



House of Commons  
European Scrutiny Committee

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**Brexit and the  
European Scrutiny  
System in the  
House of Commons:  
Government Response  
to the Committee's  
Thirty-Eighth Report of  
Session 2016–17**

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**First Special Report of Session 2017–19**

*Ordered by the House of Commons  
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## 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)

[Douglas Chapman MP](#) (*Scottish National Party, Dunfermline and West Fife*)

[Geraint Davies MP](#) (*Labour/Cooperative, Swansea West*)

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

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

[Mr Marcus Fysh MP](#) (*Conservative, Yeovil*)

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

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

[Kelvin Hopkins MP](#) (*Independent, Luton North*)

[Darren Jones MP](#) (*Labour, Bristol North West*)

[Mr David Jones MP](#) (*Conservative, Clwyd West*)

[Stephen Kinnock MP](#) (*Labour, Aberavon*)

[Andrew Lewer MP](#) (*Conservative, Northampton South*)

[Michael Tomlinson MP](#) (*Conservative, Mid Dorset and North Poole*)

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

[Dr Philippa Whitford MP](#) (*Scottish National Party, Central Ayrshire*)

### 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).

### Publications

Committee reports are published on the [Committee's website](#) and in print by Order of the House. Evidence relating to this report is published on the [inquiry publications page](#) of the Committee's website.

### Committee staff

The staff of the Committee are Dr Lynn Gardner (Clerk), Kilian Bourke, Alistair Dillon, Leigh Gibson, Nishana Jayawickrama and Foeke Noppert (Clerk Advisers), Arnold Ridout (Counsel for European Legislation), Françoise Spencer (Deputy Counsel for European Legislation), Joanne Dee (Assistant Counsel for European Legislation), Mike Winter (Second Clerk), Sarah Crandall (Senior Committee Assistant), Sue Beeby, Rob Dinsdale and Beatrice Woods (Committee Assistants), Ravi Abhayaratne and Paula Saunderson (Office Support Assistants).

### Contacts

All correspondence should be addressed to the Clerk of the European Scrutiny Committee, House of Commons, London SW1A 0AA. The telephone number for general enquiries is 020 7219 3292; the Committee's email address is [escom@parliament.uk](mailto:escom@parliament.uk)

# First Special Report

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On 7 April 2017, the European Scrutiny Committee published its Thirty-Eighth Report of Session 2016–17, *Brexit and the European Scrutiny System in the House of Commons* (HC 1124). The Government has now responded through a letter from Rt Hon David Davis MP, Secretary of State for Exiting the European Union. We publish this letter as an Appendix to this Special Report.

## Appendix

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Thank you for the Committee's report which was published on 7 April. I note that David Jones MP, as then Minister of State for Exiting the European Union, appeared before the Committee with Sir Tim Barrow on 20 March to give evidence on our approach to scrutiny and EU exit. I am pleased to provide the Government's response to the report below.

The Government remains committed to engaging with Parliament as we take forward exit negotiations, and Lord Callanan and I both consider the EU Scrutiny Committees to be an integral part of this engagement.

We remain a member of the EU until the process of withdrawal is completed. Until we have left, we will continue to play a role in representing the interests of the people of the United Kingdom and continue to contribute to the EU agenda. As the Commission itself has made clear, the UK remains a member state of the EU, subject to all the rights and obligations of membership. As such, we continue to negotiate, implement and apply EU legislation.

### THE GOVERNMENT'S APPROACH TO CURRENT DOSSIERS

**Your recommendation 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)*

The Prime Minister's letter of 27 March 2017 to the Chairman of the Committee acknowledged that the Committee was right to highlight the importance of ensuring we focus on business as usual alongside our exit negotiations. Her letter clearly set out the role that DExEU plays in that process and explained the Government architecture for both managing these links, and for taking decisions at Ministerial and official level. DExEU Ministers have already made arrangements to ensure that appropriate dedicated resources are in place, and will keep these processes under review as we proceed through the negotiations. DExEU Ministers stand ready to appear before the Committee to assist in the Committee's work.

## INFORMATION PROVIDED BY THE COMMITTEE

**Your recommendation 4.** *We appreciate the Government's desire for confidentiality in negotiations, but it would be wrong and counterproductive 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 Government recognises that the Committee depends on comprehensive Explanatory Memoranda setting out the Government policy stance on proposals and other documents submitted for scrutiny.

The Government's approach to ongoing EU business is centred around the need to ensure that our handling of ongoing EU business remains consistent and constructive, and takes into account possible implications of ongoing files for our future relationship with the EU following our exit. The Prime Minister made clear that we want to agree a deep and special partnership with the EU, covering both economic and security cooperation, alongside agreeing the terms of our withdrawal. She has made clear the UK's desire for the EU to remain strong and prosperous and for the UK to be its closest friend and neighbour. It is important that we stay engaged. Doing so protects our rights, and lays the path to the strong and wide-ranging relationship we wish to have with the EU after our departure.

I am therefore pleased to say that the Government will act on the Committee's recommendation and ensure that EU exit implications are set out as fully as we can in future Explanatory Memoranda.

Our approach will be to cover these implications in the established “Policy Implications” section by amending the template with a new heading “Policy Implications, including exit implications where appropriate”. This approach recognises that in practice it will be difficult to disassociate exit implications from wider policy commentary. This approach also recognises that there may continue to be documents submitted for scrutiny where there are no substantive exit implications.

The Government also recognises that the Committee will continue to press if, in its view, the Government has fallen short in its commentary on exit implications.

We have repeatedly stated in Parliament that we will be as open as we can without damaging the national interest, so there may be occasions when it will be difficult to set out as fully as the Committee would hope why it would not be possible to answer the Committee’s questions.

This principle was supported by the House during the Opposition Day debate on 12 October last year. Indeed, this point was also acknowledged by Lords EU Select Committee in their Parliamentary Scrutiny report: “We would expect parliamentary scrutiny of the negotiations to strike an appropriate balance between transparency and confidentiality, while achieving the overarching objective of holding the Government effectively to account.”

It will therefore be our intention that our approach to EMs will be informed by the positions that will develop throughout the negotiations, as well as the examples of good practice and the guiding principles set out in your report.

## THE NEGOTIATING PROCESS

**Your recommendation 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 Government acknowledges the importance of regular and ongoing dialogue with the Committee on dossier negotiation. Current guidance to departments makes it clear that the Committee should be updated ahead of positions to be taken in COREPER, particularly when a dossier is likely to move quickly to a Council for adoption of a position, or where

COREPER adopts an informal mandate for trilogue negotiations. DExEU officials are reinforcing this message with departments to ensure it becomes practice across government. This was discussed at a meeting of departmental scrutiny coordinators on 8 May which was attended by your Clerk.

The Government has made it clear that it will continue to negotiate on ongoing business in the national interest. This may include taking positions where we vote against a proposal in certain circumstances, and where we judge it appropriate, to record our position in a minute statement.

## THE COMMITTEE'S GENERAL APPROACH

**Your recommendation 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)*

The Government recognises the approach the Committee is taking to reshape its 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.

The Government considers that this reshaping provides an opportunity to look again at whether there is scope for a more flexible approach to the range of documents submitted for scrutiny. The Committee's legacy report from the 2013 scrutiny reform inquiry (38th Report, 2014/15, HC 918) proposed a number of categories of documents that could be exempted from scrutiny; some with conditions; whilst considering other proposals put forward by the Government should continue to be deposited. Those agreed for exemption were listed in the annex to that report with the Committee's views on other proposals put forward.

If the Committee is content to move forward with an agreement on that basis, we would consult with the House of Lords European Union Committee to see if they are content to support this approach.

Beyond these categories that the Committee would be content to exempt from scrutiny, it would be helpful to have an agreement with both committees that if the Government can make a case to the Committee staff that in the Government's view a particular document raises no important policy or exit implications, that individual documents can be exempted from deposit. That would be consistent with the ad hoc approach that has been taken to some routine documents, but importantly the decision to request deposit with an EM would remain with the Committee. If that approach is acceptable to the Committee we will also consult with the European Union Committee.

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)*

One of our key principles for the negotiations is to build a bridge from our exit to our future partnership, to allow businesses and people time to adjust, and to allow new systems to be put in place. As the Prime Minister has said, people, businesses and public services should also only have to plan for one set of changes.

We are therefore proposing a strictly time-limited implementation period where we continue to have access to one another's markets on current terms and take part in existing security measures. The length of the period should be determined simply by how long it will take to prepare and implement the new processes and new systems that will underpin our future partnership. We expect it to last around two years.

We want to agree this as early as possible, so as to provide certainty.

## REASONED OPINIONS

**Your recommendation 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).*

The Government has noted the Committee's intention to take a flexible approach to delivering Reasoned Opinions. While the UK remains an EU member state, we continue to view subsidiarity as a crucial principle that should be at the heart of the work of the EU institutions, and we will continue to provide analysis of the subsidiarity implications of individual proposals and dossiers going forward to help the Committee shape its position.

## DEPARTMENTAL COMPLIANCE WITH THE SCRUTINY SYSTEM

**Your recommendation 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

**Your recommendation 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)*

The Government acknowledges the importance the Committee attaches to departments getting scrutiny right.

It acknowledges that the Committee will call Ministers to account for scrutiny failures including when scrutiny overrides have been poorly justified; in particular where departments failed to anticipate the need for clearance or a scrutiny waiver, or where difficulties have arisen because of slow or incomplete replies to questions; and also in those circumstances where the Government did not, in the Committee's view, meet the conditions set out in waivers provided to the Government. These messages were reinforced most recently at a meeting of departmental scrutiny coordinators on 8 May attended by your clerk.

## SCHEDULING DEBATES ON EU DOCUMENTS

**Your recommendation 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 to EU policies should be regarded as a substitute for debates on documents we have referred. (Paragraph 78)*

While we remain a member of the EU we will continue to observe and comply with our scrutiny commitments. This includes recognising the importance of the timely scheduling of debates which the Committee acknowledged had improved in recent months. We accept that general EU or Brexit-themed debates (or debates on the Withdrawal) are not a substitute for discussion on individual or specific proposals. However they do provide an additional and detailed level of scrutiny, and there may be occasions when it is helpful for scrutiny dossiers to form part of those wider debates. We will continue to work with the Committee to identify such opportunities.

Finally, I would like to confirm that ministers and my officials are ready to work closely with your Committee on the scrutiny arrangements that might be required during the implementation period following EU exit, once the design of that period becomes clearer.

RT HON DAVID DAVIS MP  
SECRETARY OF STATE FOR EXITING THE EUROPEAN UNION