



HOUSE OF LORDS

European Union Committee

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Dear Natalie,

I am writing on behalf of the European Union Committee to offer some initial observations and concerns on the European Union (Withdrawal Agreement) Bill. The Select Committee considered this letter at its meeting on 29 October 2019.

Although the Bill will not make further progress before Parliament is dissolved, it is possible that it could be reintroduced in January, on an expedited timetable, ahead of the scheduled exit day of 31 January 2020. There is also a risk that the appointment of select committees at the start of the new Parliament could be delayed. We have therefore decided to send this letter now, to put our observations on the record.

We comment in this letter only on clauses 29-33 of the Bill, which relate most closely to the European Union Committee's remit. Other committees, including the Constitution Committee and the Delegated Powers and Regulatory Reform Committee, will have a direct interest in other elements of the Bill, and we have not addressed issues that would fall more naturally to them. Nor in this letter have we sought to review the Withdrawal Agreement itself, or the accompanying Political Declaration, though if time permits we are minded to publish a report on them early in the new Parliament.

The Committee's object in writing is to open a dialogue with the Government. I hope that the Government will consider bringing forward amendments to meet our concerns, and I and committee staff stand ready to discuss these issues in more detail.

Clauses 29-33 of the Bill relate to parliamentary oversight of the transition or implementation period. In our report *Beyond Brexit: how to win friends and influence people* we stated that, since the UK will continue to be bound by EU laws during the transition period, "some form of continuing parliamentary scrutiny of those laws will be essential to maintain transparency and to draw significant changes to the attention of Parliament and the wider public prior to their implementation in domestic law."

Clause 29 of the Bill provides a statutory role for the House of Commons European Scrutiny Committee (ESCOM) in scrutinising EU legislation during the implementation period. It provides that where ESCOM publishes a report in respect of EU legislation made during the legislation, stating that the legislation raises a matter "of vital national interest to the United Kingdom", a Minister must, within a period of 14 Commons sitting days, arrange for a motion drawn up by ESCOM to be "debated and voted on" by the House of Commons.

While I welcome the intention underlying clause 29, I note that prescribing such a procedure in statute, rather than in Standing Orders or by means of resolutions of the House, is an innovation, which some colleagues may find concerning. Still more worrying is the fact that clause 29 makes no provision for the role of the House of Lords European Union Committee. Hitherto the two Houses have undertaken scrutiny of EU laws in tandem: the same scrutiny reserve principles apply, the same mechanism with regard to the Justice and Home Affairs opt-in, and each House has the same powers under EU law to issue Reasoned Opinions.

There is no reason to differentiate between them now, so I suggest that clause 29, if it remains in the Bill, should be amended to ensure that there is an equivalent statutory role for the EU Committee. While the current terms of clause 29 (in particular the reference to a Minister of the Crown providing time for a debate) are not fully consistent with the way business is conducted in the House of Lords, **we strongly support the principle that it should be open to the EU Committee during the transition period to propose substantive motions for resolution relating to EU legislation, and that such motions should be debated in timely fashion.**

Our *Beyond Brexit* report also expressed concern at the lack of transparency surrounding the governance mechanisms established in the Withdrawal Agreement, in particular the Joint Committee, which we described as a “uniquely powerful and influential body”. We noted in paragraph 36 of our report that the Joint Committee had the power in certain circumstances to amend the Withdrawal Agreement, a “widely drawn” power that was “not subject to clear scrutiny procedures or parliamentary oversight”.

I also note that hitherto UK citizens have enjoyed significant safeguards in respect of the actions of the EU (including actions undertaken on behalf of the UK) in international fora. There has been extensive scrutiny by the European Parliament (including UK MEPs). There has also been extensive scrutiny by Committees of both Houses, triggered by the Government’s deposit of draft Council Decisions (including those mandating third-country agreements), and accompanying Explanatory Memoranda. Decisions of Ministers to vote in favour of EU legislation have also been subject to scrutiny reserves in both Houses. These safeguards will be lost post-Brexit.

The lack of any provision in the Bill for systematic parliamentary oversight of the Government’s actions within the format of the Joint Committee is therefore concerning. **We urge the Government to bring forward amendments to provide for appropriate parliamentary oversight and scrutiny of the Joint Committee and of the other governance mechanisms established under the Withdrawal Agreement, in order to ensure that UK citizens do not lose the safeguards they currently enjoy by virtue of the scrutiny undertaken by the European Parliament and by the two Houses of the Westminster Parliament.**

In the specific instances where the Bill envisages parliamentary oversight either of decisions of the Joint Committee or of the conduct of negotiations on the future relationship, these are invariably asymmetric: the role of the House of Commons is to approve; that of the House of Lords is to take note. **Members will wish to reflect carefully on these provisions, and their implications for the status and reputation of the House of Lords.**

Clause 30 addresses one of the key functions of the Joint Committee, which is to make a single decision, before 1 July 2020, whether to extend the length of the transition period for up to one or two years. If the Government decides to seek an extension, it provides for a Minister to lay a statement before Parliament, and for the House of Commons then to pass a motion agreeing to the proposed extension, and for the House of Lords to debate a 'take note' motion. Only then can the Minister agree in the Joint Committee.

We offer two observations. First, the House of Lords is given no decision-making role in seeking an extension of the transition period. This contrasts with its role thus far in the adoption of the secondary legislation that has given effect to extensions of the Article 50 period. We see no justification for this diminution in the role of the House.

Second, it is unclear why Parliament's role is restricted to approving a decision to seek an extension, when a decision by the Government not to seek an extension could have equally profound implications for the United Kingdom. We therefore welcome the statement by the Lord Chancellor, Rt Hon Robert Buckland MP, in responding to the second reading debate on 22 October, that the Government will bring forward an amendment "that would allow Parliament to have its say on the merits of an extension of the implementation period", and that the Government "will abide by" the result. **Parliament should have a role in approving the Government's decision whether or not to seek an extension to the transition period, and we look forward to seeing the Government's proposals to give effect to the commitments made by the Lord Chancellor on 22 October.**

Clause 31 of the Bill sets out provisions for the oversight of negotiations on the future relationship with the EU. It requires a Minister of the Crown, before the end of a period of 30 Commons sitting days from exit day, to make a statement on the objectives for the future relationship. That statement (and any revised statement) must be consistent with the terms of the Political Declaration that sits alongside the Withdrawal Agreement, and the Minister may not commence negotiations until it has been approved by the House of Commons. In negotiation Ministers must seek to achieve the objectives set out in the most recent statement to have been approved by the Commons, and Ministers must lay before Parliament a report on progress every three months.

We welcome the requirement for ministers to lay regular reports before Parliament, and for those reports to be debated. This should help to achieve a measure of parliamentary and public accountability during the process. But it is imperative that this formal statutory structure should be supported by meaningful dialogue between the Government and designated committees in each House, so that those committees can make reports to help inform public and parliamentary debate. We would be grateful for your thoughts on how to establish such a role for committees, whether in the Bill or by other means.

I would be grateful also for further explanation of new subsection (3). This requires the statement of objectives presented to Parliament to be "consistent" with the terms of the Political Declaration. Yet the precise terms of the Political Declaration have never been understood to be legally binding: indeed, paragraph 3 of the Declaration states that "where the parties consider it to be in their mutual interest ... the future relationship may

encompass areas of cooperation beyond those described in this political declaration”. Paragraph 5 envisaged that the UK-EU relationship “might evolve over time”. **What constraints, if any, does new subsection (3) place upon Ministers? Is subsection (3) in fact necessary?**

Clause 31 also sets out the procedure for ratification of any agreement reached with the EU on the future UK-EU relationship. These provisions appear to me to be unsatisfactory, not least because they map imprecisely onto the normal processes whereby international agreements are concluded. Thus clause 31(8) suggests that a statement on a “political agreement” would be provided alongside “a copy of the negotiated future relationship treaty”. But a natural reading of “political agreement” would be an agreement analogous to the Joint Report of December 2017. You will recall that it took several months to turn this political agreement into a draft Treaty, and almost a year to finalise the text.

This obscurity is compounded by clause 31(9), which appears to envisage that the House of Commons would approve only “the negotiated future relationship treaty”, and that the final text of the Treaty could be different, as long as it is “to substantially the same effect”. The meaning of this is unclear. Does this mean that Parliament would approve a stable, ‘initialled’ agreement, which might be subject to very minor amendment upon signature, or would more substantial changes be permitted? Either way, this appears to contradict the principles that underpin parliamentary scrutiny of treaties under the Constitutional Reform and Governance Act 2010.

The role of the House of Lords is attenuated still further: clause 31(9) limits the period within which the House could pass a motion relating to the future relationship treaty to just 14 Lords sitting days, rather than the 21 parliamentary sitting days required by section 20 of the CRAG Act. Given the EU Committee’s recent experience of the serious constraints placed upon effective scrutiny by the CRAG Act timetable (which, as we noted in our recent report on *Scrutiny of international agreements: lessons learned*, already reduces opportunities for consultation and collection of evidence), such a further restriction appears unworkable.

Finally, clause 31(10) disapplies the CRAG Act for the purposes of ratification of the future relationship treaty—even though Parliament as a whole (including the House of Lords) is likely to be required to pass legislation to give effect to any future relationship treaty prior to ratification. Again, this provision removes safeguards that UK citizens currently enjoy thanks to Parliament’s role in scrutinising international agreements.

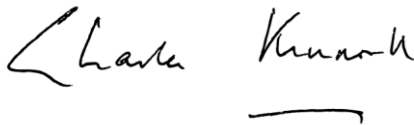
We are concerned that the provisions of clause 31 relating to the ratification of any treaty arising out of those negotiations are both restrictive and confusing. We therefore invite the Government to bring forward amendments both to clarify the clause and to strengthen parliamentary oversight, including by the House of Lords.

Finally, I note that clauses 32 and 33 would both repeal the approval process for the Withdrawal Agreement that was incorporated, after much debate, in section 13 of the European Union (Withdrawal) Act 2018, and the requirement that the Agreement should be approved under the terms of the CRAG Act. In effect, these clauses mean that Parliament would have no role in approving the Agreement, as an agreement binding upon

the UK in international law: its role would be limited to passing the domestic legislation necessary to implement that Agreement. We appreciate the difficulties the Government has faced in securing a 'meaningful vote' in favour of the Withdrawal Agreement, but nevertheless **we invite the Government to give careful thought to the precedent that will be set if Parliament's role in approving ratification of an international agreement as important as the Withdrawal Agreement—a role which exists in order to safeguard the wider public interest—is curtailed in the manner proposed in clauses 32 and 33 of the Bill.**

I would be grateful to receive a reply to this letter in due course, and at all events before any Withdrawal Agreement Bill reaches the House of Lords in the new Parliament. I am copying this letter to Rt Hon Stephen Barclay MP, Secretary of State for Exiting the EU, Lord Callanan, Minister of State, Department for Exiting the EU, Baroness Taylor of Bolton, Chair of the House of Lords Constitution Committee, and Lord Blencathra, Chair of the House of Lords Delegated Powers and Regulatory Reform Committee.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Lord Kinnoull', with a horizontal line underneath.

Lord Kinnoull
Chair of the European Union Committee