

Accountability after Brexit

Parliament and the UK–EU relationship



About this report

Although the UK left the European Union in 2020, Brexit's effects continue to be felt – and there is also much about the UK's relations with the EU and other countries that remains to be worked out. This report identifies challenges with parliamentary scrutiny so far, and makes recommendations for how parliament can more effectively scrutinise the government's policies and priorities on post-Brexit related issues.

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Summary

As prime minister, Boris Johnson claimed to have got Brexit done. But though the UK–EU Trade and Cooperation Agreement was passed in December 2020, his successor, Liz Truss, enters No.10 two years on to a sizeable Brexit in-tray.

A stand-off over the Northern Ireland protocol; regulation inherited from the EU and red tape imposed on business by the decision to leave the single market; ongoing consequences for European citizens in the UK and British citizens in Europe; and the fraught topic of the management of UK borders. All stand out as particularly difficult problems to solve for a new administration distracted by a daunting economic outlook and with the likelihood of only two years until the next general election.

Yet after a period in the run-up to the UK's exit from the EU in which it dominated parliamentary proceedings almost to the exclusion of all other business, scrutiny of the government's handling of the post-Brexit relationship in the Commons has dwindled. In effect it is now a niche activity for those with long-standing concerns about the UK's relationship with the EU. The Lords does more – but is also much easier for the government to ignore.

The current state of play apparently suited a government keen to avoid accountability for the day-to-day consequences of the Brexit it chose and an opposition still terrified that Brexit could cost it another election, as it was perceived to do in 2019. It is yet to be seen whether the Truss government is any different. But whatever the attitude of the government, effective parliamentary scrutiny of UK–EU relations, and the wider implications of Brexit, matters.

This report examines how – and how well – the UK parliament is performing its scrutiny role now the UK has left the EU, and makes proposals for improvement.

Introduction

The UK left the EU in 2020 – but this did not mark the end of Brexit as an issue in need of parliamentary scrutiny. The final report of the now defunct Commons Committee on the Future Relationship with the EU (CFREU, which ceased work in January 2021) recommended that the government produce proposals on future scrutiny in consultation with the Liaison Committee, the European Scrutiny Committee, the Procedure Committee and the chairs of the most affected select committees to make sure that there were arrangements in the House of Commons to provide effective scrutiny of the key areas it identified (see Box 1).

The committee envisaged that parliament would be kept regularly informed about developments in the plethora of committees established under the Trade and Cooperation Agreement and the Withdrawal Agreement, and given opportunities to discuss regulatory developments in the EU. It envisaged a bigger role for departmental select committees (with the possible establishment of subcommittees).

Box 1: Future Relationship Committee scrutiny recommendations¹

- “Monitoring the implementation and operation of the EU–UK Trade and Cooperation Agreement, with a focus on the work of the Partnership Council, its specialised committees and working groups
- Scrutinising the work of Withdrawal Agreement Joint Committee and its specialised committees and monitoring the implementation and operation of the Withdrawal Agreement, with a particular focus on:
 - the Ireland/Northern Ireland Protocol, including the work of the Joint Consultative Working Group and the Joint Committee’s Specialised Committee on the implementation of the Ireland/Northern Ireland Protocol the rights of EU citizens in the UK and of UK citizens in the EU, including the work of the Independent Monitoring Authority in the UK and the Joint Committee’s Specialised Committee on Citizens’ Rights
- Monitoring and examining any disputes that arise under any UK–EU agreements and monitoring how any remedies to resolve disputes are applied
- Scrutinising the effectiveness of the UK–EU relationship and examining any negotiations to change or extend the terms of current agreements or to add new agreements
- Monitoring developments in EU law and policy that affect the UK
- Developing interparliamentary relations with the European Parliament and parliaments in EU Member States.”

Hilary Benn, the outgoing chair of CFREU and former Labour cabinet minister, said: “Strong and effective Parliamentary scrutiny of this new relationship will be really important.” The report originally recommended establishing a European Affairs Committee, but Brexit-supporting members removed that recommendation.²

However, the government allowed the Future Relations Committee to expire and did not respond to its request to consider and establish new scrutiny arrangements in the Commons. That meant that the House of Commons had to fit scrutiny of UK–EU matters into its existing structures and processes. Of course, scrutiny work is not confined to specialist committees: departmental select committees undertake important work, and questions and debates on the floor of the House also play a role. But the politics of Brexit have deterred the official opposition from using those opportunities to hold the government to account, while those on Conservative backbenches tend to keep their powder relatively dry too, reserving criticism when the government is perceived to be acting in very bad faith – as with its proposed legislation on Northern Ireland.

This contrasts with the House of Lords, whose arrangements for scrutiny are less subject to direct government control, and which completely overhauled its extensive network of EU committees after Brexit, setting up new dedicated committees with changed remits.

In this report we first set out how current scrutiny arrangements in the Commons and Lords work, then offer recommendations on how they could be improved to ensure more thorough scrutiny of the future UK–EU relationship and the wider implications of Brexit.

There is a case to be made that scrutiny of Brexit’s effects should be ‘mainstreamed’ – that the UK’s new relationship with the EU should be treated just like any other with another country or bloc, with parliamentary arrangements to reflect that. In the long term that may make sense but in the short term more concentrated and specific scrutiny is still required – although the UK is no longer in a formal transition period, there are a series of connected issues that are still far from settled. At least in the short term, relying on existing parliamentary structures to address these issues risks them falling down the agenda as government becomes preoccupied with other more immediate concerns.

Current arrangements for parliamentary scrutiny

Commons committees

In the House of Commons, the business of scrutiny usually falls to select committees. These allow a smaller set of MPs to take detailed evidence and subject ministers to closer examination than would be possible on the floor of the House.

The Johnson government allowed the Future Relationship Committee to expire in January 2021

The Exiting the EU Committee, established in 2016 to scrutinise the work of the Department for Exiting the EU, outlasted its department by a year – the latter being abolished in January 2020 with the committee expiring in January 2021. It then morphed into the Committee on the Future Relationship with the EU (CFREU) and continued its work for another year, looking at post-Brexit negotiations on the Trade and Cooperation Agreement (TCA). But despite calls for CFREU to continue its work – from the committee itself and from others – the government did not introduce the necessary motion to enable the House of Commons to take a decision to allow that.

By allowing the standing order establishing the CFREU to lapse, and by failing to propose any alternative arrangements, the government ensured that the role of future scrutiny of the overall EU–UK relationship fell, by default, to the European Scrutiny Committee. This left other select committees to look at specific aspects of Brexit that fell within their remit – if they had the time or inclination.

The European Scrutiny Committee has become the principal forum for Commons scrutiny

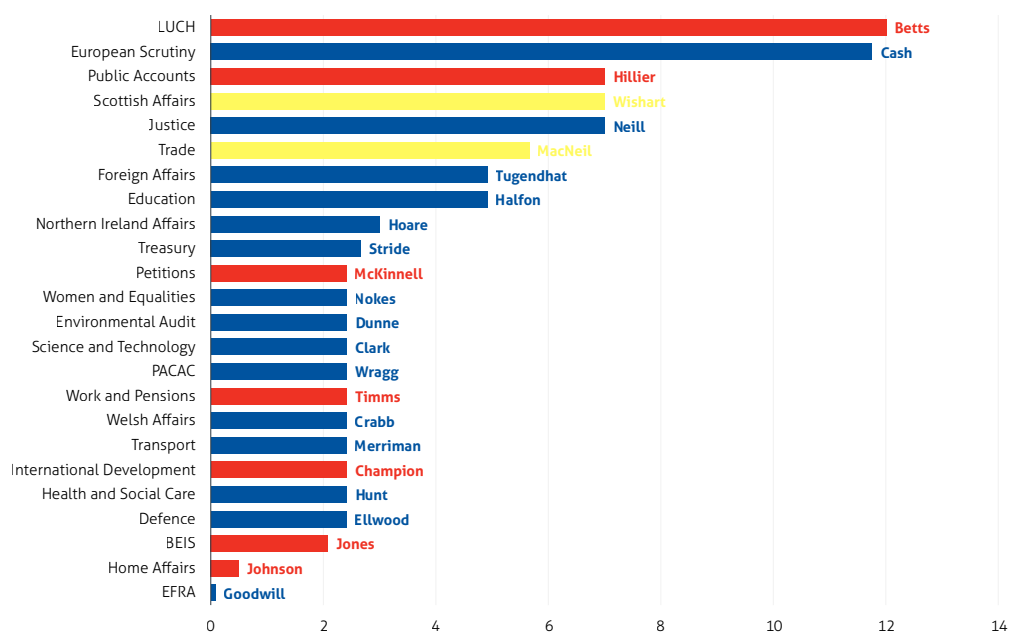
The European Scrutiny Committee (ESC) is a long established committee. Its task before the UK left the EU was to examine upcoming EU proposals and quiz the government about the lines it was proposing to take on them. Because so many decisions in the EU were taken by qualified majority voting, the ESC's actual impact on the final proposals that emerged was limited.

The committee has long been dominated by its current chair, the Conservative Sir William Cash. While MPs' membership of select committees tend to last for one or at most two parliaments, Cash has served on the ESC and its predecessors continuously for nearly a quarter of a century, first joining in November 1998. He has chaired it for half that time, taking on the role in September 2010. He is now scrutinising his fourth prime minister as chair, and sixth as a member.

Cash's tenure as chair of the ESC is exceptional – exceeded only by that of Labour veteran Clive Betts at the Levelling Up, Housing and Communities Committee. Commons Standing Order No.122a imposes a term limit of eight years, or two parliaments, whichever is the longer, on the same MP chairing the same committee. But Cash and Betts were both the beneficiaries of a decision by the House in January 2020 to suspend that order altogether in the current parliament.

Unlike the chairs and members of all departmental select committees – as well as the Public Accounts, Public Administration and Constitutional Affairs, Petitions, Standards, Procedure, and Environmental Audit committees for which whole-house elections (for chairs) and party elections (for members) were introduced in 2010 – Cash has been repeatedly elected by his party-nominated fellow ESC members, under the old whip-controlled system replaced by the 2010 reforms.* The dubious rationale for exempting the ESC from elections in 2020 was the need for it to start work immediately after any general election.

Figure 1 **Length of tenure (years) of current chairs of Commons departmental and cross-cutting committees**



Source: Institute for Government analysis of data from parliament.uk.

Many MPs in previous decades would have been relieved not to be pressed to serve as chair of a low-profile committee doing the rather thankless task of keeping abreast of forthcoming EU directives and regulations. But as a committed Brexiter, Cash’s interest in the UK’s relationship with the EU – and tireless opposition to its membership of it – has sustained his interest over the decades.

Since Brexit, the ESC’s document scrutiny work has continued but become much less onerous. There has also been a dramatic fall in the number of documents submitted to the committee. In 2019, when the UK was still subject to EU rules, it received around 1,000 documents for scrutiny. This meant that it rarely had time for the type of inquiries into government policy, expenditure and administration normally conducted by other select committees. As of 2022, government mainly submits to the ESC documents relevant to the Northern Ireland protocol, and in 2021 the total had fallen to around 100, with the committee meeting fortnightly, rather than weekly.

* The chairs of the Standards Committee and Public Accounts Committee are always held by members of the official opposition, but are still elected by the whole House.

Although the volume of document scrutiny has (inevitably) dropped, for MPs interested in the UK's new relationship with the EU a seat on the ESC retains its attractions. At a hearing with the then Brexit opportunities minister, Jacob Rees-Mogg, in April 2022, Cash made clear the many issues he considered within his committee's remit:

"Brexit was not done with the signing of the withdrawal agreement or the new trade deal. Rather, important questions remain regarding how we will regulate the economy post-EU/Brexit, and deliver and signpost the benefits of Brexit for the public and for business. These are issues that we as a Committee are deeply interested in. Our inquiry into the future of EU retained law is ongoing, and we have recently considered further work looking at the opportunities for and the challenges of regulating differently after the UK's withdrawal from the EU."³

The following week, in a session with the then minister for Europe and North America, James Cleverly – also deputising for the then foreign secretary, Liz Truss, on the TCA and the Northern Ireland protocol – Cash made clear that he expected regular engagement from the Foreign Office on these subjects. He asked Cleverly to commit to regular appearances: "You will also be aware – this is the last question – that Lord Frost, when he was in post, committed to appear before us quarterly, and the Foreign Secretary will appear at least once a year. Will you make up the difference and appear before us three times a year?"⁴ Cleverly was somewhat non-committal but suggested he would appear a couple of times a year and the foreign secretary annually. With Cleverly since elevated to foreign secretary, and Truss to prime minister, it will be interesting to see if he sticks to that commitment.

This understanding of the ESC's remit was a shift from the committee's normal way of operating before Brexit. And although it technically remained within the standing order establishing the ESC, (No.143), making use of its normal select committee power to "call for persons, papers and records" and its remit to "consider any issue arising upon any [European Union] document or group of documents, or related matters", the chair and members of the ESC have shifted their activities towards an inquiry-based model more typical of other select committees. This has been enabled by the time and capacity opened up by the drop in the flow of EU documents, allowing the ESC to fill ad hoc a scrutiny gap that would have otherwise emerged within the wider committee system. This has been a committee-driven change of emphasis rather than a decision made by parliament (facilitated by the government) to recast the committee's scrutiny approach for the post-Brexit era. In the 2021–22 session alone, the ESC opened eight inquiries,⁵ in addition to its routine document scrutiny work, although some have consisted of a single oral evidence session (see Box 2).

Box 2: European Scrutiny Committee inquiries, 2021–22 session

- Regulating after Brexit (opened April 2022)
- The UK's EU representation: what has changed and how is it working (opened March 2022)
- Retained EU law: where next (January 2022)
- Negotiations with the EU in respect of Gibraltar (September 2021)
- The institutional framework of the UK/EU Trade and Cooperation Agreement (June 2021)
- The UK's new relationship with the EU (February 2021)
- Brexit: the future operation of the Channel Tunnel Fixed Link (December 2020)
- UK parliamentary scrutiny of the Withdrawal Agreement Joint Committee and application of the Northern Ireland protocol.

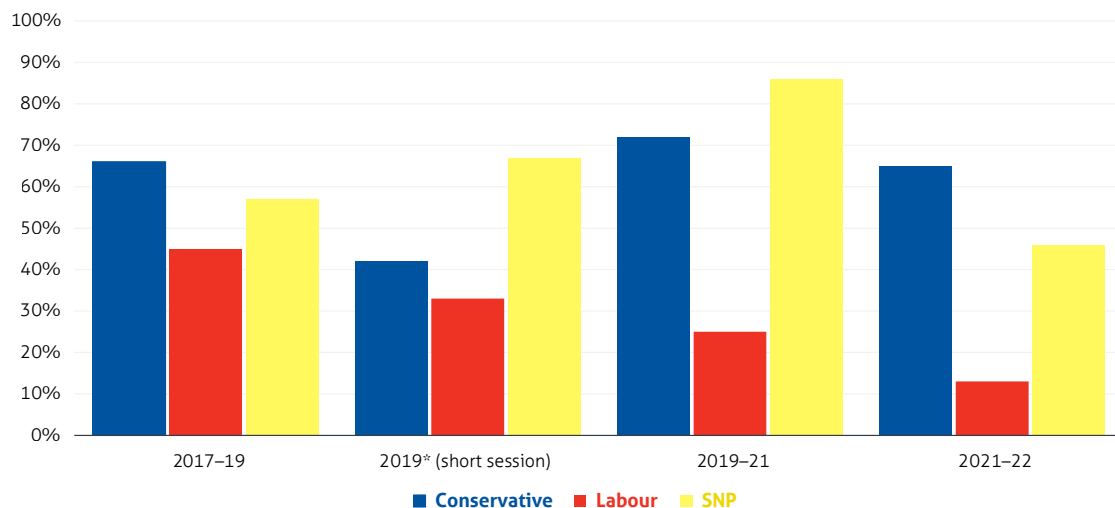
The committee produces few formal reports, though does conduct extensive (though much less burdensome to produce) correspondence with government departments – more than 200 letters were exchanged in the two parliamentary sessions since the 2019 election.⁶ But the process behind the production of such letters is less transparent than the well documented (through published formal committee minutes) process of report production.

The ESC produced a report from its study on the Channel Tunnel fixed link (and the government responded) and in July 2022, just before parliament rose for its summer recess, produced a report on its inquiry into retained EU law.⁷ That report criticises the government for a lack of consultation over its proposed approach to the Brexit Freedoms Bill, but in terms of substance endorses the government's proposals (such as by urging the government to proceed with a 'sunset clause' despite the clear preponderance of evidence to the committee that this approach was potentially risky). The report was endorsed by the Conservative majority – the one Labour member present when it was being finalised laid a series of amendments, including one which argued that "the conclusions and recommendations do not reflect the balance of evidence taken by the Committee". All were voted down.⁸

Labour MPs' attendance at European Scrutiny Committee meetings has declined

The ESC is a big committee, with 16 members.* Following changes made to the committee on 4 July 2022, just before summer recess, the committee now has eight Conservative,** five Labour, one SNP, one independent (formerly SNP) and one DUP member. (Prior to these changes, there were nine Conservative members and no representative from the DUP.)

Figure 2 **Average attendance (percentage) by MPs at European Scrutiny Committee meetings, by party, 2017–19 to 2021–22 parliamentary sessions**



Source: Institute for Government analysis of data from parliament.uk. There may be multiple reasons why an MP does not attend committee meetings, including illness or caring responsibilities, or other parliamentary duties. Excludes independent MPs.

But since the 2019 election, attendance at ESC meetings and evidence sessions has varied from the highly committed to the almost totally absent. Of course, there are many possible reasons why MPs do not attend committee meetings – including illness or caring responsibilities – and these may not always be publicly known. Nonetheless, the data shows clear variations in attendance that follow party lines and, by extension, Leave/Remain splits on the committee.

Analysis of MPs from the three main parties who have sat on the ESC in each session between 2017–19 and 2021–22 (and factoring in the number of meetings that each MP could have attended during their time on the committee) shows that in the two parliamentary sessions since the 2019 election, ESC meetings have seen committed attendance from the core membership of Conservatives – all of whom backed Leave in the 2016 referendum. Both Cash himself and former cabinet minister David Jones missed just one meeting in the two sessions following the 2019 election. Most Conservatives attended well over half the meetings in the same period (69%).

* Most departmental select committees in this parliament have 11 members. The FREU was also a big committee to ensure representation of an appropriate range of parliamentary interests in Brexit.

** At various times one of those Conservatives, Anne Marie Morris, sat as an independent after having the whip withdrawn; in Figure 2 she is classified as a Conservative MP as he currently holds the Conservative whip.

This stands in stark contrast with Labour. With the sole exception of Jon Cruddas, who attended almost two thirds of meetings, representatives of the main opposition party have largely been missing in action. The average attendance of Labour MPs on the committee has been below 50% in each parliamentary session between 2017–19 and 2021–22 – and has declined over that period. If Cruddas’s high rate of attendance is excluded, in the two parliamentary sessions since the 2019 election Labour MPs have attended just 11% and then 4% of the sessions they could have attended.

That is not surprising for some of them – both Stephen Kinnock and David Lammy have held frontbench positions since Keir Starmer was elected Labour leader in April 2020, at which point it would have been appropriate for them to have been replaced by the whips. Lammy was replaced in June 2022 and, as of September, Kinnock is still listed on the committee’s website as a member. One Labour member who attended slightly more frequently, Charlotte Nichols, was replaced in November 2021 by Dame Margaret Hodge, who has not participated in public evidence sessions or additional private meetings since then.

SNP attendance is higher than Labour’s, averaging 66% across the 2017–19 and 2021–22 sessions, though it also has smaller representation on the committee. As the third largest party at Westminster it is also entitled to representation on the committee and is currently represented by Allan Dorans. His attendance has been affected by ill health including his hospitalisation for Covid-19 and a leg fracture sustained in Westminster.⁹ (Separately, Margaret Ferrier, previously an SNP MP but who now sits as an independent having had the whip removed over Covid rule-breaking,^{*} is a regular attender.)

There is no mechanism to ensure Northern Ireland’s MPs are entitled to membership of the committee, despite the centrality of the protocol to the committee’s current work and, before that, its place in discussions over the single market during the key Brexit 2017 and 2019 parliaments. It was only just ahead of the 2022 summer recess that a Northern Irish MP – the DUP’s Gavin Robinson – joined. The lack of any systematic representation at all from Northern Ireland remains a huge omission and should have been addressed by the House of Commons after Brexit.^{**} (Other committees that have a major role in scrutinising EU–UK relations, including the International Trade and former Exiting the EU/Future Relationship committees, have (or had) some representation from Northern Irish political parties.) The committee’s scrutiny would be far more credible if it had representation from both the unionist and nationalist parties who take their seats in parliament.

* For the purposes of our analysis, Ferrier is not classified as an SNP MP and therefore is excluded from Figure 2.

** Other committees with a major role in scrutinising EU–UK relations, including the International Trade and former Exiting the EU/Future Relationship committees, have (or had) some representation from Northern Ireland’s political parties.

Lines of questioning have reflected the pro-Brexit attitudes of attendees

The ESC has become very much the preserve of committed Brexit supporters on the government side. Many are long-standing Eurosceptics in the image of their chair. This, and the absence of opposition MPs at many public hearings, is reflected in the lines of questioning the committee pursues.

The committee is generally quite supportive of the government but in more recent hearings has been impatient about the lack of progress with delivering the anticipated benefits of Brexit. In an April 2022 session with Jacob Rees-Mogg, critical questioning by committee members focused solely on the “thinness” of *The Benefits of Brexit* white paper and the slow progress in delivering concrete change. Other questions targeted the limitations on UK sovereignty imposed by the Northern Ireland protocol.

In a separate session with James Cleverly, the committee’s lines of questioning (with the exception of Margaret Ferrier’s) were all pushing the minister into a potentially more confrontational relationship with the EU.

This approach undoubtedly reflects the concerns of many government backbenchers and it is good for scrutiny that these concerns are raised. But they present a very partial picture of attitudes to the future UK–EU relationship in parliament as a whole. The committee has not raised concerns with ministers over, for example, the costs to business of divergence from the EU, the potential range of implications for the Northern Ireland protocol, or indeed the consequences for the Trade and Cooperation Agreement or business in Northern Ireland if the government moves away from the protocol. Again the absence of any Northern Ireland voices (until Gavin Robinson’s recent appointment) is notable. For ministers such as Rees-Mogg, this was scrutiny by feather duster.

No other Commons committee can do cross-cutting scrutiny, but some have held inquiries on post-Brexit related topics

There are other Commons committees that have conducted inquiries on post-Brexit related topics over the last two sessions, reflecting the degree to which Brexit and its implications cut across multiple areas of policy.

Table 1 overleaf sets out the topics that departmental and cross-cutting select committees have looked at. Although this gives a partial picture as committees can also do non-inquiry work – for example, by holding one-off evidence sessions on particular topics or writing to ministers – it provides some indication of the amount of work they are doing on post-Brexit issues.

Table 1 **Commons departmental and cross-cutting committees covering Brexit (most to least active; inactive listed alphabetically)**

Committee	No. of current EU-related inquiries/total current inquiries	Inquiries: direct UK–EU relationship	Inquiries: post-Brexit policy regime
Environment, Food and Rural Affairs	2/11	Seafood exports to the EU Animal movements	Common frameworks Labour shortages in agriculture Environmental land management and the agricultural transition
Northern Ireland Affairs	1/7	Northern Ireland protocol Cross-trade cooperation on policing, security and criminal justice Unfettered access	
Home Affairs	1/10		Channel crossings, migration and asylum routes from the EU Post-transition management of the border
Transport	1/11	Road freight supply chain	
Business, Energy and Industrial Strategy	1/12		Post-Brexit state aid and competition policy
International Trade	1/12	UK–EU trading relationship	
Treasury	1/13	1 hearing on UK–EU trade relationship, Jan 2021	Future of financial services
Welsh Affairs	0/5	Brexit and trade: implications for Wales	Wales and the Shared Prosperity Fund
Scottish Affairs	0/4		Scotland and the Shared Prosperity Fund

Foreign Affairs	0/11		
Petitions	0/1		
International Development	0/11		
Justice	0/21		
Women and Equalities	0/11		
Education	0/7		
Defence	0/14		
Levelling up, Housing and Communities	0/9		
Health and Social Care	0/13		
Science and Technology	0/7		
Digital, Culture, Media and Sport	0/8		
Work and Pensions	0/7		
PACAC	0/17		
Environmental Audit	0/14		

Note: data correct as of 2022 summer recess.

The most active committees on post-Brexit issues have been those dealing with environment, food and rural affairs, and Northern Ireland. But among the inquiries listed there has been relatively little focus on the workings of the TCA and its impact. It is notable (if politically understandable) that, despite the lead on the TCA and the protocol moving to the Foreign Office, the Foreign Affairs Committee (FAC) has not launched any inquiries into either, or indeed into UK relations with European countries and the EU more widely. The FAC has travelled to Brussels, but not published any reports related to Brexit, and appears to be trying to avoid duplicating the work of the Northern Ireland Affairs Committee and the Lords subcommittee on the Northern Ireland protocol.

Only a handful of departmental and cross-cutting committees in the Commons (outside of the FREU Committee) have held inquiries on post-Brexit issues – with just seven of 235 inquiries (or 3%) in the 2019 parliament so far. This is a sharp fall compared to committees’ interest prior to the UK’s exit from the EU – in the 2017–19 parliamentary session, one in eight committee inquiries dealt with Brexit, and all departmental and cross-cutting committees except four held inquiries relating to Brexit.

UK–EU relations now rarely feature in the prime minister’s Liaison Committee appearances

Since the 2019 election, questions about UK–EU relations have featured less and less frequently in the questions asked of Boris Johnson during his appearances before the assembled select committee chairs who make up the Commons Liaison Committee (see Table 2), with MPs choosing to concentrate instead on the pandemic, standards issues, the economy and the war in Ukraine.

Table 2 **Subjects raised with Boris Johnson at the Liaison Committee 2019–21 to 2021–22 parliamentary session**

Date	Main topics	EU relationship
30-3-2022	'Partygate' / Ukraine / Cost of living	No
17-11-2021	Standards and ethics / Violence against women and online harms / COP26 summit outcome and implementation / Budget and spending review	No
7-7-2021	COP26 / Covid and the secondary impacts of the Covid pandemic / Post-Brexit impact / Afghanistan	Yes (29 questions of 132 covering new trade deals impact on farming, mobility and the Northern Ireland protocol)
24-3-2021	UK place in the world / Covid / Economy	Yes (5/97 questions on EU mobility arrangements for musicians and on whether UK would follow EU proposals on daylight saving)
13-1-2021	Covid / UK post-Brexit / China / COP	Yes (21/103)
16-9-2020	Covid / Brexit negotiations / Integrated review	Yes (53/156)
27-5-2020	Covid	

Commons chamber

There is little activity on the floor of the Commons now about the UK–EU relationship

During the 2017–19 parliamentary session, alongside debates over key pieces of Brexit legislation, MPs made extensive use of other mechanisms to allow debates on the topic and to scrutinise the government’s approach to relations with the EU. Forty-five urgent questions (UQs) were granted on Brexit-related matters (which we define as a matter that would not have arisen without the UK’s vote to exit the EU) during that session, and opposition parties used eight of around 20 opposition day debates allotted to them to consider Brexit issues.

But the number of Brexit-related UQs and opposition day debates then fell in the two subsequent normal sessions (we exclude the unusually short 2019 parliamentary session as it was so brief). In the 2019–21 session, the number of Brexit-related UQs fell by more than two thirds – to fewer than 15 – and this fall continued into the (shorter) 2021–22 session. The same was true for the number of opposition day debates devoted to Brexit.

Much of this was due to the dominance of the pandemic. Nonetheless, the sharp and sudden fall in UQs and opposition day debates indicates that attention has moved elsewhere – especially since the UK officially left the EU in January 2020. During Lord Frost’s tenure as the minister of state for Brexit, Commons scrutiny of the new relationship was impeded by the fact that the accountable minister could be questioned only in the House of Lords. That has now changed with the machinery of government changes that followed his departure in December 2021.

In January 2022, Jacob Rees-Mogg was appointed to the new role of minister for Brexit opportunities and government efficiency with responsibility for taking forward the domestic side of Frost’s brief, looking for regulatory opportunities created by the UK’s departure from the EU. But Labour never nominated a shadow – and Rees-Mogg’s role has disappeared in the new Truss administration.

This is not overly surprising. For much of the period since the 2019 election, the pandemic dominated political discussion as Brexit had in the previous parliament, and more recently, MPs have been keen to discuss British support for Ukraine. But the relative paucity of attention to the UK’s relationship with what remains its biggest trading partner also seems to reflect the reluctance of the official opposition to talk about that relationship. This is not so surprising either. Given its bruising experience in the 2019 general election it is probable Labour fears a focus on Brexit will play into a government narrative that it wants to take the UK back into the EU (a theme Johnson regularly rehearsed during prime minister’s questions).

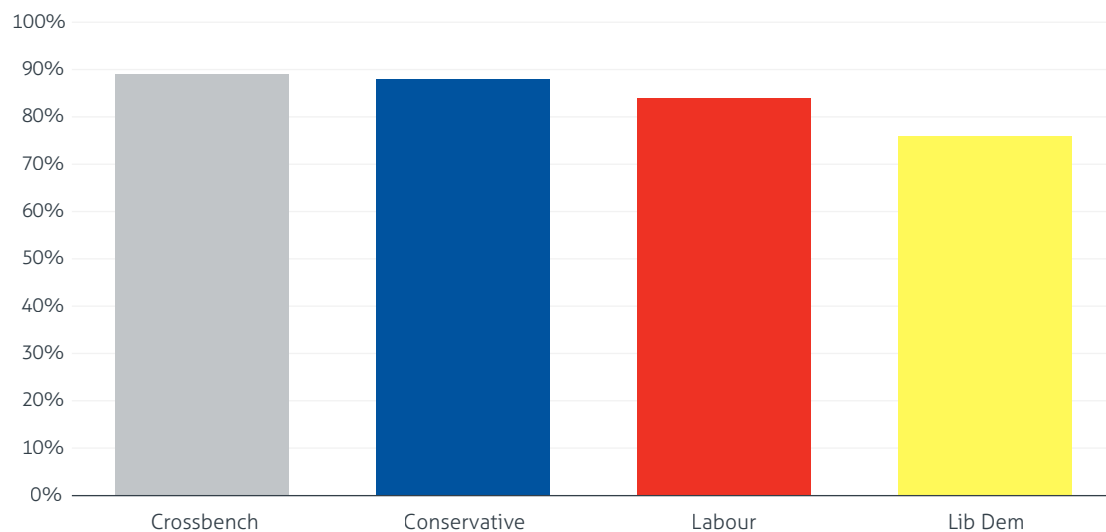
Lords committees

Unlike the Commons, the Lords has reorganised its scrutiny processes and undertakes detailed work

The House of Lords has always played a major role in scrutinising EU business. Its detailed scrutiny of EU documents, undertaken before Brexit by an overarching EU-focused committee and a suite of subcommittees, has been discontinued. The Lords has replaced this with a new structure with three relevant committees: the House of Lords European Affairs Committee (EAC), a subcommittee on the Northern Ireland protocol and a Committee on Common Frameworks (the agreements designed to manage divergence within the UK internal market after Brexit). It also has an International Agreements Committee, which among other subjects deals with post-Brexit trade deals.

There is more balanced party representation – and attendance – on the Lords committees than in the Commons, reflecting both convention and the composition of the House, where the government does not have a majority (although there is no SNP representation as the party does not nominate peers). There are currently two Liberal Democrats as well as three crossbenchers on the 13-person EAC (and both the DUP and the UUP have representation on the Ireland/Northern Ireland Protocol subcommittee).

Figure 3 **Average attendance (percentage) by peers at meetings of the Lords European Affairs Committee, by party, since 2019 election**



Source: Institute for Government analysis of data supplied by the House of Lords. Data correct as of August 2022. The European Affairs Committee was known as the European Union Committee until March 2021. One Labour peer is currently on a leave of absence from the House.

Attendance at the EAC is generally high, with relatively low variation between parties. Peers across all parties on the committee attended an average of 84% of meetings between the 2019 election and the 2022 summer recess, with only the attendance of Lib Dems falling marginally below the committee-wide average.

The EAC (which can look at the relationship with the European Economic Area and European Free Trade Association as well as the EU) launched an inquiry in July looking at many dimensions of the UK's new relationship with the EU, building on past inquiries into the UK–EU relationship in financial services and the trade in goods. In addition it has produced a report on citizens' rights. The Ireland/Northern Ireland Protocol subcommittee has two current inquiries on the operation of the protocol and the role of the European Court of Justice (CJEU) in its operation.

The EAC has found the government unwilling to share some documents with it. While the government shares documents relevant to the Northern Ireland protocol, it has taken a very restrictive view of which documents, with accompanying explanatory memoranda, to send to the committee on the functioning of the wider institutional framework. The government has questioned the locus of the committee to scrutinise such questions. The EAC's frustration has also been shared by the International Agreements Committee.

Both committees hold periodic standalone sessions at which they scrutinise government ministers on all aspects of the UK–EU relationship/protocol as appropriate – although securing regular ministerial attendance has been difficult. For example, the EAC heard from James Cleverly on 21 June 2022, some eight months after Lord Frost’s last appearance in October 2021 (he had appeared before that in May). The committee asked Cleverly why it had taken so long for him to appear (with the minister citing “bedding-in time” to his role and the range of responsibilities across his brief).¹⁰

The Common Frameworks Committee undertakes detailed scrutiny when such frameworks become available (delays meant it got off to a slow start). No other committee has shown much appetite for getting to grips with this aspect of the post-Brexit relationships within the UK so this fulfils a useful gap.

Treaty scrutiny

The UK parliament has a diminished role on treaties and trade compared to before Brexit

The UK has taken back important treaty making powers from the EU – not least in the area of trade. The European Parliament – and national and indeed subnational parliaments in some cases – were key players in the finalisation of trade deals, needing to consent to many of the deals’ provisions before they could be fully implemented. This is in marked contrast to the limited role the UK government has ceded to parliament in post-Brexit trade deal and treaty making.

There have been regular inquiries across the two Houses scrutinising the working out of the post-Brexit trade regime – and, in May 2022, the government agreed arrangements for parliamentary scrutiny of the new trade agreements it is negotiating after Brexit in an exchange of letters between the then international trade minister Lord Grimstone and the chair of the House of Lords International Agreements Committee.¹¹ These arrangements have worked fairly well in the Lords, where debates on new agreements have been held on request and the Lords has shown it is capable of detailed technical scrutiny of these new agreements.

Things have gone less smoothly in the Commons. The chair of the International Trade Committee expressed very public frustration about the government having “consistently hindered” his committee’s attempt to scrutinise the UK–Australia trade deal.¹² His fears were vindicated by the fact that the UK’s new FTA with Australia ended up being ratified through the process laid out in the Constitutional Reform and Governance Act 2010 (CRAG) without several of the government’s scrutiny commitments being met. MPs asked at the end of June for time to produce reports on the deal¹³ but ministers proceeded nonetheless – and the government also refused time for a debate in the Commons during the CRAG period (despite the commitment to do so in the exchange of letters).¹⁴ When the failure to allow more time was challenged by a Conservative MP in an urgent question, just before the House rose, the then junior trade minister claimed that the processes laid out by Lord Grimstone applied only to the “other place” (i.e. the Lords).¹⁵

One issue looming is the five-year review of the operation of the TCA. Not only do the scrutiny arrangements set out in the exchange of letters not apply to the TCA, but there might be little scrutiny of any implementing legislation. While parliament needed to pass primary legislation for the TCA to take effect (though the timing of the agreement meant there was no opportunity for any real scrutiny as the deadline for exit approached; the European Parliament allowed itself much longer, with the agreement provisionally applied until then), the government could potentially use its existing powers to agree and implement very significant revisions – or indeed a termination of the agreement – without parliamentary consent.

Looking ahead

Parliament will need to engage with Brexit legislation promised in the 2022 Queen's Speech

After the initial flurry of legislation putting in place post-Brexit regimes where they were unavoidable, there has been relatively little introduced over the last session of parliament. That is about to change.

Political commentators suggest that Boris Johnson's team regarded Brexit as a key dividing line between the political parties and sought to use it to reassert their policy agenda after the pandemic and partygate. The raft of Brexit legislation included in the 2022 Queen's Speech will need to be examined on its merits, but the proposals are intended to shape the UK's future ability to trade with the EU, and the operation of the UK internal market – proposals that should be subject to proper scrutiny by MPs before reaching the statute book. Based on its past behaviour, the opposition may fear that the government will seek to weaponise any attempt to stay closer to EU regimes as indicative of a 'soft' approach to Brexit or even a long-term desire to rejoin the bloc.

Taking Brexit opportunities was a big theme of the 2022 Queen's Speech, with the then prime minister explaining in the foreword to the accompanying notes¹⁶ where the government saw those opportunities arising:

"Our Brexit Freedoms Bill will enable law inherited from the EU to be changed more easily to suit the UK without taking decades of parliamentary time. We will bolster our world class financial services industry, create a first-rate data rights regime and unlock the potential of revolutionary technology for our farming sector. And we will reform our public procurement regime so that more small and medium-sized businesses benefit. One of our greatest new freedoms is the power to negotiate new Free Trade Agreements from scratch, as we have done with Australia and New Zealand. In this session, we will make the changes necessary for their implementation."

The text of the Brexit Freedoms Bill has yet to be published, but it is likely to give ministers powers to change retained EU law (now on the UK statute book) through secondary legislation. Ministers were also reportedly considering a 'sunset clause', which will have the effect of terminating all retained EU law at a set date in the future, as a device to force consideration of its continuation. During the Conservative Party leadership election, candidates vied for how soon EU law could be eradicated from

the UK statute book. Such important and wide-ranging legislation would raise major scrutiny challenges for parliament, not least because, as the Secondary Legislation Scrutiny Committee has previously pointed out, “there is relatively scant effective parliamentary scrutiny of secondary legislation”.¹⁷

The opposition cannot leave it to Conservative backbenchers and peers to challenge the government over such proposals simply because of their fear of being painted as Brexit deniers. All who are concerned about the ability of parliament to hold the executive properly to account will need to engage with the proposals to ensure that systems are set up to deal with the potential volume of changes coming forward – though parliament’s inability to amend secondary legislation (it can only accept or reject it) and the exceptional rarity with which secondary legislation is rejected by either House place a limit on the realistic outcome of their scrutiny.

More immediately, parliament has been presented with legislation in the form of the Northern Ireland Protocol Bill (introduced after the Queen’s Speech), which is intended to give ministers the powers to “address the practical problems” with the negotiated protocol by replacing it with their own preferred regime for managing and governing trade between Great Britain and Northern Ireland. Controversially, the government claimed that the bill, if enacted, would not breach international law because it could act under the “doctrine of necessity”. This view is disputed by many legal experts who point out that that is designed to deal with “grave and imminent peril” and cannot be invoked by a state that has contributed to the situation of necessity.¹⁸ Legislation that could take months to pass parliament hardly suggests an emergency¹⁹ – and in any case the government could in an emergency genuinely threatening to destabilise Northern Ireland invoke Article 16 of the protocol, designed to deal directly with problems arising from implementation.²⁰

Assuming the new prime minister lives up to her commitment to proceed with the bill it will now be considered in the Lords, where much more opposition is expected. The Northern Ireland Protocol Bill has already been criticised by the House of Lords Delegated Powers Committee for the extensive powers the government is proposing to give itself to enact a new way of managing trade between Great Britain and Northern Ireland (whether developed unilaterally or negotiated with the EU).

The UK–EU Parliamentary Partnership Assembly could become a useful vehicle for keeping MPs and peers engaged on EU issues

There is one other forum established so parliamentarians can engage with the EU and on EU issues. Article 11 of the TCA established a Parliamentary Partnership Assembly (PPA) where MPs, peers and members of the European Parliament can meet to discuss areas of common interest. In December the prime minister announced the 35 members of the UK delegation (plus some substitutes),²¹ which looked to reflect the balance of views across the two Houses.²²

This forum could be a useful place for UK parliamentarians to keep informed about what is going on in the EU and build personal relations with MEPs. The first meeting took place in May 2022 and kicked off with a rather unproductive slanging match between Maroš Šefčovič, who leads on the UK relationship for the European Commission, and the then Cabinet Office minister Michael Ellis, which did not seem a particularly good use of anyone's time.

It is too early to say how useful this body will be,²³ though there are some signs that it wants to engage with the future UK–EU agenda – and the TCA allows the PPA to put proposals to the Partnership Council that governs the UK–EU relationship. This could be a useful way of alerting MPs and peers to issues that will affect the course of the future relationship.

Brexit is not 'done' enough for parliament to ignore it

Liz Truss will be the first prime minister since 2016 not to have to grapple with securing the UK's exit from the EU. But she is far from free of Brexit. There are looming deadlines in the next few years when critical elements of the TCA will come up for review.²⁴

Parliament has yet to show it can hold government properly to account over its management of the UK–EU relationship – and more broadly over the consequences of the UK's decision to leave the bloc. The Johnson government ducked meaningful scrutiny while, until Keir Starmer set out Labour's approach in July 2022,²⁵ the main party of opposition seemed to regard it as an issue best avoided. This will, and will need to, change. In the next section we outline how we think parliament's scrutiny can be improved.

Improving scrutiny in the future

A new government offers the chance of a new approach to parliament and UK–EU relations. Below, we set out some steps for the Truss government to take to put scrutiny on to a more solid footing. But scrutiny and accountability are two-way processes, and it is important that parliament and parliamentarians demonstrate that they are working hard to assess the implications of Brexit – as such, we also set out some steps for the opposition and other MPs to take to ensure effective scrutiny. We close by setting out some steps for MPs, government and the opposition to take to put scrutiny on to a more solid cross-party basis.

Government and the Commons should revisit the decision to leave scrutiny to the ESC and make positive proposals for future scrutiny

Scrutiny of the government’s management of the relationship with the EU is too big an issue to be left to ad hoc reinterpretation of an outdated standing order by the chair and members of the ESC. Government and the Commons should make a positive decision on how scrutiny should be reformed, and revise the standing order to allow the committee to perform scrutiny well.

The current lacklustre arrangements probably suit the government well. So MPs, particularly the senior backbenchers who chair committees and constitute the Liaison Committee, may need to make the running on this, with input from the Procedure Committee.

Once the Commons is clear on how it would like to reform scrutiny arrangements – whether by changing the remit of the ESC or establishing new committee structures – it will need to put pressure on the government to introduce a motion for MPs to approve to allow changes to be made. That may be an unappealing prospect for the government – but both government and MPs need to realise that poor scrutiny and weak accountability reflects badly on all of them.

The new or reformed committee should lead on scrutinising the management of the UK–EU relationship

The core of the work of a new or reformed committee would be to take on the tasks identified by the now defunct Future Relationship Committee, in particular scrutinising the implementation of the Trade and Cooperation Agreement and the Withdrawal Agreement and the way the government is approaching all the committees that sit underneath those agreements. That will inevitably lead to some risk of duplication – for example, with the Lords subcommittee on the Northern Ireland protocol – but this is a risk worth taking to ensure sufficient scrutiny takes place. It should be perfectly possible to agree a sensible division of labour with the Lords.

To show that parliament is taking its scrutiny role seriously, the committee should also be interested in the wider impact of the agreements – for instance, on the economy, on citizens and on the UK’s security and foreign policy – but there it should potentially organise joint hearings with other relevant departmental select committees. It should

also look at how the UK government's management of the relations with the EU affects its relations with the devolved governments, and so its impact on the union (though leaving detailed work on Common Frameworks to the Lords).

There are a large number of looming deadlines contained in the agreements – one role of the committee should be to ensure that parliament is aware of and has an opportunity to question government on the approach it is taking in the run-up to these.

Finally, the committee should take an interest in wider EU developments and the potential impacts on the agreements with the UK as well as UK interests more generally. There are issues where the UK may need to lobby the EU to try to head off changes that would put the UK at a disadvantage and it should hold regular sessions with the UK Mission to the EU to keep up to date on the risks and opportunities being identified.

Clarifying the remit of the reformed or new scrutiny committee through revisions to standing orders is key. This would make it clearer what fell under its remit and what would fall to other select committees.

The chair and members of the new or reformed committee should be elected

The chair of the Exiting the EU Committee and its successor was elected by the whole House, but the chair of the ESC has not been since it was left out of the 2010 reforms. This may be because in its former incarnation of chief sifter of European documents, there was not much demand for the role or, since 2010, because it has suited governments to allow Bill Cash to be unopposed as chair.

But if the ESC is to be the focus of the wide-ranging scrutiny of the government's handling of relationships with the EU for which the Future Relationship Committee argued, it needs to have an elected chair. It would be for discussion whether that chair should be from the party of government or opposition. If the decision of the House is to set up a new committee to play the role mentioned above, it should ensure that its chair is elected by the Commons – as the chairs of most other committees are.

Northern Ireland MPs should have seats on the new or reformed committee as of right

The committee chosen to play this role needs wider membership. How potential regulatory divergence by the UK might impact the operation of the Northern Ireland protocol was not raised by a single member at the ESC hearing with the minister on post-Brexit regulation. Since this committee has a critical role in Commons oversight of the government's approach to the protocol, and much of its work has direct implications for Northern Ireland, Northern Ireland MPs should be represented on the committee. The overall committee membership should be large enough to allow representation from both unionist and nationalist communities (as there is now a nationalist party again that is prepared to take its seats).

As a stopgap, Labour should consider following the example of the Conservatives and cede one of its ESC seats to a member of the SDLP (or the Alliance Party) – as the Conservatives did for the DUP.

Labour MPs need to play their part in scrutinising Brexit properly

Labour needs to make its presence felt both in the committees and on the floor of the House. It is not appropriate for those challenging and scrutinising ministers predominantly to be their party colleagues. At the time of publication there is still a Labour frontbencher on the ESC (shadow immigration minister Stephen Kinnock), and it was only in July that another frontbencher (shadow foreign secretary David Lammy) left. Both should have left on assuming frontbench roles. The other members should attend more regularly.

Ultimately committee attendance of Labour members is a matter for the leader of the opposition and the Labour whips. Brexit was a difficult subject for Labour under the Johnson government. But the party has now set out its intent to “Make Brexit Work” and needs to realise that, in opposition, a key element of making Brexit work is holding the government properly to account for how it is managing the relationship with the EU.

Labour also needs to work out who on its frontbench team will lead on Brexit. To some extent this will depend on how the government organises itself in the future on Brexit, and the full suite of ministers and their responsibilities in Liz Truss’s government is not yet clear, given government formation was paused on the death of the Queen.

The government must give parliament the material it needs to scrutinise post-Brexit activity properly

The UK is no longer inside the EU, but the machinery set up under the Withdrawal Agreement and the TCA – notably the Joint Committee on the Withdrawal Agreement²⁶ and the Partnership Council – are potentially important forums for negotiation. Parliament must be able to scrutinise the activity of those committees and their subcommittees. It should do this both retrospectively but also prospectively, so that MPs can influence the approach the UK is taking on issues ranging from Northern Ireland to the implementation by both sides of the citizens’ rights agreements and the detailed implementation of the TCA.²⁷

Thus far there is no agreement about what information the new Truss government will provide the ESC to allow it to properly engage with the approach it is taking. Lord Frost was apparently reluctant to concede this role; as foreign secretary, Truss seemed to be prepared to be a bit more forthcoming but no formal agreement was reached with either the chair of the Commons or Lords committees. This will now fall to her successor as foreign secretary, James Cleverly, to decide.

Ideally the committees should go further than this. The Northern Ireland Affairs Committee has already proposed adopting an [Institute for Government recommendation](#) that government should proactively inform parliament of legislation that may create divergence between Northern Ireland and Great Britain.²⁸ The Lords European Affairs Committee has commissioned a quarterly tracker of divergence between regulation in the UK and the EU from the think tank, UK in a Changing Europe.²⁹

But this type of analysis should be provided by the government to both Commons and Lords committees with an assessment of the implications for the operation of the TCA, for compliance costs for UK businesses, public sector costs, the operation of the UK internal market and the Northern Ireland protocol. This would alert parliament to areas where there were potentially significant implications for the UK of future divergence.

The head of UKMis (the UK Mission to the EU) could also come and regularly brief MPs and peers on upcoming EU presidencies and the EU forward legislative agenda to allow scrutiny of the government's priorities for securing UK interests. The government did provide the Lords European Affairs Committee with an explanatory memorandum on the European Commission's Annual Work Programme but was less forthcoming in responding to the questions that followed.³⁰

The government should also commit to proper arrangements for parliamentary involvement in trade deals

This issue appeared to be resolved by the exchange of letters in May between Lord Grimstone and Baroness Hayter, detailed above. But the matter has now been reopened by the government decision to proceed with ratification of the UK–Australia deal without a debate or vote in parliament after the expiry of the 21-day period under CRAG, and by the minister's subsequent assertion that the Grimstone assurances applied only to the Lords.

Ministers therefore need to come back to the Commons and agree a proper process for early involvement of parliament in discussing negotiating objectives and then a process once deals are concluded for scrutiny and ratification. They need to realise that many countries use the need to get their parliaments on side as a source of strength in negotiating deals by limiting the number of concessions they can make. If ministers do not think they can convince parliament of the merits of the deals they are doing, they should be doing better deals.

Members of the Parliamentary Partnership Assembly should use it positively to keep up to date with EU thinking

There is wide-ranging and heavyweight membership of the PPA. It could just become a meaningless talking shop or another vehicle for rehearsing UK–EU disputes. But it could also become a forum to allow parliamentarians to deepen mutual understanding, build the sort of personal relationships that came much more easily during UK membership and form the basis of a more productive future relationship.

That won't happen if it becomes dominated by the lead negotiators. But it is up to members and the delegation leads to ensure that it does not and instead genuinely offers an opportunity for members to engage substantively on issues of future common concern. The presumption should be that the members of the main Commons committee scrutinising UK–EU relations should all be delegates to the PPA.

Conclusion

After parliament's bruising experiences of the post-referendum period, it is not surprising that many MPs, especially on the Labour benches, want to avoid looking back at Brexit. The government's message that Brexit is done has attraction for many in the Commons, regardless of whether they support the claim.

But whatever the government may hope, Brexit is not really done and certainly not going away. There is a lot of evidence that Brexit is causing real problems for business and citizens – some a necessary consequence of the form of Brexit chosen, others unforeseen – but there is also frustration among Brexit supporters that the government has not been nimble enough at identifying and seizing the opportunities it presents. The UK and UK companies are still affected not just by what was agreed in the TCA, but by the way that agreement is being implemented and by future regulatory developments in both areas. The TCA is also not a permanent agreement – as Lord Frost has pointed out, it contains mechanisms for review and rebalancing, which means it will potentially remain a big issue not just for the rest of this parliament but for the next one too.

It is right that the UK's relationship with its European neighbours is not dominating parliamentary time and attention as it did between 2016 and 2019. But the way the government manages the relationship still matters – and parliament must not duck its responsibilities to hold ministers to account for the way they are fulfilling that responsibility.

The early days of the Truss government do not suggest that it has much more appetite for scrutiny than the Johnson government. But its advent is an opportunity for a reset – and it should also consider what influence it might want on the long-term UK–EU relationship if it found itself in opposition after the next election. Either government should propose changes itself or senior parliamentarians from across the political spectrum should pressurise government into making clear that parliament has an important continuing role to play. Failure to do this reinforces the impression that the mantra of 'taking back control', which was so powerful in the referendum of 2016, was about handing power to the executive and hoarding it there, not re-empowering parliament.

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About the authors

Jill Rutter

Jill is a senior fellow at the Institute for Government, and has directed the Institute's work on better policy making and arm's length government, and Brexit. She is a former senior civil servant, having worked in HM Treasury, Number 10 and the Department for Environment, Food and Rural Affairs (Defra).

Dr Hannah White OBE

Hannah has been Acting Director of the Institute for Government since August 2022. She has extensive knowledge of Westminster and Whitehall based on a career in parliament, the civil service and academia. Before running the Committee on Standards in Public Life in the Cabinet Office, she was a clerk in the House of Commons. She joined the Institute in 2014. Hannah received an OBE in the 2020 Birthday Honours for services to the constitution, and in April 2022 she published her first book, *Held in Contempt: What's wrong with the House of Commons?*

Dr Alice Lilly

Alice is a senior researcher working across our civil service and ministers teams, exploring how ministers can be better supported in their roles. She also leads on much of the IfG's work on parliament and parliamentary scrutiny – and ran the IfG's Parliamentary Monitor project, which used data to explore the work of the UK parliament.

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