

European Scrutiny Committee

Oral evidence: [Post-Brexit Scrutiny of EU Law and Policy](#), HC 2493

Wednesday 4 September 2019

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Members present: Sir William Cash (Chair); Martyn Day; Richard Drax; Mr Marcus Fysh; Kelvin Hopkins; Mr David Jones.

Questions 63-85

Witnesses

I: Sir Stephen Laws, Senior Research Fellow on Policy Exchange's Judicial Power Project, **Professor Kenneth Armstrong**, Professor of European Law, University of Cambridge, and **Dr Jack Simson Caird**, Senior Research Fellow in Parliaments and the Rule of Law, Bingham Centre for the Rule of Law, formerly a Senior Library Clerk in the House of Commons Library specialising in constitutional law.

Written evidence from witnesses:

- [Professor Kenneth Armstrong](#), Professor of European Law, University of Cambridge
- [Dr Jack Simson Caird](#), Senior Research Fellow in Parliaments and the Rule of Law, Bingham Centre for the Rule of Law

Examination of Witnesses

Witnesses: **Sir Stephen Laws**, Senior Research Fellow on Policy Exchange's Judicial Power Project, **Professor Kenneth Armstrong**, Professor of European Law, University of Cambridge, and **Dr Jack Simson Caird**, Senior Research Fellow in Parliaments and the Rule of Law, Bingham Centre for the Rule of Law, formerly a Senior Library Clerk in the House of Commons Library specialising in constitutional law.

Q63 Chair: Good afternoon, gentlemen. You arrive on what could be described as an extremely important parliamentary day. An enormous amount is going on at very short notice, which is affecting the movement of some members of the Committee. We are quorate at the moment, and we hope to remain that way, but some people will have to go. I will have to go, in particular, because I have questions to put and points of order and things of that kind when the Second Reading of the Bill comes up. Because it may happen quite suddenly, I need to leave myself a little bit of leeway to get down to the Chamber.

Without making any more of that, I will start straight off with the first question to you. Thank you very much indeed for coming. It is deeply appreciated. This is a very historic time, and you are, as it were, at the centre of gravity of the analysis that we are taking by way of evidence. I hope that you have had a chance to read what was said before by Catherine Barnard, who gave evidence a few weeks ago. In earlier oral evidence to the Committee, Professor Catherine Barnard alluded to a "lengthy legacy effect of EU law" in the UK after Brexit. The European Union (Withdrawal) Act 2018 ensures that the UK's domestic legal framework will be closely aligned with the EU's on exit day and gives retained EU law a special status.

The first question is: what do you consider will be the most important legacy effects of EU law after Brexit, and how enduring are these effects likely to be? The second question is: what implications will these legacy effects have for Parliament's scrutiny of changes to retained EU law after Brexit and for how it might approach scrutiny of new EU laws and policies agreed after Brexit? I know that Professor Armstrong has submitted some written evidence, and that Dr Simson Caird sent some in this morning. However, I come first to Sir Stephen Laws and ask if he might be good enough to address the first question: what do you consider will be the most important legacy effects of EU law after Brexit, and how enduring are these effects likely to be?

Sir Stephen Laws: I am not sure I would want to express a view on what the most important aspect of it is. I think the general thing that is important is that we will retain in our system, so long as we retain the retained EU law, something that carries all the characteristics and features of European law that we have come to understand from when it was part of UK law. On the other hand, there will be no new additions, except so far



as we agree there will be no new additions. Assuming that there will be no new additions, we will have a body of law that is frozen at the moment we leave, whenever that is. Keeping it in place at that moment creates the possibility that expertise in that area of law will decay over time, because it will become increasingly something of historic interest. It will be superseded by things that will happen and we will go back to a system that is much closer to UK law, because there will not be new additions to it. I think it will last so long as we find ourselves, as a matter of policy, wanting to be compatible with particular bodies of EU law. I think there is a risk that what we will come to understand as EU law will become more and more difficult to find out, so in due course there needs to be—it may take quite a long time to do it—a process of reintegrating retained EU law into UK law so that it fits the system that everyone will be familiar with, which is UK law as it survives after we leave.

- Q64 **Chair:** With the proviso, presumably, that there is the principle that no Parliament can bind its successors. The prospect of a change to the legal arrangements under the Withdrawal Act may well turn out to be possible—likely, even—given circumstances where people decide as a matter of policy that they want to distance themselves further, particularly in the context of divergence in regulatory arrangements, for example. There may be a number of matters. It was the general principle that I was mentioning, which is the binding of successor Parliaments.

Sir Stephen Laws: I think the effect of the Withdrawal Act without any withdrawal agreement or future relationship that imposes new obligations on it—without that, the sovereignty of Parliament continues. I would not accept that it has ever been taken away, because Parliament has always had the sovereignty to change EU law. That will continue. What I am suggesting is that that sovereignty needs over time to be exercised so that we are not relying on concepts, reasoning and forms of law that people will become increasingly unfamiliar with because there will no longer be new versions.

I remember that when I was a law student, I was taught about the effect of the Law of Property 1925. To be taught about the Law of Property 1925, I had to be taught about feudal land law, but in fact the understanding of feudal land law by 1969, when I went to university, was relatively—There was a lot of learning on it, but it was not a thing that practitioners used in everyday business, yet in order to understand current land law you had to understand it. We will be in a similar situation with EU law. EU law will be frozen in 2019 or 2020 or 2022, or whenever it is. Yes, it will tell us what the present law is, but it will increasingly become difficult to see how it is relevant to what we have.

- Q65 **Chair:** Thank you very much. Professor Armstrong, would you like to add to that?

Professor Armstrong: One way of looking at this is at quite a formalistic level, but another is just to look at the substance of the law that is the legacy of the styles of EU regulation, which of course UK systems have adapted to throughout the period of membership. In many ways our



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regulatory systems, whether that is medicines, aviation, banking or other areas, have all adapted to a particular style of regulation that is to be found in European law. I guess one of the big questions for the future will be: what makes that? Is it because domestic policy preferences will change in the future, because future Governments and Parliaments will exercise sovereignty and want to move in a different direction, or will the European Union itself decide to change its style and way of doing things, whether because of its own reasons or under other international influences? This question about the legacy is at quite a deep level in terms of the substance, style and nature of regulatory policy and how it has been implemented and applied through the UK's public administration for more than four decades.

- Q66 **Chair:** Can you see a prospect of our moving back to the idea of—I am now going to use a technical expression—*stare decisis* rather than the purposive rule in terms of interpretation of law? Do you think that the judges are going to move in that direction?

Professor Armstrong: I think our judges increasingly have to deal with legal rules that are perhaps very different from the feudal property rules, or whatever they had to deal with in the past. That is to say, judges and, indeed, other regulators have to deal with a body of law that is necessarily purposive. That is to say, what is the risk and what is the activity that a regulatory framework is trying to manage, whether it is the safety of products, medicines, air craft, et cetera?

The legislation itself has changed. Our rules have changed. They are inherently purposive and regulatory, and I think our judges are now well used to applying forms of interpretation that look to what the underlying function of these rules is. They are inherently functional, and that, I think, will have to carry on. Of course, it is up to Parliament, if it wishes to lay down instructions to the courts as to how to determine—

- Q67 **Chair:** If you go back in my lifetime, which is quite considerable—I first became a practitioner in 1967, and in those days it was Maxwell's "Interpretation", if you remember the book. Of course, now we have "Craies on Legislation", so you have a completely different approach. I am very interested in that, because we cannot just talk about EU law in the context of the body of law; it is also how the courts deal with it. That is really what I want to get at. I wonder whether Jack Simson Caird has any thoughts on that—or would you rather leave that to the academics, pure and simple?

Dr Simson Caird: I was going to go back to your first question about the importance of the Withdrawal Act, if I could. I think the most important thing about the Withdrawal Act, thinking about the post-Brexit statute book and the scrutiny that might be needed, is that the EU (Withdrawal) Act does not actually make a decision on whether or not the statute book should remain aligned or diverge from EU law post Brexit. It is deliberately drafted in such a way, in my view, as to leave those questions for a subsequent Parliament.



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I will give a couple of examples. The correcting power, by an expressed limitation, cannot be used to maintain alignment post Brexit with EU laws that are made after exit day. Obviously, the thinking there was that the decisions on alignment or divergence would be taken by other primary legislation. The power was then also limited so that major policy decisions on divergence or alignment could not be made using the power in the EU (Withdrawal) Act. The thinking was that we would need other powers in specific policy areas—agriculture, fishing—to make those policy decisions on divergence or alignment.

That is interesting because it shows you that post Brexit, even in a no-deal scenario, EU law and policy scrutiny will be very relevant to the domestic legislative process, because you will need to understand EU law and policy in order to understand the powers that are being introduced via subsequent primary legislation. In that sense, what is interesting about the EU (Withdrawal) Act is the fact that it did not make any decisions on divergence or alignment post Brexit.

- Q68 **Chair:** What implications do the legacy effects have for parliamentary scrutiny of changes in retained law after Brexit, and how far might it approach scrutiny of new EU laws and policies agreed after Brexit? We covered some of that just now, but do you want to add something?

Dr Simson Caird: A good recent topical example of this was the controversy about how the Government would use legislative means to end free movement after exit day. There, you have an example of the point I was making. Section 4 of the Withdrawal Act converts the treaty rights that are directly applicable in UK law now post exit day, so the relevant article—I think it is 35, but I might be wrong—of the treaty on the functioning of the European Union would be converted the day after exit day into a domestic legal right, which would be legally effective via section 4. If the UK Government wants to remove that right, it will have to pass some sort of legislative measure in order to remove it. I probably imagined that was something the Immigration Bill might deal with in one form or another, but, absent that Bill granting a power to the Government to do that, its policy choices were restricted.

That is an example of what we were discussing, in that in order to evaluate Government policy, you are going to have to understand how the treaties affect UK law post Brexit. The fact is that because the EU (Withdrawal) Act maintained a high degree of alignment—it took over all the directly effective rights in the treaties—you are going to have to have knowledge of a lot of EU law. Until the point that we make decisions, via treaties or domestic policy, to diverge and remove those rights, we are going to have to have a high degree of knowledge of EU law and policy post Brexit.

- Q69 **Mr David Jones:** Section 19 of the Withdrawal Act provides that the Act shall not prevent the UK from “replicating in domestic law any EU law made on or after exit”. Would you like to speculate as to the reason that that provision was included in the Act? Would you say it indicates a desire to maintain a high degree of regulatory alignment with the EU after



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Brexit?

Sir Stephen Laws: As it is about drafting, I suppose that is directed primarily at me. My answer to your first question is no, I wouldn't like to speculate on it. In so far as it is saying that Parliament can do what it likes via primary legislation, it seems to me to be unnecessary.

Q70 **Mr David Jones:** But that was the interesting part of the question. The provision seems otiose, unless it was put there to signal a direction of travel.

Sir Stephen Laws: It is probably there because there is a fear that something in the Act creates the impression that it cannot be done. It cannot be an impression that Parliament cannot do it by primary legislation, because Parliament obviously can, so there must be a suggestion that somewhere in the Act there is something that suggests perhaps that there is either a limitation in international law that Parliament can disregard or there is some limitation on the exercise of powers to make statutory instruments. But I have absolutely no idea what it is that prompted it, except perhaps an excess of caution.

Q71 **Kelvin Hopkins:** Could it not be more innocent than that—just that if the EU has a good idea, we want to imitate it? Equally, if we have a good idea, they might want to imitate us.

Sir Stephen Laws: Well, as a parliamentary drafter, I am very keen on the maxim, which drafters repeat tirelessly, that unnecessary material in statutes, as in human beings, tends to turn septic. The drafting answer is: if it is unnecessary, it shouldn't be there. I would like to think that some reason was thought of why it was necessary, but I am afraid I cannot tell you what it is.

Professor Armstrong: Perhaps, to turn the question around, one way of thinking about it is, "Why is that there—but also, what's missing?" If it is true that there is nothing to prevent the UK from replicating or emulating aspects of European law in the future, where would the power be for that to happen? Of course, it is not contained in the Act itself. The deficiency power does not extend to emulating or replicating future EU Acts. One would assume that, had the European Union withdrawal agreement Bill come before Parliament, there would have been a power in it that would have allowed, by statutory instrument, the replication or adoption of EU rules by choice. However, of course, we do not have that at the moment, and that is currently missing. One would assume then that any future changes that Parliament was minded to emulate or replicate in domestic law would happen by primary legislation, unless new primary legislation is introduced to create the mechanism by which it could be done by delegated legislation.

Sir Stephen Laws: Can I just come back on that? What strikes me about this provision is that it refers to the United Kingdom, which is why I wondered whether there was some international law thing to which it was directed, although primary legislation can't affect the international law position. To refer to the United Kingdom in the sense of "making law in the

United Kingdom” does not seem to me to make much sense, unless you are talking about the United Kingdom as compared with other states, rather than a constitutional institution in the United Kingdom that makes laws.

Dr Simson Caird: In my evidence, I referred to the financial services Bill, which I think is an example of exactly what Professor Armstrong was referring to: a Bill that just basically contains a power that says, “If the EU makes changes to that particular financial services body of law post Brexit, here is a power so we can keep our law in step, so that we do not diverge accidentally; so that just by not passing legislation because there is no longer a European Communities Act, we do not accidentally diverge, which may be inconvenient for those people who for practical reasons need us to remain aligned with developments from the EU’s legislative process.”

That is exactly the point. The idea is that once the relationship with the EU is decided, the Government will then introduce various powers, some that will maintain alignment in certain areas and others that will allow the Government to diverge, if that is what the overarching policy is.

[MR DAVID JONES *took the Chair*]

Q72 **Chair:** So maybe it is pointing out a direction of travel, rather than having any inherent function itself.

Dr Simson Caird: I suppose my first point about the European Union (Withdrawal) Act is that it is clear that it is not making any decisions on alignment or divergence, because my understanding is that it was designed to cope with all outcomes of the negotiations, including a no deal and a deal. It is saying, “Future Parliaments will have to make those decisions, and Parliament will have to judge on a case-by-case basis whether or not maintaining alignment—for example, in financial services—is a good idea.”

That is why it is important from a domestic legislative scrutiny perspective that you have a Committee that can look at these powers and say, “Okay, we are going to have a power that means that financial services regulation will automatically become part of UK law post Brexit. What laws are the EU proposing in this area? Essentially, what discretion are we giving away to the Government to implement future EU law in a particular area?” I think you will need EU law and policy expertise to be able to assess whether or not that is a good idea.

Q73 **Chair:** A future role for this Committee.

Dr Simson Caird: Basically.

Sir Stephen Laws: May I come in in answer to the second question? Being a literal-minded chap, when the Chairman asked me to answer the first question I tried to only answer the first question, whereas my fellow witnesses answered the second one as well, on the implications for the Committee.

It seems to me that there are a number of features that determine what the role of the Committee should be. The first is the relationship between UK law and European law, and there are at least three possibilities there. One is that the backstop provides a dynamic connection between certain provisions of EU law, while it exists, and UK law. That relies on the rather, in my view, meaningless distinction between an amendment and a new Act or a replacement. I do not know the difference between those; in fact, I do not think there is one.

Then, there is the possibility of alignment, and there is probably a case between dynamic and alignment where there is an element of reciprocity: you know, we are aligned because the other side are offering something in return, and if they don't offer it it's going to affect, one way or another, what people are getting here. Alignment can change in one of two ways: it can either change because the EU are changing their rules, or it can arise because we are changing our rules and they will come out of alignment.

It seems to me that there is room for the expertise of the Committee—certainly in dynamism, because that is what you have been doing, and in both sorts of change of alignment.

Then there is the case where the EU are doing something and there is a policy implication, because the EU, who are our neighbours or with whom we have some future relationship, are making a change and that is something we need to take notice of because it may affect us.

On the other side, there are the mechanisms that are available to the UK Government to respond to that. There may, for the dynamism provisions, be provision for the UK Government to be consulted in advance on what is being done. Some of the machinery in the backstop does that. In my view, it is incompatible with the Belfast/Good Friday agreement, but it is there, and it would need to be followed through. You would have a role in scrutinising the Government in their exercise of that—although maybe the Northern Ireland one would go elsewhere.

Then the UK Government may have a right to react to changes that are made where there is a loss of alignment or where they want to make a change of alignment, so that would also be there. Then there is the case where the fact that the alignment is changing has a policy implication, as before.

Q74 Kelvin Hopkins: Professor Armstrong, you have described a post-exit transition period as “a type of shadow membership requiring the UK as a whole to comply with EU rules”. The Government have said that they will “support and facilitate a...parliamentary scrutiny process for as long as EU legislation will continue to affect the UK”. Do you foresee a continuing need for scrutiny of EU laws and policies during a post-exit transition period? What would its purpose be?

Professor Armstrong: Clearly, one of the purposes of scrutiny, that is, the operation of the scrutiny reserve and what Ministers do in their negotiations, falls away when the UK no longer has direct political

representation within the Council. None the less, because the operation of the transition is one in which EU rules continue to apply to the UK, and new rules will continue to apply to the UK during that transition, there is obviously good reason for a Committee to have oversight and scrutiny and to monitor what is happening.

There is a certain practical aspect that one has to bear in mind, which is that, as currently drafted, if the withdrawal agreement were ever to enter into force, that transition period would end on 31 December 2020. We have a new European Commission and a new European Parliament that would be getting up and running. You might think that how much they would do that was new in that period that would become binding on the UK during the transition period would be relatively small.

None the less, the capacity of the Joint Committee to extend the transition for one or two years clearly changes the picture quite significantly. There could be a three-year—or two and a half year, at this point—transition period during which new rules could be proposed and enacted that would become binding on the UK during the transition period. Again, that would suggest that there is a continuing and good reason to monitor what is happening at a European level and what its implications are for that body of law that has now been domesticated and is part of retained EU law in the UK.

The point I want to emphasise is that—this would be true even if the withdrawal agreement did not enter into force and we did not enter a transition period—it will be important to monitor what the political and legislative programme of the new European Commission is going to be, because whatever it does will have implications for British business. Divergence happening on their side will still be important to understand for how our legislative and regulatory frameworks will operate in the UK. Therefore, paying close attention to those priorities will be an important monitoring task.

As I also tried to emphasise in the evidence, philosophically, the shift might have to be away from scrutiny for the purposes of the scrutiny reserve towards a more active dynamic monitoring of the regulatory environment in which the UK finds itself. That is of course European, because it is our nearest neighbour and our biggest trading partner and because the legacy—to use my colleague Catherine's term—is so great. Also, that extends beyond Europe to globally, and to where Europe fits within the global regulatory environment. This shift philosophically is from scrutiny to monitoring the broader policy implications of alignment and divergence.

Q75 Chair: I wonder whether I could come back on that particular point, Professor Armstrong. Shouldn't that monitoring task actually be undertaken by the British Government, rather than a parliamentary Committee?

Professor Armstrong: What is important from a parliamentary perspective is of course that one will always want to know why the



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Government want to do something like emulate or replicate those rules in domestic law, or decided not to. What are the policy implications of that? Are they well thought through? What does it mean in terms of the conduct of regulatory policy in this country and of its implications for citizens and businesses in this country? You, as parliamentarians who represent your constituents, will be affected by that. It is absolutely right for Government to monitor those dynamics, and what is happening, but it is also important that there is a capacity for Parliament to undertake its own independent monitoring and to work out whether the Government are keeping their eye on the ball, on the target. Are they really seeing what is happening out there, and are they responding appropriately and accordingly? That is manifestly a task for a parliamentary Committee.

- Q76 **Kelvin Hopkins:** A Committee to monitor what the Government are doing, in effect—to make sure we keep an eye on them. Are there particular policy areas on which Parliament should focus its attention in the post-exit transition period? Are other areas perhaps of less importance?

Professor Armstrong: It would be a very interesting time to undertake this exercise. If we look back at the Juncker Commission, obviously so much of what it did was tied up with crisis legislation—dealing with the aftermath of the financial crisis, then the migration crisis, etc.

This Commission will—if it can—be much more forward-looking, thinking about where the European Union wants to position itself over the course of the next decade. Therefore, that will be about completing some of the activities that the previous Commission was doing—on things like financial services, banking, where monetary union goes in future, and how that relates to financial services—because there will still be that, but I think other kinds of agendas out there will be important.

Much of the EU rule book, if you like, is already relatively settled. In fact, much of the EU's activities, as we see from previous Commissions, is now moving more into a post-legislative phase—the delegated rule making, with statutory instruments outside of things at an EU level, to keep everything up to date.

As this Committee has rightly noted, for you to try to monitor that—delegated and implementing Acts—would simply swamp you, and also might not be terribly interesting. So, keep an eye on what we will see relatively soon, in November when the new Commission President sets out her legislative priorities. That will give a good indication of the sorts of things to monitor, and that might be very different from the more routine aspects of the internal market and its operation that we have all perhaps become quite used to over the past 20 or 30 years.

- Q77 **Kelvin Hopkins:** My third question: how much does scrutiny need to change, given the UK's lack of representation and voting rights within the EU institutions after Brexit?

Dr Simson Caird: That is an important question, because it shows that whatever arrangements you come to, they will have to be flexible.



Whatever Brexit scenario we have immediately after exit date is likely to change quite quickly in the period afterwards. Whatever scrutiny arrangement you come to post Brexit will have to be adaptable, and one of the good examples of that is transition. The basic point, which I think we have already covered to an extent, is that even absent the scrutiny reserve function, from a rule of law perspective there is real value in the work of the Committee in terms of making the legislative process more transparent. These are very difficult technical exercises and the work of the Committee is, as I understand it, essentially to make the legislative process more accessible by synthesising and summarising it, and then making it subject to political debate that would not otherwise happen if it were just undertaken in Government—there would not be a political debate on changes to the law that are going to affect all people in the UK. There is real rule of law value in the fact that there is a Committee in the democratically elected House that actually undertakes this work to ensure that the legislative process is as transparent as possible. In principle, even absent the scrutiny reserve, there is a case for that work to carry on, but I agree with Kenneth's point that, over time, that will obviously shift to a monitoring function, post transition.

The other point that I wanted to make about the scrutiny reserve is that there is obviously a case for adapting it to some post-Brexit functions. We have already mentioned the Joint Committee and how that could potentially be adapted to the UK Government's position in the Joint Committee. Then, I don't know that it would necessarily be the scrutiny reserve, but you would want to adapt the functions in terms of the domestic legislative process, working out the Government's position and how the domestic legislative process affects their position at the EU level when they are negotiating with the EU.

The big one would obviously be the scrutiny reserve as it might affect the negotiations themselves and the UK Government's position in the negotiations. Having an understanding of what is going on in the EU will be vital to scrutinising the positions that the UK Government are taking in the negotiations.

Kelvin Hopkins: I have to say, the Committee has taken a strong view that there should be an ongoing Committee of a slightly different type following Brexit, and that it should have a strong parliamentary role in looking at the EU afterwards. It also occurred to me that there is an organisation called COSAC, which is the representative body of the national Parliaments that meets a couple of times a year. Some non-member states have observer status at these things and can make contributions. I would have thought that Britain could do that as well.

- Q78 **Martyn Day:** Professor Barnard told us that the repeal of the powers contained in section 2(2) of the European Communities Act 1972, "may be very inconvenient for the Government where it wants to actually give effect to a piece of EU legislation", and that there might have to be some legislation that re-enacts something like that section. What is your opinion from a rule of law perspective on whether that is a useful tool for

Government and Parliament?

Professor Armstrong: This goes back to the point that we were making earlier about the way in which section 2(2) has been a very flexible instrument during membership that has allowed the UK to use statutory instruments to incorporate EU obligations in a very straightforward manner. Once you take that away and want not to correct deficiencies but simply to amend retained EU law in light of changes in the European Union legal framework that fully aligned with UK domestic preferences, how would you do that? There is no such power in the 2018 Act.

I speculated that the European Union (Withdrawal) Bill might have wanted to contain such a power to provide for that very capacity. Otherwise, the other option is to have the kind of sectoral legislation that Dr Simson Caird identified in the financial services realm—the Bill there that would have allowed in-flight rules that would amend domestic retained law to be incorporated using a power similar to section 2(2).

I completely agree that once that power disappears when the European Communities Act is repealed, it would be highly desirable to have an instrument and a mechanism that would then replicate it. Of course, from a scrutiny perspective, it would be important to know how and when that power was being used for the scrutiny of delegated legislation.

Sir Stephen Laws: The rationale of section 2(2) is that it is used for implementing obligations—we are required to do it. There is not so much pressure on what you are doing; it is more a question of whether and how you are doing it. That is why it is thought legitimate to take a very wide power for implementing it. A lot of the questions that might arise if you were enacting things from scratch do not arise, because you have to do them.

Necessarily, if we are changing EU law in circumstances where we are not subject to an obligation, that justification does not exist. That is why the system that the 2018 Act envisages is that if we make a decision that a particular area of law needs to be kept aligned, we shall take a power, as Dr Simson Caird mentioned in relation to financial services, that is confined to that area and will effectively commit ourselves to alignment.

There are going to be other cases where we want to keep in alignment but it is not a commitment; it is a temporary alignment in relation to something that changes very regularly the approved standards or is changed by administrative means. In those circumstances, it will be very inconvenient not to have the power to express something, because you will have to do it rapidly to keep it in line. Presumably the Government would seek to justify a power—perhaps sunsetted if it did not want to say, “We’re always going to keep this in alignment”—that enabled it to keep something in line where there were very rapid changes and it was not practical to think that you could do it regularly by primary legislation.

Dr Simson Caird: There may be some rule of law concerns, which are often raised in the context of delegated powers. It would be sub-optimal to

replace the broad power, which, as Sir Stephen said, is based on an international law obligation that gives the UK the power to make representations at the EU level, with a situation where you have lots of powers exercised by the Government without a commensurate increase in the UK Parliament's involvement.

If we moved from the system we have as a member state to a system where we were not a member state and the answer was just more delegated legislation without a commensurate increase in the supervision in Parliament of that legislation, I think you would say that was, on balance, a diminishing of the transparency of the legislative process. Effectively, you would have taken something that was a product of a longer EU law process, where there was democratic input at the EU level and then at the UK level, and just replaced it with a system where you have a whole range of complex powers at the domestic level, which, as we know from the statutory instruments going through at the moment to prepare for EU exit, it is not easy for Parliament to scrutinise. That might be quite a concerning scenario from a rule of law perspective.

Then, obviously, there is the question of the courts: if you are relying more and more on delegated legislation that is not supported by a treaty obligation, you might give rise to more challenges in the courts.

Q79 Chair: Thank you for that. We have already touched briefly on the Joint Committee. Do you believe that Parliament should put in place special scrutiny arrangements for the Joint Committee—the body responsible for overseeing the implementation and application of the withdrawal agreement—if one is established?

Dr Simson Caird: I will start with the major headline. I am not an expert on the Joint Committee, but as I understand it—Professor Armstrong will correct me if I am wrong—it has the decision on the extension of transition, for example. Is that correct?

Professor Armstrong: Yes.

Dr Simson Caird: That is a major decision, so it would seem very odd if Parliament did not have some kind of special power in relation to the UK Government's position on whether to seek an extension of transition at the Joint Committee.

Professor Armstrong: Moving on from that, the Joint Committee has really quite extensive powers to manage the operation of the withdrawal agreement and to adopt decisions on recommendations—decisions that are binding, and decisions that can even change the terms of the withdrawal agreement in certain respects—so how that activity is carried out is quite significant.

It is worth looking in particular at the role of the Joint Committee under the Irish backstop. It is clear that instruments that amend those pieces of legislation the withdrawal agreement says will apply would automatically apply. New instruments, however, might also apply—new instruments that are adopted if the backstop is triggered—but there is a mechanism by



which there will be an exchange of information. The drafts of new instruments will be communicated and information exchanged over, I think, a six-week period. In fact, there is a sub-committee or, more than that, a specialised committee with, below that, a working group or party that advises it. It is designed to highlight any problems that might emerge between the two sides in terms of the adoption of new EU instruments that would become applicable to Northern Ireland if the backstop were triggered. It is quite a structured process of providing and exchanging information, which obviously a Committee would want to monitor.

The importance of that is that that sort of structured co-operation is missing for the ordinary transition period and, given that that could last for three years—two and a half years—that could become an extensive period of time during which new EU rules might become applicable to the UK, but without the same structured process of dialogue. We know that the withdrawal agreement says that this Parliament will retain the status of a national Parliament for the purposes of delivery of Commission Green and White Papers, consultation documents and draft legislative proposals, so that will remain in place. None the less, the Joint Committee's function is still an important one, and it would be interesting for this Committee to explore how it might want to monitor its activities.

Sir Stephen Laws: I probably agree with that. We have already discussed the fact that the role of this Committee would be to exercise the parliamentary scrutiny—or to be the lead on it—and accountability of the Government for managing the relationship between EU law and UK law. I mentioned that that has two aspects, how the connection exists and the mechanisms—Professor Armstrong has mentioned some of them—by which the UK Government can involve itself in what is happening to EU law. Clearly, therefore, that would be a matter for the Committee to exercise its scrutiny and accountability role.

Q80 Mr Fysh: Chair, may I jump in there, because it is relevant to a question that I was going to ask later on Northern Ireland? In the context of Northern Ireland, I wonder whether we need to align ourselves with EU law to some extent to preserve North-South co-operation and whether we need a binding treaty to do that. If so, what would you propose—similar sorts of structures for proactive scrutiny, and committees to help do that, or not?

Professor Armstrong: I have already indicated that one of the problems with the backstop is that it imposes mechanisms on the process of alignment that are incompatible with strand two of the Good Friday/Belfast agreement. There are a whole load of mechanisms for reaching agreement on cross-border issues between the North and South, which would be superseded by the mechanisms provided for in the backstop. So, I think my answer to your question is, in so far as Northern Ireland is concerned, the most important and first point of scrutinising the relationship between EU and UK law should be the mechanisms provided for in the Good Friday agreement, and the burden should be on the Republic to make sure that they are able to operate them.



- Q81 Chair:** Returning to the Joint Committee and the work of this or a similar Committee, do you think that there should be a process similar to the scrutiny reserve under which the Government would need to obtain consent before agreeing to particular measures pursuant to the agreement under the working arrangements of the Joint Committee?

Professor Armstrong: One can certainly see an argument on the question of the extension of the transition period. That is quite a significant political issue. That is a decision of the Joint Committee, and it is right that this Parliament holds the Government to account in what it does there. I am not sure, though, that that is necessarily about scrutinising the Joint Committee per se. Although it is a decision that will be taken in the Joint Committee, decisions of the Joint Committee are taken by consensus; that means that both sides have a view and you have to make them match. Scrutinising what the UK Government does would happen anyway.

On the more day-to-day operation of the Joint Committee, given how wide-ranging its powers might be, it might prove to be difficult to scrutinise it, but I think it would be very important to try to establish means of communication so that there is at least clear transparency in the agendas of the Joint Committee to know what is coming up. There may be certain elements of that that could be subject to a scrutiny reserve that would be clearly of such political significance that they would require this House to be able to consider the position the Government would take before the Government then acted within the Joint Committee.

- Q82 Mr Fysh:** Coming back to reactive and proactive monitoring and Northern Ireland, if there was to be some sort of pre-commitment to alignment with EU rules within the framework of another agreement to preserve North-South co-operation, what would be the effects on, for example, adequacy decisions with respect to data? How would that be best organised from a scrutiny perspective?

Professor Armstrong: That's a difficult question. On the adequacy decisions side of things, I know this is something that the Exiting the European Union Committee has looked at and reported on. I cannot remember if it has something specific in respect of Northern Ireland. As far as I recall, it simply discussed adequacy decisions and transfers of data in the wider context of trade negotiations and how long it may take for adequacy decisions to be given. To be honest, I am not sure I could express a view on that specifically.

On pre-commitment to alignment, of course that could go beyond the backstop itself. A future Government may decide that there will be much higher levels of pre-commitment to applying EU rules, for the purposes of securing frictionless trade not just North and South on the island of Ireland but between this island and the rest of continental Europe. We have a model for this: it is called the European Economic Area agreement and we know that there are scrutiny arrangements in place there precisely because there is pre-commitment to those rules. One of the big lessons that we learn from all that is just how important it is to create strong



parliamentary contacts. Mr Hopkins mentioned COSAC as one, but EFTA and the EEA agreement have their own parliamentary groupings where there is co-operation.

Importantly, some of the same members of the equivalent to this Committee in Norway are also members of and delegates to the relevant EEA parliamentary body. What is important about that is creating a flow of information and level of contact that allows scrutiny to operate effectively, because it means that you do not have to wait for somebody else to provide you with information; you have your ears on the ground from where that information is coming. Whatever arrangements are in place, having ears on the ground becomes important.

Q83 Mr Fysh: Is it as important if you have a system of voluntary alignment rather than such pre-commitment? Is it as important to have scrutiny mechanisms and flows?

Professor Armstrong: I think it is, for the reason I gave earlier. Something that has come out of this session already is that there is one set of questions about why UK policy makers would want to diverge from EU rules, what scrutiny you would want to have of the domestic political processes, and what happens to the legacy or retained EU law. On the other side, there are questions about what happens when the EU diverges from us and, by enacting new rules, changes the system. Even if we do not have a pre-commitment to align, understanding the policy implication of that change is crucial.

One of the things I tried to draw out in my written evidence is that there will be a set of questions about how legal frameworks operate, technical questions and rule of law questions about the complexity of the legal frameworks that we will have inherited, which we will build upon in future. On how that system operates, in an ex-post scrutiny way, I argue there may be something better undertaken by the elaborate Committee system of the House of Lords to ensure that it has a strong legal eye on the technical operation of the legal frameworks.

To answer your question, there is a very strong policy implication of divergence—of why the EU might move away and develop new styles of doing things or take different approaches. That is incredibly important for the UK to understand from a policy and political significance point of view, which is why I underlined the point that I think we then move into a different era of scrutiny that is about monitoring and determining political and policy significance, perhaps a little more than legal relevance and the technical interactions of legal regimes at a European and domestic level. Sorry; that is a very long answer to your question.

Sir Stephen Laws: What is important for scrutiny and accountability to concentrate on are those things that have political salience. There are two ways in which you guarantee that you have identified those things. One is to impose requirements that make it transparent what is happening, so that you can identify it yourself. The other, which is what I say in relation to all sorts of scrutiny, including primary legislation, is to have some sort



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of system—in practice that is all you can do—of random sampling, so that you can identify from time to time the things that are politically salient.

Sometimes the technical matters, which Professor Armstrong mentioned, can themselves become politically salient. The example I sometimes give is the tax law rewrite project, which was formed when tax law was thought to be getting so complex that it had become politically salient and something needed to be done about it. What are normally important in this House are things that are politically salient in respect of the effect they have on people. In the House of Lords, the technical matters may be more politically salient than they are here, but sometimes they can become salient here, as well.

Dr Simson Caird: I just want to add one thing to your distinction of what the scrutiny needs would be if you had voluntary alignment or pre-commitment by treaty. With voluntary alignment, you are more likely to have controversy at the domestic legislative level. I think that you would therefore need the EU law and policy scrutiny expertise to analyse what is going on when the UK is passing legislation designed to maintain domestic alignment, to actually work out what is going on, because it will be quite complex and will rely on delegated powers that may not necessarily be immediately obvious. From a transparency perspective, you would need some EU law or policy expertise to say, "This Bill is designed to maintain voluntary alignment."

There, you have got to think about the fact that on a treaty basis, the EU Scrutiny Committee, as I understand it, works upstream at the EU level. But if you were going to a voluntary alignment model, work on EU law and policy scrutiny would occur more at the domestic legislative level.

- Q84 **Mr Fysh:** The Northern Ireland protocol says that the North-South co-operation relies to a significant extent on a common union legal and policy framework. Is it fair, then, to say that its reliance would vary quite significantly depending on your scrutiny arrangements in particular areas?

Sir Stephen Laws: I think the modelling exercise that was done revealed that it did not rely on it nearly as much as the backstop's terms maybe suggested.

- Q85 **Mr Fysh:** Yes, because if you have a very efficient system of analysing what each other are doing and making appropriate adjustments and thinking about it, by definition you rely less on the commonality.

Sir Stephen Laws: I think the issue may have been—I have heard it said; I am not an expert on this—that the assumption was that there was a common all-Ireland market, and there is not. There is in some respects, but not in as many respects as had been suggested.

Mr Fysh: I am afraid that I have to go to a meeting down the hallway in Committee Room 5, for which I am late.

Chair: In that case, I think I should say, "Order, order" at this point.



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Gentlemen, I can only apologise. As the Chair said, you arrived on a particularly momentous parliamentary day, and I am afraid that members of this Committee who would otherwise have been here are not, for reasons that I am sure we can all understand. With Mr Fysh's departure we lose our quorum, so I am afraid that at this juncture I will have to bring this session to a close.

I am very grateful to you for coming and hope that you would be happy to take any further written queries that we might send you afterwards, if that were convenient.

Professor Armstrong: Happily.

Chair: I do hope that you understand the problems that we have today. Thank you very much for coming.