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PARLIAMENTARY DEBATES
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HOUSE OF LORDS
OFFICIAL REPORT

ORDER OF BUSINESS

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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
Lab Co-op	Labour and Co-operative Party
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

Monday 18 February 2019

2.30 pm

Prayers—read by the Lord Bishop of Chichester.

Death of a Member: Baroness Falkender

Announcement

2.37 pm

The Lord Speaker (Lord Fowler): My Lords, I regret to inform the House of the death of the noble Baroness, Lady Falkender, on 6 February. On behalf of the House, I extend our condolences to the noble Baroness's family and friends.

Brexit: Options

Question

2.37 pm

Asked by ***Lord Dykes***

To ask Her Majesty's Government what assessment they have made of the different options Parliament has in relation to leaving the European Union.

The Minister of State, Department for Exiting the European Union (Lord Callanan) (Con): My Lords, the Motion passed on 29 January in the other place seeking legally binding changes to the Northern Ireland protocol is the only way to deliver a sustainable majority. The Government will continue to pursue this to ensure that we leave with a deal on 29 March. If MPs do not vote for the deal, the default legal position is that the UK will leave without a deal at the end of March.

Lord Dykes (CB): Surely the Government could also do something useful at the moment, such as sending Ministers to urgent anti-self-harm corrective therapy sessions. However, should they not also now promise the House to extend Article 50 and start preparing for a people's vote as well in case things go wrong on 27 February?

Lord Callanan: I can tell the noble Lord that, instead of sending Ministers to self-help therapy sessions, we are sending them to Brussels.

A noble Lord: It is the same thing.

Lord Callanan: It may well be the same thing. My right honourable friend the Secretary of State is in Brussels today; the Attorney-General will be going this week; the Prime Minister will also be going this week; and, just to add to the contingent, I myself will be going to Brussels later this afternoon.

Baroness Hayter of Kentish Town (Lab): My Lords, I think I heard the Minister say that the default legal position if the Government cannot get a majority is to leave without a deal. That may be the default legal position, but it is clearly not the default moral position. Will the Government start thinking about the country and be more serious about looking for cross-party, cross-Parliament support for a deal that can command a majority in the Commons as well as the support of the country?

Lord Callanan: I am sorry to tell the noble Baroness that it is the default legal position. It is what Parliament voted for, it is what the legislation says and we are preparing accordingly. However, of course we do not want to leave with no deal; we want to leave with a deal, which is why we are intensively engaged in discussions to try to produce a solution that is acceptable to Parliament as a whole.

Baroness Ludford (LD): My Lords, the Brexit analyses that the Brexit Select Committee in the other place finally forced the Government to publish showed that Brexit in any form whatever, let alone a chaotic no deal, will be very damaging to the British economy, to the extent of an up to 8% hit to GDP. Will the Government now accept the proposal that is being discussed in the other place—that it would approve the Prime Minister's deal, whatever that turns out to be, subject to it being put to the people to decide between that and remaining in the EU, which is far superior?

Lord Callanan: It will come as no surprise whatever to the noble Baroness to hear me say that, no, we will not. We do not think that another people's vote is the correct way forward. We have already had a referendum, and we all know its result. I admire the nerve of the Liberals in continuing to pursue this option. I notice that, in the various debates in the House of Commons, they have not put it forward as a subject for a vote; they know very well that there is no majority for it.

Lord Marlesford (Con): My Lords, did my noble friend study the interesting speech last week by the noble Lord, Lord Alderdice, in which he suggested that a solution to the border problem would be an all-Ireland solution for trade? This would involve having a border in the Irish Sea—where it would be invisible—but it could be a good idea for Northern Ireland to be in the customs union with the EU, and such a border would in no way limit the extent to which Northern Ireland is part of the United Kingdom.

Lord Callanan: I did of course listen carefully last week to the speech of the noble Lord, Lord Alderdice, and I paid tribute to him at the end of the debate. But, as the noble Lord will be aware, we do not think that a customs union border in the Irish Sea is acceptable for the constitutional integrity of our country.

Lord Rooker (Lab): Are any Ministers going to Tokyo to discuss with Honda the announcement it has just made about closing the Swindon factory in 2022? Is this not relevant to parliamentary opinion at all?

Lord Callanan: That news was just breaking as I came into the Chamber. The noble Lord will accept that it would be wrong for me to comment on something that has not yet been formally announced. However, I am sure that Ministers will want to react in the strongest possible way once we have found out the truth or otherwise of the situation.

Lord Garnier (Con): My Lords, there are three obvious options between now and 29 March: the Prime Minister's deal, some other deal or no deal. Would it not be of assistance to us all if, every Monday, the Government were to publish a list of those pieces of primary and secondary legislation that need to be passed by 29 March, so that we can place our thinking in some kind of context?

Lord Callanan: We are being very open and transparent about the legislation that is required. On secondary legislation, I can update the House that 449 statutory instruments have been laid—that is over 70% of the total—and 210 of them have now completed their passage; there will be further action on this in both Houses this week.

Lord Brooke of Alverthorpe (Lab): Does the Minister agree with the Prime Minister's view that, with a deal, the country will be no poorer than it is at the moment? When will she be honest with the country about how poor we will be without a deal?

Lord Callanan: I always agree with what the Prime Minister says.

Lord Dobbs (Con): My Lords, will my noble friend the Minister give some thought to the concept of the "hard border"? The more I push the Government for a clear definition, the more it wobbles like jelly, yet this is fundamental to the ongoing discussions. Rather than try to answer on his feet, can he perhaps go away and get from the Government a clear understanding and definition of a hard border, so that potentially we can have fruitful discussions about it?

Lord Callanan: My noble friend makes a good point, although the definition of a hard border is of course complicated; it is generally understood as being related to the installation of border infrastructure.

Baroness Butler-Sloss (CB): My Lords, why are the Government not asking for an extension?

Lord Callanan: Because we do not believe that an extension would solve our problems; it would only delay the date by which a decision must be made. As I have said before, the legal default in legislation passed by both Houses is that we leave on 29 March, with or without a deal.

Lord Cunningham of Felling (Lab): My Lords, is it not continuously misleading for the Minister to present the number of secondary legislation instruments that have been tabled as though that were the end of the matter? There is a big difference between the number that have been tabled and the number that have been subject to scrutiny. While I draw attention to that again, let me also say that the Treasury has now developed the habit of tabling instruments without any impact assessment in them at all, which is surely totally unacceptable in respect of the effective scrutiny of instruments.

Lord Callanan: I totally agree with the noble Lord that I said how many had been tabled, but I also said how many had been completed. If I did not, the number is 210, so I totally accept that there is a long gap in the process in between. The appropriate scrutiny must be provided, and I pay tribute to the work of the noble Lord's committee and that of my noble friend Lord Trefgarne in the excellent scrutiny work that they are providing on this important legislation.

Vehicle Pollution: Children's Health

Question

2.45 pm

Asked by ***Baroness Seccombe***

To ask Her Majesty's Government what steps they are taking to reduce air pollution from vehicles and what assessment they have made of the impact of such pollution on children's health.

The Parliamentary Under-Secretary of State, Department for Environment, Food and Rural Affairs (Lord Gardiner of Kimble) (Con): My Lords, the clean air strategy, which has been praised by the World Health Organization, sets out action to reduce emissions from a range of sources to improve public health. Alongside that, the more than £3.5 billion planned to tackle roadside nitrogen dioxide concentrations includes £1.5 billion to support the uptake of ultra-low-emission vehicles and grants for 85,000 domestic electric vehicle chargers. Long-term exposure to air pollution is a particular threat to vulnerable groups including the very young, whose lungs are still developing.

Baroness Seccombe (Con): My Lords, I thank my noble friend but in the side roads near the tented city opposite there are drivers sitting in their parked cars with their engines idling, discharging poisonous fumes. We know that this is illegal but it still persists. I worry about the effect on passers-by but my main concern is for little vulnerable children with little vulnerable lungs and the effect that it has on them. What can be done about this?

Lord Gardiner of Kimble: My Lords, my noble friend is right: it is already an offence to leave a vehicle running unnecessarily while it is stationary. I know that in the City of Westminster idling around schools and in the West End is a particular concern; I know that that council is working on it and issuing warnings and, if necessary, fixed penalty notices. The main

point here is that we have to change behaviours and raise awareness. Many local authorities are now doing this, and more will do so.

Lord Winston (Lab): My Lords, I declare an interest as the chairman of the Genesis Research Trust, which does research into miscarriage and stillbirth. The question is not just about born children; it is about unborn children. There is now considerable evidence from the National Institutes of Health that pollution may contribute to not only miscarriage and stillbirth but also cancer in the long term as an epigenetic effect. Is research being actively proposed, either by the Department of Health or by someone else, to look into the issue of stillbirth? There are over 3,200 stillbirths a year in Britain, one of the largest figures of any developed country, and it is a massive shock that most of them are unexplained.

Lord Gardiner of Kimble: My Lords, I do not have specific detail on the stillbirth issue and I will look into that. However, a joint survey by the UK's leading children's charity UNICEF UK and the Royal College of Paediatrics and Child Health found that 92% of child health experts believed that the public were more concerned about the negative impact of air pollution. That is undoubtedly one of the reasons why it is imperative that we all act. It is why, in working with local authorities, we need to deal with not only the over-exceedance of nitrogen dioxide but all sources of pollution.

Lord Fox (LD): My Lords, the Minister spoke about reducing vehicle emissions. As he knows, the Road to Zero is a very long road; it reaches its conclusion in 2040. Meanwhile pollution is increasing and people are being damaged today, as the noble Baroness pointed out. What is happening now that will reduce pollution today?

Lord Gardiner of Kimble: That is precisely why we require local authorities to come forward with plans. Nottingham, the first authority with an agreed plan, is retrofitting 171 buses to reduce emissions and replacing heavy, high-polluting vehicles such as bin lorries with electric vehicles, all under its current plan. Leeds is putting in a clean air zone, starting from 6 January next year. A number of immediate plans are taking place this year and next year, but in the meantime, this is obviously a continuum to reaching the point we want—zero emissions and many fewer pollutants.

Baroness Bull (CB): My Lords, we are increasingly aware of the impacts of air pollution on physical health, but recently published evidence has shown a convincing link between air pollution and mental health. In particular, research has found that children exposed to air pollution at age 12 have an increased likelihood of depression and conduct disorder when they reach age 18. Can the Minister confirm that in assessing the impact of air pollution on health, we will take both mental and physical health into account?

Lord Gardiner of Kimble: That is a very good point. I know that the Committee on the Medical Effects of Air Pollutants has started to consider the effects of air pollution on adverse birth outcomes, which may address the question from the noble Lord, Lord Winston. However, what the noble Baroness said about not only the physical but the mental aspects of air pollution is hugely important.

Baroness Jones of Whitchurch (Lab): My Lords, is it not the case that the Government have been very slow in taking action on this very serious issue of the effect of air pollution on child health? The fact is that they have been dragged to the courts to make them take action, but their response has been too little, too late. What is stopping the Government now revisiting that 2040 deadline for the sale of polluting vehicles, and replacing it with a more demanding, immediate and urgent target? That would save people's lives, particularly children's lives.

Lord Gardiner of Kimble: My Lords, clearly there is an end target. As I have already set out, a lot of work is being done during that time, but much more needs to be done. The World Health Organization has complimented us on our clean air strategy, saying that it is an example to the rest of the world. I think that is a very good thing for our country.

Baroness Couttie (Con): My Lords, I declare my interests as set out in the register. Does the Minister agree that awareness is extremely important in tackling this issue? Does he agree that initiatives undertaken by councils such as Westminster—which uses not just wardens but volunteers, particularly round schools, to knock on people's windows, telling them to turn their engines off, and informing them about the problems that the air pollution they are creating causes—are extremely valuable in the fight against this terrible scourge?

Lord Gardiner of Kimble: My Lords, I am well aware of my noble friend's expertise and leadership on this matter. As I said earlier, a number of local authorities—the Surrey Air Alliance, the Sussex Air Quality Partnership, the London boroughs of Hackney, Islington and Tower Hamlets, and the City of Westminster—are raising awareness. However, it is for us to change our behaviours; we must stop parents idling their cars outside schools, for instance.

Small Business Index

Question

2.53 pm

Asked by ***Lord Harrison***

To ask Her Majesty's Government what assessment they have made of the findings of the Federation of Small Businesses' *Small Business Index*, published on 21 January.

Baroness Vere of Norbiton (Con): My Lords, the FSB report makes fascinating reading: more than half the businesses answering the survey expect to grow in the next 12 months; nine in 10 businesses do not see access to finance as a barrier to growth; seven out of 10 firms applying for finance got it; and twice as many firms expect to increase investment as those expecting it to decline. This Government's policies are creating a positive environment for all businesses, large and small.

Lord Harrison (Lab): My Lords, I have been reading the wrong report. As I understand it, the FSB acknowledges that things have got worse, to the extent that it now complains, understandably, that the economy has declined in the last 10 years. Could the Minister address some of the domestic problems that confront small businesses, such as the late payment of commercial debt—which I have been standing here complaining about for so long—and access to finance and skilled workers? In what ways will the Government address the clear difficulties that will accrue from Brexit?

Baroness Vere of Norbiton: I pay tribute to the noble Lord for the work he has done on the late payment of commercial debt. As he will know, a year ago the Government set up the Small Business Commissioner. In the course of the year that Paul Uppal has been in place, he has managed to recoup £2.1 million in unpaid invoices for businesses, but there is so much more to be done. When I was the finance director of a medium-sized business, large businesses often used every trick in the book to avoid paying small businesses, which is unacceptable. We will work with the commissioner to find ways to develop systems to identify these large companies and make sure that they pay their bills on time.

Lord Naseby (Con): Is my noble friend aware that there is concern among small businesses because their VAT and other returns have to be totally computerised by 4 April? Against that background, can she assure me and others who know these areas in some depth that there has been sufficient trialling of the software to ensure that it works, and that there is a back-up policy if it does not? The precedent of the rating appeals does not fill one with great confidence.

Baroness Vere of Norbiton: My noble friend refers to the Making Tax Digital initiative, which was announced in 2015, and he is right that it is due to become mandatory in April of this year. Ninety-eight per cent of businesses already file their VAT returns online; I certainly used to do so and it is by far the easiest way. We are working closely with software industry suppliers to develop sector-specific software to ensure that all businesses can comply. More than 100 products are now available, some of which are free, but I reassure noble Lords that nobody who is unable to go digital will be forced to do so.

Baroness Burt of Solihull (LD): My Lords, I have to agree with the noble Lord, Lord Harrison. The *Small Business Index* paints a dismal picture and late payment is a very big issue for the FSB, which is launching a campaign on it today. But even on government-procured projects, small businesses are still being let down. This could be addressed through project bank accounts, which stop tier 1 suppliers such as the Carillions of this world using smaller suppliers as a piggy bank to assist their own cash flow. The Chancellor promised action in the last Spring Statement. Will the Minister ask him whether this simple step could be implemented in the coming Spring Statement?

Baroness Vere of Norbiton: The noble Baroness raises a very important point and I will certainly write to her with any further information I have about whether we will set up project bank accounts. Working capital does indeed sometimes get sucked out of small businesses and into large companies, and it is unacceptable. She referred to the report as "dismal" and I have to disagree. I agree with her that it is mixed; however, the annual change in confidence is minus 7.4, compared with an average annual change of minus 8 over the last four years, so we are nowhere near the dreadful situation we were in a few years ago.

Lord Hunt of Kings Heath (Lab): My Lords, I pay tribute to my noble friend Lord Harrison and say how good it is to see him back in his place. What message would the Government like to give to small traders in Swindon, who will be damaged incredibly by the Honda decision? Is this the Brexit dividend that the Government promised us?

Baroness Vere of Norbiton: My noble friend has already referred to the news that came out of Swindon shortly before we came into the Chamber today. From what I have seen to date, it looks as if the closure will happen over a three-year period. The Government will be working very closely with all the suppliers, be they large or small, and with all the employees who may need to find alternative employment over the next few years.

Lord Lexden (Con): How are the Government getting on in ensuring that all their bills from small businesses are paid extremely promptly?

Baroness Vere of Norbiton: It is the ambition of government that we pay our bills as promptly, or more promptly, than some large companies do. If I can find any more information as to detailed stats, I will write to my noble friend.

Baroness Hayter of Kentish Town (Lab): My Lords, I was particularly worried when the noble Lord, Lord Callanan, said that he only knew about Honda as he walked into the Chamber. We also know that the Government were blindsided by Flybmi. It is really alarming that our Government do not seem to know what is happening in their own industries.

Mike Cherry of the FSB also mentioned part of the reason for the dismay. He asked how, two and a half years from Brexit, politicians could allow a situation whereby small businesses have no idea what environment they will be faced with on Brexit day, in less than 10 weeks' time. We have already heard about the need

to extend Article 50. That is not just so this House can consider the legislation; these companies need certainty in time to do the necessary planning.

Baroness Vere of Norbiton: My Lords, obviously, we are in contact with many of the large employers around the country. The news was breaking as we came into the Chamber. We have had discussions with many of the large employers as we go through this Brexit period. On the noble Baroness's question about Brexit, there is a significant amount of guidance for businesses on GOV.UK around whether there is a no-deal Brexit. Companies can sign up for updates that are sector-specific. We engage regularly with all sorts of businesses. A business readiness forum, which was set up in January, meets every single week. Thirty organisations attend it, including the FSB.

Schools: Racist Incidents

Question

3 pm

Asked by ***Baroness Chakrabarti***

To ask Her Majesty's Government what progress has been made in meeting the recommendation of the Report of the Stephen Lawrence Inquiry, published in February 1999, that schools record all racist incidents and that the numbers of racist incidents are published annually on a school by school basis.

Viscount Younger of Leckie (Con): My Lords, schools are best placed to monitor and tackle racist incidents. We do not mandate that schools record or publish these, but they are required to have a behaviour policy that outlines measures to prevent racist and other forms of bullying, and are held to account by Ofsted. They are also required to take steps to advance equality of opportunity, foster good relations and eliminate racial harassment. We provide support to schools to do this.

Baroness Chakrabarti (Lab): I am grateful to the Minister for that Answer. I take this opportunity to pay tribute to my noble friend Lady Lawrence of Clarendon, perhaps the greatest campaigner for race equality that this country has ever known. When I think of the last 20 years since the publication of the Lawrence report and the challenges that those years have brought to the cause of race equality, I think of terrorism, anti-immigration sentiment, rising inequality, and sadly even recent debates around Brexit. Too often, social media has been an engine and vehicle for the transmission of race hate before, during and after class. Will the Minister set out his thinking on what can be done on the part of the Government to better resource hard-pressed teachers and schools to tackle this, and what the Government intend to do about it?

Viscount Younger of Leckie: I echo the thoughts of the noble Baroness and pay my own tribute to the noble Baroness, Lady Lawrence. We have an inaugural Stephen Lawrence Day coming up on 22 April, and I am sure many schools will want to take part. We trust the professionals in our schools to act in the best interests of their pupils. What counts is what is happening on the ground. Schools do not operate in isolation so issues soon come to light, and schools work closely with local authorities, regional schools commissioners and their governing bodies.

Baroness Garden of Frognal (LD): My Lords, now that the Government at last have the power to make PSHE compulsory in all schools, including academies, what steps will they take to ensure that racial and religious discrimination forms an essential part of that curriculum?

Viscount Younger of Leckie: Racism of any kind is completely unacceptable and abhorrent in any setting. The Government are fully committed to eradicating it and are taking several actions. The DfE is providing over £2.8 million of funding between September 2016 and March 2020 to four anti-bullying organisations to support schools to tackle bullying; again, it is action on the ground. Those include the Anne Frank Trust, which we are funding to develop and deliver its "Free to Be" debate programme.

Baroness Berridge (Con): My Lords, my noble friend is correct that the professionals and schools are at the front line of dealing with these issues. In the past, one issue has been the lack of diversity in the workforce in our schools. What progress has been made in ensuring ethnic diversity in the workforce, and particularly in the leadership of our schools?

Viscount Younger of Leckie: My noble friend is right. The Government recognise the importance of a representative and diverse teaching workforce, which is vital for both teachers and their pupils. That is why we published a statement of intent last year, alongside 10 co-signatories including the ASCL, the NAHT and the NGA, to commit to work together to address the diversity of the teaching workforce. The latest figure that I have, as of November 2017, indicates that 7% of head teachers in primary schools and 8% in secondary schools were from ethnic minorities; there is always more work to do.

The Lord Bishop of Ely: My Lords, the Minister will be aware that the Church of England is responsible for many schools where the majority of pupils are from a BME background. Those schools operate in great harmony. That is along with our initiative, Living Well Together. It would be good to hear more about how the DfE makes use of the information and statistics that it receives. There is an issue about holding the whole estate accountable, which cannot be left entirely to the local situation.

Viscount Younger of Leckie: The right reverend Prelate is right to raise that point. The DfE has an integrated communities strategy, which I am sure he is aware of. Education has a vital role in promoting integration. Through education, we can ensure that the next generation learns the values underpinning our society. All schools are required to promote mutual respect for and tolerance of those with different faiths and beliefs, as well as democracy, the rule of law and individual liberty. I hope that is clear.

Baroness Lawrence of Clarendon (Lab): My Lords, as you are aware, my interest in this subject is around the Stephen Lawrence inquiry, where schools are given a definition of a racist incident and what they are expected to do in the circumstances, which is to record, report and publish. In researching online, I found it difficult to find any results on this. All I could find was material about filling in forms. An academy in Swindon said that:

"Schools should be aware that there is no … requirement to collect data relating to racial incident reporting as academy schools are not obliged to share this information with the LA".

The Parent Zone website states that:

"Schools are required to record and respond to racist incidents".

What steps have the Government taken to make sure that schools take racist incidents seriously and report and publish them on an annual basis?

Viscount Younger of Leckie: The noble Baroness raises an important point. As I said earlier, schools should develop their own approaches to monitor bullying, including racist bullying, and exercise their own judgment on what will work best for their pupils. We have not gone down the route of mandating figures to be published because, for some schools, it will mean recording incidents so that they can monitor incident numbers and identify where bullying is recurring between the same pupils, but other schools may prefer to survey their pupils anonymously to identify bullying trends and gauge how safe pupils feel at school. As I have said, it is work on the ground that counts.

Collective Investment Schemes (Amendment etc.) (EU Exit) Regulations 2019

Long-term Investment Funds (Amendment) (EU Exit) Regulations 2019

Financial Markets and Insolvency (Amendment and Transitional Provision) (EU Exit) Regulations 2019

Over the Counter Derivatives, Central Counterparties and Trade Repositories (Amendment, etc., and Transitional Provision) (EU Exit) Regulations 2018

Motions to Approve

3.08 pm

Moved by ***Lord Young of Cookham***

That the draft Regulations laid before the House on 5, 13 and 17 December 2018 be approved. *Considered in Grand Committee on 4 February.*

Motions agreed.

Northern Ireland (Ministerial Appointment Functions) Regulations 2019

Motion to Approve

3.08 pm

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

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

The Parliamentary Under-Secretary of State, Northern Ireland Office and Scotland Office (Lord Duncan of Springbank) (Con): My Lords, this Government are committed to the Belfast agreement. At the heart of that agreement is devolved power-sharing executive government. Restoring the Executive remains our priority. Northern Ireland needs the political institutions of the Belfast agreement and its successors to be fully functioning. However, in the absence of devolved government, the UK Government must ensure the maintenance of good governance and public confidence in Northern Ireland.

In November last year, my right honourable friend the Secretary of State for Northern Ireland brought forward legislation which, among other things, addressed the need for urgent appointments to be made to a number of public bodies. The initial phase of appointments under the Act has enabled the reconstitution of the Northern Ireland Policing Board, which recently met for the first time in its fully constituted form. This has also allowed: the recruitment of a new chief constable for Northern Ireland to be initiated; the replacement of the outgoing chair and board members of the Probation Board; appointments to the Northern Ireland Judicial Appointments Commission; and the initiation of a recruitment process to appoint a new Police Ombudsman for Northern Ireland.

Under the 2018 Act, the Secretary of State also committed to make further appointments that are required in the absence of an Executive. The purpose of this instrument is to specify which further offices require appointment. In preparing this instrument, my officials have worked closely with the Northern Ireland Civil Service to identify those critical appointments that will arise soon. This instrument would add to the list in Section 5 of the Act, enabling the Secretary of State, as the relevant UK Minister, to exercise Northern Ireland Ministers' appointment functions in relation to the following offices: the Northern Ireland Commissioner for Children and Young People; the Northern Ireland Local Government Officers' Superannuation Committee; the Northern Ireland Housing Executive; the Attorney-General for Northern Ireland; the Livestock and Meat Commission for Northern Ireland; and, finally, the Commissioner for Victims and Survivors. These are important offices for which the exercise of appointment functions in the coming months is vital for the continued good governance of Northern Ireland. I beg to move.

Lord Empey (UUP): My Lords, the Minister has brought forward a further list of appointments to public bodies. Although I have no objection to those in principle, I want to put on the record the difference

between the Government's approach to, say, the appointment of a member of the Livestock and Meat Commission and to an issue which I have raised in this House many times: the mess and crisis in our health service. Is the Minister aware that, against a target of 95%, only 62% of patients are being dealt with in emergency departments? The comparable figure in England and Scotland is 89%. English doctors recently put out a statement saying that they believed people were dying as a direct result of those figures. Yet our figures are infinitely worse and are getting worse every quarter. Time and again I have raised the more than 280,000 patients waiting for consultant-led appointments. Nearly 100,000 of those are waiting for longer than 12 months.

The Minister has said that his right honourable friend in the other place is taking the initiative and that meetings with the parties have been called. I welcome that, although it does seem somewhat ill prepared. We are a few weeks before a set of elections, so whether we can expect a positive outcome is open to question. The Minister will also shortly be returning to this House with further pieces of legislation, including a budget for Northern Ireland—the third one that the Minister has proposed—even though there is now no prospect of using the former Executive's spending plans as a template because they are so out of date. He will also be coming forward with the second portion of the legislation under which this set of appointments has been made, because it has to be looked at again after five months.

There is a set of priorities here, but the priorities coming from the Government seem to be the wrong ones. I would have thought that people's lives and welfare were a higher priority than some of the things in these regulations, albeit that I am for them. I have no objection to them, but they are being done against a background of hoping that if we pull the blankets over our heads the problem will go away. It will not. The Minister may find that in the talks that are being initiated next week, I believe, we will all be proved wrong, a massive amount of good will will flow and we will get devolution back—I hope that that takes place. If I am not surprised and pleased by that—if we find that it is not the case and things drift on—what will the Minister and his colleagues do? Are they just going to leave these health figures to get worse and worse, or are we actually going to do something?

3.15 pm

The Minister has told noble Lords a number of times that the Government were prepared to look at all options and that we were going to look outside the box. We were going to look at alternatives—that is a phrase that is running around at the moment. So what alternatives are we going to look at? I believe that there are alternatives: putting direct-rule Ministers in place is one. It is not one that I want to see, because I know how hard it will be to get them out and get devolution restored, but a point will come when things just cannot be dribbled any further. That is my anxiety about this.

I am not objecting to what the Minister is proposing, I am just observing the core of government policy over the last period. For instance, we are having this set of meetings to restore devolution a few weeks before Brexit and a few weeks before local government elections, and against a background where there has been no engagement of any significance between the parties for the last number of years. Would it not have been better to have done something positive last year, before Brexit came right up to the wire and before local government elections? Instead, what did we do? A couple of meetings were called in the entire 12-month period, one of which lasted 42 minutes. I have forgotten how long the other one lasted, but it was neither here nor there.

If the Minister comes back to this House in few weeks' time with his budget and with the second part of this legislation, I sincerely hope that he comes back with a clear idea of what is going to happen, because people are suffering directly and I believe that their welfare and, indeed, their lives could very well be at risk through the lack of decision-making that has been clear for well over two years now. I hope the Minister will bear these things in mind when he comes back to the House.

Lord Lexden (Con): My Lords, I operate in this House on one principle above all: to agree with everything that my noble friend Lord Empey says. I am happy to adhere to that principle again today.

I have three specific points that I want to raise on this instrument. First, it reaches us just days before a new Northern Ireland Commissioner for Children and Young People needs to be appointed. Why was the instrument not brought forward earlier? Secondly, the instrument specifies, as my noble friend has said, six appointments deemed to be critically important. What criteria were used to establish which appointments are critical and which are not? My third and final point follows from that and concerns offices not deemed to be of critical importance. What is to happen to them? Are they to remain vacant when their current holders reach the end of their term, pending the restoration of devolution, which today seems but a distant hope?

Lord Bruce of Bennachie (LD): I think that the noble Lord, Lord Empey, was concerned with sins of omission rather than commission in terms of the content of the statutory instrument. He raises the point that effectively we are going on and on in this limbo of democratic nihilism, if I can call it that, having to institute ad hoc measures as and when necessary to fill the gap in the absence of real political initiatives. I presume that the Minister will be back here in less than five weeks, when the first term of the 2018 Act expires, because it is difficult at the moment to see that we are going to be in a position to restore the Assembly by the end of March—I do not believe that anybody would think that at all likely. So the question that arises is: what practical steps are the Government going to take to ensure that we do not get to the end of March, let alone the end of August, without having got to a position where functioning decision-making by the elected representatives of the people of Northern Ireland can return? I am sure that the Minister does not find it comfortable to come to the House and say, "Please allow me the right to

[Lord Bruce of Bennachie]
nominate these particular posts". However, perhaps he could say something about Friday's meeting, which I gather lasted 90 minutes. I am not aware that any specific proposals were on the table, which has not been well received.

I hope, from the Minister's point of view, that the Government have started to think about what they can do to break the deadlock. The Minister will not be surprised to hear me say that a Secretary of State in a UK Government who are propped up by a hard-line unionist party in Northern Ireland is likely to find the perception of her office somewhat compromised in Northern Ireland. I repeat what my colleagues have said on numerous occasions: is it not time to find some independent authority that might bring parties together and start to identify what it would take to break the deadlock and get things back to normal?

Therefore, my specific questions on this statutory instrument—somewhat along the lines of what the noble Lord, Lord Lexden, said—are, first, what were the criteria that made these urgent, and what other appointments are coming down the track that may require us to be back here in the very near future? Secondly, much more to the point, what assurances can we have that there is any reasonable momentum to try to ensure that we get the political process back, or will we have either to impose direct rule—which I think many of us would regard as a disastrous failure—or institute new elections? Nobody is particularly happy about that either, but it may be the only way to unlock the democratic logjam.

The Minister is always entirely and highly constructive, conciliatory and thoughtful—if I may say so, I would rather he was in charge of the talks; if that was the style we might make more progress. It is important to try to find out what the real obstacles are, not the synthetic ones that have been put up, and how we can build, through trust, a means of getting these decisions away from this Parliament and back to the Assembly, where they belong.

Lord Dubs (Lab): My Lords, I congratulate the noble Lord, Lord Empey, on his consistency on the issue he has raised and on the fact that he is completely right—a pretty powerful combination. Are the Government cherry picking what they are seeking to do? I know that "cherry picking" is now a fashionable expression, but it seems that the Government are cherry picking appointments. What about other appointments? Why have these ones been selected—is there a particular reason for it? Also, what about the functions to be carried out by these appointments? Are there any constraints on how these individuals can carry out their functions, given that there are serious constraints on how government departments in Northern Ireland can carry out their functions?

The whole position seems extremely illogical. We need an indication of progress—I endorse the comments that have been made. Surely the time has come, not just for the Secretary of State to say that she is doing her best—I am sure she is—and for the Minister to say that he is sure that the Secretary of State is doing her best, but to have a new initiative on knocking heads together and bringing the parties together. Surely an impartial umpire/facilitator is needed. Let us get on with making that appointment, then we can have some progress.

Lord Wigley (PC): My Lords, these questions go beyond the direct area of Northern Ireland, although obviously that is the greatest priority. They affect the workings of the intergovernmental mechanisms that bring Wales, Scotland and England together as well. There is a danger of that dimension picking up its own momentum and of Northern Ireland not being adequately involved. I hope that that will also be borne in mind as we try to make progress on these matters.

Lord Trimble (Con): My Lords, I support what the noble Lord, Lord Empey, said. I agree entirely with the comments of the noble Lord opposite, but I want to open up something that touches slightly on what he said—and I am afraid that in doing this, I may add to the list of things that the Minister has to consider.

I noticed that in his introduction the Minister made reference to the Belfast agreement. The Belfast agreement is in a very difficult situation at the moment, because the Government's withdrawal agreement takes the heart out of the Belfast agreement and rips it to pieces. To give detail on that, I draw Members' attention to a paper that may be on the Policy Exchange website this afternoon, but which will be generally available quite soon thereafter, by Graham Gudgin, who has gone in detail through the ways in which the withdrawal agreement destroys the Belfast agreement—it is as strong as that. That will also impact on the possibility of doing something through the mechanisms of the agreement for consultation between the Government and the people of Northern Ireland and bringing in other parties. This is another matter which cannot be left in abeyance. Does the Minister have any thoughts about what the Government can do to restore the health of the Belfast agreement?

Lord Cormack (Con): My Lords, on Thursday last, my noble friend came to the Dispatch Box and gave another interim Statement, saying that he hoped before long to come back with definitive pronouncements. I asked him specifically about two issues. First, if we cannot have the Executive restored, which we would all like, surely the Assembly, which has been elected and the Members of which are still paid, could meet. There is no insuperable obstacle; my noble friend Lord Trimble has made this point on several previous occasions and is nodding now.

The other point I referred to was the appointment of what my noble friend referred to as a "facilitator"—I do not much like the word—who would be impartial and would preside over the meeting of interested parties. We must recognise the fact referred to by the noble Lord, Lord Bruce, I think: namely, that the very existence of a pact between the Government and the DUP means that there is a perception that the Government are not as even-handed as I am personally convinced that they are. That is a problem.

My noble friend referred to my next point last Thursday and I bring him back to it. We are having a series of holding Statements and measures such as the

one this afternoon—I endorse what my noble friend Lord Lexden asked: what are the criteria?—but there comes a point, and it is coming very soon, when a real initiative must be taken by the Secretary of State to try to get the Assembly functioning and the power-sharing Executive restored. It is now more than 20 years—almost 21 years, I must get my maths right—since the Belfast agreement: an historic agreement which gave great comfort and joy to many people and which, for a time, worked extremely well. We are now teetering on the brink of the imposition of direct rule—and we must face up to that, because we cannot go on like this.

No one in his or her right mind wants the reimposition of direct rule, with all the problems and regression implicit in it. So I beg my noble friend to add a little, when he comes to respond, to what he said on Thursday last. We all admire him—I am one of those who believe that if he had been put in charge, things might have moved at a slightly faster pace—but we want him to tell us something that will give real, positive encouragement and will amount to a promise of a true initiative taken, I very much hope, before 26 March.

3.30 pm

Lord Murphy of Torfaen (Lab): My Lords, this debate has been short but important. This statutory instrument is not about Brexit. It is not a dry, uninteresting, bureaucratic instrument that needs to be passed on the nod—although of course we on this side will support it. But it is symbolic of what is wrong in Northern Ireland. Of course, the instrument is important; these ministerial appointments must be made, otherwise things in Northern Ireland will go wrong—so I repeat that we will support it.

Government and democracy in Northern Ireland have collapsed because of the absence of the institutions of the Assembly and the Executive. There is no representation of nationalism in either Chamber in Parliament. The Assembly does not meet and has not done so for more than two years. Of course, as the noble Lord, Lord Lexden, said some months ago, that means that the only people operating in Northern Ireland are members of local authorities, which have very limited powers. So Northern Ireland is the least democratic part of our United Kingdom—which is ironic given that 21 years ago we spent a great deal of time building up the Good Friday agreement to make Northern Ireland the most sophisticated democratic part of not only the United Kingdom but probably the world. That has also meant that decisions on important issues such as health and education are being made by civil servants. In effect, institutionalised bureaucracy is running Northern Ireland at the moment. It is a terrible state of affairs.

Worse, the absence of these institutions threatens the Good Friday agreement considerably. Over the past few months, we have argued that Brexit is a major threat to the agreement—which I believe it is—but this is a major threat, too, because central to that agreement was the establishment of the Assembly, the Executive and the north-south ministerial bodies. They were all agreed on in a very sophisticated peace process, but they have been gone for two years now.

One of the Brexit issues affecting this—a point which I think the noble Lord, Lord Trimble, was hinting at—is that, had there been an Assembly or an Executive, it is likely that those bodies would have resolved the issue of the backstop, because nationalists and unionists would have come together to try to work things out. That is the purpose of the arrangements in Northern Ireland. What has occurred there is a tragedy. Every Member who has spoken in the debate echoes those sentiments and the need for the Government to change tack and become much more urgent in trying to restore those institutions.

Of course this is happening against the backdrop of the current Brexit negotiations. I cannot imagine the Prime Minister or the Taoiseach going to Belfast in the next few weeks when all these other things are happening. Incidentally, they could have gone there more frequently in the past; both Governments are to blame for the fact that they have not done so. Once again, Members of your Lordships' House have referred to the need for an independent chair or facilitator, such as George Mitchell, and to the fact that proper all-party talks should take place, with every party represented there and a proper structure. Based on what we are seeing at the moment, there is even a case for taking the parties away somewhere like they did in the past, when they took parties to various parts of the United Kingdom and locked them up in rooms for weeks on end until they came to an agreement. These things can happen—it has been done before—but there seems to be no urgency in all this, even though there is a deadline, as there is for Brexit. Nothing is happening.

It is worth reminding the parties in Northern Ireland, including Sinn Féin—which is not represented in Parliament even though its members were elected to it—that by not having these institutions, they are breaking the provisions of the Good Friday agreement which people in the north and south of Ireland voted on. I hope that in a few moments' time, the Minister will tell your Lordships' House that we will make those ministerial appointments and also give us an indication of a change of direction, a greater sense of urgency and more structured talks to ensure that we make progress in Northern Ireland. If it does not happen, this drift will end in direct rule—and when you are in direct rule, it is the devil's job to get out of it.

Lord Duncan of Springbank: My Lords, as with other debates on Northern Ireland, this is one of two halves. I will focus on the first half, which concerns the instrument itself and some elements of it, and then move on to the wider issues which have been raised.

My noble friend Lord Lexden asked a number of questions to which I will attempt to provide answers. The first thing to emphasise is that the appointments have been identified by the Northern Ireland Civil Service. The principal criterion for that identification was obviously timing. My noble friend is absolutely right to say that this should have been brought before the House earlier, but we have to bring all the measures together. I accept my noble friend's first point and apologise to him: they should have come forward earlier.

[Lord Duncan of Springbank]

The second point concerns when the broad functioning elements of the boards become, if you like, out of kilter with the membership. There needs to be a recognition of the balance of the members on the individual boards themselves. A number of the appointed chairs and vice-chairs have reached the end of their terms, which in itself creates the need to move forward. Some have indicated their intention to accept an extension, and that is the likely outcome. However, again, the key aspect has been identified by the Northern Ireland Civil Service, not by Ministers in the Northern Ireland Office. It is our intention to do so only as far as the legislation allows, in order to move the situation forward in that regard, following the detailed advice we have received. There may be other information I can provide and if so I will make sure that it is conveyed to my noble friend directly and shared more widely. I have no desire to keep secrets on this issue.

My noble friend is also correct to say that there will be others unless we resolve this matter. In answer to the question, "Which others?", it will be all the others, frankly, unless we can get this moving. Every appointment will be done in this way until we actually have a functioning Executive. I am not trying to exaggerate the case or make it seem worse than it is, but that is the reality of where we are. Until there is an Executive, this legislation will allow us to move forward with each appointment that is required. While it is true to say that we may think that some are more important than others, all of them are important to the good functioning of governance in Northern Ireland, be it those I have iterated today or those that will be need to be iterated in the future, should we not make progress on an Executive. Perhaps that is a rather dispiriting answer, but it is the correct one.

Before I turn to the broader elements, I should say that I welcome the support of the House for the instrument, which is a necessary one and will help in the functioning of these bodies. I was anticipating a broad discussion, so perhaps I may say this. On Friday of last week all the parties gathered together in Northern Ireland. It was the first time that that had happened in more than a year and it was an attempt to move things forward in a fashion which would ultimately lead to the creation of a sustainable Executive. Noble Lords may have read about the outcome of that meeting. It was not wholly supported by the Sinn Féin party, which has made its points very clear in the newspapers, which your Lordships are more than at liberty to read. I was saddened to read those reports but they are a matter of public awareness. That is not good and there is no point in pretending otherwise.

The Northern Ireland Office had hoped that, using this, we would be able to see the steps which could be taken to bring about the very things that the noble Lord, Lord Murphy, has put to us. He mentioned the notion of an independent facilitator. Like my noble friend Lord Cormack, I do not like the term either, but I accept that it is one we are using at the moment. I also recognise the need to think outside the traditional, such as, "Let us always meet in the same office space"; rather, we should be thinking of new places. I had hoped that out of these gatherings a clear timetable would emerge to bring about those very things, and to be able to stand before noble Lords today repeating a Statement from the other place on what we all hoped would happen. We did not make the progress we had hoped for, and for that I am sad and sorry. That does not mean that we stop or that this is the end of the journey, but it has not led to the breakthrough I hoped to see. That is a simple statement of fact.

None the less, we cannot in good conscience fail to address the issues raised by the noble Lord, Lord Empey. He is correct to say that noble Lords will be seeing a bit more of me over the next few weeks, I am afraid, because I will be bringing forward further legislation. Not the least will be the Northern Ireland Budget, and I do not doubt that the noble Lord will make the points that need to be made on the health service, the wider education service and so on.

You might recall that this time last year, when I spoke of that Budget, I said it was getting ever more difficult to plot the trajectory from the point of the outgoing Executive and their spending ambitions to where we are now. It is getting considerably harder. Last year I said that that would be the last time I would make that point, and events have made a liar of me: it was not the last time. I hope the one coming will be the last time, but the noble Lord rightly raises his eyebrows, and I take that on board. There is also the issue of the five-month extension window, anticipated in the Act of last year, within which we can look at delivering the Executive. The noble Lord, Lord Empey, is quite correct that that will necessarily have to be brought forward in the next few weeks as well. He is right to flag these things up.

I struggle to find new ways to tell noble Lords the same thing. I do not wish to sound complacent as I do so, but finding new ways to say this is proving difficult. Ultimately, the only way we will be able to move this forward is for the parties themselves to recognise the need for progress. Until that happens, the Government themselves will be unable to create the "eureka" moment. It is not wholly in their gift.

Lord Bruce of Bennachie: The Minister is making a powerful and practical point, but why cannot the Government proceed with some kind of independent mediator? Exactly as others have said, the perception of a Government who are parti pris does not help and makes it much easier for Sinn Féin to do and say the things it does. I am not naive—I am not saying that it would not say that to an independent mediator—but why are the Government finding it so difficult to move forward on that?

Lord Duncan of Springbank: The noble Lord is right to raise that point. There are only so many times I can talk about the box metaphor and thinking outside it before noble Lords become tired of that. We had hoped, through those discussions last week, to get some coherent agreement on moving things forward on that basis, and we were not able to do so. We now have to think afresh. We have to think whether that can be done without the support of all the parties involved. These things need to be thought through again. I am not trying to postpone answering the noble Lord's question, but I am aware that we have not been able to resolve it in the fashion I would like. That remains at the heart of the problem.

Lord Lea of Crondall (Lab): My Lords, I hope I will be forgiven for reverting to a point made five minutes ago: the DUP being the only actor in London on the backstop question. Many other things could have been said and could have led to more constructive engagement if there had been discussions on that question between all the parties in Northern Ireland. I do not know what the agenda, the scope or the protocol was for last week's discussions, but is it not rather intriguing that such a remark can be made at this critical moment without putting any flesh on the bones of that scenario?

Lord Duncan of Springbank: The noble Lord, Lord Lea, raises a slightly cryptic question, and I am not wholly sure I can answer it in the manner I would like. The UK Government, Ministers and civil servants have been engaged in a series of bilateral discussions with all parties—it has been ongoing for quite some time—to find the means by which we can bring people into the same room to have appropriate discussions, out of which will emerge the structures and necessary elements for talks that will lead to the formation of a sustainable Executive. That is not a secret; that is our ambition—it always has been—and we have been doing it for quite some time. It is appropriate to put the point that the noble Lord, Lord Murphy, made at the end of his speech, which the noble Lord will perhaps accept as an answer of sorts. Had there been a fully functioning Executive and an Assembly discussing the Irish backstop, they may well have come up with an answer. Just let that sink in. But for many different reasons, the political parties in Northern Ireland have not been able to find the right means whereby the Executive can be restored, and that voice has been silenced. There is no point in pretending otherwise.

There has been debate in Northern Ireland; it just has not been taking place in Stormont. There has been serious engagement, but mostly through the pages of the media. Politicians have been involved, but not sitting in a forum such as this where they have a particular, structured debate. So voices are being raised, but the Executive themselves and the function they represent have been missing in action. When the history books come to be written of this moment, I do not doubt that a great omission in Northern Ireland will be seen, especially on the issue of the backstop. Above all others, this is the time when we need a fully functioning Assembly and Executive in Northern Ireland to thrash out, backwards and forwards, all the issues.

3.45 pm

Lord Lexden: Is there any reason why all the parties should not be brought together specifically to discuss the backstop?

Lord Duncan of Springbank: That is an interesting issue. I suppose the question is whether they are brought together in the form of an Assembly, which has certain logistical elements, or in a different configuration. I would like to see the parties brought together to have a serious discussion on the backstop, now more than ever. This is the time when we need to make sure that the voices of those people who live in Northern Ireland, for whom the border is a real issue, are heard. Far too many experts on Northern Irish issues have suddenly appeared over the past few weeks and months—which has been somewhat resented, I think, by the people of Northern Ireland.

Lord Cormack: I do not want to labour the point, but surely what my noble friend has just said illustrates the good sense of getting the Assembly together. It could be done. That could be the item on the agenda. It cannot put us back, but it could possibly take us forward.

Lord Duncan of Springbank: That is constructive advice, as indeed all noble Lords have given today. I will take it away and make sure that it is heard by those who need to hear it. I would dearly like to make progress on that; I am tired of giving the same speech over and over again, and noble Lords are tired of hearing it. If we can get to the stage where we can move on to new ground and new issues—where we simply applaud the good governance in Northern Ireland—what a great step forward that would be. The noble Lord, Lord Empey, would stop raising his eyebrows at me when he mentions health issues, and I would be much happier in those moments. However, here we are—again.

I was trying to find a way to describe the events of Friday. It was not easy to find a positive way to do it, but I did find one way, which noble Lords may or may not find useful. Many noble Lords will be of an age that they can remember Angela Lansbury in her prime in "Bedknobs and Broomsticks". She sang a song—

A noble Lord: Sing it!

Lord Duncan of Springbank: I will.

"After all it's a step in the right direction
It's a step in the right direction after all".

The rest of the song, I will not sing. I merely note it is a reminder that even small steps, as long as they are taken in the right direction, can make us go forward. I hope that the step taken on Friday is a small step in the right direction and will lead to some serious movement.

I must return to the matter at hand: the regulations. I have a form of words that I have to say—I have it in a bundle somewhere.

Lord Empey: While the noble Lord is looking for his music score, I will say that it is good that we can have a moment of humour on an issue like this. But the question was asked about the backstop and the role that Northern Ireland could play. When we asked what input people from Northern Ireland would have into the whole Brexit debate, we were told repeatedly that there would be consultations and so on. It did not happen that way.

In my view, instead of the Belfast agreement being used as an obstacle, parts of it could be the solution. The noble Lord, Lord Wigley, referred to the other parts of the agreement. We are forgetting that the agreement is a complicated mixture. Even at this late stage in the process, I ask the Minister: what alternative

[LORD EMPEY]
thinking is going on in the NIO as to how we might replace Stormont? I have not had an answer to that, either today or on other occasions when it was raised. The bits and pieces of the jigsaw are all on the table, but nobody is putting them together in the right way.

Trade flows across the Irish border represent 0.1% of European trade flows. How is it that, as a nation and as a continent, we are in such a state over that when we are ignoring the very institutions that are a part of the solution? Will the Minister reflect on this and consult with his right honourable friend in the other place? Perhaps he should serenade her, as he has a talent for it.

Lord Duncan of Springbank: I thank the noble Lord for giving me a moment or two to find my place in my notes and for the reminder that these are serious issues. He is correct, I did not give him an answer to his question. He will be aware that I was not able to find the right answer to give—and that is part of the challenge, to be frank.

I am also aware that I have not appropriately answered the question of the noble Lord, Lord Trimble. I will reflect upon that, come back to him on it and share the answer more widely with other Members of the House. I am conscious that the noble Lord, Lord Wigley, made the point about seeing this not simply through the lens of Northern Ireland but through a broader sense of the devolution settlements. He is absolutely right. We cannot lose sight of that fact, either.

However, I have found my form of words, which are: I beg to move.

Motion agreed.

Data Protection (Charges and Information) (Amendment) Regulations 2019

Motion to Approve

3.51pm

Moved by ***Lord Ashton of Hyde***

That the draft Regulations laid before the House on 17 December 2018 be approved.

The Parliamentary Under-Secretary of State, Department for Digital, Culture, Media and Sport (Lord Ashton of Hyde): My Lords, I declare an interest which every Member of this House who speaks will have to declare so perhaps I can save them the bother. I will benefit from the fact that I will not have to pay the £40 charge if the regulations are approved. Secondly, my wife is a parish councillor and will also benefit.

The original regulations were debated and approved in this House on 20 March 2018. Noble Lords may recall that those regulations introduced a new charging structure to fund the Information Commissioner's Office. The authority for doing so derived at the time from the Digital Economy Act 2017, now superseded by the powers set out in Section 137 of the Data Protection Act 2018. As we promised during those debates, we are now looking to implement a new exemption from the annual data protection charge for elected representatives, candidates for election and Members of the House of Lords for processing that they undertake in the course of fulfilling their democratic duties.

The new data protection framework is about protecting personal data—that is, information that can identify individuals. Some of us in this House will be data controllers—we may hold personal data—and are responsible for how that information is processed. There may be a number of reasons why we hold that personal data—for example, we may have been entrusted with it by members of the public for particular aspects of parliamentary work—but, as data controllers, we have various obligations under the Data Protection Act, including how we look after that information.

While we have previously debated the importance of having an adequately funded regulator, there will be some situations where it would be unreasonable for some data controllers to pay the charge or where the charge would give rise to unintended negative consequences. For that reason, Schedule 1 to the funding regulations details a number of exemptions to the payment of the charge. For example, any data controller who processes personal data only for staff administration purposes, or purely for advertising, marketing and public relations reasons, is not required to pay.

During the parliamentary debate of the original funding regulations on 20 March last year, the Government undertook to review these exemptions. A public consultation took place last summer and has been available online since June 2018. The consultation sought views on whether each of the exemptions was still appropriate; a proposed new exemption for elected representatives, prospective candidates for election and Members of the House of Lords; and whether any other new exemptions should be introduced. Respondents were broadly supportive of the current exemptions regime. However, there was also support for one new exemption for elected representatives, candidates, including prospective candidates for election, and Members of the House of Lords.

The Government's view is that activity deriving from elected representatives' public offices and functions should not be liable to a charge. Charges of this nature potentially represent a perceived or actual barrier to democratic engagement. A number of respondents supported this view. In light of this support, we have decided to take this amendment forward for implementation, so I now come to the details of the instrument.

The amendment introduces an exemption for: Members of the House of Lords who are entitled to receive a Writ of Summons to attend this House specifically for the purposes of related functions; elected representatives, as defined in paragraph 23(3) of Schedule 1 to the Data Protection Act 2018 in connection with the discharge of their respective functions; and relevant processing undertaken by candidates, prospective and nominated, seeking to become elected representatives. These exemptions cover those who are acting on instructions or on behalf of such Members and elected or prospective representatives. Importantly, that is not

to say that all processing of data conducted by those listed in the amendment, including all Members of this House, is automatically exempt from paying a charge. The instrument makes it clear that the exemption relates solely to processing carried out by these parties in connection with their democratic functions.

In the case of prospective candidates, the exemption would apply only to processing in connection with those activities related to election or re-election in a post. It is important to extend the exemption to anyone seeking to become an elected representative, not just to nominated candidates. This is because formal nomination, the stage at which candidates are defined in electoral legislation, occurs only in the immediate lead-up to an election. Activity to support re-election is likely to predate this stage. Excluding prospective candidates from this exemption would place them at a financial disadvantage compared with their incumbent counterparts. We have restricted the application of the exemption to data processing associated with the functions of our respective roles. This provides a safeguard against misuse, for example by individuals falsely claiming to be prospective candidates.

I want to be clear that the exemption relates only to the payment of the annual data protection charge. It is not an exemption from data controllers' important data protection responsibilities. Anyone who does not adhere to those responsibilities and principles will face enforcement action by the ICO.

I hope noble Lords will agree that this amendment is important to encourage wider participation in the democratic engagement process. The removal of a requirement to pay the annual data protection charge to the ICO will ensure that all prospective candidates will start their electoral campaigns on a footing equal to that of elected representatives already in post. It also reflects the high regard the Government place upon those undertaking public functions. I beg to move.

Lord McNally (LD): My Lords, we welcome this statutory instrument and the exemptions provided for. Like the Minister and, I think, everybody in this House, we do not want a tax on democracy, but people should be assured that the legal responsibilities remain the same and can be quite onerous. The Minister's last remark was that we must not allow people to use the candidate or even the MP or Peer as cover for activities that would be outside the narrow exemption of this House.

This reminds me of debates we had some 20 or even 30 years ago—in the early 1990s—when we brought in legislation about the financing of political parties. I remember that those of us who had experience of working for political parties were very conscious that they are all made up of volunteers, often amateurs. There was a danger in that legislation—and I think there still is—of putting on to enthusiastic volunteer amateurs, who make our democracy work, very onerous financial responsibilities in terms of election spending and, in this case, very onerous data protection responsibilities. There might be a case for giving political parties some funding for advice, training and support to make sure that these responsibilities are understood and work well.

What the Minister has had to say is very welcome, and we are all involved in this, but it appears that the initial advice was a little confusing and caused concern. Once these regulations are approved, as I am sure they will be, I wonder whether the House authorities can issue some clear and definitive advice that will be of benefit to Members of this House. We look forward to this SI being passed.

4 pm

Baroness Ludford (LD): My Lords, I just want to add to what my noble friend Lord McNally has said. I am glad that this matter is being cleared up, because we had very confusing advice a few months ago. I also want to note, as one of the people who was involved in the European Parliament's proceedings on the GDPR, that it is a UK decision to impose a fee on data controllers. The mandatory requirement was removed from the GDPR, and it is a unilateral UK decision to fund the ICO in this way so that, in effect, data controllers in the UK will not feel the change which perhaps will be felt by data controllers in other EEA states, where Governments make a decision to fund their data protection authorities from, for instance, general taxation. I realise that that decision was made in the Digital Economy Act rather than in last year's Data Protection Act, but it is imposed not by Brussels but by Whitehall and Westminster.

Baroness O'Neill of Bengarve (CB): My Lords, these amendments represent a little island of calm in a turbulent ocean. For once, I am referring not to Brexit or the backstop but, rather, to the fact that we are in the middle of some very turbulent changes in our regimes for the protection of data and privacy and many other aspects of communication. This morning, we saw the publication of the report of the Digital, Culture, Media and Sport Committee of the other place on disinformation and "fake news". In so far as I have got into the report—which is not very far—it is very welcome in that it represents a much broader view of the threats to democracy from the present regime for controlling the use of data. There is much more to be said, and I hope that the Minister will be able to say something about the ways in which the broader picture will be taken into account. These amendments do not need changing because of the broader picture, but it is curious to fiddle with the small stuff when such major and serious issues are happening in this domain.

Lord Griffiths of Burry Port (Lab): My Lords, this seems a sensible measure and the issues have been well rehearsed. There was one area where there was some confusion in my mind, and I hope that noble Lords will not mind my bringing it to their attention now. I, too, am looking forward to not having to pay £40—that is good news, but in exempting Members from both Houses, candidates and so on from the need to pay that charge, we recognise that many of us have other duties and obligations not related to our being Members of this House. We are in employment, we run things and so on, and we handle people's data other than in the sense that has been described. I guess they will

[Lord Griffiths of Burry Port]
have to pay their £40 or whatever it is, but my confusion lies in the hinterland between those two modes of operation: information gained in respect of activities of one kind can without too much imagination become useful in respect of those of another kind. I wonder whether some thought has been given to handling that kind of confusion and, if so, how. It would be helpful if the Minister could say something about that; otherwise, this seems like common sense and we would have no hesitation in wanting it to go forward.

Lord Ashton of Hyde: My Lords, I am grateful to all noble Lords who have responded. This statutory instrument is unique among those I have dealt with recently in having gained a speedy and generally favourable response; I am grateful for that.

I am grateful to the noble Lord, Lord McNally, for his welcome. He spoke about financing political parties and the need to give advice—as indeed did the noble Baroness, Lady Ludford. I can say that the House authorities will take that on board and provide some clear advice, taking into account the new requirements if this statutory instrument is passed; I am very pleased about that.

I acknowledge—the noble Baroness, Lady Ludford, was right about this—that the approach to funding the ICO was originally set by the Digital Economy Act, which was superseded by the Data Protection Act. The method of funding the ICO, and the question of whether it is adequate, have been occupying us for several years. I am pleased that we have finally resolved it. The noble Baroness is right that we decided to do it this way and not as part of the GDPR. Supervisory authorities can be funded in a number of ways. The reason for doing it this way was that it did not involve much practical change from the ICO funding arrangements under the Data Protection Act 1998 and a register is not necessary.

The noble Baroness, Lady O'Neill, talked about an ocean of calm within a broader picture that is possibly not so calming. I agree with her that it is a small but important issue. It is right to deal with an issue that promotes—or at least does not prevent—demographic engagement; and a commitment was made when the regulations were debated last year that we would look at this and take it forward. It is important to carry forward what we said; I take on board her points about the issues alluded to in the DCMS Committee's report, as outlined this morning. Generally speaking, we have not yet had time to analyse it in great detail but, together with the Cabinet Office, we will be taking forward a lot of these issues around disinformation and its effect on elections, particularly through the online harms White Paper, which will be coming out soon.

The noble Lord, Lord Griffiths, mentioned that Peers have other duties; he asked about the way this exemption would apply in relation to their duties in the House of Lords and elsewhere. He is quite right that, if they are a data controller and have other duties that are not subject to an exemption, they would be required to pay the charge. I will mention this to the House authorities when they issue their advice and hopefully they can be clear. Ultimately, the Data Protection Act says that you must have lawful authority to handle personal data and it is up to you to make sure that is the case; if you handle personal data—other than data that has some limited exemptions provided in the Act—then you will have to pay the charge.

Lord Griffiths of Burry Port: I wonder if I could ask for a little more resolution on the matter. My mind is filled with pictures of activities that I myself have engaged in where, by doing work for which I am remunerated, I gain some kind of control of people's data or the use of it, and at the same time I can be involved in an area where I am exempt from all that. Because of the homogeneity of the activities, one paid and one not, it is not difficult to see that the dividing line between what qualifies and what does not might be difficult to establish, even with the good will of the authorities of the House who write the best guidance that has ever been written.

Lord Ashton of Hyde: If the guidance does not produce clarity in the noble Lord's mind, then I think the answer is to avail himself of the ICO's telephone hotline, which is there specifically to answer questions such as the ones that he has asked. He will be able to give them the specific examples of where he is unable to be clear. That applies generally to people in public office such as him but also, importantly, to other small businesses; there is a specific small-business hotline that is there exactly to answer questions like his. I hope that has covered most of the issues.

Motion agreed.

Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019

Motion to Approve

4.11 pm

Moved by ***Lord Ashton of Hyde***

That the draft Regulations laid before the House on 14 January be approved.

The Parliamentary Under-Secretary of State, Department for Digital, Culture, Media and Sport (Lord Ashton of Hyde) (Con): My Lords, today we are concerned with the protection of personal data once the UK has withdrawn from the EU, when EU law will cease to apply in the UK.

Noble Lords will recall from debates last year on the Data Protection Bill that much of our current data protection framework derives from EU measures. When the UK leaves the EU, the GDPR will be retained in domestic law through the European Union (Withdrawal) Act 2018. That Act also permits fixes to be made so that the retained version of the UK GDPR continues to be operable in a domestic context. That is what the regulations before the House today are designed to do.

Before we look at the changes in more detail, it is important to make clear the general approach. The purpose of this exercise is to correct deficiencies arising

from our departure from the EU. As such, these regulations do not significantly affect UK businesses or erode people's data protection rights. We are looking to maintain continuity. This approach will put the UK in the best possible position to receive a positive adequacy decision from the EU.

Many of the amendments made to the GDPR by these regulations simply replace European Union-related terminology with UK equivalents. For example, there are many references in the GDPR to "member states" or "member state law". These references have typically been amended by these regulations to refer to "the UK" and "domestic law" respectively, or removed altogether. For greater clarity post exit, the retained version of the GDPR as amended by these regulations will be known as the UK GDPR.

However, simply replacing European terminology with UK equivalents does not address all the deficiencies that arise as a result of our exit from the EU. The Government have given careful thought to how the UK GDPR and the Data Protection Act 2018 should approach these remaining deficiencies. I shall address a number of these important issues in more detail.

The GDPR and Part 3 of the Data Protection Act 2018, which implemented the law enforcement directive, restrict the transfer of personal data to third countries unless certain safeguards are met. One of those safeguards is where the third country concerned, or a sector within the country, has been deemed "adequate" by the EU Commission. Once an adequacy decision has been granted, data can flow freely to that country or sector. In the absence of an adequacy decision, data can still be transferred to third countries, but the onus is on controllers to make sure that alternative safeguards, such as standard contractual clauses or binding corporate rules, are in place to ensure that the data is protected.

4.15 pm

It would not be appropriate for the EU Commission to make adequacy decisions on behalf of the UK. Therefore, these regulations transfer the function of making adequacy decisions under article 45 of the GDPR and article 36 of the law enforcement directive to the Secretary of State. Parliament will have the opportunity to scrutinise these decisions, including the opportunity to stop them from continuing to have effect. Similarly, the function of preparing standard contractual clauses is also transferred from the European Commission to the Secretary of State. The Information Commissioner will also continue to exercise this function, but will no longer be subject to EU Commission oversight.

To minimise any disruption to established general data flows from the UK to the EEA on the day of exit, a number of transitional provisions are made by these regulations. They include a provision to continue to treat EU member states, other EEA countries and Gibraltar as adequate in relation to general data processing under the UK GDPR. These provisions will be kept under review. Without such a provision, many UK businesses which are transferring personal data to businesses in the EEA on a regular basis would be forced to explore alternative mechanisms to ensure that transfers from the UK to the EEA continued to be lawful. For the purposes of adequacy assessments under the law enforcement directive and Part 3 of the Data Protection Act 2018, EU member states and Gibraltar will, as a further transitional measure, automatically be deemed adequate to preserve the flow of critical law enforcement data from the UK to the EU and Gibraltar.

Although this is not strictly relevant to the purpose of this SI because it is an EU Commission matter, I should say that while the measures I have outlined should protect established data flows from the UK to the EU, the European Commission may not put reciprocal arrangements in place prior to our departure from the EU in a no-deal situation. The Government will continue to encourage the EU Commission to begin its adequacy assessment of the UK as soon as possible.

Many UK businesses will be accustomed to transferring personal data freely to countries that have already been deemed adequate in whole or in part by the EU Commission. The regulation also makes transitional provision for those decisions that were in place at the time this SI was laid in Parliament to continue to have effect as if they had been made by the Secretary of State. These arrangements will be kept under review. This includes the EU's decision in relation to companies participating in the Privacy Shield scheme in the United States. To reflect specific arrangements put in place by the US to ensure the continued application of Privacy Shield and its protections for UK data transfers, further regulations will very shortly be brought forward to clarify that personal data can be transferred to US companies only when they have updated their Privacy Shield commitment to include the UK. Where UK organisations are relying on standard contractual clauses approved by the EU Commission as an adequate safeguard for transfers to other third countries, further transitional provisions will mean that they will not have to rewrite those contracts.

On the approach that the regulations take to the extraterritorial provisions in the GDPR, noble Lords may recall that, in addition to applying to data controllers that are based in the EEA, the GDPR applies to those based outside the EEA which are processing EEA data for the purposes of providing goods and services or monitoring individuals' behaviour. Where a data controller outside the EEA is systematically processing the data of EEA residents, it is required to appoint a representative in the EEA to act as a contact point for EEA supervisory authorities. To ensure that there is no dilution in data protection standards when the UK leaves the EU, these regulations preserve the GDPR's extraterritorial approach. This means that the UK GDPR will apply to certain data controllers based outside the UK which process the data, or monitor the behaviour, of data subjects in the UK.

Articles 60 to 76 of the current GDPR focus on how the different supervisory authorities in the EEA will work together to investigate data breaches and share guidance and best practice through the European Data Protection Board. Once the UK leaves the EU, there will be no automatic right for the Information Commissioner to sit on the EDPB or to participate in the GDPR's one-stop-shop mechanism, so these provisions have been removed from the UK GDPR. The Government

[Lord Ashton of Hyde]
recognise the value of cross-border regulatory co-operation. That is why the draft political declaration makes it clear in paragraph 10 that the EU and the UK should collaborate to ensure that our regulators can continue to work together where it is in our shared interests. Clearly, we cannot pre-empt the outcome of these discussions. However, what we can do is to retain Article 50 of the GDPR in our law, which says that the Information Commissioner,

"shall take appropriate steps to … develop international cooperation mechanisms to facilitate the effective enforcement of legislation for the protection of personal data".

This ensures that, come what may, data protection authorities on both sides of the channel will have a common basis from which to develop new international co-operation mechanisms.

Lord Adonis (Lab): My Lords, if the Minister will forgive me, this is a crucial issue in what is going to happen. Where there is a data controller outside the United Kingdom in a no-deal scenario, will there be a requirement for it to have a representative inside the United Kingdom to replicate the existing EU arrangement? It was not clear from what the Minister has just said whether that will be an absolute requirement.

Lord Ashton of Hyde: If they fulfil those conditions that I mentioned, the answer is yes.

I would like to touch on what our exit from the EU might mean for the applied GDPR, as provided for by Chapter 3 of Part 2 of the Data Protection Act 2018. Noble Lords will recall that we created a separate regime which provides for broadly equivalent standards to the GDPR to apply to processing activities that are outside the scope of EU law and covered by neither Part 3 nor 4 of the Act, which deal with processing by law enforcement and intelligence services respectively. This regime currently applies, for example, where a controller other than the intelligence services is processing for national security or defence purposes.

As the EU GDPR will not, as a matter of domestic law, apply directly to any general processing activities when we leave the EU, these regulations are intended to simplify matters by providing for a single regime for all general processing activities. Those provisions in the 2018 Act that provide for the applied GDPR, together with other references to the applied GDPR in legislation, are removed. Importantly, the provisions in the applied GDPR which currently provide exemptions from specified provisions where these are required for the purposes of safeguarding national security or for defence purposes have been retained in the merged regime. These exemptions balance the need to protect personal data against ensuring that the UK's security and intelligence community can continue to carry out its vital work to safeguard national security. I should emphasise that the merger does not itself alter the purview of EU law so where aspects of domestic data protection law were outside EU competence before exit day, this will not change as a result of this instrument. We have included provisions in the regulations to make that point clear.

I believe that the approach the Government are taking is an appropriate way of addressing the deficiencies in domestic data protection laws resulting from the UK leaving the EU. The aim of these regulations is to ensure continuity for data subjects, controllers and processors by maintaining the same data protection standards that currently exist under the GDPR and the Data Protection Act 2018.

My remarks have focused on the changes made to the GDPR and the Data Protection Act because they are the most significant. For completeness, I should add that the regulations make a number of minor amendments to other legislation, consequential on the amendments we are making to the UK GDPR and Data Protection Act 2018. For example, they amend references to the "GDPR" in other legislation to refer to the "UK GDPR".

They also address a small number of non-exit-related issues. They clarify that the GDPR definition of consent applies for the purposes of the Privacy and Electronic Communications (EC Directive) Regulations 2003, and address two minor drafting issues that were identified in Schedule 19 to the Data Protection Act 2018, shortly before it received Royal Assent. I commend these regulations to the House

Lord McNally (LD): My Lords, I am not sure the Minister is going to have quite the easy ride he had with the first statutory instrument. My eye was caught by a very detailed briefing by the law firm Fieldfisher on the consequences of this SI. It was the final paragraph that caught my eye. It says:

"From a broader perspective, the creation of a new data protection regime in the UK may present additional complexities for controllers and processors who are caught by both European and UK law and will therefore need to comply with both the GDPR and (in relation to UK customer data) something that looks like the GDPR but which may start to move away from it as time goes on".

Those last words are ominous. There is no doubt that the GDPR was a great success for European co-operation. The noble Baroness, Lady O'Neill, reminded us earlier of the wide range of issues that we will have to take into account in protecting our democracy from data abuses. There are similar dangers in the protection of our commercial and business life. The value of the GDPR is that it gives us a strength of certainty of European legislation.

I will delay the House a little with a reminiscence. Between 2010 and 2013 I was the Minister at the Ministry of Justice responsible for the earlier negotiations on GDPR. I went to a meeting in Lithuania and throughout the day I noticed that there was one person sat at the table who never participated, voted or said anything. At the end I turned to the British ambassador and asked, "Who is the guy at the end of the table—he has not said anything?" "That is the Norwegian," he said. "He can come and listen, but can't vote and he is not involved our decisions."

I often think of that when I hear people banging on about sovereignty. Sovereignty was best exercised by British Ministers at the table briefed, I have to say, by officials who were the people to go to. I will not name any particular official, but there was one man to go to as GDPR clunked its way through the machinery.

There were "light touchers" and those who had quite recently experienced a Stasi or state abuse of personal data and privacy, and balancing the requirements of GDPR was part of the diplomacy our officials showed. I was also greatly assisted by our parliamentarians in the European Parliament: my noble friend Lady Ludford was very influential in steering the GDPR through some choppy waters.

The noble Lord, Lord Forsyth, who is not in his place, said a few weeks ago in one of our Brexit debates that the first time he went as a Minister to Brussels he felt resentment and animosity that he was being, as it were, dictated to by these foreigners. I do not think that I am being too misleading in saying that; I am sure that he will correct me later if I am wrong. He certainly did not feel at home there.

4.30 pm

My first visit as a Minister was to Lithuania. I felt considerable pride that I was sitting with 27 colleagues in a part of Europe that had experienced every kind of dictatorship, from Nazism to communism. We were now sitting around a table trying to deal with one of the most important issues that we will have to face in the years ahead, with this fourth industrial revolution, artificial intelligence and the data revolution. It worries me that we are going into a period when data is described as the new oil, the most important and valued asset that we can have, while real doubts are still on the agenda and being exacerbated by the Brexit process—never, of course, put on the side of a bus.

The Minister gave sweet assurances on how quickly we would deal with adequacy. He is now shaking his head, so let us hear from him.

Lord Ashton of Hyde: Just to be clear, I did not say anything about the speed with which the European Commission would provide its decision.

Lord McNally: Oh, dearie me. It is always the EU's fault that we have got ourselves on this particular window ledge.

Lord Ashton of Hyde: I am not blaming anyone, but an EU adequacy decision can be given only by the European Commission. It is not a question of blame; it is just a fact.

Lord McNally: I will close with another one where I am sure that the Minister is not going to blame the European Commission but say that it is its responsibility. During the period that I am talking about, the stature and influence of our then Information Commissioner had a major impact on how we put the GDPR in place. Again, the Minister was unable to give us any real reassurances about whether we will be at the table in co-operation, or whether it is these difficult foreigners who are going to stop us doing that.

Lord Ashton of Hyde: I—

Lord McNally: It is no use the Minister saying otherwise, because this is the reality.

Lord Ashton of Hyde: I am sorry, I cannot let that pass. I never said anything about difficult foreigners.

Lord McNally: The Minister never said anything about difficult foreigners, but there has always been the impression that this would all be as smooth as smooth. "Do they not understand that we are trying to be helpful?", we ask, when we have caused Europe so much disruption and cost by this act. In this case, it is essential that we are part of the ongoing dialogue. This GDPR is not the end of the process. As the House was discussing last week, these European laws are going to develop. How we then act and deal with them is going to affect where jurisdiction lies—with European or British courts.

Lord Adonis: The noble Lord has raised a litany of concerns about the GDPR regime after Brexit and cited a number of people who briefed him about it, including QCs and Members of the European Parliament. However, he will have noticed that there has been no public consultation at all on these regulations. There has been no opportunity for people directly affected to publicly brief us. Does he share my concern about that? Would he like to comment on the process of public consultation on these regulations?

Lord McNally: It is, of course, a farce. These regulations are all being rushed through at the last minute and we know that we have to put them in place as the cliff edge approaches.

I do not want to be rude to Fieldfisher, because it provided some excellent briefing but, my God, the lawyers must be rubbing their hands at the cornucopia that is going to be tipped out to them as companies and individuals try to make sense of the reality. Whether we get a deal, or fall out, it will be a jagged, uncertain, unclear leaving.

Lord Howard of Rising (Con): Does the noble Lord accept just how unclear and what a complete pig's breakfast the thing is already? I do not think you could make it worse. I have to deal with this on a day-to-day basis. It is a complete and utter mess and no lawyer can even give you a definitive opinion.

Lord McNally: My Lords, I was planning a peroration, but I think I will leave it at that.

Baroness Ludford (LD): My Lords, first I have a couple of housekeeping questions which I hope are not too banal. I find considerable difficulty using the legislation.gov.uk website and its search function. Will the Minister ask his civil servants to check it out? Even if you search for "data protection 2019" under UK SIs, both the previous one and this are difficult to find. There was a 19 December version of these regulations, which were replaced in January. I must admit that I have not pored over every line of both to find the differences. Will the Minister explain why that was necessary?

[Baroness Ludford]

Secondly, I want to ask about the absence of an impact assessment. Paragraph 12 of the Explanatory Memorandum states that:

"There is no, or no significant, impact on business, charities or voluntary bodies arising from this instrument".

The pretext is that, while the Government recognise that:

"Data flows from the EEA to the UK may be restricted post-exit"—

because, if there is no deal, we will be plunged into a situation where there is no legal framework and no adequacy decision—

"that is as a consequence of the UK leaving the EU, not as a result of this instrument".

That is the justification for having no impact assessment. However, if we left with a withdrawal deal and a transition there would be a legal framework, so this instrument, which provides for both a no-deal scenario and one in which there would be no adequacy decision, surely merits an impact assessment as well as the consultation to which the noble Lord, Lord Adonis, referred.

As the ICO has made clear, and as has been mentioned already, businesses may have to deal both with the ICO and with European data protection authorities in every EU and EEA state where they have customers. They may need a European representative if they process the data of people resident in the EEA or have customers in the EEA. There would be additional complexity if they had to comply with both the GDPR and the UK GDPR. They could face concurrent legal claims in both the UK and the EEA. Will the Minister amplify the justification for having no impact assessment? Data flows are crucial to many businesses, not just the tech industry—there is hardly a business or other organisation that they do not affect—so the rather blasé claim that no impact assessment is needed is not justified.

I am a bit confused—it may just be my lack of understanding—about the situation regarding EU adequacy decisions on third countries. Paragraph 2.8 of the Explanatory Memorandum says there will be,

"incorporated into UK domestic law … EU decisions on the adequacy of third countries and on standard contractual clauses, both of which are relevant for … international transfers".

Paragraph 2.13 says:

"It will not be necessary to retain the EU decisions on adequacy and standard contractual clauses … so these are revoked by this instrument".

If I have understood the Minister's presentation, this is explained by the fact that we are recognising and incorporating past EU adequacy decisions, but that in the future, in a no-deal scenario, the UK will take over that function: I venture to suggest that that is not very clearly explained in the Explanatory Memorandum.

Lord Ashton of Hyde: Would it help if I just said that the noble Baroness is absolutely right in her interpretation?

Baroness Ludford: I do not often get that response from Ministers, so that is very gratifying.

Also, a second version of these regulations was published at the end of last week—I think the Minister referred to it—which is specifically about privacy shields in the US. I am rather surprised that we will have two separate considerations: why could they not have been incorporated into this debate? As the ICO pointed out in a notice a while ago, US companies will need to update their privacy shield commitments to state that they apply to transfers of personal data from the UK. That is a big deal for many companies. It is another reason for what I said about the need for an impact assessment. If that does not happen, a lot of companies will be in serious difficulty.

Will the Minister tell us what advice the Government are giving businesses on using standard contractual clauses or binding corporate rules in the absence of an adequacy decision? The European Data Protection Board issued a notice about this last week, on 12 February. Are the Government going to advise businesses, large and small, exactly how this will work? Lastly, what progress is being made on an adequacy decision? The Minister will know from discussions during the passage of the EU withdrawal Act and the Data Protection Act that many of us are worried about this issue. Last summer, the Government expressed their aspiration for a legally binding agreement that would be more than a unilateral adequacy decision and which would enable the ICO to have a seat on the European Data Protection Board. Essentially, it would be Brexit in name only and would retain all the benefits of being in the EU with regard to data protection structures. That aspiration is not recognised in the political declaration, which talks only about an adequacy decision, so the UK has been knocked back in that area. Perhaps the Minister could tell us precisely where we are. What signal is he getting from the Commission on an adequacy decision? Are we talking months or years?

4.45 pm

The Government in their wisdom—or, some of us think, lack of wisdom—decided not to incorporate the Charter of Fundamental Rights, and not even its Article 8 on data protection. Therefore, reliance for privacy safeguards has to be found in the European Convention on Human Rights. Again, this has been commented on in the last couple of months. The political declaration has a strange expression whereby the UK is committing itself only to respect a framework of the ECHR. This is starting to get a bit thin. When the Commission looks at an adequacy assessment, of course it always has the European Parliament breathing down its neck; the Parliament does not have a legal role but looks at this area rather closely. It seems that the Government are shooting themselves in the foot with regard to saying, "We have a very high standard of commitment to human rights, including privacy", and that is before you get to the fact that the Government, or the Conservative Party, are refusing to rule out abolition of the Human Rights Act, which is still in place. We know that when an adequacy decision comes to be made, the scope of the assessment is wider than if we were a member of the EU, and it will bring in things like surveillance by the intelligence agencies—for instance, under the Investigatory Powers Act. As noble Lords will know, in the Strasbourg court the UK was found—I think last September—in breach of the ECHR

privacy obligations in respect of the bulk collection of data. How do the Government intend to reassure the European Commission as well as other EU players that they are thoroughly fit for purpose when it comes to getting an adequacy decision, and are these issues delaying the Commission advancing on that question?

Lord Adonis: My Lords, the noble Baroness, Lady Ludford, has raised some important points. It is totally unjustifiable that there is no impact assessment for this regulation; I hope that the Minister will address and explain that. The noble Baroness also made an important point about the way that data adequacy will be assessed if we are outside the EU, particularly in a no-deal scenario.

I will extend that to cover my perennial theme of consultation. No issue affects businesses and individuals across the country more than data. Indeed, we went through the whole GDPR exercise precisely because this is so central to our individual and community life. The fact that there has been no consultation at all on this regulation seems truly indefensible, so I hope that the Minister will say why that has been the case. The noble Lord, Lord McNally, said that data is now the new oil. He is absolutely right; it is as important to the functioning of our economy and our society as energy—it is a form of energy—and there clearly should have been consultation. Can the Minister say why there was no consultation? I assume that he will tell us again that there was no time, which begs the question of why we are going through this no-deal process at all if there is not time to conduct the normal processes of government in respect of it.

As ever, there is a bizarre twist to the statement on consultation. Paragraph 10 of the Explanatory Memorandum states:

"The government has not consulted publicly on this instrument".

I presume that that means that they have consulted privately, and the House needs to know who has been consulted privately. The only body mentioned in paragraph 10 is the Information Commissioner's Office, with which, it states, the regulation has been developed in consultation. Who else has been consulted privately and what were the selection criteria? Since the regulation was published, there have been representations. What representations have been made to the Minister's department and what was their content?

The noble Baroness, Lady Ludford, also raised the issue of trying to assess the impact. Again we have doublespeak in respect of the regulations. We are told that their literal interpretation means that there is no further impact over and above the operation of existing European law. However, that is after, in the words of the White Queen in Alice in Wonderland, you have believed six impossible things before breakfast. Paragraph 12, entitled, "Impact", states:

"There is no, or no significant, impact on business, charities or voluntary bodies arising from this instrument",

but concludes:

"Data flows from the EEA to the UK may be restricted post-exit, but that is as a consequence of the UK leaving the EU, not as a result of this instrument".

It is impossible to separate the instrument from the fact that we are leaving the EU. The noble Baroness put her finger on a very important point, which is that if we leave the EU with a deal on the basis recommended by the Prime Minister, the impact might be radically different from that envisaged under the instrument, for two reasons. First, there will be a transition period in which nothing changes but, secondly, the political declaration heralds negotiations on a whole set of issues, including trade and data flows, which might well lead to our continuing in the existing GDPR regime. So the last sentence of paragraph 12 is not true. It is not true to say that the issue of data flows and the regulation of data is dependent on the UK leaving the EU, not as a result of the instrument. There is a crucial difference between leaving the EU with a deal—in particular, with a deal that maintains the status quo—and without a deal.

When the noble Lord, Lord McNally, cited one of his expensive lawyers, who had suggested that there may be additional complexity—

Lord McNally: Oh!

Lord Adonis: I was not suggesting that they were his personal expensive lawyers, just expensive lawyers who have chosen to brief him; I know that he could not possibly afford expensive lawyers. When he said that it depends on what happens as time goes on, he put his finger on a very important point. The whole point of no deal, with a separate regime under our ICO, is that we could quite quickly find ourselves diverging, and as we diverge, that will quickly impose burdens over and above those that would apply even if we left the EU with a deal.

I am also not sure it is true to say that there would be no burdens as a result of the regulations even at the outset. I am a lay man in this business, and trying to understand what is going on is very difficult, particularly because there has been no consultation and we do not have the opportunity to assess what people who are expert and directly affected have said. The reason I intervened on the Minister in his opening remarks is that, having been a company director who has had to deal with the implementation of the GDPR, I know that having a representative dealing with data matters inside the EEA is very important. Many companies have offshored a lot of their data-control activities, and the requirement of the GDPR that they must have a representative inside the EEA—which I think is the correct thing to do—is a definite burden. It means that companies not only have to employ additional individuals but have to set up additional offices, in essence, to cope with those flows in many cases, particularly if they are dealing with significant data-handling exercises which are outside the EEA at the moment. This happens all the time with call centres in India; many companies are in this territory.

My understanding of what the Minister said in our earlier exchange is that if we leave with no deal and therefore must set up our own UK data-monitoring regime immediately, there will be a requirement for every company operating outside the EEA—which must, under the GDPR, have a representative inside the EEA—to have a representative in the United Kingdom. I would be grateful if the Minister could confirm that because if it is true, that is an immediate and potentially significant burden.

[Lord Adonis]

The other important point is that people need to understand that these arrangements are reciprocal. One reason why we as a country have such a good services industry is that a lot of companies based in the UK do substantial business in the EEA and beyond. That is great. My assumption, although it is not spelled out in the Explanatory Memorandum, is that in a no-deal scenario, data controllers who are based in the UK but do substantial business in the EEA will be required by the European Union to have representatives in the European Union over and above their data controllers in the UK; these are not currently needed. I would be grateful if the Minister could address that point. This flows logically from the new regime being set up. I would be astonished if that is not the case because I do not think that the European Union would regard having a data controller in the United Kingdom as meeting its standards of data adequacy. I would be grateful if the Minister could confirm that.

On that point, it is apparent that this immediately imposes a burden, potentially a significant one, on every company that handles data in the European Union or the EEA, as opposed to just in the UK. That represents a substantial proportion of our companies. If we had had an impact assessment, as the noble Baroness, Lady Ludford, suggested, this issue would have been brought out and we would know its effect. If there had been public consultation, we would know, but there has been none—and we have had no impact assessment. To my surprise, the Select Committees of this House that oversee instruments and put them to us have not raised these issues, which seem substantial and should have been raised before these instruments came to this House.

Lord Rooker (Lab): I think my noble friend has not quite got it. I assure him that, as the noble Lord, Lord Cunningham, said earlier, Sub-Committee B is in the process of sending a letter to the Treasury complaining about the national policy it laid down on not having impact assessments for these instruments. Every week, we are seeing dozens of instruments with references to both informal consultation and none, but now it has been picked up that there is a national policy not to have impact assessments.

Lord Adonis: Is my noble friend saying that the Select Committee did raise these concerns?

Lord Rooker: Yes. As I speak, a letter is winging its way from Sub-Committee B to the Treasury. It was agreed at our meeting last week, the committee having discussed it in previous weeks.

Lord Adonis: That raises the issue of why that is not in any of the information before your Lordships. I was not aware of that at all. It is not flagged up in any of the documentation. Like other noble Lords, I appreciate hugely the work done by our Select Committees but the committee's view is not always completely clear to the House when these instruments come before it, unless the committee has issued a formal report. We do not get full value from our Select Committees in the way that their work is presented. For instance, I am surprised that the chairs of these Select Committees do not comment on these instruments based on the committees' work. I see that one of the chairs is sitting opposite; perhaps he would like to intervene.

Lord Trefgarne (Con): All I can say at the moment is that the letter to which the noble Lord, Lord Rooker, referred has not gone quite yet.

Lord Rooker: That is because of a dispute between the two chairs. Sub-Committee B agreed in discussions last week about the terms of that letter and will meet tomorrow. I do not know what has happened today in Sub-Committee A, but Sub-Committee B made a decision, based on the statutory instruments it saw, to object to the Treasury's objectionable policy. If Sub-Committee A does not agree, I hope that Sub-Committee B—which is dealing with half of these instruments—will send the letter on its own. Another member of Sub-Committee B is currently sitting in the Chamber.

5 pm

Lord Adonis: My Lords, I appear to be flushing out an important dispute that is taking place between the chairs of Sub-Committee A and Sub-Committee B.

Lord Rooker: You are.

Lord Adonis: I have to say that this for me is a black box. Because of my other duties I have not been able to spend time analysing what is going on in Sub-Committees A and B, but this is very important because hundreds of these instruments are coming to us.

I turn to the issue of there being no consultation, which my noble friend Lord Rooker referred to. I have been going on about it for weeks. This has been true of every single no-deal instrument that has come to your Lordships. It is deeply and profoundly unsatisfactory. In my view this ought to have been flagged up for each of these instruments from the beginning and ought to have been a reason for them not to come before the House. How can we possibly conduct the proper business of the nation in terms of changing the law when we do not have any public consultation with any of the sectors that are affected by these instruments? We are dependent on the expensive lawyers of the noble Lord, Lord McNally, even to spell out the most basic features of these regulations—which, first, will not be apparent to those of us who are lay people and, secondly, which those people who are affected have had no opportunity to present except through the agency of expensive lawyers who seek to make a living. Of course, the expensive lawyers referred to by the noble Lord, Lord McNally, will now advertise their wares to companies, telling them what the impact of these things is going to be because they did not have a chance to engage with them earlier and make their views known, particularly if they start being adversely affected.

Lord McNally: My Lords, I never described them as expensive lawyers—otherwise they might never write to me again. I said that they were distinguished lawyers.

Lord Adonis: Perhaps I misheard the noble Lord—we will call them distinguished lawyers.

However, there is a dispute going on between the chairs of Sub-Committee A and Sub-Committee B. I do not know how these disputes are resolved. Do they come to the House? Perhaps they should come to the House.

Lord Trefgarne: My Lords, I can assure both noble Lords, Lord Adonis and Lord Rooker, that agreement is very close.

Lord Adonis: My Lords, I hope that it is close, because meanwhile we have another seven of these instruments to consider today and the whole of the Order Paper for Wednesday has, I think, another dozen of them. We also have hundreds more coming next week. Perhaps I may say to the noble Lord that I hope that this can be resolved extremely quickly and that we can find a satisfactory way forward, because the issue of the lack of impact assessments seems to be entirely arbitrary. We have some on the later instruments that will be introduced by the noble Lord, Lord Bates, but there are none on these. However, no formal consultation has been carried out on any of the instruments.

Baroness Kramer (LD): I have some fear that I will raise the noble Lord's blood pressure even higher, but if he takes a look at the impact assessments that are provided, I think that he will be shocked by their inadequacy. They do not move us very far on from having no impact assessment at all.

Lord Adonis: My Lords, I do not think that it is possible for my blood pressure to be higher on these matters. However, I hope that the blood pressure of the House is high, because we are supposed to be legislating on behalf of the country, and the proceedings of your Lordships in respect of these no-deal statutory instruments are an absolute farce. I do not think that the procedures of the House are working well. The fact is that the two chairs of our relevant sub-committees cannot even agree on a letter to send to the Treasury in respect of the handling of consultation. The fact that it is about six months after we started getting the initial flow of statutory instruments on this matter coming to the House is in itself deeply unsatisfactory and is not a good commentary on the way our parliamentary proceedings are working. Moreover, the fact is that what we get are bromides from the Government that there is no change, based on there being no impact assessments, no consultation and a complete misreading of what the situation is in any event, because it involves a denial of all of the negative consequences that will flow from leaving the European Union, which of course is the underlying fact that they should be grappling with in the first place when conducting consultations and impact assessments. It is deeply unsatisfactory.

The right thing for this House to do would be to reject these instruments. We should not be a party to such an abuse of our constitutional procedures as is taking place with these no-deal instruments. What we will be faced with, though—I feel this pressure myself—is that we could crash out of the European Union in an unconscionable act of misgovernment in the course of five weeks' time, so we have to do our level best to ensure at least that there is a statute book in place for that eventuality. But I and other noble Lords want to put on the record that the situation we are faced with, and which gets worse with every debate that flushes out more facts about what is actually happening, is a complete abuse of our constitutional procedures.

Lord McNally: That last point is very important. Somebody pointed out the other day that one day there will be a full judicial inquiry into how this process has been carried through. Ministers and civil servants should be aware that one day there will be accountability for the way this has been done.

Lord Adonis: The noble Lord is right, but I do not think that that day is far off; I think it will come soon. Let us be clear: we are not talking about a natural disaster. As a Minister, I often had to deal with those. When there are ash clouds and volcanoes erupt, you have to take very difficult and extreme decisions at short notice. Here we are talking about an act which the Government are inflicting on the country, with no external agency whatever. Not only that, but the Government could this afternoon terminate the situation we are faced with, in respect of these no-deal regulations, by the Prime Minister announcing that she is not proceeding with no deal and that she will, on behalf of the United Kingdom, submit a request to extend Article 50—or, as we now know she can do from the judgments of the European court, rescind it unilaterally. This will be a big matter for the public inquiry that the noble Lord, Lord McNally, is referring to. All the consequences of this no-deal situation are caused by the Government, and the remedy for them is entirely at the disposal of the Government. It is our absolute duty to point this out all the way through this process, so that at least some of us in the parliamentary system can point to the fact that we did our level best not to take the nation to the edge of the cliff where we are now at.

Coming back to this instrument, it is totally unacceptable that we are dealing with such an important set of regulations relating to the fundamental issue of data and data protection and there has been neither an impact assessment nor any public consultation.

Baroness Ludford: My Lords, I asked the Minister about the state of play on an adequacy decision. I am told that the Minister in the other place, Margot James, confirmed a few weeks ago not only that those discussions can start—at least formally—only after the UK leaves the EU, but that they would take two years; that was her estimate. So that multiplies the gravity of having no impact assessment; if we crash out without a deal, we will have a legal void for a long time.

Lord Adonis: The noble Baroness raises a very important question, to which the Minister should respond: how long will it take to consider this? Noble Lords who woke up to the "Today" programme this morning will have been astonished to find that Dr Liam

[Lord Adonis]
Fox and the Foreign Secretary had written to the Japanese Prime Minister telling him to get a move on in signing a trade deal with Britain—as if we, because we are putting ourselves in a position of great jeopardy and undermining existing international agreements in five weeks, can now start instructing foreign Governments on the timescales in which they should conduct international negotiations. This is utterly humiliating to us as a country. It is a fundamental breach of the proper conduct of public affairs. What the noble Baroness said about it taking another two years even to get the basis of data adequacy agreements with the EU, because of our act of withdrawing from the European Union, simply underlines the point.

Lord Griffiths of Burry Port (Lab): My Lords, in the middle of all that I shall provide a still, small voice of calm for a moment—perhaps—in keen anticipation of the response of the Minister, who will have to orchestrate the energies that have been released and deal with the blood pressure of my noble friend Lord Adonis.

I have looked at this statutory instrument. I can see 65 pages of intricate cross-stitching, as an untold number of lawyers for untold numbers of hours have pored over pieces of legislation, harmonised what can be harmonised, tweaked what can be tweaked and produced at the end an unreadable pastiche, leaving us reliant on the Explanatory Memorandum. As I sat at my kitchen table on the sunniest weekend we have had this year so far, with pieces of legislation spread out all around me, there was no other method available to me.

I read of changes to the GDPR and the law enforcement directive,

"over which our Information Commissioner's Office and UK civil servants have had considerable influence".—[*Official Report*, Commons, Sixteenth Delegated Legislation Committee, 14/2/19; col. 1.]

That we, once among the architects of how we handle our data as a continent, should now be in the position we are in is a great sadness. I would say the same thing for the European Court of Justice, which we had a formative contribution in shaping. That we are arguing these points in this way is a dreadful place to be.

I echo what has been said to my left and to my right about reciprocity, adequacy and all that. At the moment of leaving, we will, I suppose, accept the remaining members of the European Union as having passed the adequacy test. Indeed, through the Privacy Shield scheme in the United States, we will offer that sense of adequacy even beyond Europe. But, as has been said, the negotiations to have some reciprocity and adequacy expressed for our own case will take an indeterminate time—two years has been mentioned, and the Minister will respond to that in due course. It seems such a strangely asymmetrical presentation of these important facts. I want to ask, as others have done: is it true that the assessment of adequacy for the United Kingdom might take as long as that?

In his opening remarks, the Minister mentioned that, at such-and-such an item in the political agreement, there is reference to the urgency with which certain of these things must happen. Perhaps he will excuse my ignorance on this point, but, if there is no deal, is there no deal in respect of the deal and of the political agreement? If so, the item he referred to falls, as indeed does the deal.

The noble Lord, Lord Balfe, made a speech last week on what happens once you have reached a fixed point, which has again been hinted at in this debate. At the moment, all we are talking about is something that will come to pass on a particular date, just five weeks away, at which point things should square up with each other. But what happens in the two years it will take for adequacy for us to be granted by the negotiating process that will then begin? What happens if decisions about how to act in the area of the management of data begin to diverge? It is not a fixed position. What mechanisms do we have to handle a shifting scene?

My noble friend Lord Adonis mentioned Japan. It did not come into the picture because, at the time this statutory instrument was written, something was happening that had not yet been brought to a conclusion. But we now know what the conclusion is, and we see that Japan will be a much more difficult case to crack than we had thought. Once again, we are in a bad place.

Without a deal—or even, it seems, with one—the ICO will no longer sit on the European Data Protection Board. The noble Lord, Lord McNally, referred to the loneliness of the Norwegian, and it is worth emphasising that all over again. It will be a dreadful thing for us to send our top person to such discussions and have her sit out and have no real practical influence—this is the United Kingdom we are talking about—nor will she be able to participate in the GDPR's one-stop shop mechanism. This is another terrible place to put her. How should we feel about this? I think it is important.

Incidentally, I see why there is no impact assessment or public consultation: all the people who might have been available to harness such an impact assessment or consultation have been disentangling laws and working as drones to put this SI together. I cannot feel that we are doing anything that any of us would be other than ashamed about with the passage of time.

On the age at which consent is deemed to have been given, are the Government, in opting for 13—there was a spread of ages between 13 and 16 when we considered the Data Protection Bill last year—achieving by secondary legislation what we were reluctant to do just a year ago with the primary legislation? What is our duty of care in such circumstances?

5.15 pm

Others have spoken with great passion. I wish to mention a consultation which seems to have happened with the devolved authorities on how and when they should exercise their "supervisory authority" when preparing new legislation. What kind of consultation took place with the devolved authorities? They are not desperately happy with the way they have been consulted in general as this unholy process has unfolded. I would like some reassurance on that.

I end, as my noble friend Lord Adonis did, on the gnomic utterance:

"Data flows from the EEA to the UK may be restricted post-exit, but that is as a consequence of the UK leaving the EU, not as a result of this instrument".

When he referred to Alice in Wonderland, I am afraid I was in something more desultory and the darkest kind of Gothic novel from the 19th century.

I wish the Minister well. He is a good man and will no doubt have a benign presence at the Dispatch Box. Of course we will not oppose this item but we sit down with great regret at finding ourselves where we are.

Lord Ashton of Hyde: My Lords, I took the advice of the noble Lord, Lord McNally, that it would not be easy—and he has proved to be right. It is reasonable to take on board the frustrations that some of these SIs have caused—in my view, not so much because of the process which is gone through but the fact that some noble Lords do not want to leave the EU and are highlighting the effects. What they are highlighting may well be the case, but when we are trying to pass an SI such as this one we need to concentrate on its effect and—that did not take long.

Baroness Ludford: I am sorry but the Minister must accept this. It is absolutely true—I speak for myself and my Benches—that we would prefer to remain in the EU, but that is not the point about an impact assessment. There is a difference between crashing out with no deal and a transitional period when EU law would continue to be applicable and we would not need all these arrangements. That is what an impact assessment would have to assess. This is about a no deal crash-out and it is perfectly valid to distinguish that from an advocacy of remain.

Lord Ashton of Hyde: I agree. That is why the Government are making all efforts to secure a deal. We agree that a deal is the best situation for the country. We are at one with that.

In answer to the noble Baroness, I will start with something which is my responsibility—the legislation.gov.uk website provided by the National Archives. I will take up the matter with it. I am told that it may be helpful to search for "draft statutory instruments" rather than "statutory instruments". I certainly listened to what she said about the website not working and will check what we need to do.

The noble Baroness, the noble Lord, Lord Adonis, and others talked about the impact assessment and asked why it has not been published. The impact of this instrument, not the impact of leaving the EU, was assessed in line with standard practice following the existing Better Regulation framework. It is focused on the direct impact of the relevant SI compared with the current legislation. The whole point of this SI is to maintain an equivalent regulatory framework to protect personal data. The noble Lord, Lord Adonis, quite rightly pointed out that it affects not only UK businesses but mostly EU and EEA businesses, which will have to have representatives in this country, and I will come to that. It is a reciprocal arrangement. If these regulations come into force and we have a UK GDPR, the same necessity for representatives will take place both ways, and I will come to that.

The analysis, to the best of the Government's ability, of the wider impact of the UK's exit from the EU was published in the *Long-term Economic Analysis* in November last year. The noble Lord, Lord Adonis, talked about representatives and Article 27. He is correct that data controllers who offer goods and services to or monitor the behaviour of data subjects in the UK will need to appoint a representative in the UK, but that is a cost to non-UK businesses, which is what the impact assessment is meant to address. He is also correct that there will be organisations in the UK that will be required as a matter of EU law to appoint a representative in the EEA. The ICO provides data controllers with advice on this obligation and will continue to do so. If controllers and processors based abroad are routinely processing data, it is right that they should be accountable in the UK and have a presence here because this is about maintaining the status quo as far as possible, not about rolling back protections for individuals, so the representative is a point of contact for the data subject as well as the supervisory authorities, such as the Information Commissioner.

Lord Adonis: I understand that the Minister is saying that my supposition is correct that after a no-deal Brexit a UK data controller doing business in the EEA will have to have a representative in the EEA as well as in the UK because this will be a reciprocal obligation—the Minister is nodding, so he agrees. The key point is that that is a significant burden on businesses. There is no way of getting away from it. That is a new and significant burden on UK businesses as a result of the regime put in place by this instrument, so why is it not flagged up in the Explanatory Memorandum to this order? Indeed, to take up the point made by my noble friend Lord Rooker, why did our Select Committees not point this out in their analysis of this instrument? My reading is that this is going to be a burden on a very substantial proportion of businesses which conduct business that involves data. Therefore almost all of them that do business on the continent will be required to have a representative on the continent for GDPR purposes which they do not have to do now and will not have to do if there is a deal because we would have continuity of the existing GDPR arrangements.

Lord Ashton of Hyde: It is true that they may be required to have representatives in the EEA, and it is a reciprocal benefit. The impact assessment looks at the specific requirements of the SI, not at the requirements of leaving the EU. The long-term consequences for business—

Lord Wallace of Saltaire (LD): I thought I was going to listen to a debate on a specific SI, but there are some very large principles here about the way in which this House should be handling the very large number of SIs which we are expected to get through in the next two to three weeks. If it is correct to say that the Treasury has now laid down that there should be no impact assessment because we can all rely on what the Government told us in general about the implications of leaving the EU, that seems to be close to being totally improper and at the very least to require a formal Statement to this House about how we are expected to deal with this very large number of statutory instruments.

In the circumstances, the most appropriate thing would be for the Minister to withdraw this statutory instrument and to come back in a few days after there

[Lord Wallace of Saltaire]
has been some consultation on it among the Front Benches. If he is not able to do that, at the very least he should promise that tomorrow there will be a formal Statement to the House on how statutory instruments will be handled from now on. It seems that we are heading into an area where statutory instruments are not being properly scrutinised by this House.

Lord Ashton of Hyde: I find it difficult to understand how the noble Lord can say that the SIs are not being properly scrutinised by this House, particularly in comparison with the scrutiny that this instrument received in the other place.

Noble Lords: Oh!

Lord Ashton of Hyde: I agree with the noble Lord who is saying from a sedentary position that that is why he is here and why it is important. However, taking my personal experience of the telecoms SI, an hour and a half in the Moses Room and an hour in the Chamber seems to be pretty reasonable scrutiny. As for how the House in general and the Government are handling SIs—

Baroness Kramer: This is not just a matter of time; it is whether people have the appropriate information to be able to raise and challenge issues. That is the underlying issue that the Minister is running into in this House.

Lord Ashton of Hyde: I understand that point, and the noble Lord, Lord Adonis, made it to me forcefully in the Moses Room. This SI has been laid for some time and there have been opportunities for noble Lords to talk to and engage with anyone from the DCMS. I take the point that it is sometimes difficult for Back-Benchers to get information if they do not ask the department. However, I think that the Front Benches have been fairly open in exchanging information on any SI—that is certainly the case in my department. I offered the noble Lord, Lord Adonis, opportunities to ask questions well before the debate, as I think he acknowledged.

It is not for me to say how the House and its sifting committees behave and how the two committees have liaised with each other. However, I will take the noble Lord's request back to the usual channels. I will not commit to there being a Statement tomorrow but I will certainly take back his point to make sure that the usual channels listen to what he has said. The making of Statements will be up to them—that is not for me; nor is it for me to comment on the work of the sifting committees of your Lordships' House.

Lord Wallace of Saltaire: My Lords, this morning I read a new Commons briefing on the amount of legislation that needs to have been completed to enable us to leave the EU on 29 March in good order. The answer is eight Bills, as well as, still, several hundred SIs. The Government Front Bench keeps telling us that it is perfectly possible to manage that within the next six weeks but, in spite of the remarkably light business that we have this week, it seems that we are very much in Alice in Wonderland territory here. We cannot manage all that within that period, even if we are asked to skimp on the SIs. We know that part of the problem is that the Civil Service cannot manage the impact assessments for these SIs because it is so overloaded and this Chamber is unable to do its job appropriately. The Government have therefore left it too late to be able to leave the EU in good order constitutionally and legislatively on 29 March. I would like the Minister to take that back to the rest of the Government Front Bench, and a Statement to the House on how we should manage this from now on would, I think, be appropriate.

5.30 pm

Lord Ashton of Hyde: I thank the noble Lord for his view. It is clearly not for me to promise a Statement to the House. As I said before, I will agree to take back what he said and put both interventions to the House authorities. They may or may not agree. If they do not, I am sure that he will be able to raise it in an appropriate forum direct with the usual channels—both via his own Chief Whip and also directly with the Leader of the House and our Chief Whip. However, it is not appropriate, in considering an SI, to move beyond that to the wider method used by the House to address statutory instruments. Ministers certainly feel that they have been scrutinised considerably. I do not see that the noble Lord, or others who have spoken on this, are suffering from a lack of information with which to scrutinise these statutory instruments; they seem to be scrutinising fairly effectively as far as I can tell.

My response to the point made by the noble Lord, Lord Adonis, about the effect of representatives on business, is that the need to have a representative in the EEA is not as a result of this statutory instrument—it is as a result of EU law. Therefore, as I said before, the fact that we will no longer be part of the EU means that EU law will apply to us as a third country; until now, we have not been a third country.

Lord Adonis: I seem to have misunderstood. I thought we had got clarity on this situation. While we are a member of the EU, a company needs to have only one representative in the EU—if I have got that right—whereas under the no-deal Brexit scenario, if the company is based in the UK and does business involving data exchanges or transfer in the EEA, it will need to have two. That is a very important point. It is not the case that the status quo will continue: there will be a fundamental difference once we are outside, because then we will be a third country as far as the EU is concerned. The reciprocal arrangements mean that UK businesses doing business on the continent will need to have a data representative in the EU and vice versa, which is not the case at the moment in respect of the EEA. Is that correct?

Lord Ashton of Hyde: I do not think that is correct, but I will write to the noble Lord to confirm it.

Lord Adonis: This is a fundamental issue; it goes to the heart of these regulations. The House should absolutely not agree to these regulations without us being clear in this debate on whether there will be a requirement to have data representatives in both the

UK and the EEA reciprocally in the event of a no-deal Brexit. That is fundamental. My reading of these regulations is that this will be a requirement and that is what I took the noble Lord to be confirming earlier in the debate.

Lord Ashton of Hyde: I think the noble Lord has mis-stated it. The reciprocity is that an EEA company will be required to have a representative in the UK and, likewise, a UK company will be required to have a representative in the EEA.

Lord Adonis: That is not the case at the moment, while we are in the European Union. That is the key point, is it not?

Lord Ashton of Hyde: That is correct, because we are currently in the EU.

Lord Adonis: There will be a fundamental and massive increase in burdens as a result; this is the key point that I am trying to get across, which is not in the Explanatory Memorandum at all. It is not necessarily a point about leaving the EU. If we have an agreement, with an implementation period and so on, there will not be that requirement until we leave the existing regime. These are fundamental issues, which should have been brought up well before this debate started. The fact that the noble Lord cannot even definitively confirm the arrangement is quite a serious problem for us.

Lord Ashton of Hyde: I am sorry, but I do not agree with the noble Lord. When we have the UK GDPR, which these regulations will bring into place, there will be reciprocity in the need to have representatives in each other's countries. I agree that this will be a change. We do not need them at the moment because we are in the EU, but this will be a result of leaving the EU.

Baroness Kramer: I want to get some clarity on this and perhaps the Minister will be able to help me. He is quite clear that, for a wide variety of companies, there will need to be one representative in the UK and, he seems to imply, one representative in the EEA. Is that correct, or does there need to be one in each country within the EEA—or does the individual in the EEA have to deal with different regimes because of the different local regulators and because it is representing a third country in its work? I am trying to work out how great the burden that he has indicated will be, even though he does not think that it will be part of the impact.

Baroness Ludford: Before the Minister answers, I would like to press again this idea that an impact assessment is not needed since the impact comes from leaving. I say no to that; it depends how you leave. The Minister and I may differ on the desirability of the Prime Minister's deal, whatever that is going to be, but there is a difference between crashing out and having a transition with a political declaration which may avoid the need for duplication; we do not know what the data protection provisions will be in the future relationships. We all hope that there will be a strong degree of mutual recognition, but the immediate impact of crashing out with no deal—with a void where any adequacy decision or future reciprocal relationship between regulators would otherwise be—is quite different. First, it is different from having a standstill transition and, secondly, it is different from having the prospect, or at least the hope, of a long-term relationship that preserves something of the single market. We need the impact assessment to assess the difference between those two scenarios; that is what the Minister does not seem to grasp.

Lord Ashton of Hyde: I agree with the noble Baroness that, if we leave with a deal, that is a different scenario from leaving with no deal. That seems an obvious fact and it is why the Government are trying to leave with a deal, which is what the Prime Minister is trying to achieve. This is a no-deal exit SI to prepare for that eventuality. If we leave with no deal, the object of the exercise will be to preserve the GDPR standard of data protection, which this SI will do. To return to the point raised by the noble Lord, Lord Adonis—sorry, it might have been raised by the noble Baroness, Lady Kramer—the requirement to appoint one representative in the EEA is, as I said, a result of EU law.

I say again to the noble Lord, Lord Adonis, regarding the impact on business of Article 27, that we think that if controllers based abroad are routinely processing the data of people in the UK then it is right that they should be accountable and have a presence in the UK, because it is about trying to maintain the status quo as far as possible for individuals and not rolling back their data protection. The representative is a point of contact for the data subject as well as supervisory authorities such as the Information Commissioner.

I turn to the points made by the noble Lord, Lord McNally, about the complexity for organisations potentially subject to dual regulation. The point of this instrument was to ensure the minimum disruption to organisations and to data subjects by trying to retain the effect of the data protection legislation where possible. The relationship is absolutely changing but the instrument ensures that we can co-operate on an international level with not only the EU supervisory authorities but those in other countries; that is why we have kept Article 50 of the GDPR. Where he is right, and I accept that he is right in this, is that if we move away from the GDPR—if the UK GDPR moves away from the EU GDPR—that will have consequences for the adequacy decision that we hope to achieve, which will be reviewed by the EU Commission. It is important that the EU has confidence that our data protection regime is "essentially equivalent", which is what the adequacy decision is based on. Anything that we do in future will have to bear in mind that our data regime is essentially equivalent so that it gives the EU confidence.

I agree with the noble Baroness, Lady Ludford, that in previous times there were elements that were outside EU competence that it could not look at, but now of course in an adequacy decision it will be able to look at those. Again, as it does in other adequacy decisions, it will look at the overall adequacy requirement and say whether or not it is essentially equivalent. That is why the adequacy decision is not immediate. Where we start in a good place compared to other regimes is that we have started with an equivalent regime to the extent that we have enacted the GDPR, which other third countries have not. We start on a level playing field in that respect.

[Lord Ashton of Hyde]

The noble Baroness talked about the US privacy shield and the reason why we are going to lay another set of regulations. The discussions on the US privacy shield were ongoing when this SI was laid and therefore we could not wait. It was our priority to lay this SI so that we had an ongoing regime in the event of no deal. Now that that has been agreed between us and the US, though, another SI will be laid—it may even have been laid—to ensure that the US requirements continue, and I think that will happen very soon.

The noble Baroness asked about the EDPB's recently published guidance on the implications of the UK's exit. That guidance confirmed that, if the EU Commission does not make an adequacy decision in respect of the UK, EU firms will need to put in place alternative transfer mechanisms, such as standard contractual clauses to continue to transfer personal data to the UK.

The noble Baroness suggested that the political declaration only covered adequacy. That is not right: paragraph 9 addresses the free flow of data while paragraph 10 addresses regulatory co-operation.

The noble Lord, Lord Adonis, and the noble Baroness, Lady Ludford, talked about consultation. The difference between this SI and many others is that the Data Protection Act came into force less than a year ago; it was enacted after extensive discussions in this House and the other place, after the referendum discussion had taken place. Those noble Lords who participated in the Data Protection Act discussions, which lasted for many weeks, all know that matters such as data adequacy were raised numerous times. The whole purpose of the Act, and the mixture between regulations and derogations from regulations, was that we would be on as level a playing field as we could be when it came to getting an adequacy decision.

5.45 pm

On the question of consultation, very recently stakeholders became aware of the GDPR—indeed, the whole country was aware of it eventually. There was a call for views and extensive parliamentary scrutiny. Before deciding how to implement the GDPR, we spoke informally with a wide range of stakeholders and were able to perform a broad understanding of different views. We then invited interested persons or organisations to give us their view—the call for views was from April to May 2017—and we received over 300 responses from individuals and organisations. That enabled us to achieve a fuller understanding of the potential impact of each of the specific exemptions in the Act. As I say, that all took place after the EU referendum result was known.

I have to reject the description of this by the noble Lord, Lord McNally, as a farce. The GDPR—I think every noble Lord knows this, whether or not they were involved in the Act—was extremely high in the public's consciousness, not always positively. However, what we have ended up with because of that is a data protection regime that is the same as the EU's.

Lord McNally: I withdraw the word "farce". However, while the Minister is putting great emphasis on the good fit between what he is proposing and the GDPR, the reason why that good fit exists, as I said in my remarks, is that the GDPR itself was massively influenced by British officials, who played a major role in its construction. What he is gliding over in his assurances is that if, as is likely, there are changes in the European GDPR in future then we will be coming, like the Norwegians, only to listen and accept—because, make no mistake, if there are changes in future, it will be massively in Britain's interest to accept them. This is the loss of sovereignty that the whole process is trying to glide over. We will not have the same influence on data protection in future as we have had in the GDPR itself, which is why the fit is so comfortable at the moment.

Baroness Ludford: Forgive me, but I would like to follow up on that. I really think the Minister is overselling what is in paragraph 9 of the political declaration. Last June, the Government issued a technical note about wanting a legally binding data protection agreement, and I described that earlier as a "Brexit in name only" kind of arrangement. They wanted that because there are,

"benefits that a standard Adequacy Decision cannot provide".

Except for one sentence in paragraph 10 that talks about arrangements for appropriate co-operation between regulators, paragraph 9 is about a standard adequacy decision—no less but certainly no more. It talks about the European Commission recognising,

"a third country's data protection standards as providing an adequate level of protection".

It is not what the Government hoped for last June. I do not understand why the Government are trying to pretend. We can all read paragraph 9 once we have googled it and reminded ourselves, so to say that it is more than an adequacy assessment process is simply not true.

Lord Ashton of Hyde: I understand the point from the noble Lord, Lord McNally, that our new position will not be the same as being in the EU. If we were a third country, I would expect us to have less influence than if we were a member of the EU. I am not denying that; it seems obvious. He is absolutely right that the GDPR was influenced by the UK, not only by officials in the negotiations but specifically by the ICO, which is regarded as one of the leading regulators in Europe. Of course, it will not have the same position as it did if we are not in the EU; I take that point.

However, I do not base everything on just the political declaration, which may or may not have some influence. It is also that we have retained Article 50 of the GDPR. I cannot remember the exact words, but it is on the basis of that that the EU talks about international co-operation with third countries, so there is a mechanism. As I said to the noble Lord, Lord McNally, it will not be the same, but there are bases for international co-operation. The EU wants that to happen and understands that in things such as data protection, you have to have an international consensus. In fact, on that, it is more important to go beyond the EU and do it internationally. Other organisations should—and do—take views on this. I think we are at the start of the journey on control of cross-border data flows and it will provide a further basis to influence behaviour.

On adequacy, it is easy to ask for detailed timelines on when this will take place. It will not take place on exit day, because it is not possible for the EU to give an adequacy decision unless you are a third country. Preliminary discussions—which, as the noble Baroness, Lady Ludford, has indicated, may take some time—could begin now and we are ready to begin those discussions as soon as we can. We are already liaising with the European Commission—in fact, senior officials were in Brussels for talks last week—and we have liaised with member states on this subject. When the EU is ready to begin discussions, we are confident that we will be ready, but it is impossible to say how long that will take because, as the noble Baroness said, it is not a decision that is in our gift.

However, we start from a position of regulatory alignment on data protection. We implemented the GDPR and the law enforcement directive. We have also taken a GDPR approach on data protection to areas that were outside EU competence, such as law enforcement and national security, so we start in a very good position. In fact, it is such a good position that the UN special rapporteur on the right to privacy declared that the UK now co-leads in Europe and globally on privacy safeguards, and has made significant improvements in its oversight system since 2015. He said that,

"the UK has now equipped itself with a legal framework and significant resources designed to protect privacy without compromising security".

It is important to note that there is a strong mutual interest in data adequacy.

The noble Lord, Lord Adonis, said that it is unsafe to pass this SI. I would like to point out what that would mean, if it is not passed and we have a no-deal exit. It would mean that we would cease to have properly functioning data protection law. The whole basis for adequacy decisions, which I think we all agree is very important, would go, because we would not be on a reciprocal basis—

Lord Adonis: Would the noble Lord agree that a better course would be for the Government to rule out no deal?

Lord Ashton of Hyde: I am talking about data protection. We want a deal; I think everyone agrees on that. The question is whether going into a negotiation saying that is a good way to approach the negotiation.

As well as the basis for adequacy going, there would be no transitional arrangements to enable lawful personal data to transfer to the EEA. The noble Lord, Lord Adonis, is concerned about business expenses; for that reason, that would not be a sensible way of going forward.

On the adequacy decision which my honourable friend Margot James mentioned, I do not have her remarks before me, but I believe she said something about two years. I think what she meant was that other countries' adequacy decisions have sometimes taken two years, but we see no reason for it to take two years in the UK's case, because, as I said, we are equivalent. I think I have answered most of the points that noble Lords raised.

Lord Wallace of Saltaire: I apologise for interrupting the Minister again. He said we are now undertaking "preliminary discussions" about how this would be handled if we leave without a deal, but that these discussions "may take some time"—I think I heard him say that. Is he suggesting that, if we leave without a deal on 29 March, there will be an unavoidable gap in mutual recognition of data protection law, which we—or rather businesses—will have to cope with somehow? That may have a significant adverse impact.

Lord Ashton of Hyde: Yes, because it is literally impossible to have an adequacy decision until you are a third country. Therefore, you cannot have an adequacy decision in advance. What you can do, and I should have said preliminarily that we have been discussing this—I raised it over a year ago—is start the discussions with the EU, but the decision itself cannot be made before exit day. It is impossible.

Lord Wallace of Saltaire: There would be a significant adverse impact.

Lord Ashton of Hyde: There are mitigations which prevent that—standard contractual clauses and binding corporate rules. Plus, it depends a lot on the proportionate approach that the regulators in the EU take. There would be an impact; we would have to arrange mitigations, which would be a cost to business. That is what has been set out in the technical notice to business.

Baroness Ludford: The Minister is making a very good case for why there should have been an impact assessment.

Lord Ashton of Hyde: I am making a very good case for why we want a deal. As I have said several times, we want a deal.

I think I have been through most of the questions raised by noble Lords. The important thing about this statutory instrument is to have a fully functioning data protection regime. If we go back to the original reasons why we passed the Data Protection 2018 with a fair bit—a lot, I would say—of cross-party support, the reason that it is important is to give individuals protection for their personal data. We must bear that in mind. These regulations will preserve that protection for individuals and set us on the road to a successful conclusion of our adequacy agreement when we get to the stage where the EU will allow us to negotiate it. That is why I beg to move.

Motion agreed.

Syria: UK Nationals

Statement

6 pm

Baroness Barran (Con): My Lords, with the leave of the House, I shall now repeat as a Statement the Answer given in the other place by my right honourable friend the Home Secretary to an Urgent Question on UK nationals and Syria. The Statement is as follows:

[Baroness Barran]

"Mr Speaker, may I start by paying my respects to the honourable Member for Newport West? Our sympathies are with his loved ones and all those in this House who were close to him.

Can I welcome the Urgent Question from my honourable friend? My priority as Home Secretary is to ensure the safety and security of this country. We cannot ignore the threat posed by those who chose to leave Britain to engage with the conflict in Syria and Iraq. Over 900 people took this path. Without the deradicalisation work of our Prevent programme, there could have been many more. Whatever role they took in the so-called caliphate, they all supported a terrorist organisation and in doing so have shown that they hate our country and the values that we stand for. This is a death cult that enslaved thousands of Yazidi girls and celebrated attacks on our shores, including the tragic Manchester bombing that targeted young girls.

Now this so-called caliphate is crumbling and some of them want to return. I have been clear that, where I can and where any threat remains, I will not hesitate to prevent this. The powers available to me include banning non-British people from this country and stripping dual nationals who are dangerous of their British citizenship. Over 100 people have already been deprived in this way, but we must, of course, observe international law and cannot do this where it would leave someone stateless. So, where individuals manage to return, they will be questioned, investigated and potentially prosecuted.

Our Counter-Terrorism and Border Security Act, which got Royal Assent just last week, provides more powers to prosecute returnees. It extends the list of offences we can act on when they are committed overseas and it creates new laws to ban British citizens from entering designated terrorist hotspots without good reason. Our world-class police and security services closely monitor all those returning who pose any risk. We do not hesitate to use the range of tools at our disposal, including using temporary exclusion orders to put in-country restrictions in place and managing risk through terrorism prevention and investigation measures.

The House will have seen the comments that Shamima Begum made in the media and will draw its own conclusions. Quite simply, if you back terror, there must be consequences".

6.04 pm

Lord Kennedy of Southwark (Lab Co-op): My Lords, I thank the noble Baroness, Lady Barran, for repeating the Answer given to an Urgent Question in the other place earlier today. I endorse the comments made about the honourable Member for Newport West in the other place.

Keeping our country safe must be the number one priority for the Government, and they will always have my full support in doing that. We must not forget the countless victims of ISIS and the caliphate who have been murdered and abused. Can the Minister confirm that, notwithstanding the comments of the Home Secretary, anyone returning from Syria will find themselves subject to a rigorous police investigation and potential prosecution to the full extent of the law? Will she also confirm that, as this country believes in the rule of law, democracy, freedom and justice, anyone found in that position will be given the opportunity to seek legal advice and prepare a defence for themselves in court, if the appropriate tests are met and charges brought, and will benefit from a fair trial?

Can she also comment on any plans that the Government may have to designate parts of Syria, as permitted by the Counter-Terrorism and Border Security Act 2019? Finally, can she comment on what happens to those individuals who in the end do not have charges brought against them when they are back in the UK?

Baroness Barran: I thank the noble Lord for his questions and am happy to confirm that anyone returning to this country would be questioned and investigated and, if there is sufficient evidence, prosecuted. The principle of a fair trial is one that this country has held dear for many years and we do not intend to change that.

In relation to the new proscribed areas, I will take this opportunity to thank the noble Lord for the support we received from him and his colleagues on the Opposition Benches in the passing of the Counter-Terrorism and Border Security Bill. In anticipation of introducing the proscribed areas, we have been working on those, but I remind him that it will require the approval of Parliament for any new area to be so designated—and there will not be retrospective designation.

Baroness Hamwee (LD): My Lords, the Statement mentions observing international law—without any huge degree of enthusiasm, as I read it. Can the Minister tell the House what nationality is Ms Begum's child? Does the UK have any responsibility towards him as it does to all British citizens—as of course the Minister knows?

Baroness Barran: I cannot comment on any individual case or the nationality of Ms Begum's child, but I can make a few comments in relation to children more generally who return to this country. Obviously, each case is taken on its merits, but the noble Baroness may have heard my right honourable friend say in the other place that it is the responsibility of the parent to consider the risks that they subject a child to by going to a country that has been clearly advised as unsafe to travel to, and without any consular presence there. This Government have made more than 50 children wards of court to prevent them leaving. My right honourable friend in the other place also pointed out the risk to future children in such situations—but, unquestionably, having any child caught up in such circumstances is a tragedy.

Baroness Berridge (Con): My Lords, can I clarify something that my noble friend the Minister outlined? Although she cannot comment on specific cases, where the Home Secretary has to make a decision and the decision involves a parent and a child, how many decisions are actually being made? There is a long-standing principle in our family courts that the interests of the children are often not the same as those of the parent. It cannot be the case here that they are, when the parent has obviously been involved in some kind of terrorist activity or sympathy with it, but the baby

clearly has not. It is important to know from the point of view of judicial review how many decisions the Home Secretary has to make in any case where a parent and a child are being considered if, under the Nationality Act, they are almost certainly both British citizens.

Baroness Barran: I thank my noble friend for her question. I will have to write to her in relation to numbers—I do not have that information at my fingertips—but she is right to point out the risk and harm that these children have experienced. We expect children returning from Syria to have been exposed to conflict, potentially indoctrination, and almost certainly to have experienced severe trauma. A range of specialised support will be necessary to address those concerns, with all aspects of safeguarding being considered and tailored to the needs of the individual child.

Lord Faulks (Con): My Lords, the House may have heard the lawyer representing Ms Begum asserting that there was no law which was in any way going to be found adequate to deal with what might or might not be considered offences committed by her. My noble friend may recall that during the passing of the Counter-Terrorism and Border Security Bill, my noble friend Lord Hodgson of Astley Abbotts and I put down an amendment suggesting that it was time to update the 1351 law in relation to treason, based on a Policy Exchange paper. Might my noble friend care to reconsider the Government's opposition to that amendment, and to take into account that a suitably updated law would in fact deal with many of the problems that are now coming up?

Baroness Barran: I thank my noble friend for his question. I am ashamed to say that I did not remember that it was his amendment, but I do remember the amendment. This point was raised in the other place, and my right honourable friend the Home Secretary confirmed that he would always keep under review all the tools at our disposal. Obviously powers have been increased and developed through the Counter-Terrorism and Border Security Act that came into law just last week, but he reassured the other place that he would continue to look at these issues carefully.

Lord Cormack (Con): My Lords, why cannot my noble friend comment on the nationality of the child?

Baroness Barran: I thank my noble friend for repeating the question. I know no more than is in the newspapers. It would appear that the child has a British mother and a Dutch father, but I know no more than that.

Lord Marlesford (Con): My Lords, will the Minister assure us that this Government will never divert the all too limited resources that are available for giving refuge to the innocent, to giving facilities for enemies of this country to enter or return to this country?

Baroness Barran: I can only repeat that obviously the security of our citizens remains our pre-eminent concern, and hope I can reassure the noble Lord on his concerns.

Flybmi

Statement

6.13 pm

The Parliamentary Under-Secretary of State, Department for Transport (Baroness Sugg) (Con): My Lords, with the leave of the House, I will repeat in the form of a Statement the Answer given by my honourable friend the Parliamentary Under-Secretary of State for Transport to an Urgent Question in the other place. The Statement is as follows:

"On 16 February 2019, British Midland Regional Limited, the East Midlands-based airline which operates as Flybmi, announced that it had ceased operations from that date and filed for administration. The group has surrendered its licence to operate in the UK, which means it is no longer able to operate flights. There has already been significant speculation about the reasons behind Flybmi's failure. Ultimately, this was a commercial matter for the airline.

Flybmi operated in a very competitive industry and was exposed to wider pressures faced by the global aviation industry, such as increasing fuel prices. It is very disappointing that Flybmi has gone into administration, and we know that this will be a very difficult time for those who have lost their jobs as a result. Many of those affected are highly skilled; we are confident they will find suitable employment opportunities, and we welcome the moves by the sector to offer opportunities to those affected.

The Insolvency Service's redundancy payments scheme is working with the administrators of Flybmi to ensure that former employees' claims from the National Insurance Fund, which may include redundancy pay, holiday pay, arrears of pay and compensatory notice pay, are assessed as quickly as possible. With the sector ready to recruit, I hope new jobs will be found quickly.

I also recognise that this is a disruptive time for passengers, also very distressing, and the Government's immediate priority is fully focused on supporting those affected. We are in active contact with airports, airlines and other transport providers to ensure everything possible is being done to help them. We and the Civil Aviation Authority are working closely with the travel industry to ensure this situation is managed with minimal impact to passengers. There are enough spaces on other flights for passengers to return home on other airlines, and we welcome the sector's move to offer rescue fares for affected passengers. For example, Flybmi has codeshares across the Lufthansa Group. Passengers on these flights will be subject to EU passenger protection rules and will be provided with assistance and rerouted to their final destination.

Travel insurance and credit card bookings are worth noting here. Most passengers were business, and this will also be covered through their work. In addition, the CAA is providing detailed information for affected passengers on its website, including how people can claim back money they have spent on tickets.

The Government recognise the importance of maintaining regional connectivity, and that is why we fund a public service obligation route from Derry/Londonderry to London, which was recently extended from 1 April 2019 for a further two years, the norm for

[Baroness Sugg]
PSOs. The chief executive of Derry Council has the power to transfer the PSO contract to another airline for up to seven months to allow for a new procurement process to be conducted. Subject to due diligence, we expect the council to sign contracts and appoint an airline later this week, and we are expecting services to resume swiftly. Derry and Strabane Council will take forward that part—it is its responsibility.

All affected regional airports have been contacted and while they are disappointed, we are confident this will not cause them significant issues. A number of airlines have already indicated they will step in to replace routes previously served by Flybmi. For example, Loganair has publicly announced that it will cover routes from Aberdeen, Bristol and Newcastle.

Our priority is to protect employees, passengers and local economies. We are fully focused on supporting those affected and remain in close contact with industry and the CAA to ensure everything possible is done to assist".

6.17 pm

Lord Tunnicliffe (Lab): My Lords, I thank the Minster for repeating the Answer to the Urgent Question. Eighteen months ago this House questioned Ministers on the collapse of Monarch Airlines, and we were promised things would change—yet here we are.

The Transport Secretary has dithered and delayed for nearly a year in bringing forward new rules on airline insolvencies, so we must ask Ministers what they have been doing. Flybmi has been in difficulty for some time, so what plans did the DfT have for an airline collapse? What plans does it have, or is it putting in place, should another airline be forced into this position?

Why was the airline allowed to sell tickets only hours before entering administration? The Minister detailed some of the actions being taken to support passengers left stranded by cancellations. Do the Government have an estimate of how many UK residents have been affected?

The Minister alluded to the fact that last week the Government agreed to extend the subsidy of Flybmi's London to Derry route. We have gone from a ferry company with no ferries to a flight path with no flights. Was the DfT aware that the airline was about to collapse when it agreed this commitment of public money? What checks did Ministers do on the airline prior to extending the commitment?

Baroness Sugg: I thank the noble Lord for his questions. On how we are dealing with airline insolvency in the future, we have commissioned an independent review led by Peter Bucks to review consumer protection in the event of an airline or travel company failure. It is looking at options including an orderly wind-down of an airline so that it is able to conduct and finance repatriation options without impact on the taxpayer. The review is also looking at the lessons learned from the collapse of Monarch, and will identify potential market reforms necessary to ensure that passengers are protected when an airline fails. This is a complex issue and it is an extensive report. We are expecting the report in the spring.

Initial estimates are that fewer than 1,000 affected UK-originating passengers are overseas. Many will have already made their way back; many will have been planning to stay abroad. We understand that about two-thirds of those booked to return were on code shares, and those bookings will be honoured.

On the PSO, the department and the CAA were not informed of the administration until very shortly before the directors agreed to it. To be clear, the contract for the PSO is directly with the city of Derry and Strabane council. They are the people who run that contract and it is they who will re-let it shortly.

Baroness Randerson (LD): My Lords, I thank the Minister for her Statement. The company cited Brexit as one of the reasons for its problems. First, the fall in the value of the pound in the past two and a half years has obviously meant that people are finding it more difficult to afford holidays abroad. It mentioned the spike in fuel and carbon costs caused by our exclusion from full participation in the EU Emissions Trading Scheme—we have been suspended from that until the withdrawal agreement is in place. The company said that it was unable to secure valuable flying contracts in the EU because of Brexit uncertainty.

On Saturday, we had Flybmi; today, we have the very sad news about Honda in Swindon. The trickle of job losses has become a steady flow. Today as well, we have the UK Trade Policy Observatory estimating some 750,000 job losses—that is a conservative estimated—as a result of Brexit uncertainty. What plans do the Government have to retrain people who lose their job because of Brexit uncertainty? What plans do they have to find new jobs for them? Have they estimated the total cost to our economy of retraining people and providing them with benefits while they are unemployed?

Baroness Sugg: Both the UK and the EU have made it very clear that we want flights to continue after Brexit. We and the EU are taking the necessary actions to ensure that this will be the case in the event of no deal. This sad event is a commercial matter for the airline in a competitive industry. BMI has been exposed to wider pressures faced by the global aviation industry such as increasing fuel prices and intense competition. Other EU airlines have collapsed in recent years; for example, Germania, Primera Air, Air Berlin and flyvlm. This is not just a UK issue. I agree with the noble Baroness that businesses want certainty. I am afraid that that I do not have any figures on jobs and retraining, but I regularly hear requests for certainty from the aviation industry. That is why we are working to deliver a deal and the implementation period that comes with it. I hope that that will be agreed soon so that we can give businesses the certainty they need.

Lord Carlile of Berriew (CB): Does the Minister agree that this diminution in services to and from provincial airports in the United Kingdom raises real questions about the viability of some of those airports? Does she also agree that having a good network of provincial airports is extremely important to the UK economy and the passenger group who wish to travel? Will she assure us that the Government will look at this problem as a matter of urgency?

Baroness Sugg: I agree with the noble Lord on all those points. We are seeing supply outstrip demand on many of these routes. BMI cited 19 passengers per flight on a 50-seater plane; obviously, that would be very difficult to sustain. We are seeing other regional airlines take on those routes, but there is an excess of capacity. I agree with the noble Lord also on the importance of regional airports. Maintaining that regional connectivity is key. We provide a PSO on lifeline routes. Our aviation strategy, on which we published a consultation in December last year, looked at how we might support regional airports. They are important in providing connectivity not only for people but for freight and trade, and can act as a multiplier for local and regional economies. It is very important that we support them.

Baroness McIntosh of Pickering (Con): My Lords, will my noble friend further address overcapacity, which she just mentioned? When airlines such as Ryanair and EasyJet are not making money, seeing their share price fall and issuing profit warnings, it obviously has implications for the whole industry.

Baroness Sugg: I agree with my noble friend. It is a challenging time to be in the aviation industry at the moment for many reasons. We are seeing airlines having to address those challenges. Ultimately, they are commercial enterprises, and the share price will be dictated by demand and their profitability. Through the aviation strategy consultation, we are looking to support the industry. The UK aviation sector is incredibly important to the UK economy, providing £22 billion per year and hundreds of thousands of jobs. We want to make sure that our aviation strategy helps it continue in its success.

Lord Blunkett (Lab): My Lords, I have a tangential interest. I know that the Minister, for whom I have enormous respect, has an interest in what are called in technical jargon passengers with reduced mobility; that is, those who require assistance. Is she satisfied that the industry and government are doing enough to help those who will be stranded? Quite a number of them are extremely worried.

Baroness Sugg: I thank the noble Lord for his question. Yes, we are satisfied that we are doing everything we can to help those passengers who are stranded. The CAA and the department are working closely with airlines. Detailed information on that is on the website. As always, we need to make sure that we pay special attention to PRMs, as they are called, to ensure that they receive the support they need to get home.

Lord Kilclooney (CB): I welcome the Statement by the Minister. I thank the Government for the speed with which they have attended to the problem in Londonderry and the north-west of Northern Ireland. Airlines depend on passengers. The special support that the Government are giving the route from the City of Derry Airport to London is very much appreciated, not only in Northern Ireland but also in the Republic of Ireland, because Donegal uses the airport. Does the Minister recall that more than two years ago, when there was no such thing as Brexit, Ryanair withdrew from the Derry to London route, not because of Brexit—because it did not exist—but of lack of passengers?

Baroness Sugg: The noble Lord is quite right that these routes will be dictated by passengers. However, as I mentioned previously, we have public service obligations, where the Government will provide funding to maintain these important routes. Perhaps I may provide further reassurance on the PSO route from Derry. Derry City and Strabane District Council have been in contact with a number of airlines. An emergency process is being invoked which allows the council to appoint another airline to take over the PSO for seven months without the full tender exercise. The department is working closely with the council to find a suitable alternative carrier on that route. We hope that an announcement will be made shortly.

Equivalence Determinations for Financial Services and Miscellaneous Provisions (Amendment etc) (EU Exit) Regulations 2019

Motion to Approve

6.29 pm

Moved by ***Lord Bates***

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

The Minister of State, Department for International Development (Lord Bates) (Con): My Lords, this SI is an important part of the Treasury's programme of legislation under the European Union (Withdrawal) Act 2018. It will address deficiencies related to the EU's equivalence framework for financial services, and will make provisions for elements of the UK's stand-alone equivalence framework for financial services, in a scenario where the UK leaves the EU without an agreement.

Many noble Lords will be familiar with the EU's framework for equivalence. EU legislation allows the European Commission to determine that a country outside the EU—often termed a third country—has a regulatory and supervisory regime in a particular area of financial services that is equivalent to the corresponding EU regime. Granting equivalence is a key component of financial services regulation and supports cross-border activity. Equivalence decisions can reduce or eliminate overlaps in regulatory and supervisory requirements, thus decreasing regulatory burdens on firms. Some equivalence decisions provide improved prudential treatment, or facilitate the exchange of services. This can lead to increased competition, which benefits firms and consumers, while protecting financial stability.

Before making equivalence decisions, the Commission will undertake an assessment and may ask the European supervisory authorities for technical advice to support it. As an EU member state, any equivalence decisions made by the Commission currently have effect in the

[Lord Bates]
UK. In a no-deal scenario, the UK would be outside the EU's equivalence framework. The Government place significant importance on having a functioning, stand-alone equivalence regime which will support our future relationship with the EU and other financial centres with which we want to build stronger partnerships.

Noble Lords will be aware that other Treasury statutory instruments which have completed their passage in Parliament have already transferred some equivalence responsibilities from the Commission to the Treasury, and functions from the ESAs to the UK financial regulators. Through these SIs, the Treasury has maintained the same substantive criteria that the EU uses to judge equivalence.

The SI does three main things to support a stand-alone UK equivalence framework in the event of a no-deal exit. First, it replaces the functions given to the ESAs with functions for the UK financial services regulators and creates an obligation for the Treasury and the UK regulators to enter into a memorandum of understanding that sets out how they will support equivalence assessments.

Secondly, the SI corrects deficiencies in existing equivalence decisions made by the Commission—for example, replacing references to the "Union" with references to the "United Kingdom". Fixing these decisions is important to minimise disruption for some UK firms with businesses in equivalent third countries, and for some overseas firms which currently rely on these decisions.

Thirdly, the SI creates a temporary power for Ministers to make equivalence and exemption decisions for EU and EEA member states by direction for specified equivalence regimes listed in the SI. This is separate from the permanent arrangements for making equivalence decisions, which will become available only after exit and will require regulations subject to the negative resolution procedure. This temporary power is needed to prepare for the particular circumstances we would face if we left the EU without a deal.

As an EU member state, the UK has not previously needed powers to determine whether the EU is equivalent. However, in a no-deal scenario it will be important for the Treasury to have powers to make such decisions in time for exit day, to respond quickly and effectively to any risks to the financial system and to avoid disruption for firms and markets. To illustrate why these powers are required, I point the House to the European Commission, which has published several draft legal Acts granting certain technical exemptions to UK public bodies in a no-deal scenario. The Government would grant similar exemptions for relevant EU bodies in such a scenario, and this SI contains the powers to allow such exemptions to be put in place by exit day.

To ensure transparent use of the temporary power, this SI will oblige Ministers to lay directions before Parliament and to publish them. Noble Lords may have seen that the Treasury Select Committee wrote to the Economic Secretary to the Treasury on 7 February asking if 12 months was long enough for this power, given that other transitional regimes in financial services have been passed with longer periods. The Treasury's response to the committee, published last week, emphasised that this power was needed only to mitigate the risks around exit. The Treasury expects that the permanent mechanism for taking equivalence decisions by regulations, subject to the negative resolution procedure, will be ready soon after exit day. As a result, the Treasury judges that 12 months is sufficient for this power.

The Treasury has worked closely with the Bank of England, the Prudential Regulation Authority and the Financial Conduct Authority in drafting this instrument. The Treasury and the regulators have also ensured that the resources are in place to take on these functions. The Treasury has engaged the financial services industry and will continue to do so. The regulators and key industry stakeholders have expressed support for the provisions in this SI as necessary to mitigate disruption and to provide legal certainty about the UK's equivalence system.

This Government believe that the proposed legislation is needed to ensure that the UK has an operable equivalence framework in a no-deal scenario. The powers it contains are needed to ensure that the Treasury and UK regulators are properly equipped to respond if the UK leaves the EU without a deal or an implementation period. I hope noble Lords will join me in supporting these regulations and I commend them to the House.

Lord Sharkey (LD): My Lords, the equivalence SI shares the same consolidated impact assessment with the next three SIs. I am grateful that this was published in advance of today's debate and was available in good time in the Printed Paper Office. That is a significant and welcome improvement on last week's lamentable performance. I would have preferred individual impact assessments, rather than this consolidated one. However, consolidation has the merit of making absolutely clear the unsatisfactory vagueness about the costs and benefits of these SIs and that this arises chiefly from the lack of consultation.

The summary sheet in the IA for this package of SIs notes that the likely cost for all of them is "Unknown: likely significant" in all three defined categories. The benefits are also unquantified, but are said to be "significant". This rather dramatically illustrates the point made by the noble Lord, Lord Adonis, in his later amendments. There has been no real consultation on any of these instruments. This is unsatisfactory and is entirely the Government's fault. Had the Treasury started preparing these entirely predictable SIs earlier, consultation would have been possible. Why has the Treasury left things until the last moment? Although I sympathise strongly with the spirit of the amendments in the name of the noble Lord, Lord Adonis, I hope he will not press the fatal ones to a vote as we would not support him in a Division. It is critical to the functioning of our financial services that we make the changes—no matter how unhappily—set out in these SIs.

I turn to the detail of the consolidated impact assessment. The first 40 paragraphs are clear, but some questions arise in subsequent paragraphs and apply generally to all the SIs. Paragraph 44 explains that,

"it has not been possible to discuss the impact of the full package of changes with firms as this impact assessment was being produced, and has therefore not been possible to produce a monetised estimate of their full impact at this stage".

This is more than a pity: it is tantamount to a dereliction of duty. It would not be the case if the Treasury had started the process earlier. It has had plenty of time to do this: the deadline can hardly have come as a surprise.

Paragraph 50 acknowledges explicitly that the impact assessment,

"is not able to fully quantify the potential impact of these SIs on industry".

It undertakes, as a result of this self-generated inability, that if these no-deal SIs come into effect in March,

"it will at the appropriate time complete further analysis considering all of the relevant SIs as a package".

The word "appropriate" is very vague; what does it really mean? Does it mean, for example, in less than three months after a no-deal Brexit?

I do realise that the promised analysis is shutting the stable door long after the horse has bolted, and even longer after the horse gave notice that it would bolt. Nevertheless, Parliament should still have a chance to review the real impact of these SIs on industry. Could the Minister help the House with an explanation of the limits implied by "appropriate" and confirm that Parliament will be given an opportunity to debate the subsequent analysis?

Lord Deben (Con): I wonder whether the noble Lord is being a little too kind to the Government. Is not the reason we have not had these figures—and we have not had them because we did not start to do the figuring early enough—that when you actually add up the figures you discover that the cost of Brexit is enormously greater than anybody has pretended, and therefore it is to the convenience of the Government and of those who want Brexit not to provide the figures? Does he know of any other occasion when the Government have proposed huge changes and not provided at least some estimate of the bill?

Lord Sharkey: I am grateful for that intervention. The short answer to the final question is: no, I do not. I shall try to be slightly less kind as I move on.

Paragraph 52 of the consolidated impact assessment notes that each of the SIs covered,

"contains provisions with indefinite effect and this is the majority of the content. For this reason, we have concluded that the standard 10 year appraisal period is appropriate".

This seems to me an entirely perverse conclusion. Ten years is far too long for an appraisal of the effects of instruments containing such wide powers in a complex and critical field, which were produced in very great haste and which lack proper consultation or impact assessment. It would make more sense, and reduce any inadvertent harm, if we were to appraise after, say, two years. I am sure that if the industry were eventually consulted, it would agree with this timing. I would be grateful if the Minister would say why he is proposing 10 years for appraisal and what is wrong with two. Will he reassure the House that he will reconsider the timing of the appraisals? Perhaps he will write to us with his conclusions.

Finally, paragraph 73 of the consolidated impact assessment deals with the impact on the public sector:

"Where changes to the regulators' rulebooks, or to EU technical standards, are required as a result of leaving the EU, the regulators intend to consult on these changes wherever possible".

This "wherever possible" is alarming, especially in view of the Treasury's failure to consult in the preparation of these SIs in the first place. Can the Minister give examples of situations in which it would not be possible to consult on the changes to the rulebooks or the technical standards?

Lord Deben: My Lords, I declare my interest as chairman of the organisation that represents financial advisers and those who manage other people's money. I come back to the point that the noble Lord has raised. It is very difficult for the industry to understand why the Government have not found it possible to talk in a lot more detail about the costs that are going to be placed upon the industry. After all, the industry pays these costs.

I am a great believer in regulation: I think good regulation is very important. I do not like the way that people sometimes mix bad regulation with the need to have no regulation, but if we are to have good regulation, there are two very important elements. First, it must be clearly understood, and, secondly, the cost must be clearly adumbrated so that people can make proper provision. I agree with the noble Lord who spoke last that it is unacceptable that, first, we do not know in advance; secondly, we will not know until after we have passed these things; and, thirdly, we will have to wait 10 years until we know whether or not we got it right. I have enormous respect for my noble friend, as well as enormous concern, given the difficulties he faces.

Lord Cormack (Con): Total sympathy.

Lord Deben: As much sympathy as one can possibly have. I can think of no other Minister I would be more sympathetic to, but I have to say to him that it is pretty difficult to think of another occasion on which a Minister has had to get up and tell the House that he does not know how much something is going to cost, he will not know how much it is going to cost, it is impossible to work out how much it is going to cost, we will not know until after it is all costed, and then we will not know for another decade. I do not think that the Minister will be a Minister in another decade.

6.45 pm

That is not in any way to be rude. Frankly, we all move on—I am not sure that I will be asking the Minister this question in another decade. That is one of the facts of life. It is a pretty difficult thing to ask the House to do and he is able to ask us only because we do not have an adequate mechanism of altering the instrument so that we can insist on knowing the figures, on having an earlier date and that 10 years is too long. We do not have that mechanism and I fear that the Government are relying on the inadequacy of our system to get these measures through, however seriously they affect industry.

I have a final point. Mazzini said that revolution, prima facie, demands an apology. Forcing through regulations without proper discussion and without the time to consider them certainly demands an apology. I have no doubt that the noble Lord who will speak for the Opposition will say, as he so often does, so elegantly, in his special way, "I have spent a lot of time on this but I have not been able to understand some parts of it, however much time I spend on it. It seems

[Lord Deben]
that those who have written it have had more time and expertise to do it but have so far not been able to explain it in a way that is entirely accessible by even the reasonably intelligent". The noble Lord, Lord Tunnicliffe, always refers to himself in this way: he is, of course, extremely intelligent and has understood this very much better than most, but he has said that the Government really ought to be apologising. They ought to be apologising for asking the House to do these things, which in any other circumstances they would not and could not: it is only because the SI system enables them to get away with proposing enormous changes without any costings—either now, tomorrow or in two years' time, and with no real answer for another decade.

Lord Adonis (Lab): Was the noble Lord in the House to hear the exchanges between the chair of Sub-Committee A and my noble friend Lord Rooker about a letter which apparently is going to be sent to the Treasury, but has not been made available to your Lordships, complaining about the way that consultation and impact assessments have been conducted? It came out only in the course of debate that this letter is in preparation: apparently, the chairs of the two Select Committees cannot agree on the terms of the letter, even though we are in the midst of debating literally dozens of these statutory instruments. Does he not think it would have been a good idea if we had had this letter before this debate? If the relevant authorities of the House are about to write to the Government fundamentally questioning the way that the Government have approached the process of consultation and assessing the impact of these regulations, surely it is not satisfactory for us to be considering these regulations in advance of the completion of that process.

Lord Deben: I was indeed in the House to hear that exchange. It was an amazing, remarkable exchange and another example of the total removal of this whole discussion from reality. It was so unusual that I left the House to recover some sense of sanity. First, it is obviously true that we should have had that letter. We thought that the letter, according to a senior member of the committee, had gone. We were then told by the chairman of the Joint Committee that it was almost gone, or nearly gone, or on the way to going. We did not understand whether it would go or whether it still had to be recovered and discussed. The fact of the matter is, I can think of no more appropriate role for the House of Lords than to tell the Treasury that it needs to be very much more precise and correct in its treatment of this House and of the other place. The answer is that it must at least give the figures, and to do that, it has to have a useful impact assessment, not one which is merely a matter of form.

Lord Adonis: My Lords, the noble Lord is a distinguished parliamentarian of long experience. Does he not worry that the tone of self-congratulation which we always adopt in this House for the way we conduct scrutiny and the excellence of our processes is coming under serious strain as a result of this no-deal regulation process? The earlier exchanges raise fundamental questions as to whether we are fit for purpose in the way that we are conducting this process ourselves. If it has taken us six months into this no-deal regulation process even to seek to agree an approach to the Government on how they should conduct consultations and impact assessments, does that not fundamentally question the whole process which we are ourselves adopting in holding the Government to account? Earlier a noble Lord made reference to horses bolting and stable doors being closed. Already 100 or so of the statutory instruments have bolted before the Select Committees of this House have been able to agree on what the procedure should be for considering them, let alone whether they are adequate in their own terms.

Lord Deben: I feel philosophically and religiously opposed to self-congratulation, so of course I will not suggest that we should congratulate ourselves. As I said earlier, it is quite clear that our processes do not admit the proper consideration of the issues being put before us. However, the second thing which is quite clear—and after this, I really will sit down—is that the world outside thinks that we are absolutely barmy and wonders what on earth Parliament as a whole is doing. The world outside has become less and less willing to accept that our system is fit for purpose. We all know that all political parties—I mean all of them—are not seen by the vast majority of the population as in any way reflecting what they think, want and expect. We are engaged in a serious situation, and one of the sadnesses is that, if we are trying to do the job as well as we can, we have to be involved in them. However, we are involved in them in a way which may well mean that we are ourselves part of the very situation which is undermining the whole reputation of this, the oldest of Parliaments.

Lord Adonis: My Lords, I have amendments down in respect of the later statutory instruments, and on the substance of this statutory instrument I do not have much to add to what we have heard so far from the two noble Lords. However, the earlier exchanges raise significant questions. I put on record my hope that when we have the next string of these statutory instruments on Wednesday, the chairs of the two sifting committees might address us on what their procedure will be in respect of the handling and processes of consultation and impact assessments for regulations. I hope that the letter which is to be sent can be agreed—apparently there is a dispute between the chairs of the two sifting committees—and sent tomorrow. It sounds urgently necessary that it should be agreed and sent; indeed, that should probably have happened six months ago, not now. At least we are shutting the stable door after only half the horses have bolted, which I suppose is better than after all of them have left. I put on record that if the letter can be agreed, it is important that it is circulated to your Lordships before the debates on Wednesday, because it will have an important bearing on our proceedings. It may even be possible to slightly shorten our proceedings as a result. I feel obliged to make a speech on each of these statutory instruments about the inadequate processes of consultation and impact assessment, but if the relevant committees of your Lordships' House are making these points about all the statutory instruments and requiring the Government to improve their regime in respect of all of them, we will not have to go through this gruesome process, statutory instrument by statutory instrument.

The Earl of Kinnoull (CB): My Lords, I remind the House of my interests in financial services, particularly in international financial services for quite a long time.

Many of the speeches in this debate have given the Government a poor grade on things. However, it is important to remember business, which is at the centre of this. I always find that there is some confusion about what equivalence is. For financial services, there are 11 directives or regulations which give rise to powers to grant equivalences, 35 countries have taken advantage of that, and 279 equivalences have been granted—those are the figures from October on europa.eu. I gave evidence in respect of one of those 279 to try to get an equivalence for Bermuda—a successful achievement—some years ago, so I am very familiar with the process and also extremely familiar with how important it is for international business to have that equivalence.

The areas that are covered by equivalence, where obstacles and barriers are lowered or removed by granting it, include: accounting and auditing; capital requirement measurement; risk exposure measurement; and reliance on other markets' regulators that reduces the amount of senior management time that is taken up, making sure that regulators feel comfortable with whatever the business is that you are running within their regulatory environment. It is therefore very important indeed that we have this instrument in place, if there is a disorderly Brexit, in the first instance. I agree with many of the points that have been made about how the Government's performance has not been that good on this, or indeed on other statutory instruments. However, this is vital for business and is a key part of our economy, so I hope that the House will hurry it through.

Lord Leigh of Hurley (Con): My Lords, I welcome this statutory instrument. I note that paragraph 77 of the consolidated impact assessment states:

"This does not remove the general need to review and improve legislation, which HM Treasury remains committed to doing in due course and where appropriate".

Following the debates we had on the Financial Services (Implementation of Legislation) Bill, there are areas which might improve the financial services community and be for the benefit of the public and companies seeking to raise capital without the confines of some EU regulations; in particular, for small companies and for existing public companies that are seeking to raise capital from existing shareholders. At the moment, due to the expensive costs of a prospectus, they are prohibited from so doing. Although I have never prepared an impact assessment, I cannot imagine how one can be prepared in this sector, because there are so many potential benefits that might arise from this. I refer your Lordships' House to my registered interests.

Baroness Bowles of Berkhamsted (LD): My Lords, I too declare my interest in the register with regard to the London Stock Exchange.

I will make a couple of points on specifics, but before that I will say that I agree with noble Lords who have spoken about the manner in which things have had to be done and are done, rather than possibly what is done. By and large, the Treasury has performed well in fixing what it has to fix, but it has fallen down, possibly through lack of time, sometimes on Explanatory Memoranda and definitely on impact assessments. One of the things is that the public hardly seem to appear in the commentary. When the Minister introduced this statutory instrument, he said that equivalence was beneficial—it is in several ways—because for one thing it aided competition. He then said that that was to the benefit of consumers. That was about the only reference to consumers.

If prudential requirements are lower, does that benefit the consumer? It surely does in one sense: if the costs to businesses are less, perhaps the services to the consumer are less, but what does that do for stability? There are lots of questions about that, and the whole scene is not set. If I may say so, I may be the only person who was in the room when every one of these equivalence provisions was put in place, so I know why they are different, but it is still very difficult on some of the other SIs that we are dealing with even for me to work out exactly what is going on.

7 pm

Equivalence can benefit in two ways. It can benefit those who want to bring services in. If they are equivalent, they can come in and trade more easily here. There are also the prudential aspects that affect the companies here. If the assets in third countries can be given that preferential treatment because the legislation is the same, that means a lower cost to businesses here. So there is "them", letting businesses in, and "us", allowing our businesses to have preferential treatment.

In Solvency II, those two things were divided in one respect, with regard to provisional equivalence, which is available to allow the benefits of equivalence to those companies trading in third countries. It is interesting to see that that is implemented in full in the statutory instrument; it is what I asked about when we discussed Solvency II last week. It is a problem when we get things that relate to the same basic piece of EU legislation split across several different statutory instruments. Although we have dealt with Solvency II, I could not find what happened about provisional equivalence there, but I now discover that it is here. It is nice to know that it is covered, but it would also have been nice to have rather better signposting to that effect.

My third point is that a draft piece of legislation is still in the sifting stage, called the Financial Services (Miscellaneous Amendment) (EU Exit) Regulations 2019. This seems to deal with a whole batch of statutory instruments, about half of which we have already dealt with—the other half are somewhere in the pipeline. The draft legislation is already amending them again to correct mistakes and add extra tweaks. It was going to go through as a negative instrument; I somehow suspect that it will be upgraded to affirmative. The bits that interested me were to do with equivalence determination in Regulation 19 of the new regulation that we have not got yet. It amends Regulation 147 of the Financial Services and Markets Act 2000 (Amendment) (EU Exit) Regulations 2019, which I think we have just considered, and adds an interesting sub-paragraph on equivalence, which states that there will be an,

[Baroness Bowles of Berkhamsted]
"equivalence determination if a period of more than three years has elapsed since … the equivalence determination came into force".

I am not quite sure, without sticking together about four documents, which I have not done, whether this means that we are on a regular cycle in which, every three years, equivalence will be redone. I see no reason why we should not check that the countries that were equivalent still are, but I should like the answer to that question. It seems to be an important point that could have appeared in what I think is the basic piece of regulation, if such a thing exists, about equivalence determinations.

Lord Lilley (Con): My Lords, I hope that the noble Lord, Lord Adonis, will not be shocked to hear that as I have wandered through the corridors of this place, I have heard some noble Lords expressing the view that they are a little tired of his obsession with the statutory instruments. I hope that he will not be even more shocked to know that I am coming to his defence. I think that he is doing an important job and is highlighting one of the great benefits of Brexit. He is bringing to our attention the fact that, after 45 years when we have had to accept these accumulating piles of statutory instruments with scarcely a debate, with no possibility of rejection—that is why there has been no debate—with no hope of altering or amending, which is why we have not, up to now, considered any of the statutory instruments, now, because of Brexit, we are able to do so because, to coin a phrase, we are taking back control of our laws. We should be grateful to the noble Lord for being a convert to this. There is more joy in heaven over one sinner that repents than over 99 just men who have no need of repentance—and I rejoice with him.

Along with the noble Baroness, I have the privilege of sitting on the Secondary Legislation Scrutiny Committee of your Lordships' House, which goes through these regulations and changes to ensure that they accord with what they are supposed to accord with, to highlight any aspect of them which we think needs to be brought to the attention of the House and, if need be, to upgrade them. I have to say that it has been a revelation to me to see the scope, scale, detail and complexity of legislation which, in the past, has been implemented simply because it is EU legislation. Even if the whole House had rejected it, it would still have become the law of the land.

The noble Lord, Lord Adonis, is right to be concerned about several things. He is right to be concerned about consultation, because now consultation will matter. There will be some point in listening to what people think about statutory instruments because we will, in extremis, be able to reject them, and certainly to suggest to the Government that they might choose to do things differently, and it will be possible for them to do so.

The noble Lord is also right to point to the need for impact assessments and measures of cost. My noble friend Lord Deben—another great convert to Brexit—pointed out that these were important and suggested that the failure to cost these things was because the Treasury was anxious to hide them. I can tell him that today our committee considered one measure which concerned the European budget. We suggested that there should be a costing of that, because there would be a saving of between £10 billion and £12 billion net from no longer being part of the European Community if we leave without a withdrawal agreement on 29 March.

Lord Deben: I do not quite understand how we can know the net saving if we have not estimated the actual cost of any of these statutory instruments. That, surely, is the issue. Although we all understand my noble friend's very amusing and charming way of putting it, many of us realise that the reason why we have these things in this form is that it gives us real equivalence. The problem we are now faced with is that we have fake equivalence. We decide what we want, but if others are not prepared to go along with it, our financial industry will be very much disadvantaged.

Lord Lilley: I am trying to get the full gist of my noble friend's intervention, which was, first, that he seemed to think that the cost of all the statutory instruments which have not been costed—although many of them have—might somehow accumulate to anything approaching the £10 billion to £12 billion a year net contribution that we will save as a result of this one statutory instrument that we have been discussing in the Secondary Legislation Scrutiny Committee today, which will remove us from the EU budget. If he thinks that they are on that scale, I invite him to name one that might be worth £1 billion, for example. I suspect that he will not be able to do so.

My noble friend went on to talk about equivalence, which is important and can be valuable; that is the substance of this SI. It is worth the House remembering that equivalent regulation is not as important as superior regulation. It is far more important for this country to have good regulation—that is, the best in the world, which is not to say the most detailed or intrusive regulation but effective, appropriate, not-too-onerous regulation that ensures good quality of business. That has been the City's great strength over the years. Better regulation than other countries has often been more important than identical regulation. The Eurodollar market is in London, not New York, because of bad regulation in America: Regulation Q, or whatever it was, drove all the business out of America. Our success in the trade in German state bonds was because the majority of it took place in London, due to our regulatory system being superior to the Germans' before we introduced the single market and they had to improve theirs somewhat. Likewise, we carried out a high proportion of the trade in French equities because our regulatory system was superior, rather than identical, to that of France.

We should remember that the four great financial centres in the world—New York, Singapore, Hong Kong and London—all have something equivalent to each other and are great financial centres because they have in common common law and all the infrastructure built on that, such as legal and accounting processes, which make them flexible and desirable places to do business. In effect, they outpaced countries with different legal systems. We should welcome equivalence where appropriate but be very glad that we will not have to have regulation identical to that of our friends and partners on the continent. It is almost certainly beneficial to London to be a rule-maker, not a rule-taker.

Baroness Kramer (LD): Perhaps I could explain to the noble Lord, Lord Lilley, that one reason why so many of us are making comments and expressing concerns about procedure, including about the impact assessment and the limitation on what we can do with statutory instruments—we cannot amend or change them—is because the whole process pales greatly in comparison to the equivalent process available to us as we dealt with these fundamental issues as EU members. Then, we were framing the overarching directive that set the context through extensive and transparent consultation and scrutiny, via a process in the European Parliament and the European Council. Typically, we then engaged our regulators for the final stretch, but in the context of all that work in discussion and negotiation. One of the reasons for London's great success is that it was able to shape so much of that discussion in the way it thought appropriate, bringing all its experience to the table. That is what made it Europe's premier financial centre and the great global financial centre it is today, all of which it achieved in the context of EU membership.

Lord Lilley: The noble Baroness makes an important point but one that deflects a little from reality. When I was a Treasury Minister, I had to negotiate things in Europe. I suppose we had a certain influence, but at no point did the House get involved much, rightly or wrongly. She should not create an ideal world that did not exist.

Baroness Kramer: I accept fully that this House did not get involved, but I do not consider democracy as having only one locus. Our Members of the European Parliament were democratically elected as democratic representatives. The Ministers we sent to Councils engaged with democratic representatives. I do not think that this process happens in only one place. It seemed to me that as a consequence of that representation, we had real importance. Now, we face two situations—

Lord Lilley: The point being made by the noble Lord, Lord Adonis, and others is that we should not leave that process to Ministers. The noble Baroness seems to be saying that our doing so in the past was jolly good because they defended our interests.

7.15 pm

Baroness Kramer: Well, we also had MEPs, for whom I have great respect, and engaged broadly in the process.

One of my problems is that the equivalence SI we are dealing with today essentially puts, for the next 12 months, all relevant decisions on whether we remain equivalent or, as the EU makes changes, become equivalent in any new area into the hands of the Treasury alone. Not only does that not engage this House—I suppose you could consider the Chancellor to be involved—but it represents the most disengagement we have ever had at an absolutely critical time. If we leave the EU, how we behave on equivalence in the coming months will shape the context of any negotiation on the economic future of the UK, this being its most important economic sector and a major contributor to taxes and jobs. It is pivotal to the economy, yet the Treasury alone will make many of these key decisions. All we have for context are the comments in the political declaration. I will not repeat discussions we had earlier today, but those comments are exceedingly limited and give very little sense of direction.

To make matters almost worse, it is quite clear in the SI that, beyond that period, future decisions will be made through negative SIs—not through some policy framework in this House, engagement with your Lordships in broad debate or extensive consultation, but through the negative procedure. That will make it even harder for us to be engaged in the process. I can tell the noble Lord, Lord Lilley, that all the Brexit issues we are dealing with lead to the massive democratic deficit of great concern to many of us.

Lord Deben: Did the noble Baroness notice that my noble friend said, "I think we may have had influence"? Is it not true that we have been at the centre of these discussions and that the European Union is much more transparent and open when it comes to them than the British Government have ever been—certainly more so than the Government now propose to be under these statutory instruments?

Baroness Kramer: I can only agree. We have major transparency problems. I am working on the Trade Bill; it is unconscionable that we do not have available to us information that the EU would not only put automatically on a website but constantly report back on, with discussion between the Commission, the Council and the Parliament.

Let us set that aside so I can move on with this particular instrument. I reinforce the concerns about the impact assessment. I must say that the consolidated impact assessment discussed by my noble friend Lord Sharkey contains three pages dedicated exclusively to this SI—I am sure that the Minister will point that out—but anyone who cares to read it will discover that, although it is usefully descriptive, telling us a bit more about the instrument, what used to happen in the EU and what will happen under this instrument, it cannot be called three pages of impact assessment. It does not even attempt to monetise the impact and give us a sense of the costs and the value of the benefits—that is beyond it—and it never deals with the risks in any way. Never in my commercial life have I seen impact assessments that did not assess risk—but these do not even begin to do so.

That is very disappointing, particularly for the businesses which will be picking this up. They want to make sure that this SI goes through, because anything that reduces uncertainty in any area where there is not a cliff edge will be of great value to the relevant businesses—but, my goodness, they would have welcomed something much richer in terms of the discussion to give them some forward vision rather than one that just deals with the very short period of time that will immediately follow departure under a no-deal scenario. I find that very frustrating and a real weakness in the way in which impact assessments are being dealt with here.

That takes me to perhaps the last issue that I will address, which was touched on to some degree by my noble friend Lady Bowles. There is very little discussion in any of this about what I call reciprocity. In order for

[Baroness Kramer]
equivalence for the industry to be able to function without any kind of cliff edge in no deal, not only does the UK need to provide equivalence but the EU needs to grant equivalence as well. In many instances it has not done so, but it may do so in the future. My interpretation is that at the moment it is doing so only in areas where it thinks that not granting equivalence would cause financial instability, rather than looking at broader market access issues.

I take this as a real shot across the bows that we need to take on board, framing the EU intent as to where it will take future negotiations in this area. That is important and I am rather concerned that the Government do not deal with those kinds of issues in this impact assessment, because an honest discussion of that is crucial for businesses as they use the product and everything that we are printing to try to understand what the context is going forward. It has made me feel very gloomy that we will see a much more fragmented set of financial services. I am sure that London will remain a crucial global centre, but I can see the way in which the pattern is developing. It will have some very significant rivals that will take away very significant pieces of business. Over the long term that has real consequences for the UK.

In all that we have here there is one last issue which perhaps the Minister would address, because it could be my deficiency in reading all of this. At the moment we know that third countries operate, as it were, within the EU because the EU has granted them equivalence. As I understand it, the UK will be granting identical equivalence under this SI for the day that we leave if it is a no-deal scenario. But I am unclear about how many of those third countries are granting us reciprocal equivalence. Not only do we have questions about in which areas the EU is granting us third-country equivalence, I am not clear where we stand, for example, in terms of the US. Will we be granting the US equivalence using exactly the same pattern as that of the EU currently? It is not clear whether the US is granting us equivalence and on what terms—and that is just one of the many different countries with which we have built up a kind of network through mutual equivalence that has been established over the years.

Equivalence is extraordinarily complex. It is not a matter of a simple one-hour discussion about four or five easy to understand factors. It is exceedingly complex, it often comes with conditions and it may be limited in a whole variety of ways such as by time and by content. It may have many issues attached to it, and therefore negotiating new equivalence arrangements from scratch would concern me a great deal. I say that in particular because of what we have seen with some of the trade deals, where Liam Fox was absolutely confident that we could take existing trade deals between the EU and the 71 other countries with whom we had free trade agreements and roll them over. He has now been woken to the fact that most of those countries see this as an ideal opportunity to improve their position and to renegotiate. It has become a much slower, much more difficult and much more complex process. I want to try to understand where we are with our equivalence agreements, because potentially the situation is exactly the same. It is very different having an equivalence agreement to have access to the market in the UK from having access to a market of 500 million people. I do not know how many of these equivalence agreements are in play.

Lord Tunnicliffe (Lab): My Lords, I shall be brief on this instrument and brief to the point of extinction on some of the others. I wish I thought that that would have any significant impact on the length of the debates we are going to have, but I fear that my brevity may be somewhat wasted tonight.

Every time we look at a bunch of these instruments, I hope to be forgiven for making the simple, formal statement that I regret being here doing these SIs. Her Majesty's Government should rule out no deal. The Prime Minister is behaving irresponsibly in not doing so, but unfortunately no deal seems increasingly possible. From my limited understanding of history, most bad things that have taken place were by accident. Unfortunately we have a Government who are playing a game of chicken and hoping that the EU will blink first without realising that one of the outcomes of a game of chicken is mutual disaster. Accordingly, we will not obstruct Her Majesty's Government's legislation in preparing for no deal because it is a genuine probability. It was good that at least one speaker in the debate—I think that it was the noble Earl, Lord Kinnoull—pointed out that industry needs these SIs in order to get on with its business.

Virtually all the Treasury SIs have three parts. They tend to transfer functions, to transfer references, and to have a little policy where a decision has to be made if it is not self-evident where the status quo lies. This SI is similar. Its substance is set out in Regulation 2(1), which states:

"The Treasury may, by direction",

and so on. In the Explanatory Memorandum there is a very important statement on this power:

"It provides ministers with a temporary power, for up to twelve months after exit day, to make equivalence directions and exemption directions for the EU and EEA member states. This power is intended to be used only in cases where it is necessary to make equivalence decisions for the EU and EEA member states quickly and efficiently to support UK market activity and the continuity of cross-border business".

Unfortunately, nowhere in the SI is that assurance made. There is no limitation on the powers in the statutory instrument itself. As a minimum I hope that the Minister will repeat the essence of what is in the Explanatory Memorandum and assure us that this power is designed to be very limited. As I understand it, the power can be and in fact will be used after exit day. What I would value is if the Minister could explain the parliamentary process that will be associated with it because, so far as I can see, it boils down to nothing. I assume it just boils down to a Written Ministerial Statement. I hope that he can give us some more comfort that whenever this power is used, we will know about it and that he will be making a statement of some kind.

Finally, towards the end of Regulation 2—one usually runs out of energy before one gets to the end of these—paragraph (6) states:

"The power of the Treasury under paragraph (1) includes the power to revoke or vary an equivalence direction at any time".

Could the Minister make it clear whether that paragraph dies after 12 months, like the power in paragraph (1)? The power to revoke or vary an equivalence direction—which seems almost as powerful as the power to create a direction—is pretty important and should die at the same time as the power in Regulation 2(1).

I will not make any other general comments, other than to note that all the SIs this evening, as far as I can tell, do not have reciprocity. The whole issue of the negative impact that leaving without an agreement brings is that there is no reciprocity. All we can do is create the rules that allow us to make the move towards the EU, and we have to hope the EU sees the sense in making reciprocal powers. This is just one more reason why crashing out of the EU is a thoroughly stupid thing to do.

7.30 pm

Lord Bates: We could probably start with agreement across the House in saying that that is certainly something the Government do not want to happen. There is a very easy way for the noble Lord to ensure that that does not happen: to ensure that his colleagues support the deal before the House. This would then be unnecessary. This is not in any shape or form an objective this Government relish. It is a possibility that any prudent Government must prepare for. That is its status—nothing more, nothing less.

Given that we are going to be in for five substantial debates tonight, I will set one thing in context at the beginning. I will not cover some of the points, because I know they will come up in later debates, so I will try to not test the patience of the House by repeating answers five times to five different SIs. I will try to keep them as concise as possible so we can move through them at some pace.

I thank the noble Lord, Lord Sharkey, as the official spokesman for the Liberal Democrats and the noble Lord, Lord Tunnicliffe, as the official spokesman for the Opposition, for stating their intent to let this legislation go through, because they recognise that—whatever their concerns—there is a greater concern to ensure that there is a functional statute book in the unlikely event of no deal. I recognise that responsible approach, and I am sure it will be welcomed by the industry. The noble Earl, Lord Kinnoull, and the noble Lord, Lord Leigh, spoke from that perspective.

I want to put this on record, because I think it is really important. In their presentations the noble Baroness, Lady Kramer, set out brilliantly and the noble Baroness, Lady Bowles, set out extremely well—and indeed the noble Lord, Lord Sharkey—the outstanding work that the Parliament and the Commission did in regulation. The UK has been a leader, an influencer and a shaper of regulation. It really has been a good process. Every single one of the SIs we are dealing with through this entire process has gone through that scrutiny. We are not dealing with something that has never been thought of before; this already exists and has been subject to scrutiny—not only in the Parliament but, let us not forget, in another important group that does incredible work in this House: the European Union Committee and its six sub-committees. They scrutinise all the regulations and directives that come out. Then we had the European Union (Withdrawal) Act, in which we said—because it included a revocation of the European Communities Act 1972—that we needed to bring a lot on to the statute book. That is what we are doing: bringing on SIs, directives and regulations from the EU that have been subject to scrutiny by a UK Minister, the European Parliament and your Lordships' House in the sub-committees, at the instruction of Section 8 of the European Union (Withdrawal) Act. Many of us recall the long and painful process of that working its way through the House. I looked it up: we spent 10 hours on Section 8, which gives us the powers and sets up the process we are now following.

The idea is sometimes presented that somehow what we are doing here is bringing onshore a whole load of stuff that we have never prepared for and that industry has not had any clue about dealing with. Industry is working with it, and we are now bringing it onshore. The process by which we deal with new regulations in future—the point made by the noble Lords, Lord Lilley and Lord Leigh—is something we need to look at. What we are doing at the moment is bringing across what is already in existence and has already been considered through a rigorous process, and putting it on the UK statute book.

Baroness Kramer: Perhaps this is my misunderstanding, but as I read the SI I did not have the understanding that the Treasury, following exit day with no deal, would be able to act only in exact accordance with the pre-existing rules established under European directives but that it could make fresh and new decisions to revoke, effectively amend or make new decisions for a 12-month period; a process would appear at some point in that time that was not Treasury-only, but it would be structured around a negative SI. I thought that was part of this whole package.

Lord Bates: The powers the Treasury will have are the powers the Commission currently has. The Commission cannot have them because we will have left the EU without a deal. Somebody therefore has to have them, and it goes to the Treasury because that is the equivalent body. Where the European markets authority was the regulator, that is transferred to the regulator here. We are simply doing all the things the noble Lord, Lord Tunnicliffe, has said at least two dozen times when we have discussed these points. He looks to see if we are actually following the rules as set down in Section 8 of the European Union (Withdrawal) Act. That is what we are doing. We are not making substantial policy changes, just correcting deficiencies and making fixes. The noble Baroness is absolutely right; that is the process.

Baroness Kramer: I accept what the Minister says. The Treasury in effect becomes the Commission, but without the checks and balances that normally exist on the Commission because we do not have the democratic process. That is the only point I am trying to make.

Lord Bates: I know the noble Baroness is seeking to make a point, but the Treasury does have a representative in your Lordships' House. I know the noble Lord, Lord Deben, thinks, with the Chief Whip present, that I will be here today, gone tomorrow. That may well be the case.

Lord Deben: The only suggestion I made was that the noble Lord might not be here in 10 years' time. That is a very different comment.

Lord Bates: Perhaps the noble Lord was not aware that he and I served in the same Government 25 years ago. He was a personal hero of mine because he abolished the hated Cleveland County Council and returned it to the North Riding of Yorkshire, which was greeted with absolute acclamation. However, it was still not enough to get me past the 1997 general election, so I find myself here in your Lordships' House. Indeed, the noble Lord, Lord Young, was there 40 years ago—so there is form.

My point is that the Treasury is accountable to Parliament. It is possible to question a Treasury Minister here in the House of Lords in the way that noble Lords could not question a Commissioner in the House of Lords, so I do not want us to run down that particular track. Nor do I want to overegg the situation and say that it is perfect. We are having to prudently prepare for a set of circumstances that nobody in this House wants but for which we need to prepare because the industry requires that assurance.

Let me try to deal with some of the specific points in this debate. The noble Baroness, Lady Kramer, asked what third countries will do to declare the UK equivalent. The Treasury and the regulators have been in close contact with third-country authorities, including the United States regulators. We expect to replicate all arrangements with third countries which are based on equivalence. The UK will have grandfathered all existing Commission decisions through the EU withdrawal Act, and there will be retained EU law—the point I referred to.

The noble Lord, Lord Tunnicliffe, asked about a no-deal scenario, and I have dealt with that.

The noble Baroness, Lady Kramer, asked why the negative resolution procedure is considered appropriate for equivalence. We went through this whole area. I will not repeat it, but, if the House will bear with me, it is good that the usual channels are here. As part of the EU withdrawal Act, there was intense discussion and debate about the correct process for considering the large body of regulation that would be coming onshore. A comprehensive system of scrutiny—involving sifting committees, the Joint Committee on Statutory Instruments and the Secondary Legislation Scrutiny Committee—was set out for your Lordships, and it has been working. I am sure that the noble Lord, Lord Adonis, will come back at a later stage to some of the debate we had, which was probably as interesting to me as it was to him as we listened to Sub-Committees A and B. But the reality is that that scrutiny work is going on through your Lordships' House and is following exactly the process set out in the Act and agreed through the usual channels.

The noble Baroness, Lady Bowles, said that the legislation is hard to follow. The Government are committed to ensuring that the law is transparent and accessible. That is why the National Archives will publish online a collection of documents capturing the full body of EU law as it stands on exit day. It will also gradually incorporate retained direct EU legislation into the Government's official legislation website, legislation.gov.uk. She also asked whether decisions will be reviewed every three years because of the forthcoming SI. The future Treasury SI deals with making sure that equivalence directions fit into part of the existing FSMA framework. It does not mean decisions will be reviewed every three years.

Further, the noble Baroness asked why the SIs are being undertaken in such a piecemeal way and wondered why changes cannot be assessed holistically. A number of legislative changes will be necessary to ensure that there is a functioning statute book on exit day. HM Treasury has been as open as possible about this legislation and the potential impact, particularly by publishing draft legislation in advance of laying, alongside explanatory policy decisions.

The noble Lord, Lord Sharkey, asked whether we could provide examples of consultation on proposed rule changes. The regulators have undertaken extensive consultations on the proposed changes to their rules and technical standards. However, the powers in the EU withdrawal Act allow them to proceed without consultation, where necessary, to ensure that the necessary regulations are in place for exit day.

Does relying heavily on secondary legislation leave room for departments to push through unpopular or controversial legislation? These are powers granted under scrutiny by the EU withdrawal Act, as I have already explained.

Let me turn to another point raised by the noble Lord, Lord Sharkey, and my noble friend Lord Deben. They asked why we have chosen a 10-year appraisal period. This is not about when we review the legislation; this is a technical issue about the period over which the costs are allocated. We have committed to further analysis and, if the SIs come into effect, we will need to consider what an appropriate time is, but it will be much less than 10 years.

The noble Lord, Lord Sharkey, asked about consulting and whether we would allow more than is quantified in the impact assessment. The limitations set out in the impact assessment would not be overcome by consultation at this stage. Firms need to consider all the changes made by these SIs, alongside the broader changes that occur at the point of exit, which cannot be known in advance.

The noble Baroness, Lady Bowles, asked why we have not mentioned the public in the commentary. Consumers benefit from both competition and financial stability. This instrument will allow the Government to have due regard to both.

The noble Lord, Lord Sharkey, asked why no one has come forward to provide transparency around the costs of Brexit. The impact assessments for these SIs focus solely on their direct impacts; the wider costs of Brexit were covered in the cross-government analysis.

When we talk about the costs of these SIs, which just bring onshore regulations that already exist, has anybody thought for a moment to consider what the costs would be if we did not have them ready by exit day? What would that mean for the financial services industry? It would be cataclysmic. It is absolutely the reason that the noble Lords, Lord Sharkey and Lord Tunnicliffe, were right to say that, while they recognise the need for scrutiny, they also recognise how important it is for the industry that we get these measures through.

I will come back to some of the other issues in later debates on this evening's SIs.

7.45 pm

Lord Tunnicliffe: Will the noble Lord consider my point on paragraph 2.1 of the Explanatory Memorandum? It assures us that these powers will be used in a narrow way to manage the transition and not to introduce new policy. That is quite a strong statement, but it is nowhere on the record and there is nothing in the instrument to limit the use of the powers mentioned in paragraph 2.1.

Lord Bates: The noble Lord did ask me to assure that that will apply, and I am happy to do so. With those assurances, and conscious that we will touch on many of these matters again later in the evening, I beg to move.

Motion agreed.

Official Listing of Securities, Prospectus and Transparency (Amendment etc.) (EU Exit) Regulations 2019

Motion to Approve

7.47 pm

Moved by ***Lord Bates***

That the draft Regulations laid before the House on 21 January be approved.

The Minister of State, Department for International Development (Lord Bates) (Con): My Lords, I beg to move that the House considers the draft Official Listing of Securities, Prospectus and Transparency (Amendment etc.) (EU Exit) Regulations 2019—

Lord Tunnicliffe (Lab): For once, it would be nice to get it right. The Minister is moving that they be approved.

Lord Bates: I am always very happy to take correction from the noble Lord. If he would like, I am happy to ask that the House approve these regulations.

Let me try again. The Treasury has been undertaking a programme of legislation to ensure that, if the UK leaves the EU without a deal or an implementation period, there continues to be a functioning legislative and regulatory regime for financial services in the UK. The Treasury is laying SIs under the European Union (Withdrawal) Act to deliver this, and a number of debates on these SIs have already taken place here and in the House of Commons. The SI being debated today is part of this programme.

The SI will fix deficiencies in UK law relating to the UK's listing regime, prospectus regime and transparency framework to ensure they continue to operate effectively post exit. The approach taken in this legislation aligns with that of other SIs laid under the EU withdrawal Act, providing continuity by maintaining existing legislation at the point of exit but amending where necessary to ensure that it works effectively in a no-deal context.

Turning to the substance of the SI, many noble Lords will be familiar with the prospectus directive, the transparency directive and the consolidated admissions and reporting directive, or CARD, and with related legislation that is implemented into UK law to set the listing regime, prospectus regime and transparency framework that regulate capital markets activity in the UK.

The transparency directive harmonises transparency requirements across the EU by requiring issuers with securities, such as shares and bonds, admitted to trading on a regulated market to disclose a minimum level of ongoing information to the public. It built on and amended CARD, which co-ordinates the conditions for the admission of securities to official Stock Exchange listing.

A prospectus contains information on an issuer that is seeking to offer securities to the public or is seeking admission to trading on a regulated market. The information they provide is used by investors to make investment decisions. The prospectus directive contains the harmonised rules governing the content, approval, format and distribution of the prospectuses that issuers must produce when securities are offered to the public or admitted to trading on a regulated market in a member state of the European Economic Area.

In a no-deal scenario, the UK would be outside the EEA and outside the EU's legal, supervisory and financial regulatory framework. The UK legislation implementing the prospectus directive, the transparency directive, the CARD and related legislation therefore needs to be updated to reflect this to ensure that the UK's listing regime, prospectus regime and transparency framework operate properly in a no-deal scenario. These draft regulations therefore make the necessary amendments to the retained EU legislation to ensure these regimes are operable in a wholly domestic context.

First, this SI will transfer responsibility for powers and functions currently within the remit of EU authorities to the appropriate UK institutions. Specifically, it will transfer powers from the European Commission to HM Treasury, such as the ability to make delegated acts pursuant to the relevant legislation. It also transfers powers to the Financial Conduct Authority from the European Securities and Markets Authority to create and amend certain binding technical standards. This transfer of functions mirrors the current split between the legislative power of the Commission and the regulatory role of ESMA.

Secondly, it alters the scope of the legislation by ensuring that, post exit, EEA issuers wishing to access the UK's capital markets will be required to have their prospectuses approved directly by the FCA, as any other third country would have to do. Currently, EEA issuers can passport prospectuses approved by other EEA regulators for use in the UK. This aligns with the approach taken across other financial services SIs laid under the EU withdrawal Act.

The SI also introduces grandfathering arrangements that will allow any prospectus approved by an EEA regulator and passported into the UK before exit day to continue to be used up to the end of their normal validity, as well as supplemented with additional information. The end of validity is usually up to 12 months after the prospectus is approved.

Thirdly, this SI extends the exemption under the prospectus directive for certain public bodies from the obligation to produce prospectuses to the same set of public bodies of all third countries post exit. If a UK-only approach were taken, EEA state public bodies

[Lord Bates]
that are currently accessing the UK market would be obliged to produce a prospectus to issue securities in the UK that they would not be required to do to issue securities in EEA states. Additionally, extending the exemption to public sector bodies of third countries is consistent with the UK treating EEA member states and third countries equally.

Fourthly, as the explanatory information for this SI states, in a no-deal scenario, the Treasury intends to issue an equivalence decision, in time for exit day, determining that EU-adopted international financial reporting standards can continue to be used to prepare financial statements for UK transparency and prospectus requirements. This will allow issuers registered in EEA states with securities admitted to trading on a regulated market or making an offer of securities in the UK to continue to use EU-adopted IFRS when preparing their consolidated accounts. This decision is consistent with the Government's approach to provide continuity following the UK's exit from the EU. This has been welcomed by the industry and is supported by the Financial Conduct Authority.

Additionally, this SI removes obligations within retained EU law for the FCA to co-operate and share information with EU regulators, as this obligation, with no guarantee of reciprocity, would not be appropriate as of exit day. However, the FCA will still be able to co-operate with EU regulators through the existing framework in the Financial Services and Markets Act as it is currently able to do with all other third countries.

This SI makes further amendments to retained EU and UK legislation to ensure that the UK's listing regime, prospectus regime and transparency framework operate effectively once we leave the EU. It is important to note that, while this instrument covers the UK legislation implementing the prospectus directive, there is no power to domesticate the provisions of the prospectus regulation that apply from July 2019 in the Financial Services (Implementation of Legislation) Bill. These additional provisions make significant changes to the prospectus directive.

Certain provisions of the prospectus regulation have applied since July 2017 and July 2018, with the remainder of the legislation due to apply from July 2019, after the UK leaves the EU. It is the Government's intention to domesticate the remaining provisions as they will constitute the prospectus regulatory regime from July 2019. However, the EU withdrawal Act will only convert EU legislation into UK law that is already in force and applies immediately before exit day. Therefore, remaining provisions of the prospectus regulation will be domesticated via a statutory instrument laid under the Financial Services (Implementation of Legislation) Bill. The Bill, as currently drafted, requires the affirmative resolution procedure for every statutory instrument made under it, providing Parliament with an opportunity to debate and discuss each file that the Government are implementing. This change, I acknowledge, was as a result of the scrutiny the legislation received in your Lordships' House, and we are grateful for it.

The UK has played a leading role in shaping the prospectus regulation for the benefit of consumers and industry. It is welcomed by industry and acts to cut the cost to business of producing a prospectus in the UK.

The Treasury has been working closely with the Financial Conduct Authority in the drafting of this instrument. It has also engaged the financial services industry on this SI, and will continue to do so going forward. On 12 December 2018, the Treasury published an instrument in draft, alongside an explanatory policy note on 21 November 2018, to maximise transparency to Parliament and industry.

The Government believe that the proposed legislation is necessary to ensure that the UK's listing regime, prospectus regime and transparency framework can continue to operate effectively post exit, and that the legislation will continue 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, and I commend them to the House.

The Deputy Speaker (Lord Geddes) (Con): My Lords, for the avoidance of doubt, I say that the Motion before the House is that these draft regulations, laid before the House on 21 January, be approved. The Question is that this Motion be agreed to.

Amendment to the Motion
Moved by ***Lord Adonis***

At the end insert "but this House regrets that no consultation was undertaken on this instrument despite the impact on businesses, particularly those involved in capital markets."

Lord Adonis (Lab): My Lords, perhaps also for the avoidance of doubt I should make it clear to the noble Lord, Lord Sharkey, that this is not a fatal amendment; it is a regret amendment. I have laid other amendments to the later statutory instruments.

The noble Lord, Lord Lilley, who made a fleeting appearance in our proceedings earlier, said that I have a reputation in the corridors of the House for being obsessive about these statutory instruments. I take that as an extreme compliment because, in my experience of politics, it is only the obsessive people who tend to get things done. Indeed, it is because of the Brexit and Eurosceptic obsessives, whose work goes back now 30 years, that we are in this mess to begin with. If it was not for obsessive anti-Europeans and Brexiters we would not be here. It is time for obsessive moderates like myself to start asserting ourselves. Unless the obsessive moderates assert themselves, the obsessive extremists, who seem to have taken charge of both our major political parties at the moment, will triumph. That is not in the national interest. I plead guilty to being an obsessive. I shall be obsessive about many more of these instruments, both this evening and for many days to come, because it is in the public interest that we are.

When the Minister, for whom I have great respect—I never cease to be astonished that he and the noble Lord, Lord Young, are still members of this Government as they are one of the most extremist Governments I have ever observed in my political lifetime—says that these regulations are necessary in order that we do not crash out with no deal, it is the Government of which he is a member that have a unilateral power to end no deal. This evening the Government could end the prospect of no deal by either making clear that they

will apply for an extension of Article 50 or by using the power that they have to unilaterally revoke Article 50. For the noble Lord to try to cast on us the responsibility for a no-deal Brexit, which is entirely the creation of Her Majesty's Government, is a true Alice in Wonderland situation.

8 pm

Part of the reason I tabled this amendment is to encourage a wider debate. When it comes to the handling of financial services, we see the immense harm that will be done by Brexit at large and by any form of hard Brexit to Britain's international position and trade. I can see many noble Lords around the House who are much more expert in this area than I am; we heard earlier from the noble Earl, Lord Kinnoull. I am not an expert; I come at this as a lay man. I read the debates to understand what has been happening in the financial services sector, which is one of the most important sectors of our economy. It made a £119 billion contribution to the UK's economy last year; is 6.5% of our total economic output, with half of that being generated in London; and contains about 5,500 UK firms which use existing EU passporting rights to do business. We are talking not about small matters here but about the fundamental economic interests of the country and of a huge number of people whose livelihoods depend upon this sector, so I make no apology for detaining the House on this matter and becoming obsessive. I think we need more people to be obsessive about the economic good health of this country before it goes down the plughole in coming months and years if Brexit proceeds.

Looking at the history of the policy in relation to financial services alone, although there are much wider issues at stake, it is striking how far removed the current situation is from the aspirations even of the Government after the referendum three years ago. They then talked about keeping very close to the single market, the importance of having mutual recognition and maintaining passporting. The current Chancellor of the Exchequer said it was the fundamental objective of British policy to seek to negotiate that at the beginning. We have now moved in a steady retreat from that to an equivalence regime which the Chancellor himself condemned as inadequate in repeated speeches last year, so not only the negotiating position of the Government but what they actually negotiated in the political declaration was criticised as grossly inadequate by the Chancellor only months before. Now we have the obscenity of debating a no-deal situation which the Government had said was never their policy and which they now regard as being little short of calamitous for the country, to judge by the no-deal policy statements and technical papers that they published last year. We are in an extremely difficult situation. Although the argument for having the statute book in good order is there, there is a much bigger argument for us not proceeding with no-deal Brexit in the first place, taking it off the table entirely and having a more fundamental assessment of whether Brexit in any form is the right thing for us to do.

When it comes to the regulations we are talking about now, the issue about consultation is important. Unusually, for this instrument we have an economic impact assessment. It is not quite clear to me why it was decided that we would have one on this set of regulations but not on others and I await with interest the letter that the Minister will send to the noble Lord, Lord Trefgarne, and my noble friend Lord Cunningham about the handling of impact assessments and consultation in future. However, we have an impact assessment for these regulations and it is extremely concerning. It states that there will be significant costs as a result of the duplication and the other requirements which are brought about by these regulations. The annexe to the impact assessment states that the monetised familiarisation cost per firm will be £700, and that the total familiarisation cost to all impacted firms of this instrument alone—and we will debate three others this evening, let alone the cascade to come—will be £1.5 million.

As somebody who has occupied a position similar to that occupied by the noble Lord, Lord Bates, I know that the first thing one does when looking at reports of this kind is to go to the footnotes, which contain many of the most revealing statements. The whole basis of the calculation of the costs involved in these regulations depends on the validity of the figure of 2,113 business being affected. That is a suspiciously precise number, but the figure of 2,113 has a footnote, footnote No. 10, which is a masterly piece of construction by civil servants. It states:

"This figure is the number of issuers currently listed (as of 16 November 2018). This figure should be considered the minimum number of issuers that will be impacted by this SI, as other firms such as advisors will also be impacted, though this is difficult to quantify".

That means that the Treasury does not have clue how many people are actually going to be affected by this. It will include a plethora of other organisations, such as advisers, consultants and boutique firms. Noble Lords who know far more about this sector than I do will be able to tell us that. All these organisations will be affected by these regulations and, if this economic impact assessment amounts to anything, they will be hit by the £700 per firm familiarisation cost. I suspect that is a conservative cost; when I wade through what the changes to listing requirements will be when they are duplicated as we leave the EU with no deal, I suspect the figure could end up significantly higher.

That refers directly to consultation, which is so important to this. What consultation has there been? I am now used to quoting the section on consultation to the House, and for some reason it always appears as paragraph 10 of the Explanatory Memorandum to these instruments. I am not sure how these instruments are packaged so that consultation is always paragraph 10; there is clearly a template. However technical and detailed the material before it, consultation is always in paragraph 10. In this case it does not say that consultation has not been undertaken on this instrument because the costs are negligible. It cannot say that because in this case there is an impact assessment which shows that the costs are far from negligible, so we have a complete non sequitur this time between paragraphs 10 and 11 of the Explanatory Memorandum. Paragraph 10 states:

"HM Treasury has not undertaken a consultation on the instrument",

and then we have the usual blather,

"but has engaged with relevant stakeholders on its approach",

[Lord Adonis]
without defining who the stakeholders are, what the engagement has been or what the response has been and then, after a nothing paragraph 11, paragraph 12.1 on impact states:

"There is an impact on businesses, particularly those involved in capital markets",

which is set out in the impact assessment. It seems to me fundamentally wrong. In a case of this kind where there is a significant impact which could become greater over time, as our rules diverge, where there has been an attempt to quantify that impact and where we have so many people affected—2,113 is the minimum number of companies directly affected, but the real number will be significantly higher—not to have undertaken any consultation is simply and straightforwardly unacceptable. I repeat the point I make obsessively on these regulations: in no other context would this House regard it as acceptable not to have a consultation on changes of this kind. In any other context, the normal rules would apply. They require a Cabinet Office 12-week consultation with a proper opportunity for people to respond, and then the Government respond to the consultation and publish the consultation responses and their own response.

Lord Bridges of Headley (Con): I should declare an interest as I am an adviser to Banco Santander and take considerable interest in these matters. Is the noble Lord saying that the finance industry, including UK Finance, agrees with him that there has been no consultation whatever?

Lord Adonis: My Lords, there has been no public consultation. The bank to which the noble Lord is now an adviser may have been consulted. I do not know. He can perhaps tell us—because private sources of information are the main ones—whether it has been one of the organisations which have been engaged with privately by the Government.

Lord Bridges of Headley: I had not had direct contract with the Government on these matters. However, I shall read to the noble Lord a newsletter that has just come into my inbox from the CEO of UK Finance:

"We are working closely with members and partners with regard to onshoring, to emphasise continuity with EU law and to avoid sudden and unpredictable legal changes in the UK in light of a 'no-deal' outcome. We have to date assessed close to 40 legal instruments relating directly to financial services which have been published and/or laid in Parliament, with a handful more to come. We have also responded to a number of onshoring relating consultations issued by the Financial Conduct Authority … and the Bank of England"—

a point that I am sure the noble Lord will have heard Sam Woods make to the Select Committee in the other place last month. Therefore, what precisely does he mean when he says "no consultation"? Does he mean "no consultation" or "extensive engagement"?

Lord Adonis: I mean precisely what the Government themselves say in paragraph 10 of the Explanatory Memorandum of these regulations:

"HM Treasury has not undertaken a consultation on the instrument".

That is what I mean.

Lord Bridges of Headley: The noble Lord needs to be very clear, because that paragraph then goes on to say that the Treasury,

"has engaged with relevant stakeholders on its approach to financial services legislation under the European Union (Withdrawal) Act 2018, including on this instrument, in order to familiarise them with the legislation ahead of laying".

Therefore, there has been extensive engagement. Perhaps the noble Lord would be very precise on this matter.

Lord Adonis: My Lords, I read the words of paragraph 10 very precisely. Regarding the engagement with stakeholders, the noble Lord should be very careful about making himself a defence industry for the Treasury on these matters. The reality is that there has been engagement with stakeholders—it says so here. However, the only way that we will know about the engagement is if those who have been engaged with relay that to us. If they are fortunate enough to have former Ministers such as the noble Lord retained for these purposes, those people may tell the House via a circular route what has been happening. However, the way in which our parliamentary processes should work is that the consultation should be conducted formally and publicly, with the results being formally published and reported. That is not happening in the regime that is being set up at the moment.

The noble Lord is a former Minister in the Cabinet Office. It is the rules of the very department in which he was a Minister that require in all other circumstances, apart from these no-deal regulations, a formal 12-week public consultation. I am surprised that he should somehow think that it is adequate for that to be replaced by engagement with relevant stakeholders, undefined in paragraph 10.1. The noble Lord has aided the House greatly by starting to read out some of those who have been consulted with. There is no other way, apart from his intervention, in which we would have known who these stakeholders were. The way that this whole process is being conducted at the moment is utterly inadequate.

Lord Bridges of Headley: I am making the point that the noble Lord's amendment—I am obsessive about these things—includes the words "no consultation". This House should be absolutely aware that there has been plenty of engagement. I am sure that if he were to write to UK Finance and others, he would find out more. I totally accept the point that several on the Liberal Democrat Benches have made about the inadequacy of some of the processes. I was fully aware of that when we started and that point was well made. However, it is very important that when we have these debates we are very accurate. As far as I understand it—I have not been directly involved in this matter at all myself—there has been quite extensive engagement, so I would like the noble Lord to make that clear to the House.

Lord Adonis: My Lords, the noble Lord said that I should be precise and accurate. My amendment to the Motion says that,

"this House regrets that no consultation was undertaken on this instrument".

Paragraph 10.1 of the Explanatory Memorandum in respect of these regulations says:

"HM Treasury has not undertaken a consultation on the instrument".

Those are the exact words, so I cannot understand at all the point that the noble Lord is making. He is trying to excuse the fact that there has not been a consultation by saying that there has been a lesser form of engagement. However, that engagement is not a substitute for formal public consultation. Is he suggesting that it is an adequate substitute?

Lord Bridges of Headley: I am more than happy to rise on this point. Obviously I would much rather not be in this situation, having voted to remain, but, given the time that we have, I think that the Treasury has done an extremely good job with the level of consultation that it has undertaken, as have the regulatory bodies. I completely understand the desire of the noble Lord and others in this House to have proper scrutiny of this SI, but I just wish to make sure that all Members of this House are aware of the situation. The noble Lord is quite right that there has been no formal consultation but there has certainly been extensive engagement and it is very important that we make that clear.

Lord Adonis: I am grateful to the noble Lord for making that clear. However, perhaps I may also make it clear to him that the time we have available is down to the Government. It is not because of some extra-terrestrial force that has been at work; it is because of the Government that we are operating within these confines. It is therefore absolutely appropriate that noble Lords who do not accept that we should be in this straitjacket in the first place do not accept for a moment the point that the noble Lord has just made—that dispensing with normal parliamentary and government procedures in respect of consultation is satisfactory because we are limited for time.

8.15 pm

The situation that we are in at the moment is deeply unsatisfactory. We are imposing significant burdens on companies—burdens that extend to millions of pounds according to the Government's own impact assessment, which they themselves admit is conservative. We are doing so in pursuit of a no-deal Brexit, which almost nobody who has been engaged with it—to use the noble Lord's expression—finds satisfactory and almost all of whom would wish to rescind if they were given the opportunity. There has been no consultation in defiance of all the established rules of the Government and Parliament. This is unsatisfactory and therefore I beg to move.

Lord Davies of Stamford (Lab): My Lords, the noble Lord, Lord Bridges, has told the House, quite correctly, that at present he has a role with Banco Santander. Although in my case there is no possible financial interest and the relationship occurred 30 years ago, I ought, in order to be completely transparent, to reveal that when Banco Santander initially installed itself in this country in the 1980s, I was its financial adviser. I am very pleased that at that time I was connected with a transaction that has proved to be extremely fruitful for Banco Santander and the British economy. Therefore, I genuinely wish the noble Lord every success in the role that he is currently playing for this distinguished financial institution. It has expanded over the decades in this country and I hope that that happy position will continue, although all of us—at least, on this side of the House—have some fears about that at present.

There is no doubt about the importance of this issue. We are talking about financial transparency and disclosure. Anyone who knows anything about the financial markets knows that, together with the avoidance of conflicts of interest, those are the most important foundations of a successful financial marketplace. When either of those two foundations have been weak, the human race has invariably ended up substantially regretting it. People have been ruined and even economies have, sadly, been seriously affected.

The European Union now has a good system. Together with the United States, the European Union has the longest experience of successful financial regulation in this area. People come from all over the world to discuss with us how we do things here and very often they follow our example. That is very sensible and desirable for things such as the prospectus directive, which has been imitated around the world. The whole business of regular financial disclosure—annual reports, interim reports and so forth—have, again, been very widely imitated around the world. Everyone knows that if you want to have a financial market where companies can raise serious sums of money, these things are essential.

I have always had a strong feeling that the scrutiny of secondary legislation, both in the Commons and in the Lords, is the most dubious and problematic area of parliamentary activity and the one most in need of reform. Like everybody else in the two major parties, when we were on the Back Benches in the Commons we were regularly press-ganged—I do not think that is too strong a word—by the Whips to sit on statutory instrument committees. They were absolutely deplorable occasions. They were a real travesty of good parliamentary scrutiny. I used to hope that the public would never come into the sessions because they would be horrified at what we were doing. In fact, I never saw a member of the public there, although occasionally one would see lobbyists of some kind. However, the fact is that we had no opportunity to brief ourselves, no opportunity to question Ministers—although of course in the Lords we do have that opportunity, which is a great improvement—and we had the system that we have here, which was that we could not modify these instruments if we thought it necessary to do so.

How can Parliament possibly do its job, or make a contribution, if it cannot modify a proposition for a statute or Bill by amendment? This is quite extraordinary—complete rubbish—and we should do something about it. It results in an enormous amount of legislation going through that is not properly scrutinised. In this series of statutory instruments, we see literally hundreds of important statutes supposedly being renewed—although whether they are renewed or modified is something one can never be quite sure about—and going through at a rate of knots. No one can judge the

[Lord Davies of Stamford]
pace at which this is happening other than negatively; it is quite frightening, and a very bad moment for Parliament.

The situation is made much worse by the absence on these occasions of proper consultation or, in most cases, of impact assessments—as it happens, there is an impact assessment on the statutory instrument before us but, mostly, there are not. I want to clear up the controversy that exists between my noble friend Lord Adonis and the noble Lord, Lord Bridges. Consultation is an important term; it implies a set and standard process for consulting those likely to be impacted by legislation, and passing on to Parliament before it legislates—that is, before it is too late—the results of the interchange that has taken place with the stakeholders or parties who have an interest in the sectors of activity being regulated. This should be a standardised practice; we ought not to have to ask in each case, "What kind of consultation did you have? How many banks did you speak to? Who did you speak to: the directors, compliance officers, researchers, parliamentary affairs departments—a lot of companies have these kinds of things—or PR people?"

We should not need to ask these sorts of questions because we should know exactly what a consultation exercise involves. There should be—I am sure there is—a template in the Treasury and other serious departments, which indicates what you need to do to meet your obligation for a proper consultation when proposing legislation. A proper consultation has not been done here. What has happened here is engagement. The noble Lord, Lord Bridges, is proud of the distinction he has made but, frankly, engagement can mean what you want it to mean. No one knows, unless they have specifically asked the question, what it has actually involved, or indeed whom it has involved and not involved—who has been left out, perhaps deliberately, because the Government or department concerned did not want to hear some people's negative views.

All these things are possible if you do not have a standardised system of consultation. It should be a permanent part of parliamentary procedure that you expect that consultation has been carried out and that everybody knows the principles under which it has been conducted. That does not happen here, and so we face this situation where we are being asked to vote through a whole lot of legislation at great speed. We do not know whether the impact will be what the Government say it will be; we do not know whether other people have been asked their opinion, or who has been asked. That is a very unsatisfactory situation. Has there been no consultation in the way that there normally would be? Let us be honest about it.

I come to my final point. The reason why there has been no consultation in the way that ordinarily there would be is, we are told, that we are under tremendous pressure. I say to the noble Lord, Lord Bridges, and others on that side of the House that that is a form of blackmail. I would not dream of listening to blackmail, whether about my business life, my past, my private life, or my political or governmental responsibilities. Anybody who attempted to blackmail me would be thrown out of the door; there is no question about it—I would not be interested. The Government are saying, "You have to pass these things or there will be terrible consequences for British industry and all these different sectors. You will be at fault if you haven't done what we have told you to do". That is no good; we should not listen to such nonsense. This is the responsibility of the Government. They got us into this mess and they should be expected to do their best to get us out of it, or at least to minimise the damage that there certainly will be.

As my noble friend Lord Adonis has said, it is entirely the Government's fault that we find ourselves in this position. Any day they like, the Government could withdraw their notice to quit under Article 50. They could negotiate. We have been told by the continentals that any such request would be positively considered—that we could, if we wished, negotiate an extension to that date. More than that, the Government could have conducted these negotiations very differently. Unless I am very much mistaken, the Prime Minister accepted in December 2017 the idea that we would be permanently part of a customs union with the Republic of Ireland and therefore with the rest of the European Union. Then when she returned to the UK, she was rapped over the knuckles, or worse, by both the ERG and the DUP—two groups of extremists who have an unfortunate hold over British politics at the present time. She had to go back to the EU pathetically and say, "I am sorry, I thought I could agree that but actually I can't".

That is the whole history of this negotiation. It is deplorable. It has made us look idiotic across the world and, of course, has created a climate of uncertainty that is doing palpable, concrete economic damage to this country. This is a very important matter. We should show that we mean seriously what we say on the subject of consultation. It should be a standard provision—a right, if you like—which is respected, and always expected, in the case of new legislation put forward on a statutory instrument basis. Such is the importance of this matter and of recording our feelings on it that, if my noble friend feels moved to put his amendment to a vote, I will certainly support him.

Lord Sharkey (LD): My Lords, I can be very brief. I declare an interest as chair of the Hansard Society, which is almost as obsessed with the effective scrutiny of secondary legislation as the noble Lord, Lord Adonis, is. I agree with everything that the noble Lord, Lord Davies of Stamford, has said about scrutiny, but I also have no objection to this SI per se. After listening to the exchanges, I understand the difference between consultation and engagement, and I support the view of the noble Lord, Lord Adonis, that there should have been consultation as well as engagement on this SI and the other SIs that we are considering today.

The Earl of Kinnoull (CB): My Lords, I rise to put the case for poor old business because once again it is the Government who are being blamed. This SI is about access to capital. Without good access to capital, business is constrained and we do not have the means to create the wealth that we need in our country. I have a lot of experience with prospectuses relating to both equity and debt and I am old enough to remember,

and have produced prospectuses for, the 2003 prospectus directive. I have been invited, although I have not actually been, to many conferences to discuss the prospectus directive, the transparency directive and CARD—the consolidated admissions and reporting directive. This is very much in UK capital-raising mode. It is the devil that everyone knows, and these SIs grandfather through for British business a very important route to capital. It is not the only route but it is the listed route to capital here.

Here I want to say something very complimentary about the UK Listing Authority, which many noble Lords probably do not know. I have dealt with listing authorities in other countries as well, and the UK listing authority is exceptionally good. It is good at giving clear guidance and responding swiftly when it needs to give comments on a draft prospectus, and that is certainly not the case in some of the landlocked European places that are trying to snaffle our business. Again, it is of absolute importance that this SI goes through.

Turning briefly to the amendment of the noble Lord, Lord Adonis, I think that of the various amendments that he has tabled today, this is very much the back marker, in that I do not think the case for it is nearly as strong. I note that the original policy note for this came out on 21 November last year and the draft SI surfaced on 12 December and was laid on 21 January. So this is the 89th day that this has been around, because the policy note was spot on that there have not been any changes. In fact, the appearance of the policy note produced a tremendous number of emails into my inbox from all sorts of the expensive lawyers that the noble Lord, Lord McNally, was talking about earlier—

8.30 pm

Baroness Kramer (LD): Distinguished lawyers.

The Earl of Kinnoull: Yes, I am sorry, we have now decided that they are distinguished lawyers—and others of the huge number of advisory people in London who help people get access to capital. There were a lot of notes in November and more in December, and what is interesting is that they have all been positive on this SI. So I am not sure what a full consultation would have produced in excess of the current SI. Anyway, that is what we have, and I very much hope that it too will sail through shortly.

Lord Leigh of Hurley (Con): I very much agree with the noble Earl, Lord Kinnoull. His remarks were spot on. This has been around for some time, everyone in the industry is adamant that it is necessary for ongoing financial services success, and there is no quibble about its importance. The only quibble that I might have with the noble Lord, Lord Adonis—who has explained that he is not a financial services expert—is about what he was focusing on in note 10: the underestimate of 2,113 firms having to bear the cost of £700 each. Of course, the £700 is calculated assuming that firms will use lawyers at £330 an hour in each and every case. I can assure noble Lords that my firm, for one, will not be.

Baroness Bowles of Berkhamsted (LD): I declare my interest as a director of the London Stock Exchange, the relevance of which I am sure your Lordships can appreciate. I sometimes stop and wonder, "Okay, what would actually happen if we didn't have one of these SIs?" Prospectuses would not go away; we would just have some annoying things to do with the EU and our regulators having to deal with it that would be single-ended, and I am not sure how it would all work. I am not suggesting that that is a solution but I am not sure that we would entirely be falling into a bottomless pit.

I have two fairly generic comments to make about this SI. First, in paragraph 92—I am not quite sure of what; I think it is the impact assessment—there is quite a good explanation of the transfer of functions that has been going on for loads of the statutory instruments that quite often have been debated in a much more lonely way in the Moses Room. As has been said, the Treasury takes over the powers of the Commission and then the binding technical standards go to the regulators. By and large that means that we are not really going to see a great deal of detail because the basic legislation is already done and in our legislation, and from now on significant changes are probably going to come in the technical standards. Of course, we do not have an entirely equivalent position with the EU here because we do not get a vote on the binding technical standards, whereas the European Parliament gets a vote, as indeed does the Council, if it wishes to negate the equivalent standards that come from the European supervisory authorities. From that point of view, it is sad that there has not been some kind of public consultation because it might have been the only sniff that they will ever get at it, unless there are more people like me, who make a nuisance of themselves by responding to the stakeholder consultations that regulators put out.

That was a general statement. There are two asymmetries in this piece of legislation that illustrate what is going on quite a lot of the time. One is that we will continue to recognise EU international financial reporting standards. That is a good thing in terms of openness and the ability and ease with which a prospectus can be done in the UK, but the other side of the coin is that the EU has said that it will not recognise, for example, audits done according to UK IFRS. I do not know whether it will continue with that as a generic ploy—I think it hurts the EU rather than us—but it illustrates the difference in openness and the position that the UK is taking on these things. A similar asymmetry occurs with grandfathering. We are saying, "Okay, if the prospectus has already been agreed before we leave the EU, it will be honoured for the 12-month duration that it's allowed", whereas I am afraid the EU has said that it will be cut off at the time of Brexit.

I do not think that those asymmetries harm us at all, but there are quite a lot of them spread throughout and some do operate in a harmful way. There are some of these—what was it?—"distinguished" lawyers who advise companies that they are better to operate out of the EU because the EU will not recognise us, whereas we will recognise the EU. I am not suggesting that we could necessarily operate in a different way, but industry has not always got what it wanted out of these

[Baroness Bowles of Berkhamsted]
engagements and would have sometimes preferred the Government to be a little more equivocal and to have waited to see on one or two of these things, so that, if you like, the balance of lack of knowledge was roughly the same.

Lord Davies of Stamford: I am most grateful to the noble Baroness for giving way. She just said something that alarms me greatly, which is that there will now be two forms of IFRS, one for the EU and the other for the UK. That seems to be a matter of enormous significance, and extremely undesirable. It means that you will not be able to make exact comparisons between potential investments in the UK and the rest of the EU.

Let us suppose you are doing a study of the pharmaceutical industry and you find that, in earnings per share, Glaxo or AstraZeneca has been progressing at a certain rate over the years, and German equivalents such as Bayer have different figures for growth of earnings per share. You are making comparisons, but the comparisons are falsified because of the different accounting conventions. Some of them might be very substantial. For example, if you change the conventions on amortisation of good will, that can be a very substantial figure in a balance sheet in a profit and loss account; it has a bearing on how you account for it. This is very serious, because it would be a serious reduction in the transparency of the financial markets, which would be of great disadvantage to individual investors, of course, but ultimately to firms themselves and their ability to raise money, and to the health of the financial markets, which we all depend on.

Baroness Bowles of Berkhamsted: I thank the noble Lord for that intervention. A statutory instrument on the endorsement of IFRS will be coming along from BEIS—I am already taking an interest in that. IFRS will still be a global standard, but I think there are now 144 countries that adopt and endorse them, in their own particular way. They normally go straight through, but there is sometimes a certain amount of adjustment; the Japanese have made some adjustments, as have the Australians. In fact, the EU has also done so here and there. I do not think the intention is that the UK-endorsed IFRS will differ from the EU ones, but—I say this with regret—that does not stop the EU saying that it will not recognise as equivalent those that are endorsed in the UK.

Recognising the need for continuity and stability in the financial markets, although the UK might have made rather a mess of it at the Brexit negotiation level, we probably have the high ground when it comes to how we are dealing with the conversion of legislation, given that it has to happen. However, I am just pointing out that some of the asymmetries—not these two, particularly—cause some difficulty. I think the IFRS one, such as it is, will cause more difficulty to the EU than to the UK.

Baroness Altmann (Con): My Lords, I rise briefly to express my concern from these Benches that we may set some dangerous precedents in the processes that we are adopting in discussing and passing these SIs. I understand the difference between consultation and engagement on these issues but I have significant concerns. If the SI was indeed ready on 21 November, there has been time for a proper consultation, which does not seem to have occurred. It would be helpful to the House if we had more information on what engagement has taken place.

I fully accept that, as my noble friend Lord Leigh has said, industry is in favour of adopting these regulations, should we enter a no-deal scenario. However, there are reasons for us to be concerned across the House at the procedures taking place. We are being asked to approve legislation based on evidence that we perhaps feel is incomplete. I will not vote against the Government but I would like to express my concerns.

Lord Tunnicliffe: My Lords, in trying to take my role seriously, I staggered my way through the Explanatory Memorandum to try to understand this SI. It all seemed pretty straightforward. Basically, at the moment if you have a prospectus approved by an EEA regulator, it can be used in the UK. We are foolishly—no, that is not the party line, is it?—considering crashing out of the EU and we need some substitute regulation. It seems that the bulk of this statutory instrument is saying that whereas before you would have it approved anywhere in Europe, now if you want to market it in the UK it has to be approved in the UK. That seems to be a consequence of leaving the club. I regret that we have not had the level of consultation that Members would have liked but I find it extraordinarily difficult to believe that the alternative—not approving this SI—is anything like as consequential as the intrinsic costs. No matter how much consulting we did, we would still have come to the conclusion that we should approve the SI.

As ever, I tried to look at the Explanatory Memorandum in the context of the basic assumption of the withdrawal Act: everything is transferred and no new concepts are introduced. The one area where I have some questions is on a very narrow point, which is the exemption for certain government and local authority securities. The memorandum says:

> "Under the current Prospectus Directive rules, certain public bodies are exempt from the requirement to produce a prospectus when they undertake to offer securities to the public or request the admission of securities to trading on a regulated market. This includes EEA States, EEA local authorities, EEA central banks, and public international bodies of which one or more EEA States are a member".

The dilemma is whether we continue that exemption. There is an argument that we should but, in order not to recognise EEA states, there then comes the decision to extend that exemption.

There are two ways that that exemption is described. The third bullet point of paragraph 2.5 of the Explanatory Memorandum states:

> "Extending the existing exemption from the requirement to produce a prospectus and certain exemptions under the Transparency Directive that currently apply to certain EEA public bodies, to certain third country public bodies".

That would seem to be a controlled extension of the exemption, which took account of the countries to which the exemption was applied, whereas paragraph 7.22 says:

> "To address this deficiency, the government will extend these types of public bodies exemptions to the same types of public sector bodies of all third countries".

I think Venezuela is a third country, and the idea that the public offers of securities in Venezuela should be treated the same as those in other EEA states would seem somewhat anomalous.

8.45 pm

I would value, if the Minister can get something from the Box in time, a couple of assurances. The first is that the criteria for approval of prospectuses by the FCA remain substantially identical to the present EU states' regulations. Secondly, the extension of the public bodies exemption to certain or all non-EEA states seems a significant policy shift. Could he explain why this is desirable or even allowable under the European Union (Withdrawal) Act?

Lord Bates: Again, I thank noble Lords for their contributions to this debate, which has been very useful and has focused on two themes, as will I. The first is about process, the second about the level of consultation or engagement. I will try to put some points on the record and address the specific technical points raised by the noble Baroness, Lady Bowles, and the noble Lord, Lord Tunnicliffe.

What we are doing here is onshoring the regulations that already exist, which have gone through a scrutiny process involving the European Commission and regulators in the EU, the European Parliament and our own House. We are onshoring those to the UK. These are exceptional circumstances; they are not normal circumstances in which we are doing it.

The criticism seems to be: why have we waited so long? It is worth putting on the record here that the powers by which we are undertaking this process were set out in some detail by the EU withdrawal Act. I think I said, wrongly, that there were only 10 hours of consideration about the Section 8 process. In fact there were 12 hours of consideration of this process, which was then adopted by both Houses of Parliament.

However, the EU withdrawal Act did not get its Royal Assent until 26 June. I tried to find out—given that the enabling power we had was available on 26 June last year—when the first of our SIs was laid under this process, given that the charge that has been made is that the Treasury has been somewhat dilatory in its approach. The first SI was laid on 16 July. That is not exactly a long gap between Royal Assent, having the power and actually beginning the process. We started debating these for the first time—the noble Lord, Lord Tunnicliffe, the noble Baroness, Lady Kramer, and many familiar faces will remember our first hour in the Moses Room talking about the broad principles—on 17 October, and we have been going more or less every week since then with new SIs coming through.

I want noble Lords, particularly my noble friend Lady Altmann, who I know has a great deal of expertise in this area, to feel reassured that what we are dealing with here are rules and regulations which the industry was already operating by, but under a different regulatory system, that we are now bringing onshore and applying fixes using powers and scrutiny that were set out by the EU withdrawal Act. In a timely process, we have brought that forward. I cannot claim that that will satisfy everybody, but it is worth putting that position on the record.

On whether it was consultation or engagement, in many ways we are discussing the words and phrases of it. What we are talking about here is not a normal consultation. I readily accept the point made by the noble Lord, Lord Adonis, that the rules on consultation are laid down by the Cabinet Office. As set out, they involve a particular process. That is why we are always very careful when we say "consultation" at the Dispatch Box; it has a particular formula attached to it. We might instead say "engagement". We have consistently used the term "industry engagement" through this process. As came out in the contributions from the noble Earl, Lord Kinnoull, and my noble friend Lord Leigh, industry has been almost the wind in our sails, urging us to get on with this, because of the consequences of not having these safeguards in place, leading to a cliff edge. There has been a push. My noble friend Lord Bridges highlighted the report by Stephen Jones in his UK Finance newsletter. I see my noble friend Lady Wheatcroft in her place, so I hesitate to summarise it in this way, but in terms of the City there are effectively only two main bodies: there is UK Finance, which represents a substantial body of financial services, and TheCityUK. My noble friend Lord Bridges referred to UK Finance.

Lord Adonis: Everything that the Minister has said is based on the premise that we are dealing with a no-deal situation. All the bodies to which he has referred, given the choice between no deal, a deal and not having Brexit at all, would infinitely prefer having no Brexit or having a deal. The circumstances in which the Minister seeks to justify the use of what are essentially exceptional decree-making powers on the part of the Government are circumstances entirely of the Government's own making.

Lord Bates: This is a separate debate. The noble Lord is moving his amendment, expressing regret from your Lordships' House that there has been no consultation with industry on this measure. That is what his amendment says, as my noble friend Lord Bridges pointed out. I am not trying to raise the temperature to the same level as perhaps existed earlier in the Chamber; I am trying to maintain it at a level where we are focusing on the legitimate scrutiny which the noble Lord and the noble Lord, Lord Davies, are applying to this process. My noble friend Lord Bridges talked about UK Finance; I was about to quote TheCityUK.

Baroness Kramer: I thank the Minister but he is rapidly losing me. Had the noble Lord, Lord Tunnicliffe, not raised it just now, I would not have known that we are about to give approval for the issuance in the UK of Venezuelan sovereign bonds. That may not have been of particular interest to TheCityUK or UK Finance because of the way in which they look at the world, but I suggest that, had we had a 12-week public consultation, somebody would have come in with that information, which might have been of great interest to this House and created some pressure on government to re-examine that provision and clause. While industry bodies are crucial, there are many other stakeholders with an interest which by necessity have apparently been excluded from this process so far. Underscoring their importance is the issue in front of us today.

Lord Bates: If that is the case, it is happening under the existing rules. All we are doing is replicating those rules to avoid a cliff edge.

Lord Davies of Stamford: The Minister's description of the position is not at all what I understood. As I understood it from my noble friend Lord Tunnicliffe—who spotted this, to his great credit—at present the prospectus directive provides that certain state bodies within the EEA do not have to produce a prospectus. So the Government of France do not have to produce a prospectus if they go to the markets and seek more money. That is a reasonable situation. Far from not changing the substance when they switch from an EU directive to an SI affecting only this country, it appears that the Government have made a significant change in the wording. It no longer says "any EEA sovereign body"—or words to that effect—but "any sovereign body anywhere in the world". So, as the noble Baroness, Lady Kramer, pointed out, you would have a situation where the Government of Venezuela—if there is one—or of Eritrea, or wherever, could issue a prospectus in London. I cannot believe that that would really happen, but if it did it would be an invitation for the most appalling financial crisis. People would lose all faith in the whole system and the credibility of the prospectus arrangements that we have here.

Lord Bates: In those circumstances, we would be dealing with a third country. We would not be part of the EEA, so we could not give them the terms that apply within the EEA at the moment. We had quite a bit of debate on this last time. They would be a third country like any other. We want to develop a very close relationship, but that is a matter for negotiation and discussion.

Lord Tunnicliffe: The suggestion that the EEA does not exist, because we are out of the EU, is surely not valid. Many regulations specify how they apply to different countries. It would be entirely available to the Government to say that the exemption for public moneys should apply to EEA countries and not to other third countries. It is an entirely possible outcome; I am not saying whether it is good or bad. I want to know why the Government have moved from the EEA to everybody, including Venezuela.

Lord Bates: To allow the House to make progress on this, I will seek some advice on that point.

Baroness Kramer: Is there any hope that there might be some in-flight information on this? I had understood, from listening to this debate, that this is not a rollover of the current rules; it is a way to make the rules more palatable—presumably to many of the Brexit community—by saying, "We will recognise that EEA state organisations do not have to use prospectuses, but don't worry, we're not treating them as special, we're now going to allow it for every other country, even if they don't have equivalence". That is a policy shift. All I am saying is that a consultation would surely have surfaced that issue and the Government would have dealt with it in a different way.

Lord Bates: The official position here is that, under international trade law, we cannot favour some countries' public bodies and not others. It is all or nothing. I take it that I may have other opportunities this evening—perhaps into early morning—to put on record the words of Miles Celic, chief executive of TheCityUK, and of the Investment Association, responding to the engagement which they have had with us. A lot of the issues which have been raised will come up again and I will respond to them then.

Lord Adonis: My Lords, the longer this debate has gone on, like so many of our debates on these no-deal regulations, the clearer the case has become for having this consultation. In the last 15 minutes, prompted by my noble friend Lord Tunnicliffe, a very important issue has arisen about the distinction between EEA and non-EEA states when it comes to the new listings and publications regime. The noble Baroness, Lady Kramer, brought up the exceedingly important policy point underlying it. This is not my area—my role is simply to facilitate the proper scrutiny by Parliament of these important changes to the law—but it has become ever clearer as this debate has gone on, let alone all the others we have had, why there should have been proper consultation.

Some noble Lords have said that these are exceptional circumstances. I repeat the point that, first, these are exceptional circumstances of the Government's own making. We are not talking about acts of God here; these are acts of the Government and the Government could correct these acts. The second point was made by the noble Baroness, Lady Altmann, and is incredibly important. The precedents we are setting in the examination of the statutory instruments and the processes we require to put in place, given that we are going to have a cascade more—particularly if we do indeed Brexit at the end of this process, because we are going to have literally hundreds of these, year by year—will all be cited.

The noble Lord, Lord Bridges, says that it is all very well, we have engagement not consultation, and the noble Earl is relieved that his industry is not actually going to be trashed by this regulation, although there are many others that will do so in due course if we Brexit. He says that we should get on with it and that the people he knows are very grateful that they have at least had the opportunity to engage. I tell the House that, once these precedents start to be cited, we can wave goodbye to the normal Cabinet Office processes and procedures for conducting consultations. That is what will happen. That is what always happens once you start sliding down this kind of slippery slope.

The Minister quoted TheCityUK in respect of this instrument. It is important to understand TheCityUK. I have been reading its representations and what it thinks about how the Government have handled the Brexit process in relation to financial services. Shortly after the Brexit referendum, in September 2016, the same guy the Minister quoted said:

> "While at this stage it is too early to talk about conclusions from the Brexit negotiations, access to the single market on terms that resemble, as closely as possible, the access the UK currently enjoys is the top of our list".

That is what this organisation said.

Then, when the Government published the political declaration with the withdrawal agreement at the end of last year, which marked a significant retreat from the objectives that were set out before in terms of mutual recognition, TheCityUK said:

"Mutual recognition would have been the best way forward. It is regrettable and frustrating that this approach has been dropped before even making it to the negotiating table".

That is what these vital sectors of our economy think about what is happening at the moment. The fact that they are clutching at the straws of having no-deal regulations in place that prevent catastrophe if we leave in five weeks' time with no arrangement whatever with the EU is no excuse at all for the way this whole business is being handled and for the discarding of our normal processes and procedures.

I make no excuse for detaining the House at this hour. I would be very happy to carry on these debates with the Minister into the early hours if it would bring about change in government policy. He is normally very open to these matters, so maybe it is an invitation to keep going for a long period, because we might then get proper processes of consultation and engagement in place. As a poor substitute for that, I beg leave to test the opinion of the House.

9.04 pm

Division on the Amendment to the Motion.

Contents 21; Not-Contents 121.

Amendment to the Motion disagreed.

Division No. 1

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Motion agreed.

Benchmarks (Amendment and Transitional Provision) (EU Exit) Regulations 2019

Motion to Approve

9.14 pm

Moved by ***Lord Bates***

That the draft Regulations laid before the House on 24 January be approved.

The Minister of State, Department for International Development (Lord Bates) (Con): My Lords, this instrument, laid under the EU withdrawal Act, will fix deficiencies in UK law relating to the regulation of financial benchmarks to ensure that it continues to operate effectively post exit if the UK leaves the EU with neither a deal nor an implementation period. This legislation is important for the regulation and integrity of financial markets in the UK.

The SI makes amendments to retained EU law on financial benchmarks, known as the EU Benchmarks Regulation—BMR—to ensure that the UK continues to have an effective framework to regulate financial

benchmarks. Benchmarks are publicly available indices used in a wide range of markets to help set prices, measure the performance of investment funds or work out amounts payable under financial contracts. They play a key role in the financial system's core functions of allocating capital and risk, and impact on huge volumes of credit products and derivatives. The EU BMR sets requirements on benchmark methodology, transparency and governance.

Benchmarks must be approved to be used in the EU after the conclusion of the EU BMR's transitional period at the end of 2019. To provide benchmarks for use in the EU after this, benchmark administrators located in the EU may apply for authorisation or registration. Third-country administrators or benchmarks may be approved through equivalence, recognition or endorsement. Approved administrators and benchmarks are placed on to the public register maintained by the European Securities and Markets Authority.

In a no-deal scenario, the UK would be outside the EEA and outside the EU's legal, supervisory and financial regulatory framework. The UK legislation implementing the BMR and related legislation therefore needs to be updated to reflect this and to ensure that the UK's benchmarks regulation operates properly in a no-deal scenario. These draft regulations therefore make the necessary amendments to the retained EU legislation to ensure that these regimes are operable in a wholly domestic context.

First, this instrument amends the scope of the BMR to apply in the UK only. From exit day, benchmarks and administrators outside the UK will be subject to the onshored third-country regime and must be approved via recognition, endorsement or equivalence for use in the UK. Secondly, this instrument establishes a requirement for the Financial Conduct Authority to create a UK benchmarks register, which it will maintain from exit day. Following the transitional window in the BMR, supervised entities may use benchmarks in the UK only if either the relevant administrator or benchmark is on the FCA register. This instrument ensures that benchmark administrators that the FCA has already authorised or registered ahead of exit day are automatically migrated from the ESMA register to the FCA register on exit day. It does the same for third-country benchmarks or administrators that the FCA has already recognised or which UK firms have endorsed.

Thirdly, this instrument includes a new transitional provision to take EU and third-country administrators and benchmarks that appear on the ESMA register at exit day—as the result of an approval under the BMR outside of the UK—and temporarily migrate them on to the FCA register for 24 months, beginning with exit day. This will enable continued use of these benchmarks in the UK for a 24-month period, unless and until an application for approval in the UK is refused or unless they are removed from the ESMA register during this time. This will provide continuity for administrators and users, and minimise market disruption. Administrators or benchmarks subject to the transitional provision must be approved by the FCA under the third-country regime to enable their continued use in new contracts in the UK after this period.

Fourthly, under the BMR certain regulatory functions are carried out by EU authorities, primarily the European Commission and the European supervisory authorities, including ESMA. Once the UK leaves the EU, EU bodies will no longer have a mandate to carry out these functions, and therefore this SI transfers the functions of the Commission to the Treasury, including the power to adopt delegated Acts based on the underlying legislation. The SI also transfers the functions of ESMA to the FCA. This includes the power to make binding technical standards. This SI also removes obligations within retained EU law for the FCA to co-operate and share information with EU regulators as this obligation, with no guarantee of reciprocity, would not be appropriate as of exit day. However, the FCA will still be able to co-operate with EU regulators through the existing framework in the Financial Services and Markets Act as they are currently able to do with other third countries. The SI makes further minor amendments to retained EU legislation to ensure that the UK's benchmark regimes operate effectively once we leave the EU.

These measures, when taken together, will ensure that the UK retains an effective framework to regulate financial benchmarks. The Treasury has been working closely with the Financial Conduct Authority in the drafting of this instrument. It has also engaged with the financial services industry on this SI and will continue to do so. The Treasury published the instrument in draft form on 8 January to enhance transparency to Parliament, industry and the public ahead of laying. In summary, this SI is needed to ensure that UK benchmarks regulation can continue to operate effectively post exit and that the legislation will continue to function appropriately if the UK leaves the EU without a deal or an implementation period. I hope that noble Lords will join me in supporting these regulations and I commend them to the House. I beg to move.

Amendment to the Motion

Moved by ***Lord Adonis***

Leave out from "that" to the end and insert "this House declines to approve the draft Regulations because no consultation has taken place on them despite Her Majesty's Government's economic assessment indicating that transition and associated costs will be significant".

Lord Adonis (Lab): My Lords, the same issues basically apply on this regulation as on the last and I am not going to repeat the arguments. However, I would like to ask the noble Lord a question about the impact assessment which is published alongside the instrument. The costs in respect of this benchmark regulation, although considerable for each individual firm at £520, are less considerable overall because it is a much smaller number of firms. However, the footnotes to the impact assessment say:

"This refers to the current number of approved benchmark administrators. Given the regime is not yet fully in force, we expect this number may increase".

Can the Minister give some indication of what level the number is expected to increase to? Again, I am not familiar with this sector and I do not know whether

we are talking about it increasing by dozens or hundreds. However, I would like to get some sense of whether the total burden which this regulation alone is going to impose on the sector is in the thousands of pounds or the millions of pounds. It would be useful to have the figures. I would be grateful if the noble Lord could tell us what the estimate is, as the new benchmarks regime comes into place, of how these numbers will increase, so that we can put on the record a more accurate sense of what the actual burden is going to be.

Baroness Kramer (LD): My Lords, I have a really serious question that I want to put to the Minister. I am concerned that one of the effects of this SI—I am not going to oppose it because I think that we have no choice but to allow it through—is to separate ESMA from the UK regulators of benchmarks administered in the UK. In this House and elsewhere, and I am sure that I have said it myself, we frequently talk about the excellence of UK regulators, but I am afraid that the history of the UK regulation of benchmarks is one where we frankly have to hang our heads in shame. The Libor scandal, which was finally exposed six or seven years ago, had clearly been a scandal in play for at least a decade. It represented a prolonged period in which Libor particularly, but other benchmarks as well, was being manipulated by the banks to achieve particular outcomes.

The regulator did not identify the problem and, when the regulators decided that they must act after much of this was exposed—primarily by US regulators and in the US media—found that at the time it was not even illegal to manipulate a benchmark in the UK. Consequently, the regulators were pretty powerless. I think that a couple of people have been brought to account, but very few of those who were engaged in or knew about this process—and certainly not the raft of senior management that benefited from the exceptional profits that led to higher pay for chief executives and others, year after year. It was a huge scandal.

Immediately after the scandal was exposed, the United States took the view that the UK regulators were so weak and so essentially complicit in this area that the US itself, particular for any dollar-denominated transactions, should become the locus of benchmarks. Obviously the UK fought back, because it is an iconic role seen as significant to underpinning the UK's status as a global player in financial services. While I do not know many of the details, I believe that the link to ESMA—the reassurance that there is more than one set of regulator eyes covering the way in which benchmarks have been administrated—has been important in keeping the primary benchmarks in play in London.

I understand that the role of this SI is to say that benchmarks administered in the EU can still be used in the UK—that is almost the sole purpose. But, as I say, I am concerned that the future standing of the UK as the locus of most of the benchmarks used across the globe in nearly every transaction, no matter where that transaction takes place, is potentially undermined by the kind of separation that the Minister has just described. Is he aware of any aggressive moves by the United States to say that the situation is changing? We now have the UK regulator standing alone once again. We certainly hear from the UK a great deal of language about how regulation needs to become lighter touch and should not be so heavy-handed, and how we should be much more inclined to allow greater risk taking and greater profit taking. Will this become the occasion where the United States acts to use its weight, its authority and its legislative force to try to undermine London as a locus? Should there be something in the whole language that surrounds this of an ongoing co-operation and element of supervision that continues to involve ESMA to provide a defence for London in this arena?

Lord Mackay of Clashfern (Con): My Lords, I have a great respect for the noble Lord, Lord Adonis, as I heard him many times answering questions as a Minister. The answers were always clear and a full answer to what he was asked. I also remember his difficult time as a Minister of State in the Department for Education, struggling with the impediments being placed to the implementation of his policy by judicial reviews, which he described in one of his books. But I have listened to a good number of these debates we have been having recently, and I regret to say that I cannot agree with the way in which he approaches this matter. I think that this is all part of the decision to leave the EU that the electorate took, advising Parliament that they wished that to happen.

Industry generally, and the financial industry in particular, is well aware of the situations that may arise as a result of that. Therefore, I would expect representatives to get in touch with the Treasury, for example, if they had any concerns in relation to these instruments. I wonder whether the noble Lord, Lord Adonis, has had any communication from any financial services people as to whether or not they would like him to succeed in his amendment to decline to approve these regulations.

9.30 pm

I am old enough, sadly, to remember a time before there was any question of consultation in relation to Bills before Parliament. It was thought that the publicity attending their being laid in Parliament was enough to bring out the views of people about them. The person who introduced consultation in the first instance was Lord Scarman, as the chairman of the Law Commission, when I was a part-time Law Commissioner in Scotland. It gradually became something that government wanted to do—but, like any other tool, it must be used with discretion.

The type of regulation we are dealing with now is highly technical; as far as I am concerned, it is extremely technical. I know a little about Libor, but whether criminal acts were committed in the course of things, I am not sure, and it was a difficult situation for the regulators. The truth is that, if regulators work well, they are amenable to knowing what other regulators have done, and the mere fact that we leave the EU does not mean that regulators here will not know what ESMA is doing.

It is also important that this SI is a consequence of the withdrawal Act. It is part of the arrangement and decision that the Government made to make EU law—as operating in this country under the authority of the EU up to exit day—the law of this country after exit

day as fully as possible. Therefore, this sort of SI comes into effect not only in a no-deal situation but in a deal situation, where the question arises about the implementation period. At the moment, needless to say, there is no Act of Parliament implementing that. Therefore, we are dealing with a situation where the only Act of Parliament is the withdrawal Act and the powers it gives—the principle of which is as I have said. It could be that, if the Prime Minister's deal or something like it were approved by the House of Commons, an implementation period of two years or thereabouts would be involved. But that would require the implementation period to be made effective by an Act of Parliament, which would modify the effect of the withdrawal period. For example, if ESMA was to have jurisdiction here after exit day, it would be as a consequence of an agreement in the withdrawal agreement and made effective in this country by an Act of Parliament implementing it.

In my submission, the appropriate consultation for this sort of enterprise is one that looks at the detail in the way that has been described, and a full public consultation would be an absolute waste of time. I feel pretty certain that the number in this House who are very familiar with the details of this particular situation is not very large—certainly, the proportion in the country as a whole is not large. Surely the right thing to do is to speak to those who know about it and have an interest in it, and find out how they think that it should be developed. That is what has happened. At the moment, it is not only in a no-deal situation that this would work. Of course, it may be that, if there is a deal, there will be consequential legislation, which would affect the present statutory position.

The Earl of Kinnoull (CB): It is a pleasure to follow that stream of logic, with which I agree entirely.

I wish to say two things. The Explanatory Memorandum was published initially on 23 November, so we are now in the 87th day after that. It generated a great deal of comment, which was widely circulated to people who were interested. Again I rang round various people in the course of the past few days and no one has raised any objection to this. In fact, everyone has said how important it is.

In answer partly to what the noble Baroness, Lady Kramer, said, I notice that paragraph 2.6 of the Explanatory Memorandum states:

"Without these provisions, the FCA would not have an effective framework designed to prevent benchmark manipulation in the UK, affecting the integrity and attractiveness of the UK's financial markets".

The Explanatory Memorandum is right behind the noble Baroness in her point about the necessity of having the benchmarks properly looked after.

I have looked at a list of all the benchmarks and it is worth saying that many of them have been invented here in London—they are British—and so it is unsurprising that the naughty behaviour took place here and that the skills lie with our own regulators to prevent misbehaviour.

Baroness Kramer: Part of the problem is that it was not our regulators that identified years of benchmark manipulation but the US regulator and the US media. We need to be clear about that. Our regulators came in late in the day and only after a huge amount of pressure and exposure.

Secondly, while banks were manipulating Libor and some of the foreign currency exchange rates in order to increase their profits to suit certain circumstances, they were doing it, they thought, quite openly. People were shouting at each other across various trading floors that X would like the benchmark set here and Y bank would prefer it to be set there and whether they could do them a favour. The Bank of England was then implicated in instructing various banks to manipulate the rate at the time of the financial crisis in order to disguise from the wider market how difficult banks were finding it to raise financing. So, rather than reporting the actual rate they were being offered in the market, they were reporting a lower rate to suggest that they were being looked at more favourably; and because the Bank of England saw this as necessary for financial stability, it is itself implicated in some of the manipulation.

One of the concerns that I have that underlies this is that the FCA will be in a position with this SI to be the administrator, but it now becomes the sole administrator rather than one working in partnership with other EU administrators. That could lead to a vulnerability, with the challenge coming not from the EU but from the United States.

The Earl of Kinnoull: Thank you for that. I do not want to be the defence attorney for the regulators but the FCA would argue that it did not have the relevant powers beforehand. However, I shall not go there.

Again, this will be the effective framework to enable the FCA to do that work. Without this SI there is no framework.

At the end of the paragraph in the Explanatory Memorandum headed "*Why is it being changed?*" it states:

"If this instrument were not made, there would be significant market uncertainty among UK and third country providers over whether they would still need to be compliant by 2020, and among users over which benchmark they could lawfully use".

In other words, it is a complete mess. The size of the markets that are affected by these benchmarks is vast. I am not sure that I quite understand the reasoning behind the amendment moved by the noble Lord, Lord Adonis, to decline these regulations. It seems he is trying to take aim at a government process and is actually clobbering the City. I feel that is wrong and I very much hope he will not press his amendment.

Lord Tunnicliffe (Lab): My Lords, I am afraid that despite my efforts I can find nothing wrong with this statutory instrument. It seems to be perfectly straightforward and necessary to manage the situation. I thank the noble Baroness, Lady Kramer, for reminding us of the Libor scandal. It was a dreadful period in British financial services history, and we forget it too easily, I fear.

If my noble friend intends to divide the House on his amendment I make it absolutely clear that he will not be supported by the Opposition Front Bench. We would support a fatal amendment on a statutory

instrument only in exceptional circumstances and only after very careful consideration of the reasons and widespread consultation. We will therefore be sitting on our hands if my noble friend divides the House.

Lord Bates: I again thank the noble Lord, Lord Tunnicliffe, for his responsible approach to these regulations. It is quite right that there should be scrutiny, but the amendment which we are now debating would effectively be fatal. It would prevent these regulations appearing on the statute book when their purpose is, as the noble Earl, Lord Kinnoull, and my noble and learned friend said, to avoid the type of abuse of market power and benchmarks that was sadly the case in the past. To avoid all the progress we have made in that in the event of no deal would be regretted.

However a number of points were made, including by the noble Lord, which should be responded to as part of the scrutiny, so I shall launch into them, if I may. The noble Earl, Lord Kinnoull, asked why it is important to have this SI in place. If it were not it would cause significant legal uncertainty and disruption for firms about how they were able to provide benchmarks for use in the UK and for other users about which benchmarks they could legally use. Many of them have already submitted applications or created business models on the basis of market compliance with the regime. That is why the noble Earl was right to cite paragraph 2.6 of the Explanatory Memorandum and my noble and learned friend was right to raise the importance of these regulations.

The noble Baroness, Lady Kramer, questioned the ability of the FCA to enforce these regulations given the previous situation with the Libor scandal. We do not accept that EU regulators are better regulators than ESMA. The EU regulation was created after the Libor scandal and introduced a comprehensive framework to ensure that the business integrity of benchmarks is maintained. We are confident that the FCA will enforce these regulations. She also asked about how EU and UK regulators will co-operate going forward. The FCA will use the information to ensure that on exit day any administrators or benchmarks which are on the ESMA register at 5 pm on the day exit occurs are copied over to the FCA register. FCA-approved benchmarks or administrators will be copied over permanently and those approved by other EU national competent authorities will be copied over for a temporary period of 24 months. This SI removes obligations in retained EU law for the FCA to co-operate and share information with regulators. The FCA will still be able to co-operate with EU regulators through the existing framework in the Financial Services and Markets Act.

The noble Lord, Lord Adonis, asked how we arrived at the number of firms affected by this SI. The number is the current number of approved benchmark administrators. The regulators that we are working with are seeking to understand the full range of administrators that will seek approval, but it is difficult to provide a final figure for the number located in the UK and the EU.

I think that that covers most of the points raised. Again, I thank noble Lords for their contributions on this SI. On behalf of the Government and the Opposition—and I am sure that on this occasion I speak for the Liberal Democrat Benches and perhaps the Cross Benches too—I express the hope that, despite the scrutiny that, rightly, is called for in the amendment, the noble Lord will not press it and will accept the regulations. It is necessary to put them in place in order to protect investors in this country.

9.45 pm

Lord Adonis: My Lords, I shall not press the amendment. I am extremely grateful to, and flattered by, the compliment paid by the noble and learned Lord, Lord Mackay. He said that he does not understand my opposition to these regulations, but he will appreciate that there is no way in which I could conceive of being a Minister proposing to put arrangements in place for a no-deal Brexit. I would regard that as a fundamental betrayal of the national interest. Therefore, if he accepts as a premise that the whole activity that the state is engaged in at the moment is, in my view, fundamentally illegitimate, he might accept that the course that I am pursuing is at least logical.

Lord Mackay of Clashfern: Perhaps I should respond by saying that I did understand that. Fundamentally, the noble Lord, Lord Adonis, believes that his wisdom is superior to that of the 17 million who voted the other way.

Lord Adonis: And I am very anxious that they should have an opportunity to cast their vote on the deal which they can now see but which they did not know about three years ago because it did not exist. I am fairly confident that if the electorate of this country had any idea that three years ago they might have been putting in place arrangements for a no-deal Brexit, they would not have gone anywhere remotely close to the situation that we have today. However, on that note, I beg leave to withdraw.

Amendment to the Motion withdrawn.

Motion agreed.

Packaged Retail and Insurance-based Investment Products (Amendment) (EU Exit) Regulations 2019

Motion to Approve

9.47 pm

Moved by ***Lord Bates***

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

The Minister of State, Department for International Development (Lord Bates) (Con): My Lords, the Treasury has been undertaking a programme of legislation to ensure that, if the UK leaves the EU without a deal or an implementation period, there continues to be a functioning legislative and regulatory regime for financial services in the UK. The Treasury is laying SIs under the EU withdrawal Act to deliver this. A number of debates on these SIs have already taken place both in

this House and in the House of Commons. This SI is part of that programme. It will fix deficiencies in retained EU legislation relating to packaged retail and insurance-based investment products, or PRIIPs, to ensure that it continues to operate effectively post exit. The approach taken in this legislation aligns with that of other SIs being laid under the EU withdrawal Act, providing continuity by maintaining existing legislation at the point of exit but amending it where necessary to ensure that it works effectively in a no-deal context.

I turn to the substance of the SI, which amends the PRIIPs regulation. PRIIPs are investment products offered to retail investors and considered as an alternative to, for example, depositing cash in a savings account. They include financial products such as investment funds, life insurance policies that have an investment element, derivatives and structured investment products. As such, PRIIPs are primarily sold by asset managers, insurers and banks.

The EU PRIIPs regulation introduced a standardised disclosure document called a key information document, or KID, to be provided when a PRIIP is advised on or sold to retail investors. It came into application on 1 January 2018. The PRIIPs regulation aims to make it easier for retail investors to compare similar financial products by requiring certain information about the product, such as the risks, performance scenarios and costs, to be disclosed in a standardised way on the KID. In a no-deal scenario, the UK would be outside the EU and outside the EU's legal, supervisory and financial regulatory framework. The retained PRIIPs regulation therefore needs to be updated to reflect this and to ensure that the provisions work properly in a no-deal scenario.

First, the SI amends the territorial scope of the retained PRIIPs regulation to reflect the UK's withdrawal from the EU. Currently, the EU regulation applies to any firms that manufacture, advise on or sell PRIIPs to investors in the EU. This SI ensures that, after exit day, the retained PRIIPs regulation will apply only to those firms that manufacture, advise on or sell PRIIPs to retail investors in the UK.

Secondly, the PRIIPs regulation contains an exemption from its requirements for certain securities issued or guaranteed by EEA public sector bodies. This SI expands the exemption, so that such securities issued by public sector bodies in the UK or any other third country are covered within the exemption. This is to ensure that no new securities are captured in the scope of the PRIIPs regulation in the UK on exit day, and that the UK treats EEA member states and third countries equally.

Moreover, the current regulation contains an exemption from its requirements for all Undertakings for Collective Investment in Transferable Securities funds until 31 December 2019. UCITS funds are a common type of retail investor fund and must be domiciled in an EEA state. Both UK and EEA-domiciled UCITS are sold widely in the UK and are subject to a specific disclosure framework set out in the UCITS directive, separate to the PRIIPs disclosure framework.

The instrument maintains this exemption for both UK and EEA UCITS until 31 December 2019. This is to ensure that both UK and EEA funds are able to continue to adhere to the existing disclosure framework for UCITS until the exemption ends. Furthermore, the SI transfers the functions carried out by EU bodies under this regulation to the relevant UK authorities. Following exit, EU bodies will have no mandate to carry out such functions in the UK. The instrument corrects this deficiency by transferring the functions of the European Commission to the Treasury, and the functions of the European supervisory authorities to the FCA. Powers to make and correct deficiencies in binding technical standards are also transferred from the ESAs to the FCA. This is in line with the approach taken across financial services legislation.

Finally, this SI deletes provisions in the retained PRIIPs regulation that will become redundant once the UK leaves the EU. It deletes certain powers for and references to EU regulators and EU member states, as well as administrative sanctions powers for national regulators which have already been brought into UK law and granted to the FCA through UK implementing legislation: the Packaged Retail and Insurance-based Investment Products Regulations 2017. The instrument also removes obligations in the PRIIPs regulation for the FCA to co-operate and share information with EU counterparts, as this obligation would not be appropriate after exit day. The FCA will instead be able to use existing domestic provisions for co-operation and information-sharing under the Financial Services and Markets Act 2000, to share information with EU authorities.

The Treasury has been working very closely with the FCA, and has engaged with industry bodies in the drafting of this instrument. On 22 November 2018, the Treasury published the instrument in draft, along with an explanatory policy note to maximise transparency to Parliament, industry and the public ahead of laying. The Government recognise the issues raised by industry regarding problems with the underlying PRIIPs regulation and KIDs. I fully recognise the significance of these issues. However, the EU withdrawal Act does not give the Government the power to make general policy changes to retained EU legislation. We can use the powers only to fix deficiencies arising from the UK's exit from the EU.

However, the FCA has taken action in relation to issues with the PRIIPs regulation to date. The FCA launched a call for input in July 2018, to seek input from firms and consumers on their initial experiences of the requirements introduced by the PRIIPs regulation. This call for input closed for responses on 28 September 2018 and the FCA is in the process of reviewing all responses. It expects to publish its feedback statement in quarter 1 this year.

In summary, the Government believe that the proposed legislation is necessary to ensure that the disclosure framework for PRIIPS continues to function appropriately if the UK leaves the EU without a deal or an implementation. I hope noble Lords will join me in supporting these regulations, which I commend to the House.

Amendment to the Motion

Moved by ***Lord Adonis***

Leave out from "that" to the end and insert "this House declines to approve the draft Regulations because no consultation has been undertaken despite Her Majesty's Government's economic assessment indicating transition and associated costs will be significant."

Lord Adonis (Lab): I have nothing to add to my remarks on the previous regulations. The issues are exactly the same, regarding consultation and the conduct of assessments.

Lord Tunnicliffe (Lab): When I read the SI with care, it seemed straightforward and to do its work. I was seeking to see if there was any new policy, and the new policy that I discovered was the Venezuela point. I hope the Minister will be kind enough to write to me explaining whether "all countries" has that worldwide application and why the Treasury does not perceive that there is any danger in such an extension. Other than that, I am entirely content for this SI to go through.

Lord Bates: I am happy to give the noble Lord that assurance; I will write and be clear on that question. I thank the noble Lord, Lord Adonis, for not pressing his amendment.

Lord Adonis: I beg leave to withdraw the amendment.

Amendment to the Motion withdrawn.

Motion agreed.

Public Record, Disclosure of Information and Co-operation (Financial Services) (Amendment) (EU Exit) Regulations 2019

Motion to Approve

9.57 pm

Moved by ***Lord Bates***

That the draft Regulations laid before the House on 21 January be approved.

The Minister of State, Department for International Development (Lord Bates) (Con): My Lords, as a great deal of financial services activity takes place across borders and across regulatory regimes, the ability of national regulators to co-operate with each other and to exchange information is vital if they are to discharge their supervisory functions effectively. As noble Lords will know, an important function performed by financial services regulators is the gathering of supervisory information from firms. Regulators use this information so they can ensure that regulated firms are operating in a way consistent with regulatory requirements so that they are alerted to any development that may need supervisory intervention.

The information gathered by regulators is often confidential and commercially or market-sensitive, so it is right that there are strict rules and safeguards on how regulators share such information with other regulatory authorities. EU law currently plays an important role in setting these rules. In order to ensure the effective functioning of the single market in financial services, the EU has developed a joint supervisory framework for national regulators and supervisory bodies in the EEA. This makes co-operation and the sharing of certain supervisory information between EEA national regulators mandatory. In addition to that, the EU has established the European supervisory authorities—ESAs—which are responsible for co-ordinating the approach of EEA national regulators. Co-operation and the sharing of certain information with the ESAs is also mandatory for EEA national regulators.

As well as setting out what information should be shared, EU rules include restrictions and safeguards. In the UK, these rules are implemented by Part 23 of the Financial Services and Markets Act 2000—or FiSMA, as it is known—and the Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001. For third-country authorities, there are additional restrictions when disclosing confidential information. The UK regulator may need to be satisfied that the third-country authority has protections for confidential information in place that are equivalent to those of the EU. There may also be a requirement to enter into a co-operation agreement with the third-country authority. In addition, if the UK regulator is disclosing confidential information to a third-country authority which originated from an EEA authority, the UK regulator may need to seek the consent of the EEA regulator which originally disclosed the confidential information.

10 pm

If the UK leaves the EU without an agreement, the EU has confirmed that it will treat the UK as a third country and the UK will also need to treat EEA states as third countries. The UK will be outside the single market and the EU's joint supervisory framework. References in this legislation to this framework, and to EU legislation and EU bodies, will be deficient and will need to be corrected so that the UK's disclosure rules for confidential information will work effectively.

In particular, the rules will need to be amended to reflect the third-country relationship which will exist between the UK and EEA states. After exit, it would not be appropriate to provide different rules and protections on the disclosure of confidential information by UK authorities depending on whether the confidential information is being shared with an EEA authority or authorities of non-EEA states. If the rules were left unamended, the UK would afford additional protections and less onerous restrictions to EEA states compared with other third countries.

In addition, where there are currently requirements to seek the consent of an EEA authority before onward disclosure of information, these requirements will be retained only if an equivalent requirement exists in relation to seeking consent from a non-EEA authority.

The instrument also provides for a transitional arrangement which will ensure that any confidential information received by a UK regulator before exit day will continue to be treated in accordance with the relevant provisions that existed before exit day.

While it is necessary to amend the UK implementation of rules around disclosure of confidential information to ensure that they continue to operate effectively once the UK is outside the EU, it must be stressed that these amendments are in no way intended to diminish the level of co-operation that exists between the UK and EEA regulators. The Government and UK regulators believe that effective co-operation and co-ordination is essential for the effective supervision of financial services. UK authorities will be doing everything possible to ensure that effective co-operation continues. UK regulators have always been key players in the global supervision of financial services, as is demonstrated by the close and co-operative arrangements we have with regulators in countries outside the EEA.

After exit, it will be necessary for the UK regulators to enter into co-operation agreements with EEA national regulators and with the European supervisory authorities. These agreements will help ensure that a high level of co-operation and information sharing will continue. Both the Government and UK regulators attach very high priority to putting these agreements in place, and I am pleased to report that UK and EU regulators are making good progress in their discussions to finalise these agreements. The Treasury has been working very closely with the Bank of England, the PRA and the FCA in the drafting of this instrument. There has also been engagement with the financial services industry, including publication of this instrument in draft, along with an explanatory policy note, on 9 January this year.

In summary, the Government believe that the proposed deficiency fixes are necessary to ensure that the UK has a clearly defined and operable set of rules for the disclosure of confidential information. I hope colleagues will join me in supporting these regulations. I commend them to the House.

Amendment to the Motion

Moved by ***Lord Adonis***

At the end insert "but this House regrets that no consultation was undertaken on these Regulations."

Lord Adonis (Lab): I do not have anything to add on consultation or assessment, but the Minister just said that discussions with the EU about a new regime are in progress. He was speaking extremely quickly, but I think he said that good progress was being made. Could he tell the House whether he expects that an agreement will be reached by 29 March? I beg to move.

Lord Sharkey (LD): We support this statutory instrument, but I have a couple of quick questions. In paragraph 2.7, the EM notes that:

"In certain exceptional instances, a similar requirement to seek consent from the originating regulator applies where the confidential information originated from a third-country regulatory authority".

That seems a little opaque. I could not find anywhere in the SI what these exceptional circumstances might be. That may well be my fault but I would be grateful if the Minister could point me at the relevant parts of it or, even better, explain what these circumstances are.

Finally, I was puzzled as to why the SI's introduction of transitional provision, described in paragraph 2.16 of the Explanatory Memorandum, was necessary. That paragraph says:

"In addition, this instrument introduces a transitional provision so that any confidential information that was received on or before exit day will continue to be treated in line with the relevant provisions in EU regulations and directives as they had effect before exit day".

That raised two questions for me. The first is one of necessity. Would this eventuality not be covered by the general transposition of EU law into UK retained EU law? The second is to do with the wording of the paragraph in the EM, which refers to information received on exit day. But we are scheduled to leave the EU at 11 pm on exit day, so what happens to confidential information received between 11 pm and midnight on exit day?

Lord Tunnicliffe (Lab): My Lords, looking through this statutory instrument to see whether there were any policy shifts, as far as I can understand it, the EEA countries have better protection for their confidential information than third countries do. This statutory instrument takes that special protection away and then requires agreements to be concluded. That would seem to be the wrong way around. I would have thought that the protection which the EEA states have—that before the information can be passed on, permission must be sought from the originating country—would be better extended to other third countries. This would be a better position for the management of confidential information than what is referred to in the Explanatory Memorandum as a series of agreements, followed by instructions to staff. It is a bit late to have a debate on such an obscure point but if the Minister were to read *Hansard* tomorrow and send me a letter on this point, I would value that.

Lord Bates: Again, I thank noble Lords for their scrutiny and questions. I give notice that I may need to write on one or two of them, if they would accept that, but I will say a little about how the negotiations are going. In my enthusiasm to communicate the details of this instrument to the House, I perhaps went a bit fast but I did indeed say that the negotiations were going well.

UK and EU authorities have made good progress in their discussions on a memorandum of understanding, which includes essential provisions for confidential information-sharing and co-operation. It is our hope that these will be in place by exit day. Both UK and EU regulators recognise the importance of effective co-operation and are working hard to finalise co-operation agreements. We fully expect these agreements to be in place by exit day, as part of preparations to deal with a no-deal scenario. More broadly, Members will be well aware of the top priority we have attached to putting in place a range of transitional arrangements, designed to mitigate the impact of no deal.

The noble Lord, Lord Sharkey—eagle-eyed as ever—spotted the gap between 5 pm and 11 pm. I am guessing that it is a standard cut-off point—a sort of close-of-business setting on the day in question—but perhaps that is not the case. I am told that exit day is defined in the EU withdrawal Act as 11 pm on 29 March, specifically; yes, I am aware of that. I think the point was made that it says 5 pm but there might be something else winging its way to me.

The noble Lord, Lord Sharkey, also mentioned confidential information and made a good point on that. Under Section 348 of FiSMA, "confidential information" means information which,

"relates to the business or other affairs of any person",

that was received by the FCA, the PRA, the Bank of England, the Secretary of State or specified people instructed or employed by them for the purpose of discharging their functions; and it is not prevented from being confidential information because, for example, it has already been made available in public.

I will take advice from my noble friend Lord Young and perhaps just pause there with the assurance that I will write and follow up on this, and thank noble Lords for their contributions.

Lord Adonis: At this late and extreme hour, the noble Lord, Lord Sharkey, seems to have discovered a missing six hours in the regulatory regime that is going to govern the financial services industries of the United Kingdom and Europe, and what might happen for the exchange and disclosure of confidential information. Assuming that those six hours can be repaired overnight, I beg leave to withdraw.

Amendment to the Motion withdrawn.

Motion agreed.

House adjourned at 10.10 pm.

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