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BRIEFING PAPER

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The European Union (Withdrawal) Act 2018: scrutiny of secondary legislation (Schedule 7)

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Summary

In legislating for Brexit, there has been widespread acceptance that regulations to convert non-domestic EU law into UK law will need to be implemented speedily and flexibly. However, concern was expressed that Parliament had little oversight of, and no opportunity to revise, such regulations.

The *European Union (Withdrawal) Act 2018* it includes powers to make regulations to convert EU law onto the post-exit day statute book. Schedule 7 specified that regulations that do certain things (such create a criminal offence) would be subject to the draft affirmative procedure. Other regulations would be subject to the negative resolution procedure, although ministers could choose to lay such regulations in draft (such drafts would be subject to the affirmative resolution procedure).

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

Reports from committees in both the House of Commons and the House of Lords recommended strengthened scrutiny procedures (see section 5 of the Library briefing paper *The European Union (Withdrawal) Bill: scrutiny of secondary legislation: Schedule 7*, CBP-8172, 7 December 2017). Amendments, to the *European Union (Withdrawal) Bill 2017-19* (EUW Bill), were agreed in the House of Commons to introduce a sifting mechanism that operated in the Commons. Changes were made by the House of Lords, including extending sifting to both Houses. (The Library briefing paper, *European Union (Withdrawal) Bill 2017-19: Commons consideration of Lords amendments*, CBP-8328, 5 June 2018, provides an overview of changes made to the original bill in both Houses.)

A sifting process for the Commons

At Committee stage in the House of Commons, the House agreed, without a division, to amendments moved by Charles Walker, Chair of the Procedure Committee, to create a procedure in the House of Commons for sifting SIs that the Government proposed should be subject to the negative resolution procedure.

Under this mechanism, a proposal for a negative SI would be laid before Parliament. The relevant minister would provide a written statement specifying that the proposed negative instrument should be subject to the negative resolution procedure and a memorandum setting out that statement and giving reasons for the recommendation.

Amendments to the process were made by the Lords, and rejected by the Commons, before the Lords proposed something broadly similar to Commons provisions, which also provided for sifting in the Lords, which the Commons accepted.

Any SIs subject to the affirmative procedure would continue to proceed in the normal way.

In the House of Commons, a new select committee, the European Statutory Instrument Committee, would be appointed to sift the proposals for negative SIs. SIs made under sections 8, 9 and 23(1) of the Act would be subject to the sifting process, if the Government proposed that they were subject to the negative procedure. The ESIC would consider each proposed negative SI and the accompanying memorandum. Then it would recommend whether the proposed SI should be subject to the affirmative or negative resolution procedure. The Act specifies that the ESIC would have 10 sitting days from the day after the proposal was laid to make any recommendation on the procedure the SI

should face. The Act does not require the Minister to accept the Committee's recommendation.

Andrea Leadsom, the Leader of the House of Commons, tabled a motion to establish the Committee, after the House amended the Bill. She later told the House that the proposed Standing Order would be considered after the EUW Bill had received Royal Assent.

After the ESIC had reported on the SI or after the 10-day period had passed, the Minister would then be able to lay a made negative SI that would be subject to annulment or a draft affirmative order that would require parliamentary approval before it could be made.

The sifting process will also occur in the House of Lords, where the Secondary Legislation Scrutiny Committee will perform the role.

Establishing the ESIC

At Business Questions on 5 July 2018, Andrea Leadsom, the Leader of the House of Commons, announced that there would be a debate on a motion to approve Standing Orders relating to the European Statutory Instruments Committee on 10 July 2018.

On 9 July 2018, the Procedure Committee published a report, *Scrutiny of delegated legislation under the European Union (Withdrawal) Act 2018*. The committee described the powers in the Act, the choices Ministers have in making certain SIs, the sifting process and recommended some changes to the Standing Orders, proposed by Andrea Leadsom, to establish ESIC.

How many SIs will be laid?

In March 2017, the Government estimated that "the necessary corrections to the law will require between 800 and 1,000 statutory instruments".

On 2 May 2018, Steve Baker restated this figure but added that "at the moment new information shows that it will be much closer to 800 than 1,000". He also told the Procedure Committee that the Government expected that 20%-30% of the SIs would be subject to the affirmative procedure.

However, in addition to SIs under the EUW Bill, Andrea Leadsom noted that other Brexit bills "could generate in the low hundreds of statutory instruments". These SIs would not be subject to the sifting process, which only applies to EUW Bill SIs.

> The Library briefing paper *The European Union (Withdrawal) Bill: scrutiny of secondary legislation: Schedule 7*, CBP-8172, 7 December 2017 was published before proposals for sifting SIs were considered at committee stage in the House of Commons. It has not been updated since then.

1. Introduction

Section 2 of this briefing paper notes the Procedure Committee's report on the mechanism for scrutinising delegated legislation under the *European Union (Withdrawal) Act 2018* (EUW Act).

Sections 3-5 review the amendments made to the *European Union (Withdrawal) Bill 2017-19* (the EUW Bill) that concern how the two Houses sift statutory instruments made under the EUW Act.

When the Bill was first introduced (Bill 5 of 2017-19), Schedule 7 specified that regulations that do certain things (such as establish a new public body[1] 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 could choose to lay such regulations in draft (such drafts would be subject to the affirmative resolution procedure).

The Government proposed that parliamentary scrutiny of these SIs should be in line with current procedures. The Bill, as introduced, did 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 was 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.

As is usual, 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, given the extraordinary nature of the powers in the Bill, concern was expressed that Parliament had little oversight of, and no opportunity to revise, such regulations.

Reports from committees in both the House of Commons and the House of Lords recommended strengthened scrutiny procedures (see section 5 of the Library briefing paper *The European Union (Withdrawal)*

[1] A series of Government amendments at report stage in the House of Lords removed the ability to create public authorities from the clause 7 power (HL Deb 25 April 2018 c1584 ff)

Bill: scrutiny of secondary legislation: Schedule 7, CBP08172, 7 December 2017). Amendments were agreed in the House of Commons to introduce a sifting mechanism that operated in the Commons. Changes were made by the House of Lords, including extending sifting to both Houses.

The House of Commons disagreed to the Lords Amendments on 12 June 2018. The House of Lords did not insist on its amendments but suggested amendments in lieu, on 18 June. These were agreed to by the House of Commons on 20 June.

2. Procedure Committee recommendations

On 9 July 2018, the Procedure Committee's report, *Scrutiny of delegated legislation under the European Union (Withdrawal) Act 2018*, was published.[2]

The Committee reviewed the changes made to the EUW Bill since the publication of its interim report in November 2017, when it proposed a way of scrutinising SIs subject to the negative resolution procedure under the Bill.[3]

It then described the sifting procedure under the Act. In its summary, it said:

> The Committee has examined the mechanism the Act provides for Parliamentary scrutiny of delegated legislation proposed under the Act. In a number of cases, where the Government proposes changes to the existing law by secondary legislation, the changes will have to be approved by both Houses following debate. These include regulations to set fees and charges for functions which UK public authorities will take over from EU institutions, and regulations to repeal provisions in devolution acts relating to devolution restrictions.
>
> There are three main categories of instrument where the Government has the choice to introduce regulations under the negative procedure—where law is made and continues in force unless either House objects—or the affirmative procedure—where both Houses have to agree to the legislation before it can become law. These are:
>
> - regulations to amend the law to correct deficiencies in EU law brought over into UK law, or exiting UK law implementing EU law;
> - regulations to change the law to implement any withdrawal agreement, and
> - regulations to make any changes to existing legislation which Ministers consider necessary in consequence of the implementation of the European Union (Withdrawal) Act.
>
> Where the Government proposes to make regulations in these categories under the negative procedure, it must lay proposals for the regulations before Parliament together with an explanation as to why they should be subject to the negative procedure. Committees in both Houses have ten sitting days to examine the proposals and decide whether they are content for the negative procedure to be used, or whether they recommend using the affirmative procedure. After the ten sitting days have elapsed the Government may lay the regulations in their final form before

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2 Procedure Committee, *Scrutiny of delegated legislation under the European Union (Withdrawal) Act 2018*, 9 July 2018, HC 1395 2017-19

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

> Parliament, specifying whether they should be subject to the affirmative or the negative procedure.[4]

It set out how it thought the sifting process should operate, commenting on the criteria that the scrutiny committee might use in considering whether to recommend that the affirmative rather than the negative procedure should be used. It proposed some changes to the motion to establish the ESIC, tabled by the Leader of the House in December 2017.

It also considered the statutory requirements that the Government has to fulfil if it disagrees with a sifting committee recommendation that a SI should be subject to the affirmative procedure. In its summary, the Procedure Committee said:

> In each instance where the Government disagrees with a recommendation of the new committee, Ministers have given a commitment that the reasons of the decision will be explained in a written Ministerial statement. The Procedure Committee recommends that this commitment be honoured in full, and that on every occasion the Minister should be prepared to appear before the new committee to justify the decision unless the committee indicates this will not be necessary. The new committee will be able to hold an instrument under scrutiny after it has been laid before Parliament in its final form.[5]

The Government has started to publish SIs made under the EUW Act. Draft affirmative SIs have been laid before Parliament and the Government has published final drafts of negative SIs on Gov.uk, in advance of proposals being laid before Parliament:

> With the Royal Assent of the EU (Withdrawal) Act 2018, the Government has started laying affirmative statutory instruments to prepare the statute book for exit. The Government will not lay negative statutory instruments requiring sifting until the necessary procedures for establishing the new Committee in the Commons and the expansion of the remit of the House of Lords' Secondary Legislation Scrutiny Committee are concluded. However, the Government is starting to publish final drafts of the negative statutory instruments that require sifting ('proposed negatives') on Gov.uk as they are ready. This is to increase transparency and to allow Parliament and the public to have early sight of the forthcoming legislation.[6]

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4 Procedure Committee, *Scrutiny of delegated legislation under the European Union (Withdrawal) Act 2018*, 9 July 2018, HC 1395 2017-19, Summary

5 *Ibid*

6 HCWS829, 4 July 2018

3. Introduction of a sifting process in the House of Commons

In November 2017, 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".[7]

On 7 December 2017, the Procedure Committee issued a press release announcing that its Chair, Charles Walker, had tabled amendments to the EUW Bill and that he would propose a new Standing Order to create a European Statutory Instruments Committee (ESIC). 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 (see Box 1 for the text of the press release).

Box 1: Chair tables amendments to EU (Withdrawal) Bill on scrutiny powers for Commons (Procedure Committee press notice, 7 December 2017)

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 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.[8]

At Committee stage in the House of Commons, the House agreed, without a division, to the amendments moved by Charles Walker to create a procedure in the House of Commons for sifting SIs that the

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

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

Government proposed should be subject to the negative resolution procedure.[9]

Under this mechanism, a proposal for a negative SI would be laid before Parliament. The relevant minister would provide a written statement specifying that the proposed negative instrument should be subject to the negative resolution procedure and a memorandum setting out that statement and giving reasons for the recommendation (Bill 79 Schedule 7 para 3).

Any SIs subject to the affirmative procedure would continue to proceed in the normal way.

A new select committee, the ESIC, would be appointed to sift the proposals for negative SIs. Andrea Leadsom, the Leader of the House of Commons, tabled a motion to establish the Committee, after the House amended the Bill.[10] At Business Questions on 14 December 2017, Andrea Leadsom said that "I will propose changes to the Standing Orders once the [EUW] Bill has received Royal Assent so that the sifting committee can begin its work as soon as possible".[11] (Charles Walker referred to them as "The Government's draft Standing Orders" and noted that the Procedure Committee was considering how they could be strengthened.[12])

SIs made under clauses 7, 8 and 9, of the Bill as first introduced (Bill 5 of 2017-19) would be subject to the sifting process. (Box 2 provides a summary of the powers in these provisions.) The ESIC would consider each proposed negative SI and the accompanying memorandum. Then it would recommend whether the proposed SI should be subject to the affirmative or negative resolution procedure. The Bill specified that the ESIC would have 10 sitting days from the day after the proposal was laid to make any recommendation on the procedure the SI should face. Nothing in the Bill (at this point) required the Minister to accept the Committee's recommendation.

Box 2: Delegated powers to which the sifting procedure for SIs was applied by the Bill as introduced

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".[13]

- **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.

9 HC Deb 12 December 2017 cc190-343 (debate); HC Deb 13 December 2017 cc539-542 (decision)
10 The motion first appeared in the Future Business pages of the Order Paper on 12 December 2017
11 HC Deb 14 December 2017 c608
12 Procedure Committee, Exiting the European Union: scrutiny of delegated legislation, Oral Evidence – 2 May 2018, HC 386 2017-19, Q136
13 House of Lords Delegated Powers and Regulatory Reform Committee, European Union (Withdrawal Bill), (2017-2019 Third Report HL Paper 22) para 1

- **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*

After the ESIC had reported on the SI or after the 10-day period had passed, the Minister would then be able to lay a made negative SI that would be subject to annulment or a draft affirmative order that would require parliamentary approval before it could be made.

The Bill was sent to the House of Lords containing this sifting requirement.

4. Changes to the sifting process made in the House of Lords

4.1 Committee stage debate

Although no amendments were made at committee stage in the House of Lords, the scrutiny and sifting of SIs was debated.[14]

Amendments debated would have imposed restrictions on the use of regulation-making powers; changed the sifting process; and extended it to SIs making consequential and transitional changes to existing legislation.

Lord Lisvane expressed concern at the extraordinary nature of the Bill that gave the Government the power, in some circumstances, to choose between the use of the affirmative or negative resolution procedure.[15]

Baroness Evans of Bowes Park, the Leader of the House of Lords, told the House that the Lords Procedure Committee had agreed to her proposals to sift EUW Bill proposed negative SIs:

> On 5 March … the Procedure Committee agreed to my proposal to incorporate the same powers as those of the new Commons sifting committee into the terms of reference of the Secondary Legislation Scrutiny Committee as well as conferring the power to appoint sub-committees. This will allow the sub-committees to recommend within 10 sitting days that the House's consideration of specific negative instruments related to this Bill should follow the affirmative procedure.[16]

Baroness Evans told the House that the SLSC would determine the allocation of policy areas between the two sub-committees and maintain oversight of the scrutiny process in general terms.

She also noted that "The 10-day period for allowing the sifting committee to make a recommendation was originally suggested by the Delegated Powers and Regulatory Reform Committee of this House and was endorsed by the Procedure Committee in the Commons". She told the House of Lords that the Government was content to agree to the 10-day timeframe.

She said that the House would be "invited to agree the proposed arrangement when the [Lords] Procedure Committee presents its report. That is expected to be when the passage of this Bill is nearing completion, as of course the report may have to reflect any relevant changes to the Bill that are agreed by both Houses".[17]

4.2 Report stage amendments

At report stage, the Government tabled amendments to provide for the sifting process to happen in the House of Lords as well as in the House of Commons. Baroness Evans of Bowes Park repeated what she had

14 See HL Deb 19 March 2018 cc137-168 and HL Deb 21 March 2018 cc257-267
15 HL Deb 19 March 2018 c143
16 HL Deb 19 March 2018 c152
17 HL Deb 19 March 2018 cc152-153

said in committee that if both sifting committees recommended that a proposed negative SI should be subject to the affirmative procedure that "the Government's expectation is that such recommendations are likely to be accepted"; and that when it disagreed with a recommendation, the Government would "fully expect to publicly set out our reasons to the committee concerned".[18]

However, the Government's amendments could not be moved because another amendment that was agreed beforehand removed the provisions that the Government sought to amend.

The amendment that was agreed confirmed that both Houses would have sifting committees but removed the need to lay a proposal for a negative SI: instead a draft negative SI would be laid and the negative procedure would apply unless either House required the affirmative procedure to apply.

The Government would not be able to ignore a recommendation that the affirmative procedure should apply. But the House whose committee made the recommendation could overturn it:

> Page 44, line 35, leave out from beginning to end of line 20 on page 45 and insert—
>
> *"Parliamentary committees to sift regulations made under section 7, 8, 9 or 17*
>
> 3 (1) This paragraph applies if a Minister of the Crown—
>
> (a) proposes to make a statutory instrument, whether under this Act or any other Act of Parliament, to which paragraph 1(3), 6(3), 7(3), or 11 applies or which has the same purpose as an instrument to which those paragraphs apply, and
>
> (b) is of the opinion that the instrument should be subject to annulment in pursuance of a resolution of either House of Parliament ("the negative procedure").
>
> (2) Before making the instrument, the Minister must lay before both Houses of Parliament a draft of the instrument together with a memorandum setting out the reasons for the Minister's opinion that the instrument should be subject to the negative procedure.
>
> (3) The negative procedure applies unless within the relevant period either House of Parliament requires the affirmative procedure to apply, in which case the affirmative procedure applies.
>
> (4) A House of Parliament is taken to have required the affirmative procedure to apply within the relevant period if—
>
> (a) a committee of the House charged with reporting on the instrument has recommended, within the period of 10 sitting days beginning with the first sitting day after the day on which the draft instrument was laid before the House, that the affirmative procedure should apply, and
>
> (b) that House has not by resolution rejected the recommendation within a period of 5 sitting days beginning with the first sitting day after the day on which the recommendation is made, or

[18] HL Deb 8 May 2018 c98 (as noted above, see HL Deb 19 March 2018)

> (c) irrespective of the committee reporting on the instrument, that House has resolved, within the period of 15 sitting days beginning with the first sitting day after the day on which the draft instrument was laid before the House, that the affirmative procedure should apply to the instrument.
>
> (5) For the purposes of this paragraph—
>
> (a) where an instrument is subject to the affirmative procedure, it may not be made unless the draft of the instrument laid under sub-paragraph (2) has been approved by a resolution of each House of Parliament,
>
> (b) "sitting day" means, in respect of either House, a day on which that House sits.
>
> (6) Nothing in this paragraph prevents a Minister of the Crown from deciding, at any time before a statutory instrument mentioned in subparagraph (1)(a) is made, that another procedure should apply in relation to the instrument."[19]

The House of Lords extended the sifting process to SIs that made consequential or transitional amendments (those made under clause 17) but it removed what was clause 8 (of Bill 5) from the Bill. The sifting committees would consider SIs made under powers in what were clauses 7, [8], 9 and 17 of the Bill as first introduced.

In evidence to the Procedure Committee, in the House of Commons, Andrea Leadsom confirmed that only EUW Bill statutory instruments would be subject to sifting.[20]

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19 House of Lords Report Stage Amendment 70 (see Sixth Marshalled List); HL Deb 8 May 2018 cc86-105. This is Lords Amendment 110, in the marshalled list of amendments sent back to the House of Commons, Bill 212

20 Procedure Committee, Exiting the European Union: scrutiny of delegated legislation, Oral Evidence – 2 May 2018, HC 386 2017-19, Qq188-189

5. Commons Response to the Lords Amendments and subsequent proceedings

5.1 Commons Consideration of Lords Amendments

On 12 and 13 June 2018 the House of Commons considered Lords Amendments to the EUW Bill.

On 12 June it disagreed to the Lords Amendment set out above (Lords Amendment 110) and to a related amendment (Lords Amendment 128). Both amendments were disagreed to on division:

- The motion to disagree to Lords Amendment 110 was agreed to by 324 votes 302 (Division 166); and
- The motion to disagree to Lords Amendment 128 was agreed to by 325 votes 304 (Division 167).[21]

The House of Commons provided the following Reason for its disagreement:

> Because the Commons prefer their proposed arrangements for sifting.[22]

The disagreement with the Lords Amendments meant that as the bill stood there was no statutory requirement for the House of Lords to sift proposals for negative SIs to be made under the EUW Bill, and meant that SIs making changes consequential upon the legislation would not need to be sifted at all.

5.2 Lords consideration of Commons Reasons and Amendments

On 18 June 2018, the House of Lords agreed not to insist on their Amendments 110 and 128 to which the Commons had disagreed. However, the House of Lords proposed amendments in lieu of their previous Amendments.[23] These amendments in lieu were proposed by the Government.

These amendments in lieu, agreed on 18 June, would ensure that each House took part in the sifting process. A recommendation that a proposed negative SI should be upgraded would not be binding on a minister. But the minister would be required to explain why he or she disagreed with the parliamentary committee before making the SI.

The amendments in lieu also, like the previous Lords Amendments, extend the sifting process to SIs that make consequential provisions.

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21 Votes and Proceedings, 12 June 2018
22 Votes and Proceedings, 13 June 2018
23 HL Deb 18 June 2018 cc1852-1928

5.3 Commons Consideration of Lords Message

On 20 June 2018, the House of Commons accepted the changes proposed by the House of Lords on 18 June, confirming that both Houses would sift proposals for negative SIs laid under the Act.

6. Timescales for sifting SIs

The Bill that was sent from the House of Commons to the House of Lords provided that the sifting committee (ESIC) in the House of Commons would have up to 10 sitting days, after laying, for the consideration of proposed negative SIs (HL Bill 79). This set the maximum time that a sifting committee would have – it did not preclude the committees from reporting their conclusions before the end of the 10-day period.

Following amendments in the House of Lords:

- there would be sifting committees in each House; and
- they would have 10 sitting days to consider whether to recommend that draft negative SIs should be subject to the affirmative resolution procedure.

Proposals for negative SIs would not be laid, following the changes made by the House of Lords.

6.1 Concerns about the timescales

Concerns have been expressed that this is not a sufficient period of time and questions have also been asked about how sifting committees could ensure that representations from the public were taken on board.

The Clerk Assistant, in the House of Commons, Dr John Benger, told the Procedure Committee that "I just do not think that 10 sitting days is quite enough to give everyone a chance to look at these things in any degree of serious detail".[24] He explained that depending on when and how many proposals for negative SIs were laid, it might be difficult for officials to do the preparatory work to enable the ESIC to consider them at its first meeting after they were laid. If the ESIC then required additional information or clarification (requested at the second meeting after laying), this would be considered at the third meeting after laying and could take the process beyond the 10-sitting day period.

Dr Benger also thought the 10-sitting day sifting period would make it "very difficult" for some interested parties and groups and select committees to be able make representations to ESIC. He thought that with a longer period, "there may be just a little bit more scope for them to engage with the consultation process. … I happen to think three weeks is more plausible".[25]

The Committee put these concerns to Andrea Leadsom, the Leader of the House of Commons, and to Steve Baker, Parliamentary-Under-Secretary of State for Exiting the European Union, on 2 May. Mr Baker explained why the Government thought that a 15-day period was too long:

> … is 15 days something that could be considered?

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24 Procedure Committee, Exiting the European Union: scrutiny of delegated legislation, Oral Evidence – 21 February 2018, HC 386 2017-19, Q136

25 Ibid, Q 140

> ***Mr Baker:*** We think not, Mr Walker [Chair of the Procedure Committee], and I would like to explain why. Obviously, we want to facilitate Parliament carrying out proper scrutiny, but we also have this requirement to get the statute book functioning by exit day. We think that 10 days strikes the right balance. Consider, for example, that if we laid SIs for sifting during the two-week return from the summer recess into the autumn, on the basis of 10 sitting days, sifting would be complete in mid to late October; if we add an extra five days, sifting would not be completed until the end of October at best. We need to make sure that the sifting committee has the right information and the right opportunity to sift, but we think that that is illustrative of the pressure on time that would be imposed by moving to 15 days. I would also say that, with us sitting four days a week, if we have 10 days to sift, that allows two elapsed weeks plus the further two days in the next week. A committee would potentially have the opportunity to look at an instrument twice, for the purpose of considering the procedure that it goes through, so we think that 10 days strikes the right balance between getting the instrument through sifting and getting all the instruments through to correct the statute book.[26]

The Procedure Committee also raised the potential problems of the short timescale for people who wanted to give evidence to the ESIC.[27] Andrea Leadsom pointed to the information that would be published alongside the statutory instruments and Steve Baker added that more instruments would be published in draft (before any parliamentary proceedings began). Helen Goodman expressed particular concerns that the ESIC would report within the 10-day sifting period: more "outside people who might want to have an input into the process could easily miss deadlines" and it could lead to perverse behaviour and more recommendations to upgrade SIs.[28] In reply Steve Baker said that:

> If the committee made a decision on an instrument and chose to release it, that would be helpful to us. The point you make is a very interesting one, which the committee will no doubt consider when it is formed.[29]

6.2 How long does the scrutiny of SIs take?

How long will it take to consider an SI made under EUW Bill powers?

Under the Procedure Committee's amendment, after the 10-day period had ended, the Government would lay a draft affirmative SI to be approved or a made negative SI that could be annulled. (An illustrative timetable is shown in Box 3.)

Following the changes made to the Bill in the House of Lords, the sifting period now occurs after a draft negative SI is laid. There is no longer a requirement to lay a proposal for a draft negative SI. The 10-day sifting

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26 Procedure Committee, Exiting the European Union: scrutiny of delegated legislation, Oral Evidence – 2 May 2018, HC 386 2017-19, Q175
27 Ibid, Qq213-214 and Q217
28 Ibid, Q217
29 Ibid, Q217

period would now fall in the 40-day period in which a motion that a draft negative SI be not made would be effective.

Box 3: Outline timeline for a proposal for a negative SI that is made after sifting

Thursday 21 June 2018 – a proposal for a negative SI is laid.
Monday 25 June – the 10-day sifting period begins (Friday 22 June is a non-sitting Friday)
Monday 9 July – the sifting period ends
Tuesday 10 July – the minister lays a made negative SI that is subject to annulment
Tuesday 23 October – the 40 day praying period ends

Both Houses are on recess from 25 July-3 Sept and from 14 Sept-8 Oct (inclusive) so these days are excluded when the 40-day praying period is calculated

The Procedure Committee estimated that "on present sitting patterns the House will sit on 106 days in 26 sitting weeks between the date of publication of this report and exit day on 29 March 2019". It then estimated when proposals for negative SIs and negative SIs would have to be laid in order to ensure that the praying period had ended on or before exit day:

> We expect that Departments will wish to ensure that most, if not all, of their proposals for negative instruments are laid so as to ensure that the statutory 'praying time' of 40 days (excluding periods during with both Houses are adjourned for more than four days) has expired on or before exit day.
>
> - We estimate that the latest day on which an instrument subject to negative resolution can be laid so that praying time expires on 29 March 2019 is **Monday 18 February 2019**.
> - The latest day on which a proposed negative can be laid before Parliament so that the period for consideration expires before 18 February 2019 is **Friday 25 January 2019**.
> - There are 203 calendar days between the date of publication of this report and Friday 25 January 2019. We estimate that the House is likely to sit on 72 of these days, spread over 17 sitting weeks.

It published an illustrative calendar that showed "for each day of the week on which a proposed negative is laid, the date on which the ten-day consideration period would expire and the number of calendar days between the date of laying and the date of expiry of the consideration period, inclusive of both dates".[30]

Affirmative SIs

There is no set timetable for the two Houses to follow between the laying of a draft SI under the affirmative resolution procedure and approving it. The processes in the two Houses run in parallel. However, a motion to approve a draft SI cannot be considered in the House of

[30] Procedure Committee, *Scrutiny of delegated legislation under the European Union (Withdrawal) Act 2018*, 9 July 2018, HC 1395 2017-19, paras 55-56

Lords before the Joint Committee on Statutory Instruments (JCSI) has reported on it.[31]

The Secondary Legislation Scrutiny Committee's *Guidance for Departments submitting Statutory Instruments to the Secondary Legislation Scrutiny Committee* repeats advice from government business managers that recommends departments allow six weeks for the passage of affirmative SIs:

> Government business managers (The Whips) recommend you **allow a minimum of 6 *sitting* weeks** for the instrument to pass through all its Parliamentary stages. However more time may be required if the instrument is not cleared on first consideration by one of the Committees; and/or if there is a high volume of affirmative instruments waiting for approval by the House (for example in the run-up to recesses). You are therefore strongly encouraged to liaise with your Department's Parliamentary unit which will be aware of the timetables of the Committees and of the Whips Office in each House. [emphasis in original][32]

Negative SIs

Following the laying of a draft negative SI, a minister can make the SI at the end of a period of 40 days, as long as neither House has passed a motion that the SI be not made.[33]

Following the laying of a made SI under the negative resolution procedure, Parliament has 40 days to pass a motion to annul it.[34] If passed such a motion would lead to the SI being revoked. However, made SIs can come into force before the 40-day period has elapsed. To ensure that some scrutiny can occur before SIs come into force, departments generally observe a 21-day rule, whereby:

> it is a convention that negative instruments should not come into effect until **a minimum of 21 calendar days** after they have been laid.[35]

The 40 days start on the day the instrument was laid but no account shall be taken of any time during which Parliament is dissolved or prorogued or during which both Houses are adjourned for more than four days

When will the Government begin laying SIs and proposals for negative SIs

In the evidence session, Andrea Leadsom said that the Government would like to start laying SIs under the EUW Act before the summer recess.[36] Steve Baker said "I would like to begin laying SIs shortly after Royal Assent. As the Leader has indicated, that is a moveable feast, but I would like to see the first ones being laid before we have exited June".[37]

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31 Erskine May, *Parliamentary practice*, 24th edition, 2011, p682
32 Secondary Legislation Scrutiny Committee, *Guidance for Departments submitting Statutory Instruments to the Secondary Legislation Scrutiny Committee*, July 2016, p4
33 Statutory Instruments Act 1946 (chapter 36), s6(1) and s7(1
34 Statutory Instruments Act 1946 (chapter 36), s5(1) and s7(1)
35 Ibid, p4
36 Ibid, Q176
37 Ibid, Q199

How many SIs will be laid?

In March 2017, the Government estimated that "the necessary corrections to the law will require between 800 and 1,000 statutory instruments".[38]

On 2 May 2018, Steve Baker restated this figure but added that "at the moment new information shows that it will be much closer to 800 than 1,000". He also told the Committee that the Government expected that 20%-30% of the SIs would be subject to the affirmative procedure.[39] Mrs Leadsom considered the implications for delegated legislation committees, which consider draft affirmative SIs. She noted the figure could increase, depending on how many proposals for negative SIs the ESIC recommended should be affirmative. But she suggested that it might be possible to group SIs for debate, as is done currently.[40]

However, in addition to SIs under the EUW Bill, Andrea Leadsom noted that other Brexit bills "could generate in the low hundreds of statutory instruments". These SIs would not be subject to the sifting process, which only applies to EUW Bill SIs.[41]

38 Department for Exiting the European Union, *Legislating for the United Kingdom's withdrawal from the European Union*, Cm 9446, March 2017, para 3.19
39 Procedure Committee, Exiting the European Union: scrutiny of delegated legislation, Oral Evidence – 2 May 2018, HC 386 2017-19, Qq181-184
40 Ibid, Q212
41 Ibid, Q186 and Q189

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