

Scrutiny of Delegated Legislation in Relation to the UK's Withdrawal from the European Union

By Simon Patrick

THE
CONSTITUTION
SOCIETY

First published in Great Britain in 2017 by
The Constitution Society
Top Floor, 61 Petty France
London, SW1H 9EU
www.consoc.org.uk
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ISBN: 978-0-9954703-8-5

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About the Author

Simon Patrick OBE was a House of Commons Clerk for 38 years, during the last ten of which he was a Principal Clerk responsible for, successively, delegated legislation, bills and select committees. He has also been Clerk of the European Scrutiny Committee and of the Joint Committee on Statutory Instruments. He was one of the assistant editors of *Erskine May's Parliamentary Practice* for both the 23rd and 24th editions (2004 and 2011). He retired in 2016.

Summary

The European Union (Withdrawal) Bill delegates powers to Ministers to make instruments for various purposes arising from withdrawal from the EU, including dealing with deficiencies in retained EU law, enabling compliance with international obligations and implementing the withdrawal agreement. The Government estimates that between 800 and 1,000 instruments will be needed. Of the various Parliamentary procedures which could be applied to them, the Bill prescribes the negative procedure in most cases but the affirmative procedure if the instrument contains any of a number of specified provisions.

Criticisms have been made of these provisions by Members, committees and various outside bodies, and this paper examines methods by which a sifting committee, along the lines of the existing Regulatory Reform Committee and its Lords counterpart, could specify the procedure applicable to each instrument, and considers the types of procedures for scrutiny, debate and decision which would be possible, taking the existing options available to the European Scrutiny Committee as a possible starting point.

Introduction

1. There has been considerable discussion in recent months of Parliament's methods for scrutinising the delegated legislation that will be required in relation to the departure of the UK from the European Union ('Brexit'). The Commons Procedure Committee announced an inquiry on the subject (entitled 'Delegated powers in the "Great Repeal Bill"') in February 2017, and by the Dissolution in May it had taken one session of oral evidence and received 31 items of written evidence.¹ On 15 September the reconstituted committee announced an inquiry entitled 'Exiting the European Union: Scrutiny of Delegated Legislation'. There have also been reports by the House of Lords Select Committee on the Constitution and the Hansard Society.²
2. On 13 July 2017 the Government presented the European Union (Withdrawal) Bill.³ It contains numerous powers to make delegated legislation, notably in relation to perceived deficiencies in EU law that the Bill proposes to retain after exit day ('retained EU law') (Clause 7), in order to comply with international obligations (Clause 8) and for implementing the withdrawal agreement (Clause 9).⁴ In the Explanatory Notes to the Bill, para. 14, the Government states:

The Bill does not aim to make major changes to policy or establish new legal frameworks in the UK beyond those which are necessary to ensure the law continues to function properly from day one. The Government will introduce separate primary legislation to make such policy changes which will establish new legal frameworks.
3. The Parliamentary procedures applicable to the regulation-making powers in the Bill are set out in Schedule 7 and are described in this paper in paragraph 29 onwards. Several Members referred to these issues during the second reading debate on 7 and 11 September, and amendments so far tabled for the Commons committee stage of the Bill include numerous proposals to alter the procedures.⁵ A repeated theme was criticism of the power to allow regulations to amend Acts of Parliament ('Henry VIII' powers: see paragraph 41). Some of the other criticisms made during the debate and the solutions recommended in the amendments are covered in paragraphs 34 onwards.
4. The Constitution Society wishes to contribute to this debate by surveying the possible mechanisms for scrutinising the delegated legislation made under the Bill. Other recent Brexit-related material published by the Society includes 'Preparing for Brexit: the Legislative Options' by Richard Gordon QC and Tom Pascoe (April 2017) and 'Brexit and the House of Commons' by Andrew Kennon (May 2017).

1 These include two each from two House of Lords committees: the Delegated Powers and Regulatory Reform Committee and the Secondary Legislation Scrutiny Committee. For details of the roles of these committees, see para. 16.

2 Select Committee on the Constitution, *The 'Great Repeal Bill' and delegated powers*, 9th Report of Session 2016–17, HL Paper 123, March 2017; Hansard Society, *Taking Back Control for Brexit and Beyond*, September 2017.

3 Bill 5 of Session 2017–19.

4 Use of the delegated powers begins at Royal Assent and ends two years after exit day (except for the powers under Clause 9, which expire on exit day), but regulations made under these powers do not expire at that point (paragraph 28 of Schedule 8).

5 See in particular New Clauses 1, 6 and 26 and the amendments proposed to Schedule 7.

The current procedures for delegated legislation

Definition of 'delegated legislation'

5. For the purpose of the discussion of the procedures, a rough and ready definition of delegated (or 'secondary') legislation would be that it consists of orders or regulations made by Ministers under powers granted by an Act of Parliament, and published in a numbered series of documents called 'Statutory Instruments'.
6. Four of the phrases in the previous paragraph are subject to qualification.
 - a) Not all delegated legislation consists of orders or regulations (there are also rules, schemes and other rarer types);⁶
 - b) Power is sometimes delegated to people or bodies other than Ministers, such as devolved executives, local authorities, the General Medical Council and the General Synod of the Church of England;
 - c) Powers to make delegated legislation are sometimes contained elsewhere than in Acts of Parliament, such as in delegated legislation or in Church of England Measures;
 - d) Not all documents containing delegated legislation are designated as statutory instruments.
7. Nevertheless, most of the important items of delegated legislation do fit the definition above, and in particular it is applicable to powers under the Bill, except to the extent that it deals with their exercise by devolved executives and control and scrutiny by devolved legislatures, in each case either alone or in conjunction with the Government and Parliament of the UK. For simplicity, this paper concentrates on the procedures in the UK Parliament, although the proposed types of control, such as affirmative and negative procedure, are mirrored in devolved legislatures.

Types of Parliamentary control

8. There are two interlocking roles for Parliament in considering delegated legislation: the Parliamentary control (if any) provided for in the parent Act,⁷ and the level of scrutiny that may be undertaken by Parliamentary committees (generally specified in standing orders made by either House but also sometimes catered for in legislation). These two aspects are dealt with in turn, beginning with the level of Parliamentary control, starting with the lowest levels and moving upwards.
9. **No procedure:** if an Act merely states that an order or regulations may be made by Statutory Instrument, this does not attract any formal Parliamentary procedure. In a minority of such cases there is also a provision that the instrument is to be laid before both Houses of Parliament. The provision for laying has no significant effect either for Parliamentary control or for Parliamentary scrutiny: whether laid or unlaied, the instrument may be examined by the Joint Committee on Statutory Instruments⁸ or (very rarely) referred to a (Commons) delegated legislation committee for debate.
10. **Negative procedure:** If an Act provides that a instrument is 'subject to annulment in pursuance of a resolution of either House of Parliament', this attracts the provisions of section 5 of the statutory

⁶ There are no differences in Parliamentary procedure arising from whether a particular instrument is described as an 'order' or 'regulations' or something else; there is a difference in the procedure for *making* an 'order in Council' but this does not affect Parliamentary control or scrutiny.

⁷ In this paper the word 'control' is used for powers that can result in the approval or annulment of an instrument: Schedule 7 to the European Union (Withdrawal) Bill uses the word 'scrutiny'.

⁸ Statutory Instruments are classified either as 'general' or 'local', and local instruments, if not subject to any Parliamentary proceedings, do not fall within the remit of the JCSI.

Instruments Act 1946. The instrument is laid before both Houses⁹ and comes into force on a date specified in it. If either House resolves that ‘an humble Address be presented to Her Majesty praying’ that an instrument be annulled, no further action may be taken under the instrument, but action taken before the resolution was passed remains valid. Any such resolution may be passed only within forty days of the laying of the instrument, excluding Parliamentary recesses but including weekends during sitting periods.¹⁰

11. **Draft negative procedure:** A rarely-used variant of negative procedure involves the laying of a *draft* instrument, which cannot be made until forty days have passed; and during that period either House may resolve that the instrument shall not be made.¹¹
12. **Affirmative procedure (drafts):** An Act may provide for an instrument to be made only if a draft of it has been laid before, and approved by resolution of, each House of Parliament.¹²
13. **Affirmative procedure (made instruments):** If it is desired to create a power to make an instrument urgently, an Act may provide that an instrument can be made, come into effect and be laid before Parliament, but it will expire unless, within a period specified by the enabling Act,¹³ each House passes a resolution approving it.
14. **Super-affirmative procedure:** A limitation of the previous procedures for control of delegated legislation is the absence of a formal procedure for amendment by either House¹⁴ or even of an opportunity for second thoughts by the Government during the process.¹⁵ Under what has become known as the ‘super-affirmative’ procedure,¹⁶ the first version of the instrument laid is, in effect, a draft of a draft, and is sometimes called a ‘proposal’. Often some form of prior public consultation is required. The Act then specifies a period during which Parliamentary scrutiny is possible, and may also specify how this should take place. Parliamentary committees can suggest (but not make) amendments, and when the specified period has expired the Government may lay a draft in the

9 An Act may provide that instruments should be subject to annulment or approval by the House of Commons alone, and they are laid before the Commons and not the Lords. These instruments are normally on tax-related matters and they are considered by the Commons members of the JCSI sitting separately as the *Select Committee on Statutory Instruments*.

10 The statutory definition of the forty days (s. 7 of the 1946 Act) does not include periods when Parliament is dissolved or prorogued (i.e. in the gaps between Parliaments or sessions) or when both Houses are adjourned for a period of more than four days. There is a separate, non-statutory, undertaking that negative instruments will not normally come into force less than twenty-one days after laying, to allow time for scrutiny by select committees (*Erskine May’s Parliamentary Practice*, 24th edn, 2015, ed. Sir Malcolm Jack, p. 679). It is, however, quite usual for a negative instrument to come into force before the forty days have elapsed: the Hansard Society has estimated that 80% of the negative instruments in Session 2015–16 did so (*Taking Back Control*, p. 31).

11 Details are set out in s. 6 of the 1946 Act. This procedure is used mainly when the provisions in the instrument are effectively irreversible (e.g. the abolition of an organisation) and therefore annulment after coming into force would have no effect.

12 The ‘made’ instrument is not laid before Parliament again but must be in the same form as the draft.

13 The period within which approval must be given is (unlike for negative procedure) not provided for in the 1946 Act and must be specified in the Act creating the delegated power: it is usually either 28 or 40 days and may be calculated differently from the periods provided for negative instruments in the 1946 Act, either by ignoring Lords sittings (mainly for Commons-only affirmative instruments) or by excluding periods when either House is adjourned for more than four days (rather than both Houses).

14 An instrument may be amended by Parliament only if this is specified in the parent Act (e.g. the Census Act 1920 and Part 2 of the Civil Contingencies Act 2004).

15 A draft instrument may be withdrawn and a new draft substituted; and an affirmative instrument does not have to be made even if a draft of it has been approved. Once an instrument has been made, however, it may be amended only by a further instrument.

16 The procedure was first specified in the Deregulation and Contracting Out Act 1994, but the first statutory use of the term ‘super-affirmative’ was in the Legislative and Regulatory Reform Act 2006.

same form as the proposal or in an amended form,¹⁷ which is then submitted for approval by both Houses of Parliament. It may also decide not to proceed with the draft instrument.

15. **Options to choose the procedure:** Some Acts have provided that a Minister may choose the applicable procedure, for example either laying a draft for approval under the affirmative procedure or laying a made instrument subject to annulment under the negative procedure. (This option is available for orders under s. 2(2) of the European Communities Act 1972.) A useful variant of this is for the Act to specify that certain delegated powers attract the affirmative procedure, but that other provisions that would otherwise have attracted the negative procedure may be included in the same instrument, to be approved as a whole. Another system, laid down in the Legislative and Regulatory Reform Act 2006, is for the Minister, when laying a draft legislative reform order (LRO), to specify the applicable procedure (negative, affirmative or super-affirmative), but committees in either House are empowered to change the procedure (subject to a power for the relevant House to override the committee's decision).¹⁸

Scrutiny of instruments by select committees

16. The House of Lords **Delegated Powers and Regulatory Reform Committee** examines delegated powers in bills passing through Parliament, and reports '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'.¹⁹ There is no such function in the Commons, although amendments proposing to change the level of Parliamentary control of such powers are sometimes tabled during the committee and report stages of Bills.
17. The **Joint Committee on Statutory Instruments (JCSI)** considers all delegated legislation and drafts laid before Parliament which are subject to any Parliamentary procedure, and most other SIs if they are general rather than local and not the responsibility of devolved legislatures. It draws an instrument to the attention of both Houses if it considers it appropriate on any grounds relating to its form rather than its merits, notably that it is poorly or ambiguously drafted, makes unexpected use of the instrument-making power, or appears to be beyond that power (is '*ultra vires*').²⁰
18. The House of Lords **Secondary Legislation Scrutiny Committee** (from its establishment in 2003 until 2012 entitled the 'Select Committee on Merits of Statutory Instruments') examines SIs and reports on any instrument that 'is politically or legally important or gives rise to issues of public policy likely to be of interest to the House'. The Committee can also report on an instrument on other grounds, including being inappropriate, imperfectly achieving its policy objectives or having been subject to an inadequate consultation process.²¹ There is no corresponding committee in the Commons.
19. The **Delegated Powers and Regulatory Reform Committee** (in the Lords) and the **Regulatory Reform Committee** (in the Commons) examine LROs laid under the Legislative and Regulatory Reform Act 2006, recommending whether the Minister's proposed procedure should be upgraded, and whether the draft order should be approved, amended or rejected. As well as examining whether

17 Some Acts require the Government to lay either a revised draft or a statement saying that it is proceeding with the original draft without amendment. The various procedures were catalogued by the Delegated Powers and Regulatory Reform Committee in its Special Report *Strengthened statutory procedures for the scrutiny of delegated powers* (Third Report, Session 2012–13, HL Paper 19). The Committee (para. 1) criticised the level of complexity caused by the variations in the details of the procedure between the enabling Acts, of which there were at that time eleven.

18 The procedure is always changed so as to raise the level of scrutiny (from negative to either affirmative or super-affirmative, or from affirmative to super-affirmative) and is therefore informally referred to as 'upgrading'. A decision by the committee in one House to upgrade the procedure results in a change in the procedure in both.

19 House of Lords, *Official Report*, 27 June 2017, col. 300.

20 House of Commons Standing Order No. 151. The Joint Committee cannot invalidate an instrument by declaring it *ultra vires*: this could be done only by a court.

21 House of Lords, *Official Report*, 27 June 2017, cols. 305–6.

the provisions of the Act have been complied with (including prior consultation), the Committees apply the tests that would otherwise have been undertaken by the JCSI.

20. In addition, other select committees, such as the department-related select committees in the Commons, may examine any delegated legislation within their subject area.

Procedure for formal consideration of instruments: Commons

21. In the House of Commons affirmative instruments are automatically referred to delegated legislation committees. Each such committee is set up specifically to consider a single instrument (or a group of related instruments), and considers it on a neutral motion ‘that the committee has considered the [draft] instrument’.²² Such motions are sometimes divided on, but even defeat of the motion has no effect on subsequent procedure in the House. Each debate is limited to 1½ hours. If there is more than one instrument to be considered, they may be (and usually are) debated together unless any Member objects. The motions to approve the instruments (or drafts) are then put to the House without further debate, usually one or two sitting days after the debate in committee. These decisions are usually taken at the end of the day’s business in the House and any divisions on them are therefore deferred to the following sitting Wednesday.
22. The Government may alternatively provide for debate on an instrument to take place on the floor of the House (this would normally be done after agreement through the usual channels that the subject-matter is sufficiently important), and unless otherwise provided the length is again limited to 1½ hours. The motion is to approve the instrument and the debate is immediately followed by a decision (although, again, any division may be deferred, depending on how late in the sitting it would otherwise take place).
23. Negative instruments (and, very rarely, those not subject to Parliamentary procedure) may also be referred to delegated legislation committees for debate. This is requested by one or more Members tabling a motion to annul an instrument²³ (or to take note of it), but a referral requires a motion in the House, which is in the gift of the Government, and not all negative instruments about which a motion is tabled are referred. After the debate (again, on a neutral motion) there is normally no further action, although the Opposition has occasionally put a negative instrument down for decision in the House (without further debate) on an Opposition Day.²⁴
24. Alternatively, the Opposition or the Government may provide for a debate on a motion to annul a negative instrument to take place on the floor of the House. These debates are again limited to 1½ hours in duration.
25. Draft LROs under the Legislative and Regulatory Reform Act 2006 are subject, in the House of Commons, to various procedures laid down by Standing Order No. 18. If the Regulatory Reform Committee has, without a division, recommended that a draft order be approved, there is no debate in the House (but there could be a vote); if there was a division in the Committee, there can be a 1½-hour debate in the House; if the Committee recommended that the draft order should not be proceeded with, and the Government wishes to overturn this recommendation, there may be a debate of up to three hours.

22 Usually between 16 and 18 Members are nominated to each delegated legislation committee, but any other Member may also attend and take part (but not vote).

23 This motion is usually called a ‘prayer’ because its wording (para. 10).

24 It is possible to arrange for a debate in a delegated legislation committee on a negative instrument after the expiry of the forty-day period during which the instrument can be annulled. Such a debate would not then be followed by a motion on the floor of the House to annul the instrument. A motion to revoke (rather than annul) two instruments on which the praying time had expired was agreed to in the House on 13 September 2017, but this had no statutory effect.

Procedure for formal consideration of instruments: Lords

26. In the Lords, there is no equivalent of delegated legislation committees, but some debates are held in Grand Committee, with subsequent approval of affirmative instruments in the House itself (usually without further debate).
27. The House can resolve (and has resolved) that a negative instrument should be annulled, but it is more usual to debate a ‘non-fatal’ motion expressing criticism of an instrument and (for example) calling on the Government to think again, or a neutral ‘take note’ motion.
28. If the House does resolve to annul a negative instrument, there is no provision for the Commons to override this decision (as is provided for in relation to bills by the Parliament Acts 1911 and 1949).²⁵

Procedures in the European Union (Withdrawal) Bill, as presented

29. The procedures applying to regulations under Clause 7 of the Bill (Dealing with deficiencies arising from withdrawal) are set out in Part 1 of Schedule 7. The default procedure is negative, but regulations that include provisions specified in paragraph 1(2) are instead subject to approval of a draft. These provisions include establishing a public authority in the UK, or transferring to a UK public authority an EU function or an EU legislation-making power; imposing a fee payable to a public authority; creating or widening the scope of a criminal offence, or creating or amending a power to legislate. Such a draft may include provisions that would, if separately made, be subject to the negative procedure.
30. Paragraph 3 allows a Minister to make regulations without the prior approval of a draft (if they would otherwise have required such approval) if he or she considers it necessary to do so on grounds of urgency. Regulations made under this power expire after one month²⁶ unless approved by both Houses during that period.
31. Similar provisions are made by Part 2 of Schedule 7 for the procedure for regulations under Clause 8 of the Bill (Power to implement international obligations) and Clause 9 (Implementing the withdrawal agreement).
32. Paragraph 10 in Part 3 of the Schedule provides that a Minister can apply the affirmative or negative procedure to regulations under Clause 17(5) (transitional, transitory or saving provision) if he or she considers that this would be more appropriate (otherwise no Parliamentary procedure applies).
33. There are no powers in the Bill as presented involving the super-affirmative procedure.²⁷

²⁵ For details of the Lords’ procedure, see *Companion to the Standing Orders of the House of Lords*, 2017, Chapter 10.

²⁶ The period of one month excludes time when Parliament is prorogued or dissolved or when either House is adjourned for more than four days (Schedule 7, paras 3(5) and 11(5)). This period is dependent on the number of days in the month in which the regulations were made, and is therefore more difficult to calculate than for a period of 28 or 40 days, as usually provided in these circumstances.

²⁷ For further details of the delegated powers in the Bill, see the Government’s Delegated Powers memorandum on the ‘Bill documents’ page for the Bill: <https://services.parliament.uk/bills/2017-19/europeanunionwithdrawal/documents.html>

Possible criticisms of the procedure

The context

34. In considering what changes, if any, are desirable in the procedure for considering delegated legislation under the European Union (Withdrawal) Bill, it may be helpful first to give some context. The first issue is the volume of delegated legislation required.
35. In most years there are something over 3,000 statutory instruments. Average figures for the last seven years show that about 950 are subject to affirmative or negative procedure (220 and 730 respectively), and a further 180 (of those subject to no procedure) are considered by the JCSI. There are usually about two instruments subject to super-affirmative procedure a year. There were about 145 meetings of delegated legislation committees per year, which considered 185 statutory instruments.²⁸
36. In its White Paper of March 2017,²⁹ the Government estimated that the number of statutory instruments necessary to make ‘necessary corrections to the law’ at between 800 and 1,000. These would be spread over several years, but many would need to be in place by exit day. They would therefore constitute a substantial increase in the load of statutory instruments to be considered by the committees of both Houses and also on the floor of the House.
37. It follows that it is simply not practicable (for example) to apply the super-affirmative procedure to all of these instruments, or to debate all of them in delegated legislation committees (as would presumably happen if, as suggested by some amendments tabled to Schedule 7, the power to apply negative procedure to some of the instruments were removed).³⁰ It is also relevant that both Houses will also be considering, at the same time, bills to make those major changes to policy or to administrative arrangements that may be considered desirable (see para. 2) but that cannot be described as solely to ensure that the law continues to function, to set up international agreements or to implement the withdrawal agreement, and therefore cannot be the subject of delegated legislation under the European Union (Withdrawal) Bill.
38. The second issue is that the 2016 referendum on the EU was keenly fought, with a narrow majority in favour of leaving, and there continue to be considerable ranges of views both between and within political parties as to what the future relationship between the EU and the UK should be. It follows that proposals that might, in other circumstances, be generally agreed to be minor or technical, and therefore suitable for a low level of scrutiny, are likely to be controversial or to be viewed with suspicion.

The existing proposals

39. The Government’s approach in the Bill is to rely on the affirmative and negative procedures, identifying specific matters that would attract affirmative procedure. The existing methods of dealing with instruments subject to these procedures could be operated with considerable flexibility:
- a) the most significant or controversial instruments could be debated on the floor of the House;

²⁸ Sessional Returns for 2010–12 to 2016–17 (counting session 2010–12 as two years). Analysing the statistics is complicated by the fact that some of the instruments laid in one session may be considered by the JCSI during the next, that some draft instruments are withdrawn, and that the total number of SIs is directly available only by calendar year (see legislation.gov.uk). This figure has been around 3,000 for most years since the early 1990s, but was only 2,059 in 2015 and 1,242 in 2016.

²⁹ *Legislating for the United Kingdom’s withdrawal from the European Union*, Cm. 9446, para. 3.19. The figures were repeated by Mr David Davis in his speech on the second reading of the Bill, *Official Report*, 7 September 2017, c. 350.

³⁰ The Delegated Powers and Regulatory Reform Committee has recognised that ‘it is inevitable that the process will require a substantial proportion of negative instruments’ (evidence to Procedure Committee, GRB 31, April 2017, para. 16).

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- b) time limits for debates could be lengthened by ad hoc motions;
 - c) undertakings could be given about arranging debates of instruments subject to the negative procedure, if a debate were requested by a political party, a certain number of Members or a committee;
 - d) there could be opportunities for scrutiny by the relevant subject-related select committees, possibly on preliminary, unofficial drafts of the instruments so that (for example) the forty-day limit for annulling negative instruments did not impede such scrutiny.

40. However, there are difficulties with this approach, which (as they are here set out) relate mainly to the House of Commons, but which might affect the Lords in different ways:

- a) the Government might be unwilling to concede debates on negative instruments depending on the amount of opposition (or debate requests) they generated, without some overall limit on the number of such debates;
- b) some instruments attracting the affirmative procedure under the provisions of the Bill might in fact be so uncontroversial that a delegated legislation committee would be summoned for what turned out to be a very short debate (this already happens with some delegated legislation committees on affirmative instruments);
- c) by contrast, some Members might wish to raise, in the course of debate on the instruments, matters that were controversial but could not in fact be dealt with by instruments made under the powers in the Bill but would require another bill;
- d) there might be a lack of confidence in the Government's use of its discretion in managing the business of the House of Commons.

Henry VIII powers

41. The phrase 'Henry VIII powers' came up in numerous speeches in the Second Reading debate on 7 and 11 September. It refers to any power enabling delegated legislation to amend primary legislation, i.e. Acts of Parliament;³¹ and the inclusion of any such powers in a Bill is often viewed with suspicion, particularly if they are widely drawn. A power to update a list scheduled to a Bill, or to increase fees, or to make other narrowly specified amendments, is rather different from a power to amend any Act of Parliament, often including the enabling Bill, even if the use of the power is granted only for a particular purpose.

42. Although much of the 'retained EU law' to which the Bill refers consists of EU regulations or UK delegated legislation, parts of it are contained in Acts of Parliament. Without an amending power of some sort, any modifications to Acts would have to be included in the current Bill or a future one.³²

43. One possibility would be to amend Schedule 7 to the Bill to provide that any regulations which contained one or more amendments to an Act of Parliament would attract the affirmative procedure. However, this might include uncontroversial regulations or fail to catch controversial amendments of delegated legislation.

31 The term comes from the Proclamation by the Crown Act 1539, which allowed the king, with the advice of the Privy Council, to make proclamations 'which shall be observed as though they were made by act of parliament'. The Act was repealed in 1547.

32 In 2010 the House of Commons Library estimated that there were 186 Acts of Parliament passed between 1980 and 2009 which 'incorporated a degree of EU influence' (ranging from making passing reference to EU obligations to having implementation of EU obligations as their main purpose): House of Commons Library Research Paper 10/62, 13 October 2010, page 19, quoted in Cm. 9446, para 2.6. There were another 105 such Acts between 2010 and 2014: *EU obligations: UK implementing legislation since 1993*, HC Library Briefing Paper 07092, June 2015, page 5.

Proposals for change

Who should decide the procedure?

44. As already outlined in paras. 29 onwards, the Bill as presented defines the applicable procedure almost entirely by the contents of the proposed regulations. If measures taking any of several specified actions are included, the affirmative procedure is required; otherwise, the negative procedure suffices. The exception is that for regulations under Clause 17(5) (transitional, transitory or saving provision), a Minister can choose affirmative, negative or no procedure, as he or she considers appropriate, the default option being no procedure.
45. The House of Lords Select Committee on the Constitution, the Hansard Society and the Institute for Government have all recommended that there should be a Parliamentary Committee to sift the regulations proposed under the Bill and to decide the procedure for each.³³ This is analogous to the procedure for LROs, whereby the Government stipulates a procedure and the relevant Parliamentary committees (the Commons Regulatory Reform Committee and the Lords Delegated Powers and Regulatory Reform Committee) can override this and require a fuller procedure ('upgrade' it). Difficulty would arise if the Government were not content for the procedure to be upgraded. The arrangement for LROs is that a committee's decision to upgrade the procedure can be overridden by a decision of the relevant House (although so far no attempt has been made to take such a decision).
46. The committees dealing with LROs have another power. They have a statutory veto over the use of the procedure for any particular LRO. Again, this veto can be overturned in the relevant House. So far, however, this has not been put to the test, and the Regulatory Reform Committee once recommended that an order should not be approved, but used a form of words that did not invoke the statutory veto.³⁴ This has preserved an undertaking by the Government that they would not seek to overturn a statutory veto. As has been pointed out by the Delegated Powers and Regulatory Reform Committee, this undertaking has not been repeated in relation to other super-affirmative powers.³⁵
47. In the case of the European Union (Withdrawal) Bill, a veto may not, in fact, be as final as it first appears. If a sifting committee were to decide that a particular measure should not be carried out by an instrument made under the powers in the Bill, the Government would be able to include the provisions in one of the bills that will be necessary to make policy changes or establish new legal frameworks in relation to Brexit (see para. 2), assuming that the bill concerned had not already passed through Parliament.
48. If a sifting committee were appointed, it would be sensible for it to undertake the usual work of the JCSI in respect of regulations under the Bill (in the same way as the committees handling LROs do for those orders). One test that will be of considerable interest is the *vires* test: whether regulations do no more than make the provisions described in the Bill.³⁶
49. It would probably be simpler if such a sifting committee were a joint committee; but the existing LRO procedure demonstrates that separate committees of each House could be workable.

33 Select Committee on the Constitution, 9th Report, para. 102; *Taking Back Control*, Chapter 3; Institute for Government, written evidence to the Procedure Committee (GRB 24), 10 April 2017.

34 HC 181 (2008–09), para 22. The House overturned this decision and passed the draft order.

35 Delegated Powers and Regulatory Reform Committee in its Special Report *Strengthened statutory procedures for the scrutiny of delegated powers* (Third Report, Session 2012–13, HL Paper 19), paras. 21–22.

36 An alternative which has been suggested (House of Commons *Official Report*, 7 September 2017, c. 382) is that the JCSI should itself be the sifting committee. However, this might blur the distinction between its usual role, which excludes policy considerations, and an assessment of the political importance of regulations under the Bill and the level of scrutiny which they might merit.

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50. Several of the amendments tabled for the Commons committee stage of the Bill³⁷ call for a sifting or scrutiny committee: NC1 and Amendments 33 to 41 (Opposition) call for a Commons committee mirroring the Secondary Legislation Scrutiny Committee and gives it power to decide the procedure, including a ‘procedure that allows for amendment’; NC6 (Chris Leslie) calls for Government proposals for improved scrutiny; NC26 (Kerry McCarthy) calls for a committee to ‘determine the form and duration of parliamentary and public scrutiny’ of instruments under the Bill. Amendment 68 (Chris Leslie) calls for a committee to be able to demand a 60-day period for public and committee representations on an instrument; Amendments 129 and 130 (Liberal Democrats) largely reproduce the LRO scrutiny procedure (apart from the prior public consultation phase).
51. Other amendments remove the negative procedure powers (20, 21, 23, 24: Chris Bryant and Ian Murray and 67: Chris Leslie), or give the House of Commons the power to change the procedure from negative to affirmative (3 and 4: Dominic Grieve: these also require more explanatory material from Ministers). There is also a new clause (NC12: Chris Leslie) requiring the affirmative procedure for removal of existing protections etc. for social and employment law and environment law, and an amendment restricting the use of the made affirmative procedure to cases of ‘emergency’ rather than ‘urgency’ (58: Chris Leslie).
52. Other amendments to the Bill affect the proposed removal of the EU Charter of Fundamental Rights: NC16 (Chris Leslie), NC2 and Amendment 46 (Opposition), Amendment 8 (Dominic Grieve), including the rights of residence of EU citizens in the UK: Amendment 131 (Liberal Democrats).
53. The Hansard Society takes the view that the timing available precludes the prior public consultation required for LROs and the 60-day scrutiny period for super-affirmative instruments, and proposes a shortened procedure.³⁸

Debates and examination of the merits of delegated legislation

54. In the absence of any other procedures, any debates on the merits of regulations under the Act would take place on the floor of the House, or in a Grand Committee in the Lords, or in an ad hoc delegated legislation committee in the Commons.
55. The delegated legislation committee procedure may not be a sensible vehicle for the task. These committees usually consist of about sixteen Members, appointed specifically to debate a single instrument or a small group of related instruments. The ministerial and shadow ministerial teams may be similar for instruments related to the work of the same Government department, but otherwise there is unlikely to be any continuity of expertise if instruments on related subjects cannot be considered together (perhaps because they are laid some weeks or months apart). As already mentioned, it is quite possible to summon a meeting for which sixteen Members, a chair and those advising the front benches may have to set aside 1½ hours only to discover that the issue is uncontroversial and the meeting may be over in ten minutes.³⁹ The committees cannot do anything other than debate a motion: any questioning of the Minister has to take place during speeches or interventions, and there is no provision for any other witnesses to take part.
56. One possible answer is for the sifting committee recommended above also to discuss and reach a view on the merits of each instrument, possibly after taking evidence, as is done by the committees handling LROs. There might need to be sub-committees handling instruments on different subjects.
57. The House of Commons possesses a set of select committees (currently 21) relating to the main Government departments, and it would be possible (as it is now) for them to consider any instruments within their subject area. However, unless they were very selective, it would be difficult for

³⁷ This list examines the amendments available by 5 October 2017, namely those tabled before the House rose on 14 September.

³⁸ *Taking Back Control*, Chapter 4.

³⁹ To the contrary, a committee considering more than instrument might find that a Member objected to debating them together and would be faced with a series of 1½-hour debates on each instrument. However, this is rare.

them to do justice to this scrutiny as well as their other work, especially for those areas with a high EU legislative content such as agriculture and trade. The House of Commons is in a minority among Parliaments around the world in that consideration of bills and subject-based inquiries are treated as separate functions, undertaken by separate sets of committees. An advantage often cited for this is that select committees can establish their own priorities rather than finding their time pre-empted by any legislation in their subject areas; referring all Brexit-related delegated legislation to them would remove this advantage. It might also make it more difficult for cross-party consensus to be maintained on subjects where it is possible at the moment.

58. A compromise might be for department-related select committees to consider those instruments they consider significant and for the sifting committee or its sub-committees to deal with the remainder.

A possible solution

59. An alternative, rather more flexible, procedure might be to emulate the powers of the Commons European Scrutiny Committee in relation to EU documents. As an alternative to simply ‘clearing’ a document, the Committee can refer it to one of three European committees for debate, and can also recommend, but not insist on, a debate on the floor of the House. The Committee can also decide to take oral evidence itself, or to obtain an opinion on an EU document from another Commons committee.⁴⁰

60. The European committees are similar to delegated legislation committees, but the debate is on an amendable motion expressing an opinion about the EU document, and proceedings begin with a statement by a Minister and questions to him or her. However, amending or defeating the motion in the committee has no procedural effect (the Government may still table the original motion for approval in the House), and there is no continuity of membership between one European committee and the next (although this was provided for when the committees were first established in 1980).

61. Taking this procedure as a starting point, it might be possible to establish a sifting committee empowered to determine the procedure for each set of draft regulations under the Bill:

- a) a negative instrument could be treated in the normal way, or could stand referred for debate in a delegated legislation committee, or could be upgraded to affirmative procedure;
- b) an affirmative instrument could be debated in a delegated legislation committee or a debate in the House could perhaps be insisted on; alternatively a non-controversial instrument could escape a debate if the sifting committee agreed without division that it did not need one;⁴¹
- c) the sifting committee could itself take evidence on an instrument or could refer it to an existing committee for an opinion;
- d) the sifting committee could recommend that an instrument should not proceed in its existing form and suggest amendments: this would require the Government to lay an amended draft or at the least to state its reasons for proceeding with the original one.

62. Procedure in delegated legislation committees considering instruments made under the Bill could be changed to mirror European committees (in relation to an opening Ministerial statement and questions), and they could have a greater continuity of membership. A neutral ‘take note’ motion

40 For details of these powers, see House of Commons Standing Orders Nos. 119 and 143, and the House’s Resolution of 17 November 1998 on scrutiny of European business (printed at the back of the volume of Standing Orders).

41 This mirrors a power of the Regulatory Reform Committee in relation to LROs under HC Standing Order No. 18(1) (a).

may still be suitable, given that the final decision would still be taken by the House, but a motion expressing an opinion might be better.

63. In the Lords the sifting committee's powers could perhaps be limited to upgrading the procedure and to recommending whether a debate in the Chamber or in Grand Committee would be appropriate.

Resources required

64. The House of Lords Select Committee on the Constitution has already drawn attention to the increased staff resources that will be required for examining the legal and political consequences of individual instruments and advising Members on their significance.⁴²
65. Regardless of the amount of advice, however, it is Members who have to take the final decisions, and the demands on their time during the Brexit process are bound to increase. It is therefore essential that the procedures for considering the Brexit-related delegated legislation (as well as the bills containing further primary legislation) are designed, and operated, in such a way that the time is spent on the proposals of the greatest significance. The procedures for delegated legislation currently specified in the Bill may not achieve this. What is needed is close co-operation between expert staff identifying political and legal consequences and Members taking a political view as to which of these consequences are significant.

Conclusion

66. Much of the effectiveness of Parliamentary procedure depends not on the written rules but on how Members make them work. However, in the tense political climate within which the Brexit process is taking place, a committee-based sifting system may command more respect than the Bill's current provision that the use of the affirmative or negative procedure depends on the contents of the draft instrument, with no discretion for Parliament and no opportunity for the use of the super-affirmative procedure.
67. It may be that many of the instruments turn out to be uncontroversial, and do not merit more than a cursory glance. But Members are more likely to accept this if they are reassured that a committee of their colleagues has given that glance, and provided opportunities for further scrutiny and debate where this is desirable.

⁴² Select Committee on the Constitution, 9th Report, paras. 106–8.