



House of Commons  
European Scrutiny Committee

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# Brexit and the European Scrutiny System in the House of Commons

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**Thirty-eighth Report of Session 2016–17**

*Report, together with formal minutes relating  
to the report*

*Ordered by the House of Commons  
to be printed 29 March 2017*

## The European Scrutiny Committee

The European Scrutiny Committee is appointed under Standing Order No. 143 to examine European Union documents

### Current membership

[Sir William Cash MP](#) (*Conservative, Stone*) (Chair)

[Alan Brown MP](#) (*Scottish National Party, Kilmarnock and Loudoun*)

[Geraint Davies MP](#) (*Labour (Co-op), Swansea West*)

[Steve Double MP](#) (*Conservative, St Austell and Newquay*)

[Richard Drax MP](#) (*Conservative, South Dorset*)

[Kate Green MP](#) (*Labour, Stretford and Urmston*)

[Kate Hoey MP](#) (*Labour, Vauxhall*)

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[Mr Andrew Turner MP](#) (*Conservative, Isle of Wight*)

[David Warburton MP](#) (*Conservative, Somerton and Frome*)

[Mike Wood MP](#) (*Conservative, Dudley South*)

### Powers

The Committee's powers are set out in House of Commons Standing Order No. 143. The scrutiny reserve resolution, passed by the House, provides that Ministers should not give agreement to EU proposals which have not been cleared by the European Scrutiny Committee, or on which, when they have been recommended by the Committee for debate, the House has not yet agreed a resolution. The scrutiny reserve resolution is printed with the House's Standing Orders, which are available at [www.parliament.uk](http://www.parliament.uk).

### Publication

Committee reports are published on the Committee's website at [www.parliament.uk/escom](http://www.parliament.uk/escom) and in print by Order of the House.

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## Summary

This Report looks at the ways in which the system by which the House of Commons scrutinises EU legislation may need to be reshaped in the light of the referendum result and of the negotiations for UK withdrawal from the European Union. It has been prepared in the lead up to the triggering of Article 50 on Wednesday 29 March 2017. The European Union is not standing still while the UK negotiates Brexit. Legislation and policy continue to be developed and to progress through the system. Whether or not changes at EU level involve the UK directly, they may make a significant difference to the context of negotiations. In negotiating exit, the UK Government needs to be alert to the negotiations on current business; it cannot start from the assumption that EU policy and legal frameworks are fixed. Rather than driving away from a fixed petrol pump, Brexit is analogous to disengaging from mid-air refuelling. Both parties are moving; the challenge is to separate them without either losing momentum.

The European Scrutiny Committee's weekly reports provide regular information on important EU developments, together with the Government's reaction to those developments. The Government assures us that as long as the UK remains a member of the EU, it will continue to engage in negotiation on EU matters, and that the scrutiny system will remain important. Nevertheless, we are concerned that departments may not have been giving sufficient priority to negotiations on new and existing EU dossiers. Ministers need to continue to pay close attention to these matters.

While we welcome the Government's continued engagement in the institutions of the EU, and the Secretary of State for Exiting the EU's statement that the Government wishes to exercise its influence over the best interests of the European Union until we leave because we want the European Union to be strong, stable and effective, we believe that the referendum result will fundamentally affect the nature of that engagement. The Government should be more open about its attitude in negotiations, coming to a clear view on where the national interest lies in relation to each dossier, and ensuring that view is communicated to UKREP and to our European counterparties. The Government may consider that there will be occasions when it feels it should vote against proposals it considers to be against the national interest, rather than allowing agreement by consensus. If it does vote against a proposal, it should make sure its reasons for doing so are put on record in a minute statement.

We also urge the Government to ensure that the Committee has the information it needs to assess EU proposals. The Committee understands the Government does not wish to provide information which would prejudice negotiations, but considers that there is far more information which could be provided without any such danger.

One of our tasks is to assess EU proposals for legal and political importance, and to report those of such importance to the House. While the task has not changed, the referendum result means that we will increasingly focus on those dossiers which raise questions about arrangements after the UK leaves the EU, and our weekly reports will contain a roundup of Brexit related issues.

In many cases, one of the most important questions on a new dossier will be “what are the implications when the UK is outside the EU?” We expect the Government to address this. Every Explanatory Memorandum should contain a separate section on Brexit related issues. If the Government considers that answering our questions or giving us necessary detail would compromise its negotiations on withdrawal, then it needs to explain the difficulties in sufficient detail for us to understand them.

We will also respond to the referendum result by working more closely with other committees, as appropriate. We will encourage our staff to share their expertise, and to be open to joint committee hearings. A new system of email alerts will make it easier to track our work on particular topics.

The success of the scrutiny system depends on the quality of government engagement with it. We recognise the pressures of preparing for Brexit, but proper scrutiny and parliamentary accountability are part of that preparation. We note the Government’s previous reluctance to comply with the requirements of the scrutiny system by scheduling debates in a timely way. Debates recommended by the Committee are Government business, and can only be scheduled by the Government. As the Leader of the House accepted, the Government would have to think extremely carefully if it was defeated in such a debate. It is imperative that debates on European Union Documents are scheduled, and scheduled in good time, so that the House can make its views known in an effective way. The process of exiting the EU should reaffirm the sovereignty of Parliament, not bypass it.

# 1 The Committee's consultation

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## The role of the ESC

1. On 23 June 2016 the people of the United Kingdom voted to leave the European Union. Legislation to authorise the Government to give notice under Article 50 of the Treaty on the European Union has been passed by Parliament and formal notice has now been given. Yet for the time being the United Kingdom remains an EU Member State, and continues to take its place in negotiations at the European Council, and in the Council of Ministers, including in negotiations of European legislation. The Government has continued to opt in to EU measures since the referendum result.<sup>1</sup>

2. The European Scrutiny Committee's remit also remains unaltered. The Government remains under an obligation to deposit European Union documents in each House, and the Committee remains responsible for scrutinising deposited documents and drawing those of legal and political importance to the attention of the House, and for considering "related matters".<sup>2</sup> As it is for committees to interpret their own remit this is a very wide field.

3. While the United Kingdom's status as a Member State and our own remit remain unchanged, the context has fundamentally altered. Before the referendum, the Government was negotiating and the Committee was scrutinising documents with the expectation of long-term UK involvement in most of the policy areas covered. That is no longer the case. This Report examines the consequences of that change for the way in which the Committee expects to operate in future.

4. The Committee's unique responsibilities and powers are as follows:

- to look, on behalf of the House, at individual EU proposals and the Government's view on them, and its intended action at decision points on those documents, including in COREPER and Council;
- to clear those proposals or hold them under scrutiny until the Government provides information or schedules a debate;
- to draw EU proposals to the attention of other Committees;
- to ask other select committees for an opinion on a particular document;
- to look at EU related issues which may cross departmental remits; and
- to recommend a debate on the Government's opt-in decisions.<sup>3</sup>

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1 For example on 15 December 2016 the Minister for Immigration announced that the UK would opt in to the Eurodac Regulation, [HCWS364](#).

2 See House of Commons [Standing Order No. 143](#).

3 These arise because the UK has powers either to opt in to EU legislation relating to justice and Home Affairs, or to opt out of some Schengen related proposals; the Committee has power to recommend a debate on such decisions.

5. In September 2016 the Committee consulted on its role after the referendum result. It asked:

- how should scrutiny adapt to Brexit? What should be subject to scrutiny, and what outcomes would be useful?

In particular, the Committee sought views on:

- whether any particular policy areas should be subject to increased scrutiny;
- whether there are areas where the Committee should offer a lighter touch;
- what pressing questions the Committee should ask in dealing with individual proposals; and
- how Committee material can be made more accessible and useful to third parties.

6. We received 13 replies, which have been published on our website. Some of them were about the scrutiny of particular topics, and these have been drawn to the attention of the relevant select committee. We were urged, for example, to pay special attention to the rule of law,<sup>4</sup> the rights of children,<sup>5</sup> the implications of the referendum result for local government<sup>6</sup> and the relationship between the UK and Ireland.<sup>7</sup> These are all important topics. We note that other Committees have the lead on such matters, and are better placed to consider them in depth and, indeed, in some cases, are already doing so. Others raised questions about the referendum result; as a Committee, we do not consider it our remit to challenge that result, even though individual Members have different views on these issues.<sup>8</sup> Another raised legal questions about the triggering of Article 50, which have since been considered by the Courts.<sup>9</sup>

7. We are grateful for all submissions, which have contributed to our thinking. They will influence our future activities, particularly those which addressed the way in which the Committee should work, or broader issues such as the scrutiny of international relations and the EU's wider role in the world.<sup>10</sup>

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4 The Bingham Centre for the Rule of Law, [PRC0011](#).

5 Children's Rights Alliance for England and Together (Scottish Alliance for Children's Rights) with input from Children in Wales, [PRC 0012](#).

6 Convention of Scottish Local Authorities, [PRC 0015](#), Dr Lawrence Ferry, [PRC0002](#).

7 Derek Cole [PRC0006](#).

8 Dr Meg Thomas, [PRC0005](#).

9 Dr Phil Syrpis, [PRC0010](#).

10 Wilfrid Aspinall, [PRC0013](#), Dr Amelia Hadfield [PRC0017](#).

## 2 The Government's approach to current dossiers

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8. Our evidence session on 20 March elicited some helpful information about the way in which exit negotiations will be handled. The Prime Minister will have overall responsibility for the negotiations, supported by the Secretary of State for Exiting the EU. Olly Robbins, Permanent Secretary DExEU, will be the official Sherpa, but will work closely with Sir Tim Barrow, UK Permanent Representative to the EU.<sup>11</sup> Exit, however, is not the only thing to be negotiated. The legal framework and policies adopted or under discussion at EU level will continue to affect UK law for the next two years, and—to varying degrees and depending on the outcome of the negotiations—after Brexit. In some cases, this will be because UK law is directly shaped by EU decisions. In his statement of 17 January the Secretary of State for Exiting the European Union made it clear that the Great Repeal Bill will transfer the European Union *acquis* [i.e., the body of law of the EU] into United Kingdom law. He indicated the case law of the Court of Justice of the EU (CJEU) will be transferred, and “will be frozen at the point when we leave”.<sup>12</sup>

9. The Government has also indicated its aspiration that the UK will be able to continue to trade with the EU's third country partners on the same terms as in its existing Free Trade Agreements (FTAs) with them. The Secretary of State has said “For many of the most important deals for us, the expectation is that we will get, as it were, an immediate transfer, and then we will start talking about improving the deals between us”.<sup>13</sup>

10. Moreover, the EU will remain a major trading partner and a very significant player in many international fora after Brexit. The UK should be aware of its policies. There will be a role for UK representation in Brussels even after Brexit. As David Jones, Minister of State DExEU, told us: “Whatever happens, the European Union will be an important trading partner of ours, and we will have other interests in common”.<sup>14</sup>

11. A further reason for continuing to focus on that framework is that as new legislation goes through, other Member States may themselves be preparing for life after Brexit. As Sir Ivan Rogers, former UK Permanent Representative to the EU, warned:

“others are, frankly, looking at opportunities in the next couple of years to land things in directives and regulations that they know are going to cause us difficulty. I do not want to sound paranoid, but obviously that is going on, and we have to be on it.”<sup>15</sup>

12. In negotiating exit, the UK Government needs to be alert to the negotiations on current business; it cannot start from the assumption that EU policy and legal frameworks are fixed. Rather than driving away from a fixed petrol pump, Brexit is analogous to disengaging from mid-air refuelling. Both parties are moving; the challenge is to separate them without either losing momentum.

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11 [HC 791](#) (20 March 2017) Q130, Q133–134.

12 See Official Report, 17 January 2017, [col 820](#), response to Tom Elliott.

13 See Official Report, 17 January 2017, [col 820](#), response to Kate Green.

14 [HC 791](#) (20 March 2017) Q109.

15 [HC 791](#) (1 February 2017) Q67.

13. Unsurprisingly, given the continuing importance of EU law and policy, the Government has repeatedly emphasised the continuing importance of the scrutiny system. When we took evidence from the Leader of the House of Commons, Rt Hon David Lidington MP, on 18 January 2017, he told us that the scrutiny system would:

“remain important up to the date that we actually leave the European Union. The Prime Minister has made it clear that, so long as we are members, we will stand by the rights and obligations of membership, and it seems to me that an integral part of that process is to ensure that the proper scrutiny procedures are observed.”<sup>16</sup>

14. The Government has also emphasised that it continues to play a full part in negotiating new proposals. Almost every Explanatory Memorandum on a European Document contains text along the following lines:

“On 23 June, the EU referendum took place and the people of the United Kingdom voted to leave the European Union. Until exit negotiations are concluded, the UK remains a full member of the European Union and all the rights and obligations of EU membership remains in force. During this period the Government will continue to negotiate, implement and apply EU legislation.”

15. The Government has not explored what this will mean in practice, now all sides are aware that the UK is not a long-term partner in the EU. In evidence to the Committee the Minister of State DExEU, David Jones MP, said:

“So far as the existing dossiers are concerned, as I said earlier, we fully intend, so far as possible, for it to be business as usual. Therefore, they will be treated in the manner in which they are currently treated.”<sup>17</sup>

In his statement on the White Paper the Secretary of State for Exiting the EU stated: “We will exercise our influence over what we think is the best interests of the European Union until the moment we leave because we want the European Union to be strong, stable and effective”.<sup>18</sup>

In contrast, the Leader of the House told us “clearly, the facts of the referendum, and then the strategy that the Prime Minister set out yesterday, make a difference to how we conduct EU business”.<sup>19</sup> As Brexit day approaches it is not difficult to imagine increased tension between the UK’s role as a loyal Member State of the Union and the pressure to look at EU legislative proposals from the Brexit perspective.

16. While Ministers are clearly and commendably committed to playing a full part in continuing negotiations, the challenges of delivering this at the same time as Brexit are clearly considerable. Much of the negotiating expertise rests in UKREP, but UKREP needs to work closely with Whitehall departments, which have, naturally, been challenged by the need to respond to the referendum result. We were concerned by Sir Ivan Rogers’s assessment that:

16 [HC 953](#) (18 January 2017) Q1.

17 [HC 791](#) (26 October) Q26.

18 See Official Report, 2 February, col 1220.

19 [HC 953](#) (18 January 2017) Q3.

“in the six months after the referendum, I saw a diminution of Whitehall attention and effort on day to day dossiers. [...] I had many of my officials coming to me in UKREP saying, “We had no instructions in this area. I have nothing to say, because I am not getting anything back from the Department. I am not clear what I am saying on microphone and what our position is.”<sup>20</sup>

We have noticed the same trend in the information the Government has provided to this Committee for the purposes of our day to day scrutiny of EU legislation. Sir Tim Barrow assured us that departments were now providing negotiating instructions satisfactorily,<sup>21</sup> and we trust departmental engagement with the scrutiny system will similarly improve.

17. We pressed David Jones and Sir Tim Barrow on the approach to current dossiers in the light of the UK’s decision to leave the UK. They assured us that the UK was continuing to play an active part in negotiations and that “as we put our point of view forward, it is still listened to and taken into account properly”.<sup>22</sup> We were interested to note that the UK’s negotiations on current dossiers do not necessarily reflect the concerns of exit:

“various dossiers are dealt with on their own merits and given the concerns of the United Kingdom. We are not, if you like, designing our business to reflect the fact that we are leaving. It is business as usual, as Sir Tim has said.”<sup>23</sup>

18. While the UK clearly needs to negotiate current dossiers in good faith, we are not convinced it should be entirely “business as usual”. The Prime Minister’s speech on 17 January 2017 and the Government’s subsequent White Paper set out the negotiating aims of the UK: it is clear that the Government intends to leave the EU and while it intends to do so, if possible, in a staged and careful way, the expectation is that the UK will not be bound by the common commercial policy including the Common External Tariff. It will therefore probably be outside the EU customs union notwithstanding the Government’s desire to achieve a “frictionless” customs border.<sup>24</sup> Given the magnitude of these changes, *we expect all departments working on dossiers to consider EU proposals both as they would affect the UK as an EU Member State and in terms of their Brexit implications.*

19. **We recognise the pressures on Whitehall, but it is important to deal with existing dossiers competently in parallel with the Brexit negotiations. We also consider the Government should be more alert to the connection between the two, since looking at proposals for EU legislation from a Brexit perspective highlights the issues that will arise more generally in disentangling the UK from the EU. The machinery for establishing and co-ordinating the UK position needs to be fully worked out and engaged on both types of negotiation. Establishing the Department for Exiting the European Union, and transferring responsibility for the coordination and scrutiny of ongoing dossiers is a valuable step in providing this coordination. Nonetheless there will be points when decisions need to be made and checked at the highest level, by the Prime Minister or Cabinet Committee; the centre of Government will also**

20 [HC 791](#) (1 February 2017) Q67.

21 [HC 791](#) (20 March 2017) Q119.

22 [HC 791](#) (20 March 2017) Q125.

23 [HC 791](#) (20 March 2017) Q126.

24 Speech by Rt Hon Theresa May, 17 January 2017, [The Government’s negotiating objectives for exiting the EU.](#)

**need dedicated resources to ensure that decision makers are equipped to make those decisions.** This has been raised with the Government and correspondence between the Chairman and the Prime Minister is appended to this report.

**20. Like the Government, we consider the scrutiny system, in which every European Document is subject to informed analysis and political oversight remains essential. In current circumstances, a key part of our role is to ensure that the Government is giving proper priority to negotiations on existing dossiers, and minimising the risk that changes to current EU law may disadvantage the UK after Brexit.**

### Information provided to the Committee

21. While the UK must remain fully engaged in negotiations on existing dossiers, it also needs to negotiate Brexit. The Prime Minister has said that the Government will not release further information which might damage the United Kingdom’s ability to come to a satisfactory settlement with the European Union. While she noted that it is “only right” that the process of exit will be debated and discussed at length she considered:

“those who urge us to reveal more—such as the blow-by-blow details of our negotiating strategy, the areas in which we might compromise, the places where we think there are potential trade-offs—will not be acting in the national interest.”<sup>25</sup>

22. There is a tension between this process of negotiating withdrawal, which the Government believes needs confidentiality, and the process of scrutinising EU legislative proposals under our normal scrutiny procedures. The Chairman of this Committee has written to the Secretary of State for Exiting the European Union to emphasise that:

“the Government remains accountable to Parliament, and Committees expect to be provided with information on the Government’s desired outcomes, and factual analyses of the position on, for example, possible legal arrangements. Negotiations cannot begin without each party setting out its starting position, and any factual analysis will be available to negotiating partners as well as to the UK.”<sup>26</sup>

23. We welcome the Leader of the House’s view that:

“it is perfectly reasonable for the Committee to inquire and ask of Ministers how the Government’s approach to a particular proposal coming out of the EU system fits with the ongoing negotiation and regime that we hope will apply after exit. Of course, there will be occasions where Ministers will not be able to disclose details of what may be going on in a fluid negotiation. However, those are not unreasonable questions for parliamentarians to ask.”<sup>27</sup>

25 Speech by Rt Hon Theresa May, 17 January 2017, [The Government’s negotiating objectives for exiting the EU](#).

26 [Letter from Sir William Cash MP to the Secretary of State for Exiting the European Union](#), 25 January 2017.

27 [HC 953](#) (18 January 2017) Q5.

24. We accept that the Government does not wish to release information which would prejudice the outcome of negotiations. In our view, there is much information which could be provided without this risk, particularly factual explanations of the current position and an analysis of the issues that will arise on Brexit, if not the outcomes sought.

25. We have no doubt that our European partners have access to their own analyses of international law, or of potential partnership agreements; factual analysis of such matters would do no more than provide to Parliament information which is already available to negotiators. While we understand that the Government cannot reveal its red lines or the trade-offs it would be prepared to accept, no negotiation can begin without both sides setting out the outcome they would most desire.

26. When we took evidence from Sir Ivan Rogers he agreed that confidentiality would be at a premium, but warned:

“An awful lot will leak. Brussels is very leaky, and all the institutions are very leaky; no disrespect to them, but I am afraid that is the truth. As I say, in the compilation of positions by the 27, on the basis of papers from the Commission, stuff will get out, and incessantly. You should all expect an awful lot of this negotiation to be conducted very publicly.”<sup>28</sup>

27. In the light of this, we asked David Jones to undertake that the Government would make a statement if details of the negotiations were leaked, to “set the record straight” to the House of Commons. While the Minister could not give a blanket assurance, he agreed that “it is easy to foresee circumstances where a statement would be appropriate”.<sup>29</sup>

**28. We appreciate the Government’s desire for confidentiality in negotiations, but it would be wrong and counter-productive for it to refuse to share factual material and matters which are common knowledge in Brussels. We welcome the Leader of the House’s acceptance that the Committee will have legitimate questions about the interrelations between negotiations on existing dossiers, and on wider Brexit-related matters.**

29. Many of the dossiers currently under scrutiny raise significant questions related to Brexit. One example is the question of how EU energy policy will affect the UK in future, given that over 5% of UK energy was provided by imports from the EU in 2015, and such imports are expected to increase.

30. In some cases, departments are already providing useful information. For example, when the Minister of State for Energy and Intellectual Property, Baroness Neville-Rolfe, updated the Committee on negotiations on a directive relating to accessibility, she gave a clear account of the current situation and possible impacts on UK business:

“Though we will remain a member of the UNCRPD<sup>30</sup> regardless of our EU membership, we do not yet know what relationship the UK will have with the Single Market upon exiting the EU. It is, therefore, difficult to say at this stage whether the UK will need to adopt this proposal. However, it is likely

28 [HC 791](#) (1 February 2017) Q51.

29 [HC 791](#) (20 March 2017) Q144.

30 United Nations Convention on the Rights of Persons with Disabilities, adopted 2006 with 160 signatories.

that UK businesses selling into the EU market will have to adhere to these accessibility requirements, as any other business seeking to do business in the Single Market.”<sup>31</sup>

31. Similarly, after prompting from this Committee, the Department for Business, Energy and Industrial Strategy gave an exemplary account of Government thinking on the potential impact of the Commission’s proposals to limit the use of geo-blocking<sup>32</sup> post-Brexit.

32. This good practice should become the norm. For example, in relation to measures relating to security aspects of the Justice and Home Affairs portfolio, we would expect this to include information on the contribution the UK makes to existing EU arrangements, identification of any legal barriers to cooperation with non-EU countries, and a broad indication of whether or not, all things being equal, the United Kingdom would wish to continue to participate in such arrangements. Ministers have repeatedly said that they wish to continue to work with the European Union on security measures; clearly they do not believe this undermines their negotiating position.

33. Dr Borda, of Anglia Ruskin University, proposed:

“The Explanatory Memorandums which Government Departments submit to the European Scrutiny Committee should be amended to include a Brexit section, including a statement on: (a) how and to what extent the EU instrument in question would align with the UK’s priorities post-Brexit and (b) to what extent the EU instrument in question is likely to be retained, retained in revised form, or rescinded post-Brexit.”<sup>33</sup>

34. We asked the Minister whether there was scope to improve the information on Brexit issues in the Explanatory Memoranda:

“Can you ensure that every single explanatory memorandum includes a section on Brexit, so we know exactly where the Government are coming from, which presumably you will be discussing with Sir Tim as well, in terms of how you position yourself? We believe that that will not only help us as a Committee reporting to the House of Commons, but will also ensure that officials dealing with the dossiers in question would have to take account of their potential effects on third countries, which is what we will be fairly soon.”

The Minister responded: “That is a helpful suggestion and I will certainly take it on board”.<sup>34</sup>

**35. *Each Explanatory Memorandum should now contain a separate section dealing with Brexit issues, setting out any pertinent legal framework, UK participation in existing measures and possible future barriers to cooperation.***

31 See European Scrutiny Committee, Twenty-eighth Report, HC 71-xxvi, [Chapter 1](#).

32 Geoblocking prevents Internet users in one country from accessing a site aimed at users in another country: so, for example, a car hire firm might have different sites for foreign tourists, and for local users, quoting different prices and hire terms. Original proposal to the Council and the European Parliament 25 May 2016, new rules 28 November 2016.

33 [PRC0004](#).

34 [HC 791](#) (20 March 2017) Q127.

36. In practice, the extent to which we press the Government will be largely determined by the quality of the initial Explanatory Memorandum. ***If the Explanatory Memorandum is inadequate, we will ask the Government specific questions. In such cases, the Government should provide full answers or, if the Government considers that we have inadvertently asked for something which would impede negotiations if published, a clear and full explanation of the difficulty in producing the information.***

## The negotiating process

37. Our Report on *Transparency of Decision-making in the Council of the European Union*<sup>35</sup> explored *how* decisions were reached within working groups and COREPER, the Committee of ambassadors to the EU, and called for greater transparency. We noted that:

“We share some of the concerns expressed to us about legislative acts ultimately adopted by consensus, which have not been debated in public by Ministers in the Council or where differences in individual Member States’ positions have not been recorded (for example, through the use of minute statements). In such cases, it is difficult to assess which amendments to the original Commission proposal have been ‘won’ in the national interest or ‘lost’.”<sup>36</sup>

38. It is possible that during the negotiating period the Commission will propose legislation which the United Kingdom does not believe to be in its interests, or even in the interests of the majority of EU Member States. In these cases in particular, the House needs regular progress reports on the process of negotiation, to enable us to assess whether or not the U.K.’s concerns are being satisfactorily dealt with.

39. ***The Committee expects to be given information about the progress on individual dossiers in advance of their discussion at COREPER. Some departments are already doing this as a matter of best practice: all should do so.***

40. When we discussed the way in which the UK should now engage with negotiations with the Leader of the House, he noted:

“Although we continue while we are members, of course, to operate within the bounds of the legal duties derived from the treaties, including the duty of sincere co-operation, an approach to negotiations on dossiers that enabled others to paint us as wreckers would not be helpful in the exit negotiations. We will take a firm view on each dossier about how our approach best serves the national interest in terms of the new policy direction that the Prime Minister has set.”<sup>37</sup>

41. We note that the Minister said

“it will be necessary to be fully engaged through COREPER. I do want to reiterate the degree of ministerial oversight that will be exercised. It is probably the case, in answer to the point made by the Chair, that given

35 Second Report of Session 2016–17, [Transparency of decision-making in the Council of the European Union](#), HC 128.

36 HC 128, Paragraph 50.

37 [HC 953](#), Q3.

our current position in the course of exiting from the European Union, it is more important than ever that such ministerial oversight should be engaged. I can say quite clearly that it will be.”<sup>38</sup>

42. Our Report called for greater transparency about the progress of negotiations on EU legislation before it reached Council. The recent Government response to our Report claimed:

“No file will reach a conclusion, or receive political agreement from the UK, without a formal Council decision by Ministers, where of course they are fully accountable to Parliament through the Scrutiny Reserve Resolutions of the scrutiny committees. All General Approaches—with the political weight that involves, as compared with COREPER—will be agreed by Council.”<sup>39</sup>

43. We trust that will indeed be the case, although we consider this approach downplays the importance of COREPER which, as Sir Ivan acknowledged, “is semi executive and semi legislative”.<sup>40</sup> We note that in negotiations on security of gas supply agreement of a negotiating mandate by COREPER was swiftly followed by informal trilogues with the European Parliament without any Council agreement.<sup>41</sup> This may be strictly compatible with the Government’s response, but underlines the extent to which matters can progress without coming to Council.

**44. The scrutiny reserve stipulates that Ministers should not agree to proposals which are still under scrutiny. The reserve loses its force if business is effectively completed in working groups or COREPER without reference to this Committee. Ministers must remain fully engaged in negotiations on current dossiers as well as on Brexit preparations.**

45. We raised the question of whether the Government would be readier to vote against proposals it considered not in the national interest than it has been in the past, and to be clearer about setting out its reasons for objection. The Minister assured us that “If we oppose a particular measure, we should set out very clearly our reasons for doing so”.<sup>42</sup> There was also an indication that the Government might be readier to vote against measures in future:

“Q129 Chair: On some dossiers, the Government have said that, while they were against the proposals in principle, once they had realised that they could not secure a blocking minority, it was better to negotiate than vote against. Has that approach changed as well, because the same principle seems to apply?”

“Mr Jones: The same principle does apply, and it is more likely to apply the closer we get to the point of our departure.”

**46. The Government will of course need to consider how its approach to negotiations on EU legislative proposals plays out in the wider exit negotiations. We would not want**

38 [HC 791](#) (26 October 2016), Q30.

39 First Special Report of Session 2016–2017, [Transparency of Decision Making in the Council of the EU](#), HC 1019.

40 [HC 791](#) (1 February), Q69.

41 See European Scrutiny Committee, Thirty-first Report of Session 2016–17, HC 71-xxix, [Chapter 3](#).

42 [HC 791](#) (20 March 2017) Q128.

**the UK to be seen as a wrecker. Nonetheless, Member States are entitled to oppose Commission proposals and to make their views known. We note that the UK on its own will not constitute a blocking minority. We consider that it may now be appropriate for the Government to be firm in its attitude to proposals it considers misguided, and to be readier to vote against such proposals if it does not manage to negotiate satisfactory changes. In such cases we also urge the Government to make minute statements so that its position is a matter of public record.**

## 3 The Committee's approach

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### General Approach

47. Like the Government, we consider the scrutiny system remains essential, but the fact of the UK's forthcoming withdrawal from the EU has implications for our own approach to the scrutiny process. While all European Documents will need scrutiny at the outset, it is likely that there will be some reduction in the number of documents we consider of political or legal importance.

**48. While our central function of drawing matters of legal or political importance to the attention of the House remains, the assessment of what is, in particular, politically important has to take account of the referendum result. We will reshape our scrutiny to focus on proposals which:**

- could come into force before UK withdrawal from the EU; and/or
- could be significant for the UK, even after withdrawal.

49. We note that the Prime Minister and the Secretary of State for exiting the European Union have said there would be no "cliff edge", and have spoken about a range of transitional periods. We consider it would be imprudent to assume that there will be a 2019 cut-off date after which EU legislation currently under negotiation will not have implications for the UK, whether or not it applies directly.

### Reasoned Opinions

50. Article 5(2) TEU stipulates that "the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level". National parliaments have the right to submit "Reasoned Opinions" where they consider a proposal breaches this principle. If enough national parliaments submit Reasoned Opinions within the deadline (eight weeks after the publication of the last translation into an official language), then a yellow card is triggered, and the Commission must reconsider the proposal.<sup>43</sup>

51. The Explanatory Memorandum for each European Union document sets out the Government's views on subsidiarity, but it is for this committee to decide whether or not to recommend that the House sends a Reasoned Opinion to the Commission. This is something we consider carefully, and it is not unknown for us to reject the Government's subsidiarity concerns.

52. The eight-week deadline for submission puts real pressure on us and on the House. If the House is to come to a timely decision, any recommendation has to be made in enough time for a debate to be scheduled. The Business Managers usually facilitate this efficiently, but just before Christmas they proved unable, for the first time, to provide time on the floor of the House to provide formal endorsement (without debate) of a motion on a Reasoned Opinion which had been debated in European Committee.

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43 In theory, if enough Reasoned Opinions are received an "orange card" is triggered, but this threshold has not been reached. Treaty on European Union -EUR-Lex-Europa eu Article 5 (ex Article 5 TEC):2.

53. We asked David Jones, the Minister of State at DExEU, whether we should continue to submit Reasoned Opinions in the light of the decision to withdraw from the European Union. He responded “I do not really think it is part of my function to advise you how to proceed”.<sup>44</sup> This restraint was admirable, but unnecessary. It would have been useful to have explored the Government’s views.

54. We have recommended two Reasoned Opinions since the referendum result, one on security screening equipment at EU airports<sup>45</sup> and the other on proposals relating to a common consolidated corporate tax base.<sup>46</sup> In each case, our concerns were shared by other Member States. We have also noted subsidiarity concerns about a further proposal, for a “blue card” scheme for skilled migrant workers. On that occasion we did not recommend a Reasoned Opinion, on the grounds that the proposal could potentially benefit skilled United Kingdom workers who wished to work in the EU after withdrawal.<sup>47</sup>

55. The arguments for ceasing to consider Reasoned Opinions are as follows:

- as the United Kingdom is increasingly unlikely to be affected by new EU legislation, it is inappropriate for it to take action which might inhibit the other Member States coming to agreements;
- continuing to submit Reasoned Opinions might have an adverse effect on UK/EU relations;
- if we ceased recommending Reasoned Opinions, staff resources could be deployed on other matters; and
- issues of concern could still be raised through the process of political dialogue between the European Commission and national parliaments.

The arguments for continuing to recommend Reasoned Opinions are:

- Reasoned Opinions will only be effective if a significant proportion of other Member States share our views;
- the thresholds for yellow cards have not been altered, and for the UK to refrain from expressing concern could disadvantage fellow Member States who shared our views;
- as the Government makes clear, for as long as the UK remains a member of the EU, it retains its rights and obligations;
- until the completion of negotiations, it will not be clear which legislation may be of significance to the UK once it has left the EU; and
- the legal analysis would have to be done in any event, and setting out a Reasoned Opinion clarifies the issues for our colleagues in other national parliaments.

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44 [HC 791](#) (26 October) Q38.

45 Proposed Regulation establishing a Union certification system for aviation security screening equipment: 12090/16 + ADDS 1–2, COM (16) 491.

46 [Taxation: a common consolidated corporate tax base 38210, 1370/16 article 115 TFEU, special legislative procedure. Annex: Reasoned opinion of the House of Commons.](#)

47 See European Scrutiny Committee, Ninth Report of Session 2016–17, HC 71-vii, [Chapter 9](#).

56. **On balance, we have decided to continue to take a case-by-case approach to Reasoned Opinions. In cases where other countries' Parliaments share our concerns, failure to submit a Reasoned Opinion could allow proposals to go forward, even when a substantial number of other Member States wished to challenge them. It is possible that a proposal might not conform to the subsidiarity principle, but could benefit UK citizens post-Brexit. In such cases we may decide not to submit a formal Reasoned Opinion, but will set out the subsidiarity concerns in our Report. It will be for other Member States to decide whether or how to proceed. Our analysis will be publicly available.**

### Non document inquiries and flexible working

57. In the past we have occasionally conducted inquiries into matters related to European Union documents, and we expect this will continue as the process of negotiation unfolds. We already have power to appoint subcommittees, and will use these powers if we need to increase our capacity to take evidence or run standalone inquiries.

### Co-ordination of inquiries

58. The decision to leave the European Union is one of immense constitutional and practical importance. There is no department it does not touch, although some are affected more than others. Unsurprisingly, colleagues in other committees have undertaken inquiries to explore the implications of the decision within their policy areas. As the Committee for Exiting the European Union said "A number of other Select Committees in both the House of Commons and the House of Lords have undertaken a great deal of work both in the run-up to and since the referendum".<sup>48</sup> We expect this work to continue, and we welcome it. We recognise that individual Committees will have their own priorities, and it is not for us to constrain their work. Nonetheless, it is important that resources are used effectively, and work is not duplicated. We welcome the fact that, at staff level, information is collated and exchanged to ensure there is awareness of Committees' work on Brexit related issues.

59. We already have arrangements in place to ensure other committees are aware of our work. In addition to drawing key reports to the attention of the departmental select committee(s) concerned, we have encouraged them to appoint reporters to ensure that European work is in the mainstream. A number of them have done so. The staff of the European Scrutiny Committee has expertise and an overview of European legislation in their subject areas. We have asked them to share their expertise with other Committees.

60. The way in which this Committee will work with others depends on: the extent to which we collaborate with other Committees in formal proceedings; the extent to which we are working on similar themes; and the appetite for collaboration. Earlier this session we held a joint evidence session on the steel industry, in which representatives from the Welsh Affairs Committee, the then Business, Innovation and Skills Committee and the Energy and Climate Change Committee joined us in questioning the Minister.<sup>49</sup> On 8 March 2017 we held a joint session with the Environment, Food and Rural Affairs Committee to take

48 First Report of Session 2016–17: [The process for exiting the European Union and the Government's negotiating objectives](#), HC 815, para 6.

49 Oral Evidence taken on 6 July 2016, *Steel; preserving sustainable jobs and growth in Europe*, [HC 533](#).

evidence from the Minister of State for Agriculture, Fisheries and Food.<sup>50</sup> We would be happy to consider further joint evidence sessions, as and when appropriate. We also have the power to request opinions on European Union documents from other Committees, and will use this on any important dossiers.

61. Just as other Committees have appointed European Reporters, we too have identified Committee members willing to take the lead in considering particular subject areas, and, where appropriate, liaising with colleagues on other committees.

### **Making Committee material more accessible**

62. Almost every sitting week, the Committee produces reports on a range of European Documents which provide regular information on important EU developments, together with the Government's position, and the Committee's assessment of what further information is needed. The sheer number of European Union documents, and the requirement that the Committee report those it considers of legal or political importance to the House means that it is difficult to track the progress of individual pieces of legislation. Each of our reports contains a bibliography of previous relevant reports to assist the reader.

63. The summaries of our weekly meeting now open with a section on Brexit related issues. We have also introduced subject specific email alerts. We are taking a more active approach to promoting issues of particular interest. As the withdrawal process continues, we expect to take evidence from Ministers more frequently and publish more stand-alone reports on key European proposals, such as the recent report on the clean energy package.<sup>51</sup>

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50 [HC 1074](#).

51 European Scrutiny Committee, Twenty-ninth Report of Session 2016–27, [EU Energy Policy](#), HC 71-xxvii.

## 4 Ensuring effective scrutiny

64. Adapting our practices to take account of the referendum result will be of little use if the Government does not respect the scrutiny system. When we took evidence from the Leader of the House we raised several matters which have long troubled us:

- departments' compliance with the scrutiny system;
- scrutiny overrides; and
- scheduling of debates.

### Departmental compliance with the scrutiny system

65. If the scrutiny system is to work properly, Government departments need to deposit documents properly, provide Explanatory Memoranda promptly, and ensure that the Committee is updated as negotiations progress. While many dossiers are handled well, it is not unknown for departments to request clearance on a document they have failed to deposit for scrutiny,<sup>52</sup> and all too often the Committee is updated on negotiations *after* decision points, not before them.

66. We are encouraged that when we raised this with the Minister of State, he agreed that "It is important that there be improvements, and we are trying to achieve that".<sup>53</sup> **We put on record that we will in future be readier to call Ministers or Permanent Secretaries to give evidence to account for departmental scrutiny failings.**

### Scrutiny overrides

67. The Committee is concerned that the number of scrutiny overrides appears to be increasing. Some of the overrides were caused by a dispute between the Committee and the Foreign and Commonwealth Office (FCO), which resulted in the FCO refusing to share documents marked with the EU privacy marking, "*limité*", which it was willing to share with the House of Lords. This has now been resolved. There were two main reasons for other overrides. First, the Committee is simply not asked for clearance in good time. Second in cases where a scrutiny waiver has been given on certain conditions, the Government fails to comply with those conditions.

68. This behaviour sits oddly with the professed commitment of the Government to parliamentary scrutiny. **A department's record on scrutiny overrides will be a key consideration when we decide whether or not to call for evidence on scrutiny failings. A poor record in complying with conditions attached to scrutiny waivers will be taken into account in deciding whether to give the benefit of a scrutiny waiver in future.**

### Scheduling debates

69. The House is entitled to the opportunity to give a view on proposals of particular importance at an appropriate stage in negotiations; it does this through debates on European Documents. Over this Parliament and the last, debates recommended by the

52 See Twenty-seventh report HC 71-xxix (2016–17), [chapter 3](#) (18 January 2017).

53 [HC 791 \(26 October\), Q39](#).

Committee have been delayed or sometimes not scheduled at all. We acknowledge that performance has improved over the last few months, but it remains a fact that no debate on a European document has been held on the floor of the House in this Parliament.

70. We discussed debates extensively with the Leader of the House. We asked what criteria should we consider in recommending a document for debate: his answer was:

“my first principle would be to be guided still by the degree of importance that attached to a particular measure [...] I would have thought the ones that might attract the Committee’s attention are any dossiers that look as if they could have a significant impact, in the time we remain within the EU, on British business, the powers of UK institutions and so on.”<sup>54</sup>

That is indeed what guides us. We are disappointed that self-evidently important matters have remained undebated, or have been debated only when it is too late for the House to exercise proper influence.

71. In December the House was invited to approve the Government’s position on opt-ins to the asylum reform package *after* most of the decisions had been taken, despite clear undertakings that the House would be able to give its views on Justice and Home Affairs (JHA) opt-in decisions in a timely way, and the fact that most of our debate recommendations were made months before.<sup>55</sup> We note the Leader of the House’s view that “the Government did not do what we ought to have done in terms of handling that”.<sup>56</sup> We also note his undertaking that:

“I am happy to take up this question of JHA scrutiny with the Secretaries of State concerned. We need to do our utmost to try to make sure that those commitments to enhance scrutiny are delivered.”<sup>57</sup>

72. At the beginning of September the Committee recommended a debate on the EU Canada Trade Agreement (CETA) should take place on the floor of the House. The Government undertook that the House would be given the opportunity to discuss the matter before the European Parliament voted on the matter. The Government honoured that commitment, but did so with very little notice. The debate was in fact held in European Committee, rather than the floor of the House. That Committee was selected on Wednesday 1 February. The debate was held on Monday 6 February. In response to a question from Kate Green on 2 February, the Leader of the House said: “I do not think that the notification given is unusual in terms of the period of notice given for European Committee debates”.<sup>58</sup> Although any Member of the House can speak in a European Committee, they can only do so if they are aware that one has been scheduled. We note that the Business Statement on Thursday made no reference to the CETA debate. The updated European Business paper appeared on Friday—one sitting day before the debate. We note that in similar circumstances the Minister for Immigration rightly apologised

54 [HC 953, Q5.](#)

55 See European Scrutiny Committee, Twenty-fifth Report of Session 2016–17, HC 71-xxiii (2016–17), [chapter 7](#) and [chapter 8](#), Twenty-sixth Report HC 71-xxiv (2016–17), [chapter 8](#).

56 [HC 953, Q32.](#)

57 [HC 953 Q32.](#)

58 See Official Report, 2 February 2017, [col 1210](#).

to the Committee for tabling the motion for a Tuesday debate on the Friday beforehand. We consider it should be unacceptable for European Committee debates to be scheduled without adequate notice.

73. When pressed on the failure to schedule debates promptly, the Leader of the House pointed to the pressures on Government as a result of the the referendum result and the consequent changes in the machinery of government. He also cited pressures on the parliamentary timetable as a result of the changes in sitting hours and in reduction of time available to the Government as a result of the Wright reforms.<sup>59</sup>

74. In response to the point that European documents can be taken at any hour, and that debate was limited to an hour and a half, he considered “it would be contrary to the spirit of the changes that the House has voted to support more than once were we, as a matter of routine, simply to go beyond the moment of interruption. It should be an exception”.<sup>60</sup>

75. In our view Members of the House would be happy to make an exception for debates on matters such as CETA, and there is simply no excuse for the Government’s failure to abide by its undertakings on opt-in debates, which the House was told would “significantly strengthen Parliament’s oversight of EU justice and home affairs matters and make the Government more accountable for the decisions it takes in the EU”.<sup>61</sup> As Mr Warburton said, “there is not much point in scheduling opt-in debates after the Government have already opted in”.<sup>62</sup>

76. We note that Standing Order Number 14(6) specifies that proceedings relating to European Union Documents cannot be backbench business. Such motions are normally couched in general terms, such as “that this House has considered [a matter]”. In contrast, motions on European Union Documents are substantive. They cite the documents in question and invite the House to endorse the Government’s negotiating position in some way. They are amendable. We asked the Leader of the House what would happen if a Government motion relating to any European Union document was defeated. He replied:

“It would depend very much on the nature of that document, and on the terms of the resolution that had been defeated by the House or the text of the alternative resolution that had been substituted. Legally, of course, these decisions about legislation at European level are ones that the Executive can take lawfully under the terms of the European Communities Act 1972. However, I would certainly hold to the view that the Government would, and indeed ought to, for reasons of prudence as well as principle, take very careful account if the House were to vote down the Government’s approach to a particular dossier.”<sup>63</sup>

59 HC 953, Qq13–14; See also House of Commons Reform Committee, First Report of Session 2008–09, [Rebuilding the House](#), HC 1117.

60 [HC 953](#) Q14.

61 [HC 953](#) Q32, see also [HC Deb 51WS](#), 20 Jan 2011.

62 [HC 953](#) Q33.

63 [HC 953](#) Q2.

77. **As the Leader of the House said, Government would need to think very carefully indeed if it were defeated on a motion relating to a European Union Document. It is imperative that debates on European Union Documents are scheduled in good time, and with adequate notice, so that the House can make its views known in an effective manner, on an amendable and meaningful motion.**

78. Now that the Government has committed to a series of general debates on EU matters, in the context of exiting the EU, we have on occasion suggested that particular EU proposals be discussed in those debates as part of the normal process of clearance from scrutiny. **However, unless we have indicated we are content, we do not consider general debates on matters relating EU policies should be regarded as a substitute for debates on documents we have referred.**

## Conclusion

79. Sir Ivan Rogers warned us that, as far as Brexit negotiations were concerned, “I think the first argument is, “What are we going to argue about?””<sup>64</sup> But while those arguments are going on, negotiations on current dossiers will continue. Those negotiations will not simply have implications for the remaining EU countries, or for the months between a new provision coming into force and the UK leaving the EU; they will include matters where there is a danger that “if we are not careful, we will be bound by it in some way that constrains our room to manoeuvre post Brexit”.<sup>65</sup>

80. This Report has been agreed on the day the Prime Minister will give notice of the UK’s intention to withdraw from the EU under Article 50 of the TEU. The Government White Paper on the Great Repeal Bill is expected shortly. The Committee will continue its normal scrutiny work but will also move on to assessing both the terms of the notice and the proposals in the White Paper in the coming weeks, considering their implications both for our continuing scrutiny work and for the wider relationship between Government and Parliament and Parliamentary sovereignty.

81. The Leader of the House has said that “Members would [...] expect to see the Government follow up on their undertakings and deliver on them”.<sup>66</sup> We call on him to make good that promise. As our Chairman said, “The process of exiting the EU should reaffirm the sovereignty of Parliament, not bypass it”.

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64 [HC 791](#) (1 February) Q58.

65 [ibid](#), Q68.

66 [HC 953](#), Q38.

## Conclusions and recommendations

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### The Governments' approach to current dossiers

1. We expect all departments working on dossiers to consider EU proposals both as they would affect the UK as an EU Member State and in terms of their Brexit implications. (Paragraph 18)
2. We recognise the pressures on Whitehall, but it is important to deal with existing dossiers competently in parallel with the Brexit negotiations. We also consider the Government should be more alert to the connection between the two, since looking at proposals for EU legislation from a Brexit perspective highlights the issues that will arise more generally in disentangling the UK from the EU. The machinery for establishing and co-ordinating the UK position needs to be fully worked out and engaged on both types of negotiation. Establishing the Department for Exiting the European Union, and transferring responsibility for the coordination and scrutiny of ongoing dossiers is a valuable step in providing this coordination. Nonetheless there will be points when decisions need to be made at the highest level, by the Prime Minister or Cabinet Committee; the centre of Government will also need dedicated resources to ensure that decision makers are equipped to make those decisions. (Paragraph 19)
3. Like the Government, we consider the scrutiny system, in which every European Document is subject to informed analysis and political oversight remains essential. In current circumstances, a key part of our role is to ensure that the Government is giving proper priority to negotiations on existing dossiers, and minimising the risk that changes to current EU law may disadvantage the UK after Brexit. (Paragraph 20)

### Information provided to the Committee

4. We appreciate the Government's desire for confidentiality in negotiations, but it would be wrong and counter-productive for it to refuse to share factual material and matters which are common knowledge in Brussels. We welcome the Leader of the House's acceptance that the Committee will have legitimate questions about the interrelations between negotiations on existing dossiers, and on wider Brexit-related matters. (Paragraph 28)
5. *Each Explanatory Memorandum should now contain a separate section dealing with Brexit issues, setting out any pertinent legal framework, UK participation in existing measures and possible future barriers to cooperation.* (Paragraph 35)
6. *If the Explanatory Memorandum is inadequate, we will ask the Government specific questions. In such cases, the Government should provide full answers or, if the Government considers that we have inadvertently asked for something which would impede negotiations if published, a clear and full explanation of the difficulty in producing the information.* (Paragraph 36)

## The negotiating process

7. *The Committee expects to be given information about the progress on individual dossiers in advance of their discussion at COREPER. Some departments are already doing this as a matter of best practice: all should do so. (Paragraph 39)*
8. The scrutiny reserve stipulates that Ministers should not agree to proposals which are still under scrutiny. The reserve loses its force if business is effectively completed in working groups or COREPER without reference to this Committee. Ministers must remain fully engaged in negotiations on current dossiers as well as on Brexit preparations. (Paragraph 44)
9. The Government will of course need to consider how its approach to negotiations on EU legislative proposals plays out in the wider exit negotiations. We would not want the UK to be seen as a wrecker. Nonetheless, Member States are entitled to oppose Commission proposals and to make their views known. We note that the UK on its own will not constitute a blocking minority. We consider that it may now be appropriate for the Government to be firm in its attitude to proposals it considers misguided, and to be readier to vote against such proposals if it does not manage to negotiate satisfactory changes. In such cases we also urge the Government to make minute statements so that its position is a matter of public record. (Paragraph 46)

## The Committee's general approach

10. While our central function of drawing matters of legal or political importance to the attention of the House remains, the assessment of what is, in particular, politically important has to take account of the referendum result. We will reshape our scrutiny to focus on proposals which:
  - could come into force before UK withdrawal from the EU; and/or
  - could be significant for the UK, even after withdrawal. (Paragraph 47)
11. We note that the Prime Minister and the Secretary of State for exiting the European Union have said there would be no “cliff edge”, and have spoken about a range of transitional periods. We consider it would be imprudent to assume that there will be a 2019 cut-off date after which EU legislation currently under negotiation will not have implications for the UK, whether or not it applies directly. (Paragraph 49)

## Reasoned Opinions

12. On balance, we have decided to continue to take a case-by-case approach to Reasoned Opinions. In cases where other countries' Parliaments share our concerns, failure to submit a Reasoned Opinion could allow proposals to go forward, even when a substantial number of other Member States wished to challenge them. It is possible that a proposal might not conform to the subsidiarity principle, but could benefit UK citizens post-Brexit. In such cases we may decide not to submit a formal Reasoned Opinion, but will set out the subsidiarity concerns in our Report. It will be for other Member States to decide whether or how to proceed. Our analysis will be publicly available. (Paragraph 56).

### Departmental compliance with the scrutiny system

13. We put on record that we will in future be readier to call Ministers or Permanent Secretaries to give evidence to account for departmental scrutiny failings. (Paragraph 66)

### Scrutiny overrides

14. A department's record on scrutiny overrides will be a key consideration when we decide whether or not to call for evidence on scrutiny failings. A poor record in complying with conditions attached to scrutiny waivers will be taken into account in deciding whether to give the benefit of a scrutiny waiver in future. (Paragraph 68)

### Scheduling debates on EU documents

15. The House is entitled to the opportunity to give a view on proposals of particular importance at an appropriate stage in negotiations; it does this through debates on European Documents. (Paragraph 69)
16. As the Leader of the House said, Government would need to think very carefully indeed if it were defeated on a motion relating to a European Union Document. It is imperative that debates on European Union Documents are scheduled in good time, and with adequate notice, so that the House can make its views known in an effective manner, on an amendable and meaningful motion. (Paragraph 77)
17. Unless we have indicated we are content, we do not consider general debates on matters relating EU policies should be regarded as a substitute for debates on documents we have referred. (Paragraph 78)

# Appendix: Correspondence between the Chairman of the Committee and the Prime Minister

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## Letter from Sir William Cash to Rt Hon Theresa May, 28 February 2017

Dear Prime Minister

I am writing on behalf of the European Scrutiny Committee to emphasise the importance of ensuring that the centre of Government has the capacity to focus on negotiations on current EU proposals alongside the negotiations for exit from the EU.

In our routine scrutiny, we regularly come across issues which could have grave implications for the UK once it is outside the European Union. While individual departments and Ministers may retain frontline responsibility for policy in their area, we recognise that policy priorities have to be set from the centre. Moreover, there may be difficult trade-offs, which require decisions from the Prime Minister alone or the relevant Cabinet Committee. Those decisions must be supported by properly informed analysis, which will include an understanding of developments in key current dossiers, such as data protection, or the digital single market.

Giving DExEU responsibility for policy and coordination of the scrutiny system is a welcome step in making sure that the implications of current legislative negotiations are taken into account in the Brexit process. I am sure you share, with us, a desire to ensure that the centre of Government is similarly equipped to be alert to the interplay between what has until now been business as usual and exit negotiations. I would welcome information on the systems established to ensure this.

Yours ever,

Bill

Cc Rt Hon David Davis MP, Rt Hon Hilary Benn MP, Rt Hon Lord Boswell of Aynho [...]

## Letter from Rt Hon Theresa May to Sir William Cash, 27 March 2017

Dear Bill

Thank you for your letter of 28 February.

You are right to highlight the importance of ensuring that we continue to focus on current European Union proposals alongside our exit negotiations. Responsibility for this lies with the Department for Exiting the European Union (DExEU) and the UK Permanent Representation to the European Union (UKRep).

DExEU has grown quickly to ensure that it has the capacity to manage ongoing EU business during the important negotiations on our exit. It is also providing guidance to other Departments on handling EU business, including considering whether these might have implications for the UK's withdrawal.

You asked about the systems in place to manage the links between ongoing EU business and exit negotiations. DExEU has a secretariat function, working closely with the Cabinet Office, to make sure policy on the negotiations has collective Cabinet Committee clearance in advance of EU decisions. This is done through the EU Exit and Trade Committee, which I chair, and the EU Exit and Trade (European Affairs) sub-Committee, chaired by the Chancellor of the Duchy of Lancaster.

DExEU also oversees a network of scrutiny coordinators in Departments to ensure that the two Parliamentary EU Scrutiny Committees are able properly to examine the Government's approach to EU business in the Council of Ministers. I understand that your Clerk and the Clerk from the Lords EU Committee recently attended a meeting of this group at DExEU, which was welcome. DExEU will continue to emphasise to Departments the important scrutiny role your Committees will continue to play while we remain an EU member.

In addition, DExEU oversees many of the valuable cross-Whitehall fora on managing the UK position on EU dossiers. These facilitate frequent and regular engagement across Government on current EU business, ensuring experts in all policy areas can contribute specific policy expertise to the decision-making process.

I hope this reassures you that the Government is continuing to focus on current EU proposals alongside our exit negotiations. I am copying this letter to David Davis MP, Hilary Benn MP, Lord Boswell of Aynho, Oliver Robbins, Tim Barrow and the Clerks of both EU Scrutiny Committees.

Thank you, once again, for writing.

Yours ever

Theresa

# Formal Minutes

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**Wednesday 29 March 2017**

Members present:

Sir William Cash, in the Chair

Steve Double

Chris Stephens

Richard Drax

Mr Andrew Turner

Kate Green

Mr David Warburton

Mr Jacob Rees-Mogg

Draft Report (*Brexit and the European Scrutiny System in the House of Commons*), proposed by the Chair, brought up and read.

*Ordered*, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 81 read and agreed to.

Summary agreed to.

Correspondence between the Chairman and the Prime Minister was appended to the Report.

*Resolved*, That the Report be the Thirty-eighth Report of the Committee to the House.

*Ordered*, That the Chair make the Report to the House.

*Ordered*, That embargoed copies of the Report be made available (Standing Order No. 134)

[Adjourned till Wednesday 19 April at 1.45pm.]

## Oral evidence

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The report draws upon the following oral evidence:

### **Government's approach to European Scrutiny (HC 953)**

**Wednesday 18 January 2017**

**Rt Hon David Lidington CBE MP**, Leader of the House of Commons

[Q1–41](#)

### **EU-UK relations in preparation for Brexit (HC 791)**

**Wednesday 26 October 2016**

**Rt Hon Mr David Jones MP**, Minister of State, Department for Exiting the European Union

[Q1–48](#)

**Wednesday 1 February 2017**

**Sir Ivan Rogers KCMG**, former Permanent Representative of the UK to the European Union

[Q49–91](#)

**Monday 20 March 2017**

**Sir Timothy Earle Barrow KCMG**, LVO, MBE, Foreign and Commonwealth Office, **Rt Hon Mr David Jones MP**, Minister of State, Department for Exiting the European Union

[Q92–155](#)

## Published written evidence

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The following written evidence was received in connection with the Committee's *Post Referendum Consultation* (HC 797) and can be viewed on the [publications page](#) of the Committee's website.

PRC numbers are generated by the evidence processing system and so may not be complete.

- 1 Catherine Macintosh ([PRC0001](#))
- 2 Children's Rights Alliance for England and Together (Scottish Alliance for Children's Rights) with input from Children in Wales ([PRC0012](#))
- 3 Convention of Scottish Local Authorities (COSLA) ([PRC0015](#))
- 4 Derek Cole ([PRC0006](#))
- 5 Dr Aldo Zammit Borda, Anglia Ruskin University ([PRC0004](#))
- 6 Dr Amelia Hadfield, Canterbury Christ Church University ([PRC0017](#))
- 7 Dr Laurence Ferry, Durham University ([PRC0002](#))
- 8 Dr Meg Thomas ([PRC0005](#))
- 9 Professor Phil Syrpis, University of Bristol ([PRC0010](#))
- 10 Professor Rebecca Lingwood, Queen Mary University of London ([PRC0016](#))
- 11 The Bingham Centre for the Rule of Law ([PRC0011](#))
- 12 Wilfred Aspinall ([PRC0013](#))
- 13 Wilfred Aspinall ([PRC0014](#))

## List of Reports from the Committee during the current session

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All publications from the Committee are available on the publications page of the Committee's website. The reference number of the Government's response to each Report is printed in brackets after the HC printing number.

First Report	Documents considered by the Committee on 19 May 2016	HC 71-i
Second Report	Transparency of decision-making in the Council of the European Union	HC 128 (HC 1019)
Third Report	Documents considered by the Committee on 25 May 2016	HC 71-ii
Fourth Report	Documents considered by the Committee on 8 June 2016	HC 71-iii
Fifth Report	Report of the Committee on Session 2015–16	HC 177
Sixth Report	Documents considered by the Committee on 15 June 2016	HC 71-iv
Seventh Report	Documents considered by the Committee on 6 July 2016	HC 71-v
Eighth Report	Documents considered by the Committee on 13 July 2016	HC 71-vi
Ninth Report	Documents considered by the Committee on 20 July 2016	HC 71-vii
Tenth Report	Documents considered by the Committee on 7 September 2016	HC 71-viii
Eleventh Report	Documents considered by the Committee on 14 September 2016	HC 71-ix
Twelfth Report	EU Asylum Reform	HC 71-x
Thirteenth Report	Documents considered by the Committee on 12 October 2016	HC 71-xi
Fourteenth Report	Documents considered by the Committee on 19 October 2016	HC 71-xii
Fifteenth Report	Documents considered by the Committee on 26 October 2016	HC 71-xiii
Sixteenth Report	Aviation Security	HC 71-xiv
Seventeenth Report	Documents considered by the Committee on 2 November 2016	HC 71-xv
Eighteenth Report	Documents considered by the Committee on 16 November 2016	HC 71-xvi
Nineteenth Report	Documents considered by the Committee on 23 November 2016	HC 71-xvii

Twentieth Report	EU Asylum Report: opt-in decisions	HC 71-xviii
Twenty-first Report	Europol: opt-in Debate	HC 71-xix
Twenty-second Report	Documents considered by the Committee on 7 December 2016	HC 71-xx
Twenty-third Report	Taxation: a common consolidated corporate tax base	HC 71-xxi
Twenty-fourth Report	Documents considered by the Committee on 14 December 2016	HC 71-xxii
Twenty-fifth Report	Documents considered by the Committee on 11 January 2017	HC 71-xxiii
Twenty-sixth Report	Documents considered by the Committee on 18 January 2017	HC 71-xxiv
Twenty-seventh Report	European Semester 2017	HC 71-xxv
Twenty-eighth Report	Documents considered by the Committee on 25 January 2017	HC 71-xxvi
Twenty-ninth Report	EU Energy Policy	HC 71-xxvii
Thirtieth Report	Documents considered by the Committee on 1 February 2017	HC 71-xxviii
Thirty-first Report	Documents considered by the Committee on 8 February 2017	HC 71-xxix
Thirty-second Report	Documents considered by the Committee on 22 February 2017	HC 71-xxx
Thirty-third Report	Documents considered by the Committee on 1 March 2017	HC 71-xxxi
Thirty-fourth Report	Documents considered by the Committee on 8 March 2017	HC 71-xxxii
Thirty-fifth Report	Documents considered by the Committee on 15 March 2017	HC 71-xxxiii
Thirty-sixth Report	Documents considered by the Committee on 22 March 2017	HC 71-xxxiv
Thirty-seventh Report	Documents considered by the Committee on 29 March 2017	HC 71-xxxv
First Special Report	Transparency of decision-making in the Council of the European Union: Government Response to the Committee's Second Report	HC 1019