



## Brexit and Delegated Legislation

### Summary

Delegated legislation is law made by ministers under powers given to them by Acts of Parliament. Reasons for the use of delegated, rather than primary legislation, may include:

- providing for the technical implementation of a policy;
- filling in detail that may need to be updated frequently or is otherwise subject to change; and
- accommodating cases where the detailed policy has to work in different circumstances.

This briefing provides an overview of how scrutiny of delegated legislation takes place in both Houses and considers the impact of Brexit on it.

Individual pieces of delegated legislation are often called secondary legislation to distinguish them from primary legislation contained in Acts of Parliament. Statutory instruments (SIs) are the most frequently used type of delegated legislation. Parliamentary scrutiny of secondary legislation most commonly takes the form of negative or affirmative procedures.

Brexit has posed legislative challenges. Several parliamentary committees have expressed concern that the volume and scope of secondary legislation necessary to implement the UK's withdrawal from the EU would be substantial. Initial government estimates were that between 800 and 1,000 statutory instruments would be required, although this number has been revised down to approximately 600 SIs.

Amendments were agreed during the passage of the European Union (Withdrawal) Bill to introduce a sifting function in both the Lords and the Commons. This applies to SIs made under certain sections of the act that the Government proposed should be subject to the negative procedure; each committee (European Statutory Instruments Committee in the Commons, the Secondary Legislation Scrutiny Committee in the Lords) can recommend that the SI would instead be more appropriately subject to the affirmative procedure.

On 27 March 2019, the House of Lords approved regulations, required to amend in UK law 'the exit day' specified in the European Union (Withdrawal) Act, to reflect agreement reached with the European Union to extend the two-year article 50 period beyond 29 March 2019.

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## I. What is Delegated Legislation?

In their book *How Parliament Works*, Robert Rogers (now Lord Lisvane) and Rhodri Walters provide the following overview of delegated legislation:

Delegated legislation is law made by ministers or certain public bodies under powers given to them by Acts of Parliament, but it is just as much part of the law of the land as are those acts.

Individual pieces of delegated legislation, often called secondary legislation to distinguish them from primary legislation contained in Acts of Parliament, or subordinate legislation, are found under many different names. They can be orders, regulations, orders in council, schemes, rules, codes of practice, guidance and statutes (of certain colleges rather than in the sense of acts). Even the highway code is a form of secondary legislation.<sup>1</sup>

Statutory instruments (SIs) are the most frequently used type of delegated legislation.<sup>2</sup> There are several ways in which delegated legislation can be scrutinised by Parliament. The parent act, the Act of Parliament to which the secondary legislation relates, will determine whether it is subject to parliamentary scrutiny and detail the form which that scrutiny will take, the most common form of parliamentary scrutiny being negative or affirmative procedures.

Table I, produced by the House of Lords Secondary Legislation Scrutiny Committee (SLSC), shows these different levels of scrutiny that SIs face and what processes these entail. The figures are based on the number of SIs considered in previous sessions and do not reflect the volume of SIs which have been generated by the Brexit process. As indicated, an MP or peer must object to an SI for an SI subject to the negative procedure to be considered for annulment. SIs subject to the affirmative procedure must gain the approval from both Houses to become law; the affirmative procedure is therefore considered the more onerous form of scrutiny. In a typical session the majority of SIs will be subject to the negative procedure.

**Table I: Levels of Delegation<sup>3</sup>**

No Parliamentary Procedure	Negative Procedure	Affirmative Procedure	Enhanced Procedure
The minister can make a law on her/his own authority.	SI must lay before Parliament for 40 sitting days.	SI must be laid as draft.	Super-affirmative or negative with further tests set out in the parent Act.

<sup>1</sup> Robert Rogers and Rhodri Walters, *How Parliament Works*, November 2018, p 238.

<sup>2</sup> UK Parliament website, '[What is Secondary Legislation](#)', accessed 26 March 2019.

<sup>3</sup> Based on the House of Lords Secondary Legislation Scrutiny Committee estimates.

No Parliamentary Procedure	Negative Procedure	Affirmative Procedure	Enhanced Procedure
Examples include closing a road or commencement orders.	Can be rejected by a motion: a 'Prayer to Annul' in the Lords or an Early Day Motion in the Commons.	An affirmative SI cannot come into effect until both Houses have debated and approved it.	Examples include Localism Orders and Legislative Reform Orders.
Around 1,000 SIs a year are in this category.	Around 600 SIs a year are in this category.	Around 150 SIs a year are in this category.	Fewer than five items a year are considered under this process.

Some secondary legislation is not laid before Parliament and is not subject to any parliamentary procedure, whilst some secondary legislation is subject to Commons-only procedure and is not considered in the House of Lords.<sup>4</sup>

It is important to note that, except in extremely limited circumstances where the parent act provides otherwise, an SI cannot be amended or adapted by either House. Each House simply expresses its wish for the SI to be approved or annulled/not come into force. Each House has, in effect, a veto. Affirmative SIs must be approved by both Houses and if either House objects to a negative SI (and the motion objecting to it is passed) the instrument will be annulled or not come into force.

The [Statutory Instrument Tracker](#), on the UK Parliament website, provides information regarding all statutory instruments before Parliament. As well as being searchable by government department, the tracker also highlights the type of procedure followed and the stage which each SI has reached. The tracker also includes details of where concerns have been raised by one of the committees detailed in section 2 of this briefing.

Table 2 provides a brief guide to some of the terminology which is used when discussing delegated legislation.

**Table 2: A Note on Terminology**

<b>Laid</b>	A statutory instrument is laid when it is presented to Parliament.
<b>Made</b>	A statutory instrument is made when it is signed by a minister.
<b>Prayer</b>	The name of a motion objecting to a SI. As an SI is made by one of Her Majesty's ministers, it is in the form of an appeal to the sovereign that attempts to undo it take place. <sup>5</sup>

<sup>4</sup> In the case of instruments dealing with financial matters the instrument will be laid only before the Commons (House of Commons Library, [House of Commons Background Paper: Statutory Instruments](#), 15 December 2016, p 7).

<sup>5</sup> Robert Rogers and Rhodri Walters, *How Parliament Works*, November 2018, p 241.

## **2. Parliamentary Scrutiny of Delegated Legislation**

This section outlines the different methods of scrutiny employed by each House.

Table 3 provides an overview of the different committees which undertake scrutiny of delegated legislation in Parliament. The diagram indicates which House the scrutiny takes place in and at what stage the scrutiny takes place.

**Table 3: Scrutiny of Statutory Instruments in Parliament**

Primary Legislation	House of Commons	House of Lords
Secondary Legislation	<p><b>Joint Committee on Statutory Instruments:</b> A Committee of both Houses which, supported by specialist lawyers, examines technical aspects of SIs, such as whether a Minister has exceeded their power, or the SI is defective in its drafting. Holds a 'scrutiny reserve' in the Lords, an affirmative SI cannot be debated before the Committee has reported.</p> <p><b>European Statutory Instruments Committee:</b> Responsible for scrutinising proposed negative SIs brought in under the European Union (Withdrawal) Act. Made up of 16 members, supported by Counsel to the Speaker.</p> <p><b>Delegated Legislation Committees:</b> Similar to Public Bill Committees and usually limited to 17 MPs. Affirmative SIs automatically referred to DLC (can be de-referred and taken in chamber). Negative SIs can be referred to DLC by a Minister if objected to by a Member. Cannot reject instrument—formal votes can only take place in Chamber. Any member can attend but not vote.</p>	<p><b>Delegated Powers and Regulatory Reform:</b> Examines primary legislation before it becomes an Act to check "whether the provisions of any bill inappropriately delegate power", that is whether SIs allowed by a Bill are appropriate and have the correct level of parliamentary scrutiny.</p> <p><b>Select Committee on Statutory Instruments:</b> made up of Commons members of JSCI and meets directly after that committee. Considers financial SIs.</p> <p><b>Chamber:</b> Affirmative SIs must be formally approved in chamber (although they are not re-debated). Affirmative SIs can be de-referred from DLC and debated and voted upon in chamber.</p> <p><b>Grand Committee:</b> Motions or Prayers on SIs can be debated, but not agreed or voted on in GC. An SI is formally voted on in the chamber—this may happen after a debate in GC. Any Member may attend.</p> <p><b>Secondary Legislation Scrutiny Committee: Sub Committees A and B—</b>Dual role of sifting proposed negative SIs made under certain sections of EUWA and scrutiny of all Negative and Affirmative SIs. Each sub-committee made up of 11 Members.</p> <p>Report to the House</p> <p>Any member of the House can raise an objection to either a negative or an affirmative instrument.</p> <p><b>Chamber:</b> SIs can be debated and/or voted on in the chamber—affirmative SIs must be formally approved in the chamber (although they may be debated in G/C). Any member may attend.</p>

### ***Joint Committee on Statutory Instruments***

One method of scrutiny employed by both the Commons and the Lords is the [Joint Committee on Statutory Instruments](#) (JCSI). The committee includes members of both Houses and considers legal drafting and certain technical aspects of statutory instruments after they have been laid before Parliament. Examples of issues the committee may examine include:

- where the drafting is technical or unclear;
- where an instrument has a retrospective effect; and
- where there is doubt whether the SI goes beyond the powers which the minister was given by Parliament.<sup>6</sup>

The committee meets most weeks that the Houses are in session and issues reports on statutory instruments that the special attention of both Houses should be drawn to. It also identifies those statutory instruments (both affirmative and negative) which the committee considered were not required to be reported to both Houses. JCSI reports also list secondary legislation that is not subject to parliamentary procedure.<sup>7</sup>

In March 2019, the JCSI published a report examining the Government's response to the committee's work in scrutinising instruments during the current session (2017–19). The JCSI considered over 1,000 statutory instruments in this period, of which 144 statutory instruments had been reported to the House for some form of defect. The report indicated that:<sup>8</sup>

- Of the 144 SIs reported upon, the Government has acted on concerns raised by the committee in 73% of cases.
- In 46% of the instruments reported on the Government acknowledged the errors in the instruments and in almost all cases undertook to correct the errors.
- In 10% of the instruments reported, the Government acknowledged at least one error (in most of these cases the instruments were reported on more than one ground).
- In 17% of the instruments reported, the Government provided useful additional information to aid understanding, and the instrument was therefore reported for elucidation.
- Of the remaining 27% of instruments reported, not all are instances where the Government has ignored a

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<sup>6</sup> Details of the grounds for the committee reporting on SIs can be found in the standing orders in each House: House of Lords SO 73, House of Commons SO 151.

<sup>7</sup> UK Parliament website, '[Joint Committee on Statutory Instruments: Role](#)', accessed 26 March 2019.

<sup>8</sup> Joint Committee on Statutory Instrument, [Government Response to Parliamentary Scrutiny of Statutory Instruments](#), 8 March 2019, HL Paper 311 of session 2017–19, p 3.

recommendation. They include, for example, instances where the committee have not invited any action or acknowledgment by the Government (as in late-laying cases, for example).

The committee concluded:

Although we have a duty under standing orders to scrutinise every statutory instrument within our remit, our recommendations are advisory only and the Government is not under an obligation to comply with them. It is clear from this analysis, however, that the committee's scrutiny has had a positive and substantial impact on secondary legislation so far this session. We will continue to apply the same rigorous standards notwithstanding the higher volume of instruments laid as a result of the decision to withdraw from the European Union.

That said, while we are pleased to report that the Government has acted in response to a majority of the instruments reported by the committee, there is room for improvement. We look to the Government to ensure that there are no instances where a recommendation is simply ignored, and we remind the Government that the committee, and the Houses, expect ministers, during debates on instruments, to respond to any issues raised by the committee. This is so that members of each House have the opportunity to challenge the Government about them.<sup>9</sup>

The committee has a 'scrutiny reserve' in the House of Lords; under standing order 72 an affirmative SI cannot be debated until it has been cleared by the JCSI.

Linked to the JCSI, secondary legislation that relates to financial matters, and therefore laid before the House of Commons only, is dealt with by a separate House of Commons Statutory Instruments Committee (known as the SCSI). The SCSI is made up of the Commons members of the JCSI and meets immediately after the JCSI. As with the JCSI, the purpose of the committee is to consider the technical competence of SIs, and not to debate their policy.<sup>10</sup>

The Institute for Government has estimated that between 21 June 2017 and 21 June 2018 the JCSI considered 832 pieces of secondary legislation, with the SCSI examining only 84 pieces, reflecting its more limited remit.

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<sup>9</sup> Joint Committee on Statutory Instrument, [Government Response to Parliamentary Scrutiny of Statutory Instruments](#), 8 March 2019, HL Paper 311 of session 2017–19, p 4.

<sup>10</sup> Daniel Greenberg, '[Implications for Brexit Legislation: Technical Scrutiny for Statutory Instruments](#)', Thomson Reuters Legal Insights Blog, 22 August 2018.

The Institute notes:

The JCSI considered 832 pieces of secondary legislation [in the period], of which 79 (9%) were drawn to the attention of both Houses of Parliament. Reasons for this reporting varied (note that some pieces of secondary legislation may be reported for multiple reasons), but included secondary legislation being defectively drafted, and failing ‘to comply with normal legislative practice’. Reflecting its remit, the SCSI examined only 84 pieces of secondary legislation, not drawing any to the attention of the Commons.<sup>11</sup>

## 2.1 House of Lords

The House of Lords has several committees which are charged with examining delegated legislation. In addition, any Member can raise an objection to either an affirmative or negative instrument.

Some of the different ways in which the Lords can express opposition or concern about affirmative and negative instruments are detailed in paragraphs 10.14 and 10.09 of the *Companion to the Standing Orders of the House of Lords*, although this is not an exhaustive list.

Examples for negative instruments include:

- a resolution to reject a negative instrument takes the form of a motion that “an Humble Address” be presented to Her Majesty praying that the instrument be annulled;
- critical amendments or motions inviting the House to call on the Government to take action or record a particular point of view, without annulling the instrument itself; and
- a neutral “take note” motion. Debates on take note motions can occur either in grand committee or in the main chamber.

For affirmative instruments, examples include:

- direct opposition by means of an amendment to the approval motion, the effect of which would be to withhold the agreement of the House;
- Members may, by means of an amendment or a separate motion, call upon the Government to take specified action (but which will not, even if agreed, prevent the approval of the instrument); and

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<sup>11</sup> Institute for Government, [Parliamentary Monitor 2018: Secondary Legislation](#), accessed 6 March 2019.

- Members may, by means of an amendment or a separate motion, invite the House to put on record a particular point of view relating to the instrument, but without calling on the Government to take any specific action.

Statutory instruments can be considered in either the chamber or grand committee. It is not possible to hold divisions in grand committee, therefore while SIs can be debated, any votes must take place in the chamber.<sup>12</sup>

### **Delegated Powers and Regulatory Reform Committee**

The [Delegated Powers and Regulatory Reform Committee](#) (DPRRC) examines primary legislation, a bill, before it becomes an act to check “whether the provisions of any bill inappropriately delegate legislative power, or whether they subject the exercise of legislative power to an inappropriate degree of parliamentary scrutiny”.<sup>13</sup> The committee usually only considers bills when they are introduced into the Lords; at present there is no equivalent committee in the Commons.<sup>14</sup>

### **Secondary Legislation Scrutiny Committee**

The [Secondary Legislation Scrutiny Committee](#) (SLSC) is the successor to the Merits of Statutory Instruments Committee, which was established in 2003 and existed until the end of the 2010–12 session. The SLSC considers the policy merits of regulations and other types of secondary legislation subject to parliamentary procedure; the committee will consider all statutory instruments which are subject to parliamentary procedure (negative and affirmative).<sup>15</sup>

The committee reports on an SI within 12 to 16 days of an instrument being laid before Parliament, to allow time for any Member of the House to pursue the issues raised by asking a question or tabling a motion for debate within the 40 day ‘prayer’ period for negative instruments.<sup>16</sup> By convention, affirmative instruments are considered by the SLSC before they can be

<sup>12</sup> Further details, including information about affirmative instruments being taken en bloc in the chamber, can be found in: [Companion to the Standing Orders and Guide to the Proceedings of the House of Lords](#), 2017, paras 10.10–10.19.

<sup>13</sup> The committee’s terms of reference are summarised on the UK Parliament website ([Delegated Powers and Regulatory Reform Committee: Role of the Committee](#), accessed 14 November 2018).

<sup>14</sup> *ibid.*

<sup>15</sup> For more detailed analysis of the work of the SLSC and resources relating to secondary legislation see: House of Lords Secondary Legislation Scrutiny Committee, [Accessing the Scrutiny Work of the Committee and Information Resources Relating to Secondary Legislation](#), 8 March 2019 , HL Paper 312 of session 2017–19.

<sup>16</sup> UK Parliament website, [‘Secondary Legislation Scrutiny Committee: Stage 2 Scrutiny’](#), accessed 26 March 2019.

debated in House of Lords.<sup>17</sup>

The committee meets weekly when the House is in session and aims to publish reports of its activities by the following week.<sup>18</sup> Reports indicate:

- Statutory instruments that the committee has determined should be drawn to the attention of the House, including the reasons for that decision—examples may be instruments are poorly drafted or inadequately explained;
- Statutory instruments which the committee considers may be of special interest to the House; and
- Instruments which the committee has considered and has determined that the special attention of the House need not be drawn.<sup>19</sup>

In October 2018, the SLSC announced that it would temporarily be split into two sub-committees ([Sub-Committee A](#) and [Sub-Committee B](#)) to manage the increased number of instruments which would be laid under the European Union (Withdrawal) Act 2018.

Each sub-committee would continue to meet weekly, with the full committee now no longer meeting with such regularity. In addition to its traditional scrutiny role outlined above (known now as [Stage 2: Scrutiny](#)) the committees would now also be responsible for sifting proposals for negative procedure statutory instruments made under certain provisions of the European Union (Withdrawal) Act 2018. This is discussed further in section 3 of this briefing.

All SLSC reports can be found on the [Secondary Legislation Scrutiny Committee](#) webpages. More recent reports produced by each sub-committee about the delegated legislation which they have scrutinised can be found on the relevant sub-committee publications web pages: [sub-committee A reports](#) and [sub-committee B reports](#).

## 2.2 House of Commons

Both the role of individual members and the committee structure for considering delegated legislation is different in the House of Commons.

<sup>17</sup> UK Parliament website, [Guidance for Departments Submitting Statutory Instruments to the Secondary Legislation Scrutiny Committee](#), April 2017.

<sup>18</sup> UK Parliament website, '[Secondary Legislation Scrutiny Committee: Role](#)', accessed 26 March 2019.

<sup>19</sup> In 2014, the Procedure Committee recommended two new grounds on which the committee could draw the special attention of the House to a statutory instrument (see: [5th Report of Session 2013–14](#), 10 April 2014, HL Paper 167 of session 2013–14, paras 1–2).

As highlighted in section 2.1 above, the Commons does not have an equivalent to the House of Lords Delegated Powers and Regulatory Reform Committee, checking primary legislation to see whether secondary legislation is delegated in an appropriate way and subject to the correct level of parliamentary scrutiny.

The Commons does, however, have a committee on statutory instruments (SCSI), which is not replicated in the House of Lords, that meets immediately after the Joint Committee on Statutory Instruments (JCSI). As with the JCSI the SCSI considers the technical competence of SIs, rather than the merits of SIs, and it does this for those SIs that relate to financial matters, and are therefore laid before the House of Commons only.

In addition, most affirmative SIs are automatically referred to delegated legislation committees (DLC) which can also, if a minister moves the motion, consider negative procedure SIs.

More recently, the Commons has introduced the European Statutory Instruments Committee which undertakes a similar role to the “Stage 1: Scrutiny” of the SLSC, namely sifting any secondary legislation made under sections 8, 9 or 23(1) of the European Union (Withdrawal) Act 2018 which the Government is proposing should be subject to the negative procedure.

### **Delegated Legislation Committee**

The role and powers of delegated legislation committees (DLC) are outlined in House of Commons standing order 118. The committee, or committees, consider SIs which are referred to them; once referred to the DLC the SIs are distributed to a particular DLC by the Speaker.

Any MP, whether or not a member of the DLC, may take part in the deliberations of the committee, but, under SO 118, non-members cannot vote or make any motion or move any amendment or be counted in the quorum.

Most affirmative instruments are automatically referred to a DLC, although a minister may move a motion that the instrument is not referred (and instead considered in the chamber). Alternatively, an SI may be referred to the Scottish Grand Committee or Northern Ireland Grand Committee.<sup>20</sup>

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<sup>20</sup> House of Commons, *Standing Orders: Public Business 2018*, May 2018, HC 1020 of session 2017–19, p 145, SO 118.

The MP's guide to procedure provides an overview of what happens at a DLC:

Delegated legislation committees can last for up to one and a half hours (or two and a half hours if the statutory instrument relates to Northern Ireland). If there's more than one statutory instrument, they are usually debated together and the committee can still only last for one and a half hours. But if any MP objects, the statutory instruments must be debated separately and there is up to one and a half hours for each statutory instrument. So, if there were two statutory instruments, debated separately, the committee could last for up to three hours. You won't know for certain until the meeting starts whether the statutory instruments will be debated together or separately, although it's rare for them to be debated separately.

The debate in a delegated legislation committee takes place on a motion that "the committee has considered" the statutory instrument. The rules are similar to the chamber. You stand to speak, address the chair, refer to other MPs by their constituencies and you can try to intervene on speeches. The chair decides the speaking order.

For an affirmative statutory instrument, the minister moves the motion and makes an opening speech. When the minister finishes, the official opposition spokesperson, other party spokespeople and then backbenchers make speeches. The minister then makes a closing speech.

For a negative statutory instrument, the MP who submitted the motion objecting to the statutory instrument usually moves the motion (although any member of the committee, including the minister, could move it if necessary) and makes the opening speech. This is followed by speeches by the official opposition spokesperson, other party spokespeople and any backbenchers who want to speak. The minister responds. The MP who submitted the motion may be able to speak again at the end if there's time.

At the end of the debate, the committee has to decide whether it agrees with the motion that it has considered the statutory instrument. Often this is agreed without a vote.

Even if the committee votes against the motion, the statutory instrument can still proceed to its next stage. This is because the motion is simply about whether the committee has considered the statutory instrument. The vote on whether to approve an affirmative statutory instrument (or annul a negative statutory instrument) takes

place in the chamber.<sup>21</sup>

After the DLC has considered an affirmative statutory instrument, the House needs to agree a motion to approve it before it can become law. The Government often brings the motion to the chamber the day after the committee. No further debate is allowed in the chamber, so the Speaker puts the question on whether to approve the statutory instrument straight away.

In the case of a negative statutory instrument, the vote in the chamber would be about whether to annul the statutory instrument and the Government does not have to provide time for a vote.<sup>22</sup>

Table 4 provides an overview of scrutiny which SIs undergo in the House of Commons, showing how SIs subject to the negative and affirmative procedure are considered in the DLC or the chamber.

**Table 4: Scrutiny of SIs in the House of Commons**

Negative Instruments	Affirmative Instruments
Any member can table a motion objecting to an SI; this motion is known as a prayer. If no objection is raised then an SI comes into effect after 40 days. In practice, members now generally put down Early Day Motions (EDMs), which are motions for which no time for debate has been fixed. <sup>23</sup>	Automatically referred to DLC and debated. Returns to the chamber for decision and potentially a vote, but without further debate.
Only a minister can either move a motion on the floor of the House, or send the motion to the Delegated Legislation Committee (DLC) to be debated.	As outlined in SO 118, instruments can be 'de-referred' so that they do not go to the DLC and are instead debated and decided on the floor of the House. <sup>24</sup>
DLC debates motion on prayer for one and half hours (two and half hours on Northern Ireland instruments).	

Outlining the role of the DLC in considering SIs subject to the procedure for negative instruments, Robert Rogers and Rhodri Walters state:

Only a minister can move a motion in the House or refer a prayer to a delegated legislation committee, so even debates of this sort are in the gift of the government and are normally only granted to the principal opposition parties, and almost never to backbenchers. Moreover the committee cannot reject the instrument, so any vote that is not on the

<sup>21</sup> UK Parliament, [MPs Guide to Procedure: Delegated Legislation Committees](#), accessed 6 March 2019.

<sup>22</sup> *ibid.*

<sup>23</sup> House of Commons Library, [House of Commons Background Paper: Statutory Instruments](#), 15 December 2016, p 9.

<sup>24</sup> Robert Rogers and Rhodri Walters, *How Parliament Works*, November 2018, p 242.

floor of the House if purely symbolic; and on the floor of the House no prayer has been carried since 1979.<sup>25</sup>

The House of Commons Library briefing, [House of Commons Background Paper: Statutory Instruments](#), provides further details of the scrutiny of SIs in the Commons, including details of the rules governing SIs that apply to only England and Wales. It notes:

On 22 October 2015, the House of Commons amended its standing orders to give MPs representing seats in England or England and Wales the power to veto government legislation that affected only those parts of the country, and was the subject of devolved legislative competence. The House agreed that SIs which the Speaker certified affected only England or only England and Wales and were within devolved legislative competence would be subject to double majority voting, if the question on any motion relating to the instrument was the subject of a division. The standing orders state that a motion relating to a certified SI

... shall be agreed to only if, of those in the division—  
 (a) a majority of Members, and  
 (b) a majority of Members representing qualifying constituencies, vote in support of the motion.<sup>26</sup>

### **European Statutory Instruments Committee**

Following concerns from several committees (see section 3.1 of this briefing) regarding parliamentary scrutiny of secondary legislation laid under the European Union (Withdrawal) Act (EUWA), sifting was introduced in both the House of Commons and the House of Lords.

In the Commons this scrutiny is the responsibility of the European Statutory Instruments Committee (ESIC), which was set up following amendments moved by Charles Walker, chair of the Commons Procedure Committee, during committee stage of the European Union (Withdrawal) Bill in the Commons.

A temporary standing order, agreed on 16 July 2018, governs the constitution and role of the committee. The committee is responsible for scrutinising proposals for negative instruments made under certain sections of the EUWA; it does not have a role in scrutinising other delegated legislation, either EUWA affirmative instruments or other non EUWA legislation.

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<sup>25</sup> Robert Rogers and Rhodri Walters, *How Parliament Works*, November 2018, p 242.

<sup>26</sup> House of Commons Library, [House of Commons Background Paper: Statutory Instruments](#), 15 December 2016, p 3.

A temporary standing order, agreed in July 2018, governs the role and processes of ESIC and stipulates that when examining proposals for negative SIs the committee should consider:

- whether the SI contains any of the provisions specified in paragraph 1(2) or 10(2) of Schedule 7 to the EUWA, that is, those SIs which it was agreed in the EUWA should be subject to the affirmative procedure; or
- otherwise appear to make inappropriate use of the negative procedure.<sup>27</sup>

The ESIC has ten sitting days, beginning the day after the proposed negative instrument is laid, to scrutinise the instrument and make its recommendations. The committee then reports to the Commons its recommendations of where negative proposals for SIs should be ‘upgraded’ to the affirmative procedure. Further discussion of the sifting committees in both the Commons and Lords can be found in section 3.1 of this briefing.

### **3. Delegated Legislation and Brexit: Impacts**

The potential volume and scope of the secondary legislation required to implement the UK’s withdrawal from the European Union is substantial. On 30 March 2017, the Government’s white paper, [Legislating for the United Kingdom’s Withdrawal from the European Union](#), was published.

The white paper indicated that, to facilitate the UK’s withdrawal from the EU, the Government would seek to convert the body of existing EU law into domestic law, with Parliament subsequently able to keep, amend or repeal elements of the law once the UK had left the EU. However, it indicated the importance of delegated legislation in this approach:

Simply incorporating EU law into UK law is not enough, however. A significant amount of EU-derived law, even when converted into domestic law, will not achieve its desired legal effect in the UK once we have left the EU. For example, legislation may refer to the involvement of an EU institution or be predicated on UK membership of, or access to, an EU regime or system. Once we have left the EU, this legislation will no longer work. Government must act to ensure that the domestic statute book continues to function once we have left the EU.

That said, it is neither possible nor desirable for all of the changes that will be needed to domestic law to be made in the Great Repeal Bill

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<sup>27</sup> House of Commons, [Addendum to Standing Orders Public Business](#), 12 September 2018, p 14.

[the subsequent EUWA] itself. This is for a number of reasons, including that the nature and timing of many of the necessary changes do not lend themselves to inclusion in primary legislation [...] As such, the Great Repeal Bill will create a power to correct the statute book where necessary, to rectify problems occurring as a consequence of leaving the EU. This will be done by secondary legislation.<sup>28</sup>

This approach was confirmed in the explanatory notes which accompanied the European Union (Withdrawal) Bill, which stated that the bill:

[...] creates temporary powers to make secondary legislation to enable corrections to be made to the laws that would otherwise no longer operate appropriately once the UK has left, so that the domestic legal system continues to function correctly outside the EU.<sup>29</sup>

The Government has estimated that:

[...] the necessary corrections to the law will require between 800 and 1,000 statutory instruments. This is in addition to those statutory instruments that will be necessary for purposes other than leaving the EU.<sup>30</sup>

As indicated above not all delegated legislation relating to UK's withdrawal from the European Union will be made under the "correcting" power contained the European Union (Withdrawal) Act. In addition, some will be made to existing parents acts, while others will be made under new parent acts introduced because of Brexit, such as the Haulage Permits and Trailer Registration Act 2018.<sup>31</sup>

This initial estimate has since been revised down (see section 3.2). However, the scope of the secondary legislation has also caused some concern, leading to the introduction of a new sifting procedure in both Houses.

### **3.1 Parliamentary Scrutiny and Sifting**

#### ***Reaction to the European Union (Withdrawal) Bill***

In March 2017, the House of Lords Constitution Committee published [The](#)

<sup>28</sup> Department for Exiting the European Union, [Legislating for the United Kingdom's Withdrawal from the European Union](#), March 2017, Cm 9446, p 10.

<sup>29</sup> [Explanatory Notes to the European Union \(Withdrawal\) Bill](#), p 4.

<sup>30</sup> Department for Exiting the European Union, [Legislating for the United Kingdom's Withdrawal from the European Union](#), March 2017, Cm 9446, p 24.

<sup>31</sup> More information about the different primary legislation used to lay Brexit SIs can be found at: Hansard Society, '[Westminster Lens: Brexit Statutory Instruments Dashboard](#)', accessed 18 March 2019.

**'Great Repeal Bill' and Delegated Powers.** The report examined the Government's proposals, made by the Prime Minister at the Conservative Party conference in October 2016, to introduce legislation to repeal the European Communities Act 1972, whilst retaining EU law currently in force in the United Kingdom. The report sought to outline some of the challenges the legislation might face.

In particular, the report highlighted what it described as the "constitutional risks" facing Parliament. The committee noted that the legislation would need to grant "relatively wide delegated powers" for the purpose of converting EU law to UK law, but that Parliament needed to ensure that those powers "cannot be used simply to implement new policies desired by the Government" in areas which were formerly within EU competence.<sup>32</sup>

The report included recommendations to limit the scope of delegated powers granted, for example by placing on the face of the bill the reasons for which delegated powers could be used, and by considering the use of 'sunset clauses' (time limited provisions or powers) in the bill. In addition, the committee suggested measures to strengthen the parliamentary scrutiny of secondary legislation laid under, what was then called, the Great Repeal Bill, such as the use of parliamentary committees in each House considering the appropriate level of scrutiny for secondary legislation laid under the act. The report noted that "it would seem appropriate" for the function to be carried out by the Secondary Legislation Scrutiny Committee in the Lords.<sup>33</sup>

Further to the introduction of the European Union (Withdrawal) Bill into the House of Commons on 13 July 2017, several other committees, in both the Commons and Lords, echoed some of these concerns identified in the Constitution Committee's initial report.<sup>34</sup>

The Constitution Committee itself, in a September 2017 interim report, noted that the bill raised "a series of profound, wide-ranging and interlocking constitutional concerns". In relation to delegated powers, it noted:

In the broader context, it is not merely that the bill invests the executive with deep legislative competence by authorising the making of "any provision that could be made by an Act of Parliament," it is that the bill contains multiple such powers, which overlap to a very considerable extent, and which are not subject to an enhanced scrutiny process as we recommended in our previous report. In this way, the bill weaves a tapestry of delegated powers that are breath-taking in

<sup>32</sup> House of Lords Constitution Committee, *The "Great Repeal Bill" and Delegated Powers*, 7 March 2017, HL Paper 123 of session 2016–17, p 3.

<sup>33</sup> *ibid*, p 4.

<sup>34</sup> For a more detailed analysis of the development of proposals for sifting, see: House of Commons Library, *The European Union (Withdrawal) Bill: Scrutiny of Second Legislation (Schedule 7)*, 9 July 2018.

terms of both their scope and potency.<sup>35</sup>

In the same month the House of Lords Delegated Powers and Regulatory Reform Committee published its report [European Union \(Withdrawal\) Bill](#). Unusually, the committee reported while the bill was still in the Commons, rather than, as is usual practice, reporting in time for the bill's committee stage in the House of Lords. The report noted that the bill gave ministers "unprecedented powers to override an Act of Parliament subject, in the great majority of cases, to no scrutiny whatsoever on the floor of either House".<sup>36</sup> It was critical of the "unacceptably wide Henry VIII powers", that is clauses in a bill that enable ministers to amend or repeal provisions in an Act of Parliament using secondary legislation, and the "insufficient parliamentary scrutiny of many of the law-making powers given to ministers".<sup>37</sup>

In November 2017, the House of Commons Procedure Committee also argued that the Government's proposals for parliamentary scrutiny of the Bill "do not go far enough", calling instead for a new House of Commons committee, to carry out sifting of the items of political and legal importance.<sup>38</sup>

### ***Introduction of Sifting***

During the passage of the European Union (Withdrawal) Bill, amendments were agreed which introduced additional parliamentary scrutiny, in the form of sifting committees, in both the Commons and Lords.

The European Union (Withdrawal) Act provides ministers with a choice about whether delegated legislation introduced under certain sections of the act should be subject to the affirmative or the negative scrutiny procedure. These sections are:

- Section 8 (dealing with deficiencies arising from withdrawal) which enables a minister, by regulations, to make such provision as he or she considers appropriate "to prevent, remedy or mitigate (a) any failure of retained EU law to operate effectively, or (b) any other deficiency in retained EU law, arising from the withdrawal of the United Kingdom from the EU";

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<sup>35</sup> House of Lords Constitution Committee, [European Union \(Withdrawal\) Bill: Interim Report](#), 7 September 2017, HL Paper 19 of session 2017–19, p 2.

<sup>36</sup> House of Lords Delegated Powers and Regulatory Reform Committee, [European Union \(Withdrawal\) Bill](#), 28 September 2017, HL Paper 22 of session 2017–19, p 3.

<sup>37</sup> *ibid*, p 2.

<sup>38</sup> House of Commons Procedure Committee, [Scrutiny of Delegated Legislation Under the European Union \(Withdrawal\) Bill: Interim Report](#), 6 November 2017, HC 386 of session 2017–19, p 3.

- Section 9 (implementing the withdrawal agreement) which enables a minister, by regulations, to make such provision as he or she considers appropriate “for the purposes of implementing the withdrawal agreement ...”; and
- Section 23 (consequential and transitional provision) and, in particular, section 23(1) which enables a minister, by regulations, to make such provision as he or she considers appropriate “in consequence of this Act”.<sup>39</sup>

During committee stage in the Commons, the House agreed, without division, to amendments moved by Charles Walker, chair of the Commons Procedure Committee. The amendments would establish a new procedure that would allow for a committee to sift instruments laid under sections 8, 9 and 23(1) of the EUWA that the Government had proposed were subject to the negative procedure. The [European Statutory Instrument Committee](#) was established by the introduction of a temporary standing order of the House of Commons.<sup>40</sup>

In the House of Lords, although sifting was discussed during committee stage, it was not until report stage that amendments were proposed. The Government’s own amendment to allow for the sifting process in the House of Lords to mirror that of the House of Commons could not be proposed as another amendment was agreed beforehand that removed the provisions the Government wished to amend.

The amendment which was passed made changes to the proposed sifting function, for example it would have meant the Government could not ignore a recommendation that the affirmative procedure should apply (unless the House whose sifting committee it was overturned this recommendation).

The amendment was disagreed to by the Commons, which said it preferred its own “proposed arrangements for sifting”.<sup>41</sup> The Lords did not insist upon its own amendments when the bill was considered again in the House of Lords. Instead an amendment in lieu, proposed by the Government, was passed. This ensured that each House had a sifting committee but removed the requirement for the Government to accept a sifting committee’s recommendation.

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<sup>39</sup> House of Lords Secondary Legislation Scrutiny Committee, [Sifting ‘Proposed Negative Instruments’ Laid under the European Union \(Withdrawal\) Act 2018: Criteria and Working Arrangements](#), 20 July 2018, HL Paper 174 of session 2017–19, p 8.

<sup>40</sup> House of Commons, [Addendum to the Standing Orders: Public Business](#), 12 September 2018, pp 13–15.

<sup>41</sup> UK Parliament, [European Union \(Withdrawal\) Bill: HL Bill 111: Commons Amendments, Amendments to Amendments and Reasons](#), 13 June 2016, p 13.

### **Sifting in the House of Lords**

On 19 March 2018, during the committee stage of the European Union (Withdrawal) Bill in the House of Lords, the Leader of the House, Baroness Evans of Bowes Park, outlined her proposals for the sifting of EUWA secondary legislation to be incorporated into the terms of reference of the Secondary Legislation Scrutiny Committee.<sup>42</sup> This was agreed to by the House of Lords Procedure Committee,<sup>43</sup> and subsequently by the House itself.<sup>44</sup>

On 20 July 2018, the SLSC published a report outlining the way in which the new sifting function would work and the sifting criteria it intended to apply. Explaining the background to the sifting function, the report noted:

When Parliament delegates a power to ministers by Act of Parliament, often the delegation is conditional on Parliament retaining a say in how it is used. This usually takes the form of requiring the power to be exercised by statutory instrument subject to either the affirmative or negative procedure [...] The parent act containing the power will almost always specify the level of parliamentary scrutiny to be applied to the exercise of the power. The withdrawal act, however, like the European Communities Act 1972, is an exception in that, for some of the regulation-making powers contained in the act, the level of parliamentary scrutiny is not specified and the choice is left to ministers [...]

Whilst in the House of Commons, the withdrawal bill was amended to introduce a sifting mechanism whereby instruments for which the minister had a choice of procedure, and had opted for the negative, would first be laid as “proposed negative instruments”. These proposed negative instruments would then be scrutinised by a committee in the House of Commons which could recommend, where appropriate, that the instrument be subject to the affirmative rather than the negative procedure. Further amendments were made to the bill, and the withdrawal act now contains a parliamentary sifting mechanism for instruments laid under sections 8, 9 and 23(1) by which committees in both Houses can make a recommendation that a proposed negative instrument should be upgraded to an affirmative instrument.<sup>45</sup>

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<sup>42</sup> [HL Hansard, 9 March 2018, col 152](#).

<sup>43</sup> House of Lords Procedure Committee, [Fifth Report](#), HL Paper 163 of session 2017–19, 3 July 2018.

<sup>44</sup> [HL Hansard, 11 July 2018, cols 915–19](#).

<sup>45</sup> House of Lords Secondary Legislation Scrutiny Committee, [Sifting “Proposed Negative Instruments” Laid under the European Union \(Withdrawal\) Act 2018: Criteria and Working Arrangements](#), 20 July 2018, HL Paper 174 of session 2017–19, p 4.

The committee's report, published in July 2018, detailed the sifting criteria it would employ in deciding whether a proposed negative instrument should instead be subject to an affirmative procedure. Amongst its considerations are:<sup>46</sup>

- Ensuring that where the EUWA does place some restrictions on the use of secondary legislation this is reflected. For example, under the EUWA some actions, such as creating or widening the scope of a criminal offence, must be subject to the affirmative procedure. The SLSC would seek to ensure that those SIs required to be subject to the affirmative procedure, are not put into proposed negative procedures.
- Considering whether the subject matter of the instrument and the scope of any policy change effected by it is of such significance that the House would expect to debate it.
- Applying a presumption of the affirmative procedure where a proposed negative instrument contains significant amendments to primary legislation or retained direct principal EU legislation, rebuttable by a full and convincing explanation for the negative procedure.

The new sifting function of the SLSC is known as "Stage 1: Scrutiny". In addition, the SLSC continues to scrutinise all SIs that are laid before the House whether subject to negative or affirmative procedure as it has always done (outlined in greater detail in section 2.1 of this briefing). This process is now known as "Stage 2: Scrutiny". Clearing a proposed negative at stage 1 does not mean that SLSC will fast-track or automatically clear the SI during stage 2. The SLSC notes:

At the policy scrutiny stage the committee will consider all statutory instruments, whether or not they have been through the sifting process, in the same way. Proposed negative instruments will not be fast-tracked through stage 2 scrutiny despite having been through the stage 1 sifting process.<sup>47</sup>

As with ESIC, recommendations made during the sifting process will be advisory only and ministers will still have the final say regarding whether to accept a recommendation upgrading a proposed negative instrument. However, the Government has undertaken to publicise its reasons if a recommended upgrade is ignored. In June 2018, during the passage of the

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<sup>46</sup> House of Lords Secondary Legislation Scrutiny Committee, [Sifting “Proposed Negative Instruments” Laid under the European Union \(Withdrawal\) Act 2018: Criteria and Working Arrangements](#), 20 July 2018, HL Paper 174 of session 2017–19, p 25.

<sup>47</sup> *ibid*, p 60.

European Union Withdrawal Bill, Baroness Evans of Bowes Park, confirmed:

Ministers will be required to make and provide to Parliament a written statement explaining themselves if they disagree with a recommendation from one or both of the sifting committees. Your Lordships can be assured that there will be no hiding place from the light of your scrutiny.<sup>48</sup>

This is embodied in schedule 7 to the EUWA, paragraphs 3 and 17.

Both the SLSC and ESIC have ten sitting days to sift proposed negative instruments, beginning the day after the proposed negative instrument is laid and ending after the period of ten Commons sitting days or of ten Lords sitting days, whichever is the later.

The SLSC has noted that “the period of ten sitting days for the committee to examine and report on a proposed negative instrument is tight”.<sup>49</sup> In addition the volume of the anticipated workload for the committee has grown:

The Government anticipate that Brexit-related primary legislation will give rise to 800 to 1,000 statutory instruments. In addition, the committee will be giving stage 1 consideration to about 600 proposed negative instruments (which will, we assume, in due course be laid for stage 2 consideration among those 800 to 1,000 instruments) and also to non-Brexit-related instruments.

On average, the committee considers about 1,000 statutory instruments a session (of which about 20% are affirmative and 80% negative instruments). Assuming that most of the Brexit-related instruments may have to become law before the end of March 2019, but also taking into account that there may be a decrease in non-Brexit-related instruments, we anticipate an approximate doubling of our workload.<sup>50</sup>

The SLSC therefore split into two sub-committees to assist in meeting these timescales and workloads.

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<sup>48</sup> [HL Hansard, 18 June 2018, col 1924](#).

<sup>49</sup> House of Lords Secondary Legislation Scrutiny Committee, [Sifting “Proposed Negative Instruments” Laid under the European Union \(Withdrawal\) Act 2018: Criteria and Working Arrangements](#), 20 July 2018, HL Paper 174 of session 2017–19, p 17.

<sup>50</sup> *ibid*, pp 18–19.

### 3.2 Brexit and Delegated Legislation: Progress

#### ***Volume of Secondary Legislation***

Since initial estimates that between 800 and 1,000 statutory instruments would be required to prepare the state book for the UK's exit from the European Union, the number has been revised down.

In September 2018, the Leader of the House of Commons, Andrea Leadsom, indicated that “the figure will probably be at the lower end of that estimate—somewhere in the region of just over 800”.<sup>51</sup>

On 19 November 2018, a joint letter from Andrea Leadsom and Chris Heaton-Harris, Parliamentary Under Secretary of State for Exiting the European Union, revised the figure again, stating:

Ever since we published the white paper for what became the EU (Withdrawal) Act in January 2017, we have indicated we expect that the total number of Brexit SIs needed before exit day to be between 800–1,000. As Chris Heaton-Harris noted in his letter of 25 October, we have been clear that this total would likely fluctuate and could only be an indicative figure as departmental plans were finalised and negotiations progressed. This figure has continued to become clearer as policy decisions have crystallised, other exit-related primary legislation has received royal assent, and legal drafting finalised, which is why we now expect the total number of EU exit SIs we need will be fewer than 800. We now expect the total number to be up to 700, although again this may fluctuate.<sup>52</sup>

In January 2019, in answer to an oral question in the House of Lords, Lord Callanan, Minister of State at the Department for Exiting the European Union, confirmed:

We now estimate that the number of SIs we will need by exit day is slightly fewer than 600, of which we have already tabled more than 300.<sup>53</sup>

On 21 February 2019, Andrea Leadsom, noted that:

More than 450 EU exit SIs have now been laid, which is over 75 percent of the total that we anticipate being required by exit day.

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<sup>51</sup> [HC Hansard, 6 September 2018, col 336](#).

<sup>52</sup> Office of the Leader of the House of Commons and Department for Exiting the European Union, [‘Government Correspondence: Flow and Volume of Secondary Legislation’](#), 19 November 2018.

<sup>53</sup> [HL Hansard, 7 January 2019, col 2021](#).

The sifting committee, which looks at all the statutory instruments under the key powers of the European Union (Withdrawal) Act 2018, has now considered more than 190 SIs, recommending 52 of them for an upgrade to the affirmative procedure. I can confirm to the House that there remains a relatively small number of SIs for the sifting committee to continue to review.

I can also confirm to the House that the total number of statutory instruments will be fewer than 600. I will continue to update the House, but I am confident that we have enough time to put in place all the necessary secondary legislation by the date of leaving the EU.<sup>54</sup>

Most recently, on 8 March 2019, a Government spokesperson stated that all “vital” changes to the statute book will be ready in time for the UK’s withdrawal, whether it happens with or without a deal with the EU, arguing that:

We are on track to deliver the statutory instruments (SIs) we need for exit day and we have already laid over 80% of these.<sup>55</sup>

However, the Government also confirmed that it will not have completed all of the secondary legislation needed by the time of the UK’s scheduled withdrawal from the EU on 29 March with certain pieces of legislation being “deprioritised”, to be dealt with after Brexit day.<sup>56</sup>

### **Parliamentary Scrutiny and Brexit SIs**

The Hansard Society has produced a blog, [Westminster Lens: Brexit Statutory Instruments Dashboard](#), which seeks to “track the progress made by Government and Parliament in preparing the statute book for exit day”.<sup>57</sup>

The dashboard provides a comprehensive range of information regarding the progress of secondary legislation, on topics such as:

- which government departments have laid instruments and how many;
- which primary legislation statutory instruments are laid under; and
- how many instruments have been considered by sifting committees, recommended for upgrade and upgraded.

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<sup>54</sup> [HC Hansard, 21 February 2019, cols 1607–8](#).

<sup>55</sup> B Quinn and K Rawlinson, ‘[Politics Live](#)’, *Guardian*, 8 March 2019.

<sup>56</sup> *ibid.*

<sup>57</sup> Hansard Society, ‘[Westminster Lens: Brexit Statutory Instruments Dashboard](#)’, accessed 18 March 2019.

On 18 March 2019, the Hansard Society estimated that 495 Brexit-related SIs had been laid since the passing of the EUWA, of which 294 had completed their passage through Parliament. Commenting on the number of instruments laid, the Hansard Society argued:

95% of the time available to lay the SIs before exit day has now elapsed; but only 83% of the minimum number of SIs the Government says are needed for Brexit have been laid before Parliament.<sup>58</sup>

The dashboard also provided analysis of the length of Brexit-related SIs, stating:

9,911 pages of legislation have been created by the 495 Brexit SIs laid before Parliament to date.

The average length of a Brexit SI is 20 pages. In the last parliamentary session (2016–17) the average page length of an SI was 11 pages. Page length is a somewhat crude measure but, as the Government has revised the number of SIs it says it needs for exit day from 800–1,000 to around 600 there is concern that the reduction is being achieved, in part, by a consolidation exercise.

From August to December, the average number of pages for Brexit SIs increased each month: in August it was 3 pages; in December it was 33 pages. In January it went down to 26 pages. To date, the average length of each Brexit SI laid before Parliament in February was 17 pages. The Department for Business, Energy & Industrial Strategy (BEIS) is responsible for one of the biggest SIs to date—the Product Safety and Metrology etc. (Amendment etc.) (EU Exit) Regulations 2019, which runs to 619 pages. This SI amends 3 Acts of Parliament, 26 SIs, 3 Northern Ireland SIs, and 4 regulations saved as direct retained EU law.<sup>59</sup>

Joel Blackwell, senior research fellow at the Hansard Society, has argued that parliamentary scrutiny could suffer in “the rush to prepare for Brexit”.<sup>60</sup>

This view was echoed in the *Times* by, Baroness Smith of Basildon, Shadow Leader of the House of Lords. Noting that the House of Lords “has always been a bit nerdy and precious about secondary legislation”, she argued that the Lords provides far more scrutiny of SIs than the Commons and “does

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<sup>58</sup> Hansard Society, '[Westminster Lens: Brexit Statutory Instruments Dashboard](#)', accessed 18 March 2019.

<sup>59</sup> *ibid.*

<sup>60</sup> Joel Blackwell, '[In the Rush to Prepare for Brexit, Parliamentary Scrutiny Will Suffer](#)', *Times (£)*, 18 February 2019.

the heavy lifting in examining the fine print".<sup>61</sup>

However, she highlighted “obvious concerns” with the timescales involved in the Brexit process, stating that although there are now fewer SIs than the 800 to 1,000 originally estimated:

[...] to achieve this, Whitehall departments seem to be bundling disparate issues together. One beast of an SI from the Department of Business, Energy and Industrial Strategy is 623 page long, weighs 2.54 kilos and amalgamates 11 matters that at any other time would appear as separate documents [...]

With an eye on that [no deal] scenario, the Government has brought forward a raft of SIs. But it is hard to see how these could be properly examined and processed in the limited time available to us. Therein lies the dilemma. In many areas [...] bringing this legislation into UK law is essential [...] But we need to ensure that the avalanche of documents being presented to Parliament is accurate and fulfils the commitments made to maintain such safeguards. The fear is that the two are incompatible.<sup>62</sup>

Parliamentary scrutiny, and the roles of the sifting committees in parliament, was discussed in an article in *The House* magazine, which noted concerns regarding the impact of Brexit SIs on parliamentary scrutiny:

[T]ime pressure in the SI process does not end at the sifting committees [...] “The sifting process is far from complete but it’s only the start of a much longer task,” Dr Ruth Fox from the Hansard Society tells *The House* magazine.

“Every time an SI is upgraded over a dozen MPs need to be appointed to a ‘delegated legislation committee’ to debate it. A committee room needs to be found, clerks and a Hansard reporter need to be allocated and the papers prepared. Ninety minutes have to be set aside for these debates, but they are so poor that the committees rarely last more than half an hour. It’s an enormous commitment of resources for a process that many MPs recognise is often a waste of time. The idea that these SIs are really getting the attention they deserve is for the birds”. The challenge facing the process in the time left before Brexit cannot be overstated.<sup>63</sup>

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<sup>61</sup> Baroness Smith of Basildon, ‘[Avalanche of Brexit Law Could Overwhelm Parliament](#)’, *Times*(£), 31 January 2019.

<sup>62</sup> *ibid.*

<sup>63</sup> Emilio Casalicchio, ‘[Instruments of Change: inside the Brexit Sifting Process](#)’, *The House*, 10 January 2019.

On 14 March 2019, Lord Adonis (Labour) moved a motion to adjourn the House of Lords “before we proceed with the remaining business, which is almost exclusively no-deal Brexit regulations”.<sup>64</sup> Noting that, the evening before, the House of Commons had rejected a no-deal Brexit and arguing that an extension to the deadline for leaving the EU was likely, he argued:

In this circumstance I cannot understand why it is in the public interest for noble Lords to proceed now to debate another string of no-deal Brexit regulations. Surely the right thing to do in the crisis situation in which we find ourselves, where the one certain fact is that we will not be proceeding with no deal, is not to proceed with these regulations, but to adjourn the House and for Her Majesty’s Government to come back in good order on Monday with actual proposals for the change of the law that is required to change the exit date. They should also come back with an apology to Parliament and to the public for the billions of pounds of public money that has been wasted on no-deal preparations.<sup>65</sup>

Lord McAvoy, Labour Chief Whip in the Lords, indicated that the party would not support the motion, noting “with the threat [of no-deal] still there it is essential that we carry on until things become clearer”. He called for greater clarity from the Government regarding how they would approach ‘no-deal’ Brexit planning in the light of the votes on 13 March 2019.<sup>66</sup> This view was echoed by Lord Stoneham of Droxford, Chief Whip for the Liberal Democrats.<sup>67</sup>

Responding for the Government, the Chief Whip, Lord Taylor of Holbeach, stated:

It is a subject worthy of discussion, we have had a discussion about it, I have taken note of what has been said, and we will do our best to make sure that this House is a credit to the parliamentary process.<sup>68</sup>

Lord Adonis withdrew his motion.<sup>69</sup>

### ***Extending Article 50: The ‘Exit Day’ SI***

In response to the UK’s formal request to the EU to extend the two-year article 50 period beyond 29 March 2019, the European Council agreed to an extension until 22 May 2019 if the House of Commons approves the

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<sup>64</sup> [HL Hansard, 14 March 2019, col 1140](#).

<sup>65</sup> ibid, cols 1141–2.

<sup>66</sup> ibid, col 1142.

<sup>67</sup> ibid, col 1143.

<sup>68</sup> ibid, col 1144.

<sup>69</sup> ibid, col 1145.

withdrawal agreement before 29 March 2019, and to 12 April 2019 if the House of Commons does not approve the withdrawal agreement by 29 March 2019.<sup>70</sup>

The terms of this extension were adopted as a legally binding European Council Decision on 22 March 2019, meaning the UK would not leave the EU on 29 March 2019.

The European Union (Withdrawal) Act 2018 (EUWA) set the date of ‘exit day’ in domestic law as 29 March 2019. The statutory instrument required to change the exit date in UK law was laid before both Houses on 25 March 2019, under the affirmative procedure. The House of Lords was due to debate the European Union (Withdrawal) Act 2018 (Exit Day) (Amendment) Regulations 2019 on 27 March 2019.<sup>71</sup>

There is no time limit specified for debate on delegated legislation in the Lords. Under House of Lords standing order 72, motions to approve most types of statutory instrument may not be moved until a report on the instrument from the Joint Committee on Statutory Instruments (JCSI) has been laid before the House.<sup>72</sup> However, the House has agreed from time to time to dispense with this standing order.<sup>73</sup>

On 26 March 2019, Baroness Evans of Bowes Park moved a motion in the House of Lords to dispense with standing order 72 on 27 March 2019 so that the Lords could consider the ‘exit day’ SI whether or not the JCSI had reported on it.<sup>74</sup> Lord True (Conservative) tabled an amendment to the government motion under which the Lords would have declined to consider the SI until the JCSI had reported, on the grounds that “it is not in accordance with the practice and traditions of the House to consider significant affirmative instruments laid by Her Majesty’s Government without prior consideration by that committee”.<sup>75</sup> Following debate, Lord True withdrew his amendment and Baroness Evans’ motion was agreed without a vote.

On 27 March 2019, Lord Callanan, Minister of State for Exiting the European Union, moved that the European Union (Withdrawal) Act 2018 (Exit Day) (Amendment) Regulations 2019 be approved. Opening proceedings, he argued that the instrument was “vitally important” with a “simple but crucial

<sup>70</sup> For more information see: House of Lords Library, [Extending Article 50: European Union \(Withdrawal\) Act 2018 \(Exit Day\) \(Amendment\) Regulations 2019](#), 26 March 2019.

<sup>71</sup> House of Lords, [Future Business](#), 26 March 2019, p 4.

<sup>72</sup> House of Lords, [The Standing Orders of the House of Lords Relating to Public Business](#), 2016.

<sup>73</sup> House of Lords, [Companion to the Standing orders and Guide to the Proceedings of the House of Lords](#), 2017, para 10.12, footnote 5.

<sup>74</sup> House of Lords, [Future Business](#), 26 March 2019, p 1

<sup>75</sup> ibid.

purpose” and stated:

Without this instrument being put in place, there would be a clash in our domestic law whereby contradictory provisions applied to both EU rules and new UK rules simultaneously, and in some cases new UK rules would replace EU rules prematurely. We estimate that tens of thousands of amendments to our domestic legislation will be made in the light of EU exit.<sup>76</sup>

As the House had suspended standing order 72 on the previous day, the SI was considered without the JCSI having reported on it. However, Lord Callanan noted that the JCSI had:

[...] met only this afternoon but has very helpfully released its view on the instrument and has not found any reason to draw it to the special attention of the House.<sup>77</sup>

In addition, on 26 March 2019, the Secondary Legislation Scrutiny Committee reported on the instrument, drawing the regulations to the special attention of the House on the ground that “they are politically and legally important and give rise to issues of public policy likely to be of interest to the House”.<sup>78</sup> Explaining the purpose and background to the SI, the committee noted:

These regulations will not alter the content of any of the “Brexit-related” instruments that have already been considered, but simply ensure that the provisions in them that are necessary to keep the UK statute book operational only come into effect at the point at which the UK’s membership of the EU lapses.<sup>79</sup>

Baroness Hayter of Kentish Town, Shadow Spokesperson for Exiting the European Union, moved a non-fatal amendment which would have inserted a statement of regret to the end of the approval motion. Introducing her amendment, Baroness Hayter hoped that the House would “support the amendment and regret the shambles that got us here”, although she noted “of course, we agree that the instrument is necessary to ensure we have clarity on our statute book”.<sup>80</sup>

Baroness Ludford, Liberal Democrat Spokesperson on Exiting the European Union, also supported the SI “as a necessary measure to prevent confusion

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<sup>76</sup> [HL Hansard, 27 March 2019, col 1846](#).

<sup>77</sup> *ibid*, col 1843.

<sup>78</sup> House of Lords Secondary Legislation Scrutiny Committee, [46th Report of the Session](#), 26 March 2019, HL Paper 326 of session 2017–19, p 1.

<sup>79</sup> *ibid*.

<sup>80</sup> [HL Hansard, 27 March 2019, col 1850](#).

and uncertainty” but noted that she was “sympathetic” to Baroness Hayter’s amendment.

Closing the debate for the Government, Lord Keen of Elie, Advocate-General for Scotland, noted “it appears to have taken us rather more than an hour to arrive at the conclusion we are all in favour of the instrument”.<sup>81</sup> Speaking to Baroness Hayter’s amendment he argued the proposed amendment “would be a wholly reckless course of action for this House to adopt”.<sup>82</sup> Responding, Baroness Hayter noted “I think it served its purpose in allowing the House to express its views, without having to divide”.<sup>83</sup>

Baroness Hayter withdrew her amendment, and the motion to approve the European Union (Withdrawal) Act 2018 (Exit Day) (Amendment) Regulations 2019 was agreed to without division.<sup>84</sup>

### **National Audit Office: Implementing the UK’s Exit from the European Union**

The National Audit Office (NAO) has produced a series of reports which examine the progress of different departments in implementing the UK’s exit from the European Union. To date this has included: the [Department for Exiting the European Union](#) (November 2017); the [Department for Environment, Food and Rural Affairs](#) (September 2018); the [Foreign and Commonwealth Office](#) (April 2018); and the [Department for International Trade](#) (January 2018). These provide an insight into the challenges faced by different departments in undertaking preparations to implement Brexit.

The NAO report concerning the Department for Exiting the European Union (DExEU) noted the high volume of delegated legislation required for Brexit and outlined the coordinating role which the department would be taking, noting:

Departments routinely manage secondary legislation. Due to its scale, the secondary legislation required for Exit is monitored, coordinated and prioritised by DExEU and the Government Legal Department working with departments. DExEU has advised departments that they should assume there will be minimal room for non-critical non-Exit secondary legislation in the run up to Exit and that they should plan accordingly.<sup>85</sup>

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<sup>81</sup> [HL Hansard, 27 March 2019, cols 1862–3](#).

<sup>82</sup> *ibid*, col 1863.

<sup>83</sup> *ibid*, col 1866.

<sup>84</sup> *ibid*.

<sup>85</sup> National Audit Office, [Implementing the UK’s Exit from the European Union: The Department for Exiting the European Union and the Centre of Government](#), 17 November 2017, HC 593 of session 2017–19, p 10.

Other NAO reports have highlighted the interdependencies that impact upon a department's ability to implement secondary legislation. Referring to secondary legislation on consumer protection, competition and state aid to ensure a functioning statute book, the NAO noted:

[The Department for Business, Energy and Industrial Strategy] BEIS is reliant on factors outside its direct control to lay its legislation in Parliament in time for a no-deal scenario in March 2019. It plans to lay the required secondary legislation in Parliament by January 2019 at the latest. However, the volume of legislation that is needed across government to ensure a functioning statute book on EU Exit is substantial, and there is pressure on parliamentary time.

Delays to UK and EU negotiations on the future relationship pose a risk to BEIS's ability to ensure a functioning consumer protection framework on 30 March 2019. To mitigate these risks, BEIS is exploring ways to streamline its programme: for example, options to pass some pieces of legislation earlier than currently scheduled to ease pressure on parliamentary time.<sup>86</sup>

While its report on the Department of Transport, published in July 2018, commented:

The Department has planned, reduced and reprioritised its programme secondary legislation but the timetable for laying this legislation is now seriously compressed [...]

The Department faces the challenge of delivery against uncertainty over the passage of primary legislation required to allow secondary instruments to be laid, continuing uncertainty associated with the negotiations, and evolving processes within government for processing the volume of SIs coming through. For example, the SI to give the UK power to issue its own vehicle type approvals is now under pressure as a knock-on effect of delays in preparing and laying business-as-usual SIs. The Department's legal resources are already stretched on EU Exit and this adds to the challenge of delivery. By April 2018, the Department estimated that it needed an additional 10 full-time equivalent staff on its exit legal work to meet its timetable on top of the 27 full-time equivalent lawyers already in place.<sup>87</sup>

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<sup>86</sup> National Audit Office, [Exiting the EU: Consumer Protection, Competition and State Aid](#), 6 July 2018, HC 1384 of session 2017–19, p 17.

<sup>87</sup> National Audit Office, [Implementing the UK's Exit from the European Union: Department for Transport](#), 19 July 2018, HC 1125 of session 2017–19, p 10.