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BRIEFING PAPER

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The *European Union (Withdrawal) Bill*: scrutiny of secondary legislation (Schedule 7)

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Summary

This briefing paper has been prepared for day 7 of the Committee Stage of the *European Union (Withdrawal) Bill 2017-19* (EUW Bill) in the House of Commons.

It addresses **Schedule 7** of the EUW Bill which sets out how the Government wants Parliament to scrutinise and, where necessary, approve secondary legislation made under the Bill.

The HC Library's Briefing, European Union (Withdrawal) Bill (CBP8079), covers all of the provisions in the Bill, and was published on 1 September 2017.

Schedule 7 specifies that regulations that do certain things (such as establish a new public body or create a criminal offence) would be subject to the draft affirmative procedure. Other regulations would be subject to the negative resolution procedure, although ministers can choose to lay such regulations in draft.

The Government proposes that parliamentary scrutiny of these SIs should be in line with current procedures. The Bill, as introduced, does not establish any novel requirements for parliamentary scrutiny or approval.

- SIs subject to the negative procedure would be made and come into force without parliamentary action but they could be annulled, on a motion of either House;
- SIs subject to the affirmative procedure would be debated (usually by a delegated legislation committee in the House of Commons, and in the Chamber in the House of Lords) and could only be made after being approved by both Houses of Parliament;
- Under an "urgent procedure", SIs subject to the affirmative procedure could be made and come into force before parliamentary approval is given. In this case, if the regulations were not approved by both Houses within one month of being laid, they would cease to have effect.

In no case would Members of Parliament or members of the House of Lords have any opportunity to amend the regulations brought forward by the Government. If Members objected to specific provisions, the whole regulation would need to be not approved or annulled in order to prevent those provisions having effect.

There has been widespread acceptance that a method is needed that allows regulations to implement the legislative consequences of the leaving the EU speedily and flexibly. However, concern has been expressed that Parliament has little oversight of, and no opportunity to revise, such regulations.

Reports from committees in both the House of Commons and the House of Lords have recommended strengthened scrutiny procedures. Amendments have been tabled to provide for such procedures.

The Procedure Committee recommended "the establishment of a committee to examine the legislative changes the Government proposes and identify those of political and/or legal importance". This new House of Commons committee would adopt the working methods of the European Scrutiny Committee: it would review (sift) each SI laid under the EUW Bill and recommend further consideration (debate in a DLC or on the floor of the House) for any SI that was either politically or legally sensitive. The Procedure Committee said that the scrutiny committee should have a "defined period" to scrutinise each SI. The Procedure Committee noted that the ESC's work "is effectively underpinned by the scrutiny reserve … which injuncts Ministers against further action on a legislative proposal

until either the Committee has cleared it from scrutiny or the further consideration recommended in the House has taken place".

On 7 December 2017, the Procedure Committee issued a press release announcing that its Chair, Charles Walker, had tabled amendments to the Bill and that he would propose Standing Order to create a European Statutory Instruments Committee. The role of the sifting committee differs from that proposed in the Procedure Committee's report. The press release outlined how it would operate:

> The Procedure Committee's amendments provide that every statutory instrument to be made via the negative procedure under the main law-making powers in the Bill will be laid before the House of Commons in draft by Ministers and sent to a Commons committee for consideration.
>
> The new committee, a so-called 'sifting committee', will have the job of looking at each of these instruments and recommending which ones require the affirmative procedure instead (i.e. requiring debate and a vote in the House before they became law). The committee would have ten sitting days to make this recommendation.

1. Introduction

The *European Union (Withdrawal) Bill 2017-19* (the EUW Bill) was published on 13 July 2017. The Bill cuts off the source of European Union law in the UK by repealing the *European Communities Act 1972* and removing the competence of European Union institutions to legislate for the UK.

It converts EU law, as it stands on exit day, into UK law and gives the Government powers to amend that law so that it continues to function outside the EU.

The Bill was given a second reading following debate in the House of Commons on 7 and 11 September 2017. The Programme Motion passed at the end of the second reading debate provides for eight days in Committee of the Whole House.

The Department for Exiting the European Union (DExEU) has published Explanatory Notes to the Bill, a series of factsheets on the Bill's provisions and a Delegated Powers Memorandum (DPM) addressed to the House of Lords Delegated Powers and Regulatory Reform Committee.

A large number of amendments have been tabled for the Committee stage. An up to date list of amendments can be found on Parliament's bill pages online.

The Commons Library produced a briefing paper to inform the Second Reading debate which sets out full details of the provisions of the Bill and extensive commentary on them. This briefing paper has been produced to inform the Committee of the Whole House debate on Schedule 7, which is scheduled to take place on day seven, which the Leader of the House has provisionally scheduled for 13 December 2017.

Schedule 7 of the *European Union (Withdrawal) Bill 2017-19* sets out how the Government wants Parliament to scrutinise and, where necessary, approve secondary legislation made under the Bill. It also sets outs the procedures to be followed when UK ministers and devolved authorities use powers to act jointly to make regulations under Part 1 of Schedule 2.

This paper briefly reviews the powers contained in the Bill.[1] It then considers the Government's proposals for scrutiny of secondary legislation in the Bill. It notes concerns about the Government's proposals and recommendations for alternative approaches to scrutinising secondary legislation under the Bill.

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[1] The powers to make corrections are scheduled to be debated on Day 6 – 11 December 2017, and are considered in a separate Library Briefing Paper, *The European Union (Withdrawal) Bill: clause 7 "the correcting power"*, CBP 8171, 6 December 2017

2. Powers granted in the Bill

The Explanatory Notes describe the "approach of the *European Union (Withdrawal) Bill*", saying that it "creates powers to make secondary legislation, including temporary powers to enable corrections to be made to the laws that would otherwise no longer operate appropriately once the UK has left the EU and to implement a withdrawal agreement".[2]

Clauses 7, 8 and 9 of the *European Union (Withdrawal) Bill 2017-19* grant the Government new powers, which the House of Lords Delegated Powers and Regulatory Reform Committee described as "excessively wide" and "unique in peace-time".[3]

- **Clause 7** grants Ministers the power to make statutory instruments to prevent, remedy or mitigate any "failure of" or "deficiency in" retained EU law arising from the UK's withdrawal from the EU. It has been described as the "correcting" power.
- **Clause 8** gives UK Government ministers the power, until two years after exit day, to make secondary legislation to prevent or remedy any unintended breaches of the UK's international obligations that might arise from Brexit.
- **Clause 9** provides the Government with the legislative authority to use secondary legislation to implement any withdrawal agreement agreed with the European Union under Article 50(2) Treaty of the European Union.

Retained EU law – anything which, on or after exit day, continues to be, or forms part of, domestic law by virtue of clauses 2, 3 or 4 or clause 6(3) or (6) of the *European Union (Withdrawal) Bill 2017-19*

A brief description of the other powers the Bill proposes should be delegated to ministers was given in the Library Briefing Paper on the *European Union (Withdrawal) Bill* (CBP 8079, 1 September 2017). This description is repeated in the Appendix of this Paper.

In all instances, the secondary legislation exercising the new powers has, once 'made'—signed into law—by Ministers, the force of law as if passed by both Houses of Parliament, save that the actions of Ministers in making such legislation are subject to judicial review.

Regulation making powers granted to Ministers under primary legislation are usually subject to parliamentary scrutiny when they are used.[4] **Schedule 7** sets out the parliamentary requirements which must be satisfied before the regulations may be signed into law by a Minister or, if already signed, may continue in force. Where no form of control is specified in the Bill, there are no parliamentary requirements to be satisfied before the regulations may be made.

The Government proposes that parliamentary scrutiny of the statutory instruments flowing from clauses 7, 8 and 9 should be in line with the current procedures for scrutinising negative and affirmative instruments. **Schedule 7** does not establish any novel requirements for parliamentary

2 European Union (withdrawal) Bill 2017-19 – Explanatory Notes, para 11
3 House of Lords Delegated Powers and Regulatory Reform Committee, European Union (Withdrawal Bill), (2017-2019 Third Report HL Paper 22) para 1
4 One major is exception is commencement regulations, which are usually not subject to further parliamentary scrutiny

scrutiny or approval of the secondary legislation to be made by Ministers under the powers delegated in the Bill.

3. The scrutiny of secondary legislation

3.1 Scrutiny provided for in the Bill

The EUW Bill does not establish any novel requirements for parliamentary scrutiny or approval of statutory instruments made under it.

- SIs subject to the negative procedure would be made and come into force without parliamentary action but they could be annulled, on a motion of either House;
- SIs subject to the affirmative procedure would be debated (usually by a delegated legislation committee in the House of Commons, and in the Chamber in the House of Lords) and could only be made after being approved by both Houses of Parliament;
- Under an "urgent procedure", SIs subject to the affirmative procedure could be made and come into force before parliamentary approval is given. In this case, if the regulations were not approved by both Houses within one month of being laid, they would cease to have effect.

The Bill sets out the circumstances in which instruments would be subject to affirmative procedures, and the Delegated Powers and Regulatory Reform Committee (DPRRC) provided the following summary of those circumstances:

> The "draft affirmatives" under clauses 7 to 9 cover a variety of matters:
>
> - establishing a new public authority;
> - transferring an EU function to a newly created public authority;
> - transferring an EU legislative function to a UK body;
> - imposing fees;
> - creating or widening the scope of certain criminal offences;
> - creating or amending a power to legislate; and
> - (in the case of clause 9) amending the European Union (Withdrawal) Act.

In addition, the "made affirmative" procedure is to be used in urgent cases.[5]

The DPRRC also noted that:

> If an exercise of powers does not fall within one of these matters, Ministers have an unfettered discretion to decide whether the affirmative or negative procedure should apply.[6]

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5 Delegated Powers and Regulatory Reform Committee, *European Union (Withdrawal) Bill*, 28 September 2017, HL Paper 22 2017-19, paras 96-97

6 Delegated Powers and Regulatory Reform Committee, *European Union (Withdrawal) Bill*, 28 September 2017, HL Paper 22 2017-19, para 98

In no case would Members of Parliament or members of the House of Lords have any opportunity to amend the regulations brought forward by the Government. If Members objected to specific provisions, the whole regulation would need to be not approved or annulled in order to prevent those provisions having effect.

In the White Paper, *Legislating for the United Kingdom's withdrawal from the European Union*, the Government set out its intent to follow these procedures. It said that "The Government proposes using existing types of statutory instrument procedure". It then indicated when the negative and affirmative procedures might be used:

> The Bill will therefore provide for the negative and affirmative procedures to be used. The mechanistic nature of the conversion of EU law to UK law suggests that many statutory instruments will follow the negative procedure (for example, removing the requirement to send reports to the Commission on the UK's public procurement activity). The affirmative procedure may be appropriate for the more substantive changes.[7]

The powers to make corrections are scheduled to be debated on Day 6 – 11 December 2017, and are considered in a separate Library Briefing Paper, *The European Union (Withdrawal) Bill: clause 7 "the correcting power"*, CBP 8171, 6 December 2017.

3.2 Current procedures for scrutinising statutory instruments

The Parliamentary procedures for considering statutory instruments vary, depending on whether an SI is subject to the affirmative or the negative resolution procedure.

- Under the **affirmative procedure**, an instrument is usually laid before Parliament in draft and must be approved by both Houses before it may be made.[8]
- Under the **negative procedure**, a statutory instrument is laid before both Houses,[9] usually after being 'made' (ie signed into law). Either House may within 40 days pass a motion that the instrument be annulled: this triggers a procedure whereby the Sovereign will annul the instrument

Statutory Instrument Practice (the manual for officials who prepare SIs), also describes two made affirmative procedures:

> Class ii
>
> The instrument is laid after making, but cannot come into force unless and until so approved
>
> Class iii
>
> The instrument is laid after making, but cannot remain in force after a specified period (usually 28 days, sometimes a month or 40

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7 Department for Exiting the European Union, *Legislating for the United Kingdom's withdrawal from the European Union*, Cm 9446, March 2017, para 3.22

8 In some cases the parent Act may specify that the instrument is to be approved by the House of Commons only.

9 In some cases the parent Act may specify that the instrument is to be laid before the House of Commons only.

> days, from the date on which it was made) unless approved within that period.[10]

In its report on fast-track legislation, the Constitution Committee, in the House of Lords, commented on the made affirmative process. It described the Class iii approach as "a kind of 'fast-track' secondary legislation":

> The made affirmative procedure is often used in Acts where the intention is to allow significant powers to be exercised quickly. It is a kind of "fast-track" secondary legislation. In most cases the parent Act specifies which form of procedure should be applied to instruments made under it. In some cases however the Act may provide for either the draft affirmative or the made affirmative procedure to be used. If the made affirmative procedure is used then the instrument is effective immediately.[11]

If a statutory instrument, subject to the negative procedure, is made before it is laid, there is no way that it can be upgraded to one requiring parliamentary approval before it comes into force. Its provisions can only be revoked following parliamentary action – Parliament is not required to approve it before it is made.

However, it is possible to lay negative SIs in draft form: such an instrument cannot be made if the draft is disapproved within 40 days of it being laid.[12] In order to prevent it being made, either House would need to agree a motion that such an instrument "be not made". It is also possible to envisage that a procedure could be adopted where an instrument that was laid as a draft negative was upgraded to an affirmative instrument. Both Houses would then be required to approve the draft before it could be made.

Box 1 provides an overview of the procedures for the Parliamentary control of secondary legislation and the JCSI's role is described in Box 2. Statutory instruments, whether subject to the negative or affirmative procedures, are scrutinised by the **Joint Committee on Statutory Instruments** (JCSI).

The **Secondary Legislation Scrutiny Committee**, in the House of Lords, was set up in 2003 as the Merits of Statutory Instruments Committee. It reviews SIs and has the power to draw SIs to the special attention of the House of Lords on the basis of a number of grounds relating to the policy objectives of the SI.[13] There is no equivalent committee in the House of Commons.

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10 Office of Public Sector Information, *Statutory Instrument Practice*, 4th edition, 2006, Table B

11 Constitution Committee, *Fast-track Legislation: Constitutional Implications and Safeguards*, 7 July 2009, HL Paper 116-I 2008-09, para 134

12 Office of Public Sector Information, *Statutory Instrument Practice*, 4th edition, 2006, Table B

13 The Committee's Terms of Reference provide that:
(2) The grounds on which an instrument, draft or proposal may be drawn to the special attention of the House are—
(a) that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House;
(b) that it may be inappropriate in view of changed circumstances since the enactment of the parent Act;
(c) that it may inappropriately implement European Union legislation;

Before Ministers and others are granted delegated powers in primary legislation, the **Delegated Powers and Regulatory Reform Committee** scrutinises proposals in bills to delegate legislative power. Government departments provide the Committee with Delegated Powers Memorandums.[14]

Box 1: Outline of procedures for Parliamentary control of secondary legislation

Under the **affirmative procedure**, an instrument is usually laid before Parliament in draft and must be approved by both Houses before it may be made.[15]

In the Commons, affirmative instruments are usually referred automatically to a committee for debate, with the approval motion then being taken without debate in the Chamber: it is rare for an approval motion to be debated on the floor of the House. It is generally understood that the Government will not arrange for debate on an instrument until the Joint Committee on Statutory Instruments has considered the instrument and reported on it.

In the Lords, affirmative instruments are always debated. Although there is no set timing for such debates, under House of Lords Standing Order 72 no motion to approve a draft affirmative can be taken until the Joint Committee on Statutory Instruments has reported on the instrument.

Where there is particular urgency for an instrument to come into effect, the parent act may provide for a **made affirmative** procedure, whereby an instrument may be made by a Minister before it is laid before Parliament, but must be approved within a specified period in order to continue in force.

Under the **negative procedure**, a statutory instrument is laid before both Houses,[16] usually after being 'made' (i.e. signed into law). Either House may within 40 days pass a motion that the instrument be annulled: this triggers a procedure whereby the Sovereign will annul the instrument.

The instrument may come into force at any time after it is made and remains in force until it expires or is revoked (by another instrument) or annulled.

In the Commons, MPs may signify their discontent with an instrument by tabling a 'prayer'—a motion requesting that the instrument be annulled. It is only effective if passed within the 40-day "praying time" stipulated in the *Statutory Instruments Act 1946*. Such 'prayers' may result in the instrument being referred to a committee for debate: it is rare for them to be debated and voted on in the Chamber.

In the Lords, instruments under the negative procedure are only considered in the Chamber if a peer specifically requests a debate.

Source: House of Lords Delegated Powers and Regulatory Reform Committee, *Special Report: Strengthened Statutory Procedures for the Scrutiny of Delegated Powers* (HL (2012–13) 19) para 5

(d) that it may imperfectly achieve its policy objectives;
(e) that the explanatory material laid in support provides insufficient information to gain a clear understanding about the instrument's policy objective and intended implementation;
(f) that there appear to be inadequacies in the consultation process which relates to the instrument.

14 The *European Union (Withdrawal) Bill 2017-19 Delegated Powers Memorandum* was published on 13 July 2017, the day the Bill was first introduced into the House of Commons

15 In some cases the parent Act may specify that the instrument is to be approved by the House of Commons only.

16 In some cases the parent Act may specify that the instrument is to be laid before the House of Commons only.

Box 2: Technical scrutiny of secondary legislation: the Joint and Select Committees on Statutory Instruments

Most statutory instruments subject to parliamentary procedure are examined by the Joint Committee on Statutory Instruments. The Commons Members of this committee sometimes sit separately (as the Select Committee on Statutory Instruments) to consider instruments laid before the Commons alone (usually dealing with financial matters).

These Committees do not consider the merits of any SI. They are responsible for ensuring that a Minister's powers are being carried out in accordance with the provisions of the enabling Act. They report to the House any instance where the authority of the Act has been exceeded, or any which reveal an "unusual or unexpected" use of the powers, or have been drafted defectively, or where the instrument might require further explanation. Reports of the committees are printed as House of Commons and House of Lords papers and are available on the websites of the two committees.

The Joint Committee has the services of Counsel to the Speaker and the Counsel to the Lord Chairman of Committees available during its deliberations. The Joint and the Select Committees may, like other Select Committees, take oral or written evidence, but only from officials of the responsible Government Department on instruments they are considering.

Some SIs (e.g. local orders not laid before Parliament) are not scrutinised by either Committee. Other instruments, which are not technically SIs but which may need an affirmative resolution, such as reports on local government finance special grants, draft codes of practice which have legislative effect and orders subject to special parliamentary procedure under the *Statutory Orders (Special Procedure) Acts* of 1945 and 1946 are examined.

The Government is under no obligation to respond to reports of the Committees or to take corrective action, although made instruments are frequently amended, or revoked and replaced, by subsequent legislation as a consequence of JCSI or SCSI observations.

Source: Adapted from Commons Briefing Paper 6509, Statutory Instruments, para 3.1.

4. Why has the Government recommended using existing scrutiny procedures?

As noted above, the Government believe that any secondary legislation made under the EUW Bill should be scrutinised in line with current procedures. In evidence to the House of Lords Constitution Committee, the Government noted that the types of powers the Government sought were "not novel", nor should the existing scrutiny process be denigrated:

> Although the challenge of delivering on EU withdrawal is unprecedented the types of the powers in the Government are seeking in the Bill are not novel. Secondary legislation is an established part of the UK's constitutional arrangements and, as the Government has submitted in previous enquiries on the proper role of secondary legislation, preserves a key role for Parliament in both granting and circumscribing powers. The Government also believes that the scrutiny of the exercise of these powers by Parliament, the need for Parliament to assent (or not dissent) to the exercise of powers, and the rigour with which Parliamentarians challenge Government should be recognised and not denigrated.[17]

In oral evidence to the Procedure Committee's inquiry into the scrutiny of delegated legislation under the EUW Bill, Steve Baker, the Parliamentary Under Secretary of State, Department for Exiting the European Union, was asked about the process of scrutinising SIs made under the powers proposed in the EUW Bill. He emphasised the need to make changes in a relatively short period of time before exit day:

> The crux of the matter … is time. It is imperative that we deliver a functioning statute book on exit day and I hope and believe that all parliamentarians would agree with us on that point.[18]

The Department told the Constitution Committee that "To make all these corrections by primary legislation would require a volume of primary legislation which could not be delivered in a timely manner".[19]

The Leader of the House of Commons, Andrea Leadsom, acknowledged that "in the past secondary legislation has not been as well managed as it could be". However, she noted that the Parliamentary Business and Legislation Committee (a Cabinet Committee), which she chaired was "now overseeing secondary legislation as well". She believed that this would produce "a more rationale flow of business for Parliament":

> The Cabinet Committee that I chair, the Parliamentary Business and Legislation Committee, is now overseeing secondary legislation as well. It is looking to ensure that it is properly

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17 Constitution Committee, *Written Evidence from the Department for Exiting the European Union* (EUW0036)

18 Procedure Committee, *Scrutiny of delegated legislation under the European Union (Withdrawal) Bill – Oral Evidence*, 18 October 2017, Q34; see also Andrea Leadsom's response to Q40

19 Constitution Committee, *Written Evidence from the Department for Exiting the European Union* (EUW0036)

> timetabled, the quality is improved, the explanatory memoranda are better, there is more of a rational flow of business for Parliament to have to deal with, to try to improve the service that Parliament gets for secondary legislation. I think that is going to upgrade what we can do and that is something that we will be listening very carefully to feedback on and very keen to make progress on.[20]

The two ministers also argued that the current procedures for scrutinising secondary legislation were "tried and tested". Andrea Leadsom added that the Government believed that "a great number of the changes needed to make the statute book ready are tweaks" and that the procedures were "entirely appropriate to use for much of our Brexit legislation". In evidence to the Constitution Committee, the Government said that:

> A significant quantity of the changes to make retained law operate effectively will be of a type and level of detail which are more suitable for secondary legislation than primary. Many of these will be to make mechanistic, textual, or technical changes.[21]

However, Andrea Leadsom also told the Committee that "the Government are indeed looking very carefully at whether there are extra levels of scrutiny that are necessary for the *European Union (Withdrawal) Bill*".[22] In commenting on the "existing well established processes for scrutiny", Steve Baker reiterated the need for timely scrutiny:

> I would just reinforce that, as you know, the Bill does use existing well established processes for scrutiny. There is no question of any of these statutory instruments going through in private, which has been suggested by some groups and there is no question of that. We have talked about the triggers. The heart of this is the balance between scrutiny, which the House finds appropriate, and this imperative to deliver with timeliness, with flexibility and in particular bearing in mind with some of the powers the fact that we currently do not know what we will need to implement, particularly in relation to the withdrawal agreement because it remains to be negotiated.[23]

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20 Procedure Committee, *Scrutiny of delegated legislation under the European Union (Withdrawal) Bill – Oral Evidence*, 18 October 2017, Q34

21 Constitution Committee, *Written Evidence from the Department for Exiting the European Union* (EUW0036)

22 Procedure Committee, *Scrutiny of delegated legislation under the European Union (Withdrawal) Bill – Oral Evidence*, 18 October 2017, Qq41-42

23 *Ibid*, Q43

5. Expressions of concern about scrutiny proposed in the Bill

Concerns have been expressed about the provisions that mean wide law-making powers are given to ministers whilst Parliament is given no say over how the subsequent regulations are scrutinised. Neither would Members have any mechanism to amend the regulations brought forward under the EUW Bill. Members, parliamentary committees and outside bodies have all identified criticisms along these lines.

The Procedure Committee observed that:

> In our view, the Government's proposals for scrutiny as provided for in the European Union (Withdrawal) Bill establish a system over which elected Members of Parliament have insufficient control over the means by which adequate scrutiny and consequential changes are to be achieved. We believe that it would be preferable to have a system for exercising control which could not give rise to any suspicion that the motives of the Government are to avoid scrutiny rather than ensure the means whereby from exit day the statute book contains a workable framework of law seamlessly transposed from existing EU law.[24]

It also noted that witnesses had expressed concern about the difficulty in amending secondary legislation.[25]

In his evidence to the Exiting the European Union Committee's inquiry into the EUW Bill, Sir Stephen Laws, a former First Parliamentary Counsel, provided the following summary of the concerns:

> The powers in the Bill to modify the law to implement UK withdrawal from the EU have become controversial, although there is, I believe, a broad consensus that the Art. 50 timescale and the volume of work involved in securing continuity at exit will necessitate some wide powers to be taken to adapt the law in a very short period across a very wide legal landscape. The controversy appears to be about how wide the powers should be, and about how the exercise of the powers is best to be subjected to an appropriate level of Parliamentary scrutiny.[26]

Yet there is widespread acceptance that the Government will have to use delegated legislation in order to leave the EU. For example, the Hansard Society said:

> … Brexit imposes a requirements for speed and flexibility. The combination of a tight deadline (29 March 2019) and protracted uncertainty over the content, timing and sequencing of negotiations and any resulting agreements makes it unavoidable that considerable delegated legislation will be needed.[27]

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24 Procedure Committee, *Scrutiny of delegated legislation under the European Union (Withdrawal) Bill: interim report*, 6 November 2017, HC 386 2017-19, para 18

25 *Ibid*, para 26

26 Exiting the European Union Committee, *The European Union (Withdrawal) Bill – Written Evidence from Sir Stephen Laws KCB, QC*, para 45

27 Hansard Society, Taking Back Control for Brexit and Beyond: Delegated Legislation, Parliamentary Scrutiny and the European Union (Withdrawal) Bill, September 2017, p10

6. Proposals for creating a new scrutiny process

6.1 Call for enhanced scrutiny - House of Lords Constitution Committee

Before the *European Union (Withdrawal) Bill 2017-19* was published, concerns were expressed that it might contain exceptionally broad delegated powers. In a March 2017 report, the House of Lords Constitution Committee considered the issues "liable to be raised by the 'Great Repeal Bill' in their wider constitutional context". It recommended that a strengthened scrutiny procedure should be used to consider SIs that made changes of "significant policy interest or principle"; and that the procedure should provide an opportunity for such SIs to be revised.[28]

Following the publication of the Bill, the Committee issued an interim report, published on 7 September 2017. It expressed concern that "no consideration has been given to the need for enhanced parliamentary procedures" to scrutinise SIs made under the legislation.[29]

A number of proposals to change the way EUW Bill SIs are scrutinised have been proposed.

6.2 Call for a sifting committee with scrutiny reserve - Procedure Committee

Before the 2017 general election, the Procedure Committee launched an inquiry entitled "Delegated powers in the 'Great Repeal Bill'". Initial terms of reference were published on 2 February 2017.

The Committee did not complete its inquiry before the election. However, in its report, *Matters for the Procedure Committee in the 2017 Parliament*, it recommended that its successor committee "examine, as a matter of urgency, the implications for the House's procedures of the Government's proposals for a bill to repeal and replace the European Communities Act 1972".[30]

On 15 September 2017, the Committee announced an inquiry entitled "Exiting the European Union: scrutiny of delegated legislation". It published an interim report on 6 November 2017.[31]

Its report included the outline of a new system to scrutinise secondary legislation made under powers proposed in the EUW Bill.

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28 Constitution Committee, *The 'Great Repeal Bill' and delegated powers*, 7 March 2017, HL Paper 123 2016-17, para 105

29 Constitution Committee, *European Union (Withdrawal) Bill: interim report*, 7 September 2017, HL Paper 19 2017-19, para 54

30 Procedure Committee, *Matters for the Procedure Committee in the 2017 Parliament*, 2 May 2017, HC 1091 2016-17, para 11

31 Procedure Committee, *Scrutiny of delegated legislation under the European Union (Withdrawal) Bill: interim report*, 6 November 2017, HC 386 2017-19

The Committee argued that the Government proposals for parliamentary scrutiny, "resting as they do entirely on existing procedures, do not go far enough".[32]

The Procedure Committee recommended the establishment of a new House of Commons committee "to examine the legislative changes the Government proposes and identify those of political and/or legal importance".[33]

The new committee would adopt the working methods of the European Scrutiny Committee: it would review (sift) each SI laid under the EUW Bill and recommend further consideration (debate in a DLC or on the floor of the House) for any SI that was either politically or legally sensitive. The Procedure Committee said that the scrutiny committee should have a "defined period" to scrutinise each SI.[34] The Procedure Committee noted that the ESC's work "is effectively underpinned by the scrutiny reserve … which injuncts Ministers against further action on a legislative proposal until either the Committee has cleared it from scrutiny or the further consideration recommended in the House has taken place".[35]

Some background to the European Scrutiny Reserve and its main provision are set out in Box 3. The full resolution is set out in Appendix 2 of this Briefing Paper.

Box 3: Resolution on European Scrutiny Reserve (November 1998)

The European Scrutiny Reserve was set out in a resolution of the House in November 1998. The resolution was brought forward by the Government, following a report from the Modernisation Committee and a White Paper, both on the Scrutiny of European Business.[36]

The key aspect of the European Scrutiny Reserve was that, with some minor exceptions, ministers were prevented from agreeing proposals for European Community legislation, common position or joint action until the House completed its scrutiny. The resolution began:

> That,
> (1) No Minister of the Crown should give agreement in the Council or in the European Council to any proposal for European Community legislation or for a common position or joint action under Title V or a joint position, joint action or convention under Title VI of the Treaty on European Union--
> (a) which is still subject to scrutiny (that is, on which the European Scrutiny Committee has not completed its scrutiny) or
> (b) which is awaiting consideration by the House (that is, which has been recommended by the European Scrutiny Committee for consideration pursuant to Standing Order No. 119 (European Standing Committees) but in respect of which the House has not come to a Resolution).[37]

The Procedure Committee set out the extent of the proposed sifting committee's role and its power to recommend further consideration of an instrument:

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32 *Ibid*, p3
33 *Ibid*, para 22 and p3
34 *Ibid*, para 24
35 *Ibid*, para 23
36 Modernisation Committee, *The Scrutiny of European Business*, 17 June 1998, HC 791 1997-98; and *Scrutiny of European Business: Government Proposals*, Cm 4095, 12 November 1998
37 HC Deb 17 November 1998 cc778-808

> The committee would be required to examine every instrument laid before the House under the powers in the Bill, whether affirmative, made affirmative or negative. It would be charged with determining which such instruments were of political and/or legal importance: whether, for instance, a change in legislation proposed was of a substantive character amounting to a policy change, or whether a change proposed was outside the powers authorised by Parliament. The committee would have the power to recommend that any instrument identified as important should be further considered by the House: usually in a general committee, the form and operation of which the House would determine, but in exceptional circumstances on the floor of the House. It would be under an instruction to complete its scrutiny of an instrument within a defined period.[38]

The new scrutiny committee proposed by the Procedure Committee would have no formal power to amend an SI nor would it have the power to require the Government to do so. However, the Procedure Committee proposed that alongside the sifting committee a scrutiny reserve resolution would "constrain Ministers from bringing any legislation into force unless and until it had first been cleared from scrutiny by the committee or had been considered in the manner recommended by the committee".[39]

The Procedure Committee did not recommend any form of enhanced forms of strengthened scrutiny (eg super-affirmative procedures) or suggest that the proposed committee should have the power to upgrade the level of scrutiny proposed by the Government. But it argued that affirmative and negative SIs should not be brought into force until the scrutiny process was finished. For affirmative instruments this would be relatively straightforward as they need parliamentary approval before they can be made. For negative SIs, the Committee felt this could be achieved because they did not need to come into force until exit day. For made affirmative instruments, it considered that "by their very nature they would be candidates for immediate consideration in a general committee prior to a decision in the House as to whether they should be approved".[40]

The Procedure Committee also suggested that if a sifting committee scrutinised them that not every affirmative SI would need to be debated.[41] The Procedure Committee said that:

> … Affirmative instruments found to raise no issues of political or legal importance might be sent for approval forthwith by the House without the requirement for debate in committee.[42]

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38 Procedure Committee, *Scrutiny of delegated legislation under the European Union (Withdrawal) Bill: interim report*, 6 November 2017, HC 386 2017-19, para 24

39 *Ibid*, para 24

40 *Ibid*, para 25

41 Currently, when a motion to approve an SI is tabled, the SI is automatically referred to a delegated legislation committee for debate

42 Procedure Committee, *Scrutiny of delegated legislation under the European Union (Withdrawal) Bill: interim report*, 6 November 2017, HC 386 2017-19, para 25

The Procedure Committee said that the sifting it proposed "ought to be able to receive and consider representations made by interested organisations and individuals outside Parliament".[43]

Although SIs cannot be amended, the Procedure Committee considered that "in common with legislative provision in other Acts which employ a form of super-affirmative procedure, the committee to be established should consider issues raised by the drafting of each instrument. Where appropriate, the committee should recommend that an instrument either be withdrawn and re-laid in a more acceptable form or (if a negative) be revoked and re-made".[44]

The process would also require the "readiness of Departments to respond to any issues raised by the committee".[45]

The Procedure Committee called on the Government to produce an outline schedule for the laying of instruments before the House and to regularly update it. This would assist the proposed House of Commons sifting committee in making sure its scrutiny was timely as well as effective.

Procedure Committee amendments to the Bill

On 7 December 2017, the Procedure Committee issued a press release announcing that its Chair, Charles Walker, had tabled amendments to the Bill and that he would propose Standing Order to create a European Statutory Instruments Committee. The role of the sifting committee differs from that proposed in the Procedure Committee's report. The press release outlined how it would operate and the effect of its amendments to the Bill:

> The Chair of the Procedure Committee, Mr Charles Walker OBE MP, has today, on behalf of the Committee, tabled amendments to the European Union (Withdrawal) Bill which will provide a statutory process for greater Parliamentary scrutiny of the delegated legislation to be made under the Bill.
>
> Separately, Mr Walker is writing to the Leader of the House of Commons, Rt Hon Andrea Leadsom MP, with draft standing orders for a new European Statutory Instruments Committee which will have the job of sifting instruments proposed under the Bill.
>
> The Government's proposals in the Bill provide that certain categories of instrument will always require approval by both Houses before coming into law (the affirmative procedure). But it has been identified that a very large number of technical instruments would not, as the legislation stands, require parliamentary votes before being signed into law by Ministers. These instruments would pass under the negative procedure which relies on the House acting to annul the legislation.
>
> The Procedure Committee's amendments provide that every statutory instrument to be made via the negative procedure under the main law-making powers in the Bill will be laid before the

43 *Ibid*, para 26
44 *Ibid*, para 27
45 *Ibid*, para 34

> House of Commons in draft by Ministers and sent to a Commons committee for consideration.
>
> The new committee, a so-called 'sifting committee', will have the job of looking at each of these instruments and recommending which ones require the affirmative procedure instead (i.e. requiring debate and a vote in the House before they became law). The committee would have ten sitting days to make this recommendation.
>
> Ministers could in theory ignore the recommendation of the new committee, but they could be summoned to the committee to explain why.
>
> The Procedure Committee's amendments are tabled following the publication of its report last month which highlighted concerns about the Government's decision to propose no change to the present arrangements for scrutiny of delegated legislation in the Commons.[46]

6.3 Calls for enhanced scrutiny determined by Parliament - House of Lords Delegated Powers and Regulatory Reform Committee

The House of Lords DPRCC reported after the Bill's second reading in the House of Commons.[47] It concluded that clauses 7 and 8 (on correcting deficiencies) involve "an inappropriately wide delegation of power". In both cases, it recommended that "the 'appropriateness' test in clause 7 [and 8] should be circumscribed in favour of a test based on necessity".[48] In relation to clause 9 (on implementing the withdrawal agreement), the DPRCC concluded that it "involves an inappropriate delegation of power in allowing statutory instruments to amend or repeal the European Union (Withdrawal) Act". It recommended that changes to the Act should be made by Parliament through primary legislation, rather than by ministers through statutory instrument, "particularly where significant and contentious policy issues are at stake".[49]

The DPRCC also commented on the parliamentary scrutiny procedures for regulations.

It expressed the following concerns about the extent of the powers and the Government's proposals for parliamentary scrutiny:

- there was "no obvious rationale for the narrow range of matters which must be contained in affirmative regulations under clauses 7 to 9".

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46 Procedure Committee news, *Chair tables amendments to EU (Withdrawal) Bill on scrutiny powers for Commons*, 7 December 2017

47 The DPRRC's remit, in relation to delegated powers, is "to report 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" [DPRRC, *Role of the Committee*]

48 Delegated Powers and Regulatory Reform Committee, *European Union (Withdrawal) Bill*, 28 September 2017, HL Paper 22 2017-19, paras 31 and 40

49 *Ibid*, paras 48-49

- the affirmative procedure is required to establish a new body to exercise a function of an EU body but the negative procedure can be used to transfer such functions to an existing body;
- Henry VIII powers could be subject to the negative procedure, unless regulations must be affirmative – the Committee said that "This is a significant departure from long-established practice whereby the Government have accepted the Committee's position that powers to amend primary legislation should be made in affirmative instruments save in exceptional circumstances for which a full justification must be provided".[50]

The Committee also considered that in situations where there was an opportunity to decide whether the negative or the affirmative procedure should apply, it should be Parliament, rather than the Government, that made the choice.[51]

The Committee made recommendations to address these concerns. It recommended that:

> The affirmative procedure should apply to regulations which transfer EU functions to a UK body under clauses 7 to 9, irrespective of whether or not the body is newly established.
>
> In the absence of a convincing explanation to the contrary, the affirmative procedure should apply to regulations under clauses 7 to 9 and 17 that amend or repeal primary legislation.[52]

It recommended a sifting system so that Parliament rather than ministers determined the level of scrutiny each SI received. It proposed that all SIs be laid in draft; and that ministers should propose whether they were subject to the affirmative or the negative procedure, with a justification if they proposed the negative procedure. Where the affirmative procedure was proposed it would apply. If a draft negative order was laid, a committee (of each House or a joint committee) would have ten days to consider whether to accept the minister's proposal or to recommend the affirmative procedure. The Committee's recommendation would apply unless within five days the relevant House had rejected the recommendation. For draft negative instruments, the minister would then be able to make the SI but it would still be subject to annulment.[53]

6.4 Calls for sifting and enhanced scrutiny - Hansard Society

The Hansard Society has been calling for reforms to the way in which Parliament considers secondary legislation for a long time. In the wake of the publication of the EUW Bill it set out proposals for a new 'sift and scrutiny' system for all SIs in the House of Commons; and it recommended a strengthened (or enhanced) scrutiny procedure for regulations made under the EUW Bill.

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50 *Ibid*, paras 99-103
51 *Ibid*, para 104
52 *Ibid*, paras 105-106
53 *Ibid*, para 107

The Hansard Society noted that it had previously called for the 11 existing strengthened scrutiny procedures to be revised and consolidated. It has also "expressly opposed the creation of a twelfth version". Despite this, it has argued for a new process for regulations under the EUW Bill:

> … we have concluded that their drawbacks, particularly the absence of speed and flexibility, render the existing eleven procedures unsuitable for use in the EU (Withdrawal) Bill given the unique pressures of time, volume and capacity – inherent in the Brexit process.[54]

Under the Hansard Society's proposed 'sift and scrutiny' system for all SIs, the process of praying against negative SIs and the automatic 90-minute delegated legislation committee debates on affirmative SIs would be abolished. A new Delegated Legislation Scrutiny Committee (DLSC) would be established to review all SIs. Sub-committees would undertake detailed scrutiny; identify concerns; and suggest changes. Affirmative SIs could not be approved whilst the DLSC or a sub-committee was considering it. The Hansard Society said that "This will in effect provide a 'conditional amendment' power to MPs on the sub-committee, for they will have in reserve the option of recommending annulment or disapproval to the House if the SI is not suitably amended".[55]

A final recommendation on whether a negative SI should be annulled or an affirmative SI should be disapproved would be made by the DLSC and would trigger a debate and vote on the floor of the House of Commons.

The Hansard Society's proposed strengthened procedure for the EUW Bill is based on its proposals for a new sift and scrutiny system for all SIs. It would include a role for the new DLSC. In summary:

1. Government lays a draft Order
2. Minister recommends whether the draft Order should be subject to the affirmative or negative procedure
3. JCSI, DLSC,SLSC scrutinise the draft Order
4. In the first 20 days, SLSC and DLSC have to the power to upgrade from negative to affirmative
5. If the two Houses disagree, it is upgraded

Draft negative Orders

6. Unless upgraded, negative Order becomes law on stated date unless either House agrees that it should be annulled
7. MPs would lobby the DLSC to reconsider its decision not to upgrade the draft Order to enable a date (rather than praying against the Order)

Draft affirmative Orders

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54 Hansard Society, *Taking Back Control for Brexit and Beyond: Delegated Legislation, Parliamentary Scrutiny and the European Union (Withdrawal) Bill*, September 2017, p55

55 *Ibid*, p47

8. The SLSC and the DLSC will report, recommending whether the draft Order should be approved or disapproved. The minister will be required to take account of representations and recommendations from the Committees. "This has the effect of granting both Houses a 'conditional amendment' power".

9. After 40 days, the minister can table a motion that the draft affirmative Order be approved. It will have to be approved by both Houses. A debate will only be necessary if a committee did not unanimously recommend approval.[56]

The Hansard Society argued that by clarifying and agreeing the concept of 'conditional amendment' Members would have an opportunity to identify problems with and suggest remedies to SIs they were concerned about:

> Members would be given the power to delay an SI about which they had concerns, combined with the ability to indicate what steps the government might take that would render it acceptable in the future. This would not preclude the government from coming back with the same instrument if it so wished.[57]
>
> in the House of Lords.[58]

6.5 Other proposals

Call for sifting - Institute for Government

In evidence to the Procedure Committee, in April 2017, the Institute for Government argued that the House of Commons "needs to adapt its procedures to make sure it focuses its scrutiny efforts where they matter most". It suggested a sifting committee distinguish between technical and substantive measures. To facilitate this, it said that the Government would have to present sufficient information with its proposals.[59]

Constitution Society

In a Constitution Society report, Simon Patrick, formerly a House of Commons clerk, reviewed the current procedures for scrutinising delegated legislation and examined how a sifting committee could operate.[60]

6.6 Costs of scrutiny

In his evidence to the Procedure Committee, the Clerk of the House of Commons noted that if a sifting committee was established, "significant additional costs would be incurred":

> If the Committee were to recommend, and the House agreed to, the establishment of a scrutiny committee, significant additional costs would be incurred. If, for example, it was provided with

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56 *Ibid*, pp57-59
57 *Ibid*, p63
58 Hansard Society, Taking Back Control for Brexit and Beyond: Delegated Legislation, Parliamentary Scrutiny and the European Union (Withdrawal) Bill, September 2017, p7
59 Procedure Committee, *Written evidence submitted by the Institute for Government*, [GRB 24], April 2017
60 Simon Patrick, *Scrutiny of Delegated Legislation in Relation to the UK's Withdrawal from the European Union*, The Constitution Society, 2017

> professional, policy and legal support similar to that available to ESC [European Scrutiny Committee] (which seems a reasonable comparison), the cost would be in the order of £750,000 a year. Costs could be shared with the Lords if the committee was joint.[61]

[61] Procedure Committee, *Written evidence submitted by the Clerk of the House of Commons* [EUX 10], October 2017, para 54

7. Amendments to the Bill

In its interim report on the scrutiny of delegated legislation under the Bill, the Procedure Committee noted that several amendments had already been tabled for Committee stage on the Bill, on how secondary legislation proposed under the Bill should be scrutinised:

> Rt Hon Keir Starmer QC MP, shadow Secretary of State for Exiting the European Union, and Valerie Vaz MP, shadow Leader of the House, gave evidence to us on the amendments proposed by the Opposition, and Rt Hon Dominic Grieve QC MP discussed with us the purpose of his amendments, which had much in common with a scrutiny system proposed by the Hansard Society.[62]

On 7 December 2017, the Procedure Committee issued a press release announcing that its Chair, Charles Walker, had tabled amendments to the Bill and that he would propose Standing Order to create a European Statutory Instruments Committee (see section 6.2).

[62] Procedure Committee, *Scrutiny of delegated legislation under the European Union (Withdrawal) Bill: interim report*, 6 November 2017, HC 386 2017-19, para 17

8. Expected volume of delegated legislation under Brexit legislation

The volume of statutory instruments is likely to be unprecedented for instruments made under a single Act. It is estimated that over 17,000 EU legislative measures currently in force in the UK—either regulations with direct effect or directives transposed into UK law—may need to be altered in order to be converted to retained EU law.[63] The Government, in the White Paper for the Repeal Bill, estimated that "the necessary corrections to the law" would require between 800 and 1,000 SIs. However, this figure was uncertain and dependent on the outcome of negotiations:

> We currently estimate 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. Ultimately though, it is not possible to be definitive at the outset about the volume of legislation that will be needed, as it will be consequent on the outcome of negotiations with the EU and other factors.[64]

In recent parliamentary sessions, 800 is around the minimum number of SIs that have been laid before Parliament (see chart below). So 800-1,000 Brexit SIs would represent around a session's additional workload of statutory instruments to be dealt with before exit day.

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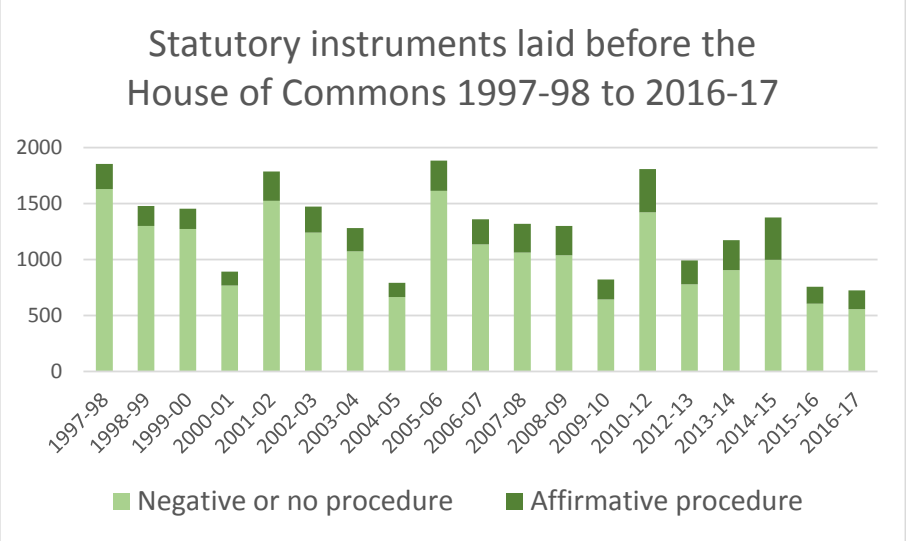
63 The total number of EU directives, regulations, decisions and international agreements (or similar) in force in 20 subject categories **was 20,506. The** data was compiled from the Eur-Lex Directory of EU legislation in force (accessed on 5 May 2017). It includes 2,104 International agreements/ treaties/arrangements, protocols, conventions, Exchange of Letters, MoUs, CFSP and JHA common position and joint positions, but excludes delegated and implementing laws (around 3,200), amending laws and other non-binding instruments. So without the international agreements, and taking into account some duplication across the 20 categories, the figure is around 17,500 - 18,000, based on data on Eur-Lex

64 Department for Exiting the European Union, *Legislating for the United Kingdom's withdrawal from the European Union*, Cm 9446, para 3.19.



There has been no indication of the nature of these SIs. In addition to the powers in the EUW Bill, other legislation that has been introduced to deal with the consequences of leaving the European Union includes powers to make regulations. For example, the *Trade Bill 2017-19* includes powers to implement non-tariff trade agreements with partner countries that mirror agreements already made with the EU before exit day.

In evidence to the Procedure Committee, in October 2017, ministers indicated that they were still expecting between 800 and 1,000 statutory instruments. Steve Baker also commented that although the estimate was being "refined all the time as we work with Departments" he was "not expecting any dramatic change in those numbers".[65]

In evidence to the Constitution Committee, the Government confirmed that a number of powers would be used in making these SIs:

> Despite a precise number being unavailable, the Government estimates that 800-1000 statutory instruments will be required, some under the powers in the Bill, others under existing powers or powers being taken in other EU exit related primary legislation.[66]

The Government has not, so far, proposed any form of enhanced scrutiny for regulations made under other legislation to deal with the consequences of leaving the EU.

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65 Procedure Committee, *Exiting the European Union: scrutiny of delegated legislation – Oral Evidence*, 18 October2017, Q36 and Q64

66 Constitution Committee, *Written Evidence from the Department for Exiting the European Union* (EUW0036)

Appendix: EUW Bill – overview of powers

This overview of the powers in the Bill is taken from House of Commons Library Briefing Paper, *European Union (Withdrawal) Bill*, CBP 8079, 1 September 2017

Schedule 7, Part 1 deals with regulations which are to be made under the powers in clause 7 of the Bill. This clause gives Ministers the power to make regulations to deal with any deficiencies in primary or secondary legislation arising from the UK's withdrawal from the EU (see section 6 above).

This part details criteria that determine whether regulations are to be subject to the **affirmative procedure**, which requires a vote in Parliament before the change to the law may enter into force, or the **negative procedure**, under which regulations do not require parliamentary approval before entering into force.

Schedule 7, part 2 sets out the procedures for Parliamentary control of other powers to make regulations under the Bill:

- Regulations to enable challenges to the prior validity of retained EU law (Schedule 1, paragraph 1(2)(b)) are subject to the **affirmative procedure.** In urgent cases a **made affirmative** may be used.
- Regulations made under the following powers rely on the same criteria as those made under section 7 powers to determine what procedure is to be used:
  - Regulations under **clause 8** powers (implementing international obligations).
  - Regulations under **clause 9** powers (implementing the withdrawal agreement).
- Regulations under **paragraph 1 of Schedule 4** (power to provide for fees and charges for new functions) which impose a fee or charge in respect of a function exercisable by a public authority, or confer a power to make subordinate legislation any provision of that paragraph, are subject to the **affirmative procedure**. All other such regulations under Schedule 4 are subject to the **negative procedure**, unless a Minister determines otherwise. In urgent cases, a **made affirmative** may be used.
- Regulations under **paragraph 4 of Schedule 5** (power to make provision about judicial notice and admissibility) are subject to the **affirmative procedure**.
- Regulations under **clause 17(5)** (power to make transitional, transitory or saving provision) are subject to **no procedure**. However, **paragraph 10 of Schedule 7** allows a Minister, if it is appropriate, to make such regulations subject to the negative or affirmative procedures.
- Regulations under **clause 17(1)** (power to make consequential provision) are subject to the **negative procedure**.

The following powers to make regulations exist in the Bill, but are subject to no Parliamentary procedure:

- Regulations under **clause 19(2)** (power to make commencement regulations).

Appendix 2: European Scrutiny Reserve

The European scrutiny reserve was set out in a resolution of the House in November 1998.

> That,
> (1) No Minister of the Crown should give agreement in the Council or in the European Council to any proposal for European Community legislation or for a common position or joint action under Title V or a joint position, joint action or convention under Title VI of the Treaty on European Union--
> (a) which is still subject to scrutiny (that is, on which the European Scrutiny Committee has not completed its scrutiny) or
> (b) which is awaiting consideration by the House (that is, which has been recommended by the European Scrutiny Committee for consideration pursuant to Standing Order No. 119 (European Standing Committees) but in respect of which the House has not come to a Resolution).
>
> (2) In this Resolution, any reference to agreement to a proposal includes--
> (a) agreement to a programme, plan or recommendation for European Community legislation;
> (b) political agreement;
> (c) in the case of a proposal on which the Council acts in accordance with the procedure referred to in Article 189b of the Treaty of Rome (co-decision), agreement to a common position, to a joint text, and to confirmation of the common position (with or without amendments proposed by the European Parliament); and
> (d) in the case of a proposal on which the Council acts in accordance with the procedure referred to in Article 189c of the Treaty of Rome (co-operation), agreement to a common position.
>
> (3) The Minister concerned may, however, give agreement--
> (a) to a proposal which is still subject to scrutiny if he considers that it is confidential, routine or trivial or is substantially the same as a proposal on which scrutiny has been completed;
> (b) to a proposal which is awaiting consideration by the House if the European Scrutiny Committee has indicated that agreement need not be withheld pending consideration.
>
> (4) The Minister concerned may also give agreement to a proposal which is still subject to scrutiny or awaiting consideration by the House if he decides that for special reasons agreement should be given; but he should explain his reasons--
> (a) in every such case, to the European Scrutiny Committee at the first opportunity after reaching his decision; and
> (b) in the case of a proposal awaiting consideration by the House, to the House at the first opportunity after giving agreement.
>
> (5) In relation to any proposal which requires adoption by unanimity, abstention shall, for the purposes of paragraph (4), be treated as giving agreement.[67]

[67] HC Deb 17 November 1998 cc778-808

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