. For absolute clarity, when is exit day?

Mr Walker: It is 29 March 2019.

Chair: Therefore, potentially we have to do 800 SIs in the next six months.

Sir David Evennett: It depends on how many are going to be affirmative, doesn't it?

Q260 **Chair:** But they have to be processed.

Mr Walker: Yes.

Q261 **Chair:** So it seems that this sort of relaxed demeanour might be somewhat misplaced.

Mr Walker: I do not think there is a particularly relaxed demeanour about this. If you speak to the Leader of the House, or many of my colleagues, there is recognition that it is a significant task for Parliament. In the 2014-15 Session, 1,378 SIs were laid. I think it is possible for Government to proceed over this period with a pipeline of SIs.

Chair: But they are not necessarily ordinary SIs, are they? These are SIs attached to the UK leaving the EU, which is one of the most monumental and extraordinary political events that will probably happen in any of our

lifetimes. I certainly hope that is the case.

I am slightly worried. We have a scrutiny Committee established because we felt there was a need to scrutinise these to make sure they were fit for purpose. As my colleague has observed, we are not too far along with the 800 to 1,000. Remind me, Will. How many have we done? You seem to be on top of this.

Mr Wragg: Fewer than 100.

Q262 **Chair:** Therefore, we are 10% to 12.5% through the pizza.

Suella Braverman: If we secure an agreement and a deal with the EU, a number of those can be deferred and the Bill will be legislating for that deferral power.

Q263 **Chair:** You say "a number". A number is one; another number is 700. Where between one and 700 does "a number" fall?

Suella Braverman: I cannot give an exact number, but I think there is quite a high number.

Q264 **Chair:** A significant number.

Suella Braverman: I think a significant number would not be needed for exit day in the event of a deal.

Mr Walker: The other important point in this regard is that a significant amount of legislation in this process needs to be primary. The Chamber is currently debating key primary legislation with regard to our exit. While there are important SIs under the powers in the withdrawal Act that we need to get on with, and which we are very much focused on programming properly for Parliament between now and exit day, very important debates are also taking place on the Floor of the House about directly exit-related legislation, which we also need to move forward with. I recognise that there is a challenge for colleagues across Government to co-ordinate the approach to that to make sure that both get the right degree of scrutiny, and it is one we are determined to meet.

Q265 **Mr Bone:** The danger, surely, is that unless the Father of the House was right today that pro-European Tories, with Labour Members, support the Government, right-wing nationalists and Conservatives like me will not let the withdrawal Bill go through. There is difficulty at the moment in seeing how the withdrawal Bill will get through Parliament, so there must be a substantial risk of a no-deal situation.

We had the head of the National Audit Office before the Brexit Committee this morning. I think he expressed some of the concerns that we have already expressed in this Committee. It is all right for the Government to say that these SIs can get through Parliament and be voted on, which I am sure is true, and we will also have all the normal SIs going through, not necessarily ones related to Europe, but, for instance, the Northampton unitary authority SI.

The problem is in drawing up the SIs, getting them correctly drafted.

These are important SIs. Clearly, there are not enough available people in-house to do that. I fear that the Government are forgetting how Parliament works. If that is not addressed now, we will get to a position where the Government might have all these wonderful things they want to do but they will not get them through the House, not because they are not voted on but because they are not properly drafted.

Mr Walker: You raise a very important point. Making sure that all the SIs are properly drafted is crucial. I recognise that probably the Departments with the largest number of SIs to draft in this respect are BEIS and DEFRA. The NAO report on DEFRA highlighted some issues with regard to the pipeline of SIs. It also highlighted that they had “already achieved a great deal in their preparations for EU exit,” and noted that they had expanded their legislative team from 65 to 89 full-time equivalent staff during the current year.

That has been taken on board by Government and key Departments, and certainly part of our role and that of our colleague Chris Heaton-Harris in looking at the no-deal preparations is consistently to challenge other Government Departments on their delivery, drafting and pipeline. It is something we take very seriously, and we will continue to engage with those Departments in meeting the challenge together.

Q266 **Mr Bone:** If the Department has looked at that, perhaps it could provide the Committee with a note not only on how many SIs still have to be done, assuming there is no deal by 29 March, but how much time is required to draft them and how many people it has in place to do that drafting. That might be useful to us.

Mr Walker: I am happy to look into that and see if we can write to you. Obviously, various Government Departments are responsible for drafting them, but we have a co-ordinating role in that respect.

Chair: We asked for that information nearly 12 months ago and it was not forthcoming. I think you are picking up that the Committee is extremely concerned that, having invested a lot of our time in coming up with a sifting Committee and having got that through on the Floor of the House, it seems to be underutilised. We are getting to the point where it is not sufficient to be told it will be jam tomorrow, and that they are all working very hard in Whitehall—“Don’t you worry, all these SIs will start appearing.” Actually, once we get into February it is almost too late. Unless we see some pick-up in the next week or two, I think our concerns will mount.

Q267 **Sir David Evennett:** I am on that Committee. We do not have a meeting this week because nothing has come through, and it is worrying that we have done so little since July. The Committee meetings are taking much longer. We have challenged quite a few SIs to make them affirmative when they come through as negative. Not only will it take us more time, the more we get of that, it will also take more parliamentary time when we actually debate them. I make a plea, as someone who very vigorously wants you to succeed, that we get a move on with some of these, and

get a steady flow every week so that we can do our job, and then, hopefully, we and you will be in a better position.

Suella Braverman: Message heard.

Q268 **Nic Dakin:** I am a bit concerned, listening to the evidence, that there is a hope that the cavalry of a deal will come over the hill. I think we all hope the cavalry of a deal will come over the hill, but the reality is that we need to be prepared for no deal. Your Department has a co-ordinating role. I like the word "co-ordinating"; however, there needs to be some oomph behind this co-ordination to make sure that the pipeline of stuff is coming through. You need a bit more than just co-ordination; otherwise, it is all going to come at a time and you will not get everything for the reasons Peter, David and others have given. A crash is coming, if you cannot sort it out fairly quickly, because of the timescale.

Mr Walker: You are right to say that it is a question of co-ordination and drive, and that drive needs to come partly from our Department and partly from the Leader of the House's office. I can assure you that there is a great deal of work going on across Government to co-ordinate it. The Leader of the House and our Department are regularly involved in that. Your point is right; we need to drive on with the process.

Q269 **Chair:** You have been extremely good witnesses. There is concern about the extension of the powers in section 8 going on for a significant amount of time beyond what was originally envisaged in the EU (Withdrawal) Act 2018. The Government are very good at saying, "Don't worry. We won't abuse these powers; we recognise that we are constrained by Parliament."

It is very important that the Government understand that, for those reassurances to carry weight, the sifting Committee that this House established through amendments to the Bill is taken seriously and that you take it seriously. That does not seem to be the case at the moment, and it undermines the reassurances given by the Government in other areas about how they are going to proceed with the legislative burden coming from withdrawal.

Mr Walker: We do take it seriously. Of the various SIs that have been laid, about three fifths have been referred to the sifting Committee and we have agreed with all its recommendations so far. There is also the point, on which you have had correspondence with my colleague Chris Heaton-Harris, about the nature of any statement that would be made in the event that the Government were to disagree. I hope that his latest response on that is satisfactory, and that he has accepted the Committee's recommendation. I think that is a useful step forward because it shows we take the concerns raised by this Committee very seriously.

Q270 **Chair:** I do not want to hold the Committee, but it might be worth at some stage doing something with a DEFRA Minister, bearing in mind you have identified DEFRA as the generator of a lot of these SIs, and exploring where the hold-up is. As you say, Suella, if there is a deal

before 29 March, some of them will fall by the wayside, but we need an understanding of what types will fall by the wayside, so that we and parliamentary colleagues can be better informed.

Mr Walker: I think that is fair. I have pointed to some of the remarks in the NAO report on DEFRA that are a bit more positive. Both DEFRA and BEIS have the challenge that a lot of their policy areas coincide or intersect with devolved competence, so a degree of engagement has to take place with the devolved Administrations and legislatures on some of the draft SIs, and indeed on who is going to lay them. That may be partly responsible for the fact that they were not necessarily brought forward right at the beginning of the pipeline, but it is certainly worth having that conversation. Both Departments have recognised the need to invest in their legislative capacity as part of the process.

Q271 **Sir Christopher Chope:** Is the NAO now saying to you that it is satisfied that the Government have the capability to do all that is necessary in the event of no deal?

Mr Walker: I do not have precise wording from the NAO on that. I am not going to try to put words into its mouth, but overall the Government believe that the secondary legislation programme is on track, and we have the right arrangements in place. You will have seen the technical notices that we have been publishing over recent weeks. That is some of the outward face, but we do not underestimate the importance of having the pipeline of legislation planned and in place so that we are ready for March 2019.

Chair: I thank both Ministers for coming today. You have been absolutely open and straightforward. Thank you very much. It is enormously appreciated by the Committee. I doubt we will summon you again, but who knows? We might.