

Written evidence submitted by Professor Adam Cygan (UFR0001)

1. Throughout the Implementation Period, the UK was a 'rule taker' of EU law. Under s. 1A European Union (Withdrawal Agreement) Act 2020 the UK continued to abide by EU laws, including those coming in to force during the Implementation Period, 'as if it were a Member State'. During the Implementation Period the European Scrutiny Committee (ESC) continued to monitor the EU policy making and legislative process, under the same terms of reference that applied during membership. At the same time the Select Committee on the Future Relationship with the European Union, scrutinised the Future Relationship negotiations and the broader impact of any future UK-EU deal.

2. Having formally left the institutional architecture of the EU on 31 January 2020, the UK government and Parliament did not exercise any formal role within the EU decision-making process during the Implementation Period. But if Parliament wishes to continue to conduct effective scrutiny of EU law and policy it faces new substantive, procedural, legal and institutional challenges which may impact negatively upon its ability to conduct scrutiny which ensures executive accountability and that enables timely influence of ministers.²

(i) Access to documentation

3. Since the Treaty of Lisbon came in to force on 1 December 2009, national parliaments in the EU have benefited from certain procedural prerogatives concerning direct access to information contained within Protocol 1 on the Role of National Parliaments in the EU. The primary effect of Protocol 1 is that it provides legally enforceable obligations upon the EU institutions with respect to the provision of documentation to national parliaments.

4. Should the ESC (or any successor scrutiny committee) continue to monitor EU legislative proposals then, following UK withdrawal from the EU, documentation is no longer made directly available to the UK Parliament (except in the case of the Northern Ireland Protocol where documentation will be made available to the JCWG if an EU legislative proposal is relevant- see (vi) below).

5. Documentation is still readily available via the Commission's website and Parliament will need to be proactive in order to ensure that it accesses documentation in a timely manner on future EU policy and legislative proposals that may be relevant to the UK (subject to any specific arrangements in the future relationship agreement that may allow for continued provisions of EU documents). In order for effective scrutiny to be possible the government should also continue to systematically provide Explanatory Memoranda as these will form the basis of scrutiny whenever relevant. Depending upon how the future UK-EU relationship develops, especially if it may include some possibility of 'dynamic alignment', effective scrutiny of legislative proposals by the ESC, or any successor committee, would benefit from a well-resourced UK Parliamentary representation in Brussels that would enable Parliament to have direct contacts with EU institutions and allow it to go 'up stream' in the EU decision-making process. This could help Parliament identify, as early as possible, legislative proposals that may be of relevance to the UK. In short, Parliament will need eyes and ears in Brussels.

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² See further HC 1124, Thirty-eighth Report of session 2016-17, House of Commons European Scrutiny Committee, 'Brexit and the European Scrutiny System in the House of Commons.' Part 4.

(ii) Framework for scrutiny

6. Protocol 2 on the Application of the Principles of Subsidiarity and Proportionality provided a structured mechanism through which the UK Parliament participated in EU affairs. By reviewing the application of subsidiarity, Parliament participated in the Commission's broad consultation on draft legislative acts which was part of the Impact Assessment and Better Regulation agenda within the EU. Post-withdrawal, this privileged position for Parliament to formally challenge the Commission's subsidiarity judgments through issuing a reasoned opinion no longer exists.

7. Should the UK Parliament voluntarily decide or be required to adopt EU legislation as part of the future relationship, or under the Northern Ireland Protocol, the UK Parliament will not be able to comment directly upon whether the legislation is necessary at the EU level or whether the objective is better achieved by legislation at the national level. This is important because EU legislation is 'Europeanised' to the extent that it delivers the integrationist objectives of the EU.

8. In the event that UK would have to comply with obligations arising from the future UK-EU relationship, Parliament could be adopting 'Europeanised' regulatory standards or governance processes which Parliament may be uncomfortable with. Parliament may adopt EU legislation which the ESC, had it been conducting a subsidiarity review, may have concluded did not comply with subsidiarity and would have issued a reasoned opinion to that effect. It will always be open for the UK to draft bespoke domestic legislation, but this is unlikely to be 'Europeanised' to the same extent as EU law and may not accurately reflect the objectives of the EU legislation. In the context of trade, for example, this could impede market access and may, if drafted incorrectly, place the UK in breach of its obligations under the future UK-EU relationship.

9. Fulfilling the obligations of Protocols 1 and 2 was a task for the ESC, but post-Brexit without the procedural guarantees in Protocols 1 and 2, the manner in which Parliament engages with the EU policy and decision-making process will have to change. Parliament should retain a committee dedicated to the task of reviewing the technical legal effect of EU legislative proposals on UK law when this is relevant. The ESC is best placed to fulfil this role and could also undertake broader oversight of UK-EU relations more generally.

10. Alternatively, the scrutiny of broader policy issues could be fulfilled by other committee(s), for example a repurposed Committee on the Future Relationship with the EU, with the ESC focussing on technical scrutiny. This division of labour would appear to be the most efficient way forward. As the 'future relationship' is likely to be a dynamic relationship and evolve in response to legal, political and economic developments (both with the EU and also third countries), the systematic monitoring of the UK-EU relationship, its governance and broader policy development is desirable.

(iii) Technical legislative scrutiny

11. On the question of technical legislative scrutiny of EU legislative proposals, the existing standing orders for the ESC through which it considers 'the legal and political importance' of EU legislative proposals upon the UK are likely to be largely appropriate to fulfil this task (subject to any necessary amendments which reflect the new UK-EU relationship). Monitoring the law and policy implications of EU legislative proposals could include examining the UK statute book more broadly and to consider the 'horizontal' implications of the UK adopting EU legislation. To this extent the ESC could flag up concerns at an early stage where an EU legislative proposal would, if adopted by the UK, raise cross-departmental legislative issues and devolution issues which would need to be addressed to ensure a functioning statute book.

12. More broadly, better coordination of EU affairs within Parliament will be essential in order to maximise resources, avoid duplication of inquiries and to build Parliament's capacity as an institution

which is monitoring a policy-making and legislative processes in which the UK no longer participates. Thus, some distinction will be required between technical scrutiny work around future possible alignment of UK law with EU law and more substantive policy focused work and oversight of the UK-EU relationship. One change brought about by the parliamentary Brexit process has been that departmental select committees, which had hitherto mainly been peripheral actors in EU scrutiny, became more directly engaged. If this trend continues post Implementation Period, it needs to be managed in order for Parliament to respond to government proposals and utilise resources effectively.

(iv) Future inter-parliamentary cooperation

13. Effective parliamentary scrutiny of EU affairs was aided through inter-parliamentary cooperation. Most significantly, this came through participation in COSAC. Going forward what opportunities are there for inter-parliamentary cooperation now Parliament is no longer a member of COSAC?

14. Article 123 of the Political Declaration states that “The future relationship should include dialogue between the Parties at appropriate levels so as to provide strategic direction and discuss opportunities for cooperation in areas of mutual interest”. “Appropriate levels” could encompass inter-parliamentary dialogue possibly through COSAC or, more likely, through bilateral discussion with other national parliaments on areas of shared interest. Developing such contacts may be important as a mechanism for ‘soft power’ influence for the UK Parliament to have its voice heard indirectly, but such influence will be limited. Some Member States such as Poland and Hungary have been identified as potentially being sympathetic to the UK. However, within the current rule of law dispute that both Poland and Hungary have with the EU, it is unlikely that bilateral relationships with Parliament’s in either of these Member States would generate much in the way of value-added cooperation in the foreseeable future.

15. Article 125 of the Political Declaration states that “The Parties support the establishment of a dialogue between the European Parliament and the Parliament of the United Kingdom, where they see fit, in order for the legislatures to share views and expertise on issues related to the future relationship.” What exact value there may be in developing a relationship with the European Parliament is unclear, but informal liaison with MEPs could be another avenue to exercise ‘soft power’ with an EU institution that has a central role within the ordinary legislative procedure.

16. As for COSAC, there is some precedent with Norway which participates by invitation in COSAC. But given that Norway is within the EEA and has a much closer economic relationship with the EU than the UK is likely to, it is not clear, whether the UK Parliament would be invited to attend COSAC meetings. However, attendance at COSAC could be a worthwhile strategy for Parliament to pursue, especially if the UK does adopt new EU rules as part of the future relationship or in the context of the Northern Ireland Protocol. It would also allow the UK Parliament to exert its ‘soft power’ more directly to national parliaments in the EU-27.

(v) Treaty scrutiny

17. The future UK-EU relationship is very likely to be dynamic and which may lead to a raft of new treaties which Parliament will have to ratify. In addition, the UK is likely to make treaties covering issues such as trade with many other countries and these treaties should also be scrutinised. Developing a procedure for the systematic review of treaties is therefore important for Parliament and is likely to need the establishment of a specialist committee. One proposal is that this should be a joint committee between the Commons and Lords.

18. Even if the UK secures a deal before the end of the Implementation Period, whether on trade or security cooperation, there will remain many other policy areas such criminal procedure and judicial

cooperation which will need to be agreed in the coming months and years. These treaties may raise regulatory and human rights issues which will need to be reviewed for compliance with, for example, the Human Rights Act 1998. Effective, timely and concentrated scrutiny by select committees of such treaties is desirable in order to consider the legal impact upon UK law and to ensure that the treaties include sufficient checks and balances.³

19. What should be Parliament's role in relation to the oversight of future treaties? In legal terms, Parliament has two distinct roles. First, the government will be obliged to lay a new treaty before Parliament for 21 sitting days prior to ratification, under the Constitutional Reform and Governance Act 2010 (CRA). In theory, this will give Parliament the opportunity to scrutinise the treaty and object to ratification, by passing a resolution. An objection by the House of Commons (but not by the Lords) would block ratification. Secondly, if implementation of the treaty requires new legislation, Parliament has the power to pass or defeat that legislation (or amend it, if it is a statute).

20. In practice Parliament's scrutiny of treaties has been largely inadequate. This is partly because its powers of scrutiny are limited but also because Parliament does not necessarily make sufficient use of the powers that it already has. For example, the House of Commons has never used its power under CRA to veto ratification of a treaty. The main deficiency is that there is no mechanism to ensure that a debate and vote take place because the government controls the Parliamentary timetable and limit, or even deny the time to debate a treaty. Even if a select committee has examined and reported on a treaty within the laying period, the government may still refuse time for a debate, or insist that it can only be held in the very limited time allocated to the opposition or backbenchers.

21. The House of Lords EU Committee undertook scrutiny of Brexit-related treaties and published a report which sought to reflect on the lessons learned from this process.⁴ Generally, the recommendations focus on the need to establish a new treaty scrutiny committee, preferably a joint committee of both chambers. In its April 2019 report the House of Lords Constitution Committee stated that in order 'To address the shortcomings in Parliament's scrutiny of treaties, we recommend that a new treaty scrutiny select committee be established. This committee should sift all treaties, to identify which require further scrutiny and draw them to the attention of both Houses'.⁵

22. A Treaty Committee would be advantageous because it could develop institutional capacity and focus on improvements in treaty scrutiny across all committees, for example by establishing requirements for the government to provide timely access to accurate information. It could also be given the power to call or request a debate. Moreover, its role need not be confined to scrutiny of treaties laid under CRA prior to ratification. For example, it could also establish, in dialogue with government, new standards for the provision of information about treaties under negotiation, and opportunities for Parliament to consider the government's negotiating aims and priorities.

23. A Treaty Committee could also offer improved opportunities for dialogue between Parliament and treaty-makers in the government, increase the body of parliamentarians with experience of treaty scrutiny, and develop good practice – without preventing other committees from scrutinising treaty actions. Finally, a Treaty Committee could also provide a useful focal point for dialogue with devolved legislatures about trade treaties to ensure greater coherence to the implementation of new trade deals across all the nations of the UK.

³ See the written evidence submitted to the House of Lords Constitution Committee inquiry on parliamentary scrutiny of treaties by Lord Boswell on behalf of the Lords EU Select Committee.

<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/constitution-committee/parliamentary-scrutiny-of-treaties/written/94744.html>

⁴ HL Paper 387 42nd Report of Session 2017-19 'Scrutiny of International Agreements: Lessons Learned'.

⁵ HL Paper 345 20th Report of Session 2017-19 'Parliamentary Scrutiny of Treaties, para.18.

(vi) Scrutiny of the Northern Ireland Protocol

24. Because the UK no longer participates in EU decision-making, the Northern Ireland Protocol annexed to the Withdrawal Agreement establishes a Joint Consultative Working Group (JCWG) to ensure that there is a direct channel of communication between the EU and UK on draft EU laws relevant to Northern Ireland.⁶ The JCWG, which will begin its work after the Implementation Period, is the initial forum for discussions concerning which new EU legal acts the EU considers fall within the scope of the Protocol, but which do not merely amend or replace legislation already referred to within the Protocol. The JCWG will report to the Specialised Committee on Northern Ireland, which sits under the UK-EU Joint Committee and oversees the overall application and implementation of the Withdrawal Agreement. In terms of the composition of the JCWG, the government has proposed that the Northern Ireland Executive is one of the UK representatives on the JCWG.

25. The ESC has thus far taken the lead on scrutiny of the formation of the JCWG⁷ – this is appropriate as the JCWG’s task will largely fit in with the ESC’s broader scrutiny activities of monitoring EU legislative proposals. To ensure legislative coherence it is suggested that the ESC should also monitor if the implementation of new EU laws under the Protocol will lead to divergence with the rest of the UK and what the effect of any divergence could be on the UK Single Market. Equally, should the government propose to diverge from EU law, the ESC could also consider what effect this may have on the Protocol and the UK Single Market.

26. However, two issues arise with respect to the extent the ESC will be able to scrutinise legislative proposals which the JCWG may want to adopt because of their relevance to Northern Ireland. Firstly, if new EU legislation is to be adopted that falls within the scope of the Protocol, what opportunity, if any, will there be for Parliamentary scrutiny of the implementing legislation? New EU legislation will be adopted via secondary legislation and so any influence is likely to be limited only to those instances where the affirmative procedure is used and even this influence will be constrained.

27. Secondly, if there is an opportunity to conduct a review of a legislative proposal, could this review be an indirect way for the UK to be involved in EU decision-making?⁸ The Chancellor of the Duchy of Lancaster in his Explanatory Memorandum⁹ to the ESC writes that participation on the JCWG would mean that the ‘UK has a formal opportunity to influence the development of EU law where it is relevant to the Protocol’. It is, however, unclear what precisely this influence would be and at what stage of the planned EU Act scrutiny would take place. For example, could the ESC provide a subsidiarity type assessment as part of its review in which it concludes that EU legislation is not necessary, and the UK government is better placed to legislate?

28. The Explanatory Memorandum does not expand upon why the Chancellor of the Duchy of Lancaster comes to the conclusion that participation on the JCWG will allow the UK to ‘influence the development of EU law’. However, it is unlikely that the JCWG, which is neither an EU institution under the EU Treaties nor does it have the legal status of a Member State would be able to substantively influence the content of an EU legislative proposal.

29. It is also not evident how this ‘influence’ would be transferred to the ordinary legislative procedure of the EU where the Council and European Parliament co-decide. This is because Article 15 of the

⁶ Article 15 Northern Ireland Protocol attached to the Withdrawal Agreement.

⁷ European Scrutiny Committee Twenty-seventh Report of Session 2019–21

https://publications.parliament.uk/pa/cm5801/cmselect/cmeuleg/229-xxiii/22903.htm#_idTextAnchor004

⁸ See ESC, Twenty-seventh Report of Session 2019–21, at para.1.8. This states that ‘The Minister notes that the JCWG will have an important role to play in being the body through which the EU informs the UK about amendments and replacements to Union law listed in the Annexes to the Protocol, and through which the UK, says the Minister, has a formal opportunity to influence the development of EU law where it is relevant to the UK in this context.’

⁹ [Explanatory Memorandum for European Union Legislation and Documents.](#)

Protocol states that ‘Within the working group, the Union shall *inform* (emphasis added) the UK about planned Union acts within the scope of the Protocol, including Union acts that amend or replace the Union acts listed in the Annexes.’ This does not appear to offer an opportunity to substantively ‘influence’ the EU legislative proposal and for the Chancellor of the Duchy of Lancaster to suggest otherwise could be viewed as an attempt to detract attention from the position that, under the Protocol, the UK would almost certainly be a *de facto* ‘rule taker’.

30. For the position of the JCWG to be formally represented in the decision-making process then either the Commission would need to reflect this in its original legislative proposal or the European Parliament and/or the Council would need to propose an amendment to the legislative proposal to incorporate the JCWG position. Neither of these possibilities appears likely. However, until such time as greater clarity is provided by the Chancellor of the Duchy of Lancaster as to how this ‘influence’ will be achieved, the ESC will be unable to finally determine the necessary scrutiny arrangements for legislative proposals considered by the JCWG.

(vii) Conclusions

31. Scrutiny outside the EU legal and political space will be challenging for Parliament. Indirect access to documents and not participating in the EU institutions where decisions are taken will limit Parliament’s influence over any future EU legislation that the UK may choose/be required to adopt. In the context of the Northern Ireland Protocol where the JCWG will be informed of relevant EU legislative proposals the prospects for influence are still very limited. In addition, the absence of arrangements for the systematic scrutiny of new treaties will pose real accountability challenges – especially because treaties are likely to include provisions that may impact individual rights.

32. Adapting procedures and practices to the scrutiny of EU law and policy will also be time consuming and there is a risk that there will be ‘gaps’ in the effectiveness of scrutiny. Going forward, the most effective arrangements for scrutiny and accountability would include probably three different committees. One committee will be needed to continue with the work of legislative scrutiny and scrutiny of the JCWG and Northern Ireland Protocol. The ESC seems best placed to do this. A second committee should review the operation of the Withdrawal Agreement and future relationship arrangements including governance and dispute resolution. This could be undertaken by repurposed Future Relationship Committee. A third committee, ideally a joint committee of both Houses should be established, which engages in treaty scrutiny. Finally, the Commons should also consider how best to coordinate these scrutiny activities amongst these and other departmental committees to maximise resources and avoid duplication.

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