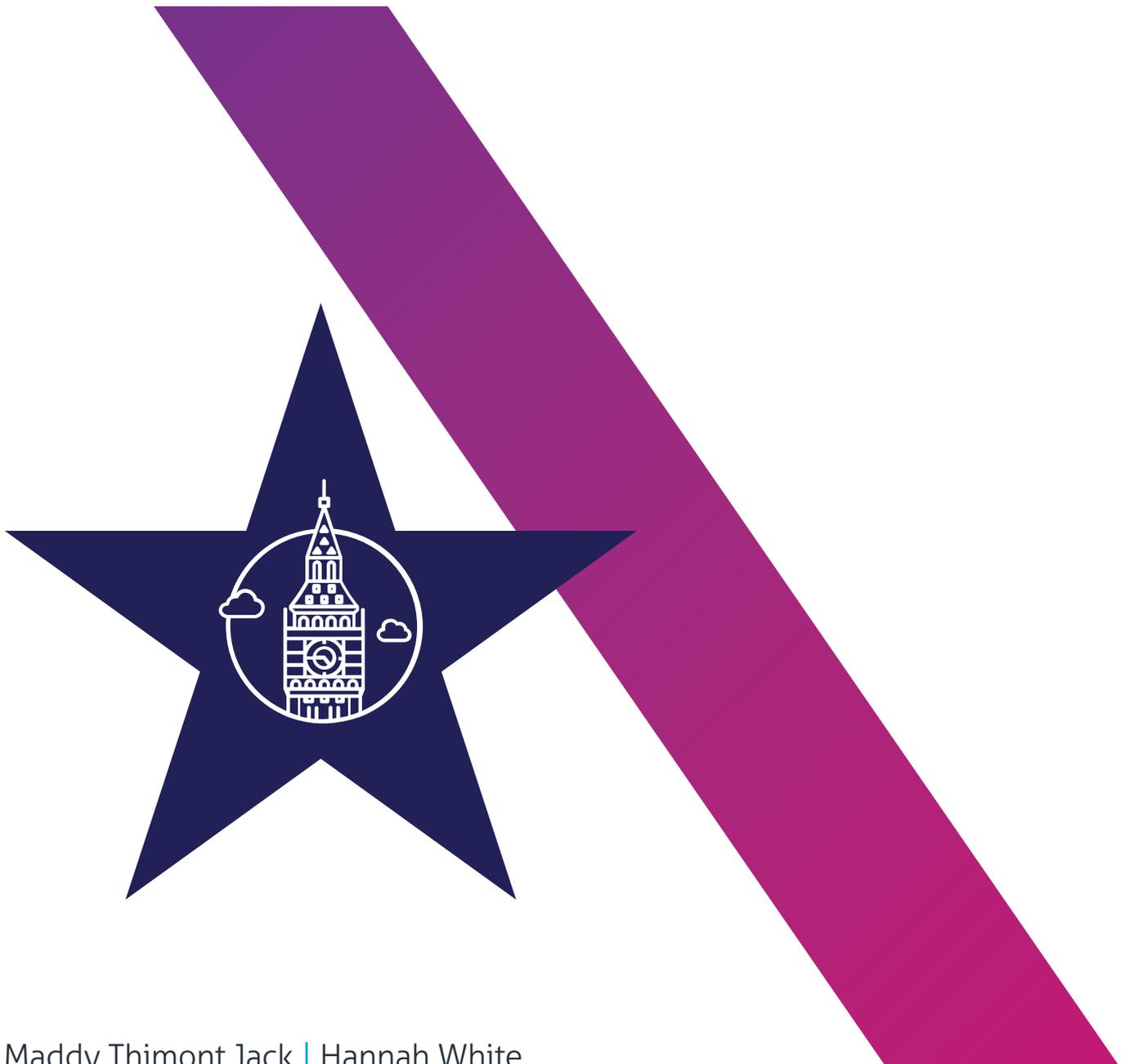


# Parliament after Brexit



# About this report

This report sets out the key issues that Parliament needs to consider about its role after Brexit. It also looks at the procedural questions raised during the process of Brexit, and at their implications.

## Our Brexit work

The Institute for Government has a major programme of work looking at the negotiations, the UK's future relationship with the EU and how the UK is governed after Brexit. Keep up to date with our comment, explainers and reports, read our media coverage, and find out about our events at: [www.instituteforgovernment.org.uk/brexit](http://www.instituteforgovernment.org.uk/brexit)

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# Summary

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For more than 40 years, Parliament has carried out its role within the context of the UK's membership of the institutions of the European Union (EU). After Brexit, it will need to take on new functions, or adapt ways it has carried out tasks, to ensure that it is fully prepared to scrutinise the Government once the UK is no longer part of the EU.

The exact nature of the UK's future relationship with the EU is extremely uncertain, and there is still a chance that the UK will not leave the EU at all. Despite this uncertainty, there remains a real imperative for Parliament to shape its role in a post-Brexit UK.

For example:

- The UK may be leaving the EU, but the relationship between the two will probably remain close. Parliament will need to consider how it can continue to influence – and stay informed about – events in Brussels. The Government and Parliament have still not explicitly agreed the precise role of Parliament in the negotiations on the future relationship.
- After Brexit, the UK Government will be conducting trade negotiations for the first time in more than 40 years. It will also take back responsibility for negotiating treaties beyond trade deals, which will have an impact on important domestic policy areas. The Government has set out a role for Parliament in free trade negotiations but has largely remained silent on treaty negotiations beyond those.
- The devolved governments of the UK and Westminster have committed to working together on policy areas that were devolved during EU membership. But current forums for discussion are not transparent to Parliament or other affected parties. Parliament should consider what type of information it needs to properly scrutinise decisions that the four governments are making.

Parliament's experience of Brexit so far has exposed deep-seated problems with parliamentary processes and highlighted uncertainties in the relationship between the executive and the legislature. There have been questions about what the Government is able to do without Parliament's approval, the wide-ranging powers given to ministers to amend and introduce laws as well as who should control the agenda in the House of Commons. The powerful role of the Speaker has also been a key flashpoint. Parliament needs to explicitly address these issues rather than simply assume that the UK will shortly return to a period of majority government and that closure on the divisive issue of Brexit will be reached.

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Questions raised by Brexit present both Parliament and the Government with a real opportunity to re-examine how Parliament should function in the 21st century. The Government and the Opposition should actively consider these challenges.

Both Houses of Parliament should establish a joint committee with a remit to equip Parliament for its role after Brexit. Relevant work is already being done in different parts of both Houses, but it lacks the strategic oversight and direction that such a joint committee could bring. The various issues that a joint committee should consider will need to be addressed according to different timescales. Some must be dealt with now. A joint committee could prioritise and co-ordinate this work, with the ambition of ensuring that Parliament has the powers and resources it needs to perform its role in the UK's democratic system after Brexit.

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# 1. Introduction

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Since the 2016 referendum on the UK's membership of the European Union (EU), Parliament has become the battleground for debate on the UK's withdrawal from the EU and future relationship with it. From the start, there have been underlying tensions regarding the roles of the Government and Parliament. The first flashpoint was whether the Government needed parliamentary approval to trigger Article 50 of the Treaty on European Union – the legal process for withdrawal from the EU (the Supreme Court ruled that it did<sup>1</sup>). These tensions increased after the 2017 general election – which resulted in a hung Parliament – and came to a head in the first few months of 2019.

The House of Commons and the House of Lords have been busy with Brexit. They have scrutinised the legislation required to give effect to Brexit and establish new domestic policy regimes in place of old ones. They have held inquiries into the progress of negotiations and the nature of the future relationship between the UK and the EU, as well as more recently into no-deal preparations. But amidst all this activity, not enough attention has been given to vital questions about the role of Parliament itself once the UK has left the EU.

Addressing some of these questions is challenging because of continued uncertainty about the nature of the UK's future relationship with the EU. Parliament will need to adapt, but it does not yet know the end state for which it needs to adapt.

But what is certain is that just as the UK Government will need to adapt and take on new responsibilities after Brexit, Parliament will also need to change in order to play its role effectively. It will need to scrutinise new areas of government policy making, provide oversight in areas previously monitored by the EU and find ways of overseeing the negotiation and management of the UK's new relationship with the EU.

Parliamentarians will also need to consider how best to continue to engage with the EU, the development and decisions of which will inevitably continue to affect the UK.

How Parliament plays these roles will not just be of practical importance, it will also be highly symbolic. Narratives about the UK 'restoring' the sovereignty of its Parliament were influential in the referendum debate. But in the three years since, already low levels of public confidence in the UK's democratic system have been shaken further by criticism of the role that Parliament has played in the Brexit process. This has included apparent conflict between the outcome of the referendum – an exercise in direct democracy – and the role of Members of Parliament (MPs) as agents of representative democracy. The Government, backbench and opposition MPs, and the Speaker have all been willing to be creative with parliamentary procedures and even break parliamentary conventions in pursuit of their preferred outcomes.

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The combination of Brexit (views on which cut across both main political parties) and a minority government has fuelled this instability. But while the current scenario may be unique, there remains a distinct possibility that minority government could become more of a norm for the UK in the future. This means that precedents set now may have implications for subsequent governments.

The question of whether Parliament can step up and shape an effective role for itself in the aftermath of Brexit is therefore crucial for public confidence as well as of real practical importance. Historically, Parliament has tended to respond to change in a reactive, piecemeal manner. This is due to Parliament's nature – above all, it does not have a single central authority which takes responsibility for thinking strategically about its future.

Previous reforms have often been precipitated by crises that have given small groups of MPs a mandate for change. But even these conditions have not been sufficient without support from the Government and – often – the personal sponsorship of a reform-minded Leader of the House. For example, the 1979 select committee reforms were backed by Norman St John-Stevas, Leader of the Commons in Margaret Thatcher's government. More recently, the 2009 parliamentary expenses scandal led to the establishment of the Independent Parliamentary Standards Authority and prompted the-then Prime Minister Gordon Brown to try to rebuild the reputation of the House of Commons through a Select Committee on Reform of the House of Commons. The committee, led by Tony Wright, made recommendations on membership of select committees, the management of time in the House of Commons and public involvement in Parliament, although not all of these have been implemented.<sup>2</sup>

Arguably, the recommendation to create the Backbench Business Committee was only implemented because of the Coalition Government that followed and the support of Sir George Young as Leader of the House. Many of the reforms of the past quarter of a century – including changes to sitting hours and an increase in the number of bills considered in draft – were driven by the Modernisation Committee, which existed between 1997 and 2010. Crucially, that was a committee chaired by the Leader of the House.

Too often, the combination of factors necessary to generate change in Parliament is absent. No single group of parliamentarians outside the Government is given the authority to initiate it and a minority of reactionary MPs, with or without the tacit collusion of the Whips, rally to strangle attempts at reform. Although small groups of MPs, peers and officials have been convinced for decades of the need for renovation of the Palace of Westminster, a lack of incentives plus fierce opposition from certain members have prevented work beginning. Similarly, the idea of introducing a proxy voting system in the House of Commons languished until a combination of events in this Parliament – including negative press coverage of Brandon Lewis MP breaking his 'pairing' arrangement with Jo Swinson MP on a crucial vote (see Chapter 3 for further details)<sup>3</sup> – forced the Government finally to pick up the Procedure Committee's proposals to bring in a pilot of such a system which allowed new parents to be absent from Commons votes.

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## About this report

This report sets out the key issues that Parliament needs to consider about its role after Brexit. It also looks at the procedural questions raised during the process of Brexit, and at their implications.

In Chapter 2, we examine how Brexit will force Parliament to adjust its existing processes, and probably establish new ones, to adapt to the UK's new role outside the EU.

In Chapter 3, we look at how the Brexit process has called into question the way Parliament works and raised fundamental questions about the relationship between the Government and Parliament.

Finally, in Chapter 4, we argue that in a Parliament where strategic direction is absent and no one is sufficiently 'in charge' to drive it, there needs to be a group of people with sufficient political capital (and buy-in from the Government and the Opposition) to consider these questions in the round and agree on a vision for Parliament after Brexit. We set out our recommendation to establish a new joint committee to do just this.

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## 2. What are the issues?

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There remains considerable uncertainty about what form the future UK–EU relationship will take. The Government has not got its Withdrawal Agreement<sup>1</sup> through Parliament and the UK and the EU have not moved on to the next phase of the Brexit negotiations. The Political Declaration,<sup>2</sup> published alongside the Withdrawal Agreement, is relatively high-level and allows significant flexibility regarding the exact nature of the future relationship.

But regardless of what exactly happens next, if the UK leaves the EU then Parliament's role will need to adapt. Below is a list of seven post-Brexit issues that we think Parliament, through a new joint committee, needs to consider:

1. Scrutiny of new EU rules during the transition period and beyond
2. Oversight of the Withdrawal Agreement Joint Committee
3. Scrutiny of the negotiations on the future relationship between the UK and the EU
4. Scrutiny of treaties
5. Gaps in oversight created by leaving EU institutions
6. Scrutiny of UK-wide agreements on co-operation – 'common frameworks'
7. Parliament's relationship with the EU after Brexit.

In some cases, Parliament already carries out functions that could either continue in much the same form or be adapted to reflect new circumstances. It may be that parliamentarians will decide that new mechanisms or processes are unnecessary. But this should be a conscious decision, not simply the result of neglecting the question.

Some work has already been done on the issues set out above. For example, the Liaison Committees in both Houses of Parliament are already conducting inquiries into the committee systems after Brexit, and the House of Commons International Trade Committee has looked into Parliament's role during trade negotiations.<sup>3</sup> Meanwhile the House of Lords European Union Committee has recently published a report looking at the UK's relationship with the EU after Brexit and Parliament's role in that.<sup>4</sup> But there are other issues that have had less attention and too little co-ordination across both Houses of Parliament.

Some adaptations will need to be immediate; there will be new functions that Parliament will need to take on during the transition period (provided a deal is agreed). Others can be considered over a longer period, for example the role that Parliament

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should play in scrutinising new 'common frameworks' established between the UK Government and the devolved administrations.

The extension to the Article 50 negotiating period until 31 October 2019 means that there are just a few more months for Parliament – which until now has mainly focused on the immediate process of leaving the EU – to consider these questions properly. How Parliament approaches these issues, and new areas of domestic responsibility, in the next few months will lay the foundation for how it engages with European affairs in the years to come.

For each of the seven issues that we have highlighted, this section sets out:

- what the issue is
- how Parliament currently approaches it (if this is the case)
- what will be different after the UK leaves the EU
- what questions this raises for Parliament.

## **1. Scrutiny of new EU rules during the transition period and beyond**

### **What is the issue?**

If the Withdrawal Agreement is eventually ratified, one of its key provisions will be the establishment of a time-limited transition period. During the transition period, the UK will continue to follow EU rules and remain part of EU programmes, but will no longer be represented in EU institutions.

If negotiations on a future relationship have not delivered an alternative solution to manage the border on the island of Ireland by the end of the transition period, the Northern Ireland backstop will come into force. This requires regulatory alignment between Northern Ireland and the EU. The Government has committed to ensuring that there is no divergence between Great Britain and Northern Ireland<sup>5</sup> so, in practice, this will entail the whole of the UK continuing to adopt new EU rules.

Depending on the future relationship that the UK negotiates, it is possible that it will decide to commit to 'dynamic alignment' with EU rules on a more permanent basis, which would allow the UK to continue to align with the EU on regulatory standards as they change.<sup>6</sup> This could be achieved through either a new 'common rulebook', as the Government proposed in June 2018,<sup>7</sup> or another – yet to be agreed – mechanism.

In all these circumstances, Parliament will need to decide what attention it should pay to new rules emerging from the EU.

### **What happens now?**

Parliament plays a formal role in the UK's membership of the EU, scrutinising proposals for new rules that come from Brussels and holding the Government to account for how it represents the UK in EU institutions.

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The Government deposits documents from EU institutions, including proposals for new legislation, in Parliament and sends them to specific committees in the House of Commons and the House of Lords, together with an Explanatory Memorandum setting out the Government's position. The House of Commons European Scrutiny Committee and the House of Lords European Union Committee – which has six subcommittees – operate a 'scrutiny reserve'. This means that ministers representing the UK in the Council of Ministers are not supposed to vote on EU proposals until they have been cleared from scrutiny by both committees or debated by both Houses. Both committees are also able to conduct wider thematic inquiries into the issues raised by EU proposals, although the House of Lords tends to do this more.

National parliaments of EU member states also have a direct relationship with EU institutions. If there are concerns that a proposal from the EU breaches the 'subsidiarity principle' – which is an EU commitment to only take action at an EU level if it is "more effective than action taken at national, regional or local level"<sup>8</sup> – then either House in the UK can send a reasoned opinion to the European Commission challenging it. If a third of legislatures across the EU issue a reasoned opinion, then the EU institution issuing the proposal must review it and may decide to amend or withdraw it.<sup>9</sup>

### **What will be different?**

Once it is no longer a member of the EU – including during the transition period – the UK will not have a vote in the institutions of the EU. This means that the scrutiny reserve will no longer function and the UK Parliament will no longer be able to raise reasoned opinions. However, the UK will still need to follow EU rules during the transition period, including new ones emerging from Brussels, so Parliament will have an interest in monitoring them.

In July 2018, the Chairs of the Commons and Lords scrutiny committees wrote to the Government to propose adapting the scrutiny reserve system after Brexit.<sup>10</sup> They suggested that their committees should be able to require the Government to raise concerns about particular proposals or place issues on the agenda for discussion in the Joint Committee of the Withdrawal Agreement – the new joint EU–UK institution that would be established to manage the ongoing application of the Withdrawal Agreement. This proposal was rejected by the then Secretary of State for Exiting the European Union, Dominic Raab, who said that any issues raised by Parliament could be dealt with through diplomatic conversations rather than being formally placed on the Joint Committee's agenda.<sup>11</sup>

Raab noted that the majority of the rules coming into force during the transition period would be likely to have been approved while the UK was still a member of the EU, which – he argued – removed the need for a formal system through which Parliament could raise concerns.<sup>12</sup> This argument relies on the period during which rules continue to apply to the UK, without the UK having a say over them, finishing in December 2020. If the UK and the EU agree to extend the transition for two years (an option under the Withdrawal Agreement), the Northern Ireland backstop came into force, or the UK decided to continue aligning itself with EU rules, the period could be much longer.

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If parliamentarians disagree with the Government's analysis, they will need to articulate more clearly the purpose of parliamentary scrutiny of EU rules during this period. One persuasive argument for this is that arrangements established for scrutiny during this period will lay the foundations of arrangements for the scrutiny of EU rules once the UK has entered a permanent future relationship with the EU. Parliamentarians might want, for example, to look at how the Norwegian Storting (Parliament) handles European affairs to support its government's decisions on whether to incorporate new rule changes into the European Economic Area Agreement.<sup>13</sup>

### **What questions need to be answered?**

- What does Parliament want to achieve by scrutinising EU rules during the transition period and beyond?
- By what mechanism will Parliament be able to communicate any concerns around new EU rules to the Government during the transition period and beyond?
- How would a new scrutiny mechanism support the UK Government's engagement with the EU once the UK has left the EU?
- How will Parliament engage with the EU independently from government?
- Are current committees well suited to fulfil these roles or are new structures necessary?

## **2. Oversight of the Withdrawal Agreement Joint Committee**

### **What is the issue?**

The UK and the EU have agreed to establish a Joint Committee to oversee "the implementation and application" of the Withdrawal Agreement. This committee will be able to take decisions that are binding on both the EU and the UK, and it will, in certain circumstances, be able to amend the agreement.<sup>14</sup> But there are no transparency obligations in the treaty and it is up to the EU and the UK to decide whether to make any documents relating to the committee's meetings and decisions public.<sup>15</sup>

There is no precedent in the UK for scrutiny of this kind of body. But the European Parliament, where there are precedents, has already agreed with the European Commission the scope for its involvement.<sup>16</sup>

Where the Joint Committee decides to make any changes to the Withdrawal Agreement, the European Parliament will be "immediately and fully informed", in line with how it is engaged during international negotiations (set out in Article 218 of the 2007 Treaty on the Functioning of the European Union).<sup>17</sup> It will also be informed if the European Council authorises member states (for example, Cyprus, Ireland or Spain) to negotiate bilateral agreements with the UK. The UK Government has not set out any proposals for domestic scrutiny of the Joint Committee.

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## What could Parliament do?

The UK Parliament could articulate the scrutiny role it would like in relation to the Joint Committee, in the way the European Parliament has already done with the European Commission. The Lords EU Committee has called for greater transparency, including publication of meeting schedules and agendas and draft decisions or proposed changes made by the Joint Committee. The implication is that the scrutiny of these documents would be undertaken by current EU scrutiny committees.<sup>18</sup> But the House of Commons has not really engaged in this question and the Government has yet to respond. There are also unanswered questions about the composition and operation of the Joint Committee.

Whatever system is put in place for the Withdrawal Agreement will probably lay the ground for the scrutiny of governance in the future relationship between the EU and the UK. While the Political Declaration does not go into much detail on the exact governance of the relationship, it does propose that a Joint Committee (separate from the one overseeing the Withdrawal Agreement) should be set up to oversee the implementation and operation of the future relationship.<sup>19</sup> These governance arrangements will have oversight of a wide-ranging agreement, beyond a purely economic relationship. For example, the EU and the UK have agreed to have a close relationship in areas such as security, foreign policy and defence. However, the role envisaged for Parliament in scrutinising these arrangements has not yet been set out.

## What questions need to be answered?

- How should Parliament organise itself to scrutinise the work of the Joint Committee of the Withdrawal Agreement?
- What commitments should it seek from the Government regarding scrutiny of the Joint Committee?
- To what extent should this be replicated in the scrutiny of the governance of the future relationship?

## 3. Scrutiny of the negotiations on the future relationship between the UK and the EU

### What is the issue?

If the Withdrawal Agreement is ratified and the UK leaves the EU, the two sides will move on to negotiating the future relationship. Even if the UK leaves without a negotiated agreement, discussions about the future UK–EU relationship will have to begin at some point. The current Political Declaration setting out the UK–EU proposal for the future relationship is extremely ambitious, covering a number of different areas beyond a simple trade agreement.<sup>20</sup>

### What happened during the first phase of the negotiations?

During the first phase of negotiations, the Exiting the European Union Committee in the House of Commons and the EU Committee in the House of Lords were responsible for scrutinising the work of the Government. The Secretary of State and ministers from

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the Department for Exiting the European Union gave evidence about events in Brussels and domestic preparations for leaving the EU, and both committees have travelled to Brussels and taken evidence from Michel Barnier, Chief Negotiator for the EU. Other select committees were also involved; for example the House of Commons Public Accounts Committee conducted an inquiry into the financial settlement in the Withdrawal Agreement.<sup>21</sup> The Prime Minister updated the House of Commons after her visits to Brussels.

Parliament amended the EU Withdrawal Act 2018 to give MPs a 'meaningful vote' on the final deal agreed with Brussels. The amendment also required the Government to implement the Withdrawal Agreement in primary legislation. The deal has to be approved in both of these ways before the Government is able to ratify the Withdrawal Agreement, unless Parliament agrees to amend the Act to remove this requirement.

### **What will be different?**

While the first phase of negotiations focused on withdrawal issues – notably the financial settlement, EU citizens' rights, the transition period and how to avoid a hard border on the island of Ireland – the next phase will cover a wide array of subjects, from the economic relationship, to co-operation on security and partnership on research.

The Institute for Government has recommended that the Cabinet Office should be responsible for the co-ordination of the negotiations.<sup>22</sup> If the Government were to act on our recommendation, both the Commons and the Lords would need to think about which of their committees would be best suited to scrutinise negotiations. If, in the House of Commons, it is agreed that a dedicated EU committee should do that, effective co-ordination with departmental committees will be crucial. This would be necessary to ensure that scrutiny of the future relationship did not suffer from the same lack of attention paid to EU affairs more generally before the EU referendum. Lack of MP interest at that time was exacerbated by the scrutiny of EU matters being siloed within the European Scrutiny Committee, which is dominated by Eurosceptic MPs.

There is also a question about what role Parliament should have at the end of the negotiations. Theresa May indicated she would be willing to give the Commons a vote to approve the final agreement on the future relationship. A new prime minister may try to take a different approach, although Parliament may demand it anyway.

### **What questions need to be answered?**

- Which House of Commons and House of Lords committees are best placed to scrutinise the next phase of the negotiations?
- How should those committees draw on wider parliamentary expertise including that of other select committees?

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## 4. Scrutiny of treaties

### What is the issue?

The EU negotiates certain international agreements on behalf of its member states. Some of these, like international trade agreements, are the sole responsibility of the EU, while others, such as treaties on development co-operation and humanitarian aid, are 'mixed agreements', which also impact areas managed at the national level.<sup>23</sup> After Brexit, the UK will have sole responsibility for negotiating all treaties involving the UK. The Government and Parliament therefore need to agree whether current arrangements for the parliamentary scrutiny of treaties are adequate.

### What happens now?

Currently, Parliament has a role only at the conclusion of international agreements entered into by the UK Government. The Constitutional Reform and Governance Act (CRAG) 2010 put the existing 'Ponsonby Rule' convention on a statutory footing by giving Parliament 21 days to vote against ratifying a new treaty after the Government lays it before Parliament.<sup>24</sup> If Parliament does reject the treaty, it can be laid again, and Parliament has another 21 days to consider it. In theory, Parliament could delay ratification indefinitely under the CRAG. But the Government controls parliamentary time and can choose whether or not to schedule a vote.

Under the current system, the UK Parliament actually has a greater opportunity to scrutinise negotiations managed by the EU than those conducted by the UK Government. Ministers are supposed to inform the EU committees in both Houses of Parliament of the EU's proposed negotiating mandate, the proposal is deposited in Parliament and it is then subject to the scrutiny of those committees. Such proposals are subject to the scrutiny reserve, meaning that – in theory – ministers should not agree to them at EU level before both Houses have considered them.<sup>25</sup>

### What will be different?

Historically, there has been limited interest in Parliament in the process for scrutinising treaties, partly because the EU has taken responsibility for trade negotiations for the past 40 years. The current process was established in the CRAG without any careful examination because it was rushed through in the final days before the 2010 general election, and received little scrutiny compared to the attention paid to the rest of the Bill's provisions.

But Brexit has dissolved Parliament's lack of interest in treaties. Already, the House of Lords EU Committee has established a temporary scrutiny system for 'Brexit-related' international agreements (mainly trade deals that the Government is 'rolling over' from EU membership).<sup>26</sup> In response to parliamentary interest, the Government has also made certain commitments about parliamentary engagement during any free trade agreements it seeks to negotiate after leaving the EU. It has promised to allow a designated select committee in each House of Parliament access to sensitive information during negotiations as well as to let them have private briefings from negotiating teams. The Government has also said that it will allow enough time for these committees to report on the content of any trade agreement once the agreement has been finalised, before the treaty is laid before Parliament under the CRAG.<sup>27</sup>

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But while these commitments are welcome, the Government has largely ignored the question of whether a similar process will be needed for treaty negotiations that extend beyond trade. Treaties can also entail questions of security and defence, human rights, as well as contentious policy areas such as fisheries. It is not clear whether the same commitments will apply to these areas.

Treaties are also likely to have an impact on devolved policy areas. The Government's proposal detailing its process for negotiating free trade agreements sets out how it intends to engage with the devolved administrations, but leaves the question of how devolved legislatures will engage up to them.<sup>28</sup> In the next section, we explore how the UK's parliaments may need to work together to scrutinise domestic policy after Brexit – but it will also be necessary to consider co-operation over treaty scrutiny.

One way to carry out this work would be to establish a designated treaty committee (either just in the House of Commons or jointly with the House of Lords) that could either scrutinise all treaties, drawing on expertise from departmental select committees, or 'sift' treaties, sending them to departmental select committees for further scrutiny where necessary. Whatever the new system is, it is important that it forces the Government to engage with Parliament at an early-enough stage in the process and before the outcome is effectively irreversible. Unless parliamentarians have the prospect of affecting the outcome of negotiations, they will have little incentive to engage seriously with the complex and detailed work of treaty scrutiny.

### **What questions need to be answered?**

- Should proposals for the scrutiny of trade deals be applied to the scrutiny of treaties more generally?
- What sort of committee structure would deliver the most effective scrutiny of treaties?
- How should the House of Commons and the House of Lords ensure that their activity is complementary and that they liaise effectively with each other to scrutinise the Government's activity?
- How should scrutiny of treaties in the UK Parliament interact with scrutiny activity in the devolved legislatures?

## **5. Gaps in oversight created by leaving EU institutions**

### **What is the issue?**

After the UK leaves the EU, it could be harder for individuals, non-governmental organisations (NGOs) and businesses to hold the Government to account for its decisions and actions because the opportunity to appeal to European institutions – in particular the European Court of Justice (ECJ) – will have been lost. NGOs have already raised concerns that there will be a 'governance gap' in environmental policy with no external party to engage.<sup>29</sup>

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There are some areas of domestic policy that may be subject to 'level playing field' conditions in the future relationship. These will help to maintain common standards with the EU in areas including the environment, social protection and state aid, to ensure that UK companies cannot undercut their EU competitors. The EU will be keen that there is enough domestic enforcement of these rules once the UK is outside EU institutions. The UK Government has yet to set out in any detail how this will be achieved.<sup>30</sup>

There could be a role for Parliament in addressing these matters.

### **What happens now?**

The European Commission and EU agencies monitor member states' implementation of EU rules. If a member state fails to implement the rules properly then the Commission can initiate infringement proceedings against them – the final stage of which involves the Commission taking the country in question to the ECJ.<sup>31</sup> In certain circumstances, the ECJ has the power to impose a financial penalty on the country.

Proceedings can also be initiated by individuals or organisations. For example, the charity ClientEarth (an environmental NGO) has brought three cases against the UK Government over the high levels of pollution in the UK, winning each time.

There is no specified role for Parliament in this process.

### **What will be different?**

The Prime Minister Theresa May has pledged to take the UK out of the jurisdiction of the ECJ. From the EU's perspective, in the absence of ECJ jurisdiction, robust oversight mechanisms will be important to ensure that the UK complies with any 'level playing field' provisions in the future relationship. As already noted, these provisions are important to ensure fair competition between EU and UK companies after Brexit.

Away from the level playing field, the Government has committed to establishing two bodies in areas where others have identified gaps in oversight. A big EU concern during the first phase of the Brexit negotiations was how to ensure that the UK adequately protects the rights of EU citizens living in the UK after Brexit. The Government is setting up an Independent Monitoring Authority to oversee the provisions protecting EU citizens' rights in the Withdrawal Agreement.<sup>32</sup>

The other body that is being established is the Office for Environmental Protection, in response to concerns from NGOs about the environmental 'governance gap' that might emerge after Brexit. The Government has published its plans to set this up.<sup>33</sup>

For these two new bodies to fulfil their roles effectively, they will need to be sufficiently independent from government and safe from being abolished on a whim. Parliamentary sovereignty means that one parliament cannot bind its successor, so it is impossible to guard against this entirely when these bodies are set up, but an enhanced role for Parliament could be one way to give these bodies more freedom to hold the Government to account. In 2018, the Institute for Government suggested that the National Audit Office, as a body that is funded by – and reports to – Parliament,

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could prove a useful model for the Office for Environmental Protection.<sup>34</sup> Select committees could also play a role in approving the appointment of the chairs of these bodies, as the Treasury Select Committee does for the Chair of the Office for Budget Responsibility.<sup>35</sup>

### **What questions need to be answered?**

- What significant 'governance gaps' may be created by the UK's exit from the EU?
- What role is there for Parliament in identifying and helping to fill governance gaps after Brexit?
- How can Parliament ensure that new (or existing) public bodies are independent from government and are credible overseers of UK policy commitments?

## **6. Scrutiny of UK-wide agreements on co-operation – 'common frameworks'**

### **What is the issue?**

Currently, some devolved policy areas are managed at the EU level, which prevents significant divergence across the UK. Leaving the EU would, in theory, give the devolved administrations and the UK Government more freedom to diverge, which may cause problems for businesses operating across the UK. Therefore, the governments of the UK have committed to establishing 'common frameworks' across some of these devolved policy areas to prevent this from happening and facilitate joint-working.

The governments are discussing common frameworks for areas such as the environment, agriculture and fisheries.<sup>36</sup> If the UK maintains close regulatory alignment with the EU, more extensive frameworks will not be necessary. Nonetheless, Parliament should consider what role it should play in scrutinising joint-working between the four nations of the UK, which is likely to increase after Brexit, and how working with the devolved legislatures could support this.

### **What happens currently?**

Since the devolved administrations were established 20 years ago, UK parliamentary interest in intergovernmental relations has been limited. No transparency obligations have been agreed between the UK Government and Parliament in relation to the Joint Ministerial Committee (JMC) – the main forum for meetings between the UK Government and the devolved administrations. By contrast, the Scottish Government has a Written Agreement with the Scottish Parliament, which includes a commitment to give advance notice of intergovernmental meetings to the relevant parliamentary committee as well as a written summary of the discussion after it takes place.<sup>37</sup> The Welsh Government introduced a similar agreement with the Welsh Assembly in January 2019. But the UK Parliament does not have anything comparable.

In October 2017, an 'Interparliamentary Forum on Brexit' was established to bring together parliamentarians and staff of committees scrutinising Brexit in the House of

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Lords, House of Commons, Scottish Parliament and Welsh Assembly. Officials from the Northern Ireland Assembly also attend. Although it is difficult to discern any tangible impact from the creation of the forum, informal feedback indicates that it is seen by those involved as an opportunity to build relationships between parliamentarians and staff. The forum has agreed recommendations about how to improve intergovernmental relations in the UK, including putting elements of arrangements for intergovernmental co-operation in statute and agreeing clearer processes for decision making in the JMC.<sup>38</sup>

### **What will be different?**

Establishing UK-wide common frameworks will mean that the governments of the UK will need to work together in new ways. This could lead to a less binary division of powers in the UK. Currently, powers are either devolved or reserved (to the UK Government). After Brexit, this distinction may become less clear, although this will depend on the nature of the common frameworks, whether the UK governments decide to make joint policy decisions or whether they are limited to commitments to co-operate.

But as more decisions are taken in relatively opaque intergovernmental forums, Parliament should consider how it could conduct effective scrutiny. This could be through formal mechanisms that allow select committees across the legislatures to work more easily with each other if the four governments agree joint policies, or by continuing to build informal relations between members and staff through subject-specific forums.

### **What questions need to be answered?**

- Will stronger interparliamentary relations be required to support the scrutiny of policy areas covered by common frameworks?
- What are the benefits of formal mechanisms for engagement between the legislatures versus informal mechanisms?

## **7. Parliament's relationship with the EU after Brexit**

### **What is the issue?**

The UK will no longer be a member of the EU after Brexit but decisions made in the EU are very likely to continue to have an important impact on UK domestic policies as the UK Government has expressed an intention to continue to partner with the EU in a wide range of areas.<sup>39</sup> Whatever form the future relationship ends up taking, it is important that Parliament continues to engage with the EU and it needs to consider the best ways of doing so.

### **What happens now?**

Compared with national parliaments in some other EU member states, the House of Commons is not good at considering European issues, although the House of Lords has a much better reputation of engaging with EU affairs.<sup>40</sup>

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Parliament has a National Parliament Office (NPO) in Brussels. Until March 2019, when the House of Commons scaled back its representation, it was staffed by two officials from the House of Commons and one from the House of Lords. The purpose of the NPO is to help EU committees in the House of Commons and House of Lords, as well as any other committees when necessary, pay attention to European issues.<sup>41</sup> For example, it flags interesting or important issues raised in Brussels and builds relationships with relevant parties in Brussels to help strengthen committee recommendations and share relevant information on EU-related work.

The UK is a member of the Conference of Parliamentary Committees for Union Affairs (COSAC) – a conference of the EU committees of national parliaments of member states, which meets twice a year. COSAC can submit contributions for the attention of the European Parliament, the European Council and the European Commission.<sup>42</sup> This has been one way in which members of the UK Parliament have played a role in influencing EU institutions and helped to build relationships with other parliamentarians in Europe.

### **What will be different?**

While the UK will no longer be part of the EU after Brexit, decisions made in Europe are likely to still have an impact on the UK. If the Government – as set out in the 2018 white paper on the future relationship between the UK and the EU<sup>43</sup> – seeks to continue to align with the EU on certain goods and agri-food, then EU decisions made will be even more important. Parliamentarians should not take a step back from engaging with Europe.

Other third countries agree that ministerial and parliamentary engagement is a vital way of influencing Brussels. And senior parliamentarians can often be a useful proxy for the Government to discuss difficult issues when ministerial engagement is too sensitive. A well-resourced NPO (like Norway) would be a good way to identify opportunities for parliamentary influence and support engagement.

Parliament may want to draw other lessons from how other non-EU countries engage with the EU. Maintaining relations with other parliaments in the EU – both the European Parliament and national parliaments in EU member states – is a sensible approach. Committees in certain non-EU parliaments (those with a close relationship with the EU, including Iceland, Norway, Switzerland and even Georgia) request attendance at relevant COSAC meetings.<sup>44</sup> Committees in both Houses should strongly consider how to make the most of such opportunities.

### **What questions need to be answered?**

- What does Parliament want to achieve from its relationship with the EU after Brexit?
- How should the NPO be resourced to support parliamentary engagement in Brussels after Brexit?
- What kind of relationship should Parliament seek with COSAC?

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## 3. What has Brexit shown about the way Parliament operates?

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The attempt to give effect to Brexit has placed a strain on parliamentary working methods. Procedures designed to manage party political differences have struggled to deal with a controversial subject that has cut across the normal party divisions. Backbench and opposition MPs have been galvanised into trying to take control of parliamentary processes as a result of the Government's attempts to minimise parliamentary engagement and to use the existence of deadlines as a lever to secure support for what has proved to be an unpopular deal.

Parliamentary procedures have been a weapon used by all sides. We have seen the use of older procedures (such as a 'motion to return' in the form of a humble address to secure parliamentary access to government papers) as well as some innovations in the way Parliament operates (for example, backbenchers holding 'indicative votes' to try to resolve a contentious issue).

All this has not just been the result of Brexit. Unusual developments in Parliament have been prompted by the Conservative Government's lack of a majority, governing through a confidence-and-supply agreement with a minority party (the Democratic Unionist Party – DUP) that has a deep interest in one of the trickiest issues in the withdrawal negotiations – the border on the island of Ireland.

Nor are all the questions raised by this tumultuous period new. The question of how much control the executive should exert over parliamentary time has been long debated, as has the balance in the Government's use of primary and secondary legislation and the appropriateness of 'Henry VIII powers' (which allow ministers to use secondary legislation to amend primary legislation; see below).

But Brexit has flagged the importance of longstanding issues to new audiences, revealed some new questions and given a new urgency to addressing both. As the UK leaves the EU, Parliament has an important opportunity to revisit historic questions and resolve new ones to equip itself for the next phase in the UK's history of governance.

In this chapter we set out some of the key parliamentary flashpoints that have occurred during the Brexit process, and the wider questions they raise, which a new joint committee should address.

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## Government use of prerogative power

### What happened?

After the referendum on the UK's membership of the EU in 2016, there was controversy over whether the Government could use the royal prerogative to trigger Article 50 – the legal process for leaving the EU, which establishes the two-year negotiating period set out in the Lisbon Treaty. Gina Miller (and other claimants) took a case to the Supreme Court, which ruled in January 2017 that Parliament had to give its consent. The Government was therefore forced to introduce the EU Notification of Withdrawal Bill, which passed in March 2017 to secure parliamentary authority to trigger the Article 50 process.

### Was this new?

For a long time, Parliament has moved towards limiting the Government's prerogative power in statute, of which the Fixed-term Parliaments Act 2011 is the most recent example. But on the whole, the use of the prerogative in foreign affairs has been relatively unchallenged. More recently, however, questions about the extent of the Government's prerogative power to go to war led to this power being constrained by the establishment of a convention for parliamentary approval of such decisions, although the scope of any such constitutional convention has been challenged by ministers, including Theresa May.<sup>1</sup>

### What are the implications?

The Supreme Court's decision will now form part of UK jurisprudence. The case has already been a factor in discussions about whether the Government would need parliamentary approval to revoke Article 50. Constitutional lawyers disagree on whether this would be necessary.<sup>2</sup>

More broadly, it highlights the impact that foreign affairs has on domestic policy in a globalised world, which is an increasing challenge for Parliament in its procedures and approach to oversight.

## The use of 'Henry VIII powers'

### What happened?

The EU Withdrawal Act 2018 – the Government's flagship Brexit legislation – gave the Government wide-ranging 'Henry VIII powers' to amend primary legislation using secondary legislation. This was advantageous to the Government because the process of passing secondary legislation – which involves less parliamentary scrutiny – is quicker and easier than passing primary legislation.

The Government made the case that these powers were necessary due to the tight timeframe imposed by the Article 50 process. It argued that it would need to amend UK law to reflect the fact that the UK would be outside the EU, but because of the ongoing negotiations it was unsure exactly what would need to change.<sup>3</sup> Important changes might need to be made to the law without there being time to pass primary legislation. Other Brexit legislation also gives ministers extensive delegated powers.

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## Was this new?

Questions about the extent to which the Government should make use of Henry VIII powers are not new. Nor are questions about the overall balance struck between primary and secondary legislation by successive governments. This has become a particularly salient issue as governments of both colours have increasingly relied on secondary legislation to implement policies under 'skeleton' parent Acts.<sup>4</sup>

But the EU Withdrawal Bill was more widely drawn than previous pieces of legislation. When it was first introduced, the House of Lords Constitution Committee said that it created "an unprecedented and extraordinary portmanteau of effectively unlimited powers... [which] would fundamentally challenge the constitutional balance between Parliament and Government".<sup>5</sup>

## What are the implications?

During the passage of the EU Withdrawal Bill, 'sunset' clauses were introduced to the Henry VIII powers to ensure that they would be time limited.

Parliament also amended the bill to create a new 'sifting' mechanism in each House of Parliament to review statutory instruments made using the powers created by the Act. The Secondary Legislation Scrutiny Committee in the House of Lords and the newly established European Statutory Instruments Committee in the House of Commons were able to scrutinise statutory instruments laid under the so-called 'negative procedure' (subject to the most minimal level of scrutiny) and recommend whether they should be upgraded to the 'affirmative procedure' (subject to slightly greater scrutiny). In practice, this has proved an unexacting form of control, as the Government has been able to avoid the two-step scrutiny process by using the affirmative procedure for nearly half of the statutory instruments that it has laid.<sup>6</sup>

The extensive use of secondary legislation to give effect to Brexit could make it easier for governments to justify using secondary legislation to do more significant things than was previously seen to be acceptable, for example in the Customs and Trade Bills. Brexit could permanently shift the balance of expectations about what it is legitimate for governments to do using secondary legislation.

On the other hand, the Government's use of secondary legislation to give effect to Brexit might strengthen calls for a long-overdue wholesale review of Parliament's scrutiny of secondary legislation.

## The House's powers to demand information from the Government

### What happened?

The Opposition has increasingly relied on a procedure called a 'motion to return' (often taking the form of a 'humble address', technically a message to the Queen) on Opposition Days to force the Government to release Brexit-related information. In November 2017, it passed a motion forcing the Government to release the sectoral analyses that David Davis, as Secretary of State for Exiting the European Union, had referred to during an appearance before the Exiting the EU Committee. In January 2018, the Opposition called for publication of the Government's EU exit analysis, and

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in November 2018 the legal advice that the Attorney General had given the Cabinet on the Northern Ireland backstop.<sup>7</sup>

### **Was this new?**

The humble address being used to force the Government to release information is not new, but until this Parliament it had rarely been used in modern times. According to Andrea Leadsom, the former Leader of the House of Commons, the last time it was used this way was by John Stuart Mill in 1866 while campaigning to extend the electoral franchise to women.<sup>8</sup>

### **What are the implications?**

The use of 'motions to return' to force the Government to release papers has been successful because the Government does not have a majority in the Commons and has not engaged with Opposition Days. It is therefore vulnerable to defeat on issues not relating to confidence or supply (on which the DUP has pledged to support it). The procedure would be unlikely to work against a government with a sizeable majority. But it has caused alarm in the Government, which has flagged the risk that officials choose not to provide advice in writing, or water it down, in case it is subsequently released.<sup>9</sup> This could hamper government processes and restrict institutional memory.

The Procedure Committee in the House of Commons has recently published a report on the powers of the House of Commons to call for papers, which concludes that there is no need to change this procedure as the Government can use a majority to resist calls for information. It says that the recent problems for the Government have been caused by political disagreements over the treatment of Opposition Days as the Opposition has taken advantage of the Government's attitude to pass these motions.<sup>10</sup>

## **Control of the parliamentary agenda**

### **What happened?**

There have been a number of moments during the Brexit process where the Government's control of the Commons' agenda has been a flashpoint. For example, the Government delayed scheduling the report stage of several pieces of Brexit legislation to avoid potential defeats on tricky amendments. Most notably, the Trade Bill and Customs Bill were both delayed for six months in the first half of 2018. The Government also prematurely terminated a planned five-day debate on the Brexit deal in December and postponed the first 'meaningful vote' on the deal, thereby denying the Commons the opportunity to express its view until January 2019.

Most recently, backbenchers have taken control of the House of Commons' agenda against the Government's will (the Commons Standing Orders do allow a number of days to be used for Opposition or backbench business days, although the Government retains the power to withhold them,<sup>\*</sup> and legislation cannot be initiated in this time). In March 2019, MPs voted to suspend Standing Order 14(1), which gives precedence to government business on three separate days during this parliamentary session. This process was co-ordinated by Oliver Letwin and Yvette Cooper, both high-profile

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<sup>\*</sup> The Government did not schedule any Opposition Days between 13 November 2018 and 24 April 2019. It also has not formally increased the number of Opposition Days from 20 to reflect the two-year session, although it has scheduled some 'unallotted' days.

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backbenchers who were able to persuade MPs from across the House of Commons to support them. Two of these days were used to hold indicative votes and the final one was used to pass legislation to try to prevent the UK from leaving the EU without a deal on 12 April 2019. We address both of these events in more detail below.

### **Was this new?**

The extent of executive control over the agenda of the House of Commons is unusually high in Westminster compared with other similar legislatures. That being the case, it is normal practice for the Government of the day to exert that control to its own advantage.

Questions about whether this degree of control is appropriate are longstanding. In 2009, the Wright Committee on the reform of Parliament recommended establishing a House Business Committee to agree the weekly agenda of the House of Commons (a proposal modelled on other similar parliamentary chambers that have established equivalent bodies),<sup>11</sup> but successive governments have not chosen to adopt this recommendation.

It has been unprecedented in modern times for backbenchers to secure control of the agenda against the Government's will and to use that time to legislate without the support of the Government.

### **What are the implications?**

The Standing Orders of the House of Commons are based on the assumption that there will be a party in government that can rely on the support of a majority of MPs in almost any key decision. The prominence of questions about who controls the House of Commons' agenda that have arisen in connection with a minority government trying to implement a contentious policy (Brexit) may mean that parliamentarians will choose to revisit the issue if the current pattern of a small or no majority in the House of Commons persists.

The Government's opposition to the House of Commons' decision to temporarily amend this particular Standing Order to enable a group of non-government MPs to control the House of Commons' agenda was due to its concern that it sets "an unwelcome precedent".<sup>12</sup> Others may see a weakening of the Government's grip on the House of Commons as a welcome development. Either way, this move by backbenchers may be relevant if a future government finds itself on the other side of the debate to a majority of MPs, something much more likely to happen with a minority government.

## **The way decisions are made in Parliament**

### **What happened?**

One of the reasons why MPs voted to take control of the agenda of the House of Commons was to hold a series of indicative votes on different Brexit options, after having rejected the Prime Minister's deal several times. This challenged the usual decision-making process in Parliament. MPs normally vote 'yes' or 'no' on one question at a time. For the indicative votes, MPs voted on a number of different Brexit options (selected by the Speaker) all at the same time, using a ballot paper on which they were

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allowed to vote for as many options as they wanted. This meant that the initial voting took place secretly rather than via MPs walking through the lobbies together. In theory, this could have helped MPs avoid the pressures exerted by party Whips (although the way each MP voted on each option was subsequently published online). The results of the ballot were then announced together. No single option – in either of the two rounds of indicative votes on Brexit options so far – gained a majority.\*

### **Was this new?**

The House of Commons has previously used indicative votes twice – in 2003 and 2007 – to gauge support for different options to reform the House of Lords. But on those occasions it voted on a series of motions one at a time. The precise method for holding the indicative votes on Brexit options in parallel was therefore new.

### **What are the implications?**

Brexit has illustrated the limitations of Parliament's binary voting system. If Parliament had to vote 'yes' or 'no' by walking through the lobbies on a series of options for the future relationship between the UK and the EU, the ordering of those options would have been crucial, with all MPs hoping that their option was the last one standing.

Although none of the options on either day of indicative votes ended up with a majority, it was the best way of seeing the current view of the House of Commons given the difficult circumstances. This process could become a useful way to test the will of the House on controversial policy areas in the future.

## **Backbench legislation**

### **What happened?**

In April 2019, as the-then Article 50 deadline approached, Parliament passed a bill introduced by backbench MPs Yvette Cooper and Oliver Letwin against the Government's wishes. The resulting Act required the Government to hold a vote in the House of Commons on requesting an extension to Article 50 ahead of the European Council meeting on 10 April.

### **Was this new?**

Although backbenchers can introduce legislation in the form of private members' bills, these are effectively subject to a single-member veto because of the severe limitation on the time available for them and the absence of any timetabling mechanism (which is up to the Government to do). Usually they have to be passed in the time that is set aside for private members' bills. MPs taking control of government time in the Commons to introduce and timetable the passage of a bill in order to pass it represented a huge break from normal procedure.

### **What are the implications?**

The fact that MPs, and members of the House of Lords, passed an Act of Parliament that the Government in normal times would not have even allowed a debate on is a dramatic break with the culture, conventions and expectations of Parliament in the past century.

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\* The Cabinet was instructed to abstain on this process, and on neither occasion was the Government's deal put to MPs.

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This was not the first attempt to introduce a backbench Brexit bill – MPs had previously voted against taking control of the House of Commons' agenda on 29 January 2019. The bill that was eventually passed had been redrafted four times. And the votes to pass the legislation were very close. This suggests that there is a very high bar to be leapt to find a majority in favour of this kind of action.

## **'Pairing' for key votes**

### **What happened?**

During the passage of the Trade Bill in July 2018, Conservative MP Brandon Lewis broke a 'pairing' arrangement with Liberal Democrat MP Jo Swinson, who was on maternity leave. 'Pairing' is where the Whips of the government and opposition parties agree that an MP who plans to vote the opposite way to an MP who cannot attend a vote (for various reasons, including illness) should not vote so as not to change the size of the majority. It subsequently transpired that a number of other Conservative MPs had also been asked to break their own pairing arrangements to ensure that the Government won a close vote.<sup>13</sup>

### **What are the implications?**

The resulting controversy, along with the sight of very ill MPs being wheeled through the voting lobby on Brexit votes and the Labour MP Tulip Siddiq delaying a caesarean section to ensure that she did not miss a key vote, led to the Leader of the House bringing forward a proposal piloting 'proxy voting' for MPs on parental leave. This was not a new proposal but it had been languishing as the Government was reluctant to implement it. MPs approved a one-year pilot on 28 January 2019 and the first proxy votes were cast the following day.<sup>14</sup> A review will take place at the end of this year.

## **The role of the Speaker**

### **What happened?**

The Speaker of the House of Commons has wide discretion in shaping the course of debate in the House, and the current Speaker, John Bercow, has consequently taken on a central role in Brexit. He has exercised discretion about which motions can be discussed and which amendments can be voted on. Perhaps most controversially, in March 2019 he drew on parliamentary precedent to pre-emptively rule out the Prime Minister holding another vote on her Brexit deal if the question she wished to pose was 'substantially' the same as the one already asked of the House earlier in the session.

But the Speaker has also been willing to challenge precedent. On 9 January 2019, he selected an amendment to the supplementary business motion restarting a debate on the Government's Brexit deal (a debate that the Government had suspended in December 2018 amid controversy<sup>15</sup>). The decision proved controversial because the previous business motion specified that supplementary motions would be decided 'forthwith', which is normally understood to mean 'without debate or amendment'. For some, the Government's decision to restart the debate with a business motion it had disregarded when it terminated the December debate prematurely justified the Speaker's decision. The amendment, in the name of Conservative MP Dominic Grieve,

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was passed by a majority of MPs. It required the Prime Minister to make a 'next steps' statement three days after losing the meaningful vote, rather than the 21 days set out in the EU Withdrawal Act. But other MPs were unhappy because they had not been given the opportunity to table their own amendments.

More significantly, the Speaker also accepted (and the House passed) an amendment on 4 December 2018 overriding the provisions of the EU Withdrawal Act by allowing amendments to the motions 'in neutral terms', which the Government was required to move if Parliament rejected the deal. This paved the way to the amendments that eventually led to backbenchers seizing control of the agenda of the House. By using a series of 'daisy-chain' amendments, backbenchers were able to take control of the agenda on three separate days, holding indicative votes on two and passing the Cooper–Letwin bill on the third day.

### **What are the implications?**

The Brexit process has demonstrated the importance of the role of the Speaker, especially in times of minority government. Some of the decisions that the Speaker has made raise specific questions about parliamentary conventions and the precise interpretation of procedural terminology, for example the meaning of 'forthwith'. But there is also a wider question about the level of discretion that the Speaker has historically been allowed, for example the selection of amendments to bills and motions.

MPs elect the Speaker, and when John Bercow does decide to step down and MPs start to prepare for the race to be the next Speaker, this question is likely to be at the forefront of the debate. John Bercow has provided a new model of how to be a Speaker. He was elected after pledging to give more precedence to backbench MPs – a commitment realised in the significant increase in the number of Urgent Questions and Emergency Debates he has granted.<sup>16</sup> Many backbenchers and opposition MPs have praised these innovations and the Speaker's practice of extending time for questions until all MPs present have had a chance to ask a question.

But the Speaker's prioritisation of the interests of backbench and opposition MPs has been inconvenient for the Government, and may not be viewed as entirely positive by opposition frontbenchers contemplating the prospect of coming into government themselves. There have been reports of plans to limit the powers and discretion of the Speaker following a general election. Some of the controversies that have arisen during the Brexit process mean that candidates keen to replace him are already saying they would want to take the role in a different direction.<sup>17</sup>

The actions of Speaker Bercow have also raised very pertinent questions about the extent to which a government that cannot command a majority in the House of Commons should be enabled by the rules of the House to avoid allowing debates and decisions that – it has been ultimately proved – have the support of a majority of MPs.

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## 4. The way forward

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**Brexit has raised important questions for Parliament. While some work is under way, certain issues are not being addressed and sufficient time and energy is not being devoted to others. A new joint committee would play a vital role in identifying, co-ordinating and prioritising work within Parliament in terms of its role after Brexit.**

While some of the procedural questions could melt away under a return to majority governments, there is a risk that Brexit will have a lasting negative impact on the reputation of Parliament. The Government's attitude towards Parliament during the Brexit process has also prompted serious questions. As Gordon Brown did after the expenses scandal, the next Prime Minister should sponsor this process as an exercise in reputation-building and the opposition parties should support it for the same reason.

### **Who should be involved?**

Without the support of the Government, which controls time in the House of Commons, it is often almost impossible to push through reforms. For the 2012 Parliamentary Commission on Banking Standards (PCBS), for example, engaging both the Government and the Opposition in its terms of reference, its work and its recommendations was a crucial aspect of getting buy-in for the reforms it suggested.<sup>1</sup> Given the distinct possibility of another general election in the coming year, it will be important to get buy-in from the Opposition for any reforms that are proposed.

The size and make-up of the joint committee also matters. The PCBS, again, provides a useful precedent: Andrew Tyrie, chair of the PCBS, was keen to keep the size of the commission down to make it a more flexible body.<sup>2</sup> A committee of 10 committed parliamentarians would be sensible for the kind of joint committee proposed here – half drawn from the House of Lords and half drawn from the House of Commons to enable cross-Chamber co-ordination.

**MPs should vote to elect a chair for the joint committee. The chair should then work with both the Government and the Opposition to assemble a cross-party committee of MPs and peers.**

### **What should the cross-party committee of MPs and peers look at?**

In this report we have set out our view of the key issues facing Parliament. They include both the substantive questions that leaving the EU raises and some of the challenges to parliamentary procedure that the process of Brexit has created.

The first step for members of a new joint committee should be mapping out its understanding of the issues – and establishing what work has already been or is currently being done. Attention has been paid to some parts of our agenda, in particular questions around the scrutiny of trade agreements. But others, for example

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the scrutiny of decisions taken in intergovernmental forums, have largely been neglected by all except a few MPs who were already interested in the issues.

Very little attention has also been paid in the House of Commons to how Parliament should engage with the EU after Brexit. Although the House of Lords has identified this as a challenge, there will need to be co-ordination across Parliament to agree next steps. The joint committee should address gaps by undertaking work itself or inviting others to do so.

It is also vital that the joint committee pays attention to resourcing questions. If Parliament wants to change the way that it scrutinises treaty making, then it will need the expertise and support to do so. The joint committee should identify where there are gaps in expertise and support to parliamentarians and consider what should be done to address these. Parliament will also need to play a role in legislating for areas previously managed at the EU level, meaning the number of 'business as usual' tasks will also increase. This also needs to be taken into account.

**The joint committee should undertake a mapping exercise and then publish a detailed work plan, outlining the work that it will undertake and the work that it will invite other parliamentary committees to undertake on its behalf.**

### **What is the timeframe?**

The joint committee should approach these questions with urgency. Although the extension of Article 50 to 31 October 2019 has provided some breathing space, the clock is still ticking. On some issues, for example scrutiny of the Joint Committee of the Withdrawal Agreement, if Parliament does not proactively set out a clear preference for how it should work, then its role will be dictated by whatever the Government decides.

The first priority should therefore be to publish its mapping exercise. After that, the joint committee should report as it works. The possibility of a general election taking place over the next year is a good opportunity for parliamentarians to secure political support for any structural changes they believe need to be made.

Leaving the EU brings many challenges for Parliament – but it is also an opportunity to think more strategically about how it can best carry out its duties in the future.

**A joint committee should be established as soon as possible – certainly before conference recess in the autumn.**

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