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# Not so fast!

## Westminster's (continuous) oversight of European affairs post-Brexit

By Agata Gostyńska-Jakubowska

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- ★ Brexit has changed the work of British parliamentarians. Before the 2016 referendum MPs were rarely drawn into European affairs. But since the vote to leave, the UK's relationship with the EU has left British lawmakers with little time to think of anything else.
- ★ Westminster has also become more assertive vis-à-vis the government. This is rare in British politics because MPs almost always follow the instructions of their party leaders. But the government does not have a majority in parliament and the issue of the UK's relationship with the EU has cut across party lines; lots of MPs – including Conservatives – have obstructed the government's plan for exiting the EU.
- ★ Parliament's confrontation with the government over Brexit could enhance its oversight of EU matters in the future. But those in power need to learn lessons from past mistakes. The government needs to understand that parliamentary scrutiny is not a zero sum game and parliament is not the enemy: it can often bring about improvements in government policy, or give it added legitimacy through its endorsement. A government that has parliamentary backing for its negotiating objectives represents a persuasive force in the eyes of the EU-27.
- ★ The UK will not be able to make a clean break from the EU and its laws, irrespective of whether it leaves the EU with or without a deal. Westminster will still want to assess EU legislation; but its existing structures are ill-suited to deal with that task.
- ★ Today, the Brexit-related work of the House of Commons is divided between different committees. This can lead to duplication or contradictory recommendations on the same issues and makes it easier for the government to cherry-pick the ideas it likes and ignore the rest.
- ★ The House of Commons should abolish the European scrutiny committee and concentrate all EU and Brexit scrutiny in the hands of the exiting the EU committee, which was created to monitor the work of the government's department for exiting the EU (DExEU). But that committee should evolve into a new European affairs committee if the government decides to abolish DExEU.
- ★ In parallel to holding the government to account, Westminster should strengthen its own network of contacts with national parliaments in other EU member-states and with the EU institutions in Brussels. The government has pledged that it will co-operate closely with Westminster in the next phases of Brexit, but in the past it backtracked on its promises – and parliamentarians need a back-up plan.
- ★ Whether MPs like it or not, leaving the EU is just the beginning of a long process of defining the UK's place in Europe. Better oversight of EU affairs will make it easier for Westminster to navigate this uncharted territory.

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For decades after the UK joined the European Economic Community (EEC), unless the government of the day was focused on a specific EU matter, such as a new treaty, British MPs tended to pay little heed to European affairs. But for almost three years Brexit and the UK's future relationship with the EU-27 have had parliament's undivided attention.

It may be anathema to many Brexiters, but leaving the EU will not mean a clean break from the EU and its laws. EU legislation will continue to have an important impact on the UK irrespective of whether the UK leaves with a withdrawal agreement or not. Under the withdrawal agreement the UK will have to apply EU law until the end of the transition period, currently planned for December 2020. The UK government has also committed to apply EU rules for goods unilaterally if the so-called backstop, which creates a common customs territory between the UK and the EU-27, kicks in.<sup>1</sup> The UK would also align with some EU laws if London decided to pursue a softer form of Brexit. And, even if there is no deal, the UK will probably align with EU rules at least temporarily, to help

provide much-needed continuity for British business and citizens. Westminster will want to assess EU legislation, but will have to adapt its current scrutiny structures to an as yet unknown post-Brexit reality.

This policy brief assesses Westminster's past scrutiny of government policy on the EU and asks whether parliamentarians' keen interest in the future EU-UK relationship could translate into more effective parliamentary oversight of European matters after Brexit. It also makes a series of recommendations for improving co-operation between parliament and government in the next phases of Brexit, and looks at ways to keep Westminster plugged into EU decision-making.

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## Looking back: Westminster's scrutiny of EU affairs

Ironically, given the strength of many Brexiters' views, EU affairs have generally had a low profile in the House of Commons. Members of Parliament have tended to take the view that the key to winning re-election was a good track record of working on domestic issues rather than the EU. They were reluctant to sit on the 16-member European scrutiny committee (ESC), which examines the government's EU policy and considers EU documents, or even to take part in debates when the ESC decided an EU document needed more discussion.<sup>2</sup> In his oral evidence to the House of Lords' constitution committee in January 2019 David Lidington, Prime Minister Theresa May's de facto deputy, complained that when he was Europe minister he found it difficult to get departmental select committees (which shadow the work of individual government departments) to focus on the European dimension of their business.<sup>3</sup> The ESC can ask departmental select committees for an opinion on an EU document, but the committees are not legally obliged to provide one.

This limited interest in European matters among neutral or even pro-EU MPs allowed staunch eurosceptics like the Conservative Sir William Cash or Labour's Kate Hoey, who used their membership of the ESC to express their distaste for European integration, to dominate the debate. Ten out of the 16 current members of the ESC are reported to have voted to leave the EU in 2016.<sup>4</sup> Unlike

most chairs of select committees in the Commons, the chair of the ESC is not elected by the whole House of Commons but by the committee members; Cash has held the position since 2010.

But this inadequate interest in EU affairs is not entirely down to MPs' passivity. The government, not parliament, usually determines what is debated in the Commons; and the government has often deprived pro-EU MPs of the chance to confront eurosceptics by refusing to allocate time for EU-related debates in the Commons.

The approach of MPs to EU affairs contrasts sharply with the attitude of the House of Lords. Unlike MPs, who are directly elected, peers are appointed or are hereditary members of the UK Parliament, or senior members of the clergy; they tend to have more time to delve into EU matters than MPs, who also have constituency responsibilities. The Lords EU select committee is renowned for its expertise and high quality reports.<sup>5</sup> But elected MPs enjoy greater democratic legitimacy than members of the Lords, however knowledgeable the latter may be. As a result MPs stand a greater chance of influencing the public debate about European affairs and also the government's actions. This policy brief mainly focuses, therefore, on parliamentary oversight of EU matters in the House of Commons.

1: The Irish backstop was the biggest bone of contention in the divorce talks between the EU and the UK. It serves as an all-weather insurance policy for Dublin and provides that, unless both parties conclude the agreement on the future relations which would obviate the need for a hard border on the island of Ireland, the UK will remain in a customs union with the EU, and Northern Ireland will remain part of the EU's regulatory area.

2: Agata Gostyńska-Jakubowska, 'A ten-point plan to strengthen Westminster's oversight of EU policy', CER policy brief, May 2015.

3: House of Lords, Select committee on the constitution, 'Uncorrected oral evidence: Parliamentary scrutiny of treaties', January 30<sup>th</sup> 2019.

4: Calculation from TheyWorkForYou, data and information from official parliamentary sources, March 2019.

5: Julie Smith, 'MPs are from Mars, peers are from Venus: Westminster and the EU', UK in a Changing Europe, September 11<sup>th</sup> 2015.

## Westminster's interest in the UK's relationship with the EU: Late to the party?

The UK's referendum in 2016 has forced pro-European MPs to engage in the public debate about European matters, even if that means going head-to-head with eurosceptics. Two thirds of the MPs on the Commons exiting the European Union committee voted to remain in the Union in 2016.<sup>6</sup> While many of them accept the vote to leave the EU, they have argued for a softer Brexit than their eurosceptic colleagues.

*“Since the referendum Westminster has become increasingly assertive about its role in holding the government to account for its Brexit strategy.”*

The outcome of the referendum has also resulted in an increase in select committee inquiries into European matters. Written evidence submitted on March 14<sup>th</sup> to the Commons liaison committee, which is composed of the chairs of the various select committees and takes evidence from the prime minister, showed that select committees have conducted 67 inquiries and produced 58 Brexit-related reports (24 per cent of the total) during this parliament. That compares with just 22 reports (3 per cent of the total) between 2010 and the 2016 referendum.<sup>7</sup> The referendum has as a result led to a broader distribution of EU business across the House. Today, the ESC is just one of many Commons committees scrutinising aspects of the UK's relationship with the EU.

However, Westminster's interest in Brexit should not be seen as an increased interest in the day-to-day business of the EU. The overall attendance of ESC members has never been very impressive – reaching 66.9 per cent in the 2015-2016 session. But the latest attendance statistics published by the ESC show that in the 2017-2019 session the turnout was even lower at 58.6 per cent.<sup>8</sup> The spike in Brexit-related activity has not yet translated into a greater understanding in the Commons of how the EU operates.<sup>9</sup> Because public interest in the EU has surged as a result of Brexit, MPs' pronouncements on Europe have had a higher profile in the media, regardless of whether they have done their homework on the implications of leaving the EU or not.

But it would be unfair to say that Brexit has not brought any change to Westminster. Since the referendum

Westminster has become increasingly assertive about its role in holding the government to account for its Brexit strategy. It has been helped in this process by a series of legal challenges by various individuals, perhaps the most famous being Gina Miller's case to force the government to seek parliament's authorisation before triggering Article 50 – the legal process for exiting the EU. May's efforts to control the Brexit process have seen MPs resort to all sorts of arcane parliamentary conventions to influence the government's negotiating position.

There are two reasons behind parliament's increased assertiveness over the Brexit process. First, since the 2016 referendum, many MPs have been acting contrary to their own previously stated beliefs. Most MPs backed remain in the referendum, but the Commons, fearing a public backlash if it seemed to be resisting the referendum result, voted by an overwhelming majority in 2017 to authorise the prime minister to notify the UK's intention to leave the EU. Nevertheless, since then lots of MPs – including Conservatives – have tried to obstruct the government when they thought its plans for exiting the EU would harm the national interest – or their preferred version of Brexit.

This is rare in British politics. MPs almost always represent a specific party, support its manifesto and obey its leaders. But the EU issue has always transcended party lines and loyalty. The outcome of the referendum has only deepened these divisions and made the government's job harder. The cracks in Westminster's tribal political system have been highlighted by a number of MPs quitting the two main parties to form a new party called Change UK – The Independent Group, and by many others rebelling repeatedly against their party's instructions on Brexit-related votes.

Second, this change in relations between parliament and government has been facilitated by May's ill-advised decision to hold a snap general election in 2017. May lost her majority and was forced to form a minority government propped up by the Northern Irish Democratic Unionist Party (DUP). With no reliable majority, she has found it incredibly difficult to push through her Brexit plans, with the Northern Ireland backstop being a particular problem.<sup>10</sup> One of May's biggest mistakes has been her failure to appreciate the need for cross-party consultations over Brexit.

6: Calculation from TheyWorkForYou, data and information from official parliamentary sources, March 2019.

7: Adam Cygan, Philip Lynch and Richard Whitaker, 'Select Committees and Brexit', Written evidence to the Commons liaison committee, March 1<sup>st</sup> 2019.

8: House of Commons, European scrutiny committee, Formal minutes and attendance, see: [www.parliament.uk](http://www.parliament.uk).

9: Author's interviews with Westminster officials.

10: John Springford, 'Theresa May's Irish trilemma', CER insight, March 7<sup>th</sup> 2018.

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## Westminster in the Brexit talks: Bystander or veto player?

Under the Constitutional Reform and Governance Act (CRAG), the British government needs to lay the final text of any international treaty before the Commons and the Lords 21 days before it intends to ratify it.<sup>11</sup> It has, however, no formal obligation to inform UK Parliament about progress in international negotiations. But the Brexit talks are like no other international negotiations that the UK has carried out before; their outcome will have far-reaching implications for the British economy and UK citizens. Under pressure from MPs, the then-Secretary of State for Exiting the European Union, David Davis, pledged that the UK Parliament would get a so-called 'meaningful vote' on the withdrawal agreement and the political declaration on future relations. He also promised that Westminster would be able to scrutinise the exit talks to the same degree as the European Parliament. But to meet that commitment, the government would not only have had to share its negotiating objectives with MPs, but also to provide them with confidential information about progress in the talks, and take their recommendations on board.<sup>12</sup>

*“When the prime minister finally decided to put the agreement to a vote in January, parliamentarians showed her their teeth.”*

The government failed to deliver on this promise. It repeatedly misled MPs on whether it had made assessments of the impact of Brexit on different sectors, and refused to share its full legal advice. As a result, for the first time in modern history, in December 2018 the Commons found the government in contempt of parliament. The prime minister also withdrew a parliamentary vote on the withdrawal agreement in December 2018 after many MPs had already spoken in a debate on the agreement.

When the prime minister finally decided to put the agreement to a vote in January, parliamentarians showed her their teeth. May lost by 230 votes, the largest ever defeat suffered by a British government. MPs also instructed the government to replace the current Irish

backstop with alternative solutions – another rare move by the parliament. When May put her deal to a vote for a second time, with additional reassurances from the EU-27 that they did not intend to keep the UK trapped in the backstop forever, MPs still remained unconvinced. The government was defeated again for the second time on March 12<sup>th</sup>, albeit by a reduced margin of 149 votes. On March 14<sup>th</sup> the Commons agreed that the prime minister should ask the EU-27 to extend the article 50 deadline from the original exit date of March 29<sup>th</sup>. In response the European Council agreed to postpone the UK's departure, until May 22<sup>nd</sup> if the Commons voted in favour of the withdrawal agreement by March 29<sup>th</sup>, or until April 12<sup>th</sup> if the Commons failed to approve the agreement by March 29<sup>th</sup>.<sup>13</sup> The government held another vote on its withdrawal agreement on March 29<sup>th</sup> but it was defeated again, this time by a margin of 58 votes. Fearing a no-deal exit, MPs also passed a law giving parliament the legal ability to compel the prime minister to seek an extension of the article 50 talks. This law (which began life as the so-called 'Cooper-Letwin Bill') reduces the risk of the UK crashing out. The Commons also held two series of indicative votes to see if there was a majority for any other method of avoiding a no-deal Brexit. None of the options secured a parliamentary majority. Theresa May then started consultations with the Labour opposition and asked the EU for a further extension.

Parliament's repeated rejection of May's deal has complicated the UK's orderly withdrawal from the EU. It has also irked European institutions and capitals who have long wanted to turn the page and begin talks with the UK about the future relationship. EU leaders worry that the extension of the talks will only prolong uncertainty about the UK's direction of travel and complicate the EU's decision-making process. But the EU-27 do not want a no-deal Brexit either, and so on April 10<sup>th</sup> they gave the UK another extension, this time until October 31<sup>st</sup>.<sup>14</sup> The extension is flexible and allows the UK to leave before that date if it ratifies the withdrawal agreement earlier. If, however, the UK fails to hold European Parliament elections in May, then it will have to leave the EU with no deal on May 31<sup>st</sup> (though the EU seems to have left itself some room to offer a further extension).

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## Learning lessons from the past: Parliamentary oversight of EU affairs in the future

Something positive can still come out of parliament's confrontation with the government over Brexit, if those in power now and in the future learn lessons from it. May argued for a long time that thorough parliamentary oversight of the government's stance would weaken its negotiating hand. But this approach has damaged

11: Constitutional Reform and Governance Act, 2010.

12: Agata Gostyńska-Jakubowska, 'Parliamentarians in Brexit talks: Bulls in a china shop?', CER policy brief, February 1<sup>st</sup> 2017.

her chances of success. Parliamentarians are more likely to give their consent to an agreement that they have helped to shape rather than one they get to see at the last minute. May realised this too late and engaged in cross-party consultations only after the Commons voted against her deal three times.

13: European Council, Special meeting of the European Council (Article 50) – Conclusions, March 21<sup>st</sup> 2019.

14: European Council, Special meeting of the European Council (Article 50) – Conclusions, April 10<sup>th</sup> 2019.

A government with parliamentary backing for its negotiating objectives would have represented a much more formidable and persuasive force in the eyes of the EU-27 and might have found it easier to achieve its aims. The British prime minister should keep that in mind for future negotiations with the EU.

*“Something positive can still come out of parliament’s confrontation with the government over Brexit, if those in power learn lessons from it.”*

There are several ways that co-operation between parliament and the government on EU matters might be organised in future. Irrespective of whether the UK leaves the EU with or without a deal, the EU and its laws will continue to have an impact on the UK. The UK’s legislature and executive should work together to ensure the EU-UK relationship is as effective as possible. At the time of writing the next steps in the Brexit process remain unclear. This paper assumes, however, that the most likely outcome is that the UK leaves the EU at some stage on the basis of the present withdrawal agreement. However, other possible outcomes such as a no-deal Brexit or no Brexit are also worth looking at in terms of what they might mean for parliamentary scrutiny of EU affairs.

## A) Exiting with an agreement

MPs and peers will soon discover that leaving the EU is just the beginning of the Brexit process.<sup>15</sup> Parliamentarians will need to oversee the implementation of the withdrawal agreement, negotiations on the future relationship with the EU-27 and the application of EU law in the UK in the transition period and afterwards.

### Parliamentary scrutiny of the implementation of the withdrawal agreement

The withdrawal agreement establishes a joint committee, comprising representatives of both the EU and the UK, which will decide among other things on whether the transition period should be extended or whether the backstop is still needed. These decisions will have implications for the UK, and parliament will want to hold the government to account for them. The exiting the European Union committee argued in a report in March 2018 that a decision by the EU-UK withdrawal agreement joint committee to extend the transition period should be subject to parliamentary approval.<sup>16</sup> In order to take an informed view, however, Westminster would have to know what the UK and EU positions were. According to the withdrawal agreement, the meetings of the joint committee will be confidential (unless the

committee chairs decide otherwise), so the government will probably resist providing MPs and peers with detailed information about the talks. In the past Westminster could put pressure on the government to compromise by refusing to clear an EU document from scrutiny.<sup>17</sup> With some exceptions, the government cannot agree to a proposal in the Council of the EU while parliament is still considering the EU document concerned (the so-called ‘scrutiny reserve’). But post-Brexit, parliamentarians will no longer be able to use that leverage over the government because the UK will no longer be a full member of the Council of the EU or the European Council. Rather than abolishing the scrutiny reserve completely, parliamentarians should try to retain it in a modified form by amending the procedure to reflect the new post-Brexit institutional architecture. Ministers might be more inclined to engage in dialogue with the parliament before joint committee meetings if Westminster could potentially delay its decisions.

### Parliamentary oversight of the future EU-UK negotiations

After May lost her first vote on the withdrawal agreement on January 15<sup>th</sup>, she promised that if the Commons gave her another chance and approved the deal, she would consult parliament on the government’s negotiating mandate for the future talks. She promised that she would give MPs a progress report before each biannual high-level EU-UK stocktaking conference which is envisaged in the political declaration attached to the withdrawal agreement.<sup>18</sup> MPs should push the government to enshrine that framework in law – perhaps in the ‘Withdrawal Agreement and Implementation Bill’ which will give force to the provisions of the withdrawal agreement in British law. Parliament could also insist that the scrutiny reserve should apply to any decisions taken at the EU-UK stocktaking conference. The government might want to oppose this idea. It will argue that the talks will be dynamic and will require quick decisions, so parliament should not tie the government’s hands with a scrutiny reserve. But ministers need to understand that scrutiny is not a zero sum game and parliament is not necessarily the enemy: it can often improve on the government’s policy proposals. Besides, the scrutiny reserve always offered room for manoeuvre; ministers could override it if rapid EU action was needed, but had to justify this to parliamentarians. A similar system could apply after Brexit, as long as the government does not abuse it to circumvent scrutiny.

### Parliamentary monitoring of the application of EU law in the transition period and beyond

If the UK leaves the European Union with a withdrawal agreement it will also be bound by existing and new EU laws at least until the end of December 2020. The longer it

15: Sam Lowe, ‘Dreaming of life after Brexit’, CER bulletin April/May 2019, March 22<sup>nd</sup> 2019.

16: House of Commons Exiting the EU committee ‘The progress of the UK’s negotiations on EU withdrawal: December 2017 to March 2018’, March 2018.

17: House of Commons’ scrutiny reserve resolution, November 17<sup>th</sup> 1998 and House of Lords’ scrutiny resolution, March 16<sup>th</sup> 2010.

18: Prime Minister’s statement to the House of Commons on Brexit, January 21<sup>st</sup> 2019.

takes Westminster to approve the divorce deal the shorter the initial transition period. And, if the backstop kicks in after the transition period is over, the UK would have to apply new rules concerning goods in Northern Ireland. The British government has committed itself, therefore, when EU rules apply to Northern Ireland, to voluntarily apply them also across the whole of the UK, so as to avoid intra-UK regulatory divergence. EU law would also have a continued impact on the UK if it decided to pursue a softer Brexit, either in the form of customs union or in the form of European Economic Area membership.

The UK would not be able to take part in shaping new EU legislation under any of these scenarios, because it will be a third country.

*“EU law would also have a continued impact on the UK if the backstop kicked in and if the UK decided to pursue a softer Brexit.”*

Parliament should, therefore, ensure that the government continues to present draft EU legislation in both houses, together with thorough impact assessments. UK parliamentarians should also monitor the success of any government attempts to influence EU law-making. London should follow the example of Norway, which does not participate in EU decision-making but implements relevant new EU laws. To maximise its influence on EU decision-making, Oslo has intensified bilateral contacts with individual member-states. It has also strengthened its presence in capitals holding (or due to hold) the presidency of the Council of the EU.<sup>19</sup>

Government ministers have tried to downplay the need for thorough parliamentary oversight of EU law post-Brexit. They argue that very few new EU legal acts will be applied to the UK in the transition period.<sup>20</sup> It takes the EU at least 17 months to approve legislative acts at the first reading, and 39 months at the second reading.<sup>21</sup> Dominic Raab, the then Brexit secretary, argued in September 2018 that due to the lengthy EU legislative process, new laws taking effect during the transition would almost certainly have been scrutinised by the UK when it was still a member-state. But Westminster should not be fooled.

Brexit has shown that the EU can rapidly adopt legislation when it is confronted with serious challenges. Since 2017 the EU has adopted or agreed 17 out of 19 draft laws designed to mitigate the negative consequences of a no-deal Brexit.<sup>22</sup>

## B) No-deal Brexit or no Brexit

The European Council decision to extend the deadline for the UK to leave the EU does not formally take no deal off the table. If the UK leaves without an agreement there will be no transition period and the UK will no longer be bound to apply EU law. But it will still not be able to make a clean break. EU legislation has constituted the legal basis for the functioning of the UK's own businesses for the last four decades and the UK could not abandon all EU laws at once. The EU is a regulatory superpower – it regulates global markets, setting global rules in areas such as food safety, chemicals, competition and data protection. In order to mitigate no deal uncertainty in various UK sectors, the government would have to maintain continued alignment with EU law, at least in the short term.<sup>23</sup>

The disruptive nature of a no-deal Brexit would probably force the British government to seek bilateral agreements in areas such as social security co-ordination with individual member-states and – in parallel – London would probably be back at the EU negotiating table trying to get back to something very similar to the existing withdrawal agreement. In such a scenario Westminster should ask for the same access to information as it would get if the UK departed with a withdrawal agreement.

In the event that the UK does not leave the EU by October 31<sup>st</sup> and secures an even longer extension, or withdraws its notification to leave the EU altogether, MPs and the government will be tempted to maintain the current model of parliamentary oversight of EU affairs. But this would be a mistake. The referendum did not end divisions over the UK's relationship with the EU. European issues would continue to be as divisive as ever if the UK remained in the EU. Parliamentarians should push for a departure from old scrutiny procedures based on the work of the ESC which failed to provide a balanced debate about the EU and the UK's place within it.

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## Post-Brexit parliamentary scrutiny structures: A new EU affairs committee?

The structures created to deal with European matters and with the Brexit talks have many flaws. MPs and peers

have rarely discussed Brexit with each other, which has led to duplication in the work of individual committees.

19: Kristin Haugevik, 'Diplomacy through the back door: Norway and the bilateral route to EU decision-making', Global Affairs, 2017.

20: Dominic Raab, letter to Sir William Cash and Lord Boswell, September 5<sup>th</sup> 2018, see [www.parliament.uk](http://www.parliament.uk).

21: European Parliamentary Research Service Blog, 'Number and average length of co-decision procedures', April 13<sup>th</sup> 2018.

22: European Commission, 'Brexit preparedness: EU completes preparations for possible "no-deal" scenario on 12 April', Brussels, March 25<sup>th</sup>.

23: The government is for example reported to have decided that the UK would align with EU food safety and animal health regulations for at least nine months in the event of an unmanaged Brexit. Peter Foster, 'Exclusive: Britain will follow all EU food and farming regulations for nine months in a "no-deal" Brexit', *The Telegraph*, March 1<sup>st</sup> 2019.

Such an overlap results at times in committees making contradictory recommendations on the same issues, despite the hard work of officials in both houses to co-ordinate Brexit-related work.<sup>24</sup> This parliamentary cacophony makes it easier for the government to cherry-pick the committee recommendations it likes and ignore the rest.

*“MPs should abolish the European scrutiny committee and put all post-Brexit scrutiny functions in the hands of one committee.”*

Assuming the UK leaves the EU with a withdrawal agreement, parliamentary oversight of European issues after Brexit will be much more difficult than when the UK was a member of the Union. In the short term at least, MPs will have more on their plate. While before they sifted EU documents and at times recommended further parliamentary debate on EU proposals, after Brexit MPs will have to oversee all three key EU-facing areas: the application of the withdrawal agreement, monitoring of the application of new EU legislation in the UK, and oversight of the negotiations on future EU-UK relations as well as the evolution of the relationship itself. Parliamentarians will have to develop new dynamic structures that would enable them to shift the balance of their work between these three elements of parliamentary oversight, depending on how the UK-EU relationship develops.

So far, parliament has paid little attention to its role in the future, focusing instead on day-to-day Brexit developments.<sup>25</sup> Relevant Commons and Lords committees have, however, conducted various inquiries into parliamentary scrutiny of international negotiations. After Brexit the UK will cease to be a party to the EU's trade deals, and will have to negotiate its own agreements. This will pose a challenge not only for the British government and civil service, but also for the parliament which will want to monitor these negotiations.<sup>26</sup> Indeed, Sarah Wollaston, the chair of the Commons liaison committee, asked the prime minister in a letter of December 2018 about the role of the UK

Parliament in the next phase of the negotiations, but May has not offered a concrete answer.<sup>27</sup> And besides this exchange of letters, there has been little parliamentary debate on how to adjust the current parliamentary structures to deal with European matters post-Brexit.

But MPs and peers need to start thinking about this. After the snap elections in June 2017 it took the Commons three months to reconstitute the exiting the EU committee, and as a result two rounds of the Brexit negotiations went by without any parliamentary scrutiny.<sup>28</sup>

The Commons and Lords should jointly devise constructive recommendations on adjusting scrutiny procedures for this new post-Brexit reality. The Commons liaison committee has launched an inquiry into the effectiveness of departmental select committees, and the House of Lords is reviewing its own committee system. MPs and peers could exchange insights from these ongoing inquiries. Parliamentarians could consider creating a joint committee on European affairs. A number of such joint committees already exist.<sup>29</sup>

This, however, may be easier said than done.<sup>30</sup> MPs and peers have rarely exchanged views on EU legislative proposals or co-ordinated their objections to draft legislation from the European Commission (making use of the right of national parliaments to send so-called 'reasoned opinions' to the Commission). There is little reason to think MPs and peers would be willing to change this approach for the sake of developing new parliamentary oversight structures.

If MPs and peers disagree on creating a joint committee, the Commons should nevertheless push for a change in the way it has scrutinised EU affairs. MPs should abolish the European scrutiny committee and put all post-Brexit scrutiny functions in the hands of one committee. This would reduce possible duplication in the committees' work and give MPs a stronger voice vis-à-vis the government. Initially, these scrutiny functions would have to be performed by the exiting the EU committee. As long as the government's department for exiting the EU exists, the committee, currently chaired by Labour MP Hilary Benn, would have to shadow its work. Once DEXEU

24: The House of Lords established an informal group in November 2016 which oversees committees' Brexit activities and liaises with the House of Commons, which created its own post of Brexit liaison manager only in December 2017.

25: The exiting the EU committee has recently launched an inquiry into the role of UK Parliament in the transition period, in the EU-UK negotiations and in the event of no deal, but most evidence so far has focused on issues such as the Irish backstop or the extension of the article 50, see: House of Commons Exiting the EU committee, 'The progress of the UK's negotiations on EU withdrawal: Role of Parliament inquiry', 2019.

26: The government published a paper in February 2019 indicating how it envisages the parliamentary scrutiny of international trade negotiations. It does not, however, cover the negotiations with the EU on the future relationship. See 'Processes for making free trade agreements after the United Kingdom has left the European Union', Department for International Trade, February 2019.

27: Letter from Prime Minister Theresa May to the chair of the Commons liaison committee, January 14<sup>th</sup> 2019, see [www.parliament.uk](http://www.parliament.uk).

28: Philip Lynch, Richard Whitaker, and Adam Cygan, 'Brexit and the UK Parliament: challenges and opportunities', in: Thomas Christiansen, Diane Fromage (ed.), 'Brexit and democracy: the role of parliaments in the UK and the European Union', April 2019.

29: The Joint Committee on the National Security Strategy was established in the 2005-2010 Parliament, and includes members from the House of Commons and the Lords.

30: Agata Gostyńska-Jakubowska, 'A ten-point plan to strengthen Westminster's oversight of EU policy', CER policy brief, May 2015.

is abolished the exiting the EU committee would evolve into a new European affairs committee.

This committee, like other select committees, would have the power to create ad hoc sub-committees.<sup>31</sup> If the committee members thought that juggling the three main scrutiny tasks was too much, they could delegate some of these roles to sub-committees. That would also give the committee the flexibility to respond quickly to any new, possibly sudden, developments in EU-UK relations without getting in the way of any of its regular tasks. If the future talks between the EU and the UK stalled – say over arrangements to replace the free movement of EU workers – the committee could create a sub-committee to investigate this problem. Because of the scope of its responsibilities, the new committee would have to be bigger than an average 11-member Commons select committee, and would also need more staff and research resources.

*“There are limits to what lawmakers can do, however, without the support of the government of the day.”*

A European affairs committee would be useful even if the UK found itself temporarily outside the EU without a deal or if it remained in the club. In the first scenario, it would oversee government negotiations with the EU and its member-states to mitigate the consequences of no-deal. And in the second, it would scrutinise EU draft legislation and the government’s position in the EU decision-making bodies – the role that is currently carried out by the European scrutiny committee.

There are limits to what lawmakers can do, however, without the support of the government of the day. The government might be reluctant to abolish the European scrutiny committee, which has so far provided oversight of EU documents, and set up a new and potentially influential European affairs committee. Instead, it might want to parcel out responsibility to departmental select committees with plenty of other work to do and with less access to specific EU expertise.

But given the make-up of the European scrutiny committee, if it was retained it would probably focus on making the government’s job difficult and seeking to block any new EU laws during the transition period as undemocratic. An effective European affairs committee, with a chair elected by the entire house (as with other select committees) rather than by the committee’s members, would encourage moderate and pro-European MPs to join and facilitate a more balanced approach to European matters – an objective that the government should support.

The creation of a European affairs committee would not stop other select committees from conducting their own inquiries. But they should each appoint a *rapporteur* on European matters to liaise with the new committee. Rapporteurs would update their committees on the work of the European affairs committee, and act as channel of communication, both formal (for example, answering requests for information and participating in some of the committee’s inquiries) and informal. Such co-operation would ensure that departmental committee recommendations reflect European affairs committee expertise and vice versa.

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## Plugging Westminster into EU decision-making

It is also important for the UK Parliament to develop and nurture its own network of contacts in Brussels and EU capitals. The British government pledged that it would co-operate closely with the parliament in the next Brexit phases, but it has often backtracked on its own promises, and Westminster needs a back-up plan.

After Brexit, the British parliament will be unable to exert direct influence on EU decision-making, either by raising objections or offering positive feedback on Commission legislative proposals.<sup>32</sup> It will also cease to be a full member of all the inter-parliamentary conferences that have provided a platform for parliaments of individual EU member-states to interact with each other and with the European Parliament.

Westminster should design its own co-operation structures with national legislatures and with the European Parliament. Any agreement on the future EU-UK relationship will be put to the European Parliament, and the Commission is also likely to consult MEPs during the talks. The European Parliament also decides, along with the Council of the EU, on the majority of new EU laws, including those which would apply to the UK post-Brexit. The political declaration that establishes the framework for the future EU-UK relationship provides for an EU-UK parliamentary co-operation forum. Westminster should press the government to take account of parliamentarians’ views when it negotiates this aspect of the future relationship with the EU.

31: House of Commons, Standing order 152, ‘Select committees related to government departments’, 2002.

32: National parliaments can object to Commission’s legislative proposals on the basis of the subsidiarity principle (a so-called ‘reasoned opinion’). They can also submit opinions within the framework of the so-called political dialogue with the Commission.

In 2017 the majority of committees responsible for European affairs in the EU member-states indicated their willingness to continue to invite Westminster representatives to inter-parliamentary conferences post-Brexit.<sup>33</sup> UK Parliament should exploit this support to request participation in these inter-parliamentary forums. It could follow the example of Norway's parliament. Norway is not a member of the EU but its parliament writes a letter to incoming presidencies of the Conference of Parliamentary Committees for Union Affairs of Parliaments of the EU (COSAC) and expresses its interest in participating in inter-parliamentary meetings.

*“Westminster should design its own co-operation structures with national legislatures and with the European Parliament.”*

But the various inter-parliamentary conferences usually take place only a couple of times per year. That is not

frequent enough for Westminster to remain up to date with developments in the EU and its member-states. The work of the UK national parliament office, which is staffed by two officials who represent the Commons and Lords at the European Union level, will be therefore even more important after Brexit. UK Parliament should maintain the two officials to act as Westminster's eyes and ears in Brussels. When the UK government was doing its best to keep parliamentarians in the dark about the progress of the withdrawal talks, these officials facilitated meetings in Brussels for MPs and Lords, and provided useful insights into the EU's negotiating position.

Westminster's engagement in Brussels should go beyond inter-parliamentary co-operation. British parliamentarians have occasionally conducted evidence sessions with EU commissioners in Brussels, to better understand the EU's rationale for its legislative actions. Westminster should keep that practice up, and use those trips to flag up the findings of its own inquiries in policy areas in which the UK will continue to align itself with the EU. The European Commission could find these findings useful when it opts to review relevant EU legislation.

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## Conclusion

The outcome of the EU referendum has brought an important shift in attention in Westminster. Whereas before the 2016 referendum MPs were occasionally drawn into dealing with European affairs, leaving the EU has become an all-consuming issue. Since the 2016 vote, one sixth of the time on the floor of the house has been spent on matters related to Brexit.<sup>34</sup> This increased interest, combined with Westminster's greater assertiveness in holding the government to

account, presents an excellent opportunity to improve parliamentary scrutiny of European matters. Whether MPs like it or not, leaving the EU is just the beginning of a long process of redefining the UK's place in Europe. Westminster will find it easier to navigate these uncharted waters if it revamps its current scrutiny procedures and maintains close ties with the national chambers of member-states and with the EU institutions.

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33: COSAC, 'Twenty-seventh Bi-annual Report: Developments in European Union procedures and practices relevant to parliamentary scrutiny', May 3<sup>rd</sup> 2017.

34: Lewis Lloyd, 'The Brexit effect. How government has changed since the EU referendum', Institute for Government, March 2019.