Vol. 794
No. 215

Wednesday
28 November 2018

PARLIAMENTARY DEBATES
(HANSARD)

HOUSE OF LORDS
OFFICIAL REPORT

ORDER OF BUSINESS

Questions
Church of England: Disestablishment 619
Mortgages: Cerberus....621
Brexit: Economic Forecast 623
Independent Inquiry into Child Sexual Abuse 626
Hereditary Peers By-election
Announcement 628
Counter-Terrorism and Border Security Bill
Order of Consideration Motion 630
Health and Social Care (National Data Guardian) Bill
Order of Commitment Discharged 630
Brexit: Economic Analysis of Various Scenarios
Statement 630
Immigration (Health Charge) (Amendment) Order 2018
Motion to Approve....634
Investigatory Powers Tribunal Rules 2018
Motion to Approve....655
European Research Infrastructure Consortium (Amendment) (EU Exit) Regulations 2018
Motion to Approve....659
Package Travel and Linked Travel Arrangements (Amendment) (EU Exit) Regulations 2018
Motion to Approve....667
Trade Barriers (Revocation) (EU Exit) Regulations 2018
Motion to Approve....677
Mental Health (Northern Ireland) (Amendment) Order 2018
Motion to Approve....686
Central Securities Depositories (Amendment) (EU Exit) Regulations 2018
Trade Repositories (Amendment and Transitional Provision) (EU Exit) Regulations 2018
Motions to Approve 690
Privacy and Electronic Communications (Amendment) (No. 2) Regulations 2018
Motion to Approve....696
Short Selling (Amendment) (EU Exit) Regulations 2018
Motion to Approve....702
Markets in Financial Instruments (Amendment) (EU Exit) Regulations 2018
Motion to Approve 707

Lords wishing to be supplied with these Daily Reports should give notice to this effect to the Printed Paper Office.

No proofs of Daily Reports are provided. Corrections for the bound volume which Lords wish to suggest to the report of their speeches should be clearly indicated in a copy of the Daily Report, which, with the column numbers concerned shown on the front cover, should be sent to the Editor of Debates, House of Lords, within 14 days of the date of the Daily Report.

This issue of the Official Report is also available on the Internet at
https://hansard.parliament.uk/lords/2018-11-28

The first time a Member speaks to a new piece of parliamentary business, the following abbreviations are used to show their party affiliation:

Abbreviation	Party/Group
CB	Cross Bench
Con	Conservative
DUP	Democratic Unionist Party
GP	Green Party
Ind Lab	Independent Labour
Ind LD	Independent Liberal Democrat
Ind SD	Independent Social Democrat
Ind UU	Independent Ulster Unionist
Lab	Labour
LD	Liberal Democrat
LD Ind	Liberal Democrat Independent
Non-afl	Non-affiliated
PC	Plaid Cymru
UKIP	UK Independence Party
UUP	Ulster Unionist Party

No party affiliation is given for Members serving the House in a formal capacity, the Lords spiritual, Members on leave of absence or Members who are otherwise disqualified from sitting in the House.

House of Lords

Wednesday 28 November 2018

3 pm

Prayers—read by the Lord Bishop of Worcester.

Church of England: Disestablishment
Question

3.07 pm

Asked by ***Lord Berkeley***

To ask Her Majesty's Government what assessment they have made of the case for the disestablishment of the Church of England.

Lord Young of Cookham (Con): My Lords, none.

Lord Berkeley (Lab): I am grateful to the Minister for that comprehensive reply. Going back a short time in your Lordships' House to 1953, when the Queen was crowned, some noble Lords may remember that the Archbishop of Canterbury crowned the Queen and she gave a sworn oath to,

"maintain and preserve inviolably the settlement of the Church of England, and the doctrine, discipline and government",

et cetera. According to the National Secular Society, even since 2002 the proportion of Britons who identify with the Church of England has halved from 31% to 14% and half of British people have no religion. Is it not time for the new monarch, when he comes, to embrace this secular state and perhaps swear an oath to Parliament, as suggested by the UCL Constitution Unit, that he will in all his,

"words and deeds uphold justice, mercy, fairness, equality, understanding and respect for all",

his,

"Peoples, from all their different backgrounds"?

Is that not the way we should be heading?

Lord Young of Cookham: My Lords, the noble Lord seeks to amend the Coronation Oath Act 1688. The Act sets out the oath and requires that it is,

"In like manner Adminstred to every King or Queene who shall Succeede".

While it has been altered to modernise the language and to reflect the territories that have been added and subtracted, the noble Lord's proposition goes beyond that, raising broader constitutional issues and requiring primary legislation.

Lord Lexden (Con): Does my noble friend agree that one of the reasons why an established Church should be retained is that its prelates are needed in this House, not least in order to be held to account for the occasional serious lapse, such as the destruction after a deeply flawed investigation of the reputation of the great Bishop George Bell, who died 60 years ago—an investigation castigated by the noble Lord, Lord Carlile, in a report published a year ago, to which the Church has yet to make any redress?

Lord Young of Cookham: Well, without getting drawn into the second half of my noble friend's question, I agree with the first half that it is important that the bishops are represented in your Lordships' House. They add a spiritual dimension to our discussions. They speak with a moral authority that escapes most of us, and they are the only Members of your Lordships' House with a specific geographical remit.

The Lord Bishop of Worcester: My Lords, I am grateful to the Minister for his affirmation. When the country came together to commemorate the 100th anniversary of the Armistice earlier this month, the Church of England led events of solemn remembrance and thanksgiving in pretty much every community up and down the land of England. The convening power of the Church in bringing together people of different faiths and none is a central feature of its established status that is greatly valued by those of other faiths, who appreciate such a hospitable establishment. Does the Minister agree that at a time when healing divisions must be a priority in our society, the established Church is a significant force for good?

Lord Young of Cookham: I wholeheartedly endorse what the right reverend Prelate has said. The bishops seek to heal religious conflict and promote religious tolerance and inclusiveness. He quite rightly points out that on some of the major occasions in the country's history—coronations, state occasions, other anniversaries and Remembrance Day—it is the Church that has a leading role. It would be sad if that link between Church and state was weakened, and it is not something the other faiths have asked for.

Lord Wallace of Saltaire (LD): My Lords, I remind the Minister that William Gladstone's Liberal Party had a programme of constitutional reform that included the disestablishment of the Church in Ireland, Wales and England, an elected second Chamber, the separation of the House of Lords' judicial function into a Supreme Court, universal suffrage with a fair and open voting system and, for some, abolition of the monarchy. Not all of that programme of constitutional reform has yet been agreed, and I know there are many in this House who are opposed to a number of aspects of it. Meanwhile, can we not be grateful that our national Church—part of that continuing anomaly—does so much work to hold together local communities, in particular working with other faiths, including the new faiths within Britain, and to hold our national community together?

Lord Young of Cookham: I agree with the noble Lord. Who we are as a country is defined by our Church and our state and the relationship that has been developing over 400 years between them. The Government value that relationship; we think it adds value to both sides and is welcomed by the country. We have no plans to destabilise that relationship.

Lord Carlile of Berriew (CB): Would the Minister like to reflect on the undoubted fact that the moral authority in the clergy in Wales is no less than that of the clergy in England, albeit that there has been no established Church in Wales for approximately a century?

Lord Young of Cookham: The noble Lord is right: the Church in Wales was disestablished in, I think, the 1920s. The four bishops that Wales sent to your Lordships'

[Lord Young of Cookham]
House were then assumed by England, and I am sure no one would object to that. He is of course right about the validity of the authority and morality of the Church in Wales.

Lord Mackay of Clashfern (Con): My Lords, we have had some terrible disasters in the months that have passed. And where do people go with these disasters? They flock to the Church. The Church of England is there to provide a service that all faiths and none find comfort in on these occasions.

Lord Young of Cookham: I agree with my noble and learned friend. The Government's policy, in a word, is antidisestablishmentarianism.

Lord Winston (Lab): My Lords, I am one of those people who is unrepresented, as my noble friend suggested. In my view, the Church of England is hugely important to the nature of this country and in this House as well. Indeed, it is one of the reasons why I am proud to be British.

Lord Young of Cookham: I entirely agree with the noble Lord. Perhaps the Labour Party should disestablish the noble Lord, Lord Berkeley.

Lord Elystan-Morgan (CB): My Lords, does the Minister submit to the canard that the Church of England is sometimes seen as the Tory party at prayer?

Lord Young of Cookham: Well, a large number of the Tory party were at prayer 10 minutes ago.

Mortgages: Cerberus

Question

3.15 pm

Asked by ***Lord Sharkey***

To ask Her Majesty's Government what action they intend to take to ensure that those holding mortgages sold by UK Asset Resolution to Cerberus receive a fair deal, and are able to access good value fixed rate mortgages.

The Minister of State, Department for International Development (Lord Bates) (Con): My Lords, the Government believe that better deals should not be beyond the reach of customers who continue to pay their mortgage. The Treasury is working closely with the Financial Conduct Authority and industry to explore what options are available to help customers with inactive lenders. In the meantime, Landmark Mortgages Ltd, which manages mortgages and was sold by UKAR to Cerberus in 2015, is an FCA-regulated organisation and is bound by the FCA principle of treating customers fairly.

Lord Sharkey (LD): My Lords, after Northern Rock went bust, many of its mortgages were sold by UK Asset Resolution to Cerberus, an American hedge fund not authorised by the FCA. At the time, UK Asset Resolution said that returning those borrowers to the private sector would mean that they would be offered new deals, extra lending and fixed rates. This was completely untrue. Instead, about 100,000 borrowers were trapped. They continue to pay very high interest and are not allowed by Cerberus to have a fixed-rate mortgage. Many are now in deep financial difficulty. Can the Minister tell those mortgage prisoners when they may be rescued from Cerberus and what lessons UK Asset Resolution has learned from this sorry episode?

Lord Bates: The noble Lord is right to highlight that this traces back to 2008 and the financial crisis, when we had immense irresponsibility in the mortgage lending system. Some mortgages were offered at 120% of the value of the mortgage, allowing people to self-certify their income. Those mortgages, banks and institutions were then rescued. As a result of state aid rules, they were then unable to offer new mortgages. The mortgage prisoners, to use the noble Lord's term, were then doubly blighted by the fact that in the intervening time, the European Union mortgage credit directive came into effect, which introduced an affordability test which meant that they could not apply to transfer to another lender to achieve a mortgage at a lower rate—they were indeed trapped.

We have tried to find how we can help that situation. We are working with the FCA—we are aware of the representations being made—and will continue to do so. My honourable friend the Economic Secretary to the Treasury will be writing further on this important issue.

Lord Davies of Oldham (Lab): My Lords, the months and years slip by. The Minister says that every constructive effort is being made, but there is precious little in the way of a solution to this problem for these mortgage holders. When a question involves a number of people in considerable difficulty and relates to difficulties with the banking and mortgage sector over a decade, it behoves the Minister to produce a better response than that we are looking four or five years ahead before we have made even a significant gesture.

Lord Bates: There is that aspect to it. I do not want to make a partisan point, but it is part of cleaning up the mess of the irresponsible lending happening in the past. These people find themselves in this situation. We and the Financial Conduct Authority are asking how we can work with the industry to come up with solutions whereby there might be greater flexibility for some people who are trapped to move to lower interest rate mortgages. At the moment, people who are on UK Asset Resolution mortgages may be paying 4% to 5%, but there are better deals, potentially, at 3% to 4%. How do they get on to them? If they have equity in their property, are up to date with their mortgage and have the income to justify it under the new rules, they can already move. It is those people who do not fall into those three categories for whom we need to work for a solution within the new European rules. That is what we are turning our attention to.

Lord Naseby (Con): Does my noble friend fully understand that most of these people are, if I may use the phrase, very ordinary people? They are not experienced in financial matters in any depth, and it really is a

particular problem. It is totally non-party political. It is an issue that the FCA should give greater priority to than it has done hereto. I hope not to have to stand up in a year's time to ask this question again.

Lord Bates: It is a major issue. The average size of the mortgage held under UK Asset Resolution is around £120,000. People find themselves in these very difficult situations, but we are bound by the rules as they are. There will be some opportunity to offer a little bit of flexibility when the credit directive has to be onshored into UK legislation. There will be that opportunity, within tight limits, to look again at some of these aspects, and of course we will do that to the full with the FCA.

Lord Wrigglesworth (LD): The mortgage prisoners that have been created by this deal between UK Asset Resolution and Cerberus are seeking to get further mortgages. Cerberus gave an undertaking when it bought this package of mortgages that they would be allowed to do so. Is the Minister saying that Cerberus is helping these people to get the lower mortgages that are available and to stop being imprisoned in the deal that was done at the time? Will UK Asset Resolution also ensure that if any future mortgages are sold off, the undertakings given will be upheld?

Lord Bates: My Lords, I will not go into the technical detail, but one of the conditions for Cerberus to operate in this country was that it operate under a regulated body, so it operates under Landmark Mortgages. It is not active in the lending market, so the people who can move to get the better deals are those who are up to date with their payments, have equity in their property and can meet the new affordability test. That is the conundrum that we are seeking to find a way through.

Lord Fox (LD): My Lords, my colleagues, in two different ways, have asked the same question, which is what lessons have the Government learned, and how will they avoid this happening again? Will the Minister please answer that question?

Lord Bates: Yes: I think that lessons have been learned. I am very happy to make available to the noble Lord the response that the Economic Secretary to the Treasury gave to the chairman of the Treasury Select Committee on 12 November this year—which sets out many of the details of what we can learn—as well as the response from the Financial Conduct Authority to the noble Lord, Lord Sharkey. I am happy to make both available.

Brexit: Economic Forecast

Question

3.23 pm

Asked by ***Lord Strasburger***

To ask Her Majesty's Government whether they forecast that any sectors of the United Kingdom economy will be disadvantaged by the proposed European Union Withdrawal Agreement and political declaration when compared with the alternative of the United Kingdom remaining a member of the European Union; and, if so which sectors.

The Minister of State, Department for Exiting the European Union (Lord Callanan) (Con): My Lords, the UK will be leaving the EU on 29 March next year. Today the Government published their EU exit analysis. It is not a forecast, but focuses on the long-term impact on the UK's economy. The analysis shows that the model White Paper scenario would support higher economic output for all sectors, compared to the model "no deal" scenario. This is the best deal on offer for protecting jobs and our economy.

Lord Strasburger (LD): I thank the Minister for that Answer to my Question, if that is what he thinks it was. The Prime Minister repeatedly asserts that rejecting her deal will take us back to square one. That can mean only one thing: that we continue with our current status, which is full membership of the European Union, with all its benefits and with all our current opt-outs. Does the Minister agree with the majority of this House, the majority of the other place, and the majority now of the voting public that square one is a great place to be, and the best option for the country?

Lord Callanan: I am sorry if the noble Lord was disappointed with my Answer, but perhaps he has neglected the small matter of the EU withdrawal Act, which was passed by this Parliament—this House and the House of Commons—and legislated for our withdrawal from the European Union as a result of the referendum, which the Liberals also want conveniently to ignore. We are leaving the EU on 29 March next year. I hope that we will leave with this deal, but if we do not, we will leave with no deal.

Viscount Hailsham (Con): My Lords, does my noble friend agree with the Treasury assessment that the United Kingdom's economic interests would best be served by remaining in the European Union on existing terms?

Lord Callanan: I refer my noble friend to the Answer I just gave the noble Lord. We had a referendum on the subject and the country decided to leave the European Union. That referendum was authorised and legislated for by this Parliament, our notification of withdrawal was legislated for by this Parliament, and we have now ratified the withdrawal Act, which legislates for our withdrawal date of 29 March next year.

Baroness Hayter of Kentish Town (Lab): Given that that analysis is based on the Chequers deal and not on the deal that has been negotiated with the EU, when will we have an economic analysis of the deal that is to be put in front of this House, and when will we get the legal advice?

Lord Callanan: The agreement of the political declaration will now be followed by negotiations on the legal text. We and the EU both recognise that this means that there could be a spectrum of different outcomes, and have agreed that it should be as ambitious as possible. On the legal advice, my understanding is that there will be a Statement in the House of Commons next week.

Baroness Ludford (LD): My Lords—

Lord Lilley (Con): My Lords, is it not a myth that there is a conflict between democratic control of our laws and prosperity? In fact, democracy and prosperity go hand in hand, because in a democracy, if the Government do not deliver prosperity, the people can chuck them out. But the EU is not like that. Its principal economic policy, the euro, has been a disaster which has deprived millions of young people throughout southern Europe of jobs, but nobody in the European Commission has lost their job. Should we not be free to have our own laws, not constrained within a straitjacket of uniform laws across the European continent?

Lord Callanan: As always, my noble friend makes a powerful point. One of the results of the referendum that I am particularly proud of is taking back control to this country. It delivers control of our immigration policy, our fishing policy and our agricultural policy. Once again, the destiny of this country is in the hands of its elected representatives, which is a good thing.

Baroness Ludford: My Lords—

The Earl of Clancarty (CB): My Lords, the original Question was on sectors of the economy. What do the Government think will be the particular effect of the loss of freedom of movement on our service industries with regard to business in Europe?

Lord Callanan: The noble Earl is correct that freedom of movement is ending. We are in favour of agreeing a mobility partnership with the EU which will allow the movement of business professionals, tourists, and so on, from which both our economies develop. But there will no longer be freedom of movement as in the original treaties.

Baroness Ludford: My Lords—

Lord Tebbit (Con): My Lords—

Baroness Ludford: No; I will not give way to a third Tory. Can the Minister tell us whether this is the first Government in history who have deliberately pursued a policy that they know—as the Chancellor confirmed this morning—will make this country and its people poorer? If not, please can he name any other Governments who have acted in such a way?

Lord Callanan: I do not think the noble Earl would be happy to be called a Tory by the noble Baroness. This policy will not make the country poorer. On every scenario, this country will continue to grow. A range of possible growth predictions is modelled in this analysis, but of course many other factors can influence economic growth, and this is likely to be a relatively small contributor to the overall economic growth. Of course, what would be truly disastrous would be a Labour Government, who would affect the economic growth of this country. We are proud of our economic record; we have delivered record low levels of unemployment for 40 years, the Government can be proud of their economic record, which will continue.

Lord Bridges of Headley (Con): My Lords—

Lord Tebbit: My Lords—

Lord Taylor of Holbeach (Con): My Lords, my noble friends will have to decide which of them will ask a question.

Lord Tebbit: My Lords, will my noble friend remind the questioner that square one for this country was to be a free, democratic country in which we elected our own Government and could sack our own Government? That is not the European Union.

Lord Callanan: I will agree with my noble friend briefly and then perhaps we can hear from the noble Lord, Lord Bridges.

Lord Bridges of Headley: As we have heard, a number of my noble friends have been asking whether Article 50 might be revoked and making the case for this. Yesterday, the European Council's top lawyer argued that Article 50 cannot be unilaterally revoked but would require the unanimous support of all EU member states. Do the British Government agree with the EU on this point?

Lord Callanan: I knew I would regret asking the noble Lord to come in on this one. He will be well aware that as the Minister responsible for this matter, I am unable to comment on the ongoing judicial process beyond saying that the UK will not revoke its Article 50 notice.

Independent Inquiry into Child Sexual Abuse

Question

3.31 pm

Asked by ***Lord Beecham***

To ask Her Majesty's Government when they intend to provide a formal response to the Interim Report of the Independent Inquiry into Child Sexual Abuse, published on 25 April.

The Minister of State, Home Office (Baroness Williams of Trafford) (Con): My Lords, the Government welcome the inquiry's interim report and appreciate the work that has gone into it. We are carefully considering all its recommendations and will publish our response shortly.

Lord Beecham (Lab): My Lords, eight years ago, Gordon Brown issued an apology for the mistreatment of migrant children sent to Australia and other parts of the Commonwealth between 1945 and the early 1970s, many of whom suffered serious physical, sexual and emotional abuse. The Independent Inquiry into Child Sexual Abuse published its report last March calling for redress within 12 months. Australia established a scheme within six months. In July, the Minister for Mental Health and Inequalities promised a response before the Summer Recess. None has been published. How long will it take this Government to accord justice to the many victims of such shocking mistreatment?

Baroness Williams of Trafford: The noble Lord is absolutely right: a response is required and will be forthcoming very shortly. On top of that, the Government are acutely aware of the age and declining health of so many former child migrants. We are, as I say, committed to providing a considered response to the inquiry's recommendations as soon as possible.

Baroness Walmsley (LD): My Lords, does the Minister accept that every week the Government delay in taking a grip on this issue means more young people having their lives destroyed? When they are considering their response, will the Government take account of the mounting evidence, added to only this week by evidence about the Catholic Church, that unless people are forced to report child abuse to external agencies, and report only within the agency concerned, very often these organisations will cover it up because they are afraid of reputational damage? Will the Government take that into account?

Baroness Williams of Trafford: I totally accept the noble Baroness's point—I have just made it myself—that nobody wants to see any further delay, certainly given the age of some of these former child migrants. On reporting sexual abuse to external agencies, the noble Baroness is absolutely right: unless there is a proper system of support for these allegations, there is then further opportunity for internal cover-up.

Lord Morris of Aberavon (Lab): My Lords, could the Minister comment on an item on the front page of today's *Times*, which reports that a child-abuser in prison was able to stake his claim to parental rights to the child of the victim, to her astonishment. Is Rotherham Council part of the problem, or do the guidelines need to be changed?

Baroness Williams of Trafford: That report is extremely distressing for the individuals concerned and for all of us. I know that the relevant government departments here—the DfE and the MoJ—and the local authority will work urgently to understand the facts of this case and to implement any changes needed to the law or procedure. I thank the noble and learned Lord for raising this matter, because it is something on which I think we all agree.

Lord Empey (UUP): My Lords, the Minister will have heard the noble Lord, Lord Beecham, talk about delays, but this delay pales into insignificance compared with the delay in the implementation of the Hart report in Northern Ireland, which investigated historical institutional abuse. That report has been sitting on the table for years. It has unanimous political support from every party in Northern Ireland—not a single politician is not in favour of its implementation—but, because of the current crisis and the failure to take any action, the victims are being revictimised all over again. I invite the Minister to appeal to her right honourable friend the Member for Staffordshire Moorlands to ensure that the Hart report is implemented and that those people are given justice.

Baroness Williams of Trafford: I certainly will elect to bring the noble Lord's points to the attention of my right honourable friend. Of course, a particular set of circumstances in Northern Ireland means that certain things do not go smoothly, and this is perhaps one of them. However, I will certainly take back the noble Lord's points.

Lord Campbell-Savours (Lab): My Lords, do Ministers accept that, in organising its inquiries and hearings, the IICSA has a duty to protect the reputations of persons who have been accused of sexual offences but not found guilty in a court of law? Or is it the Government's position that IICSA should be free to undermine the reputations of whole families by the way it conducts its inquiries?

Baroness Williams of Trafford: It is important to point out that IICSA's central role is to inquire into a number of institutions rather than people, and that includes the Home Office, the DfE and the Department of Health and Social Care.

Lord Beecham: My Lords, have the Government made any assessment of the process in Australia, where, as I said, matters have been resolved within six months? If so, what lessons have they learned from that?

Baroness Williams of Trafford: The noble Lord is right that many of the children who went to Australia were apologised to by the Australian Government, and indeed the Australian Government issued compensation to some—I do not know whether it was all—of those involved. Certainly, we will consider all those things in the round when we respond to the inquiry review.

Lord Lexden (Con): Why do the Government take so long to reach a decision on these matters?

Baroness Williams of Trafford: My Lords, the Home Office is providing a consolidated report on behalf of all the government departments involved. My noble friend is absolutely right to point out that we need to issue our response very soon, but we want to respond in a very considered way and there are quite a lot of recommendations to be considered.

Hereditary Peers By-election

Announcement

3.37 pm

The Clerk of the Parliaments announced the result of the by-election to elect a Cross-Bench hereditary Peer, in place of Lord Northbourne, in accordance with Standing Order 10.

Twenty-nine Lords completed valid ballot papers. A notice detailing the results is in the Printed Paper Office and online. The successful candidate was Lord Carrington.

[Baroness Williams of Trafford]

Lord Grocott (Lab): My Lords, as has become the tradition on these occasions, I should like to say a couple of words. I thank the clerk for giving us the result, or at least for naming the successful candidate. He now has a burgeoning career as a returning officer because another one is due in January. However, I am afraid that, as far as I am concerned, there is not enough information, despite the improvements we have seen.

It is worth saying that in this by-election there were 31 electors, which is about par for the course. There were 11 candidates, two of whom did not submit election addresses, and this is the 35th by-election held under a system established 19 years ago as a short-term, interim measure.

I ought to avoid being churlish by saying to the clerk, the authorities and the usual channels that they have improved these by-elections—or, at least, the procedures for them—in two respects. For the first time ever, thanks to various requests, the fact that the result was to be announced appeared on today's Order Paper. It was, admittedly, in the smallest print discoverable, but it at least told us that there was a hereditary Peers' by-election result today, the first time that has happened—normally they are smuggled in secretly. It also appeared on the annunciator, so I am grateful for those two small improvements.

However, I should like to see us go a little further. I certainly think we need more information than just the name of the winning candidate. I would like to know what his or her—it will be his, because all those on the list are male, bar one—majority was. Most returning officers give the number of votes cast for each candidate. I would also like a little of the sunshine of publicity on this. I have asked, without success, several questions suggesting that the media should be there to record the count, as they are in all other by-elections. Only a camera could capture the drama of the occasion—the ballot papers piled up on the trestle tables until the winning line is passed and the 16 votes obtained. I suggest that for future occasions.

Finally, and seriously, this House has decided that we should reduce its size to around 600 Members. That seems to have near-universal approval across the House. We shall have great difficulty doing that unless something happens. So far this year, the life Peers—if I may put it in those terms—have been reduced on the basis of two out, one in, which seems a pretty sensible, gentle way of reducing the size of the House. The principle for the hereditary Peers this year has been three out, three in. This clearly undermines the House's objective of trying to reduce its size in reasonable time. There is a mechanism for dealing with this in a painless way—a Private Member's Bill whose sponsor modesty prevents me mentioning. Anyone who was present on Friday will know that that Bill passed Committee by acclamation, with overwhelming support. For the good sense of the House, the sooner this Bill is on the statute book, the better.

Lord Robathan (Con): I am most interested in what the noble Lord, Lord Grocott, says. I have much in common with him on many issues, but not on this. I think the whole House could agree that the by-election system is rather quirky and unusual, but it was put in place by a fellow called Tony Blair, whom I think the noble Lord, Lord Grocott, knew pretty well. Rather than arguing the toss on this, I congratulate the noble Lord, Lord Carrington. I am sure he will be a great addition to the House.

Lord Blunkett (Lab): My Lords, I am undoubtedly in favour of congratulating the noble Lord, Lord Carrington, and I am sure he will make a tremendous contribution to this House. But, as we said on Friday—and I am very pleased that Committee has been completed—the whole argument about this is so arcane that, if people really knew what we were saying and doing, they would think we had lost our marbles.

Counter-Terrorism and Border Security Bill

Order of Consideration Motion

3.43 pm

Moved by ***Baroness Williams of Trafford***

That the amendments for the Report stage be marshalled and considered in the following order:

Clauses 1 to 12, Schedule 1, Clauses 13 to 18, Schedule 2, Clauses 19 to 21, Schedule 3, Clause 22, Schedule 4, Clauses 23 to 27, Title.

Motion agreed.

Health and Social Care (National Data Guardian) Bill

Order of Commitment Discharged

3.44 pm

Moved by ***Baroness Chisholm of Owlpen***

That the order of commitment be discharged.

Baroness Chisholm of Owlpen (Con): My Lords, I understand that no amendments have been set down to this Bill and that no noble Lord has indicated a wish to move a manuscript amendment or to speak in Committee. Unless, therefore, any noble Lord objects, I beg to move that the order of commitment be discharged.

Motion agreed.

Brexit: Economic Analysis of Various Scenarios

Statement

3.45 pm

The Minister of State, Department for International Development (Lord Bates) (Con): My Lords, with the leave of the House, I will repeat the Answer to an

Urgent Question given in another place earlier today by my honourable friend the Financial Secretary to the Treasury:

"Mr Speaker, today the Government published the analysis of the economic and fiscal effects of leaving the EU, honouring the commitment made to this House.

It is important to recognise that the analysis is not an economic forecast for the UK economy; it only considers potential economic impacts specific to EU exit and it does not pre-judge all future policy or wider economic developments. The analysis sets out how different scenarios affect GDP and the sectors and regions of the economy against today's arrangements with the EU.

Four different scenarios have been analysed: a scenario based on the July White Paper; a no-deal scenario; an average FTA scenario; and an EEA-type scenario. Given the spectrum of different outcomes, and ahead of the detailed negotiations on the legal text of the deal, the analysis builds in sensitivity, with effectively the White Paper at one end and the hypothetical FTA at the other.

I turn now to the outcome of the analysis. The analysis shows that the outcomes for the proposed future UK-EU relationship would deliver significantly higher economic output—around 7 percentage points higher—than a no-deal scenario. The analysis shows that a no-deal scenario would result in lower economic activity in all sector groups of the economy compared to the White Paper scenario. The analysis also shows that in the no-deal scenario, all nations and regions of the UK would have lower economic activity in the long run compared to the White Paper scenario, with Northern Ireland, Wales and Scotland all being subject to a significant economic impact.

What the Government have published today shows that the deal on the table is the best deal. It honours the referendum and realises the opportunities of Brexit. It is a deal that takes back control of our borders, our laws, and our money. Let me be very clear to the House and to those who say that the economic benefits of staying in the EU mean we should overturn the result of the referendum: to do so would open up the country to even further division and turbulence and undermine the trust placed by the British people in our democracy. What this House and our country face today is the opportunity presented by the deal: a deal that honours the result of the referendum and safeguards our economic future; or the alternative, the risk of no deal or indeed of no Brexit at all".

3.47 pm

Lord Davies of Oldham (Lab): My Lords, I am grateful to the noble Lord for that short series of comments on this important issue.

Of course Her Majesty's Opposition respects the referendum result but no one can offer much respect to the botched Brexit negotiations, in which the Prime Minister neither meets our six points nor her own red lines. Do the Government accept that the choice cannot be between her deal and no deal? Do they not recognise that we need a deal to support jobs and the economy, and which guarantees that important standards are sustained and protections are clearly in place?

There is a real worry about the Government's position as a result of the negotiations, and this House and the other place will hear a great deal about that in the next few weeks.

Lord Bates: The choice before us is clearly between a deal and no deal. Many people have speculated over the past two and a half years as to what would happen. They said that no agreement would be reached in December and that we would not get the EU (Withdrawal) Act through Parliament. Both those things have happened. Also, crucially, they said that we would not reach a deal this November, which the Prime Minister has secured. It is a good deal for this country, which is being put before Parliament as promised. Also as promised, we are supplying, in a transparent way, the economic analysis of that, included in technical notes, so that the House can come to an informed decision.

Baroness Kramer (LD): My Lords, the Chancellor this morning—I am sure quite inadvertently—suggested in a number of media interviews that the deal being presented to Parliament would offer a level of prosperity only marginally poorer than that of remaining in the EU. Of course, he was reading from the wrong column of his own report. Is he now willing to make the correction and confirm, as the Institute for Government and others have, that the nearest comparison to the proposed deal is the column entitled "Modelled White Paper with 50 per cent NTB"—non-tariff barrier—"sensitivity", which blows a complete cannonball through that assertion and, indeed, shows that the option on the table is far more damaging even than the EEA or Norway option?

Lord Bates: The analysis shows a range of possible outcomes because we do not know, at this stage, what the outcome will be of the negotiations. We have set out a proposal in the White Paper that is backed up by the political declaration, and we want to see that achieved. To help the House and indeed others to prepare for that, we have provided for a whole range of scenarios. That includes sensitivity analysis, which would allow for just the point the noble Baroness has highlighted—about different types of trade outcomes—to be factored in before people come to a conclusion.

Baroness Quin (Lab): My Lords, is it not clear from what the Minister has said that what is in front of us is not delivering exactly the same benefits, which is what we were promised by the former Brexit Secretary in the other place? What discussions have the Government had with the City of London about the exclusion of services? The figures seem to show that the economy of London—which, it was previously thought, would do rather well out of this situation—is being quite badly affected because of the exclusion of the service sector which is so important to our economy.

Lord Bates: I can confirm that the economic analysis being undertaken is for the economy as a whole—goods and services—and that is reflected in the regional pages. Further analysis by the Bank of England, which we believe will be released in about 40 minutes' time, will give another view that will be helpful to Parliament

[LORD BATES]
and to others who wish to see what the impact would be. But we are absolutely confident that the deal as presented represents the best opportunity for this country, and that is backed up by the analysis.

Lord Dobbs (Con): I wonder whether my noble friend could help me understand this. He said, in his own words, that there is a clear choice between this deal and no deal, but the Statement finished off with a third alternative: no Brexit at all. Could he elaborate: in what circumstances could there be no Brexit at all?

Lord Bates: We have the EU (Withdrawal) Act which, of course, commits us to a course of action. The choice I mentioned was clearly the preference that we would have a deal as negotiated by the Prime Minister, but that is subject to the will of Parliament as expressed in a meaningful vote on 11 December, and we are seeking to inform that debate.

Lord Wigley (PC): My Lords, the Minister will be aware that the Welsh economy benefits substantially from European structural funds. At the time of the referendum, guarantees were given by those campaigning for Brexit that these funds would continue way into the future, not just up to 2020. What assumption was made in this document about the continuation of such funding for the Welsh economy?

Lord Bates: I do not have specific information on that. I know that, when we leave the European Union, the intention is to establish a fund to seek to address the points that the structural funds dealt with. On whether Wales will continue to benefit from or be eligible for the structural funds, I am very happy to write to the noble Lord on that and what is covered in the analysis.

Lord Fox (LD): My Lords, the tabulation clearly links the importance of migration to future GDP. In fact, going from free movement to zero migration reduces GDP by a further 2%. In that case, does the Minister share my frustration that his colleague in the other place is still delaying publishing the immigration Bill? When will it be published? It is extremely important to this country's future.

Lord Bates: The answer is, very soon.

Viscount Ridley (Con): Is my noble friend at all concerned about what appears to be a circular argument in the analysis of the Treasury, in which it assumes its own conclusions? Essentially, it says that if there are no gains from separating from the EU, there will be net losses from that separation in proportion to the degree to which we separate.

Lord Bates: This is not Treasury analysis; it is government analysis. It has been drawn up in collaboration with departments such as BEIS, Defra and DExEU, which have had a significant input. We believe that the analysis supports the case for backing the deal that has been presented to us.

Lord Stoddart of Swindon (Ind Lab): My Lords, does the Minister agree that the forecasts made during the referendum have proved utterly false and that we should therefore take note of what is being said by the Bank of England and others? Secondly, does he agree that the referendum was not simply about trade or money, but whether this country makes its own laws and decides not to continue to pay into the EU's coffers?

Lord Bates: All of those points were made, but the important one concerns the nature of the analysis itself. It is analysis, not a forecast. The forecast will take into account many other things, such as productivity improvements and demographic changes—those are for later. What was promised was economic analysis of the impact of leaving the European Union in different scenarios.

Immigration (Health Charge) (Amendment) Order 2018

Motion to Approve

3.57 pm

Moved by ***Baroness Williams of Trafford***

That the draft Order laid before the House on 11 October be approved.

Relevant document: 3rd Report from the Secondary Legislation Scrutiny Committee (Sub-Committee A).

The Minister of State, Home Office (Baroness Williams of Trafford) (Con): My Lords, since its launch 70 years ago, the National Health Service has transformed the health of the nation and established itself as one of this country's greatest assets. Our NHS is always there when we need it and those who live in this country contribute to the long-term sustainability of the service over their lifetime. The NHS is the envy of the world and will always be free at the point of delivery.

The immigration health charge represents the most cost-effective and fair means of ensuring that temporary migrants make a financial contribution to the operation of the service. Doubling the charge will still ensure that official health costs associated with migrating to the UK remain lower than or comparable with those of other nations, including those in Europe, North America and Australasia. The charge is paid by non-European Economic Area temporary migrants who apply for a visa for more than six months or apply to extend their stay in the UK for a further limited period. It is paid up front as part of the immigration application process and is separate to the visa fee.

From the point of arrival in the UK, a charge payer can enjoy the same access to the NHS as a permanent resident. They can use the full range of NHS services without incurring treatment charges and without having made any tax or national insurance contributions in the UK. They generally pay only those NHS charges that a UK resident would also pay.

Lord Maxton (Lab): My Lords, the Minister keeps talking about "the UK", but there are four health services within the United Kingdom. Can she tell the House whether this order covers all those health services, or just England?

4 pm

Baroness Williams of Trafford: I am talking about the United Kingdom, so I am talking about the devolved Administrations as well—I think. Yes, I am. I thought it was a trick question and so doubted my own mind. Going back to what temporary, non-EEA migrants might have to pay for, they generally pay only those NHS charges that a UK resident would also pay: an example might be prescription charges in England. They will also be charged for assisted conception services in England, should they choose to use them.

The charge rate has not increased since its introduction in 2015. It is currently £200 per year; students and youth mobility scheme applicants enjoy a discounted rate of £150 per year. To date, the charge has raised over £600 million for the NHS. Income is shared between England, Scotland, Wales and Northern Ireland using the Barnett formula. That answers the noble Lord's question.

The draft order amends Schedule 1 to the Immigration (Health Charge) Order 2015, to double the annual amount of the charge across all routes. Students, dependants of students and youth mobility scheme applicants would continue to pay a discounted rate, which would rise to £300 per person. The annual amount for all other relevant application categories would rise to £400 per person.

The Department of Health and Social Care has reviewed the cost to the NHS of treating charge payers in England. It estimates that the NHS spends, on average, £470 per person per year for all migrants who pay the charge. This calculation includes those surcharge payers who actually use the NHS and those who do not. Where the cost has been calculated on the basis of those who use the NHS, the figure rises to £1,300 per person per year. This means that temporary migrants are currently paying the surcharge at a significantly lower rate than the amount it costs to treat them each year.

The proposed new charge level is intended to better reflect the costs to the NHS of treating those who pay it. However, it is important to note that it will remain below average cost recovery level, in recognition of the wider contributions that migrants make to this country. It will also continue to represent good value compared to health insurance requirements in other comparable countries.

The charge should not be conflated with the system of hospital treatment charges for overseas visitors provided in NHS legislation. That provides a separate framework for recovering treatment costs from short-term visitors and those without lawful status. The NHS charging system observes the important principle that immediately necessary or urgent medical treatment is never withheld, irrespective of the patient's status.

The Government believe it is fair that temporary migrants make a financial contribution to the comprehensive and high-quality range of NHS services available to them during their stay. The charge will remain a good deal for migrants. Even at the increased rates, they will still pay less than it costs the NHS to treat them. By increasing the charge, the Government estimate that a further £220 million a year could be generated, helping to protect and sustain our world-class healthcare system for everyone who uses it. By way of illustration, England's share of the additional income could fund around 2,000 doctors or 4,000 nurses. I commend this order to the House.

Amendment to the Motion

Moved by ***Lord Rosser***

At end to insert "but that this House regrets that the Order provides for an unaffordable level of fee, particularly for those who came to the United Kingdom as young children; does not take into account the contribution of migrants who are taxpayers; and may have a detrimental effect on recruitment for key public services, including nursing."

Lord Rosser (Lab): My Lords, as the Minister said, for the last three years, under the Immigration Act 2014 an annual health charge has been payable by non-EEA nationals making an immigration application to enter or remain in the United Kingdom. That charge has been on top of any immigration application or visa fees, and was introduced as part of a clampdown on what has been described as health tourism.

I do not intend to go down the same road as the Secondary Legislation Scrutiny Committee, whose report on this order states, at paragraph 7:

> "While acknowledging that the revenue to the NHS will be increased, it is still not clear to the Committee why the charge remains below the full cost of supplying these services".

It ended by suggesting that:

> "The House may wish to ask the Home Office Minister to justify this subsidy".

That is not an invitation that I will take up; it is upto the Minister whether she chooses to explain the Home Office's argument to justify this "subsidy", as the committee described it. I want to raise the matter of the high level of the charge, the increase and the impact that it will have.

As the Minister said, the order doubles to £400 a year the immigration health charge payable when an immigration application is made, with it being doubled from the current £150 to £300 for students and their dependants. The payment cannot even be made in instalments, and must cover the total cost up front for the duration of the leave applied for. It is payable in respect of each individual named on the immigration application.

The present charge was determined in 2015. What has the increase in NHS expenditure been since then on average for immigration health surcharge payers? Could the Government give a breakdown of their estimate of £470 on average per year per charge payer? The Secondary Legislation Scrutiny Committee drew attention in its report to the fact that one part of the Government's documentation referred to the revised charge being £470 per year per person, while a subsequent part of the impact assessment refers to it being £480, but perhaps that is not worth quibbling about.

[Lord Rosser]

What was the equivalent estimated cost in 2015, when the charge was first imposed? The Secondary Legislation Scrutiny Committee tells us at paragraph 3:

> "When the charge was originally introduced in 2015 we drew the matter to the attention of the House, questioning why it was set at £200 per person per year, significantly below full cost recovery levels, then estimated at £800 per person per year".

If I am looking at comparative figures—if not, I am sure that the Minister will correct me—how was the full cost recovery deemed to be £800 per person per year in 2015 but is not at that level currently? Apparently it is now either £470 or £480. That fact does not exactly inspire much confidence in the figures put in front of us in the Government's documentation. Can she comment on that?

The charge that we are talking about is payable on an annual basis until such time as the person to whom the payment relates is granted indefinite leave to remain in the UK or returns to their own country at the end of their visa period. Applying for two and a half years of limited leave to remain will require an immigration health charge of £1,000 to be paid. As I understand it, paying the charge means that the person covered is exempt from the system for undocumented migrants in the UK of up-front charging of some 150% of the estimated cost of treatment prior to accessing secondary NHS healthcare.

The increased charge will hit children who have grown up in the UK but have uncertain status particularly hard. These are not temporary migrants. If they can make an application for leave to remain they are granted just two and half years leave at a time and will have to make four applications over the course of 10 years. That costs just over £6,500 in application fees, plus an additional £2,000 for the immigration health charge, at the current rate of £200 per annum, before they can be granted settled status or indefinite leave to remain—a total of just over £8,500. With the doubling of the immigration health charge to £400, which the Government intend to levy from February next year, a further £2,000 will be payable over the 10-year period, bringing the total to over £10,500.

For migrants on lower incomes in particular, this significant further increase will mean even greater difficulty in finding the not-inconsiderable up-front costs required to secure or maintain regular status in the UK. That will have an impact on the quality of children's lives, not least if problems arise over finding the money to pay the rent, and increase the prospect of poverty or deepening existing levels of poverty. Bear in mind that an immigration application can become invalid by the non-payment or even partial payment of the immigration health surcharge. Yet, without regularised status a migrant cannot access housing, education and health services, the latter in particular posing a potential public health risk.

I accept that it is true that there is a system of exemptions and fee waivers, but apparently less than 8% of children are granted fee waivers. A family of four with working parents would be required to save some £8,100 every two and half years, excluding legal costs. As I understand it, that is more each year in immigration fees than the average UK household spends on food. Yet, parents in employment would also pay national insurance and taxes, contributing towards the cost of the NHS. They would thus, in effect, be charged twice.

Interestingly enough, as far as I can see, the impact assessment makes no reference to the potential impact on children and young people and their rights—in particular for those who have grown up in the UK and are on the 10-year route to settlement—of the doubling of the immigration health surcharge. How does that square with the Government's stated commitment to consider children's rights when developing policy? Will they now carry out that assessment? What steps will the Government take to ensure that low-income families who might be ineligible for a fee waiver under the current system do not risk losing their status because of the high fees and the high health surcharge, along with the requirement for up-front payments?

If I am right in believing that a report by the Independent Chief Inspector of Borders and Immigration is due on Home Office charging for services, including the impact of high fees in the immigration system, why is the immigration health surcharge being doubled now before we have had the chief inspector's report?

The immigration health charge will also have an impact on those non-EEA citizens either working or thinking of coming to work in this country. The increase in the immigration surcharge could also worsen the skills shortage in a number of key areas, such as the construction and hospitality sectors, and in health services. For example, the charge has to be paid by non-EEA international nurses and their families coming to work in health and care services across the UK. At present, there are apparently some 40,000 such nursing vacancies in England, a figure that is estimated to rise further. There appear to be no guarantees that the immigration health charge will not be applied to EU citizens after Brexit and potentially make skills shortages even more acute.

4.15 pm

The Government have said that any EU citizen who is resident in the UK before we leave the European Union next March will not pay the charge, but what will be the situation for EU citizens coming to this country either after March of next year or after the end of any transition period? The Government committed themselves to publishing a White Paper on the future immigration system this autumn, I believe. They said that the charge was being considered as part of that process and of ongoing negotiations. I do not know when the Government believe that autumn ends, but will the Minister say when that White Paper will be published?

The Explanatory Memorandum states, somewhat surprisingly, that there was no public consultation on the increase in charges. Why was there no public consultation, particularly since the impact assessment runs to some 36 pages of assumptions and estimates on the impact, costs and increases in revenue arising from the changes and asserts that the increase will increase public confidence in the immigration system? Maybe a public consultation would have brought to light some of the issues I am raising in respect of children and the potential impact on the skills shortage

in nursing, construction and the hospitality sectors, for example. This last is an issue that, according to the press, is of concern, post Brexit, to the business world and to those running public services, as well as, apparently, some members of the Cabinet. The Government should reconsider the fairness and appropriateness of the proposed increases we are discussing as a matter of urgency. I beg to move my amendment.

Lord Paddick (LD): My Lords, I thank the Minister for explaining this order and I wholeheartedly agree with the noble Lord, Lord Rosser, that this House should not approve it, for the three reasons he set out. The first is that, taken together with other excessive charges made by the Home Office on those seeking to come to or remain in the UK, the increase in the immigration health charge provided by this order makes it unaffordable for many to come to or remain in the UK, even though they have a legal right to do so. Secondly, while the immigration health charge is intended for those seeking to stay temporarily in the UK, as the noble Lord, Lord Rosser, has said, many people whose applications for permanent leave to remain are being considered will also be unfairly caught by this charge. The final issue is that, in addition to paying the immigration health charge, many of those affected will be working in the UK, paying income tax and national insurance. They will effectively be paying twice for any treatment they receive from the National Health Service.

We have discussed before the level of charges levied by the Home Office for such things as visa applications. These are way above the cost of processing such applications. When this 100% increase in the immigration health charge is added to these already excessive costs, it becomes unaffordable for many even to contemplate coming to the UK, even though they are perfectly entitled to do so. As the noble Lord, Lord Rosser, pointed out, children seeking permanent leave to remain are now granted only a maximum of two and a half years' leave at a time. They would have to make four applications before they reach the required 10 years' residency, costing £6,521 per child at current prices. They are now going to have to add another £4,000 in immigration health charges, bringing the total for one child to £10,521 just to remain in the UK.

There are exemptions from the health charge and other immigration charges, yet the process is so complicated and ineffective that, as the noble Lord said, only 8% of children are granted fee waivers. Many families are having to make the choice between being plunged into poverty and being forced to leave the UK—which is, of course, exactly what this Government are trying to do, whether or not they have changed the packaging from "hostile environment" to "compliant environment".

The Government's own impact assessment clearly anticipates a reduction in the number of people seeking to enter or remain in the UK, as a result of doubling this charge. The impact assessment also shows that there will be a net cost to the Exchequer in dissuading working migrants from coming to the UK, because immigrants contribute more overall to the public purse than they cost in public expenditure. They do so already, without the immigration health charge increase. There is one clear conclusion from the impact assessment. This is a financially self-harming, ideological and constituent part of the hostile—or compliant—environment, designed to deter those from overseas coming to or remaining in the UK, even if they come here to make a valuable contribution to the UK economy.

The irony of the Government's whole approach to immigration and the punitive charges levied by the Home Office is encapsulated by the case of nurses from non-EEA countries coming to work in the NHS. First, this Government create a hostile environment for all immigrants by holding a referendum on membership of the European Union where false stories of excessive immigration are deployed by the leave side, resulting in a massive increase in hate crime against those from other countries while making EU migrants in particular feel vulnerable and unwanted. Having caused an exodus from the health service of EU nationals working in it, the NHS is then forced to employ non-EEA nationals to fill the gaps. It has to pay an additional £1,000 per non-EEA national employed per year in immigration skills charges. Meanwhile a qualified nurse from, say, the Philippines—a country that can ill afford to spend money training nurses only to see them leave for the UK once qualified—not only costs the NHS £1,000 a year more than an EEA national employed in the same role but also has to pay £400 a year towards the cost of the NHS, even though she is employed by the NHS. She will effectively pay twice for the NHS by paying tax and national insurance in addition to the immigration health charge.

Of course, revenue from the immigration skills charge is supposed to be put into training UK citizens to reduce the need for skilled immigration. Instead, the Government have abolished student bursaries for nurses, making it less likely that UK citizens will train to become qualified nurses and creating more demand for nurses from overseas. Numbers applying to begin training in September 2018 dropped 12% when compared to the same time last year, resulting in a total decline of 16,580 applications since March 2016—the last year in which students received financial support through the bursary. The fall in mature student numbers has been even more extreme, with a 16% drop by the June application deadline compared to the same point last year and a total decline of 40% since June 2016. As the noble Lord, Lord Rosser, said, there are currently estimated to be 40,000 nurse vacancies in England alone.

This Government are creating not only a hostile environment for immigrants but a hostile environment for common sense and decency. This order is very much to be regretted.

Lord Hylton (CB): My Lords, the Refugee and Migrant Children's Consortium is deeply concerned about this order, which doubles the health surcharge. These concerns are, I suggest, important because of the interaction with other charges. In the past, people who were here legally but with uncertain future residency could expect to remain after six years, with good behaviour. Now they will be granted only two and a half years in extensions and thus may have to pay over £6,500 just to remain, as the noble Lord, Lord Rosser, pointed out. On top of this, they may have to find

[Lord Hylton]

£2,000 for an immigration health surcharge, in what one might call a double whammy. This is particularly hard on those on low earnings because of their uncertain status. They are also doubly taxed if they suffer PAYE and national insurance on their wages.

The noble Lord, Lord Paddick, rightly mentioned the case of nurses from the Philippines. Ill health, or health at all, may thus become a cause of homelessness if rent arrears lead to eviction. The Government may say that there are exemptions for some. However, children in care are exempt, but not children who live with their natural family. A family with four children may have to pay £8,100 on several occasions. The situation may be even worse if the family is also paying fees to register for British citizenship. An impact assessment has been published, but it makes no reference to working parents and their children.

This is an anti-family measure. Her Majesty's Government should withdraw this order and think again. They must consider its impact on those least able to pay and not just on fat cats and non-doms. Will they please also rethink the exemptions? I support the amendment.

Baroness Lister of Burtersett (Lab): My Lords, I rise to speak in support of the amendment moved by my noble friend Lord Rosser, particularly its reference to those who came to the UK as young children. I apologise if I repeat some of the arguments already made, but they bear repetition. I am grateful to the Refugee and Migrant Children's Consortium for drawing to our attention the implications of doubling the surcharge for children and young people making immigration applications from within the UK on the basis of prior long residence in the UK, many of whom are vulnerable and living with parents who cannot possibly afford this surcharge.

I am struck by how the Government constantly refer to it as a charge for "temporary migrants". The evidence base attached to the statutory instruments says that. The Minister's Written Answer of 14 November to the noble Lord, Lord Jones of Cheltenham, said it. The Minister for Immigration said it when introducing the statutory instruments in committee in the other place, and this afternoon the Minister constantly used the term "temporary migrants". As my noble friend said, these children are not temporary migrants. Many have grown up here, look to make a future here and have a legal right to do so. Why are they and their parents being expected to pay a surcharge which is designed for temporary migrants? I would be grateful if the Minister could answer that.

As we have heard, when added to the fees that families are already required to pay for their children to acquire indefinite leave to remain, the total bill over a 10-year period will come to more than £10,000.

Last week, the Parliamentary Under-Secretary of State for Children and Families made a Written Statement to mark the anniversary of the UN's adoption of the Convention on the Rights of the Child. He stated:

> "The UK is a proud and long-standing signatory of the United Nations convention on the rights of the child … and this Government remain fully committed to the promotion and safeguarding of children's rights.
>
> The UNCRC sets out an enduring vision for all children to grow up in a loving, safe and happy environment where they can develop their full potential, regardless of their background. This Government share that vision and are dedicated to providing the best possible opportunities for all children but especially those who have the hardest start in life".—[*Official Report*, Commons, 20/11/18; col. 21WS.]

Will the Minister explain to your Lordships' House how doubling the surcharge on top of the exorbitant fees these children and their families already face squares with that very positive vision?

According to the consortium, the cumulative cost of the fees and surcharge is,

> "seriously impacting on the quality of children's lives, affecting their development and forcing families into long-term poverty".

Do the Government know that or even care, given that they have not even bothered to make any reference to the potential impact of the surcharge increase on children and young people and their rights in the impact assessment provided? Will the Minister undertake to rectify this omission and at the very least ensure that a child's rights impact assessment is provided retrospectively and, perhaps more importantly, in all future regulations relating to both immigration and citizenship fees and charges affecting children? This is not the first time that we have had regulations of this kind without any assessment of the impact on children.

4.30 pm

No doubt the Minister will respond that families who genuinely cannot afford the surcharge can apply for a waiver. According to ILPA, though, it is notoriously difficult to make a successful application for a fee waiver. It says:

> "Applicants have to provide detailed evidence of their income and outgoings, their budgeting for necessities, explaining the minutiae of their finances to the Home Office. They are often also asked to show that they are unable to borrow the required amount from family or friends, and/or why not".

That can be humiliating for people to provide. Having to provide that kind of detailed information about your budgeting and whether you can get by from day to day is going back to the 1930s means test.

The impact assessment acknowledges that only a proportion will be eligible for a waiver on destitution grounds. Could the Minister give an estimate of what that proportion is? I think my noble friend referred to 8%, but I am not sure if that was a different figure. Could she undertake to look again at the restrictiveness of the criteria for the rules that allow someone to get a waiver on destitution grounds? People really should not have to be destitute before they can get any sort of help.

Ministers are always very keen to talk up the availability of waivers in the context of immigration and related fees even when they are not available, as is the case with children's citizenship registration fees. I would like to say how grateful I am to the noble Baroness, Lady Manzoor, for putting the record straight in her Written Answer to me of 20 November; that was very helpful.

That brings me to the wider context, which is the general level of Home Office fees, which has already been referred to. Would it not have made sense, as my noble friend says, to have awaited the report on fee

levels that is due from the Chief Inspector of Borders and Immigration before going ahead with this measure? Can the Minister give us an idea of when the Home Office expects to receive the chief inspector's report and when the Home Office will publish it—those can be two very different things; there can be quite a long gap in between—and will she undertake that it will not be published on the eve of a recess in the middle of a whole lot of other reports so that no one notices, as is the Home Office's wont?

Lord Lansley (Con): My Lords, may I recount a story to the House from several years ago? I think it was around the time I was first appointed Secretary of State for Health. I was visiting a GP surgery in Cambridge, close to my constituency. The GP said to me, "There's one thing I want you to think about. We have, obviously, many students come to Cambridge University. When they arrive they register with GPs, and many register with us. Happily, in some cases they never come to see us, but others do. When they come to see a doctor, I talk to them and prescribe whatever it might be. Then, when they go out of the door, the Americans, the Australians and the Chinese—many of these students come from outside the European Union—immediately go to the reception desk and ask where they're going to pay. They are rather staggered to be told, 'But you're not paying. You pay nothing'. They say, 'How can this be? Here we are in your country. If we were at home, we would be paying'". They regard it as an absurd proposition. They are not here permanently and, in their view, they are therefore not entitled to the free care that those permanently resident in the UK should receive. This is an anomaly created by the use of the term "ordinarily resident" for access to NHS services. Although, as Secretary of State, I did not introduce the health surcharge, I none the less supported it when it was introduced.

The noble Lord, Lord Rosser, made a good job of objecting to something which I think he knows—and the House should know—is an entirely reasonable proposition. Not only should people who come here to take advantage of the opportunity to work here make the appropriate contribution to NHS services, the amount should be determined in relation to the average costs, which is a bargain for anyone actually accessing NHS services. Therefore, I will not support the amendment and support the order.

I say this in parenthesis to the noble Lord, Lord Paddick, about Filipino nurses. The Philippines has consistently—over many years—trained more nurses than it could possibly require in the expectation that Filipino nurses will get jobs abroad, principally in America. Many Filipino nurses came to Papworth Hospital in previous years. They have been extremely successful and many have settled. In recent years, we have had principally European Union nurses, but we would do well to have more Filipino nurses in future—if we can attract them, given the higher salaries that they enjoy in America. We are certainly not depriving the Philippines of nurses that it requires and it has never been the Government's intention to do so.

That said, I shall not support the amendment. The Government are right and moderate in the increase to the charge that they seek.

Lord Russell of Liverpool (CB): My Lords, in the absence of the noble Lord, Lord Grocott, I feel brave enough to rise to my feet. I declare my interest as a governor of Coram, the children's charity. I shall agree with the noble Lords, Lord Lansley and Lord Rosser, as a true Cross-Bencher should. I understand, and in principle do not disapprove of, charging those from outside the EEA for using the wonderful NHS. If it produces £220 million for the NHS, I think we would all say hurrah. For many migrants, it is undoubtedly a very good deal and a lot cheaper than insurance.

But—as the Minister knows, there is always at least one "but"—I should like to make a few points. They concern what I hope are unintended, not deliberate, consequences of the IHS. The noble Lord, Lord Teverson, asked a Written Question on 12 July about whether there would be a children's rights impact assessment of the increase in the fee. In her reply on 23 July, the Minister said:

> "A full impact assessment will be published alongside the draft Order".

In the event, the impact assessment had been completed three weeks earlier on 3 July, but having read it extremely carefully to see whether I could find any trail within it which looked like a children's right assessment, all I could find, at the top of page 17, in subsection F.5, was a comment about the proportion of in-country family visa applications which may be eligible for the waiver. It said that Her Majesty's Government,

> "is also considering options to mitigate the consequence an increase in Surcharge may have for applicants' affordability".

Given that the impact assessment says that the Government are considering options, what are those options and how far have Her Majesty's Government gone in their thinking about them? Does the Minister genuinely think that the impact assessment before us includes anything like a full children's impact assessment?

Secondly, when we are talking about the fee waiver system, which is extremely well intended, many of us outside the Home Office struggle to understand how it is working at all. The reason is that the Home Office has the relevant statistics and we do not. In May last year, Coram, of which I am a governor, sent a freedom of information request to the Home Office, to which the Home Office replied. The statutory response timeframe is 20 days. In this case, it excelled itself by responding nine months later. It said that roughly 7% of fee waiver applications were successful. Why was a new request for the 2017 statistics in a freedom of information request denied by the Home Office on the grounds that it would be too costly to compile it? Given what we heard earlier—that the Government, in their wisdom and munificence, are deliberately undercharging when it comes to the IHS—how can the Home Office justify not acceding to the freedom of information request?

We simply cannot judge whether the waiver scheme is working properly if we do not have the data. I am not trying to be awkward or embarrass the Minister or the Government; we simply need to know the figures so that we can come to a reasoned judgment, together with the Home Office, on whether the fee waiver system is working in the way we all know it was intended to work. It would be helpful to all sides if we were able to do that.

[Lord Russell of Liverpool]

Thirdly and lastly, we welcome the report of the Independent Chief Inspector of Borders and Immigration. I hope he will include the effect of the IHS when he publishes his report, and we look forward to its findings. If it does not contain an analysis of the effect of the IHS, will the Minister say why not? The children we are talking about find it very difficult to have their voices heard. Frankly, we are inadequate substitutes for these children, though we do our best to communicate their raw and often very painful testimony. But they have an inalienable right to be heard, and it is in that spirit that I ask these questions—their questions—and I look forward to the Minister's answer.

Baroness Jones of Moulsecoomb (GP): My Lords, it has been an interesting debate for me because other noble Lords have argued from points of view that I have not considered. I support the amendment to the Motion in the name of the noble Lord, Lord Rosser, simply on the basis of unfairness and injustice.

I want to take issue with some of the things said by the noble Lord, Lord Lansley. It seems to me that we do not take into account the value of immigrants in Britain, and again and again that creates a hostile environment. I shall quote a government press release:

"We welcome long-term migrants using the NHS, but the NHS is a national, not international health service and we believe it is right that they make a fair contribution to its long-term sustainability".

That is true, but the NHS is paid for by everyone who pays tax in Britain. This includes immigrants, who overwhelmingly pay more in tax than they receive—and perhaps make the wider contributions that the Minister was thinking about when she mentioned that. They already make more than their fair contribution to the running costs of the NHS, but the Government do not seem to appreciate that, and I ask why. All the figures suggest that immigrants give more than they take, so why are the Government not recognising that?

This dog whistle rhetoric of calling it,

"a national, not international health service",

is a particularly harsh insult to the 144,000 NHS staff whose nationality is non-British. The truth is that we do have an international health service, which runs on the hard-working dedication of so many people who move here from all over the world to look after the people who live here in the UK. It is hard at the moment to see why anybody would want to come here in view of the sorry, xenophobic state we are in, but they still do.

Not only is our immigrant workforce being blamed, yet again, for the failures of government policy, but now they are being charged £400 a year for the privilege. The same people who came here to work so hard to deliver our National Health Service are now being told that they do not deserve to have their own health needs looked after properly. If this kind of policy had been introduced in 2010, people would have been rightly disgusted. It is the kind of thing that only UKIP would have got away with eight years ago, and everyone would have thought it wrong. But somehow, in our society today, we have become so hostile, so fast, that now such policies just seem normal.

This change is a continuation of the Government's obsession with blaming all the country's problems on immigration. As a Green, I strongly resist any measure of hostility based on where in the world a person was born. In particular, I ask the Government to consider whether it is particularly unfair to charge an NHS surcharge to people who work in the NHS. I am dubious about the amount that the Government claim they will raise. I would like the Minister to confirm that amount, because it would be interesting to see later whether it is realised.

Finally, do the Government agree that the best way to fund the NHS is to invest in it properly? Only the Government can do that.

4.45 pm

Baroness Williams of Trafford: My Lords, I thank all noble Lords who have taken part in this debate.

First, in virtually every country in the world, all migrants who move to a new country expect to pay towards their healthcare. In most countries this is usually in the form of medical insurance or through up-front payments when accessing healthcare. Many countries require health insurance as a condition of a migrant's visa. For example, all foreign fee-paying students applying to study in Australia or New Zealand are required to hold acceptable medical insurance as a condition of their visa.

Healthcare can be needed at any time, regardless of age or profession. Anyone who has purchased healthcare insurance will know that it will likely cost more for those most at risk, such as the elderly, the very young or those with long-term health conditions. As noble Lords will know, that is not the system we operate in the UK. Our NHS does not charge more to those who need it most. However, everyone must make a contribution towards the costs of the NHS, to ensure that we all have access to care when we need it. It is therefore right that migrants who have access to the NHS in the same way a British citizen would if they needed it, pay a fair share towards it.

Lord Teverson (LD): The point is, as the noble Baroness, Lady Jones, said so well, that all those other jurisdictions the Minister has mentioned do not pay for their health services totally through national income taxation, which is paid by migrants in this country. That is the fundamental difference and is the whole point of the argument.

Baroness Williams of Trafford: I will give an example: if I went to America and worked there, I would pay taxation but would also pay health insurance. It is no different.

Lord Teverson: It is completely different.

Baroness Williams of Trafford: I think we will have a disagreement on a point of principle, but if the noble Lord could let me outline the Government's position—I will certainly take interventions at the end—I will explain why temporary migrants coming to this country get a fair deal.

A number of noble Lords have raised the issue of NHS professionals and how they ought to be exempt from the charge. The Government fully recognise the contribution that international healthcare professionals make to the UK, but it is only right that they also make a proportionate contribution to the long-term sustainability of the NHS. In that regard, NHS professionals are in the same position as other providers of essential public services, including teachers.

I recognise that there are concerns about the financial impact on nurses. However, the answer is not to exempt nurses from the charge but to increase their pay. This is happening. All NHS nurses will benefit from a pay increase as set out in the Agenda for Change framework. It is important to remember that the charge offers access to healthcare services that are more comprehensive and at a lower cost than those in many other countries. Most professionals who choose to work overseas need to have the appropriate medical insurance in place, which is the point that I made to the noble Lord.

Paying the charge ensures that the income generated goes directly to NHS services, helping to protect and sustain our world-class healthcare system for everyone who uses it. I am conscious of the concerns regarding the combined cost of the charge and visa fees. However, the charge is set at a competitive level and will remain low compared to the potential benefit, which is free access to the NHS. It offers better value than private medical insurance where the premiums are more expensive. As a matter of interest, I looked at the average insurance cost for the average American, which is $320 per month—significantly more than we would expect to pay. The Government are clear that migrants must pay the charge when they make an immigration application and should plan their finances accordingly. The costs of both the health charge and the application fees are available online and should not come as a surprise.

Many noble Lords spoke about vulnerable groups. We are committed to ensuring that vulnerable groups can access the NHS without charge. There are several groups applying for leave to remain in the UK who are exempt from the requirement to pay the immigration health charge as set out in the Immigration (Health Charge) Order 2015, and they continue to apply. They include people who apply for leave to remain relating to an asylum or humanitarian protection claim, and would absolutely include people who the noble Lord, Lord Hylton, spoke about, such as refugees, victims of modern slavery and children in local authority care.

Those who are exempt from paying the immigration health surcharge or who have the requirement waived are treated the same as those who have paid it, so they are entitled to virtually all NHS care free of charge. Noble Lords, including particularly the noble Baroness, Lady Lister, and the noble Lord, Lord Rosser, talked about how the requirement to pay up front could discriminate against those on low incomes. As I have said, the charge is set at a competitive level and is low compared with the potential benefit of free access to the NHS. Migrants are aware of the rules when applying for a visa, including the need to maintain and accommodate themselves in the UK, pay the health charge—and ensure they plan their finances accordingly. As I have said, and as noble Lords have mentioned, there are exemptions available.

A number of noble Lords talked about children. I am aware of the concerns raised about the impact of increasing the charge on children. Children are as likely as adults to use NHS services; as such, it is only fair that their parents or guardians contribute to the cost of their care. The Government continue to ensure that those who are most vulnerable are protected. Where an application fee is waived on destitution grounds the surcharge is also waived and, as I have mentioned, exemptions are in place for children in local authority care.

The noble Lords, Lord Paddick and Lord Rosser, talked about nurses.

Baroness Lister of Burtersett: The Minister is moving on to another issue, but could we stick with children for a moment? A number of noble Lords made the point that these children are not temporary migrants. At the outset, following an intervention, she said she would explain how temporary migrants get a fair deal. Then she said that migrants are aware of the rules when applying for a visa—but we are talking about children who are here, who have been here for some time, and who want to stay here. Could she please address that point?

Baroness Williams of Trafford: If you intend to be here temporarily, you apply for a temporary visa and you are captured by the immigration health surcharge, but clearly if you have indefinite leave to remain or are a citizen of this country, the health surcharge no longer applies to you.

Baroness Lister of Burtersett: But the point is that, to get leave to remain, people have to pay over 10 years and, as noble Lords have said, that amounts to over £10,000 when you add in this new surcharge. Therefore, it is making matters very difficult. It is a Catch-22 situation, is it not? How do the children get to show that they need to remain if they cannot afford it and the ability to afford it is being reduced by the health surcharge attached to the fee?

Baroness Williams of Trafford: My Lords, in estimating the charge, we estimated the cost of providing healthcare to someone who is here temporarily. The cost was estimated at £470 per person. To answer the point raised by the noble Lord, Lord Rosser, we decided to set the charge at £400 and not at full cost recovery because we recognise the contribution that migrants make to this country. We have not set the charge above cost recovery, as the committee had suggested.

I realise that the surcharge might make an application very expensive but we think that it is proportionate, given the access to healthcare that people will avail themselves of, and of course it is considerably cheaper than if they were to have private healthcare insurance. I am not decrying the fact that it might be expensive for a family—I appreciate that—but it is significantly cheaper than if they were to have private healthcare insurance, and of course the people concerned generally come here to work. I do not decry the fact that it is expensive; I am saying that, first, it is significantly cheaper than what we might pay for private healthcare

[Baroness Williams of Trafford]
as migrants going to any other country and, secondly, the service that they will get from the NHS once they have paid the surcharge has to be taken into account.

Baroness Lister of Burtersett: I am sorry to push it, and I promise not to do so again, but a number of noble Lords have pointed out that there is no child rights impact assessment, even though I think that one was promised in response to a Written Question. Can the noble Baroness undertake to take back to the Home Office the concern raised here so that in future, whenever regulations affecting children are brought before us, the impact assessment will include a proper assessment of the impact on child rights and not the cursory words to which the noble Lord, Lord Russell, referred?

Baroness Williams of Trafford: I can certainly undertake to take this away and provide for the noble Baroness and other noble Lords a more fulsome illustration of the impact. I have an illustrative example of a nurse and I can write to noble Lords with that.

Baroness Jones of Moulsecoomb: Before the noble Baroness returns to her response, I want to say that it is not appropriate to compare this country with places such as America, because we have a national health service and they do not. The point about our National Health Service is that it helps us to have a healthy and perhaps happier population, and that is good for everybody: it is good for the Government and for every single person who lives here. Therefore, it is not a gesture of good will from the Government to create a good National Health Service; it is imperative to our democracy.

Baroness Williams of Trafford: My Lords, I gave the example of America precisely because we have a national health service. Were I to migrate to America for a job, I would have to have healthcare insurance at a huge cost. The noble Baroness is right. There is a huge disparity in healthcare outcomes in America between those who can afford health insurance and those who cannot, and I am glad that we have an NHS for that very reason.

Baroness Jones of Moulsecoomb: My point was that we are not taking into account the wider implications of immigrants paying into our tax system, but then charging them on top of that. To me, that just does not seem fair.

Baroness Williams of Trafford: As I said earlier, if I went to America and paid my taxes, I would still need health insurance on top of that. The point I am trying to make about the surcharge is that, compared to what one might pay for private healthcare insurance in most countries, this is a very reasonable charge to access what I think is one of the best healthcare systems in the world.

Baroness Jones of Moulsecoomb: You are not going to convince us.

Baroness Williams of Trafford: No.

Lord Paddick: I do not want to prolong the agony for the Minister, but the point about America is that the tax people pay there does not pay for healthcare. That is why people have to have insurance. Immigrants come to this country, get jobs and pay national insurance and income tax, which pays for healthcare. But only immigrants have to pay a charge in addition to the national insurance and income tax they pay to fund the health service. Can the Minister explain why?

Baroness Williams of Trafford: Temporary immigrants have to pay the healthcare charge, but anyone with indefinite leave to remain or who is a citizen of this country contributes to the NHS through general taxation. We are not going to agree on this.

5 pm

Lord Lansley: I cannot bear that assertion being put on the record without being refuted: American taxation pays for healthcare—it pays for Medicare, Medicaid and the CDC. American public expenditure on health is nearly as large, as a proportion of GDP, as British expenditure on health. It is just incredibly inefficient. As my noble friend says, those who travel to America and work do not get access to Medicare or Medicaid.

Baroness Williams of Trafford: I am glad to have a former Health Secretary standing behind me to put noble Lords—and me—absolutely right.

Lord Russell of Liverpool: Will the Minister come back to the point I raised about the inadequacy of the information we have about how effective the fee-waiver system is?

Baroness Williams of Trafford: I will. I will not give him an adequate response, but I will tell him why; if that is okay.

The noble Lord, Lord Rosser, asked why the charge was set below cost recovery levels. I think I have answered that. He asked why the estimate in 2015 of £800 per person is so different from what we have now. It is because in 2015 it was just that, an estimate. We can now give an actual figure, given that people actually use the health service. The noble Lord also asked why we decided to double it on the basis of Department of Health and Social Care analysis. He will know that we made a commitment before the 2017 general election to triple the surcharge. We have not; we have doubled it. It was because we had made a manifesto commitment that we did not consult on the issue.

The noble Lord also asked about EU citizens. We are in the process of negotiating reciprocal healthcare arrangements with the EU. We have reached agreement on citizens' rights that will protect EU citizens and their family members who are resident in the UK by the end of the planned implementation period on 31 December 2020. We have made it clear that the immigration health surcharge will not apply where EU citizens make immigration applications during the implementation period after the UK leaves the EU. We will set out our plans for the future border and immigration system in a White Paper later this year, which, noble Lords will work out, has not long left.

Another noble Lord asked that question. I will not pre-empt or trail the White Paper with further detail at this stage.

We have been through the double taxation argument. I do not think that the noble Lords who asked about it agree with me, but I have made the point that the charge is fair not only to migrants but to UK national and permanent residents who have or will make a greater contribution to the NHS over their working life.

The noble Lord, Lord Paddick, and the noble Baroness, Lady Jones, talked about the compliant environment. This is nothing to do with the compliant environment. The charge is intended to ensure that temporary legal migrants make a fair contribution to the cost of their healthcare in the UK. In contrast, the compliant environment is a suite of compliance, deterrence and data-sharing measures that form part of our overall approach to deterring and tackling illegal migration and protecting public services.

The noble Baroness, Lady Lister, asked why children do not feature in the impact assessment. This is because it is at a macro level rather than an individual level. I know she does not like that answer but individuals are fully catered for in the system of fee waivers and exemptions, and a child is as likely to need healthcare as an adult.

Baroness Lister of Burtersett: I know I said I would not come back to this issue but no impact assessment deals with individuals; they deal with groups. An equality impact assessment would deal with equality groups. A child's rights impact assessment is supposed to inform us, not whether they are more or less likely to have healthcare, but what the impact is going to be on the rights of that child. All I was asking for was an assurance that future regulations have a proper child rights impact assessment as a part of them.

Baroness Williams of Trafford: I take the noble Baroness's point because in everything we do with law, we have to consider the rights of the child. That is a basic requirement on the Government. It may be implied, it may not be, but I entirely take the noble Baroness's point.

The noble Lord, Lord Rosser, asked me about undocumented children having to make four applications over 10 years at over £10,000. These applicants fall within the scope of specified human rights applications for which fee waivers are available—we have gone over that point—but, of course, parents may apply for the fee waiver for the child.

We have produced the policy on equalities assessment and will provide it to Peers who have spoken in this debate and place a copy in the House Library. I cannot stand at the Dispatch Box and say that it includes children. I suspect from what the noble Baroness says that it does not, so I go back to my previous point.

The noble Baroness asked about the chief inspector's report and when it will be published. The immigration fees and the surcharge are obviously two separate things. The Government made a manifesto commitment to increase the surcharge and it is important that we deliver on that.

The noble Baroness also asked about the proportion of applicants receiving a waiver—this goes to the point made by the noble Lord, Lord Russell of Liverpool—but we have not published that information. However, we are reviewing the process because, as time goes on, these issues necessarily become more complex. I know that does not answer entirely the point made by the noble Lord, Lord Russell, and the noble Baroness, Lady Lister, but we will be reviewing that.

Lord Russell of Liverpool: On the point I made that in the impact assessment there is a reference to the Government considering options for families who are experiencing hardship, what options are the Government considering and where are they in their thinking?

Baroness Williams of Trafford: I cannot give the noble Lord any more information on that at this point but I am sure it will be released in due course. He also asked about the Coram freedom of information request. The first response was based on management information from a live database which is subject to variations as the year progresses. The second was not answered because of a policy to release only published information. Government departments often do not release information if it is not published information, although I have given management information with caveats before. The Government are seeking to resolve this issue.

Lord Russell of Liverpool: Does the Minister accept that it is extraordinarily difficult for us to try to work out the effects and the effectiveness of the fee-waiver system in the absence of any reliable or up-to-date data? How can the Government make decisions about it if they do not have the data? If they do have the data, please can they share it with us?

Baroness Williams of Trafford: We do not share management information data because it is purely that—management information. As I understand it, we are seeking to resolve this issue with Coram Children's Legal Centre, and when we do I will be happy to write to the noble Lord with the outcome.

I hope that noble Lords are satisfied with my response, although I suspect they are not, and that the noble Lord will feel happy to withdraw his amendment.

Lord Rosser: I thank the Minister for her response. I did not get the impression that she was particularly excited about some of the things that are presumably in the brief in front of her when she responded to the numerous questions that have been asked. Nevertheless, she always—and I mean this—seeks to respond to the questions raised. We are grateful for that—and I mean that too.

I also thank all noble Lords who have participated in this debate. It seems quite a long time ago that I moved the amendment. I do not intend to make another lengthy speech or go through all the points.

[Lord Rosser]
I was certainly struck by the view of the noble Lord, Lord Lansley, that it is a bargain. Whether he believes that it is a bargain for young children, which is one of the issues mentioned in my amendment, I do not know. Obviously, from the way he said it, I assume that he does, but I and some other noble Lords fundamentally disagree with his view. On that score, though, I respect his opinion and the arguments that he made.

During this discussion and in the response we have had from the Minister on behalf of the Government, great stress was laid on estimated costs and how the charge has been looked at against estimated costs. Very little was said about looking at the income of some of the people who will have to pay those costs. It is all being looked at from a cost point of view; it has quite obviously not been looked at from the point of view of the impact on the total incomes of those who will have to pay the charge, not least of those in low-income families.

Baroness Williams of Trafford: I apologise for intervening on the noble Lord. I said that I would write to noble Lords with an illustrative example of a nurse, if that helps.

Lord Rosser: I appreciate that the Minister said that she would write. I would be very grateful indeed if, when she writes, she will address this issue of the impact of the charges on the incomes of those who will have to pay it, particularly those on low incomes and with families with children.

There is another example of the way that the Government look at the issue. When reference was made to the impact on nurses, the answer was: "You solve it by increasing pay". Yes, there has been a small increase in nurses' pay, but there have not been very big increases over the past eight years. The charge is being doubled but I do not think that nurses' pay is being doubled. I do not think that nurses will necessarily feel that the relatively small increase they have just had—they have not had much over the past few years—will be any real compensation for having to pay, for one specific item, a doubled charge. One does not get the impression that the Government have looked at this from the point of view of the impact on incomes, particularly for those among the less well off.

I think I heard a comment—I will withdraw my remarks if I am incorrect—which almost seemed to say that when low-income families are faced with this additional charge, it is up to them to arrange their finances accordingly. That was the thrust of the argument and how it came across to me. That is another indication that this has not been looked at from the point of view of the impact, particularly on people on low incomes and with children.

I am grateful to the Minister for saying that she will write. I hope she will perhaps reflect further on the point made by the noble Lord, Lord Russell of Liverpool, and my noble friend Lady Lister about the child rights impact assessment. I hope she will address that issue in her response on behalf of the Government. I know that she will give examples, but I also hope that she will reflect further on looking at the fee-waiver rules on destitution. "Destitution" implies that one must be in a pretty desperate state before receiving any assistance. The figures on the numbers of those getting the waiver appear to bear that out. No doubt the Minister will give examples in her reply—without indicating who she is talking about or anything like that—of the kinds of situations and income levels to which those fee-waiver rules have been applied up to now. At least then we could get a feel for the issue.

The answer given on why there had been no public consultation rather took my breath away. Apparently, it was because there was a manifesto commitment to £600. That seems an extraordinary reason for saying that there will be no opportunity for people to comment on what the Government are doing in the sense of how it will apply and its impact. I would have thought that any Government would want to put something like that out for consultation to get responses from people on the impact of such a doubling of charges.

I was very surprised to find that we have a Government who believe that they should not do any further consultation on the impact of something—not the principle of whether they will do it—and on how they might mitigate that because of a figure in a manifesto that they intend not to keep but to put at a lower level than is in the manifesto, which I am not complaining about. However, if the argument is that people voted for an increase in the charge to £600—it is difficult to believe that votes in the general election were determined solely by that—then they have not got what they voted for because the charge is less than that. Again, I am not complaining about that. I find it extraordinary that that was used as a reason for not consulting and giving people an opportunity to comment on the impact on certain people of doubling the charges.

I raised the issue of the child rights impact assessment. As I said, I hope the Minister will address that in her response. I will bring my comments to a conclusion. We opposed this matter in the Commons, where the order was agreed to in a vote. I tabled my amendment today to emphasise our continuing serious concerns about the impact of this increase in the immigration health charge but it is not my intention to press it to a vote.

Baroness Jones of Moulsecoomb: Before the noble Lord sits down, will he reconsider withdrawing his amendment? I honestly think that the Government have got this completely wrong. That is the mood of the House. Therefore, he might get considerable support.

Lord Rosser: I thank the noble Baroness, Lady Jones, for that contribution, but I have to say no; I am not prepared to reconsider the decision not to push it to a vote. We made our intentions clear beforehand and I have no intention of going back on what was said about pursuing this to a vote. However, I appreciate where the noble Baroness is coming from.

I hope that the Minister will read through this debate—I know she will, she does it automatically—because questions have been raised and, inevitably, she has not been able to respond to them all. I hope she

will look at that and respond to ones she has not been able to reply to at the Dispatch Box. She has replied to a great many questions.

I also hope the Government—this pursues the point the noble Baroness, Lady Jones, made—will have got the message that there is a good deal of disquiet about the impact of doubling this charge in particular areas, not least in relation to children and school shortages. I hope the Government will have got that message and will look at this again when they come to their White Paper on the future immigration system. We have to await the chief inspector's report on Home Office fee levels and see what that says; it may or may not make a comment on the charges we are talking about. I will leave it in that context and I beg leave to withdraw the amendment.

Amendment to the Motion withdrawn.

Motion agreed.

Investigatory Powers Tribunal Rules 2018

Motion to Approve

5.21 pm

Moved by ***Baroness Williams of Trafford***

That the draft Rules laid before the House on 11 October be approved.

The Minister of State, Home Office (Baroness Williams of Trafford) (Con): My Lords, I am pleased to be given the opportunity to debate the updates to the Investigatory Powers Tribunal Rules in the House this afternoon. Before I address the updates to the rules, I will briefly cover the background to the Investigatory Powers Tribunal, as well as some key statistics.

The Investigatory Powers Tribunal, which I will refer to as the tribunal from now on, was established under the Regulation of Investigatory Powers Act 2000. The tribunal replaced the Interception of Communications Tribunal, the Security Service Tribunal, the Intelligence Services Tribunal and the complaints provision of Part III of the Police Act 1997, which concerned police interference with property. The tribunal investigates and determines complaints which allege that public authorities have used covert techniques unlawfully. It also investigates complaints against security and intelligence agencies for conduct which breaches human rights. There are presently 10 members of the tribunal, and the president is the right honourable Lord Justice Singh.

I will now address the updates to the tribunal rules. Under Section 68 of the Regulation of Investigatory Powers Act 2000, the tribunal is entitled to determine its own procedures. These proceedings are documented in the rules I am presenting here today. The rules have not changed since the tribunal was established 18 years ago. Therefore, it is now necessary that they be updated to better reflect current tribunal practice.

First, to improve the efficiency of decision-making in the tribunal, we have amended the rules to allow further functions of the tribunal to be exercised by a single member of the tribunal.

Secondly, to strengthen the power of the tribunal, we have added an explicit process for when a respondent refuses to consent to disclosure, but the tribunal considers disclosure is required.

Thirdly, the rules have been updated to make clear that the tribunal will hold open hearings, as far as is possible. For the first time, this puts in writing the tribunal's commitment to transparency, where appropriate.

Fourthly, to assist complainants and respondents to the tribunal, we have provided details of the function of counsel to the tribunal, including by listing the functions the tribunal may require counsel to the tribunal to perform.

Finally, we have amended the rules to set out the process for the making and determination of applications to the tribunal for leave to appeal in specific circumstances, as well as determining in which court the appeal should be heard. This is in preparation for the new right of appeal, which is coming into force as a result of the Investigatory Powers Act 2016. The introduction of an appeals route will allow for greater levels of reassurance that justice has been done, as well as greater levels of transparency.

In bringing forward those updates to the tribunal rules, it was important that we consulted extensively on the proposed changes. We did that through a six-week public consultation in November 2017. Three substantive responses were received, within which 17 amendments were proposed. Officials considered the amendments carefully with colleagues across government, and five amendments were accepted and incorporated into the rules.

The updates to the rules make the work of the tribunal more transparent and efficient, as well as ensuring that the legislation accurately reflects how tribunal process and proceedings have evolved over time. I commend the rules to the House.

Lord Rosser (Lab): We are not opposed to this statutory instrument, which updates the rules that govern procedures in the Investigatory Powers Tribunal, including those for a new right of appeal. The tribunal investigates and determines complaints that allege that public authorities have used covert techniques unlawfully and have infringed the right to privacy, as well as complaints against the security and intelligence agencies for conduct that breaches a wider range of human rights.

The Investigatory Powers Act 2016 introduced a right of appeal, which will be on a point of law, from decisions and determinations of the Investigatory Powers Tribunal. Leave to appeal will be granted only where the appeal raises an important issue of principle or practice, or for another compelling reason. Have there been any cases in which leave to appeal would have been granted had there been an appeals procedure, or is the appeals procedure being added because it is felt that it ought to be available rather than because there is evidence that its not being available has denied a right that ought to be there? How many cases is it anticipated might be appealed per year? How many determinations and decisions are made by the Investigatory Powers Tribunal each year, and is that number going up or down?

[Lord Rosser]

The tribunal rules are also being updated by this statutory instrument to provide, among other things, that further specified functions may be exercised by a single member of the tribunal. As a result of the public consultation, to which three substantive responses were received, 17 amendments were proposed, of which the Home Office accepted five. Those are listed in paragraph 10.3 of the Explanatory Memorandum. I am aware that the question was asked and answered when the rules were considered in the Commons, but it would nevertheless be helpful if the Minister could clarify for the record in our *Hansard* the reasons for not accepting the 12 amendments that have not been incorporated.

Could the Minister also give the reasons why it is proposed in the rules that further functions should be able to be exercised by a single member of the tribunal, and why in particular the listed functions in paragraph 7.5 of the Explanatory Memorandum? Did that proposed change arise from a proposition from the tribunal itself? If so, what reasons were advanced for going down that road, and did the tribunal ask for any other functions to be exercised by a single member to which the Government have not agreed?

Lord Paddick (LD): My Lords, I thank the Minister for introducing the rules. The right to appeal from decisions and determinations of the Investigatory Powers Tribunal is welcome, although yet again the changes will not take effect in Northern Ireland until the Northern Ireland Assembly has given its consent, an ongoing cause for concern.

Extending the range of functions that can be exercised by a single member of the Investigatory Powers Tribunal appears reasonable. Overall, there is a move in the direction of more openness and transparency so far as that is in the public interest, which is to be welcomed. That includes the tribunal's power to order disclosure, and a presumption that hearings should be held openly unless it is in the public interest for the complainant or the respondent to be excluded. It is good to see that not only was there a public consultation on the new rules, but the Government listened and acted on some of the responses, and explained the rationale for rejecting other suggestions in their response to that consultation.

Overall, we support these rules and the clear way in which they set out the process by which complaints of unlawful action by a public authority improperly using covert investigative techniques, and claims brought against the security and intelligence agencies alleging the infringement of human rights, are to be handled. We have no questions and we support the draft rules.

5.30 pm

Baroness Williams of Trafford: I thank both noble Lords for their comments. The question from the noble Lord, Lord Rosser, on the number of cases that have and might come forward is, at this stage, impossible to answer, given that there has not been an appeals route before. It is not possible to say at this point.

The public rely on a small number of bodies, of which the tribunal is one, to ensure that public authorities are using their investigative powers in accordance with the law. The tribunal's work in this regard is vital, so it is equally vital that it can operate under up-to-date rules. This is why noble Lords' support is so important and welcome.

I will go into more detail about the updates to these rules, address the issues raised, address the Government's response the consultation and outline which amendments we accepted and why we rejected those that we did. Between November and December 2017 we held a six-week public consultation. Representations were welcomed from past, current or potential complainants and respondents at the tribunal and their representatives, as well as from professional bodies, interest groups and the wider public. As I said in my opening speech, we received three substantive responses, and of the 17 amendments proposed five were accepted.

On the amendments we accepted, we removed the ability of a single member of the tribunal to decide preliminary issues. We provided the tribunal with the power to make directions if, following a direction from the tribunal, the respondent elects not to disclose to a complainant documents or information, or a gist or summary of the documents or information. This includes the power to direct that the respondent must not rely on anything that the tribunal directed the respondent to disclose.

We provided that, where an arguable error of law is identified by counsel to the tribunal relating to any decision or determination made by the tribunal consequent upon a hearing held in the absence of a complainant, counsel to the tribunal must notify the tribunal and the tribunal must then disclose to the complainant the arguable error of law. We required the tribunal, where it makes a determination not in favour of the complainant, to provide the complainant and respondent with a summary of its determination if it considers it necessary and in the interests of justice to do so. Finally, we removed the requirement for an application for leave to appeal to state the ground of appeal where counsel to the tribunal has notified the tribunal of an arguable error of law and the tribunal has not disclosed it to the complainant.

I will go through some of the amendments we rejected and give the reasons why. We rejected the suggestion that an amendment should be made to allow the tribunal to make disclosures to the IPC, since Section 237 of the IP Act already permits disclosure to the IPC. We rejected the suggestion that counsel to the tribunal's functions should be specifically identified in the rules because not all the functions of counsel to the tribunal will be relevant in every case, and the tribunal should have discretion as to which functions would assist counsel to the tribunal in each individual case.

We rejected the suggestion that the tribunal should compel witnesses to attend to give evidence. It could be counterproductive for such a power to be given, as the tribunal has functioned on the basis of voluntary co-operation. We rejected the use of special advocates in the tribunal, as there are considerable benefits to the tribunal employing its own counsel. Indeed, counsel to the tribunal is provided with specific functions that are more suited to the work of the tribunal.

Finally, we sought to allay concerns that the tribunal can receive evidence that would not be admissible in a court of law. In the consultation response we stated that, while it is important that the tribunal has flexibility to receive evidence in any form, it is inconceivable that a situation would arise wherein the admission of evidence that might have been obtained as a result of torture or inhuman or degrading treatment would not be subject to challenge, either by the complainant or by counsel to the tribunal.

The noble Lord, Lord Paddick, mentioned Northern Ireland. The IP Act does not allow for appeals to be heard in the Court of Appeal in Northern Ireland. That omission is the result of legislative consent not being obtained for the IP Act in Northern Ireland. However, the Act contains a power, to be exercised with the consent of the Northern Ireland Assembly, to provide that appeals can be heard in the Court of Appeal for Northern Ireland. We have discussed this with officials in the Northern Ireland Office and agreed that, as it is not currently possible for the Assembly to consent to appeals being heard in Northern Ireland, it is appropriate to proceed with the current wording in the rules. These are that,

"the relevant appellate court is the appellate court in the jurisdiction with the closest and most substantial connection".

This allows any appeals that relate to Northern Ireland to be heard in either the Court of Appeal in England and Wales or the Court of Session in Scotland. The Permanent Secretary of the Department of Justice, Northern Ireland, has confirmed that the Department of Justice will seek consent from the Assembly once it is up and running again. He has also confirmed that the Lord Chief Justice of Northern Ireland is content with this approach.

Lord West of Spithead (Lab): My Lords, I think we should be very pleased with what the Government have done here. These are all very important minor things that make quite a difference and add to what is probably the best bit of legislation relating to this very difficult area of endeavour anywhere in the world. This adds to it and the Government should be congratulated.

Baroness Williams of Trafford: I thank the noble Lord for that. The tone of the debate this afternoon shows clearly that the Government have addressed some of the outstanding concerns.

Motion agreed.

European Research Infrastructure Consortium (Amendment) (EU Exit) Regulations 2018

Motion to Approve

5.38 pm

Moved by ***Baroness Vere of Norbiton***

That the draft Regulations laid before the House on 29 October be approved.

Baroness Vere of Norbiton (Con): My Lords, in moving that these regulations be approved I shall add some context. A European Research Infrastructure Consortium is known as an ERIC. ERICs are set up to support major international science and research collaboration within the EU and provide a legal structure that enables countries and organisations to work together to tackle international research challenges. These projects often involve science and research in areas where the resources and expertise required are far beyond the capabilities of any single nation. Each ERIC has its own statutes setting out, among other things, the rights and obligations of the members and the functioning of the ERIC.

ERICs are funded primarily through ERIC member contributions, not the EU budget, and they often have expected lifetimes of decades. The UK presently hosts two ERICs: the European Social Survey, based at City, University of London, and Instruct, an ERIC looking at integrated structural biology, based at Oxford University. There are 19 ERICs in existence; the UK is a member of 12 of them and an observer of one. Based on our estimates, the UK has received around £30 million in funding from grants and membership fees and, by the end of 2017, had contributed around £64 million to ERICs. In addition, UK businesses can bid to supply parts and services to ERICs of which we are members.

BEIS Ministers make the final decision on whether the UK joins a particular ERIC, usually following an approach from a research interest and advice from UKRI. Funds are provided using Section 5 of the Science and Technology Act 1965. BEIS and UKRI officials usually participate in ERIC councils.

The outcomes of these projects feed into research communities across the UK, including marine science, astrophysics, human health and welfare, and societal change. ERICs stand as the kind of world-class facilities that we aim to ensure UK scientists can access to underpin the UK's position as a leading scientific nation. For example, the integrated structural biology ERIC gives the UK access to specific flagship nano-bodies facilities in Belgium, which offer technology the UK would otherwise not have access to.

The draft statutory instrument before your Lordships is largely technical in nature, in that it makes purely technical arrangements for the existing legislation on ERICs. It addresses deficiencies in the retained EU ERIC regulation—the legal framework for the creation and operation of ERICs—that arise as a result of the United Kingdom's exit from the European Union. It does not implement new policy. For example, the instrument removes provisions that relate to European Commission actions, such as the production of annual activity reports by the ERIC. The amended regulation will ensure that ERICs continue to have the same attributes, such as legal personality, as they had under the ERIC regulation as it applied before exit day.

The scope and technical nature of these regulations as I have outlined them may suggest that the negative procedure might have been more appropriate for this statutory instrument. Indeed, this was the conclusion of the Secondary Legislation Scrutiny Committee of your Lordships' House. However, the European Statutory

[Baroness Vere of Norbiton]
Instruments Committee in the other place noted the ongoing role of the Court of Justice of the European Union—the CJEU—in ERICs, and recommended the affirmative procedure. I would therefore like to explain briefly why this SI makes no amendment to that role post exit.

Membership of ERICs requires recognition that the Court of Justice of the EU has a limited role in ERICs. Specifically, if a dispute arises between ERIC members, or the ERIC itself and a member, in that case the court could be asked to determine whether an ERIC member is fulfilling its obligations under the ERIC statutes. This is different from the CJEU's role in ruling on compliance by EU member states with the Treaty on European Union and the Treaty on the Functioning of the European Union. It is not an area where penalties could be imposed for non-compliance. Any remedy would be applied by the individual ERIC in line with its own rules—rules to which members of the consortium agree when they sign up. There would therefore be no impact on the United Kingdom's sovereignty owing to our membership of ERICs. We remain free to leave ERICs at any time of our choosing, in line with the rules of each ERIC.

Participation in an ERIC is open to any country in the world. As such, there is no legal reason why the UK could not continue to participate in these projects following EU exit. The legislation before the House is technical in nature and ensures that our laws are fit for purpose if we leave the EU with no deal. The UK's leadership in science and innovation is supported and strengthened by international collaboration. Projects such as ERICs help facilitate such collaboration; in turn, this helps to consolidate further our world-leading reputation in science, research and innovation. I commend these regulations to the House.

5.45 pm

Lord Fox (LD): My Lords, I thank the Minister for introducing this statutory instrument. I agree with her that ERICs have an important role to play in unusual but very important projects, such as the ones she has described. I feel we are witnessing something very sad. It is almost as if a whole edifice of structure and relationship is being knocked down by our withdrawal from the European Union and then, SI by SI, we are coming back with Lego bricks and trying to rebuild one piece, and then next piece. Of course I support the objective of this SI because it is putting back something that we should not be knocking down in the first place.

I admire the Minister's gymnastics around the role of the ECJ. Of course, we on these Benches do not have to make the big exceptions and explanations that she is making for the benefit of her supporters. Of course the ECJ should continue to have the role that it has so, in all, what we see before us is a sensible and pragmatic piece of work, and we are glad that the Minister has brought it to the House today.

I had the benefit of a brief meeting yesterday, and I thank the Minister for that. One thing I asked in order to try to short-circuit some of these discussions was that the Minister would in her introduction or response give the House some idea of how a new ERIC would be established and what procedures would be gone through, given that we are now speaking from two jurisdictions rather than one. It is not clear to me from the background information or from yesterday's conversation what that process is. Were I part of a consortium and to lead that consortium, how would I go about the necessary negotiations in order to deliver a new ERIC rather than simply sustaining the one we have? Who approves or oversees the statutes? As I see it, the ECJ covers the regulations and the board of the ERIC manages the statutes, but my question is about establishing the statutes. With that overriding question, I support the objectives of this SI.

Lord Deben (Con): I much admire the Minister who introduced this statutory instrument, but I would not like her to go away with the idea that everybody is happy that we are playing around in this way with 40 years of building relationships with our neighbour. The truth is that the argument about the ECJ, although beautifully put and extremely elegant, really does not hold water. If you are going to have an agreement with your neighbour, it is not unreasonable to have an independent judgment should you fall out. The idea that this is different because it cannot impose any penalties itself but the organisation can as a result of its decisions seems to me to be a distinction without a difference. It arises only because my noble friend has to appease a lot of people who do not understand what a remarkable step forward the relationship between the United Kingdom and the rest of the European Union is and why that many of us will continue to fight for our membership whatever people say about ideas which we understand will leave Britain poorer off by the words of the Chancellor today.

One of the ways we will be left poorer off is that it will be more difficult to have these kinds of relationships. It is all right saying "we are a leader in the world", but part of the reason why we are is because we are in the European Union, and if you remove us from the European Union it will be much more difficult to be a leader in the world. We merrily talk about this being necessary should we leave the European Union without a deal. If that were to happen, this is the last thing anybody would be thinking about. They would be asking how to get food in the supermarkets. They would be asking whether packaging would come to get the stuff to the supermarkets. They would be asking a whole lot of other questions, such as how can they get down the M20 or the M2. That is what they would be asking—this would be low down their list of priorities.

Of course we are not going to stop this affirmative resolution going through, but we are doing it in the heart of the most disgraceful activity Britain has done in peacetime for as long as anyone can remember. We are making ourselves poorer, less able to say something in the world, less able to have influence and less able to be a leader. We are doing so with our eyes open and asking people to support it. I have to say to my noble friend that I have come particularly to say that this does not have my support. I am not going to oppose her Motion, but it is a sad day that we have to have it at all.

Lord Stevenson of Balmacara (Lab): Follow that. I am happy to agree with the last two speakers, both of whom have brought a lot of sense to this debate, although I think "poorer off" is probably a combination of "worse off" and "poorer". If the noble Lord, Lord Deben, is intending to repeat that speech during the longer debates that are coming over the horizon, as I hope he will, he might want to get the wording a bit more right because it would have more punch. It is very daring of me to advise a man of such distinction and history in Parliament, particularly in this House. I am a bit old for Lego so I did not quite catch the allusion made by the noble Lord, Lord Fox, but I think the point that he was making is right. We are scratching around here and missing the bigger picture, and both the previous speeches made that point.

I thank the Minister for her letter and for the pre-meeting that we had on this Motion, and I am grateful to her for changing slightly the explanation that she would otherwise have given in order to give a bit more detail. I still think we are a bit short of a couple of issues that I hope she will cover when she responds, and there are a couple of questions that I would like to leave her with at the end. Having said that, I am not going to oppose the Motion; it is a sensible piece of bookkeeping that I hope will never have to be used. The implication is that if there is no deal and we leave on 29 March then this will be implemented. Could she reflect on what happens if there is a deal but no transition period? What is the timing in that situation?

On the particularities, the information that I asked for in the pre-meeting about the process that would be applied if this SI were in place follows up on exactly what the noble Lord, Lord Fox, said. The power to pay money for this, as the Minister said, lies in the 1965 Act. I understand that but what is not clear is the role of UKRI consequent on the Higher Education and Research Act 2017, which is now in force and changes the nature of the relationship between the research councils and the overarching decisions that are being made. As I understand it, research councils still make their own budgets and agree them with the department, but UKRI has an advisory and oversight role and indeed has additional funding if it wishes to do things. Who has the authority to agree to any group in this country going forward to an ERIC? What precisely is the nature of the power that is being taken, who exercises it, and in what way is that different from the current situation? In other words, under the present arrangements, as we are a member of the EU and not a third country, presumably we have a system under which money that is required for creating a new ERIC or joining an ERIC is still in play, maybe still under the 1965 Act. Does that change as a result of this SI?

The subsidiary question, which I am sure the Minister will duck, is this: while there may be no change in terms of regulation, will there be any change in funding opportunities for people if and when we leave the EU and we still wish to participate in these ERICs? The Minister said how many there are; we are a member of a number of them and two are located here. Are there any plans—I have not seen them if there are—for developing this approach? As she said, it seems to bring benefits; it seems to double the money that we can invest in science, and it is good to maintain links with scientists and technologies in other areas because otherwise arrangements for common work would be more difficult.

I turn to the issues that were raised in the other place. The Minister mentioned the CJEU. Like both of the other speakers, I am not sure that I quite follow where we are on this. The CJEU has a role in asserting the overall regulatory framework under which the ERICs operate. However, from both her letter and what she said in introducing the SI, the only power that we would have in the way that is now described—we can debate why she has expressed it this way—is to resign. In other words, if for some reason the rules are going to be adjusted or changed in a way that would imply a necessary change in UK legislation, there is no way in which the CJEU must be allowed to influence British legislation so, if the research party concerned wishes to continue, I take it that its only solution is to resign. That does not seem a very fair or equitable way forward, and I wonder whether the Minister would comment.

That covers one of the points made by the committee in the other place. The other point that it raised was rather more philosophical. The Government's assertion is that nothing is changing here because we are simply adjusting the rules that would have applied before leaving the EU to a situation to allow it to continue afterwards. The committee said:

> "While it can be argued that the policy has not changed, future UK participation as a third country will inevitably mean that the policy functions in a different context".

Will the Minister comment on whether that is true and, if so, whether there are any implications that we should be aware of?

The regulations before the House deal primarily with research, which is a reserved area. Any change in research funding or research activity has a significant implication for universities, which are of course a devolved matter. Did the Government therefore consult with the devolved Administrations prior to laying this instrument? If so, what was the result? I think there is a reference to letters having been issued but I do not think that involves consultation.

My final point is the regular question about immigration policy. ERICs will allow the UK to engage in science research projects, but the industry has previously mentioned the problem of how the UK's immigration policies limit its ability to recruit the postgraduate scientists who will necessarily be employed in these areas. In March, 48 science organisations wrote to the Prime Minister claiming that the repeated rejection of skilled workers due to the capping of the tier 2 visas has damaged the UK's international appeal and will continue to do so. What action have the Government taken since then to try to resolve this very difficult problem?

Baroness Vere of Norbiton: My Lords, I thank noble Lords for their very valuable contributions to this debate. I will aim to answer as many questions as I can. There were some impassioned speeches and hard words around the broader picture but when we come

[Baroness Vere of Norbiton]
back to look at the SI that we are actually considering, to coin a phrase, nothing has changed. This measure is technical in nature. We are not knocking down anything; indeed, we are doing our best to ensure that it stays in place because we very much value the relationships that we have with ERICs. They play a very important part within a much wider research and innovation framework.

On the point about the CJEU, the noble Lord, Lord Fox, reached the point that I had already written down as he was speaking: this measure is pragmatic. It is purely a pragmatic way to approach an issue whereby it may be between the member state, or indeed the ERIC participant, and the ERIC. Someone needs to be able to make a decision there. From the Government's perspective, we are very content for the CJEU to make that decision because the EU is not a party to that particular procedure.

Lord Stevenson of Balmacara: On that point, let us take a practical example. An ERIC is set up and operating. For reasons best known to themselves, our researchers decide that its rules are not currently fair and it needs to change something affecting, let us say, an immigration regulation within the UK. Is the Minister saying that the Government would accept the CJEU's decision to make that change? This is a fantasy world; I am not trying to say it is a real situation. However, this is the narrow point. The Minister is saying the CJEU will have the authority to change the rules and regulations of the ERIC because they do not affect the UK but, if the rules are changed so that we would have to change our own legislation in order to stay in the ERIC, that cannot be true.

Baroness Vere of Norbiton: The rules and regulations are agreed by member states as they come together to form the ERIC, so obviously, those statutes are specific to that ERIC. I take the point made by the noble Lord, Lord Stevenson, concerning if, for some reason, the ERIC regulations fundamentally change. I do not think they have changed since 2008-09 and there is no move to change them whatsoever—let us remember that other non-EU countries would also be impacted by such a change to regulations—so I cannot imagine that there will be a great groundswell to change them. The CJEU is looking at the statutes of the ERIC—not the regulations themselves, the individual statutes of the regulations. Obviously, if a ruling went against us, we would have to consider our position, but we must be realistic: not a single case has ever been taken to the CJEU. We are probably dancing on the head of a pin. We have a mechanism—I do not want to call it a backstop—through which disputes, if there are any, are now resolved and will be in future. We are content to maintain that mechanism and I hope that the noble Lord is too.

I am pleased to say we may well be joining a number of ERICs in the next few years, and I hope that I outlined the process in my opening remarks. BEIS Ministers, using royal prerogative, have authorisation to join an ERIC, but before that happens there is an enormous collaboration process with UKRI, which advises whether it is a good idea for us to join. Securing the funding comes down to priorities, business cases and collaboration between the Department and the Treasury.

Lord Fox: Just to be clear, the Secretary of State would exercise the royal prerogative.

Baroness Vere of Norbiton: Yes.

That is how, hopefully, we will be getting involved in new ERICs, which may happen soon. I take on board the comments of my noble friend Lord Deben, and I hope I have addressed them in the context of the CJEU and our pragmatic approach to this issue.

The noble Lord, Lord Stevenson, raised the issue of timing—when the legislation will be needed or commenced. Obviously, if we have a deal, we will never need it, and therefore we hope that it will be put to one side. However, there is a possibility that, a scenario in which, we end up with no deal after the implementation period. At that point, this piece of legislation and many others—

Lord Stevenson of Balmacara: I am very grateful to the noble Baroness for clarifying that, but does that not leave it completely open? If there is no deal, we have the SI. If there is a deal, presumably there will be discussion and negotiation to arrive at the deal, and this will be part of it. So the issues we are talking about are not settled in that situation. There will have to be discussions about how ERICs function, under what rules, and whether the CJEU is involved. All that stuff will have to come up again, I assume—I am a novice in this matter.

Baroness Vere of Norbiton: I am very happy to be asked questions by a novice, although I do not believe that the noble Lord is a novice at all. He is right that discussions are ongoing, particularly in the area of research and innovation, which is a very important area of collaboration for us. He asked about the legislation. That is exactly what will happen. We are looking at one piece of legislation that may not be needed—in fact, there is a very small chance that it will be—but we have to be sure that we have it in case it is.

The noble Lord suggested that I might want to duck the question of the change in funding for research and innovation in the coming years. I am ducking. Obviously, I can make no commitment to future funding; that would be really unwise in the current environment. However, I want to address his point about future opportunities, because it is really important. We have tasked UKRI to develop the first UK national research and innovation infrastructure roadmap. By the end of next year, it will have completed its work and we will have a full understanding of where our money is going and what it is being invested in.

In the course of my research, I happened to find out that UK entities are involved in about 750 research infrastructures encompassing international, European and national RIs. I find that extraordinary. It is really important that we map all these things, examine where our gaps are and fill them.

I have just been told that I need to correct myself. I said that this SI is not needed in a deal scenario; it is needed in a deal scenario. I shall write to the noble Lord and absolutely clarify why it is needed.

The devolved nations have all agreed to the legislation. On immigration, the noble Lord mentioned the potential shortage of skilled labour. He will be aware that a White Paper on immigration will be published shortly. The Government will of course carefully consider the MAC's recommendations before setting out further detail on the UK's future immigration strategy. We recognise that we need skilled resources and that they can come from both European Union nations and other nations.

Given those responses and my promise to write on the critical detail concerning when we will need the SI, I commend the regulations to the House.

Motion agreed.

Package Travel and Linked Travel Arrangements (Amendment) (EU Exit) Regulations 2018

Motion to Approve

6.07 pm

Moved by ***Baroness Vere of Norbiton***

That the draft Regulations laid before the House on 29 October be approved.

Baroness Vere of Norbiton (Con): My Lords, the regulations will be made under powers conferred by the European Union (Withdrawal) Act 2018. They form part of the work being done to adjust our existing legislative framework in readiness for leaving the European Union next year.

The best outcome for the UK is, of course, to leave with a good deal. If a withdrawal agreement is reached between the UK and the EU, the implementation date of the instrument could be changed by a subsequent Bill that the Government introduced to implement the withdrawal agreement into UK law.

However, it is sensible to prepare for all scenarios, and that is what we are doing in bringing this instrument before your Lordships' House today.

The Package Travel and Linked Travel Arrangements Regulations 2018 were debated in your Lordships' House in May this year and came into force in the UK on 1 July. They implemented the European Union's 2015 package travel directive. The 2018 regulations expanded the definition of a package to ensure that it encompassed modern methods of purchasing package holidays, particularly online. It also created the new concept of linked travel arrangements, which are a looser combination of travel services, and introduced a limited level of protection for consumers who purchase them.

The 2018 regulations include the provision of information to travellers, so that travellers have clear information about their package holiday or linked travel arrangement and their statutory rights. They also require organisers to put in place adequate insolvency protection to cover the refund of payments made by or on behalf of passengers and, if necessary, their repatriation. If approved, this instrument will make amendments to deal with deficiencies that arise from a possible UK withdrawal from the EU on a no-deal basis. I will now explain the effects of the instrument.

The 2018 regulations implemented the mutual recognition requirement of the EU directive, which requires that member states must recognise the insolvency protection put in place by traders under the law of the member state in which they are established. In consequence, the 2018 regulations exempted traders established in other member states from having to comply with UK insolvency protection laws, which are ATOL protection, insurance, a trust fund, or a combination of several of them. On EU exit, the UK will no longer benefit from the mutual recognition provisions of the directive and, in consequence, the remaining member states will no longer recognise the UK's insolvency protection under the 2018 regulations. This instrument will remove the exemption for traders established in member states, so that if they sell or offer for sale package holidays or linked travel arrangements in the UK, they will be required to comply with the UK insolvency protection rules on the same basis as UK traders, or indeed traders established elsewhere in the world.

I consider this change necessary, first to ensure that UK travellers are fully protected by the 2018 regulations if they purchase a package holiday or a linked travel arrangement from EU traders that choose to trade within the UK market; and, secondly, to ensure fairness for UK-based traders, whose EU-based competitors should not have the advantage of an exemption under the UK rules no longer available to UK traders under the EU rules.

The 2018 regulations also require member states to establish central contact points, the main purpose of which is to facilitate administrative co-operation between member states in relation to insolvency protection and, in particular, the exchange of information concerning national insolvency protection requirements. The Civil Aviation Authority is the lead central contact point in the UK. Should the UK leave the EU without a deal, the role of the central contact point would become redundant. This instrument revokes the function of the central contact point to reflect this. This does not affect the CAA's other, broader enforcement functions in relation to the 2018 regulations.

This instrument also makes changes to the obligations on UK retailers when they sell a package that has been put together by a non-UK organiser. Currently, Regulation 27 of the 2018 regulations requires that a UK-established trader selling a package put together by an organiser established outside the EEA will be responsible for the performance of the package and must meet the insolvency protection obligations of the 2018 regulations, unless that retailer can provide evidence that the organiser complies with these requirements. This instrument changes Regulation 27 so that this responsibility is placed on a UK-established retailer alone when selling a package put together by any organiser established outside the UK, including organisers

[Baroness Vere of Norbiton]
established in the EEA. This change is important to ensure that, when purchasing packages combined by EEA-established organisers, UK travellers can continue to be confident that they would be protected by adequate insolvency cover in the event of the organiser's insolvency.

Finally, this instrument makes other technical changes to deal with references to EU legislation. For instance, it replaces references to EU directives with references to the relevant retained EU-derived domestic legislation. It is important that the exit regulations do not otherwise change the 2018 regulations, so that, after EU exit, travellers will continue to benefit from all protections in the 2018 regulations.

This instrument is a sensible and necessary use of the powers of the withdrawal Act, which will ensure that our consumer law continues to function effectively on exit day. I commend these regulations to the House.

6.15 pm

Baroness Randerson (LD): My Lords, this is obviously a case of more preparations for a no-deal Brexit. It might be one where the public could suffer directly, and there will certainly be an impact on small businesses and traders in the travel business as a result of this. The key point is that on Brexit, the UK will no longer benefit from the mutual recognition provided for in the EU package travel directive. The remaining 27 EU states will no longer be required to recognise insolvency protections put in place by the UK 2018 regulations, and the remaining EU states will potentially no longer protect UK travellers under the insolvency protection established by their travel organisers and traders.

So the UK does not consider it appropriate to continue to recognise insolvency protection put in place by traders established in the remaining 27 states. This is a simple tit-for-tat: if they do not recognise ours, we will not recognise theirs. As the Explanatory Memorandum points out, this mutual protection is clearly an economic benefit. It facilitates trade and this SI puts an end to that benefit. The big issue is whether consumers and travellers will still benefit from the same level of protection after Brexit. This is not a theoretical situation; insolvency happens with some regularity in the travel business. In the last calendar year Monarch Airlines collapsed, and there are concerns in today's press about the profit situation of an organisation as large as Thomas Cook. I do not for one moment suggest that it is in a Monarch situation, but it is a tough world out there.

I have some questions for the Minister. Paragraph 7.1b of the Explanatory Memorandum states that,

"the role of a central contact point serves no purpose once the mutual recognition",

of the insolvency protection ceases. Indeed, the Minister referred to this in her introduction. The CAA was that central contact point, so can the Minister explain more about what exactly that role has been in the past so that we can understand why it is no longer needed? Referring back to the Monarch situation, I recall that when the airline collapsed, the CAA had a vital co-ordinating role in organising the repatriation of travellers and compensation provisions. Who will do that in future if the CAA no longer acts as a central contact point? I am trying to tease out the precise meaning of that phrase.

My second question refers to UK retailers selling packages organised by EU traders. Let us imagine that I go into a travel agent and buy a package consisting of hotel and bus travel in Europe. If that package is put together by an EU-based company, as opposed to a UK-based company, how does a travel agent ensure that insolvency cover is adequate? Maybe the UK travel agent himself puts together the package by choosing a hotel and bus, but in that case does the UK travel agent have to satisfy himself that both the hotel and the bus company have satisfactory insolvency arrangements? Paragraph 7.1c of the Explanatory Memorandum clearly states:

"This may place additional obligations on UK retailers".

Paragraph 12.2 states that it,

"could present an additional cost to … retailers".

Hence I was surprised to read in paragraph 13.2, on regulating small business:

"No steps have been taken to minimise the impact of the requirements on small businesses … as no new requirements are being introduced".

That seems a direct contradiction, and there will be a serious impact and additional responsibility on small businesses. That is, with respect, clearly incorrect. There is also no mention here of the consumer, and the potential impact on them if UK businesses are unable to satisfy themselves accurately about insolvency cover.

The package travel directive has been a major source of protection for consumers. It has been the foundation for the huge growth of the travel industry, giving people the confidence to undertake what might otherwise be financially and personally risky foreign travel. It is important always to remember the significance of the annual, or perhaps twice-yearly, holiday for the average person in this country. That directive was originally introduced simply because the guarantees it brought were, demonstrably, badly needed. Anything that reduces those guarantees or makes them more complex undermines public confidence, and therefore the travel industry itself.

My question for the Minister is: what about bookings made now, before 29 March 2019, for holidays to be taken after that time? What is the situation and what rules should the travel industry follow at this point? Hundreds of thousands of people are making those bookings, and millions will do so in the next few months. The public need absolute clarity on their rights should something go wrong with the process.

Earlier this year the regulations were updated, as the Minister stated, to take account of the digital age. They now encompass so-called linked travel arrangements, which we welcomed at the time. But LTAs provide a lower level of protection than that provided by traditional packages, and the LTA is itself a complex concept. When we debated this before, we emphasised the importance of clarifying this with the public. The Minister referred to that, but the concept of "ATOL protected" is well understood by the public. For example, at the end of an advert on television it very quickly said, "ATOL protected". People understand it. What are

the Government doing to advertise the new concept of linked travel arrangements and the protection that brings? Do the Government intend after the end of March to continue with the concepts of linked travel arrangements and binary levels of protection that come into place as a result of the EU directive, but which we will, of course, no longer be obliged to follow in the future?

Lord Deben (Con): My Lords, I was fortunate in my education to do a long period of medieval history, in which I read a great deal of complicated theological arguments about angels on the end of a pin—and I am beginning to wonder whether the Government have gone to that position. All these people are working away, trying to create an entirely unnecessary thing because they wish to get rid of something which is both necessary and sensible. My noble friend said that this statutory instrument was both sensible and necessary. It is necessary but it is entirely unsensible. It is not sensible to get rid of a perfectly reasonable mechanism whereby we all recognise each other's insolvency arrangements.

However, I will take my noble friend to the practical situation. A middle-aged gentleman—unhappily, I am not middle-aged now, but just imagine it—wants to buy a package holiday for his family. He goes into a travel agent, who presents him with a series of opportunities. Is he supposed to say to the travel agent, "Is this bus ride arranged for the island of Corfu covered by the insolvency arrangements here, or has there been an arrangement, or are you covering it?" No, of course—that is up to the travel agent. But what if they do not do it? What happens to the protection for the customer? Can my noble friend say what on earth we are doing here, asking the customer to have to know about this? The customer has to know about it. I apologise to the Minister but the customer does have to know about it, otherwise he is entirely in the hands of the travel agent obeying the rules and understanding them.

That leads me to the second issue. The travel agent has to understand not only what the rules are under this peculiar decision but who, among the people who have put together the package, is covered and who is not. He then has to understand how he gets the coverage for those who are not covered. The Minister may be an expert in insurance and in insolvency, but few travel agents are. We are asking them to discern what they have to do in circumstances when a mixed package is presented to them.

In the notes, the words "may" and "could" are used. The fact is that this is not a matter of "may" or "could". It will be more expensive—that must be true—and it is not that it "could" cause more difficulties: it will cause more difficulties. Therefore, as the noble Baroness, Lady Randerson, said, the bit which suggests that there is no special arrangement for small businesses is true as far as that goes—but not the second half, which says that no new obligation is placed upon them. There is an obligation; they now have to understand the interior workings of very complicated issues.

On the CAA, if it is not going to be the point of contact, which instead will be the Government, will we perhaps have the undoubted quality of the service provided by the Home Office in these circumstances? The CAA has shown itself extremely well organised to deal with these issues, as the noble Baroness said. Or will the Home Office, or whoever, be the point of contact but the CAA will then carry out what needs to be done? If that is the case, we are again complicating something which ought to be simple.

I am sorry that the Minister has to produce a manifestly barmy proposal. It is barmy because, in a world in which we are so close together, and where it is obviously sensible for us to have mutual recognition of things such as this, we are suggesting that there is some fundamentally sensible reason to remove ourselves from that and to set up a system in which the two people who now have to understand it are the two sets of people least able to do so: the travel agent and the customer. The customer will have to make sure, for his own protection, that the mechanism laid down in this statutory instrument, which is so much more complicated, has in fact been complied with.

I would love to be the fly on the wall during the conversation between the slightly informed customer and the slightly informed travel agent who are trying to work this out together. But what saddens me is that we are complicating something that is simple, straightforward, reasonable and about the world we live in, and are putting in its place something which has a much better position in medieval manuscripts.

6.30 pm

Lord McNicol of West Kilbride (Lab): I thank the Minister for her introduction to this regulation. As I was going through it, I started a note saying that this appeared to be one of the more straightforward regulations but the noble Baroness, Lady Randerson, and the noble Lord, Lord Deben, raised a number of questions and I have a few more. At this stage, there is not a lot to disagree with. It is just sad that we find ourselves in a situation where we are having to rebuild legislation and pieces of text that work well already. I am sure some of my shadow BEIS colleagues will have some points to raise when this is discussed in the other place.

If the Minister is not able to answer my questions, I am more than happy for her to write to me with a fuller explanation. In reading the Explanatory Memorandum accompanying the draft SI, she will be aware—this has been touched on already—that her department has recognised that there will be an additional financial cost for UK businesses arising from this instrument. On that basis, does the Minister not agree that an impact assessment should have been prepared before this debate? Can she inform us what the costs, as stated in the Explanatory Memorandum, will be for businesses?

As a result of these regulations, the mutual recognition of insolvency protection with EU member states will end. As part of the withdrawal negotiations, did the Government attempt to negotiate continued mutual recognition of this? If not, do they intend to try in future? If those mutual recognitions were in place, it would be far simpler than having to move forward as the instrument outlines. This instrument confirms that UK individuals and businesses will no longer benefit

[Lord McNicol of West Kilbride]
from mutual recognition of insolvency protection, and could therefore see a reduction in their consumer rights. In October 2017, the Prime Minister told the Commons that she wanted a new partnership with the European Union based on strong consumer rights. Can the Minister reassure us that, in light of the removal of mutual recognition, we will not see a reduction in consumer rights and protections?

Paragraph 2.3 of the Explanatory Memorandum states that these regulations are being changed to make them work for the protection of travellers after exit. This draft SI covers both package holidays and linked travel arrangements, and I have a specific question about LTAs. As we touched on earlier, an LTA is a holiday that includes two or more travel services, but the protection applies only when the services are booked from one website, shop or call centre, including through travel agents. Many of us now book our holidays online and build our own package holidays using more than one website or operator to arrange flights, hotels, care hire, tourist excursions or travel services. Crucially, these are often paid for separately. As I am sure the Minister will know, these holidays that we build ourselves are therefore not covered. Did she or her department consider extending the definition of LTAs to cover that wider definition, by removing the need for it all to be from a single website or shop, thus giving added protection?

As we all know, if one part of our holiday fails the whole holiday could be ruined. If the definition was expanded slightly to cover this style of holiday, it would offer far more protection for holidaymakers; surely that would be a good thing. I reiterate a point made by the noble Baroness, Lady Randerson, which was also touched upon by the noble Lord, Lord Deben. That is the question of who will check—and where the checks will be made—on the insolvency protection that needs to be offered by EU businesses providing services within the UK. Will this sit with individuals, the travel agent, or the providers, and how will it be monitored?

Baroness Vere of Norbiton: I thank noble Lords for their contributions and, once again, I hope to answer as many questions as I can. On the point made by the noble Lord, Lord Deben, I am a little worried that he thinks the world is coming to an end with these regulations. I assure him that it is not, and that this is actually quite a minor change. He talked about why we are removing ourselves from mutual recognition—well, that is only in the context of no deal. If we have a deal, mutual recognition may well remain on the table in the future and, as part of the negotiations for the future economic partnership, we will have mutual recognition. Even without mutual recognition, we must understand that a lot of people go on holiday outside the EU where there is no mutual recognition. This concept is not entirely unknown to the providers of travel services and to consumers.

Nobel Lords have raised a number of issues. I hope to put their minds at rest as to what the different impacts will be; it is clear that there might be some impacts and it is important that we set out exactly what they are. The first issue I address is the impact on UK retailers—this was raised by the noble Baroness, Lady Randerson; indeed many noble Lords have spoken on it—and what they will have to do to make sure they have coverage. The first thing they can do is look at the contracts they have with their suppliers across the EU, providing all sorts of different services. They can look at their contracts and they might adjust them to say that insolvency protection up to a certain standard is suitable for the travel agency and needs to be in place.

The impact assessment assumes that this can be achieved. Given that many traders will have experience of this in non-EU countries, it assumes that a person would need maybe three hours of training and advice to get to that stage. After a couple of hours of legal advice, the contracts could be amended for all participants within the travel arrangement. Some noble Lords may be thinking that surely there will be some providers who cannot provide the appropriate level of insolvency protection—that is indeed the case and our impact assessment looked at that. In such cases, it is possible to buy insurance; this is done with a fair amount of frequency within the sector—it is not unknown. Our impact assessment, which is a little higher than it should be, assumes that all 1,695 travel agents will be impacted by this; of course, that is clearly not the case. We assumed that insurance would be needed in 20% to 25% of cases and that, on average, it would cost £4,200 per business. That is how we got to the figure of between £1.4 million and £1.8 million—

Lord McNicol of West Kilbride: The Explanatory Memorandum says that there is no associated impact assessment for this legislation. Will the Minister please clarify?

Baroness Vere of Norbiton: In circumstances such as this, the impact assessment would not usually be published. There is an impact assessment but, because it falls below the £5 million threshold, it is not published in detail. I thought noble Lords might be interested to hear how we got to these figures because it is important to understand that. Within the context of the revenue as a whole for this sector, clearly it is not a large amount. I would expect the trade associations to get involved in this area and to help their members to sort it out in a sensible and swift fashion.

Lord McNicol of West Kilbride: The point about trade associations was one that I scrubbed out. The Explanatory Memorandum says that there was no consultation. Can the Minister clarify whether there was consultation with the individual companies or trade associations?

Baroness Vere of Norbiton: I am afraid that I am not currently able to clarify that but I will write to the noble Lord if anything comes to light. However, from my experience of running a trade association in the past, albeit not one relating to holidays, I can say that this is exactly the sort of thing that trade associations would get involved in. If I were a member, I would expect them to be right on top of this and getting to grips with it.

Lord Deben: I still do not understand. According to what my noble friend has said, there will be a cost because people will have to do a series of things and they might have to take out insurance, yet paragraph 13 of the Explanatory Memorandum says that there has been no special arrangement for small businesses because no extra burden is placed on them. However, she has just told us that there will be an extra burden. It might not be huge but it is an extra burden, although the Explanatory Memorandum says that there is no extra burden. I do not understand.

Baroness Vere of Norbiton: My noble friend is quite right to pick that up. What I have just outlined—in a sufficient amount of detail, I hope—is a de minimis burden. It is a very small, almost negligible amount spread across the entire industry. That is why this is structured as it is. We are talking about £1.4 million to £1.8 million a year for the whole industry, and that is at the highest level because we have assumed a cost for every single one of 1,695 travel agents.

Lord Fox (LD): It is certainly de minimis for the nation but is it de minimis for a small travel agent? What does the Minister regard to be de minimis in terms of margin for an already low-margin business? This is an increased cost for a low-margin business. It may indeed be de minimis for the United Kingdom but the cost for those travel agents that have to take it on board might mean the difference between success and failure.

Baroness Vere of Norbiton: I take the noble Lord's point that there might be certain businesses for which an additional cost of between £3,000 and £5,000 will be very difficult, but I believe that the number affected will be very limited. We will look at whether any implications arise from this, although my view is that they will not. When the system is eventually in place—if indeed it needs to be in place—I think that consumers will take added comfort from the fact that it is all in place and that they are covered.

Lord Deben: Perhaps my noble friend will be kind enough to remove from the Explanatory Memorandum the paragraph that specifically says that there is no additional weight. As someone who runs a small business that has nothing to do with travel—so I am not declaring an interest—I am just saying that that £3,000 or £4,000 comes straight off the bottom line, and that is really serious for a small business. My noble friend says that in the end the customer will pay, but I come back to the point that there is nothing in this document about the customer and I am really concerned about the way in which we are railroading this stuff through without telling customers about the cost.

Baroness Vere of Norbiton: My Lords, the figure of £4,200 that I quoted is an average. As we know, travel agents range from ginormous to very, very small. I am sure that all noble Lords who have ever purchased insurance will know that it depends on the size of the business being insured. It is very unlikely that the cost of this insurance will get anywhere close to £4,000 for a small business with a very small amount of revenue.

Lord Stevenson of Balmacara (Lab): It might be helpful if the noble Baroness could take away from this that we are struggling here a bit with figures, which might or might not be correct, on a spreadsheet that I can see on the Dispatch Box opposite to which we have not had access. If there are impact assessment figures and a calculation that will give some comfort to the noble Lord, Lord Deben, will she write to us explaining them? Otherwise, I do not think that we can say to the House with any degree of sincerity that we have done a proper job of scrutinising this legislation.

Baroness Vere of Norbiton: I will certainly endeavour to set out everything that I have said in a letter, although I do not believe that there is any more information to give. The spreadsheet actually consists of my notes, which the noble Lord will definitely not see. However, I will indeed write to noble Lords.

6.45 pm

I turn to the central point of contact, which was mentioned by the noble Baroness, Lady Randerson. It is nothing more exciting than a mechanism by which information is shared. It is required by the regulations and is simply the way in which insolvency protection information is shared among members of the European Union. Were the central point of contact not to exist, nothing would particularly change. However, it is run by the CAA, which will retain its critical role in enforcing the regulations relating to packages and linked travel arrangements. These regulations were discussed by noble Lords back in May 2018—at some length, if I recall correctly. They came into effect in July and the CAA is still the enforcement authority for them. The Department for Transport has every confidence that the CAA will be able to discharge all its functions appropriately in the event of no deal.

My noble friend Lord Deben suggested that there might be a cost implication for consumers. We do not believe that it would be significant enough to register at this time because, as I said earlier, the total cost to the industry will be de minimis. We do not expect there to be less choice. We are making sure that information about insolvency protection is provided to consumers. This also stems from regulations which the Government have drafted and which we have already looked at and passed in your Lordships' House. If consumers have any concerns about this, they can contact Citizens Advice. They can also contact the European Consumer Centre until at least March 2020 if they have questions about the insurance provision for European travel.

The noble Baroness, Lady Randerson, raised a question about exit day travel—that is, what will happen to people who have bought their package but will be travelling after exit day. If they have bought a package from a UK trader, they will be fully protected on both sides of exit day, so I hope that that takes out a very large chunk of consumers. Therefore, we are looking at people who purchase their packages from EU-based traders. Their protection will depend on the law on insolvency protection in the member state concerned. However, given that we currently have mutuality with all the different insolvency laws, one would assume that it would be fairly robust. Therefore, we believe

[Baroness Vere of Norbiton]
that there is a limited risk. It would, in any event, affect very few people and only if an EU trader became insolvent and the local insolvency laws did not offer protection. Again, we do not feel that that is a significant risk. I hope that I have been able to provide some comfort—if not 100% comfort—to the noble Baroness.

Baroness Randerson: What are the Government doing to advertise these new arrangements to people and indeed to the industry as a whole? She is quite right that many travel agents will belong to trade associations, but not all of them necessarily will. Nowadays, people buy their goods online, including from abroad, and they might think they will continue to have the protections they had in the past.

Baroness Vere of Norbiton: The noble Baroness is quite right, but that is a consequence of regulations that have already been through your Lordships' House. Significant guidance was published at the same time and goes into some detail about LTAs and what would and would not constitute an LTA. We will work with the trade associations and make sure that the guidance is kept up to date as we move to the next phase.

I thank the noble Lord, Lord McNicol, for his balanced assessment of this legislation. He mentioned building one's own holiday, which I am sure many noble Lords do. It is slightly beyond the scope of the discussions today, but if I can get any further information, I would be happy to write to him. I believe that takes me to the end of the questions, and I beg to move.

Motion agreed.

Trade Barriers (Revocation) (EU Exit) Regulations 2018

Motion to Approve

6.50 pm

Moved by ***Baroness Fairhead***

That the draft Regulations laid before the House on 22 October be approved.

The Minister of State, Department for International Trade (Baroness Fairhead) (Con): My Lords, these regulations revoke the EU Trade Barriers Regulation 2015/1843 under Section 8 of the European Union (Withdrawal) Act 2018. The EU Trade Barriers Regulation sets up a process for businesses, trade associations or member states to report trade barriers in non-EU countries to the European Commission. Cases have ranged from burdensome customs procedures to discriminatory pricing systems. The Commission assesses the measure and makes proposals for resolution—for instance, raising it in bilateral discussions or at the World Trade Organization. It should be noted that this covers unlawful trade barriers only.

After we leave the European Union, the work on trade barriers will fall to the British Government. It is important that we get this right. Trade barriers cost the UK economy billions of pounds in exporting opportunities worldwide, and non-tariff barriers on average add up to three times as much as tariffs to the cost of traded goods. That is why one of the Department for International Trade's key objectives is to open markets and why our export strategy details the types of barriers businesses face when exporting and the government support that will be available. It is therefore crucial that businesses can continue to report them. But that only makes it even more crucial that the system for reporting them works effectively, and there is limited evidence of the success of the statutory process.

We do not believe the current Trade Barriers Regulation is fit for purpose in the new UK context. It is complex and costly for businesses, making it slow and infrequently used. It sets a high threshold to be met before an investigation is initiated. This high threshold acts as a disincentive to firms, particularly small firms, reporting market access barriers. The Trade Barriers Regulation requires a complaint to provide detailed evidence that obstacles to trade actionable under international rules are causing injury or adverse trade effects. Just gathering this evidence requires significant amounts of complex legal and economic analysis to be conducted by firms or trade associations. All this is required just for an investigation to be triggered and a report to be written. This is a higher threshold than the Government wish to set for a potential non-tariff barrier to be examined in the first place.

However, amending this threshold would be a change in policy, and thus not within the scope of the powers granted under the European Union (Withdrawal) Act. We would therefore need primary legislation to provide the legislative authority to have a new threshold for reporting trade barriers under a UK replacement of the EU Trade Barriers Regulation. Moreover, it does not create an obligation on the Government to resolve trade barriers. Creating such an obligation would again be a substantive change of policy, again needing primary legislation. The Government have therefore decided not to replicate the Trade Barriers Regulation, and instead to introduce a materially enhanced non-statutory system.

In the EU's own evaluation of the Trade Barriers Regulation in 2005, a potential TBR user indicated that, while it believed it had a sufficiently sound case, it was discouraged from proceeding to file because of the volume of additional information requested by the European Commission during the pre-initiation phase. In the same report, one of the important EU trade associations commented that there is a large discrepancy between the TBR as a market-opening instrument and the reality faced by complainants in making a complaint. This leads to a lot of frustration for companies or industries that want solutions to market barriers.

The Trade Barriers Regulation, as it stands, provides for a five-step process: the complaint is submitted; the Commission has 45 days to determine whether to investigate; the Commission announces this decision in the *Official Journal of the European Union*; the Commission actually investigates; and a report is submitted to the trade barriers committee. It is drawn-out and complex. Businesses are required to submit lengthy

reports, involving detailed economic and legal analysis for which small organisations just do not have the resources. It is also almost entirely superfluous. All the regulation does is to commit the Commission to investigate and write a report. There is no requirement to take action. In practice, the regulation has been almost entirely bypassed. Around 70 new barriers were reported to the EU last year. On just one of those did the businesses involved choose to use the statutory process; the rest were submitted informally. Indeed, in the last 10 years there has been just one UK application. There is no evidence that those submitted informally were any less likely to be resolved.

Businesses are already revealing their preference for a non-statutory process. So we propose a new, non-statutory process to improve the approach rather than continuing to use a less effective one. Our non-statutory approach will be accessible and user-friendly, with a simple online form on www.great.gov.uk for businesses to fill in. This is already well under way and will be ready for 29 March 2019. Because it is non-statutory, it will also be a flexible process. UK exporters will be able to tell the Government of the full range of barriers they face, including ones that breach the letter and spirit of international agreements. The Government will then use the full range of available tools to tackle these barriers: economic diplomacy, regulatory dialogues, WTO dispute settlements and, if necessary, committees. It will also be a two-way process. It has been designed with the objective of better understanding the trade barriers that businesses face so that we can target the Government's effort more effectively.

We will, of course, provide reports to businesses and Parliament within the bounds of commercial confidentiality. In due course, the Government will be able to share information with businesses on where barriers exist or—just as importantly—have been removed. That will help businesses make decisions. We are absolutely clear that reports of non-tariff barriers will not disappear into a vacuum and that we will give both parliamentary oversight and feedback to businesses on barriers they report. We are expanding the market access team in the DIT to support this work, with a designated regional point of contact for each of the nine DIT global regions. Her Majesty's Trade Commissioners overseas will spearhead and champion action on market access across our nine regions overseas. Of course, this will be accessible and available to all parts of the UK.

We are upgrading our capacity to deal with market access barriers, including the IT infrastructure to share information on market access barriers faced by UK businesses. This will enable better collaboration and information-sharing.

As the UK delivers an independent trade policy for the first time in 40 years, we are committed to ensuring that our businesses have as many exporting opportunities as possible. Part of that means helping to resolve trade barriers as effectively as possible. I welcome the opportunity for full scrutiny of this statutory instrument and of the Government's new approach to tackling trade barriers. I look forward to hearing noble Lords' contributions. I beg to move.

7 pm

Lord Fox (LD): My Lords, I thank the Minister for her presentation. I shall try to be brief but I do not want her to interpret my brevity as meaning that I think this is a well-presented policy. There are problems, and the problems are magnified by the nature of the challenge we will face. Assuming that Brexit happens—which these Benches do not—whatever the arrangements, non-tariff barriers will be a real issue for many businesses, big and small, across the country. So it is right that we are having this discussion.

I assume—because the Minister has not said otherwise—that, with or without an agreement, whether we crash out or agree, the Government intend that this is the direction we will travel in in dealing with non-tariff barriers. That is unusual because, in many of the other SIs we have discussed, we have tried to roll over or reproduce in British law things that exist now. That is a change.

The Minister mentioned the necessity of primary legislation if the statutory route were to continue. That pre-empted one of my questions. She then went on to make a virtue of a necessity—or a necessity as far as the Government are concerned—by justifying why a non-statutory route is preferable to a statutory one. We can perhaps come back to that.

The Explanatory Memorandum does a great job of explaining what we are not going to have any more. It goes into great detail about what the TBR does and then offers us eight lines on the proposal. If the Minister, in another life, was sitting on the board of directors of a large company and was presented with a paper making a big, important proposal that used eight lines of a full-page document, she might think that that was a little sloppy, a little cursory and lacking in detail. To some extent, it takes us for granted. There was more detail in the Minister's presentation, however, and I thank her for that.

The Minister set out some reasons for the infrequent use and for some of the barriers and other issues. To some extent, as she said, we could have debated this in primary legislation and improved the system that we have now. However, it is not clear what is replacing it. It looks like a relatively informal system that is lacking in process. It is not clear how much resource the Government are prepared to put behind it or how individuals will operate within it.

The Minister has given a number of reasons and explanations and yet in paragraph 10 of the Explanatory Memorandum we see that there was no formal consultation. There are six paragraphs of anecdote. If you do not have a formal consultation process you are merely choosing the results; it is not a consultation. Essentially, the argument against a rolling-over of the TBR process is based on a series of anecdotes and not on a formal consultation. This lacks detail about what is to replace it, as well as a formal consultation.

As for what this process may or may not be able to achieve in the event that it is resourced, has a process and all the boxes and wires—which are not set out here—are joined up, we need to remember that the influence that we will be able to exert, compared with the influence that the European Union was able to exert,

[LORD FOX]
will be less because our market is smaller, about one-10th the size. So in dealing with the challenge of non-tariff barriers that our companies will definitely face, we might end up with a system that people have access to, but we will have a weaker punch and less of an opportunity to make anything happen. We will ultimately have a system where there is more friction, more problems for our businesses and a weaker way of resolving them. That is why I find this SI disappointing.

Lord Stevenson of Balmacara (Lab): My Lords, I am grateful to the Minister for her detailed introduction to the SI. I agree almost entirely with the approach of the noble Lord, Lord Fox, and will follow a number of his points.

I am intrigued by this SI. The noble Baroness was right to point out that it does not do what the other SIs are trying to do, which is to replicate in a UK context what is currently happening because of our membership of the EU. I do not quite follow the logic. We are considering these SIs today in such large numbers because they transpose whereas this SI dismantles. The Government's argument is that we cannot amend it but we can dismantle it. I do not get the logic of that. It seems that the Government could not do anything about it because anything they wanted to do would require primary legislation. That rather suggests that the Trade Bill, which is in limbo, is not appropriate for that. However, it seems to me to fit entirely within the parameters of the Trade Bill. I understand what the noble Baroness is saying but I do not get where we are going.

My second complaint is that the figures I have do not square with the figures that the noble Baroness used. I have just looked at the list of trade barriers which are currently reported to the Commission and, on a quick count, there appear to be about 1,000—there are 116 in agriculture and fisheries alone. If you count them by country—which I can do even as I speak—you will find that many of them are interesting countries, including the USA, which have a substantial number of trade barriers.

I am hearing a different story from the other side of the Dispatch Box about a pathetic structure which is hardly used and has industry turning away in droves. As the numbers show, however, that is not what seems to be happening; there are live cases covering a range of issues that play to this question of non-tariff barriers. It seems rather odd that we are trying to dismantle it. Those are my opening points. It is a system which the Government have taken against. They have decided in principle, for reasons I do not follow, that it would be much better if we were not part of the TBR scheme, or any TBR scheme, as we leave the EU, if we have to, on 29 March.

As the noble Lord, Lord Fox, said, there are clearly issues about trade barriers and how we are going to resolve them. Surely it must be the objective of the Government to make sure that we have a robust system in place to support our businesses and workers, who will otherwise be affected badly by countries which have decided, for reasons best known to themselves, that barriers should be erected. Given the new world order, in which might is right and where protections and tariffs are rife, we verge on the prospect of a very dangerous set of trade wars. It therefore must be appropriate for the UK Government to think hard about this, and it is not obvious that the right way to do it is to dismantle something that has some merit.

Why would the Government decide to replace the present statutory scheme, without formal consultation or proper notification, with a non-statutory reporting mechanism, which seems at its heart to simply rely on emails sent to local ambassadors in the hope that they will be able to do something about it? That does not seem to pass the test of a serious approach to supporting exporting.

I am intrigued why this responsibility—which clearly is not the flavour of the month within the department—is not given, to be beefed up and made more effective, to one of the two bodies that the Government will rely on if the Trade Bill ever goes forward. The Trade Remedies Authority deals with exactly these issues. Why does it not have this responsibility? If there is some doubt about whether it has the range or the skills to do it, the CMA will also be looking, through its state aid function, at similar areas. There is a perfectly good way of taking on this responsibility outside the department. Taking it outside the Department for Trade will give hope to those industries that do not naturally relate to BEIS or other departments such as Agriculture that the new body will set up expertise.

The Minister said that feedback on the effectiveness of the trade barriers regulatory system has been mixed. Without a formal impact statement being available—or maybe an informal one, as we have heard in other SIs—and without knowing what an adequate definition of "mixed" is, there are rather confusing messages coming back. "Mixed" does not mean a unanimity of views, so I take it that there were some dissenting voices. Would it not be sensible to set out clearly what the objective of the trade barriers system should be, what system is required to countermand these things, and to set up a proper consultation to come up with a solution that will command the support of those who have to be involved in it?

The argument seems also to rely on the fact that even though there is this system, it does not achieve very much and has rarely been used. The information I have—I do not know whether it is true—is that when the Confederation of European Paper Industries lodged a complaint that measures imposed by Turkey on the imports of certain varieties of paper were inconsistent with both the WTO and the EU-Turkey customs arrangements, Turkey immediately withdrew the unfair measures because of possible action through the statutory system. Even though it does not have a set of sanctions or a court behind it, the fact that this was formal and statutory-based was sufficient to get action. I do not understand why what might be a developing, long-term programme will be abandoned when the UK might have need of it.

If we are to get rid of it, what about the things that are present and still of value? The Minister did not give any detail. There is a market access advisory committee which monitors arrangements and puts forward recommendations, and there are lists published.

Who will do that when we move into this new, semi-informal system? In particular, how will we organise in the UK the variable geometry that arises when different departments have responsibilities here? I do not think the issues that will be affecting Defra—such as the transport of live animals—will be in any way cognate with some of the other issues that have been raised. How will that be managed? In particular, in the future we will have a situation where the devolved Administrations—Scotland, Wales, and Northern Ireland if ever re-formed—will have direct trade responsibilities. How will their complaints be organised? Will that be done on an informal basis, and has that been cleared with the devolved Administrations? I suspect that they will have concerns about that. While we are on the topic of consultations, in the absence of a properly constituted market access advisory committee, where in the system will representatives, consumers, trade unions and businesses be able to feed in views and advice about this non-statutory system? Will this be done in some informal way, through Facebook perhaps?

The trade barriers regulations are only one area of EU legislation that deal with trade barriers and dumping. This SI before the House is part of a process, so where are the other pieces of EU legislation that deal with dumping and other matters? Specifically, what about Regulation (EU) 2016/1036 about protection against dumped imports and Regulation (EU) 2016/1037 on protection against subsidised imports? Can we expect those, and, if so, roughly what is the timescale?

There is also a transitional issue. There are a number of complaints apparently already in the system from the UK. What will happen to those if they have not been completed by 29 March 2019 and we have to leave the EU with no deal? What happens if there is a transition period? These are two separate issues. I put it to the Minister that the department should be issuing advice about those currently engaged. Even though they are small numbers, the issues are substantial.

I end by suggesting to the Minister that, rather than revoking the regulation, it might have been a good idea to make a greater effort to investigate whether the current system was truly effective and whether the fact that the statutory element was not used very often was a sign that it was working rather well, rather than the opposite. I generally agree with the noble Lord, Lord Fox, on this: this SI is somewhat undercooked.

Baroness Fairhead: My Lords, I thank your Lordships for your contributions today. This has been an interesting debate in a particular area and I will try my best to cover all the points that were made. I start with the point made by the noble Lords, Lord Fox and Lord Stevenson of Balmacara, about why we are revoking. Essentially it is because, as I laid out in the briefing, there is a very complex process to submit and all it requires the Commission to do is to investigate and produce a report—it has no teeth or requirement to solve anything. What is the logic of revoking rather than amending? The amendment, as I said, concerns primary legislation—that is our advice. When you look at amending to create primary legislation with the force of just creating a report, you wonder why you would do that. Many countries have exclusively non-statutory approaches, including Australia and New Zealand.

7.15 pm

On the point about the TBR versus the TRA and the trade remedies, there is a difference between trade remedies and trade barriers. Trade remedies are the ability to apply additional tariffs or protective measures when there is dumping or when there are subsidies. That is a particular part of the Trade Bill and the Taxation (Cross-border Trade) Act 2018 and is separate from trade barriers. Trade barriers simply alert us to the fact that barriers exist. They are two separate things within the EU Commission today.

The main point made by the noble Lord, Lord Fox, was on new market access. I completely understand and appreciate his point about the information and that the Explanatory Memorandum was thin. I tried in my opening speech to make sure that noble Lords understood just how much will be behind this. To give the House a bit more detail, the team, which will be a dedicated team, consists of three or four people and will be 20 people in a very focused group. We will have an online system, user-tested with businesses to make sure that it is fit for purpose, which is why we are confident that it will be ready by 29 March. This is work that we already undertake in our trade policy group and noble Lords will know that this group has been significantly increased to hundreds of people as a result of the referendum.

To touch on the point made by the noble Lord, Lord Stevenson, about the numbers of investigations and reporting, I believe that, typically, the numbers are of breaches reported through the Market Access Advisory Committee—MAAC, to which the noble Lord referred. The TBR, again, is a separate system within the EU that sits alongside the MAAC, and that is where all of the reporting has taken place.

The noble Lord, Lord Stevenson, gave the example of Turkey. It is true that it was withdrawn, but it would be a challenge to say that it was because of the threat of the TBR when 69 other elements that were raised to the European Commission were raised through the MAAC. Businesses are moving to the more informal way because they find that that is a better way to resolve their issues.

Lord Stevenson of Balmacara: I understand the point the Minister is making, although it was not really at the heart of what I asked. It would be helpful if she could explain what would be the difference. She talked about the informal ways, but let us take the Turkey example. As I understand it, that was properly documented, sent in, appropriately registered, taken up by the European Union and was formally there. Therefore, it is the threat—rather than the practice of it—that the EU might take a range of sanctions and not necessarily just do a report that seems to have caused the change of heart in Turkey. In the new system, what is it—emails to the ambassador?

Baroness Fairhead: Definitely not. What happens when this goes to the MAAC—Market Access Advisory Committee—is similar to what will happen when it

[Baroness Fairhead]
goes to the market access team, which is the new team set up inside the DIT. All concerns and market access issues can be raised on an online site and, as I tried to explain, they will be reported on. The concerns will go back to businesses and particular sectors and will also come before this House. So within the bounds of commercial confidentiality, the concerns will be logged as specifically as possible. In fact, it will be similar to the current approach: the areas will be reported on and will not just stay in the ether.

Lord Fox: From that answer, it is still not clear what they will plug into. Perhaps the Minister can help on that. Improving the resources from three or four people to 20 people sounds impressive—until you think about the scale of the task. If the Minister's wonderful online system will gather in more issues, as it is supposed to, there will be a lot of work to do.

There is a large variety of sectors. For example, rules of origin will be a major issue around non-tariff barriers in the food sector; we have not mentioned those dreaded words. The department will need tremendous ability to analyse and substantiate any claim around that. Automotive and aerospace are industries that I know better—and chemicals. All those industries have immense specialisation in them and a great number of legal issues around them. The reason this process becomes complicated quickly in its TBR mode is that there are those complications. Simply having an online form will not remove that complication. So understanding the scale of the resource, it seems that, unless nobody bothers to do this, 20 people will soon be insufficient. Attracting sufficient expertise to address that issue will be a real challenge.

Baroness Fairhead: Again, the noble Lord makes good points. The market access team will be made up of 20 people, as I said. That is similar to the number of people on the Market Access Advisory Committee, which exists currently for all EU nations. There are 28 people there—one for each EU nation—as against 20 who will focus just on the UK.

The new digital system will be online and accessible to all businesses. I will come on to engagement in a moment, but we have had feedback from discussions at the round table of businesses that there is unanimous support for the new approach. Businesses see it as a way to make sure that the system is accessible and that more information can flow in a less restricted way, eventually becoming a two-way process.

I will touch briefly on engagement and consultation. As I said, the TBR process has been used very rarely, so we reached out to organisations that have used the process or contemplated doing so. We sought their feedback on the most effective way to use it. We engaged with businesses on the right approach to the online service. They have had an active role in user testing to make sure that the external-facing side is fit for purpose. We reached out to and included stakeholders from the full range of sectors, including food and drink, pharmaceuticals, alcoholic beverages and automotive; they all attended the round table. We also spoke to those who had been actively involved in TBRs. We also engaged with stakeholders who fed into the design of the service. All that engagement had the aim of making sure that we had something that businesses thought was the right support for them in terms of the market access barriers that they see.

The noble Lord, Lord Fox, made an important point about the power of the UK and its capability to influence. This is not new to us. On trade missions, I often push back at some of the trade regulations and non-tariff barriers. We can see significant successes in pushing back on regulations on a UK-only basis. For example, Taiwan removed the barriers on pork from the UK. That was done not on an EU basis but on a UK bilateral basis with Taiwan. Similarly, the Chinese block on UK beef was also pushed back. So we have the ability to push back on such regulations.

The noble Lord, Lord Stevenson, was concerned about mixed feedback. The broad majority of businesses were comfortable with this non-statutory approach and supported it unanimously. Even the entity that was more interested in continuing with a statutory option appeared pretty sanguine about moving to this approach and could see some real benefits. My understanding from the impact statement is that neither the TBR approach nor the new approach regulates business, so no impact assessment is needed. However, I hope that I have conveyed our significant engagement with all parties that we think would be interested in the approach.

I truly appreciate the challenge we face here. I hope that I have given noble Lords some confidence in what is being created, because it will support British businesses and help them push back the barriers. The approach has been designed with the objective of being business-led. With this in mind, I ask noble Lords to support this instrument.

Motion agreed.

Mental Health (Northern Ireland) (Amendment) Order 2018

Motion to Approve

7.28 pm

Moved by ***Lord Duncan of Springbank***

That the draft Order laid before the House on 31 October be approved.

The Parliamentary Under-Secretary of State, Northern Ireland Office and Scotland Office (Lord Duncan of Springbank) (Con): My Lords, the draft instrument will correct an unintended consequence of the Mental Health Review Tribunal (Amendment) Rules (Northern Ireland) 2016 due to its interaction with the Mental Health (Northern Ireland) Order 1986. Because of a legislative deficiency, the current regime in Northern Ireland presents a risk to life. Currently, patients suffering from mental illness or severe mental impairment could be released when they are a risk to themselves or others. This order addresses that issue.

The Mental Health (Northern Ireland) Order 1986 covers the assessment, treatment and rights of people with a mental health condition in Northern Ireland. It also provides for a person to be detained in hospital

where such an outcome is in their best interests. Any detention involving the state must be compliant with the European Convention on Human Rights, which provides that a detained person must have the right to,

"take proceedings by which the lawfulness of his detention shall be decided speedily by a court".

In the 1986 order, this is manifested in a right to apply to the mental health review tribunal.

That order also provides that a patient can apply to the tribunal at any time in the first six months of their detention. Rule 20 of the Mental Health Review Tribunal (Northern Ireland) Rules 1986—hereafter known as the court rules—provides that at least 14 days' notice must be provided before a tribunal hearing unless all parties consent to a shorter period. The court rules, in combination with the 1986 order, created the effect that no challenge to the admission for assessment could be made, as the assessment period could only last 14 days and 14 days' notice was required for a tribunal hearing.

The court rules were amended by the 2016 amending rules to enable the notice period to be shortened where it is in the interests of justice to do so. The changes to the court rules therefore made it possible to have a hearing in the assessment period, and the first such hearing was held in 2017. A conflict between the court rules and Article 77 of the 1986 order, resulting from the changes made by the 2016 amending rules, has now been identified.

An unintended result of the 2016 amending rules is that the mental health tribunal is required to apply more stringent criteria, which relate to continued detention of patients outside their initial assessment, when deciding whether to continue detention for assessment purposes. The order before the House this evening will amend Article 77 of the 1986 mental health order so that the same criteria for admitting and detaining a patient for assessment apply to the discharge of patients by the mental health tribunal during the period when patients are being assessed.

The anomaly created by the legislative deficiency effectively means that patients who are in the process of being diagnosed with a mental illness or severe mental impairment could be released before the period of assessment is complete. If the criteria used by the tribunal are left unamended, this will continue to enable release of patients who have not yet been diagnosed with a mental illness or severe mental impairment, even if they suffer from a mental disorder that poses a substantial risk of physical harm to themselves or others, should they be released. Moreover, there is a concern that, left unamended, the legislation is in conflict with professional codes of practice for health professionals.

The House will be aware that this order, in normal circumstances, would have been taken through the Northern Ireland Assembly. However, as noble Lords well know, Northern Ireland has been without a devolved Government for over 20 months. The principle established in our interventions thus far over the past year is that we will legislate where doing so is necessary to ensure good governance, protect the delivery of public services or uphold public confidence.

This measure does not set or change policy direction on devolved issues in Northern Ireland; that is rightly for the Executive and Assembly, and our overriding priority is to see them up and running again, and running well. The order before the House corrects a legislative deficiency; it does not set or change policy direction in Northern Ireland. On that basis, I beg to move.

Baroness Harris of Richmond (LD): My Lords, I thank the Minister for introducing this order. We on these Benches of course recognise that the proposed change is needed and is a matter of both patient and public safety. It is certainly in the public interest for this change to be made. We also recognise that the political parties in Northern Ireland have been briefed on the proposed changes.

However, we are again deeply concerned that it is necessary for this change to be made by this Parliament, rather than by the Northern Ireland Assembly. We remain deeply disappointed that more progress has not been made to restore the devolved Executive, and we have been urging the Government for many months now to take a number of steps, including appointing an independent mediator, to invigorate the talks process.

During the progress of the Northern Ireland (Executive Formation and Exercise of Functions) Bill, my noble friend Lord Bruce raised a number of important policy issues for Northern Ireland that are currently not being resolved there, as there is no Executive or Assembly in place. The *Belfast Telegraph* recently revealed that a backlog of 164 important decisions has piled up since the collapse of Stormont because there are no Ministers to make decisions. Those outstanding decisions include: an investment strategy; an action plan to tackle paramilitary activity, criminality and organised crime; dozens of public appointments; stiffer penalties for driving while using a mobile phone; minimum pricing for alcohol; publishing the Protect Life 2 strategy to tackle suicide; a superfast broadband strategy; an arts and culture strategy; and school development proposals.

The people of Northern Ireland are suffering. Budgets are being cut, services are under extraordinary pressure and no decisions can be taken to alleviate any of this. What a shameful situation—one that is clearly unsustainable. With each passing day, crucial decisions are not being taken, and the services on which people rely are getting deeper into financial difficulty and falling further and further behind where they should rightfully be. As well as causing real suffering to people today, this also carries with it a lost opportunity cost, with planning and infrastructure delays holding up investment and job creation.

Despite this, there appears to be no urgency in the efforts to restore the Assembly. We urgently need a talks process to restore devolution. Can the Minister tell this House when the Secretary of State will call all-party talks, so that this sort of SI will be a one-off event?

Lord Murphy of Torfaen (Lab): I very much agree with the noble Baroness, Lady Harris, on the issues surrounding the current position in Northern Ireland. We obviously support the Government in this change

[Lord Murphy of Torfaen]
to put right the legislative anomaly that has led to the SI. The problem, of course, is that there is no Assembly or Executive in Northern Ireland to deal with these matters. I am glad the Government consulted extensively with the Northern Ireland Courts and Tribunals Service, the Northern Ireland Department of Justice and the Health and Social Care Trust, as well as other professionals.

Of course, at the end of the day, this should not be before us at all. It is a matter for people in Northern Ireland and their elected representatives. I know that, at the moment, with the chaos surrounding Brexit and everything else—which is likely to last until Christmas, if not beyond—the chances of reviving the Northern Ireland institutions are pretty slim. However, it does not mean the Northern Ireland Office, the Minister and his boss cannot be active; they can. They can at least deal with talks about talks, and look at how those talks are arranged—the all-party talks, for example, or the possibility of an independent mediator. These points are made constantly by Members of your Lordships' House and in the other place.

The noble Baroness, Lady Harris, talked about urgency—or the lack of it. It seems to all of us observing the situation in Northern Ireland that Brexit has added to this lack of urgency, so I hope the Minister can tell us that efforts to get those institutions up and running have not completely gone to sleep. The sooner they are, obviously, the better.

Lord Duncan of Springbank: I begin by thanking the noble Lord and the noble Baroness for recognising that the order is a simple correction which is needed and timely. I could stop there, but I will not: I will address the more serious points raised concerning where we are in Northern Ireland.

Your Lordships will be aware that we have brought legislation before this House and the other place to provide an opportunity for the parties to come together and move towards securing an Executive. The first period is five months, with a five-month extension if we make enough progress in the first period. I can assure you that my noble friends, and my right honourable friends in the other place, have been active on these matters, not just in the early stages of looking at the architecture but regarding the independent mediator. I believe that these matters will be part of the ongoing solution.

Your Lordships will be aware that the battlefield is crowded with other issues, but we cannot lose sight of the reality we face in Northern Ireland. I repeat: frankly, I would much rather not be standing here doing this, and I am sure noble Lords would much rather not listen to me, either. None the less, we must secure progress because, as all would accept, this is a lost opportunity cost for the people of Northern Ireland. Their voices have been silenced in a way they do not deserve. There needs to be progress and a change in Northern Ireland. I can assure your Lordships that the Government are working now to bring that about in the first five months, hopefully without requiring an extension into that second period. That is the Government's hope; I am sure it would be supported by everyone in this House, who know the consequences of failure in this regard. We do not wish to find ourselves tumbling down the steps into direct rule.

On that basis, returning briefly to the reason we are here, I thank your Lordships for your support, which I hope will be given, and I commend this order to the House.

Motion agreed.

Central Securities Depositories (Amendment) (EU Exit) Regulations 2018

Trade Repositories (Amendment and Transitional Provision) (EU Exit) Regulations 2018

Motions to Approve

7.40 pm

Moved by ***Lord Bates***

That the draft Regulations laid before the House on 31 October and 6 November be approved.

The Minister of State, Department for International Development (Lord Bates) (Con): My Lords, these are two out of around 60 financial services SIs being laid by the Treasury under the EU withdrawal Act. They form part of the preparations being undertaken to ensure, in the event that no deal has been agreed when we leave the European Union in March 2019, that a functioning legislative and regulatory environment will continue to be in place for the financial services sector. They deliver on a commitment made last December, when the Treasury announced that it would provide functions and powers to the Financial Conduct Authority in relation to trade repositories, and to the Bank of England in relation to non-UK central securities depositories, to enable them to manage in an orderly manner any cliff-edge risks arising from a no-deal scenario.

Trade repositories and central securities depositories provide services in the UK under EU regulation. Should the UK leave the EU without a deal or an implementation period, trade repositories and central securities depositories would be unable to provide services to UK firms until they had the appropriate permissions under the UK's domestic regimes, given that the UK would be outside the single market for financial services. The SIs seek to ensure that there will continue to be a functioning regulatory regime and mitigate any disruption in the provision of services in that scenario.

First, I will discuss the trade repositories SI. Trade repositories collect and maintain records centrally on derivative transactions. Derivatives are financial instruments that can be used to hedge against risks such as interest rate fluctuations or asset price volatility.

The European Markets Infrastructure Regulation, known as EMIR, requires all information on European derivative transactions to be reported to trade repositories

registered or recognised by the European Securities and Markets Authority. If trade repositories were unable to provide services to UK firms post exit, those firms would be unable to fulfil their reporting requirements under the UK's regime and the UK regulators would lose access to valuable data used to monitor the UK market for financial stability risks.

The SI therefore introduces a number of measures to mitigate against that risk and ensure a smooth continuation of services from trade repositories to UK firms. First, it establishes a UK framework for the registration of UK trade repositories, while maintaining the same regulatory criteria for new UK trade repository applicants. To do that, ESMA functions relating to registration of trade repositories will be transferred to the Financial Conduct Authority. That includes the mandate to make technical standards specifying the information to be provided by trade repository applicants. The FCA is already familiar with the reporting requirements under EMIR, due to its role in supervising UK firms, which are subject to existing EU reporting obligations. That means that it is the most appropriate UK authority to take on that role.

Secondly, the SI provides powers to the FCA to consider applications ahead of exit day so that a trade repository can provide services in the UK as soon as possible following exit. Thirdly, it establishes a "temporary registration" regime for eligible trade repositories that will allow them to continue to provide services to the UK by forming UK-based subsidiaries. That provides temporary registration for a period of three years to UK trade repositories that are part of a group containing an ESMA-registered trade repository, the purpose being to allow additional time for their application for permanent registration to be considered by the FCA and to ensure continuity of services to UK firms. To enter the temporary regime, an eligible trade repository must, ahead of exit day, submit an application to the FCA for registration and set up a new legal entity in the UK.

Finally, the SI creates a conversion regime whereby UK trade repositories, currently registered by ESMA, are deemed to be registered by the FCA from exit day. To enter the regime, a UK trade repository must notify the FCA of its intention to be registered ahead of exit day. The conversion regime therefore ensures smooth continuity of services from UK trade repositories to firms.

7.45 pm

I turn to the central securities depositories SI. Central securities depositories are financial market infrastructures that keep a record of who owns individual securities, such as bonds or shares. A central securities depository carries out three core functions: trade settlement, registration of share ownership and ongoing delivery of obligations arising from share ownership. The provision of those services is governed by the Central Securities Depositories Regulation, which created a common authorisation, supervision and regulatory framework for central securities depositories across the EU. If non-UK central securities depositories are unable to provide services to UK firms after exit, that will introduce risks to any UK firm using those services and potentially cut off their access to certain financial markets.

This instrument therefore introduces measures to mitigate those risks and ensure a smooth continuation of services by central securities depository services to the UK financial sector. It transfers the various functions and powers currently held by EU bodies to the appropriate UK authorities. Following exit, the powers to recognise non-UK central securities depositories, held by ESMA in the EU, will be transferred to the Bank of England. The European Commission's powers to make equivalence decisions are being transferred to the Treasury. That is a process of reviewing another country's regulatory framework to determine whether it is equivalent in outcome to one's own regulatory framework. Once the Treasury has deemed a country equivalent, the Bank of England can recognise central securities depositories within that country. That allows them to provide services to UK firms in compliance with the UK regime.

The instrument also introduces a UK transitional regime to allow UK and non-UK central securities depositories to continue to provide services in the UK after exit. To make use of the UK transitional regime, the SI also introduces a requirement for non-UK central securities depositories to notify the Bank of England, before exit day, of their intention to provide services in the UK following exit from the European Union. The Bank of England has sent letters to non-UK central securities depositories to set out the notification process.

The Treasury has been working very closely with the FCA, the Bank of England and industry bodies to draft the instruments. In advance of laying them, the Treasury published the TR instrument in draft along with an explanatory policy note on 5 October 2018, and the CSDR instrument in draft along with an explanatory policy note on 22 October 2018, to maximise transparency to Parliament, industry and the public. Regulators and industry bodies have generally been supportive of the provisions in the SIs. Both are essential to ensure that a functioning legal regime is in place for trade repositories and central securities depositories in the event of no deal, and that UK regulators are equipped to manage any cliff-edge risks. UK businesses and customers who currently use trade repositories and central securities depositories can be confident that they will continue to operate in the UK, no matter what the outcome of negotiations. I hope that colleagues will join me in supporting the regulations, and I commend them to the House.

Baroness Bowles of Berkhamsted (LD): I thank the noble Lord, Lord Bates, for his introduction. As usual, I declare my registered interest as a director of the London Stock Exchange. By now we are familiar with the pattern of how powers transfer to the UK regulators and temporary regimes. I will not revisit that. I have just two points regarding these SIs that the Minister might be able to clarify.

I do not need a response to anything on the trade repositories regulations. I just note as new—new in the sense that I have not commented on it before—the way

[Baroness Bowles of Berkhamsted]
an ESMA-recognised UK trade repository or entity can simply move into the UK regime. That seems a sensible provision.

On the CSDs, the policy note and guidance on the Treasury's website say that applications before exit will be "subject to existing law" while the application is considered. I wondered whether there could be some elaboration on the difference between that UK law and the onshored CSDR once firms switch to it. What happens at the point of switching, or is this just, as I suspect, splitting hairs and no big deal? That provoked my curiosity and, with other things going on, I did not quite have the energy to work through absolutely every last word and work it out for myself.

Two issues are general to all these SIs, particularly in the context of the no-Brexit—sorry, that is a Freudian slip—of the no-deal preparations, so I take this opportunity to raise them. Last week I showed a letter to the noble Lord, Lord Bates, when we expected to discuss the SIs that are to come later. It was sent to the chair of the Secondary Legislation Scrutiny Committee, explaining that the SIs laid under the EU withdrawal Act will be deferred, amended or revoked by the withdrawal agreement Bill, ready for the end of an implementation period, rather than exit day. My first point is that it is dangerous to think of any of these SIs as just-in-case provisions. Obviously, much of this allocation of powers is a provision for any Brexit scenario, but it would be helpful to know which provisions are likely to be revoked or substantially modified if we go into an implementation phrase. I am not sure we can necessarily do that for these at this point, but it would be useful if it was in the Explanatory Memorandums.

The other point that we have not previously discussed is that since Monday last week we have had the impact assessment. It did not reveal a great deal—there was no new or useful information—but I do not have a clue where the figures of the costs for firms to familiarise themselves with regulations come from. The amounts seem very small indeed. I wonder whether they include the thousands of pages of consultation that the FCA is doing, which is up to about 1,800 pages just on Brexit preparation. For MiFID, one of the largest regulations and which we will deal with later, the familiarisation cost is a mere £1,900. That is a very low charging rate. I cannot see anybody getting much legal advice for that; at London rates that is about two hours. Just for comparison, how long does it take the Treasury to make a complete transcription? It obligingly sent us the MiFID schedules, along with caveats about accuracy. The problem is that the firms that have to familiarise themselves with these new regulations cannot put in caveats about accuracy. Their compliance executives work under the rigours of a senior managers' regime. There are no short cuts. I do not mean to cast any aspersions on the hard work being done by anybody in the Treasury—I know that a lot of diligent work is going on—but I do not see how these rather minimal costs can be justified.

Lord Tunnicliffe (Lab): My Lords, I will take the statutory instruments in order, starting with the central securities depositories regulations. A characteristic of these SIs is that they tend to have two parts. I wish I had the same interests to declare as the noble Baroness because then I would come to this knowing something about it. Starting from scratch is quite a battle. My analysis of these SIs is broadly that there is a bit about the transfer of functions and a bit about the transitional provisions. They are more or less in those two groups. The transfer of functions is unexceptionable, except that I am not at all convinced that the Treasury should be solely responsible for the equivalence decision. That is a view that I shall take all the way through. The noble Lord does not have to answer me on this SI because I will bring it up on the last one, by which time a note might have arrived from the Box.

The transitional provision is more complex in all the SIs, but in particular with this one. When you dig into it you discover that apparently there is only one UK CSD and its transition will be little more than a formality, which is good to hear, since these organisations are so important in our lives. Non-UK CSDs have a more complex transition process, but, as far as I understood it, that was okay.

Similarly, the transfer of functions for the trade repositories is straightforward, except for my caveat on the Treasury's role. I understand that there are five UK trade repositories, covered by paragraph 7.18 of the Explanatory Memorandum. Once again, it looks as though that is pretty well a formality. I found the non-UK TRs transfer regime more complicated, but the one feature I saw is that some new TRs—if they ever emerge—seem not to be fully registered for up to three years. Can the Minister explain why such a long period is necessary?

Lord Bates: I thank the noble Lord and the noble Baroness for their scrutiny of the statutory instruments. I will respond first to the noble Baroness, Lady Bowles, who asked about the difference between the current system and the onshoring SI. Before the CSDR, the recognised clearing house regime under the FSMA applies. After exit and the end of the transition regime, the onshored CSDR regime, which is more extensive, applies for any CSD.

The noble Baroness asked for more detail on how that process will work. The Bank of England sent a letter to non-UK CSDs, setting out the process through which CSDs may notify the Bank of England to enter a transitional regime following the UK's withdrawal from the EU. The process is proportionate and straightforward, with questions we do not expect to be onerous for CSDs to answer. Non-UK CSDs are encouraged to indicate to the Bank of England their intention to notify from the point at which they receive the letter—so the letters have been sent. The Bank of England will treat these indications as notifications at the point that the legislation is made. We are therefore confident that non-UK CSDs will be able to make these notifications in good time. One specific element is that a non-UK CSD will continue to be subject to the existing requirements under the FSMA until the Treasury has made a decision on jurisdiction. Once that happens, these CSDs will be required to provide an application to the Bank of England six months

after the Treasury decision. There is a requirement for non-UK CSDs to notify the Bank before exit day of their intention to continue to provide services in the UK following exit.

The noble Baroness asked about the familiarisation costs included in the regulations. I was looking at the algorithm in Annexe 5 and she made some points about that. I am happy to confirm that the familiarisation costs in the impact assessment cover only these instruments. They do not include FCA consultations or the broader impact of leaving the EU—just the specific provisions in this SI.

8 pm

Baroness Bowles of Berkhamsted: May I go back to the point about when CSDs switch from being under the present UK regime to being under the new regime? It seems a bit peculiar. Is it the situation that while they are currently running under the UK regime, once they start to run under the onshored CSDR there will be an equivalence decision and they will then be under a tighter, more extensive regime? It seems very strange that as soon as you have recognised a country as having equivalence, you then require more rather than less—or have I misunderstood something?

Lord Bates: I certainly would not suggest that the noble Baroness has misunderstood anything. I will work my way through the pile: I have a feeling that I will have an answer for her very shortly.

She asked what would be amended if there were an implementation period. The legislation would not come into effect in March 2019 in the event of an implementation period. It would be amended to reflect the eventual deal on the future relationship, or to deal with a no-deal scenario at the end of the implementation period. Amendment would depend on agreement being reached with the EU.

The noble Lord, Lord Tunnicliffe, asked if was appropriate that the Treasury is the only body responsible for equivalence decisions. The Treasury takes the role of the Commission in equivalence decisions, but will be informed by advice from the FCA as necessary. As to why the regime will last for three years, the TRRs provide sufficient time for the FCA to be satisfied that the new TR fully meets the requirements set out in the draft Over the Counter Derivatives, Central Counterparties and Trade Repositories SI, of which he and I have fond memories and which was published on 22 October. Three years was judged the most suitable duration period, based on consultation with the FCA. The timescale aligns with other temporary regimes such as the CCP temporary recognition regime.

The noble Lord, Lord Tunnicliffe, asked specifically about the transitional regime for central securities, and the noble Baroness, Lady Bowles, also referred to it. The transitional period is intended to allow non-UK CSDs to continue to provide services in the UK after exit. UK CSDs that have applied for authorisation prior to exit day will be automatically entered into the transitional regime. There is a requirement for non-UK CSDs to notify the Bank before exit day of their intention to continue to provide services in the UK following exit. Any non-UK CSD that fails to notify the Bank may be subject to public censure. A non-UK CSD that has notified the Bank and entered the transitional regime can continue to provide CSD services in the UK on the current basis for a certain period. For a CSD that has made an application for recognition to the Bank of England, that period ends when the application is decided. For a CSD in a jurisdiction that the Treasury has determined to be equivalent and that has not made an application to the Bank of England, that period extends to six months after the Treasury's equivalence determination. I think that is a partial answer to the question raised by the noble Baroness, Lady Bowles.

The noble Lord, Lord Tunnicliffe, also asked why the Government are not bringing into UK law the settlement discipline regime. Certain CSDR provisions on settlement discipline do not come into force until after exit day. As a result, they cannot be considered retained EU law and are beyond the scope of the European Union (Withdrawal) Act 2018. Returning to the question asked by the noble Baroness, Lady Bowles, she said that it seems strange that once a country has been found equivalent, more is required of that CSD. Equivalence is a decision on the alignment of another country's regulatory regime. This is a decision of the Treasury. The recognition of a specific CSD is a more technical decision at the level of that CSD, and that is made by the Bank of England.

Lord Tunnicliffe: Before the noble Lord sits down, I am fascinated to know what "public censure" looks like.

Lord Bates: Of course, that would be what the regulators engage in in the rigorous upholding of the rules that govern activities in their respective areas, whether it is the Bank of England, the Financial Conduct Authority or the Prudential Regulatory Authority. Any reprimand of any shortcoming they observe would be regarded as a matter of public censure.

I am grateful to noble Lords for their comments. I commend both these SIs to the House.

Motion agreed.

Privacy and Electronic Communications (Amendment) (No. 2) Regulations 2018

Motion to Approve

8.07 pm

Moved by ***Lord Bates***

That the draft Regulations laid before the House on 1 November be approved.

The Minister of State, Department for International Development (Lord Bates) (Con): My Lords, for most people in the UK, their largest financial asset will be their pension, which unfortunately makes pensions an attractive target for fraudsters. As I am sure the House is aware, pension scams have had devastating consequences. Scams can leave people to face retirement

[Lord Bates]
with limited income, unable to rebuild their pension savings. Cold calling is not only a nuisance but the most common method used to initiate pension fraud. I am aware of the strength of feeling on tackling cold calling from recent debates in this House and in Committee. According to Citizens Advice, the most recent statistics show that 97% of pension fraud cases brought to it originated from a cold call. That is why the Government are taking action to ban pensions cold calling.

Before we discuss the legislation I will present to the House today, allow me to briefly explain how the current system works. Currently, the Privacy and Electronic Communications Regulations 2003, or PECR, permit firms to cold call consumers for marketing purposes, subject to a couple of exceptions: where the consumer has notified the caller that they do not wish to receive such calls, or has listed their number on the telephone preference service. The current regime therefore permits cold calling unless a consumer has proactively opted out.

The purpose of the legislation under discussion today is to amend PECR in order to much more tightly restrict firms from cold calling consumers on their pensions. It does so by creating an explicit opt-in regime prohibiting all such calls unless one of two tightly drafted exemptions applies. Importantly, the exemptions do not apply to so-called introducers. Introducers are the marketing firms which seek to establish "leads" which they pass to financial advice firms. It is introducers who undertake the majority of pensions cold calling.

The ban will make it clear to consumers that any pensions cold call they receive from an unknown caller is illegal and likely to be a scam call, so they should hang up. To help future-proof the regulations, the definition of,

"direct marketing in relation to pension schemes",

in the SI has been drafted widely. This will help to ensure that we capture new activities which may evolve in future, as well as activities that we know scammers already use today.

So that the ban does not have an unnecessary or disproportionate impact on legitimate activities, the Government have provided two narrowly defined exemptions. The first is where the consumer has given consent to a caller to receive direct marketing calls on their pensions. This exemption has been included so that consumers seeking information on pension products are able to do so. The SI is fully in line with the GDPR, which sets a high standard for consent.

The second exemption is where the consumer,

"has an existing client relationship with the caller",

such that they would expect to receive such calls. This is so that individuals are able to receive information about investment opportunities from firms with which they have a client relationship. Crucially, the exemptions apply only where the caller is authorised by the Financial Conduct Authority or is the trustee or manager of a pension scheme. This means that there are no circumstances in which introducers, as defined, are permitted to call consumers on their pensions.

As many noble Lords will be aware, a similar ban on cold calling by claims management companies was implemented through the Financial Guidance and Claims Act 2018, which was skilfully taken through your Lordships' House by my noble friend Lord Young, who joins me on the Front Bench this evening. The present SI has been drafted so as to achieve a consistent approach to both bans. The ban will be enforced by the Information Commissioner's Office, a world leader in the protection of information rights. The Information Commissioner's Office has tough enforcement powers, which include fining offenders up to £500,000. From 17 December 2018, directors of companies making unlawful calls may be personally liable for penalties of up to £500,000.

The Government are working with partners across the public, private and charity sectors to ensure that news of the ban reaches as many people as possible. To support the industry to keep within the law, the Information Commissioner's Office will publish updated guidance when the ban comes into force. I will take this opportunity to thank stakeholders across the industry and the third sector for their helpful comments on the drafting of the regulations through consultation over the summer. As a consequence, I am pleased to say that we have a set of regulations which our stakeholders can get behind.

In summary, the Government believe that the proposed legislation is necessary to tackle the scourge of pension scams and help protect customers and consumers from pension fraudsters. I hope that noble Lords will join me in supporting these regulations and I commend them to the House.

Baroness Drake (Lab): My Lords, I welcome these regulations, which restrict firms in cold-calling individuals regarding their pension schemes. The Explanatory Memorandum was clear and helpful in setting matters out. This was a point of considerable concern during the passage of the Financial Guidance and Claims Act 2018, when the Government gave a commitment to ban cold calls on pensions. It is pleasing to see the product of that commitment in these regulations.

As we all know, the threat of pension scams—in fact, the threat of financial scams—is a growing problem. The scale of these unsolicited calls and the number of people impacted is alarming. The estimates from the Money Advice Service indicate that there are 250 million scam calls per annum. Most cases involving pension scams start with cold calling and if someone is scammed out of their pension savings, the effect can be not only devastating but lifelong and irreversible. Scams can originate from sources other than onshore cold callers—for example, from social media and offshore callers—but these regulations will make a significant contribution to protecting individuals. I acknowledge that there are many positives in the regulations. The definition of direct marketing set out in paragraph (5) of new Regulation 21B in relation to pension schemes has been drafted widely, which is helpful. Organisations which breach the ban may be liable to pay compensation to the victim, be subject to enforcement activity by the Information Commissioner's Office and, as the Minister referred to, face a penalty of up to £500,000.

8.15 pm

However, as has been pointed out, there are two exemptions to this ban and I have some questions and seek reassurance in this area. The first exemption is where the person being called has given consent. The second exemption is where that person has an existing client relationship with the caller, could "reasonably envisage receiving" direct marketing calls about pensions, and has been given the opportunity to refuse to receive cold calls from that organisation. In both cases, the caller must be either a trustee or manager of a pension scheme, or a firm authorised by the FCA. It is welcome that restricting the exemptions to those callers will reinforce the ban on unregulated lead generators calling about pensions.

My areas of concern, however, include that some individuals can still be vulnerable to being pressured into giving consent, or not actually understand that they are doing so. For example, if someone fails to tick a box they could be deemed to have given consent by inertia. Similarly, where these exemptions require that individuals be given the opportunity to refuse to receive direct marketing calls from an organisation, how robust will that opt-out process be? Can the Minister give further assurance on what standard is to be set for ensuring that a person has knowingly given consent to being cold called, and how will that be policed?

Similarly, where an exemption is allowed to the ban on unsolicited calls if the person being called has an existing client relationship with the caller, and could "reasonably envisage receiving" direct marketing calls about pensions, how is "reasonably envisage" to be interpreted? A pension saver may have an existing relationship with an FCA-authorised firm as the administrator of their pension scheme, but that does not mean that they should reasonably envisage receiving direct marketing calls about pension products which that firm may also sell through another of its divisions. Could the wording of the exemption from the cold-calling ban in some circumstances give that FCA-authorised firm a preferential market position over other product providers which have no existing relationship? Can the Minister clarify how paragraph (3)(b), which includes the phrase,

"the recipient might reasonably envisage receiving unsolicited calls for the purpose of direct marketing",

will operate in practice?

Baroness Bowles of Berkhamsted (LD): My Lords, first, I again thank the noble Lord, Lord Bates, for his introduction; it makes a change not to be the expert in the room. I greatly welcome this legislation and have just a few points to make, some of which follow up on those made by the noble Baroness, Lady Drake.

As I understand it, much of the problem with cold calling is that the cold callers—in this case, the introducers—are offshore. We will not be able to get at those generators of leads and they will attempt to sell on their information, which at the moment they may do quite successfully. The UK buyer of those leads would then presumably be committing an offence by following them up with a cold call, on the assumption that the person buying the information is not already, for example, the financial adviser to the individual concerned. Those following up, having bought that information in this hypothetical case, would be subject to the penalty. They should therefore be too scared to do it, so nobody buys leads and offshore cold calling stops because they cannot sell their ill-gotten gains. I think that is how it is meant to work, but it would be good to hear that confirmed.

We still have to address the wider issues of cold calling, beyond protecting pensions. I hope that, having dealt with this issue, we will not think that it is "job done" and that is the end of it. Following the noble Baroness, Lady Drake, I shall look at some of the issues that were not dealt with after the consultation period. The first was the time limit for having given consent. If the case in question happened 20 years ago, it rests on whether a person would reasonably expect to be contacted. It is probably quite a sophisticated system if the caller has information about the person because they already have a policy, for example. It all sounds very formal, and they go through some kind of identity check. I understand that the reason for not doing anything was the fear of setting a wider precedent within the GDPR, but that is a common excuse that is used more widely.

There may be more that could be done in due course because there is also consent by inertia, which was mentioned by the noble Baroness, Lady Drake. Perhaps after a time lapse, instead of saying that someone is not allowed to make the call, there could be a halfway house of having to make sure that the person still consents to receiving calls, especially if they are on a related product rather than the product they have already been advised on. The existing client relationship could become very stretched, especially where one firm is taken over by another which has a wider suite of products on offer. A client might expect a much narrower relationship than would come from an enlarged entity. I am not sure that the recipient of a cold call stating that the caller is the successor of Bloggs and Co would know that the call should not perhaps have been made.

Ultimately, we may have to look at more than just pensions. If we are successful, that lucrative strand for the scammers and the cheaters will be closed off, but individuals who have diligently put money into ISAs—especially if they have put it into stocks and shares ISAs over the period since ISAs started—can have as much saved in them as they might have in a pension fund. So when these organisations start looking for where else they can swindle people, those might be next on their list.

I urge that we do not think that this is "job done". This instrument is excellent as far as it goes, but it is a work in progress and we have to continue to keep an eye out for where the scams move to.

Lord Tunnicliffe (Lab): My Lords, subject to a satisfactory response from the Minister to the queries by the two noble Baronesses, I warmly welcome these regulations. I am sure many people will value the fact that cold calling is reduced, particularly in this important area.

Lord Bates: I thank noble Lords for their questions. I will try to address the points that were raised. The noble Baronesses, Lady Drake and Lady Bowles, asked why we have not considered banning all cold calls. Pensions cold calling is a special case where levels of consumer detriment are particularly high. The Government are determined to tackle the scourge of nuisance calls, but a balance needs to be struck between ensuring that consumers are adequately protected and providing the right conditions for the legitimate direct marketing industry to operate. Government efforts are focused on taking action against companies that deliberately break the rules, not on penalising legitimate businesses that comply with the law.

The noble Baroness, Lady Bowles, made a specific point about extending this to cover all investments. The wording used—

"direct marketing in relation to … pension schemes"—

is broadly defined in the SI to capture the marketing of any investment product, not only conventional pension products, to be acquired using pension funds. However, it does not cover marketing in relation to funds held in other products that may serve to provide retirement benefits, such as a lifetime ISA, as this would go beyond the powers currently in the enabling Act. However I accept her point that our approach should be continued vigilance rather than claiming that it could never be changed in future.

The noble Baroness, Lady Drake, asked about the definition of "reasonably envisage". It is drafted to set up an objective rather than subjective standard. It would be determined on a case-by-case basis. Consideration would be given to the nature of the firm with which there is a relationship. Is it the kind of firm that could provide pension services, for instance? She asked whether the exemption gives a preferential market position to those with an existing relationship. It enables consumers to hear from the existing provider and enables them to make informed decisions about their pensions.

It was suggested that the ban would be ineffective because it does not cover calls from overseas. The Information Commissioner's Office has arrangements with international—including non-European—regulators to enable enforcement action where companies operating abroad make calls to the UK which would appear to be unlawful if made in the UK. Companies based in the UK which contract or instruct companies based abroad to make calls into the UK must comply with data protection legislation. In fact, this is a good moment to note that the PECR and this SI sit alongside the Data Protection Act 2018 and the GDPR in this respect.

The noble Baronesses, Lady Drake and Lady Bowles, raised a very fair point about potential inertia by people ticking boxes. We have all inadvertently done that or not done that, as the case may be. The GDPR provides a very high threshold for consent. Consumers cannot provide consent through a pre-ticked box. Consent must be actively given under the GDPR.

The noble Baroness, Lady Bowles, asked why the FCA is not prohibiting the use of personal data collected by third parties through cold calling. Organisations are already required to process or handle personal data in accordance with the Data Protection Act—a point which I have already made. The Data Protection Act 2018 and the GDPR include significantly stronger sanctions for breaches than the legislation they replaced. Processing data in contravention of data protection principles could attract fines of up to approximately £17 million, or 4% of the company's global annual turnover, whichever is higher.

I do not know whether I have reached the threshold set by the noble Lord, Lord Tunnicliffe, for adequately responding to the questions. If I have not, I will be happy to write, but on the basis of what I have said I commend the regulations.

Motion agreed.

Short Selling (Amendment) (EU Exit) Regulations 2018

Motion to Approve

8.29 pm

Moved by ***Lord Bates***

That the draft Regulations laid before the House on 9 October be approved.

The Minister of State, Department for International Development (Lord Bates) (Con): My Lords, this statutory instrument forms part of the work being delivered to ensure that there continues to be a functioning legislative and regulatory regime for financial services in a scenario where the UK leaves the EU without a deal or an implementation period. As a responsible Government we are of course preparing for all potential scenarios, despite remaining confident of securing an ambitious deal with the EU.

The instrument has been drafted using powers delegated to Ministers under the European Union (Withdrawal) Act 2018 to address deficiencies in applicable EU law relating to the regulation of short selling that will be transferred directly on to the UK statute book at the point of exit. It will also amend relevant parts of the Financial Services and Markets Act 2000. This is in order to provide continuity, given that the approach of the European Union (Withdrawal) Act is to maintain existing legislation at the point of exit. The instrument has already been debated in the House of Commons this morning.

Short selling is the practice of selling a security that the seller has borrowed, with the aim of buying the security back at a lower price than the price that the seller sold it for. The short selling regulation, the SSR, was introduced after the financial crisis to enable the EU to act to suspend or ban short selling in cases where financial stability was at risk. It covers the EU's regulatory oversight of short selling and certain aspects of credit default swaps, and relates to financial instruments that are admitted to trading or traded on an EEA trading venue.

Post exit, the SSR will no longer be effective in maintaining the framework to regulate short selling and certain aspects of credit default swaps in the UK. This is because in a no-deal scenario the UK will be

outside the European Economic Area and therefore outside the EU's regulatory, supervisory and legal framework. The solution is therefore this instrument, which will amend the retained EU law related to SSR to ensure that it continues to function effectively in the UK post exit.

The instrument makes the following amendments. First, it will amend the scope of the regulation to ensure that it captures instruments admitted to trading on UK venues and UK sovereign debt only. The SI will therefore not capture instruments admitted to trading only on EEA trading venues. Furthermore, amendments have been made under the instrument that change the scope of the UK's powers to address threats to stability or market confidence in the context of the regulation. Currently the SSR allows the UK to act against instruments that have their most liquid market in the UK or if the instrument was first admitted to trading in the UK. That has the effect of requiring the UK to seek consent from the relevant EU regulator if it wants to take action on the basis of an instrument that has its most liquid market elsewhere in the EU or was first admitted to trading on an EU venue. The instrument removes that provision. In line with other third-country instruments, the UK will in future be able to take action against any instrument traded on a UK venue. The UK will be required to consider threats to UK market confidence and financial stability only before using these powers.

Secondly, the instrument transfers functions currently carried out by EU authorities to the appropriate UK bodies. For example, powers will be transferred from EU supervisory bodies to the FCA as the most appropriate regulator, given its expertise in regulating short selling currently. These include the power to make technical standards: for example, to take action on all instruments admitted to trading on a UK venue, not just those for which the UK is the most liquid market. Functions are also transferred from the European Commission to the Treasury, as in other statutory instruments, including the power to specify when a sovereign credit swap transaction is considered as hedging against a default risk.

Thirdly, the instrument will maintain a number of existing exemptions. Certain exemptions are already provided for reporting requirements, the buy-in regime and restrictions on uncovered short selling for shares that are principally traded in a third country. These will be retained. In respect of the last point, the FCA will take on the responsibility for publishing the list of relevant third-country shares. This ensures continuity by recognising the European Securities and Markets Authority's list for two years following exit day. Additionally, the instrument will maintain the SSR's exemption for market makers and authorised primary dealers. Market makers will be required to join a UK trading venue and notify the FCA at least 30 days before exit should they want to benefit from this exemption. Those who have done so already will not see any change. The exemption means that firms can carry out certain market-making activities and primary market operations without disclosing their net short position, and they are not required to comply with restrictions on uncovered short selling, provided that they meet certain thresholds.

Additionally, amendments provide HM Treasury with the power to set relevant thresholds after exit. The instrument will also allow market participants to use UK credit default swaps to hedge correlated assets and liabilities elsewhere in the world rather than just the EU. This will ensure that UK firms can continue to use UK sovereign credit default swaps to hedge correlated assets or liabilities issued by issuers outside the UK.

Lastly, the instrument deletes provisions that facilitate co-operation and co-ordination across the Union. Currently member states must notify other regulators ahead of taking action to restrict short selling, with other regulators then determining whether to apply corresponding restrictions. This SI deletes these provisions, as well as deleting the European Securities and Markets Authority's intervention powers except in exceptional circumstances.

The SI makes technical amendments to existing UK legislation—in the case of Part 8A of the Financial Services and Markets Act 2000, to ensure that the UK can continue to respond to requests for information from overseas regulators. The UK intends as far as possible to maintain a mutually beneficial working relationship with the EU, in the same way we currently co-operate with non-EU regulators under the existing provisions of the Act.

It should be noted that, in accordance with the comments we received from the Secondary Legislation Scrutiny Committee, the Explanatory Memorandum for this instrument has been revised and relaid. The revisions to the Explanatory Memorandum provide further clarity on amendments made to ensure that UK firms could continue to use UK sovereign credit default swaps to hedge correlated assets or liabilities outside the EU. It addressed why amendments had not been made to the buy-in procedure in Article 15 of the SSR, clarifying that this is repealed by Article 72 of Regulation 909/2014 and that, given that will not be in force before exit day, we cannot use EU withdrawal powers to enable it. A separate instrument will make this amendment. Lastly, it clarified that notifications given to the FCA continue to be effective for exemptions for market-make—therefore, they will see no change.

In summary, the Government believe that, should the UK leave the EU with no deal or implementation period, this SI will provide for a framework to regulate short selling and certain aspects of credit default swaps effectively post exit.

I hope that noble Lords will join me in supporting these regulations. I commend them to the House and beg to move.

Baroness Bowles of Berkhamsted (LD): My Lords, I thank the noble Lord, Lord Bates, for his introduction and once again declare my interest in the register as a director of the London Stock Exchange plc.

It is fair to say that when this legislation was negotiated, a lot of it was directed against the markets in London, so if anyone is worried that the regime will run without so many requirements for consultation, it should not be the UK. I had the advantage of participating in scrutiny on Sub-Committee A of the Secondary Legislation Committee, on which I sit. As the Minister

[Baroness Bowles of Berkhamsted]
explained, in consequence, there has been an extension to the Explanatory Memorandum, and I thank him for that. The correspondence about that is in Appendix 2 to the report. As he said, it mainly concerns the use of sovereign credit default swaps for hedging purposes. That is the single issue to which I shall return.

By way of background, sovereign credit default swaps and their short selling was a highly contentious issue at the time of the eurozone sovereign debt crisis, with many wanting to ban sovereign CDSs altogether, blaming them for escalation to the crisis. It took several months of my life turning that around to establish that there was such a thing as legitimate hedging of correlated assets. Due to that sensitivity, it is worth more clearly explaining that in consequence of changes made in the regulation, there is a widening of the scope of the assets that sterling CDSs could be used to hedge—which, again, the Minister explained—which happens by removing the EEA reference and replacing it with a global one. I do not object to that widening—there was a choice between narrowing or widening, and widening probably goes with the open approach of the UK—but it means wider possible use of sterling credit default swaps. I want to ensure that that is properly understood, should anyone ever read this debate.

It would also be worth knowing what, if any, assessment of the additional volume that is expected to create, if any such calculation has been done, especially in the event of a no-deal Brexit, when some more chaotic things may be happening of the variety that was of concern during the eurozone sovereign debt crisis. I am still confused why Articles 8.4, 8.5 and 8.6 of the delegated act regulation have been deleted. Deleting those paragraphs removes the requirement for a Pearson correlation coefficient of 80% as part of the high correlation definition under Article 3.7(b) of the short selling regulation. The 70% threshold is retained under Article 3.7(c), within Article 18 of the delegated Act. Article 18 was cited in correspondence with the sub-committee as what the Treasury will follow when it takes over setting the correlation conditions.

I do not object to the Treasury taking over setting correlation conditions, because I think it has a good interest in what happens to hedging using sterling CDSs. I just want to know whether 80% is out of favour, whether something happened to replace it prior to the regulation, or whether that change is another widening.

Lord Tunnicliffe (Lab): My Lords, I thank the Minister for presenting this statutory instrument. I thank him, first, for forcing me to understand a little about short selling; it took several hours to get a reasonable knowledge of it. What I found most difficult were the various exemptions. I sought help from the department to try to understand them. It was pointed out to me that, in some ways, that was the wrong question. The key essence of much of what we are doing tonight is in Section 8 of the European Union (Withdrawal) Act. I remember the debates on that provision with great care, and the overwhelming requirement of Section 8 is that it should not be used to change policy, except as required for the smooth transition.

8.45 pm

I think that perhaps the noble Baroness has brought out an area where there may be a little change policy, and I shall listen carefully to the noble Lord's response. I particularly noted the narrowing/widening argument; there was no option—one or the other had to be chosen, and the widening choice seems more sensible.

One of the things I learned while trying to understand short selling is that it is not necessarily the evil practice that the popular press held it to be in some of the various crises. It had a role. Nevertheless, it is a powerful tool which, if misused, could destabilise financial systems. Clearly, it is essential that the ability to manage it is carried through after exit day if we are unfortunate enough to leave with no deal. Therefore, I support the statutory instrument.

Lord Bates: I thank noble Lords for their scrutiny, and I shall address some of the points raised. The noble Baroness, Lady Bowles, asked why the instrument deletes the provisions on correlation between assets liabilities and sovereign debt in another member state. That is because, after exit, we will be concerned only with the sovereign debt of the UK, so technical provisions on correlation to sovereign debt across the EU will no longer be relevant. They must reference the rest of the world, not just the EU. It cannot be confirmed at this stage what impact this may have on the volume of instruments that are traded.

The noble Lord, Lord Tunnicliffe, asked whether this SI potentially challenged the principle of no policy change. Like all SIs we are making under the European Union (Withdrawal) Act, this is not intended to make policy changes except where necessary to reflect the UK's position outside the EU and aid a smooth transition. Changing the scope is an example of where a change was necessary, as noted by the noble Baroness, Lady Bowles. She also asked about the reference to Article 15 of the SSR. The SI needs to be made to provide the UK with an effective framework to regulate short selling and certain aspects of credit default swaps after Brexit. By not approving this instrument, the FCA would not have the necessary oversight of UK markets in relation to short selling, which, of course, would be a precarious position to be in.

The noble Baroness, Lady Bowles, asked about the change in the use of sovereign CDS positions for hedging purposes. As references to member states are being replaced with the appropriate UK reference, the provisions around cross-border hedging would be deleted. To ensure that firms can continue issuing UK sovereign credit default swaps as a hedging tool, development provisions have been onshored to allow market participants to use UK sovereign CDSs to hedge assets or liabilities located anywhere in the world.

The noble Baroness, Lady Bowles, asked about thresholds. Any future CDS correlation thresholds will be future policy, and it will be a decision for the Treasury. I think that that deals with most of the points raised in this debate, and I commend the SI to the House.

Motion agreed.

Markets in Financial Instruments (Amendment) (EU Exit) Regulations 2018

Motion to Approve

8.49 pm

Moved by ***Lord Bates***

That the draft Regulations laid before the House on 17 October be approved.

Relevant document: 3rd Report from the Secondary Legislation Scrutiny Committee (Sub-Committee B).

The Minister of State, Department for International Development (Lord Bates) (Con): My Lords, these draft regulations have been laid under the European Union (Withdrawal) Act 2018 as part of government preparations for a scenario in which the UK leaves the EU without a deal. As with other instruments, this does not intend to make policy changes other than to reflect the UK's position outside the EU in that eventuality. This instrument addresses legal deficiencies in the markets in financial instruments regulation, the markets in financial instruments directive and in related domestic financial services legislation and EU delegated regulations, which I shall collectively refer to from here on in as MiFID II.

MiFID II regulates the buying, selling and organised trading of shares, bonds, and complex financial instruments. It governs the practices of investment banks, exchanges and portfolio managers, among others. MiFID II came into effect on 3 January 2018. These regulations are essential to the financial services sector, and key parts of legislation would be inoperable without them.

In its report of 21 November, Sub-Committee B of the Secondary Legislation Scrutiny Committee drew this instrument to the special attention of your Lordships' House. The SLSC focused on the SI's approach to the transparency regime, which I will address specifically.

MiFID II requires buyers and sellers on financial markets to disclose specified data, such as price information for their trades, which brings transparency to price formation in financial markets. It also provides exemptions from these transparency requirements in several cases. Formulas are used to calculate whether a trade may qualify for an exemption to these transparency requirements. Generally, these formulas are calculated using pan-EU trading data.

In a no-deal scenario, the UK is not expected to have access to the pan-EU trading data, which is necessary for calculating these thresholds. This instrument therefore grants the Financial Conduct Authority a set of temporary powers that will allow it some controlled flexibility over how the MiFID II transparency regime operates in the UK. These powers will operate during a transitional period of up to four years. If the Treasury feels that the FCA can fulfil its transparency functions before the end of the transitional period, the Treasury may end this period by the issue of a direction.

In addition to temporary powers, the FCA is also provided with some longer-term flexibility to reflect the fact that it may be necessary to use reliable trading data from other countries in calculating transparency thresholds after exit. The four-year transitional period for the FCA's temporary powers is necessary to give the FCA time to adjust its IT systems and gather relevant market data so that it can administer an effective transparency regime in a no-deal scenario.

In its report to the House, the Secondary Legislation Scrutiny Committee mentions the adequacy of FCA resourcing to carry out its new responsibilities. The Treasury has worked closely with the FCA to deliver MiFID II, and the FCA is confident that it will have sufficient resources to operate the transitional transparency regime. Before exit day, the FCA will publish a statement of policy on how its temporary powers will be used. The Treasury can refuse to approve the FCA's policy statement on specified grounds. The ability for the Treasury to object to such a statement by the FCA was raised by the Secondary Legislation Scrutiny Committee in its report, which noted Parliament's interest in understanding the reasons for an objection, should one be made.

Provisions have been included so that the Treasury may refuse to approve an FCA statement should it potentially prejudice any international agreement that the UK hoped to reach, or the Treasury believes that the statement is incompatible with international obligations. In a no-deal scenario, it is important that the Treasury can manage international negotiations effectively, and this mechanism is a sensible way of ensuring this. The FCA supports this approach. Parliament will also be able to scrutinise and question Treasury Ministers and the regulators on its approach to the use of these temporary powers, as Parliament does now.

The Secondary Legislation Scrutiny Committee also noted that it would have been helpful if the FCA's policy statement on its use of these powers could have been made available before the debate. This was not possible, as the FCA needs sufficient time to consider the drafting of such a statement. The FCA has provided assurance that a statement of policy will be ready at least four weeks before exit, if the UK leaves the EU without a deal. I turn to other issues contained in this SI.

Certain functions under MiFID II are carried out by EU authorities, principally the European Commission and the European Securities and Markets Authority, known as ESMA. The Commission and ESMA will not carry out these functions once the UK leaves the EU. This instrument therefore—consistent with other SIs—transfers the functions of the Commission to the Treasury, and ESMA's functions to the FCA and the Bank of England. The instrument also transfers responsibility for making binding technical standards from ESMA to the FCA, the Bank of England, or the Prudential Regulation Authority. This is in keeping with the approach set out in the Financial Regulators' Powers statutory instrument, which was debated in your Lordships' House on 17 October 2018.

This instrument also deletes provisions that will become redundant when the UK leaves the EU, such as requirements regarding automatic recognition of an action by an EU body. In addition, this instrument removes obligations on UK authorities to share information with EEA authorities' obligations, although this does not preclude UK authorities from co-operating with the EEA; it can do so on a discretionary basis.

[Lord Bates]

A key set of provisions of concern will be the treatment of third-country regimes. Under MiFID II, a third-country regulatory regime may be determined by the European Commission to be equivalent to the requirements of MiFID II. So that MiFID II equivalence regimes operate effectively in the UK after exit, the Treasury will take on the Commission's function of making equivalence decisions for third-country regimes. Existing Commission equivalence decisions will also be incorporated into UK law and will continue to apply to these third countries.

The Government have introduced a temporary permissions regime, as set out in the EEA passport rights regulations 2018 made on 6 November. This will enable EEA firms and funds operating in the UK through a passport to continue their activities in the UK for a limited period after exit day and allow them to apply for UK authorisation or transfer business to a UK entity as necessary. This instrument makes provisions for EEA firms operating in the UK under the temporary permissions regime, by ensuring that they will not be deemed in breach of the UK's MiFID II rules if they can demonstrate that they have complied with corresponding provisions in the EU's MiFID II rules.

Without these provisions, such firms would be faced with possible conflicts of law and duplicative regulatory regimes, which would impede their operations in the UK. This provision will apply only to certain provisions of MiFID II during the temporary permissions regime, and only where the EEA MiFID II requirement has equivalent effect to the UK MiFID II requirement.

This instrument also includes transitional arrangements for data reporting service providers which report transactions to regulators and publish transparency data. Under the transaction reporting regime in MiFID II, investment firms must submit a report to their national regulatory authorities following a trade. These reports are used by regulators to detect market abuse. Under the regime, UK branches of EEA firms do not send transaction reports to the FCA but to their home regulator, and this information is then shared between EU regulators. As automatic sharing of information will no longer occur, this instrument will require UK branches of EEA firms to report to the FCA. The instrument also provides that firms will continue to be required to report on trades in financial instruments admitted to trading, or traded, on trading venues in the UK and the EU. This maintains the FCA's existing scope for the monitoring of markets.

The Treasury has been working closely with the FCA, the Bank of England and industry bodies in respect of this instrument. It was published in draft form, with an Explanatory Note, on 5 October 2018, to maximise transparency to Parliament, industry and the public ahead of laying. Regulators and industry bodies have generally been supportive of this statutory instrument.

This Government believe that the proposed legislation is necessary to ensure that MiFID II continues to function appropriately if the UK leaves the EU without a deal or an implementation period. I hope noble Lords will join me in supporting these regulations. I commend the regulations to the House and I beg to move.

9 pm

Baroness Drake (Lab): My Lords, the Government are planning for all eventualities, including the UK leaving the EU without an implementation period, and changes made in this statutory instrument might not take effect on 29 March 2019 if the UK enters an implementation period. None the less, statutory instruments intended to deal with all eventualities, even though they might not happen, should not set precedents and practices in the use of SIs that are undesirable.

As the Minister said, MiFID II is the EU legislation that introduces a transparency and disclosure regime into financial markets, particularly by requiring firms to provide trade data to give transparency on the best-execution obligation and transaction reporting requirements, which are used by regulators to detect market abuse. The intended outcome of this regime is to improve protections for investors, increase confidence in financial markets and maintain financial stability.

The functions under MiFID II are carried out by EU authorities, so if the UK leaves in a no-deal scenario this legislation needs to continue to work, and these regulations transfer responsibilities to the FCA, the PRA and the Bank of England, with overall responsibility reserved to the Treasury. In particular, it gives the FCA a set of temporary powers to operate the MiFID II transparency regime with flexibility during a four-year transitional period—with the intention, it states, of preserving the existing outcomes of the transparency regime as far as possible: that is, improving protections for investors, increasing confidence in financial markets and ensuring financial stability.

The FCA has to issue a statement of policy on its use of these temporary powers but, as the Secondary Legislation Scrutiny Committee observed in its report of 1 November, and as the Minister has acknowledged, that policy statement is not available to consider alongside these draft regulations. That is not helpful, given that the FCA is taking responsibility for complex legislation which governs the buying, selling and trading of financial instruments.

It will take four years for the FCA to become operationally ready to carry out its functions relating to transparency and disclosure, and these regulations could result in significant policy changes. Yes, this SI addresses a deficiency by transferring the functions of the European Securities and Markets Authority to the relevant UK regulator and the functions of the Commission to the Treasury, but it also gives the FCA a set of temporary powers that allow it the scope to operate the transparency regime in a stand-alone UK context.

It is clear from reading the Explanatory Memorandum that these temporary powers go beyond the narrower issue of correcting deficiencies into making policy. For example, as the Explanatory Memorandum confirms, waivers and thresholds for disclosure contained in the current transparency and disclosure regime are calculated

on the basis of EU-wide market data. An abrupt move to using UK-only data will pose operational challenges for the FCA and could result in outcomes that do not enhance investor protection and market confidence.

The Explanatory Memorandum further confirms that the FCA is given powers that include amending and freezing obligations on firms where it is considered appropriate. Certain transparency conditions could be suspended during the four-year transition period. In effect, there could be a weakening of the transparency regime, with implications for investor protection. These are important matters which necessitate the FCA statement of policy on how these temporary powers will be used being in place before exit day if there is no implementation period.

There is also a time-sensitive issue. Firms will need to review their contracts, and contracts on derivative trades may need to be agreed some time in advance. So I ask the Minister for an assurance that an FCA policy statement will be in place before exit day and that Parliament will have the opportunity to consider that statement, as the Secondary Legislation Scrutiny Committee flagged. In his opening speech the Minister acknowledged the need for the FCA to have the necessary resources. But it is not simply a matter of saying that it needs extra FTE of 200, 500 or whatever; it is about whether the Government are confident that there is the supply of staff with the necessary expertise to carry out what is going to be a hugely complex challenge for the FCA.

As the Treasury made clear in response to a question from the Secondary Legislation Scrutiny Committee, it can refuse to approve the FCA policy statement on the use of its temporary powers if the department considers that the statement would prejudice an international agreement it hoped to reach. That again prompts a series of questions. Can the Minister confirm that, in the event of the Treasury refusing such approval, its reasons will be made known to Parliament, and Parliament will be able to consider them? If the Treasury vetoes an FCA policy statement, what policy will apply in its stead? These temporary powers are given to the FCA to maintain a transparency and disclosure regime intended to protect investors and maintain confidence in financial markets, so could the Minister give an illustrative example of when potential prejudice to concluding an international agreement could justify vetoing an FCA policy statement and possibly weakening the transparency regime?

Baroness Bowles of Berkhamsted (LD): My Lords, once again I thank the noble Lord, Lord Bates, for his introduction and declare my interest as a director of the London Stock Exchange plc. I will speak on many of the things that the noble Baroness, Lady Drake, has just mentioned. I too echo the feelings of Secondary Legislation Scrutiny Committee (Sub-Committee B) about being asked to approve this legislation in the absence of the FCA policy. Even if it is not completed, we could have been given more clues about its shape and type of content.

In its reply to the sub-committee, the Treasury says the response to the FCA consultation is needed first. I think that refers to the FCA consultation that came out last Friday, and I wonder whether it was timed to come out after we would have, under the normal scheme of things, approved this the previous Wednesday. So was it actually being kept away from our beady eyes? I could not get around to looking at it until today; in fact, I could not even find it when I looked earlier. In fact, it just repeats that the policy is yet to come. It is 986 pages long, but on pages 39-41 I found some useful information. It says:

"We will issue a statement of policy on how the temporary powers will be used".

That refers to the transparency regime. Everything else in there just details the powers it has been given.

I found a little more useful information around page 770, but only about the new Article 17A of the relevant BTS, which appears to say how it will operate those waivers that will remain, such as "large in scale", and how it will operate deferred publication on venues—but these are not actually among the main things that the FCA has been given the power to suspend.

The only firm policy we have been given is that the FCA does not have the necessary resources and that some of the most controversial, industry-disliked parts of MiFID II and publication on waiver volumes are to be suspended by up to four years. It is a major policy change to go from mandatory measures to suspension for such a long period and yet the Government say that they aim to preserve existing outcomes of the transparency regime as far as possible.

I shall go on to test that statement in a moment but, before I do, I should mention that the Treasury, in reply to the Secondary Legislation Committee, in Appendix 1, states:

"A properly considered statement of policy on the use of the temporary powers would need to be informed by",

the FCA consultations. However, there is nothing in the FCA consultations that informs how the policy of suspension will be used. In another reply, it states:

"HM Treasury received no objections from any of the industry stakeholders on the way these powers would be used by the FCA".

So it seems that industry has been consulted. However, it was not a public consultation—I have looked for that too. Industry has been spoken to and has some knowledge of what is going on but we, who have to approve this legislation, are the ones most kept in the dark. This is a decision in search of a policy and that is not the way properly to treat Parliament.

I shall go on to test the statement about preserving existing outcomes of the transparency regime as far as possible. With equities, the double-volume cap is suspended because the FCA does not have all the information, but here there is a mitigating measure in that the FCA can suspend two of the transparency waivers for six months at a time. The formulation used for the suspension of those waivers is,

"if the FCA considers that it is necessary to do so to advance the FCA's integrity objective under section 1D of FSMA".

I have asked the Minister to confirm whether the policy intention of the double-volume cap—which, broadly speaking, is to limit the amount of dark trading—is fully encompassed in that integrity objective, taken together with the additional conditions of having reference to consumer protection, competition and the pre-Brexit thresholds.

[Baroness Bowles of Berkhamsted]

I ask this question about the integrity objective because the FCA objectives as defined in FSMA are not coupled to MiFID II, and historically UK regulators have gone to less-strict standards. For example, on best execution, the UK regulators always went with "all reasonable efforts"—indeed, I remember the fight to get that wording into MiFID I—rather than the strict "best endeavours" that the EU finally went out with as the standard of MiFID II. So if we fall back on FSMA objectives, my concern is that they are not as strict as the requirements of MiFID II.

There is a mechanism here for the FCA to address the dark-trading policy, but it is thrown into doubt by the statement that there will be no publication of trading under waivers and that the FCA will not have sufficient data. Does this mean that there will be no way of checking whether the FCA has done its job? I do not understand why the FCA will not have data, because it collects UK data. What lack of data is preventing information under the equity waivers when they are used?

There are other things that the FCA could also do. Under MiFID I, venues had the task to monitor waivers and impose restrictions under conduct of business rules. My next question is: is the FCA empowered to revert to such a mechanism should they wish and are there any plans to do so? I certainly have not seen any in the consultation because it was all silent about how these powers would be used. Concerning equities, my conclusion is that there is, possibly, the ability to live up to the statement about preserving the outcomes of the transparency regime because there is a substitute regime, but there is still no way for observers to know that if there is no information about the use of waivers.

9.15 pm

On non-equities—I will not do everything because we would be here all night—the policy objective is to have pre-trade and post-trade transparency, lowering costs for investors and less over-the-counter trading. There is some evidence on the ESMA website of costs having come down already after the EU transitional measures were introduced. In the US, the evidence is very substantial that costs are lower for bonds when they come under the TRACE post-trade reporting system.

MiFID II went further than the US with provisions for pre-trade as well as post-trade transparency—the pre-trade was, of course, the bond traders' most hated—although it is still pretty much a fledgling provision and covers only a small part of the market, the liquidity tests having ruled out most instruments; it ends up covering only about 1%. It is those liquidity tests that use EU-wide data, hence the suggestion that there needs to be a suspension. The same integrity objective and other conditions are used and I question whether they can fully cover the policy objectives that I have outlined. Here there is no mitigating alternative suggested for the FCA to use. As far as I can see, the pre-trade and post-trade transparency regime goes completely—and from the tone of everything that has been written, that seems to be the likely outcome. Preserving as much as possible, therefore, means preserving nothing. I think we should have a touch more honesty about that.

There has been massive lobbying to get rid of bond transparency—bond traders do not like it. Consultant Russell Dinnage, reported in the *FT* by Norma Cohen on 9 October 2017, said:

> "Bond trading is like playing poker …You never want to give your hand away".

But he also highlights the importance of the measures to derivatives, interest rate swap and exchange-traded funds, which will all come under the suspension chop. Transparency helps to get away from that gambler mentality, which is pretty fundamental to addressing culture and attitude in financial services. That same *FT* article also references the view from another consultant, Larry Tabb: that if EU transparency rules had been around in 2006-07, banks would have been alerted sooner to the souring of the US mortgage securities market. So it is no trivial measure as an early warning about financial stability.

I can assure noble Lords that this is not something that a consultant has dreamt up retrospectively. These were the very issues that were being discussed when MiFID II was negotiated—that is engrained on my brain, and the scars are on my back. Therefore, I have a series of questions. Is any consideration being given to continuing to have post-trade transparency, even if pre-trade transparency is suspended? Is it expected that suspensions will be done at the same time for venues and systematic internalisers? Also, what volume of the data originates in the UK anyway, given London's position, and what volumes might be expected to move? Is it really true that the London volumes cannot sustain sufficient data for transparency?

Finally, I come again to the suspension of publication of trading carried out under waivers—I am still mystified as to what that is all about. The policy note says that the FCA will have neither data nor resources to do that. On non-equities, it seems likely that there will be nothing to publish anyway; if there is no transparency regime because it has been suspended, there is no need for waivers. However, if and where there are waivers, such as on equities, why will the FCA not have the data? It collects all the UK data. I cannot see that being suspended—or will it? Perhaps the Minister could let me know.

If the FCA does not have the data, how can it monitor market integrity and make those other suspension decisions based on market integrity? How is there to be any measure of whether the policy objectives—less dark trading—have been achieved? If the FCA has the data, why can it not be published so that others can take a view on, comment on and perhaps even judge the FCA's efficacy? Should investors not have that information? It may look charming to have fancy words around the suspensions about the integrity objective, taking account of the latest ESMA data, preserving as much as possible and so forth but in reality, such words conceal the fact that there will be no policy preservation when suspension takes place. That is for non-equities.

I can accept the need for emergency powers in the event of a chaotic, no-deal Brexit. I can accept trying to work out where they might be—perhaps matching changes that the EU is in the process of making—and I acknowledge that hard work is being done by all.

However, I do not accept pretending that transparency measures will be preserved when they will not, and I object to removing waiver use publication and depriving the public of information on market developments without a better explanation.

Lord Tunnicliffe (Lab): My Lords, I thank the Minister for presenting the instrument and I thank both noble Baronesses for the variety and depth of their questions. I tried to understand the instrument—I put quite a lot of effort into it—and I thank Treasury staff for helping us to do so. I came across a clear need for the maintenance of MiFID II in our law; I accept entirely the general direction of the instrument towards preserving it. Fortunately, I did not come into contact with the entire 900 pages, which is probably the only reason I can claim for still being sane.

I came across some of the concerns that have been expressed. The most worrying area, at least to me, is the temporary powers that the FCA is to have. Why has the SI not been delayed until we have sight of the FCA's statement of policy on the use of temporary powers? No matter how expert one may be, we do not have a clear view of what powers we are giving away and what impact that may have. If that is not possible—clearly, that is the Government's position—surely the statement of policy should be brought before Parliament. Its impact will be as big as that of granting the concept of temporary powers.

Can the Minister assure us that in those four years, the temporary powers will not be used to water down MiFID II? That seems an important step towards transparency in these intricate markets. I can see why the industry would want those watered down. It is crucial that the Government be able to assure us they will resist that, and that the temporary powers will not be used to water it down.

Finally, I would like to come back to the FCA having sufficient resources. In the past, the most detail the Minister has given is to say "it will have sufficient funds because it will be able to pre-set the industry, so funds are not a problem". The noble Baroness hit the nail on the head: it is not about funds but available pools of talent. In the letter the Minister will undoubtedly write concerning this instrument, could we have some clarity, direct from the FCA, on why—in this very highly paid industry, where there is strong competition for talent—it is so confident it will be able to access the available talent to do the task required for this SI and the others considered today?

Lord Bates: My Lords, at this hour a letter is an attractive proposition. I counted some 27 questions, which is a pretty respectable ratio from the three distinguished speakers in this debate. I will try to deal with as many as I can in the time available. Clearly, I will have to read the *Official Report* with officials to see if there are any points we need to write on; I suspect there will be. Therefore, if we run out of time, I will include other answers in that communication.

The noble Baroness, Lady Bowles, asked why the amended thresholds which appear in Article 5(1)(a) and 5(1)(b) of the Commission of Delegated Regulation 2017/567—thresholds for determining which equity instruments are liquid—have not been changed. However, replacing references to Union data with UK market data in the legislation would change which instruments were classed as being liquid for UK market participants.

On the FCA not having the data, it needs sufficient time to build systems to analyse market data independently from ESMA. It estimates that this will take four years. As noted, the Treasury can end this period earlier if the transparency regime cannot operate earlier. The FCA does not have all the data relating to firms in the UK, as EU firms currently report back to their own competent authority and not to the FCA.

Baroness Bowles of Berkhamsted: Does not this very regulation enable that, within the transition period, the FCA will collect that data? That is one of the other provisions. Although it might not have it now, after Brexit, as soon as we are into the transition period, it will have it.

Lord Bates: Of course, in the event of a deal, that would be the case, and that is what we would expect to happen. On the transitional period that the noble Baroness, Lady Bowles, asked about, it took approximately four years to develop the detail of the current transparency system and put it in place. On her point about the FCA being held accountable, and what parliamentary oversight of the FCA's decisions there would be—a point also raised by the noble Baroness, Lady Drake, and the noble Lord, Lord Tunnicliffe—the powers being granted to the FCA are necessary to uphold market stability. These powers will generally be constrained to situations where their use is necessary for the advancements of the FCA's integrity objectives. The FCA will be held accountable in two ways. First, it will be required to publish a statement of policy explaining its approach; the policy statement could come into effect only if the Treasury did not raise objections. Secondly, Parliament will be able to further scrutinise and question Treasury Ministers; if the Treasury objected, the FCA would need to revise its statement.

The noble Baroness, Lady Bowles, asked about the transitional powers. Without these powers—

Baroness Bowles of Berkhamsted: I am sorry to interrupt again, but I think that the noble Lord just said that Treasury officials would interrogate the FCA about its policy and that it would have to change it if they did not like it. However, my understanding of the regulation is that they can do that only with regard to either international standards or if it would interfere with some international negotiation. The provision does not appear to have been put into the legislation as an all-round general policy; indeed, I think that the whole idea is that the Treasury is not supposed to interfere with what the FCA does. So I am not sure that this line from the Treasury—"We're going to make sure it's all right"—fully stands up.

9.30 pm

Lord Bates: That is a good one for the letter. We will certainly address that point; it is a legitimate question to ask.

[Lord Bates]

The noble Baroness, Lady Bowles, asked whether the FCA consultation was timed to come out after the debate should have occurred. No, the FCA operates completely independently of the Treasury. She also asked whether we had considered keeping the post-trade transparency even if pre-trade transparency is suspended. Simply replacing references to EU market data with UK market data in the legislation will result in significantly different calculations and thresholds for market participants. The FCA can use the data available to it. The intention is to maintain the outcomes of the transparency regime. Transparency will continue to operate during the temporary period.

The noble Baroness, Lady Drake, said that the instrument should not set bad precedents. It has been drafted in accordance with Section 8 of the EU withdrawal Act, and some policy changes are an unavoidable result of addressing deficiencies. We have sought to maintain the intended policy outcome of the legislation. She asked whether a sudden change in the requirement would be hard for firms to deal with. We have announced plans to grant the regulators temporary powers to phase in new requirements that would apply to firms in a no-deal exit. Those powers must be exercised by the regulators in accordance with their statutory objectives, as set by the FSMA. This is a sensible measure to ensure that firms have the time needed to adjust in an orderly way.

The question about whether the FCA has enough human capital to carry out its functions and responsibilities is interesting, I undertake to feed that point back to it, and it may feel better placed to respond. The FCA has reported to the Treasury that it is confident that it will have sufficient resources to operate the transitional transparency regime, due to the preparations that it is making. As it set out in its 2018-19 business plan, a significant proportion of its resources are already focused on the forthcoming exit.

The noble Baroness, Lady Drake, asked about the Secondary Legislation Scrutiny Committee report saying that the powers could have been made available to the House before the debate. Unfortunately this was not possible because the FCA had given priority to making regulatory rules fit for purpose in a no-deal scenario, to avoid significant disruption of financial markets. It would also be unusual for the FCA policy to be ready prior to the passing of legislation to which it relates. She also asked about the scale of what was covered—

Lord Tunnicliffe: In my experience it is not unusual for enabling legislation to be accompanied certainly by draft regulations. Often the House has demanded that, to give it proper comfort that it is right to give those powers.

Lord Bates: We are not talking about the secondary legislation; we are talking about the statement—but I take on board the noble Lord's point.

The noble Baroness, Lady Drake, asked how many firms would be directly impacted by the SI. The answer is approximately 3,300 UK firms and 1,650 EEA firms. The FCA estimates that changes to reporting requirements and IT processes will affect approximately 1,500 branches of EEA firms, and that this will result in a one-off cost to business of £8.75 million.

The noble Baroness, Lady Drake, asked whether the statement would be ready. We have said quite specifically that it will be ready at least four weeks before exit. On views expressed by stakeholders, the Treasury has engaged with a wide range of stakeholders, representing large international firms as well as smaller UK businesses.

The noble Lord, Lord Tunnicliffe, asked whether the SI makes policy changes. The UK is putting in place all necessary legislation via the EU withdrawal Act to ensure that there is a functioning legal regime in the event of a no-deal exit in March 2019. He asked whether the FCA will have adequate resources. I covered that point in response to the noble Baronesses, Lady Bowles and Lady Drake. He also asked about the temporary permissions regime that applies for a limited period and who would decide when it ends. The length of the temporary permissions regime is determined in accordance with the EEA Passport Rights (Amendment, etc., and Transitional Provisions) (EU Exit) Regulations 2018, made on 6 November.

In a previous debate, the noble Lord, Lord Tunnicliffe, asked why the Treasury is solely responsible for the equivalence decisions, which relates to this debate. Across all financial services statutory instruments, the Commission's functions are transferred to the Treasury. The transferral of equivalence powers is in keeping with this approach. Equivalence decisions are made by the issue of Treasury regulations. Regulations are issued by statutory instrument and subject to parliamentary scrutiny.

Again in a previous debate, the noble Baroness, Lady Bowles, asked whether the impact assessment is accurate given the cost to firms and how extensive MiFID is. The estimated costs of familiarisation have been calculated using the formula given at the end of the impact assessment and relate only to the cost of reading and understanding the instrument. Of course, affected firms will also need to familiarise themselves with a number of materials that are already published.

The noble Lord, Lord Tunnicliffe, asked a further question about whether temporary powers would water down MiFID II. The temporary powers are included to try to preserve outcomes for transparency. Without these flexibilities there would be a cliff-edge risk as to how the transparency regime operates. It would create uncertainty for firms and business, which we are trying to avoid.

With those responses, and the undertaking to study in detail the *Official Report* and to write on the specific questions raised, I beg to move.

Motion agreed.

House adjourned at 9.38 pm.

Volume 794
No. 215

Wednesday
28 November 2018

CONTENTS

Wednesday 28 November 2018