Regulatory strings that bind and the UK Parliament after Brexit

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Abstract
This article analyses Brexit’s promise of restoring UK sovereignty and retrieving regulatory autonomy from the EU from the perspective of the UK Parliament. It argues that while the prospects of post-Brexit regulatory alignment remain high, they are to some extent counterbalanced by those of targeted divergence. A two-fold argument is put forward to demonstrate this. The first argument builds on the literature on the Brussels effect and argues that the strength of economic interdependence between the UK and the EU and the size and influence of the latter’s market generate significant pressures for UK regulatory alignment with EU standards. This is demonstrated through a qualitative empirical examination of the contents of UK parliamentary scrutiny of the projected impact of Brexit on the key UK export industry sectors: automotive, pharmaceuticals, chemicals and financial services. It is shown that select committees in both Houses of Parliament, including the Eurosceptic ones, have consistently advocated close alignment with EU regulatory standards across the export-intensive economic sectors. As such, these findings relativise the prospects of taking back control to the extent that the substance of Westminster’s post-Brexit legislative activity may continue to be significantly influenced by EU regulation and policy. This is reinforced by the sanctioning mechanism foreseen in the Trade and Cooperation Agreement and the economic benefits of adhering to the EU’s adequacy and equivalence regimes. These factors therefore facilitate the future Europeanisation of UK law after Brexit. The second argument nuances the first argument by showing that UK legislative and regulatory divergence is not an abstract possibility, but rather a political reality grounded in strong government majority following the 2019 election, the scrutiny approaches that favour assessment of regulatory impacts, and the UK’s willingness to take unilateral action.

Keywords Regulatory alignment · Divergence · Europeanisation · Parliament · Scrutiny · Industry · BrusselsEffect

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Introduction

This article analyses Brexit’s promise of regulatory autonomy from the perspectives of UK industry lobbying and the UK Parliament’s committee scrutiny of sectoral economic impacts of Brexit during the withdrawal process and in its aftermath. It addresses the gap in the literature on the post-Brexit trajectory of UK law and regulation from the viewpoint of the central institution of Britain’s democracy—its Parliament. The analysis demonstrates that UK parliamentarians’ committee work on Brexit was guided by EU regulatory effects on the UK, but also that these effects are subject to political and legal developments in the UK, the EU and their bilateral relationship. The key argument is that Brexit is unlikely to eliminate market-based pressures for the UK’s regulatory alignment with EU rules, but also that Brexit has increased the scope for regulatory divergence. This puts Britain in a position of ‘re-engagement’, characterised by active but limited Europeanisation. Such ‘re-engagement’ will be effected not only by the UK Government, regulatory agencies and courts, but also by the UK Parliament by legislating and scrutinising post-Brexit UK–EU relations. The article shows that these two important parliamentary roles will continue to be informed by the preferences of British export industries and by the possibility of the Brussels Effect being activated.

To begin with, one of the key objectives of Brexit has been to regain legislative and regulatory sovereignty. For the British Government under Prime Minister Boris Johnson, the ability to diverge from EU rules has been the ‘cornerstone’ of its Brexit policy (Armstrong 2020, 213). This is to enable the UK Parliament to decide on the goals, level and direction of British policy without external fetters. Johnson emphasised this in his speech on the outcome of UK–EU trade deal negotiations:

We have taken back control of laws and our destiny. We have taken back control of every jot and title of our regulation. In a way that is complete and unfettered. […] British laws will be made solely by the British Parliament.

A significant degree of regulatory alignment between the UK and the EU, however, is already embedded in UK legislation and UK–EU agreements. The resulting formal constraints are threefold.

The first constraint concerns voluntary alignment through legal takeover and instates the highest level of alignment. This stems from the incorporation of EU law into UK law through the process of retention under the European Union (Withdrawal) Act 2018. The internalisation of EU acquis was designed to prevent a regulatory hiatus and allow Parliament to assess policy impacts and decide whether to repeal, amend or keep retained law (Craig 2019; Elliott and Tierney 2019).

The second constraint concerns negotiated alignment through direct application and represents a similarly high level of alignment, albeit territorially and
materially restricted. This derives from the Withdrawal Agreement’s Protocol on Ireland/Northern Ireland, which keeps Northern Ireland in the EU’s customs union and internal market for goods. This includes not only the Union Customs Code, the Common Customs Tariff and the EU’s trade defence instruments, but also 287 legislative instruments on goods and agricultural products, 22 on VAT and excise, seven on wholesale electricity markets, and a number of them on state aid (Weatherill 2020, pp. 224–225).

The third constraint concerns negotiated divergence management, which does not require regulatory alignment, but may indirectly incentivise it. Article 9.4 of the UK-EU Trade and Cooperation Agreement (TCA), in force since 1 May 2021, establishes either party’s right to take unilateral rebalancing measures where the other party’s significant divergence from the agreed thresholds in the areas of subsidies, labour and social standards, and environment and climate protection causes material impacts on UK–EU trade and investment, provided such measures are strictly necessary, proportionate and based on reliable evidence. This may generate a chilling effect on UK policy making and cause ‘dynamic alignment in disguise’ (Lydgate et al. 2021, p. 5). The UK Parliament’s post-Brexit legislative action may thus partially be shaped by the awareness of the adverse economic consequences for British exporters of the triggering of this mechanism (Jancic 2021).

These formal constraints, however, are merely the most visible limitations on Britain’s decision-making autonomy. As this special issue highlights, Brexit will not necessarily lead to deep changes. Indeed, this article argues that the UK Parliament’s legislative and regulatory choices may continue to be constrained by EU law and policy beyond the aforesaid legal commitments (Fahey 2017, p. 23). This stems from the anticipated de facto Brussels Effect (Bradford 2020a), which creates market-based incentives for UK export industries to adhere to EU regulatory standards owing to the economic benefits of regulatory alignment. In turn, these incentives may lead Parliament to enact rules identical to or substantially the same as EU rules, thereby activating the de jure Brussels Effect (Bradford 2012, p. 8).

This article has a twofold purpose. First, it presents evidence of the prevailing political opinion about the desirability of regulatory alignment that was expressed by a selection of the select committees in the House of Commons and the House of Lords during the 2017–19 Parliament. The pre-withdrawal period was chosen because it was crucial to Parliament’s in-depth examination of the economic impact of Brexit. The committees were selected based on a preliminary investigation of all committees and the importance which they attached to sector-specific EU regulatory impact on the UK in their scrutiny. The analysis demonstrates that regulatory alignment was widely supported across parliamentary committees, but also that this was accepted by the Government. This exposes the discrepancy between the Government’s intransigency in the public discourse on Brexit and its more compromising attitude in Parliament—itself a familiar pattern consisting of much scepticism of the EU in public debate and an accommodating and constructive approach in political practice.

Second, these insights are juxtaposed with post-withdrawal scrutiny by the post-2019 Parliament and complemented with an appraisal of some of the key broader
Regulatory strings that bind and the UK Parliament after Brexit

politico-diplomatic developments in post-Brexit UK–EU relations. The aim is to contextualise the prospects of Britain’s regulatory alignment with EU rules post-Brexit and demonstrate the counter-trends that are more favourable to divergence. The latter is shown through four counter-trends: (a) the differing political make-ups of the 2017–19 and post-2019 Parliaments; (b) the Johnson Government’s demonstrated wish to exercise Britain’s new-found sovereignty through unilateral action; (c) the TCA’s governance regime; (d) the response to the Covid-19 pandemic.

The UK Parliament’s scrutiny in the pre-withdrawal and post-withdrawal phases exposes the contours of Britain’s future ‘re-engagement’ with the EU. Pre-withdrawal scrutiny indicates that EU law and policy will continue actively to influence the post-Brexit UK (Cygan 2020), ensuring a degree of Europeanisation of UK laws as long as this is economically beneficial and politically desirable. Post-withdrawal scrutiny challenges this by suggesting that any Europeanisation will be limited and secondary to the UK’s own domestic legislative and regulatory plans.

These insights are important not only to depict how industry pressures can inform parliamentary processes, but also for two broader reasons. First, academic commentaries have persuasively noted that Brexit will not occasion Westminster’s outright empowerment and most explanations have been domestically-oriented with the central focus being on the UK executive’s dominance in deciding the fate of retained EU law (Chalmers 2017, p. 665; Cygan et al. 2020, p. 1614; Baldini et al. 2018). There has been less focus on the exogenous limitations to Parliament’s post-Brexit democratic authority, which Armstrong rightly stresses originate from both EU governance and global governance (Armstrong 2018). This article builds on the limitations derived from EU governance by showing that British parliamentarians who were engaged in scrutinising the economic repercussions of Brexit have recognised the EU’s potential regulatory effects and that they were guided by them in their Brexit-related work. Second, these insights provide a helpful context in which future research endeavours can situate the UK Parliament’s post-Brexit role in European affairs in terms of mechanisms for scrutiny, oversight and transnational cooperation.

This article is structured as follows. After a brief overview of the Brussels Effect, the analysis moves to the Brexit positions of the key British export industries—automotive, chemicals, pharmaceuticals and financial services. These sectors were selected because of their share in the volume and value of trade, and because in these industries EU regulatory standards are particularly tight, while divergences could be costly and could negatively affect the existing trade patterns. That industry views have been echoed in Westminster is shown through a qualitative legal investigation of the content of parliamentary scrutiny of Brexit’s impact on these economic sectors. This is done by examining the outcomes, reasoning and statements about regulatory alignment drawn from committee reports, ministerial correspondence, debates, evidence sessions transcripts, and other empirical material so as to gain a detailed insight into the UK Parliament’s and Government’s sector-specific institutional positioning in the Brexit process. This is followed by an examination of the changing contexts and trends that are more amenable to post-withdrawal divergence. The conclusions then affirm the potential for post-Brexit regulatory alignment, while highlighting the risks of overstating the prospect of it materialising.
The Brussels Effect

Post-Brexit Global Britain intends to maximise the economic advantages of regulatory autonomy by engaging in global markets, forging partnerships beyond the EU and defending multilateralism and the rules-based international order. However, the pursuit of UK global leadership coincides with the tangible imprint of EU rules on global norms. Going beyond Europe, the UK may paradoxically find itself redirected back to Europe because important segments of global law and governance originate in EU rules. As Bradford argues, ‘the Brussels Effect shatters the illusion of the regulatory freedom that Brexit is meant to deliver to the United Kingdom’, which becomes a ‘voiceless rule taker’ after Brexit (Bradford 2020a, pp. 278 and 283). Although this claim neglects the potential for the UK to assert its regulatory preferences in global rulemaking, which is beyond the scope of this article, the Brussels Effect remains convincing.

What is more, voluntary factual implementation of EU regulatory standards across global supply chains can activate the de jure Brussels Effect and become formalised through national legal enactments and international agreements. This article argues that both de facto and de jure Brussels Effects may be felt in the UK in the future and that this may indirectly affect Westminster’s lawmaking and scrutiny choices after Brexit. Although the withdrawal of the second largest European economy will negatively affect the EU’s own regulatory influence by reducing its market size and regulatory capacity, the Brussels Effect will not disappear (Bradford 2020a, pp. 265 and 278). British companies wishing to sell their goods and services in the EU single market will have to comply with EU regulatory standards and this may lead them to conform to these standards in non-EU markets too, especially where these markets are substantially influenced by EU standards. This perpetuates the substantive influence of EU regulation within the UK as long as it imposes standards higher than those imposed by UK and as long as the EU market is essential to British businesses (Barnett 2018). This is important for discussions on the likelihood of post-Brexit deregulation (Arana et al. 2019), which itself operates under the shadow of the TCA’s rebalancing mechanism.

British industry and UK–EU economic interdependence

While Brexit has also had non-economic rationales, the pull of the EU market and the dependence of British firms on profits made in it is very powerful. Accounting for 42% of British exports and 50% of British imports in 2020, the EU is the UK’s largest trading partner, followed by the USA, which accounts for 21% of British exports and 13% of British imports (Ward 2021, p. 4). Post-withdrawal, Britain continues to enjoy a services trade surplus (£37 billion) with the EU, while its overall trade deficit shrank by £17 billion (from £66 billion in 2018 to £49 billion in 2020) and the goods trade deficit by £11 billion (from £97 billion in 2018 to £86 billion in 2020) (Ward 2021, p. 4; Ward 2019, p. 3). This increases the relative significance of EU goods and services regulation, which provides an important context in which
UK legislative and regulatory choices are made (Bradford 2020b). This is tangible in all key British export industries.

With half of British car exports going to the EU, the automotive industry has strongly supported alignment with EU standards (Beattie 2017). In 2006, when the EU was adopting its chemicals regulation nicknamed REACH, the UK’s largest car lobby group, the Society of Motor Manufacturers and Traders (SMMT), representing over 800 companies, opposed it for fear of losing competitive advantage over non-EU manufacturers. But with Brexit in sight, the same group lobbied both the Government and Parliament not to diverge from REACH because doing so would damage their business interests and reduce their market share in the EU. Like Dow Chemical in the USA, which announced plans to make all of its products REACH-compliant regardless of whether they were sold in the EU (Sachs 2009, p. 1864), British companies are likely to keep implementing only EU rules after Brexit to preserve access to the single market and avoid costly manufacturing according to different sets of regulatory standards. At the outset of UK–EU negotiations, the SMMT hence stated that:

We respect the UK’s objective of securing regulatory sovereignty following its withdrawal from the EU, and the desire to retain the right to diverge in some areas of the economy. However, we do not believe that regulatory divergence in automotive would benefit the sector or the UK economy (SMMT 2020, point 2.10).

Warning that any duplicate vehicle testing would cause significant costs to British business, they advised that Britain ‘should choose to remain fully aligned with the EU type approval framework’ and that ‘both parties should aim to align all technical regulations related to automotive’ (SMMT 2020, points 2.12 and 2.13). Crucially, the SMMT highlighted that increased regulatory costs of design, testing and manufacturing would render ‘the production of some models for the UK market unprofitable’ (SMMT 2020, point 2.15). This implies that such production would cease and only that which yields profits would continue. Considering that only two out of ten UK-built vehicles are sold in Britain and that more than twice that number is sold in the EU (53.5% of all British vehicle exports in 2020) (SMMT 2021, 5 and 7), complying solely with EU standards and partially abandoning the UK market appears more lucrative. Other industry organisations have issued similar assessments.

The Confederation of British Industry (CBI), representing 190,000 businesses which employ a third of the British private sector workforce, underlined the global impact of REACH and advised the establishment of a mechanism for managing regulatory divergence in order to ‘avoid unintended consequences and disproportionate reduction in market access’ (CBI 2020, p. 22). Advocating deep cooperation with EU agencies, the Confederation stressed the importance of regulatory convergence with EU standards:

These EU bodies are world-leading, setting precedent and policy at an international level—not just an EU one. The UK’s voice has been lifted as a result of its involvement in these organisations, and that has had com-
petitive benefits in terms of UK industry’s reach across the world. Additionally, UK exporters will have to abide by the rules set by these bodies whatever the deal agreed and so have an interest in their development (CBI 2020, p. 28).

Similarly, the Chemical Industries Association (CIA), whose members annually add some £19 billion to the UK economy, invited the Government to ensure ‘regulatory consistency and continuity’ and remain ‘as close as possible to the existing REACH regime’ in order to ‘ensure continued access to the market place’ of the EU (CIA 2018).

This resembles the advice offered by the Association of British Pharmaceutical Industry (ABPI). Following their assessment of Brexit’s impact on the research, manufacturing and supply of medicines, they have been ‘calling for a continuation of the harmonisation in regulation’ in the area of pharmaceutical products, recommending that UK regulatory policies ‘should largely mirror what is undertaken in Europe’ (Acha 2017, pp. 72–73).

Concerning financial services, the International Regulatory Strategy Group (IRSG), which is co-sponsored by TheCityUK and the City of London Corporation, recommended setting up a bilateral forum to ‘proactively encourage continuing alignment’ (IRSG 2017, p. 38). As the TCA Joint Declaration on Financial Services Regulatory Cooperation suggests, this would facilitate voluntary cooperation on regulatory initiatives, equivalence decisions, and coordination in international bodies.

This overview shows widespread British industry support for regulatory alignment. Although industry preferences have no legal value for the UK Parliament, the analysis below demonstrates that they have informed parliamentary committees’ approach to Brexit.

**UK parliamentary scrutiny of Brexit’s economic impact**

This section studies the scrutiny by both Houses of Parliament of Brexit’s regulatory effects on the UK industry sectors that account for the largest share of British exports to the EU–automotive, chemicals, pharmaceuticals and financial services. It documents the MPs’ and peers’ tangible preference for regulatory alignment and a weariness towards divergence.

**House of Commons**

The expected economic impact of Brexit was scrutinised across the select committees. The Exiting the EU Committee highlighted the economic harm that British industry would sustain in case of regulatory ruptures and tariff and non-tariff barriers.⁴ This Committee procured from the Government a series of 39 sectoral reports

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⁴ HC 2560 ‘The consequences of “no deal” for UK business’, 19.7.2019.
which excluded commercially, market-sensitive and negotiation-sensitive data. Although the Committee had requested impact assessments, the Government clarified that these did not exist.\(^5\) Despite this, the Committee received and published the Government’s preliminary Brexit analysis resulting from a cross-Whitehall briefing, which was designated as market-sensitive. In it, the Government pursued an undefined ‘practical approach to regulation’ and held that ‘estimating regulatory opportunities is particularly difficult’.\(^6\) It showed, however, that the greatest economic impact would be on the pharmaceutical, automotive and chemical sectors, which, together with financial services, were scrutinised in greater depth by other select committees.

(a) Automotive

A flagship British export industry,\(^7\) automotive is one of the most productive UK economic sectors and one that is most integrated with the EU internal market. This is why Parliament unambiguously advocated the highest possible form of regulatory alignment. This was argued from three important perspectives.

The first notes that the British market is insufficiently large to dictate standards and develop a new UK regime for vehicle approvals, as this would create costs for manufacturers without bringing any benefits. Since the EU is expected to remain the primary export market in the short to medium term, the Business, Energy and Industrial Strategy Select Committee concluded that there was ‘no argument for a separate set of UK standards’, and the Government was advised to ‘rule it out’ since regulatory divergence made no commercial sense.\(^8\)

The second argument indirectly recognises the potential for the Brussels Effect to be triggered if future British regulatory standards became less restrictive than the EU’s. Since they ‘have not identified any potential benefits from regulatory divergence from the EU,\(^9\) whether in terms of competitiveness or improved access to new overseas markets’,\(^10\) MPs emphasised that:

[I]t would be self-defeating to depart from the EU regulatory framework. Alignment is also likely to require compliance with other regulatory regimes relevant to the content of vehicle components, such as the EU chemicals regulatory framework, REACH, end of vehicle life and also intellectual property regulations. Such alignment will in any case happen naturally: UK based manufacturers seeking to export to the single market will have to align with EU

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\(^5\) HC Hansard, Written statement ‘EU exit: sectoral analyses’ (David Davis), vol. 630, col. 49WS, 7.11. 2017.

\(^6\) HC ‘EU exit analysis: Cross-Whitehall briefing’, January 2018, 3 and 7, www.parliament.uk/documents/commons-committees/Exiting-the-European-Union/17-19/Cross-Whitehall-briefing/EU-Exit-Analysis-Cross-Whitehall-Briefing.pdf.

\(^7\) Note, however, that this UK industry is almost entirely non-UK owned.

\(^8\) HC 379 ‘The impact of Brexit on the automotive sector’, 1.3.2018, paras 27 and 29, 13–14.

\(^9\) The UK’s Review of the Balance of Competences (2012–2014) reached similar conclusions.

\(^10\) HC 379, supra note 8, para. 30, 14.
standards, regardless of any domestic regulatory changes, unless a trade deal allows for a degree of divergence.\textsuperscript{11}

The third argument is that the best way to achieve Global Britain was via the EU route. Two particular reasons for alignment stood out. On the one hand, China’s wide-ranging alignment with EU automotive standards and its being the fastest growth market for British exports make it imperative for the UK to align, too. On the other hand, ‘the best way to exert influence at a global level’ in this sector is ‘by maintaining a close association with the EU expert groups that develop regulatory standards’.\textsuperscript{12} In its reply, the Government confirmed that the exercise of Parliament’s legislative supremacy is strongly informed by EU regulatory developments:

> UK law may not necessarily be identical to EU law but should achieve the same outcomes. In some cases, parliament might choose to pass an identical law. The Parliament of the day may decide not to achieve the same outcomes as EU law. But if it does so, it will be in the knowledge that if our regulatory standards are not substantially similar, there may be consequences for our market access.\textsuperscript{13}

These statements show the costs of an untrammelled exercise of regulatory autonomy and the desirability of alignment.

(b) Chemicals

With chemicals being among the top British exports to the EU, Parliament carried out an inquiry into the post-Brexit status of REACH in UK law early on. Faced with overwhelming environmental and industry support for the closest possible alignment, the Environmental Audit Committee acknowledged that a separate UK regulatory regime would be expensive and called for British involvement at least in the EU’s chemicals registration process.\textsuperscript{14}

In an oral evidence session before this Committee, the Government disclosed its intention to roll over REACH and confirmed that there was ‘certainly no immediate appetite to make any significant change’.\textsuperscript{15} The British version of REACH after Brexit would be ‘seamless’ in terms of assessments in the processes of registration and evaluation.\textsuperscript{16} However, Sect. 140 and Schedule 21 of the Environment Act 2021 empower the Secretary of State, under certain conditions, to amend the UK REACH regime, thereby enabling divergence.

\textsuperscript{11} Ibid, para. 28, 14 (emphasis added).
\textsuperscript{12} Ibid, para. 36, 16.
\textsuperscript{13} HC 1018 ‘The impact of Brexit on the automotive sector: Government response to the Committee’s fifth report’, 15.5. 2018, para. 14, 4.
\textsuperscript{14} HC 912 ‘The future of chemicals regulation after the EU referendum’, 29.4.2017, para. 4, 4.
\textsuperscript{15} HC 912, Oral evidence, 7.3.2017, Q273.
\textsuperscript{16} Ibid, Q219.
(c) Pharmaceuticals

With pharmaceuticals similarly being among the most successful sectors of the British economy, Parliament widely consulted with industry representatives and intensively scrutinised the Government’s policy. The sectoral committees’ approach to UK–EU regulatory relations in this field was twofold.

The first approach was of a substantive nature and was rooted in the economic rationality of regulatory convergence. The Business, Energy and Industrial Strategy Committee held that since the EU market ‘heavily outweighs’ the British one, ‘manufacturers are unlikely to prioritise the UK over the EU as a market’ and that ‘the closest possible regulatory cooperation’ should be sought. This Committee found that:

What little benefits there may be of regulatory divergence would be greatly overshadowed by the costs and loss of markets and influence the UK would face. It makes commercial sense for the UK to remain aligned with standards in the EU market, given the significant amount of trade it provides for both the UK and EU and the access it gives both to medicines. The Government should pursue this approach.

They also argued that the best Global Britain there can be is a European Britain:

The potential for new, untapped markets simply does not exist in an already global sector in which the UK is highly engaged. The best potential approach we found for the UK to grow as a world leader in the development, manufacture and regulation of pharmaceuticals is to maintain as close a relationship with the EU as possible.

The Health and Social Care Committee advised that regulatory divergence should be prevented by transposing relevant EU laws into UK law, and in no scenario did MPs recommend the development of a fully standalone UK regulatory system. Instead, the ‘closest possible regulatory alignment with the EU’ would ensure the continued availability of medical supplies on the British market.

The second approach had an institutional focus. This advocated a formalised relationship between the UK’s Medicines and Healthcare products Regulatory Agency (MHRA) and the EU’s European Medicines Agency (EMA) given ‘the success of EU-wide regulation of manufacturing and regulation of testing and release of medicines’. Although EU law does not formally provide for institutional links with third-country regulators, the EU collaborates with external partners based on

17 HC 382 ‘The impact of Brexit on the pharmaceutical sector’, 17.5.2018, para. 73, 37.
18 Ibid, para. 42, 20 (italics in original).
19 Ibid, para. 74, 37.
20 HC 392 ‘Brexit: Medicines, medical devices and substances of human origin’, 21.3.2018, para. 87, 30.
21 Ibid, para. 71, 26.
22 HC 382, supra note 17, para. 46, 22.
international agreements and this model would foster UK–EU regulatory cooperation too.

Similarly, MPs warned of the adverse effects on access to medicines by the National Health Service (NHS) if, after Brexit, Britain were to change the intellectual property regime applying to medicines. The Government was therefore urged to ensure that any UK–EU trade agreements ‘do not cause us to diverge from current intellectual property rules’. Academic analyses confirm that the benefits of withdrawal are far outweighed by the political and financial costs of the UK acting on its own in a highly globalised policy area where the EU has successfully exported its norms and where access to its market is conditioned by adherence to its intellectual property rules (Farrand 2017, pp. 1315 and 1317; Dinwoodie and Dreyfuss 2018, p. 983).

The Government responded with rather general comments, expressing its intention to push for the maintenance of the same high safety and quality standards post-Brexit.

d) Financial services

With services accounting for some 80% of the British GDP, the Exiting the EU Committee held that post-Brexit UK–EU trade in services should be based on ‘close alignment’ with EU rules. Given the absence in the TCA of any liberalisation in this field and the loss of passporting rights by UK financial services providers, reliance on the EU’s equivalence regimes, which do not cover all areas of financial services, became critical. The European Scrutiny Committee rightly noted that ‘[w]hile the UK would be free, legally, to diverge from EU rules, this could have political and economic consequences’: not only would obtaining equivalence ‘mean staying aligned with EU financial services law’, maintaining it might ‘require the UK to follow new EU financial regulations over which it had no say’.

The political salience of regulatory alignment is further elevated by the tightening of EU equivalence regimes due to the prospect of high volumes of financial services being provided by British firms based outside the EU. With equivalence regimes being a powerful tool of influence over UK rulemaking post-Brexit (Pennesi 2021), the European Scrutiny Committee strongly criticised the Government for not making ‘even the most cursory attempt’ to place them in the post-Brexit context and for failing to assess their impact on UK regulatory autonomy. EU legal developments anyhow incentivise UK alignment in order to avoid indirectly imposing market access barriers on Britain’s most profitable economic sector. Indeed, since the UK has been at the heart of much of EU financial regulation, no extensive regulatory change and deregulation is, for some time, likely to occur after Brexit (Moloney

23 Ibid, para. 61, 29 (emphasis removed).
24 HC 2560 ‘The consequences of “no deal” for UK business’, 19.7.2019, para. 48, 21.
25 HC 16-i ‘1st Report of Session 2019–20’, 22.10.2019, paras 10.3, 54 and 10.8, 56.
26 Ibid, para. 10.9, 56.
27 Ibid, paras 10.10–10.11, 56.
Regulatory strings that bind and the UK Parliament after Brexit (2017). Therefore, while there may be areas where regulatory divergence would be beneficial to British firms (Steenis 2020), those where alignment is preferable is likely to guide UK lawmaking.

**House of Lords**

Regarding goods trade, the Lords’ scrutiny was more restricted, since no inquiries were devoted to individual industry sectors. Yet, like MPs, their Lordships concluded that any divergence from EU rules is one of the ‘contested benefits’ of Brexit. Acknowledging the benefits of extended regulatory alignment across the British industry, the EU Committee noted that even the option of a free trade agreement—now the TCA—meant that the UK ‘may have to continue to update its domestic law to be consistent with EU law’ in the medium to long term in order to secure wide market access. The peers also discarded the notion of ‘complete regulatory sovereignty’ as incompatible with the liberalisation inherent in the very idea of free trade.

The scrutiny of services trade yielded stronger demands, particularly concerning financial services. Although Brexit could eventually lead to some regulatory divergence, both automatic alignment and a ‘bonfire of regulation’ were ruled out. Instead, the EU Financial Affairs Sub-Committee advised adopting a balanced approach through case-by-case fine-tuning and optimisation of the existing rule-books. However, EU legislative activity will remain influential. This Sub-Committee underlined that the global financial actors’ familiarity with EU equivalence regimes is likely to place any divergent British system at a comparative disadvantage. Accordingly, the EU Committee recommended that it was in the EU’s and Britain’s mutual interest that ‘the UK should maintain direct influence within the EU’, that ‘direct regulatory cooperation’ should be encouraged and that ‘UK input to EU regulation-setting upstream’ should be sought.

Furthermore, owing to London’s pre-eminence as an international financial centre, peers emphasised that it was ‘imperative’ for Britain to continue to engage in international standard-setting forums and for the Government to ‘work vigorously to shape them in future’. Global cooperation on financial regulation could ultimately ‘synchronise standards within and beyond the EU’. While it remains to be seen

28 HL 149 ‘UK-EU relations after Brexit’, 8.6.2018, 20–21.
29 HL 46 ‘Brexit: Deal or no deal’, 7.12.2017, para. 100, 35; HL 215 ‘Brexit: Chemical regulation’, 7.11.2018, para. 46, 12.
30 HL 72 ‘Brexit: The options for trade’, 13.12.2016, para. 164, 49.
31 Ibid, para. 260, 71.
32 HL 129 ‘Brexit: Trade in goods’, 14.3.2017, para. 186, 57.
33 HL, Letter to Chancellor of the Exchequer, 27.3.2020.
34 HL, Oral evidence ‘Financial services after Brexit’, 29.1.2020, 18.
35 HL 81 ‘Brexit: Financial services’, 15.12.2016, para. 58, 21.
36 HL 66 ‘Brexit: The future of financial regulation and supervision’, 27.1.2018, para. 61, 24.
37 Ibid, para. 62, 24.
how effective the UK can be at shaping international standards, this is a notable way in which Britain’s regulatory alignment would not result from the UK being a rule taker but rather a rule maker.

Finally, given the post-Brexit transfer of regulatory powers from EU to UK regulators—the Financial Conduct Authority and the Prudential Regulation Authority—their Lordships emphasised the need to increase Westminster’s rights of scrutiny and democratic oversight over their activities. In this respect, the European Parliament’s oversight was referenced as a model worth replicating.

**Contextualising Post-Brexit regulatory relations**

While the findings above favour regulatory alignment after Brexit, four important counter-arguments signal a shift away from it.

The first concerns weakening political support for alignment with EU rules. This is demonstrated by two aspects.

On the one hand, the change of government following the UK general election of 12 December 2019 has reduced parliamentary emphasis on regulatory alignment with the EU (Cygan et al. 2020, p. 1606). Unlike the fragile minority government of Theresa May that enabled Parliament to become a key player in the Brexit process (Russell 2021; McConalogue 2020), the strong majority government led by Boris Johnson has been more capable of controlling it and imposing its view of UK–EU relations. Although tensions within the Conservative Party between the liberal and conservative wings have become more palpable, Brexit has ‘accelerated a longer-term realignment in British politics and reshaped the country’s political geography’ (Cutts et al. 2020, p. 20). The Johnson Government has unambiguously stated that ‘we will not agree to any obligations for our laws to be aligned with the EU’s, or for the EU’s institutions, including the Court of Justice, to have any jurisdiction in the UK’. The Government’s Taskforce on Innovation, Growth and Regulatory Reform, chaired by Iain Duncan Smith, reported in May 2021 on various areas where regulatory reform is desirable. These include inter alia changes to financial services and investment law and the EU-derived General Data Protection Regulation. The September 2021 statement by Lord Frost confirms the UK Government’s intention to remove the special status of retained EU law and review its substance, while implementing a wide-ranging regulatory reform.

On the other hand, Parliament’s active support for alignment is morphing into a more passive variant of it and one which is more receptive of future divergence.

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38 Ibid, paras 90–91, 33.
39 UK Government, ‘The future relationship with the EU: The UK’s approach to negotiations’, CP 211, February 2020, para. 5, 3.
40 See the ‘TIGRR report’ at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/994125/FINAL_TIGRR_REPORT__1_.pdf.
41 Lord Frost, Oral Statement to Parliament, 16.9.2021, https://www.gov.uk/government/speeches/lord-frost-statement-to-the-house-of-lords-16-september-2021.
Parliament’s scrutiny has identified areas where divergence is more likely or even preferable.

In the House of Commons, this is well illustrated by developments in the area of transport. Regarding the future governance of the Channel Tunnel, the European Scrutiny Committee welcomed the Government’s ‘firm rejection’ of ‘any future dynamic alignment with EU laws on the UK-side of the Fixed Link’ and any jurisdiction of the Court of Justice and the European Union Agency for Railways.\(^{42}\) Although most UK business groups continue strongly to advocate alignment, potential areas of divergence that these groups identified in roundtable sessions held in the Business, Energy and Industrial Strategy Committee in June 2021 include financial regulation and public procurement in the area of construction.\(^{43}\) While not relating specifically to goods or services regulation, the Government’s decision not to replicate EU legislative plans on public country-by-country tax reporting by multinationals is another instance of possible future divergence.\(^{44}\)

In the House of Lords, openness to divergence can be gleaned from a series of EU Committee reports on post-Brexit trade from March 2021, which call for caution in mutual regulatory positioning. On goods, where a need for amending the current labour and environmental standards arises, their Lordships urged the Government to proceed ‘with transparency and only after consultation, taking into account the potential impact on UK–EU trade in goods’.\(^{45}\) Any change in UK law should only occur after an inclusive process of balancing the economic benefits and detriments of divergence. An example of possible future divergence concerns chemicals regulation. Although the Committee urged the Government ‘to avoid divergence for divergence’s sake’, they also noted, without objection, the latter’s ‘decision not to commit to aligning with EU REACH in the future’.\(^{46}\) On services, the peers recommended the pursuit of regulatory dialogue and the creation of a dedicated Working Group within the Trade Specialised Committee on Services, Investment and Digital Trade to ensure divergence is managed effectively.\(^{47}\) This recommendation evidently takes divergence not as a possibility, but rather as a certainty whose effects require bilateral cooperation. Regarding both goods and services, therefore, this predominantly pro-EU House of Parliament has legitimised divergence as Britain’s possible future regulatory trajectory.

The second argument goes to loose regulatory disciplines and governance structures of the TCA, which does not foresee a commitment to alignment. Apart from the Partnership Council, questions of alignment and divergence will particularly be addressed by the trade specialised committees on goods, services, technical barriers to trade, and regulatory cooperation. Relatedly, the establishment of a Parliamentary

\(^{42}\) HC 1062 ‘Brexit: The future operation of the Channel Tunnel fixed link’, 23.2.2021, para. 38, 12.
\(^{43}\) HC 385 ‘Post-pandemic economic growth: Industrial policy in the UK’, 28.6.2021, 56.
\(^{44}\) HC 121-vii ‘7th Report of Session 2021–22’, 14.9.2021, para. 1.9, 6.
\(^{45}\) HL 249 ‘Beyond Brexit: Trade in goods’, 25.3.2021, para. 42, 17.
\(^{46}\) HL 247 ‘Beyond Brexit: Food, environment, energy and health’, 23.3.2021, para. 233, 50 and para. 238, 51.
\(^{47}\) HL 248 ‘Beyond Brexit: Trade in services’, 24.3.2021, para. 147, 37.
Partnership Assembly (PPA) could add value by fostering dialogue on legislative and regulatory plans at the bilateral level, and by promoting multilateral cooperation beyond the EU. The PPA’s right to request information from and make recommendations to the Partnership Council can increase the UK Parliament’s ability to pronounce on post-Brexit developments of both UK law and EU law. As a communication channel, the PPA can help to recreate the weakening social connections between UK and EU parliamentarians, and to increase mutual understanding of the advantages and disadvantages of alignment and divergence between the two polities’ laws and regulations. One role that the Lords EU Committee foresees for the PPA is for UK parliamentarians ‘engage with MEPs throughout the EU’s legislative processes’. This is important because relevant EU legislation still applies in Northern Ireland, and because any changes in the rules on either side could lead to divergence and regulatory costs. Advance interparliamentary dialogue on these issues could mitigate the negative consequences of divergence.

The third argument concerns the willingness to engage in unilateral action to assert sovereignty, showing the UK’s readiness to diverge. In this sense, the initial version of the Internal Market Bill sought to protect the unity of Britain’s internal market even if that violated the Withdrawal Agreement, although the Bill was subsequently amended to remove this legal clash. The same applies to Britain’s unilateral decision to extend the grace period on Irish Sea border checks, which was taken in March 2021 contrary to the Withdrawal Agreement. These instances, and the EU’s initiation of infringement proceedings against the UK, signify friction that may dampen the prospects of alignment. The five-yearly reviews of the TCA may also spark political debates of EU overreach and the need to reduce the UK’s ties with the EU.

The fourth argument refers to the handling of the Covid-19 pandemic, which combines political tensions and vaccine diplomacy with decisions on continued alignment with substantive EU law. On the politico-diplomatic front, the Commons Foreign Affairs Committee heard that the UK made a ‘political decision’ not to participate in the EU public procurement scheme because Britain had ‘left the European Union’. Opposition criticism ensued with Liberal Democrats accusing the Government of putting ‘Brexit before breathing’ and questioning the value of autonomy in these dangerous times. Yet it could be argued that it was precisely the UK’s regulatory independence and agility in approving vaccines, exercised by an autonomous MHRA, that led to the success of its vaccination programme which has far outstripped the EU’s (Nugent 2020). The EU’s short-lived imposition of Covid-19 vaccine export controls at the Ireland/Northern Ireland border in January 2021

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48 HL 246 ‘Beyond Brexit: The institutional framework’, 22.3.2021, para. 88, 30.
49 HL 147 ‘The United Kingdom Internal Market Bill: Part 5’, 16.10.2020, paras 94–96, 28.
50 HC, ‘Oral evidence: Coronavirus: FCO Response, HC 239’, 21.4.2020, Q97 and Q99. This explanation by the Head of Diplomatic Service, Sir Simon McDonald, was later retracted and non-participation in the EU scheme blamed on omissions in email correspondence.
51 Layla Moran MP as reported in (Fox 2020).
52 Baroness Ludford in: HL Deb ‘European Union: Negotiations (European Union Committee report)’, 16.3.2020, vol. 802, col. 1290.
may erode British willingness to keep aligning with EU rules. While less focused on the economic benefits of alignment, these events highlight the advantages of institutional regulatory autonomy in the area of pharmaceuticals. Although this does not as such signal regulatory divergence, it may create an amenable environment for it to occur.

On the substantive law front, however, the Government does not seem to have clear guidelines in place for deciding when to diverge from EU law. For example, when asked by the Commons European Scrutiny Committee, in the context of the Northern Ireland Protocol, what factors it would take into account in deciding whether to diverge from the EU’s drug precursor rules, the Government had no reply to offer other than that ‘a range’ of factors would be considered. This approach hampers the transparency of governmental decision making and renders effective parliamentary scrutiny of the desirability of future alignment with EU rules more difficult.

**Conclusion**

This article has analysed the pulls of economic interdependence between Britain and the EU by inspecting the UK Parliament’s scrutiny of the projected post-Brexit influence of EU law and policy on British lawmaking. This influence was conceptualised through the Brussels Effect so as to interrogate the leading Brexit motive of restoring Westminster’s democratic authority. Rather than investigating the party-political dimension of Brexit (Evans and Menon 2017; Diamond et al. 2018; Lynch and Whitaker 2018), the qualitative legal inquiry focused on the institutional level. It did so for two reasons: first, in order to determine the sector-specific findings reached in Parliament, which are predominantly rooted in inquiry-based committee reports; and second, because these findings provided an important analytical basis for Parliament’s pronouncement in Brexit negotiations.

The article shows that select committees dealing with Brexit in both Houses of Parliament in the period 2017–19 recognised that while Westminster has recovered legislative authority, its laws would be made in cognizance of EU policy evolution. If Britain’s entanglement in the EU legal order ‘undercuts Parliament’s centrality as the font of law’ (Ekins 2018, p. 1001), this article shows that its disentanglement from it places Parliament in a position of normative vigilance over EU lawmaking. While Brexit removes EU-derived limits to Parliament’s decision-making powers, it also reveals that the use of these powers is informed by the factual economic and regulatory strings that will continue to bind the UK market to that of the EU. This means that the context in which the UK Parliament is adapting to post-Brexit life is that of significant EU normative gravity. Political choices as to the content of British legislation and regulation will to some extent remain linked to the corresponding

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53 HC 533 ‘Northern Ireland Protocol: Withdrawal Agreement Joint Committee decisions and declarations of 17 December 2020: Government’s response to the Committee’s forty-first report of session 2019–21’, 6.7.2021, para. 13, 4.
developments in the EU and both Westminster and Whitehall will keep a watchful eye over these developments.\textsuperscript{54} Parliament exhibits strong institutional awareness that the benefits of alignment with and divergence from EU law set the informal parameters that need to be taken into account in the exercise of its legislative freedom, both concerning retained EU law and entirely new UK legislation. This may lead to a new form of Europeanisation, thereby excluding the de-Europeanisation scenario defined in this special issue.

However, this article also demonstrates that the degree of Europeanisation is likely to decrease in the future. From the Government’s 2021 regulatory reform agenda and its approach to EU relations to Parliament’s scrutiny outcomes in the post-2019 period, the intention to develop UK law regardless of EU law is tangible. This indicates the UK’s ‘re-engagement’ with the EU, whereby Europeanisation is limited to what is politically tolerable and to what coheres with Britain’s own policy preferences.

Finally, Parliament’s post-Brexit roles of scrutinising EU affairs, holding the Government accountable, and stimulating public debate on European matters have begun adapting with a refocused European Scrutiny Committee in the House of Commons and a new European Affairs Committee and a Sub-Committee on the Protocol on Ireland/Northern Ireland in the House of Lords. Whether the UK opts for higher or lower levels of alignment or divergence, parliamentary scrutiny will need to analyse not only EU developments and the implementation of UK–EU agreements but also UK law and regulation for their impact on UK–EU relations.\textsuperscript{55} Post-Brexit scrutiny structures and procedures should ensure timely information access, cross-committee collaboration and reliance on thorough evidence-based policy analysis that continues to foster industry consultations and external expertise.

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\textsuperscript{54} HC 17 ‘Post-Brexit scrutiny of EU law and policy’, 5.11.2019.

\textsuperscript{55} HL 246, supra note 48, paras 81–83, 28–29.
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