# Brexit: Parliament's Five Transition Tasks

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# Brexit: Parliament's Five Transition Tasks

On 19 March, the UK and the EU published a draft Withdrawal Agreement (WA) which provides for a 21-month transition period, from Brexit on 29 March 2019 to 31 December 2020, in which the UK would essentially remain within the EU legal order and subject to the authority of EU institutions. The UK would, in particular, continue to take on new EU law coming into force during the transition period.

According to the colour coding used in the 19 March draft, counting by number of articles (excluding Protocols) just under 80% of the draft WA is agreed, 3% is agreed in principle, and nearly 20% is not agreed.

Publication of the draft has prompted reaction and speculation mainly about the high politics of Brexit, and particularly about prospects for Parliament's promised 'meaningful vote' on the WA later in 2018.

But the prospective post-Brexit transition period also has a set of much more technical implications for Parliament.

In this briefing note, we outline five areas where this applies. These can be seen as making up Parliament's transition 'to do' list.

The first three 'to do's' relate to Parliament's role in EU affairs, and are closely mutually linked.

The remaining two areas concern the need to take account of the transition period in Parliament's legislative and scrutiny work.

But, at the end of the note, we suggest that the prospect of the transition period may not make much difference to Parliament's work now, before the WA is finalised and approved. Uncertainty - over both content and process - plus Brexit political needs will prevent Parliament from starting to operate now on the assumption that the transition period as provided for in the draft WA will definitely come about. Instead, the legislature will be obliged to carry on trying to accommodate the possibility of both transition and no-transition at least for another few months.

## Parliament and EU affairs in transition

### 1. Scrutinising new EU law and policy in the EU system: no longer an EU national parliament

The EU Treaties give the national parliaments of EU Member States a role in the EU decision-making system, albeit a very limited one (Article 12 of the Treaty on European Union and Protocols 1 and 2 to the EU Treaties).

However, Article 123 (2) of the draft WA specifies that, with some exceptions, the UK Parliament is no longer to count as an EU national parliament during the transition period.

*1.1 Direct engagement with the EU institutions*

National parliaments' role in the EU system starts with their receipt from the EU institutions of European Commission policy and consultation documents and annual legislative programme (Protocol 1, Article 1), agendas for and outcomes of EU Council meetings (Protocol 1, Article 5), and all draft EU legislation (Protocol 1, Article 2). This may be the basis for national parliaments to send views to the European Commission, under the banner of 'political dialogue'.

However, under the 'yellow' and 'orange card' system (officially the 'subsidiarity control mechanism') introduced by the 2007 Treaty of Lisbon, national parliaments are also able to submit formal 'reasoned opinions' to the EU institutions making a case that an EU legislative proposal violates the principle of subsidiarity. If the number of 'reasoned opinions' passes a Treaty-set threshold, national parliaments can trigger a review of any proposal (Protocol 2, Article 7). In the UK, the submission of 'reasoned opinions' takes place via the European scrutiny committees in both Houses, the European Scrutiny Committee (ESC) in the Commons, and the EU Select Committee in the Lords.

Under Article 123 (2) of the draft WA, it appears that the UK has carved out an exception so that the EU institutions will still send Commission documents and draft legislation (but not Council agendas and outcomes) to the UK Parliament during the transition. (The exception was not in the European Commission's original, 7 February, paper on the WA, but first appeared in the UK's response to it, published on 21 February.)

But the UK Parliament will no longer be eligible to participate in the yellow/orange card system. Because of the possibility of triggering a review, EU national parliaments often use this subsidiarity mechanism - rather than the vaguer 'political dialogue' - to raise concerns which are not, in fact, related to subsidiarity but rather policy substance.

According to the European Commission's most recent annual report on the issue, in 2016 the House of Lords submitted views on EU proposals 17 times, and the Commons three, including one 'reasoned opinion' under the subsidiarity control mechanism.

Westminster's loss of 'EU national parliament' status is the - probably unavoidable - corollary of the UK government's loss of institutional representation during transition, once the UK becomes a non-EU state on 29 March 2019. There are well-grounded concerns, raised not least by UK parliamentarians and ministers, that the current 'card' system is an ineffective vehicle for national parliament influence (the yellow card threshold has been reached three times since the Lisbon Treaty came into force in 2009). And, as the ESC noted in 2017, falling out of the subsidiarity mechanism at least means one less task for UK parliamentary staff.

But, just like the UK's overall status during transition, Westminster's loss of 'national parliament' status raises concerns about the UK applying EU law while being outside the mechanisms to make and control it. Moreover, inasmuch as, to ensure continuity, EU law might be 'frozen' into UK law at the end of the transition period (rather than in March 2019), the post-transition UK might continue to be affected by law over which it has had no say (see section 4. below).

In its latest report, in March 2018, the ESC said that "if the transitional arrangement is implemented as described … it would require continued intensive scrutiny of EU affairs by Parliament" (paragraph 46). Working out how this is to be effected is Parliament's first transition task. The ESC suggested that looking at the work of the relevant committees of the Norwegian and Swiss parliaments might be a place to start (paragraph 49).

The solution which is arrived at, for the monitoring of new EU law and policy and for the parliamentary scrutiny of the government's EU-related action as outlined in 2. below, will have implications for parliamentary resources and staff. Because of the volume of business and the need for legal expertise, the ESC and the Lords EU Committee are two of Parliament's more resource-heavy select committees. If they were to need to carry on processing new EU material at something like the same volume as now, there could be less scope to transfer parliamentary resources to other areas where the UK is gaining policy powers as a result of Brexit, such as trade.

Parliament's engagement with the EU during transition could also have implications for the National Parliament Office (NPO), Westminster's 'eyes and ears' in Brussels. (According to the public list of NPOs, the Norwegian Parliament maintains such an office in Brussels; its Swiss counterpart does not.)

*1.2 EU inter-parliamentary cooperation*

The EU Treaties also provide for cooperation between EU national parliaments and the European Parliament (EP).

There is a panoply of EU inter-parliamentary bodies and forums. In addition to standing bodies, there are occasional meetings on particular policy issues organised by EP committees, or sometimes the national parliament of the country holding the EU Council Presidency. These bodies and forums have no formal role in EU decision-making (the Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union - COSAC - is the only one mentioned in the EU Treaties). However, if national parliamentarians choose to use them, they can be useful channels to exchange information, build networks and relationships, question senior EU officials directly, exercise informal influence and coordinate activities with counterparts from other Member States and the EP.

For standing bodies, decisions about members, observers and invitees from non-EU parliaments are for the bodies themselves, and there is no consistent practice. National parliaments of European NATO members (as well as of EU candidate states) have observer status in the Inter-Parliamentary Conference for the Common Foreign and Security Policy (CFSP), guaranteeing the post-Brexit UK Parliament representation in that forum should it want it. Beyond that, the picture is:

- EU Speakers' Conference: no provision for non-EU Speakers to attend;
- COSAC: EU candidate countries have observer status; other non-EU invitations are discretionary;
- Inter-Parliamentary Conference on Stability, Economic Coordination and Governance in the EU (SECG conference, or 'Article 13' conference): EU candidate countries have observer status; other non-EU invitations are discretionary;

- New Joint Parliamentary Scrutiny Group on Europol: may invite non-EU observers only from countries which have an agreement with Europol.

In its March report (paragraph 49), the ESC argued that the fact the UK will be applying EU law during transition but without representation in the main EU decision-making bodies *increases* the premium on retaining sight of EU developments where possible.

One channel for such activity is the 'tripartite' meetings that UK MPs and peers hold with UK MEPs usually twice a year, outside EU mechanisms. Without UK MEPs, this forum must presumably cease with Brexit; but UK participation in the EU inter-parliamentary bodies would appear potentially to remain available.

The UK Parliament's post-Brexit status does not seem to have figured largely in the formal proceedings of EU inter-parliamentary bodies since the UK referendum. The first step in arranging some kind of transition period status for the UK Parliament in EU inter-parliamentary bodies would presumably be behind-the-scenes soundings about the possible issuing and receipt of invitations.

Decisions about the status and size of non-EU delegations to EU inter-parliamentary bodies can be vexed. Participants on the EU side may not wish to invest significantly in developing a bespoke transition status for the UK Parliament given that the transition period is intended, not least on the EU side, to last only 21 months, and EU inter-parliamentary bodies typically meet only twice a year. During transition, it might be easiest for the UK Parliament simply to be an invitee to relevant meetings, pending greater clarity on the nature of the long-term UK-EU relationship. Who and how many Westminster parliamentarians might attend would remain to be determined.

In the context of UK parliamentarians' contacts with their European counterparts, it may be useful to note that the MPs' expenses scheme has already been modified to facilitate these. Previously, MPs could claim travel expenses for up to three visits per year to the EU institutions and the parliaments of Council of Europe member states. After a consultation ending in October 2016 and reporting in March 2017 which concluded that "given the UK's expected exit from the European Union, MPs may in future have an increased role in representing their constituents in Europe", the Independent Parliamentary Standards Authority (IPSA) amended the rules with effect from the 2017-18 financial year. MPs may now claim travel costs for an unlimited number of journeys related to their parliamentary work "to and from other states in Europe".

## 2. Scrutinising the UK government in EU decision-making: the UK's European scrutiny system

Independently of EU mechanisms, the UK Parliament operates a system of European scrutiny based on holding the UK government to account for its actions in EU decision-making.

This system is a matter for the UK, but institutionally it is linked to the UK Parliament's role in the EU decision-making system outlined above, through the central position occupied in both by the ESC and the Lords EU Select Committee (plus, on the staff information-gathering side, the NPO in Brussels). As well as providing for scrutiny and

accountability vis-à-vis the UK government, Parliament's European scrutiny system is a major vehicle for information about EU developments to reach Westminster.

The UK's European scrutiny system is triggered when the UK government deposits, with the ESC in the Commons and the EU Select Committee in the Lords, EU documents that it receives as an EU Member State government from the EU institutions. The committees' work is based primarily on the explanatory memorandums that the UK government submits, setting out its position on the EU documents. The whole system is geared around the positions and actions of UK ministers in the EU Council. Inasmuch as the system has bite, it derives from the 'scrutiny reserve', set out in resolutions of both Houses, which in theory prevents UK ministers from agreeing to an EU measure in the Council if it is not cleared from the UK scrutiny system. Ministers also make written parliamentary statements before and after Council meetings, an important source of ongoing information about EU business and UK positions.

However, in the transition period, it is not clear whether the UK government will receive documents from the EU institutions as it does now as a Member State. (Comparing the government's 21 February text with the 19 March draft WA suggests that UK government receipt of Commission proposals during the transition was a UK request which has not been met.)

More importantly, during the transition UK ministers will not be in the EU Council to vote and take a position. The ESC has said that this renders the UK's European scrutiny system "toothless" (paragraph 47).

The draft WA does, however, provide for the UK to have some limited consultation rights (Articles 123(5) and (7), 124(2) and (5)); to decline to be bound by some EU CFSP decisions where it would have had a veto as a Member State (Article 124(6)); and to continue to be able to opt in to new justice and home affairs law where that amends law to which the UK has already opted-in (Article 122(5)).

There will thus still be some UK government activity at the EU level for the UK Parliament to scrutinise and hold to account.

Apart from the wider questions about how this might be done (on which the ESC and the Lords EU Committee are both engaged), this will require both Houses to amend the parts of their Standing Orders which underpin the current European scrutiny system.

The extent of any continued European scrutiny system that Westminster operates during the transition will have implications not only for staff resources, but also for MPs' and peers' time, and for time allocations on the floors of both chambers.

## 3. Oversight of the Withdrawal Agreement

The draft WA's third EU affairs-related implication for Parliament concerns the legislature's role in oversight of the Agreement.

This is not limited to being a transition task, since the WA is intended to outlive the transition period; but Parliament will need to get relevant arrangements in place before the transition starts.

The draft WA (Article 157) establishes a UK-EU Joint Committee to ensure the Agreement's implementation. The Joint Committee has power to adopt binding decisions, and to amend the WA in certain cases. The Joint Committee will sit at the head of an architecture of specialised committees, and it is to issue an annual report. It *may* have power to refer UK-EU disputes about the WA to the EU Court of Justice (Article 162; this is not yet agreed).

The Commons ESC and the Lords EU Select Committee are already asking questions about the Joint Committee's parliamentary accountability. In its March report, to which a government response will be due in May, the ESC asked the government "to demonstrate how the Joint Committee will ensure a high level of transparency and accountability" (paragraph 52). And the Lords EU Committee has requested a response from Brexit Secretary David Davis by 13 April to a letter asking, among other things, whether he plans to make "proposals to ensure appropriate parliamentary involvement in or oversight of the work of the Joint Committee".

As with other aspects of legislative-executive relations in Brexit, the UK Parliament may be able to leverage the position taken by the EP: in the EP's 14 March resolution on the future UK-EU relationship, it "underline[d] that the EU representatives on [the Joint] Committee should be subject to appropriate accountability mechanisms involving the European Parliament".

The mechanisms the government and Parliament put in place for oversight of the Joint Committee could matter for the operation of the WA. But they could also come to stand alongside arrangements for parliamentary oversight of similar bilateral bodies created in new post-Brexit UK international agreements, including the UK-EU agreement(s) on the two sides' long-term relationship, and UK trade agreements. As such, the precedent-setting effect of the WA arrangements could be even more important.

## Legislating and scrutinising for transition: more time?

### 4. Scrutiny of UK Brexit preparedness

Parliament's Brexit scrutiny - especially by select committees - has focused to a significant extent on the degree to which the UK will be ready to operate outside the EU by March 2019 in administrative, regulatory and practical, as well as legal, terms.

For example, the House of Commons Business, Energy and Industrial Strategy Committee said in March that leaving the European Aviation Safety Agency (EASA) in March 2019 was not an option, and that the UK Civil Aviation Authority would "need to undergo a major investment and recruitment programme if it is to take over the functions of EASA". In February, the Lords EU Select Committee called it "imperative to ensure that the Competition and Markets Authority is appropriately resourced – and has staff with the right skills and experience in place – in good time to prepare to take on its post-Brexit caseload". The Commons Home Affairs Committee said the same month that the Border Force "does not currently have the capacity to deliver" any additional checks at the border on EEA nationals entering the UK after March 2019 and would "struggle to put sufficient additional capacity and systems in place".

However, the transition period which is in prospect would appear to mean that the UK does not need to be ready to operate outside the EU system in these administrative and practical terms by March 2019, but only by December 2020. The gaining of more time to prepare is precisely one of the main aims of the transition.

Select committees might have cause to be aggrieved that the timing assumption that has underpinned their scrutiny work so far may be overtaken. On the other hand, their work will not be wasted, and agreement on a transition period is arguably a 'win' for those committees which had advocated this outcome.

Either way, select committees will have to adjust their scrutiny of Brexit preparations to the potentially longer timeframe.

In principle, this could allow more in-depth scrutiny, alongside more prioritisation and greater use of milestones along the way to December 2020. However, the timeframe for some preparations could still be tight. And, depending on how much is known about the post-transition UK-EU relationship before Brexit, and how much remains to be negotiated afterwards, select committees may still be scrutinising preparations during the transition period without knowing exactly what the UK is preparing for.

## 5. Legislating for Brexit: more time, or more time-points?

The legislative approach to Brexit so far has been to create a UK legal order that can operate essentially independently of the EU from Brexit on 29 March 2019.

The government's vehicle for this, the EU (Withdrawal) Bill, starts its report stage in the House of Lords on 18 April. Broadly, the Bill:

- repeals the 1972 European Communities Act (ECA) on exit day, to eliminate at that point the supremacy and direct effect of EU law;
- saves, into UK law, EU law as it exists on exit day, as a new category of 'retained EU law'; and
- (under Clause 7) gives ministers powers, from passage of the Bill until two years after exit day, to make delegated legislation to 'correct' retained EU law to make it work in a UK-only context after 29 March 2019.

But the draft WA provides that during the transition period the UK will essentially remain within the EU legal order and subject to the authority of EU institutions. (The exact role of the EU Court of Justice during transition remains one of the issues not yet agreed.) The UK would, in particular, continue to take on new EU law coming into force during the transition period.

As noted above, for business, and in some respects public authorities, the transition period is intended to make Brexit easier - by allowing more time to prepare for the long-term UK-EU end-state, and by requiring as far as possible only one adjustment, to that end-state once it is known.

But for Parliament, contemplating the Brexit legislative task, the prospective transition period arguably makes life more complicated, not less.

This is because there are still things that will happen when the UK leaves the EU on 29 March 2019 for which the legislature must make legal provision. However, Parliament must also provide a legal basis for the transition period, and for whatever comes afterwards. A Brexit with transition thus appears to involve multiple legislative time-points - multiple points at which different elements of the legislation for Brexit will need to fall into place. And yet Parliament must provide for this while still conducting proceedings on a Bill, the EU (Withdrawal) Bill, which essentially provides for a one-off severing of the UK and EU legal orders on 29 March 2019.

It might be thought that it would be easier to abandon the EU (Withdrawal) Bill and start over, with the government's promised Withdrawal Agreement and Implementation Bill (WAIB). However, even apart from the probably impossible politics of this, the basic legislative tasks of the EU (Withdrawal) Bill will still need to be carried out - just at different or additional times, in some cases. And work done in connection with the Withdrawal Bill on unavoidable - and unavoidably complex - issues such as retained EU law, and devolved and delegated powers, will not be wasted and should save valuable time when Parliament comes to consider the WAIB.

It therefore seems most likely that the WAIB will amend what will by then be the EU (Withdrawal) Act to make legislative provision for transition.

This raises the bizarre prospect of parliamentarians still working on a Bill, on which they have already spent over 200 hours, while knowing that they will be amending the resulting Act within months.

Legislative provision for the kind of transition foreseen in the draft WA would seem to require, in particular, re-creation of the most important elements of the ECA, to enable the UK to continue to take on new EU law and to allow for its supremacy and direct effect.

The Hansard Society will shortly be publishing a discussion paper by Swee Leng Harris of the Legal Education Foundation which looks in detail at how the EU (Withdrawal) Bill might be amended, and what the WAIB needs to do, to provide for transition.

Here, we flag three more general points.

First, the EU - including the EP, which must sign off on the WA - will have an interest in the legislative provision that the UK makes for transition, inasmuch as the EU will wish to ensure that the integrity of its legal order is protected and that the UK will implement the obligations it undertakes in the WA.

Second, the altered and/or multiple timings involved in legislating for transition could affect not only the EU (Withdrawal) Bill and the WAIB but also other Brexit primary legislation. For example, other bills - such as the Trade Bill - cross-reference to 'exit day' as defined in the EU (Withdrawal) Bill.

Third, delegated legislation and its scrutiny, on which the Hansard Society has focused much of its recent work, will also be affected.

Debate on the nature and scrutiny of the Clause 7 powers in the Withdrawal Bill has been conditioned by the fact that, absent a transition, they would need to be used relatively

speedily, in the time between passage of the Withdrawal Bill in early summer 2018 and Brexit in March 2019.

With a transition period of the kind envisaged in the draft WA, however, in which the UK will continue to apply EU law, the relevant 'corrections' to EU law to make them UK-only would presumably need to be ready to take effect only by December 2020, at the end of the transition. This longer timeframe could open the way to more extensive scrutiny.

However, just as there were always limits on the extent to which ministers could in practice use the Clause 7 powers before knowing whether there would be a transition, it may be that ministers also cannot fully use the Clause 7 powers during the transition as long as they do not know if and in what form there will be a different post-transition UK-EU relationship. In that case, the time for scrutiny before December 2020 would shorten again.

## Preparing for transition - but not yet: continued uncertainty and contingency

This note has identified five areas where the prospective post-Brexit transition period has implications for Parliament which will require the legislature to take action: continued monitoring of EU developments; continued scrutiny and accountability of the UK government in EU affairs; oversight of the UK-EU Withdrawal Agreement Joint Committee; adjusting scrutiny of UK Brexit preparedness to a longer timeframe; and legislating for transition.

### Parliament and government

The prospective transition period is intended to enable as much legal and practical continuity as possible after 29 March 2019. Brexit with transition is often characterised in terms simply of the UK government falling out of the EU institutions on exit day.

The discussion here on Parliament's role in EU affairs has highlighted that the legislature, too, will be implicated in an institutions-only Brexit. Parliament will lose both its own place in the EU institutional system, and, via the exit of UK ministers and officials from EU institutions, also its main locus to exercise scrutiny of the executive in EU affairs.

To ensure that effective arrangements are put in place for transition scrutiny and accountability in the EU-related areas identified here, the government will need to engage constructively with Parliament, as the relevant select committees are already requesting.

For the remaining two areas discussed in this note, legislation and scrutiny of UK preparedness, it would be hugely helpful to Parliament's work if the government to: set out how it envisages providing for transition in legislative terms; confirm the nature of the UK's relationship with and use of EU bodies and agencies during the transition period; and outline its own preparation plans over the somewhat longer timeframe now in prospect. Added to the draft WA itself, this would provide greater clarity about what Parliament might be dealing with after 29 March 2019.

## Parliament and uncertainty

However, even with such a statement from the government, Parliament would be unlikely to start operating now on the assumption that the transition as provided for in the draft WA will definitely come about.

This is because, first, there are remaining unresolved issues - most notably arising from the Northern Ireland/Ireland border - which might yet cause the WA to fail to be agreed, or to fail to be approved by the two parties' parliaments.

Second, the UK government remains under domestic political pressure, including from parliamentarians, to continue to be seen to countenance the possibility of there being no WA and therefore no transition, as a negotiating tactic with the EU. (In the House of Commons debate following the 22-23 March European Council at which EU leaders welcomed the draft WA, the Prime Minister acceded to a request again to confirm that "no deal is better than a bad deal and that all necessary preparations are being made for such an eventuality".)

Third, if Parliament were to be seen now to assume that the transition is a done deal, it would undermine its own case for a 'meaningful vote' on the WA.

At least until the WA is approved, therefore, Parliament is likely to continue to have to try to accommodate both potential transition and potential no-transition in its legislative, scrutiny and EU-related activities. Useful preparatory work for transition can be done, but transition is unlikely to become the exclusive basis for Parliament's work.

It remains to be seen whether Parliament would take the transition as definite when its two Houses pass motions approving the WA, when the EP does so, or only when the WAIB receives Royal Assent.

Two linked final points can be made arising from the discussion here.

The WA is intended to come with a UK-EU document on the nature of the two sides' long-term post-transition relationship. The extent to which this document provides in detail for the future relationship may be critical in determining whether the WA is approved at Westminster.

But the level of detail on the future UK-EU relationship will also determine, first, the extent to which Parliament can operate from the start of transition knowing what will come afterwards, rather than simply embarking on a repeat period of uncertainty. (The legal status of the prospective UK-EU declaration, and of any Westminster approval of it, could also matter here.)

Second, in outlining the nature of the prospective post-transition UK-EU relationship, the level of detail in the document could also indicate the extent to which the kind of close parliamentary monitoring and scrutiny of EU law and policy which is warranted by the transition will also be required for the long term, or whether only a much more limited engagement with EU law will be needed.


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