Vol. 795
No. 235

Tuesday
15 January 2019

PARLIAMENTARY DEBATES
(HANSARD)

HOUSE OF LORDS
OFFICIAL REPORT

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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

Tuesday 15 January 2019

2.30 pm

Prayers—read by the Lord Bishop of St Albans.

Personal Statement

2.36 pm

The Advocate-General for Scotland (Lord Keen of Elie) (Con): My Lords, with the leave of the House, I would like to make a short statement to correct something I said in closing last night's debate. I attributed to my noble friend Lord Forsyth of Drumlean some comments which were in fact made by my noble friend Lord Lamont of Lerwick. I have apologised to my noble friend Lord Forsyth of Drumlean, and I am grateful for the opportunity to correct the record.

Gambling: Children

Question

2.36 pm

Asked by ***The Lord Bishop of St Albans***

To ask Her Majesty's Government what assessment they have made of the prevalence of gambling among children and young people.

The Parliamentary Under-Secretary of State, Department for Digital, Culture, Media and Sport (Lord Ashton of Hyde) (Con): My Lords, protecting children is a priority for the Government. There are strict controls to prevent underage gambling. In 2011, 23% of 11 to 15 year-olds had gambled in the last week, including with friends. Last year, it was 12%. On the other hand, the Gambling Commission's *Young People & Gambling 2018* report shows an increase to 14%, though not to earlier levels. Sample sizes are small, and we do not know if this is a trend. We are of course monitoring the situation very carefully.

The Lord Bishop of St Albans: I thank the Minister for his reply. At a time when the gambling industry is spending about £1.5 billion a year on encouraging gambling, when children are seeing three gambling adverts every day on average and when 55,000 teenagers in this country are now classified as problem gamblers, we need to look at what is happening particularly online, where young people most often see the adverts, which is outside all the previous criteria for regulation. What are Her Majesty's Government doing to regulate online advertising, which is particularly focused on our young people?

Lord Ashton of Hyde: My Lords, the right reverend Prelate is right that advertising is increasingly going online, although it is not only there. Of course, there are already strict rules to ensure advertisements do not exploit vulnerable people or specifically target children. Those apply online as well. The Advertising Standards Authority has made it clear that age-restricted advertisements online must be actively targeted away from children. However, the evidence is not clear, so GambleAware will publish significant research on the impact of advertising on children this year, including information about how much they see online. The ASA also proactively monitors online advertising, and we will consider all the new evidence carefully.

Lord Robathan (Con): My Lords, online advertising for gambling is relatively recent. Frankly, while I do not believe in banning things, this is feeding gambling addiction and many families are badly affected by this. Although I am against banning things, on this occasion I say to my noble friend that we should ban it.

Lord Ashton of Hyde: My Lords, I am glad that normally my noble friend does not ban things without the correct amount of evidence. The issue here is that there is actually not conclusive evidence on the harms that this does. We are of course aware that there is certain evidence out there, and we are commissioning more. GambleAware is going to look at the influence and extent of online advertising and the effect that it has. If there are clear lessons to be learned, we will take action on that.

Lord Hunt of Kings Heath (Lab): My Lords, is the Minister aware that there are games aimed at children that, although not strictly classified as gambling, actually encourage them into gambling habits? There are also games like mystery boxes that essentially are open to children and could be considered as gambling. Surely we need a much more proactive approach to doing something about this.

Lord Ashton of Hyde: My Lords, that is exactly why the Gambling Commission is consulting on requiring age verification before allowing free-to-play demo games to be downloaded. However, that will apply only to games hosted by gambling operators. We are aware of the problem of games and are waiting for GambleAware to do its consultation, and we will certainly take the issue that the noble Lord has raised into account.

Lord Browne of Belmont (DUP): My Lords, the most common way in which children and young people enter the route into gambling is by the purchase of scratch cards and lottery tickets. These are prominently displayed in many outlets, and it is often difficult for the seller to determine the age of the customer. Is it not time that these cards were put behind shutters, in the same way that cigarette packets are, so as not to entice young people to enter the route of gambling?

Lord Ashton of Hyde: My Lords, although there may be an intuitive link there, there is not actually conclusive evidence that that is how problem gambling starts. The other point to make is that, while I am not sure that it is a majority, a significant number of children who buy scratch cards and National Lottery-type products do it with their parents' money and indeed with their parents actually present. The question of whether 16 and 17 year-olds should be allowed to use the National Lottery will be part of the review for the fourth competition for the next national lottery licence.

Lord Storey (LD): My Lords, we know that half a million young people are gambling regularly. I am concerned about the support that we can give to those

[Lord Storey]
young people who become addicted. I wrote a Written Question to the Minister and I was very grateful for his detailed reply. We have a national facility, the National Problem Gambling Clinic, and I think we are due to open one in Leeds, but that covers only a small percentage of young people who need support. There is a charity called Beacon Counselling, which is working with the NHS trust in Lancashire to provide a facility. Could the Minister look at that and see how we could roll it out to the rest of the country?

Lord Ashton of Hyde: I certainly will look at that. We are looking at treatment for all problem gamblers and for children in particular. That is why I am pleased that the NHS long-term plan is committed to expanding dedicated support for those experiencing problems with gambling. As the noble Lord says, GambleAware is setting up a new clinic in Leeds. We will see how that goes, and we are working with the NHS to see if more treatment centres are needed.

Lord Griffiths of Burry Port (Lab): My Lords, we have had a number of questions relating to gambling in recent times. Indeed, there is another Question tomorrow relating to advertising, which is why I would like to ask a question elsewhere in the arena, as it were. I have seen the figure of 450,000 mentioned—it comes in the Gambling Commission report—but a different interpretation is put on it according to where people come from. I have a briefing paper here from Sky Betting & Gaming that puts an entirely different interpretation on the figure and even questions the way in which it is being used by those in favour of clamping down. So my question is—and this has come up in debates again and again—is it not time, in all these consultations and studies that are being done, that we had a serious, focused look at compiling evidence upon which comments can be made? At the moment, there is far too much of a fissiparous nature that allows people to draw whatever conclusions they like. I just wanted to use that word; I am sorry, it just came to me. I wanted to put the Minister on the back foot. Secondly—

Noble Lords: Too long!

Lord Griffiths of Burry Port: Have I finished?

Noble Lords: Yes.

Lord Ashton of Hyde: I understood some of his question. The noble Lord is right: as I keep on saying, the evidence is not certain, so we are having a serious look at it. For example, Public Health England is doing wider research, which it will produce in the second half of this year, measuring the evidence for gambling-related harms. It is looking at all the available evidence and trying to get some consensus about what the truth is—reading the newspapers, I find that one moment you get a report saying one thing and the next you get one on a different basis. We are taking an overall view, and there is a significant amount of other research that we are doing this year through GambleAware and the Advertising Standards Authority.

Dentistry: Children

Question

2.46 pm

Asked by ***Lord Storey***

To ask Her Majesty's Government what steps they are taking to reduce dental decay and gum disease in children.

Baroness Manzoor (Con): My Lords, improving oral health outcomes, particularly for deprived children, is a Public Health England priority. PHE has established the Child Oral Health Improvement Programme Board to improve the oral health of children, with a substantial programme of work involving a wide range of partners. In addition, as the noble Lord will know, government measures to reduce sugar consumption, along with the soft drinks industry levy, will have a positive effect.

Lord Storey (LD): I thank the Minister. I was surprised and disappointed that when I asked her a Written Question about how many registered dental practices we have, she replied that the Government do not have the information available.

I want to talk about units of dental activity. The Minister will know, I hope, that if a child needs dental treatment but no NHS dentist is available, they can go to a private dentist under contract where there are units of dental activity. However, when those units are used up and there is no dental treatment available at all, the child goes untreated. Yet there might be other dentists who have spare capacity—spare units of dental activity. Why can the units not be transferred to the dentist who needs them to treat children? It is outrageous that 45,000 young people are going to hospital to have operations to deal with dental decay.

Baroness Manzoor: My Lords, I agree that it is outrageous that 45,000 children are requiring operations due to tooth decay but, as the noble Lord will know, tooth decay is a preventable disease. Access to dental services for children remains high. Although NHS England recognises that it has further to go in some hotspot areas, 6.9 million children were seen by a dentist in the 12-month period ending 30 September. NHS England has a legal duty to commission primary care NHS dental services to meet local needs and to help patients who cannot find a local dentist who is taking on new patients. Patients in this situation can contact NHS England's customer contact centre for assistance.

Baroness Thornton (Lab): My Lords, it is to be welcomed that the 10-year plan includes a commitment to seeing more children from a young age form good oral health habits to prevent tooth decay. It is, however, in conflict with the cuts to our public health budget. Does that commitment in the 10-year plan mean that the Government will be investing in children's oral health and, if so, how much are they going to invest and when will that commence? If the noble Baroness does not have those figures to hand, I would be grateful if she would write and tell me what they are.

Baroness Manzoor: My Lords, I do not have those figures to hand, but will write to the noble Baroness with them. Under the *NHS Long Term Plan*,

NHS England will invest to ensure that children with learning disabilities have their needs met by dental services and will work with partners to bring dental checks to children and young people with a learning disability, autism or both in special residential schools. That is part of the 10-year plan, but I do not have the figures that the noble Baroness requested and I will write to her with them.

Baroness Boycott (CB): My Lords, the leading reason for children aged between five and nine now going into hospital is to have teeth extracted, which I think we must all agree is quite shocking. There are many points on which I could ask a question, but I shall ask just one. Can the Minister update us on the implementation of phase 2 of the obesity plan, which will limit advertisements for sugary drinks or sweets, and on the limit on supermarkets using such products as promotions for selling cheaper food? At the end of the day, tooth decay is caused by sugar, and that is the problem.

Baroness Manzoor: The noble Baroness is absolutely right: sugar is a leading cause of tooth decay and we must do more to tackle it. Indeed, the Government are doing that. We published the second chapter of our world-leading childhood obesity plan in 2018. This builds on the real progress that we have made since publication of chapter 1 in 2016. The key measures in chapter 2 include restricting promotion deals on sugary and fatty products, introducing further advertising restrictions, mandating calorie labelling in restaurants and ending the sale to children of energy drinks which may be high in sugar.

Lord Colwyn (Con): My Lords, I am aware that the UDAs are not very popular with the dental profession. Can my noble friend update the House on the long-term plan for the NHS published earlier this month? A recent Written Answer revealed that only 108 practices are signed up to Starting Well. As far as I am aware, the scheme has received no new funding. I declare my interest as a retired dental surgeon and a fellow of the British Dental Association. Will the Government agree to examine the success of the tried and tested deals in Scotland and Wales and roll out a properly funded, universal oral health prevention programme to children across England?

Baroness Manzoor: I thank my noble friend for that question. NHS England's Starting Well initiative is supporting dentists across England to see more children from a young age and form good oral health. Two hundred and thirteen practices in 13 identified areas are participating in the programme, of which 210 have preventive champions in place. In Hull, for the first time, each practice has identified a health visitor to work with it. In Ealing, early indications are that children who do not normally attend dental practices are reported to be doing so. However, it is early days. We are also looking at how we might put more preventive dental access into the dental contract, but that will take a little time.

Breast Cancer: Women Over 73

Question

2.53 pm

Asked by ***Baroness Bakewell***

To ask Her Majesty's Government what plans they have to extend the reminder for breast cancer checks to women over 73 years old.

Baroness Manzoor (Con): My Lords, routine breast screening is currently offered to women aged 50 to 70 on the basis of evidence. There is currently no evidence to suggest that inviting women over 73 for routine screening provides more benefits than harms. However, women over 70 are invited to self-refer for a mammogram every three years if they wish. They are informed of this when they attend their last routine breast screening appointment.

Baroness Bakewell (Lab): I thank the Minister for that Answer. The risk of breast cancer increases with age. A third of all breast cancers and a quarter of all breast deaths occur in women over 70—I have these figures from Breast Cancer Care, of which I am a patron. Older women need to know and report their symptoms. They need to be reminded, because as you get older your memory fades. Why are the reminders stopped at 70? Although there is now a trial, it stops at the age of 73. What about those of us over 73?

Baroness Manzoor: My Lords, the noble Baroness makes a very interesting point but the NHS breast screening policy is based on strong peer-reviewed evidence. The decision to offer routine screening to women between the ages of 50 and 70 followed support from the Marmot review, which estimated that inviting women between the ages of 50 and 70 reduces mortality from breast cancer in the population invited by 20% and saves an estimated 1,300 lives a year. It also stated that evidence to support screening outside the 50 to 70 age group was not strong enough to allow older women to be invited for screening routinely.

Lord Patel (CB): My Lords, does the Minister agree that although the evidence from the study leading to the introduction of screening between the ages of 50 and 73 was strong, the evidence for screening beyond 73 exists only in observational studies carried out in the United States and Australia? Would it therefore not be wise to ask NICE to conduct the same type of study it carried out before and assess the cost-benefit analysis, which includes the health benefits, relating to women over 73 who are offered regular mammography?

Baroness Manzoor: On the NICE review, NHS England has asked Sir Mike Richards to lead a review of the current cancer screening programmes and diagnostic capacity. He will make initial recommendations by Easter this year and the review should be finalised in the summer of 2019. The review aims to further improve the delivery of the screening programmes, increase

[Baroness Manzoor]
uptake and learn lessons from the review and recent issues. I cannot say any more until the review has completed its work.

Baroness Walmsley (LD): My Lords, has the department carried out any research—and if not, will it do so—into the number of women, like me, who were diagnosed with breast cancer on the final routine mammogram for which they were called? If the number is substantial, surely that indicates that the age range for the routine screening service should be extended, particularly in the light of the fact that we are all getting older.

Baroness Manzoor: My Lords, I can only refer the noble Baroness to the answer that I gave previously, but I am delighted that her issue was picked up and dealt with effectively in routine screening—I am pleased to hear that. However, as I said, once we know the results of the AgeX trial we can consider any other issues that may emerge.

Lord Winston (Lab): My Lords, for the second time in a week, the noble Baroness has denied evidence that exists. The evidence from New York—a recent study—clearly shows that screening of women over 75 is valuable. Moreover, most of those cancers—about 85%—are invasive. The problem, of course, is that all cancers are more common in older people. Is it worth while paying for mammography, or is it better to pay for the surgery afterwards?

Baroness Manzoor: My Lords, I agree entirely with the noble Lord, Lord Winston. It is always better to do preventive care. I am a passionate believer in that, and so is the department. As I said, however, the reality is that peer reviews in this country demonstrate different evidence. At the moment, we can only look at peer-based evidence and reviews undertaken by clinicians and researchers.

Baroness Jones of Moulsecoomb (GP): My Lords, is the Minister implying that the lives of older women are less important?

Baroness Manzoor: Absolutely not, my Lords. Screening has to be evidence based, there are very clear criteria, and where there is a need, we will endeavour to do it. It is not about inequality or accessibility. If any lady, whatever her age, including women over the age of 73, feels that she has an issue when she is examining herself and there are abnormalities in the breast, she can refer herself to a GP or self-refer for screening. Women are openly and freely able to do it every three years and can be seen more often if the need arises.

Baroness Thornton (Lab): My Lords, will the Minister please return to that question? My noble friend asked what value the state and the NHS are putting on the lives of older women, because they are not included in the screening programme. Surely that is a question that she and her colleagues need to ask themselves.

Baroness Manzoor: My Lords, we place the same value on everyone's life. No one life is more important than the next. I have already answered the noble Baroness on that. We will endeavour to do everything possible to save lives where we can and where evidence demands it.

Sudan

Question

3 pm

Asked by ***Baroness Cox***

To ask Her Majesty's Government what assessment they have made of the current situation in Sudan, with particular reference to the recent protests in that country.

The Minister of State, Foreign and Commonwealth Office (Lord Ahmad of Wimbledon) (Con): My Lords, we are very concerned by the current situation in Sudan. Together with our troika partners, Norway and the United States, we continue to call for restraint in policing the protests, for the release of detainees and for accountability for those killed. We expect the Sudanese people to be allowed to exercise their right to freedom of peaceful expression. Sudan's response to these protests will shape our approach to engagement with the Government of Sudan in the coming months and years.

Baroness Cox (CB): My Lords, I thank the Minister for his reply. Is he aware that I visited war zones in Sudan virtually every year during the self-avowed jihad waged by its Government from 1989 to 2005 and, subsequently, saw people suffering from its genocidal policies in the Nuba mountains and Blue Nile? Every time that I have returned and raised these issues in your Lordships' House, the Government's reply has always been, "We are talking to the Government in Khartoum". That Government there love talking to the British Government but continue to kill while they talk. So what specific requirements are the Government placing on the Sudan Government after their current atrocious perpetration of human rights abuses against peaceful protesters, including reportedly killing 40 and injuring and arresting hundreds more—or will Her Majesty's Government allow the Government of Sudan to continue their violations of human rights with impunity?

Lord Ahmad of Wimbledon: My Lords, I am fully aware of the work done by the noble Baroness in Sudan and the support she extends to people there who are suffering oppression and the denial of their human rights. As Minister for Human Rights, I assure her that I am acutely aware of these challenges. During a visit to Sudan last year, I raised these directly with government officials as well as civil society leaders. On the issue of our engagement, our excellent ambassador there, His Excellency Irfan Siddiq, met directly with the acting Foreign Minister immediately after these protests. As I outlined in my original Answer, we will hold the Sudanese Government to account if they

persist in the brutal suppression of the longest protests we have seen since the independent Sudan came into being.

There have been some positives, however. Through our direct engagement, we saw a humanitarian corridor open to South Sudan to address some of the issues beyond the borders of Sudan itself. So engagement does have some positive returns.

Lord Collins of Highbury (Lab): My Lords, there is no doubt that engagement has a positive impact, but the Minister referred to the impact of the relationship. What range of impacts does it have? The strategic dialogue meeting will take place very shortly, at which surely we should make it clear to the Sudanese that we will not continue this dialogue if they continue to abuse human rights the way they are doing.

Lord Ahmad of Wimbledon: My Lords, the noble Lord is aware that, on these issues of direct engagement, the strategic dialogue allows for exactly those conversations to take place. For example, at the last strategic dialogue in November last year, issues of human rights, including human trafficking, modern slavery, freedom of religion or belief and gender equality, were all raised in a productive and structured way. I assure the noble Lord, and your Lordships' House, that we will continue to do so and use those dialogues to ensure that we hold the Government to account.

Lord Chidgey (LD): My Lords, the Minister recognised that the largest demonstrations for some considerable time are taking place in Sudan right now, with the same measure of reaction from state security. It is rather disturbing that Qatar, Saudi Arabia, China and even the United States seem to continue to side with President Bashir. Now we have reports that Russia's mercenary army—the Wagner—fresh from atrocities in Syria and Ukraine, is now seen on the streets of Khartoum, presaging an escalation of peaceful protest into bloody violence.

In the meantime, is the Minister aware that the Mo Ibrahim Foundation reports that Sudan has dropped towards the bottom of its index of African governance, because of its human rights abuses and lack of freedom? Will the Government now liaise with that foundation and work with African Governments, beyond the IGAD arrangements, to protect the well-being of the Sudanese people?

Lord Ahmad of Wimbledon: I will certainly follow up on what the noble Lord suggests. He mentioned IGAD at the end of his question. The returns that we have seen from the IGAD relationship demonstrate directly the benefits of Uganda and Sudan working for the betterment of near neighbours, including South Sudan.

Lord Alton of Liverpool (CB): My Lords, has the Minister had a chance to look at the information that I sent him in the past couple of days about the disproportionate use of force by the Bashir regime in firing bullets and tear gas into a hospital? Is this not in line with precisely what this regime has done in Darfur, where 2 million people were displaced and 200,000 killed, and in Blue Nile and South Kordofan, to which my noble friend Lady Cox referred? Is this not also in line with a Government who are in debt to some $40 billion and are using that money on violence and internal repression rather than to lift up the standard of living of people who are often living in gross misery, fuelling the exodus from that country and therefore fuelling all of the deaths that we see in the Mediterranean?

Lord Ahmad of Wimbledon: I have seen the detailed assessment that the noble Lord sent, and I thank him for it. We are acutely aware of, and of course deplore, the attack that took place on the hospital, firing into those people and actually targeting those who were assisting people who were already injured. It was appalling, and I assure the noble Lord that we are taking it up in the strongest terms. On the wider issue of Darfur, during my visit to Sudan I did visit the region. With the UN mission actually pulling away from Darfur, we remain deeply concerned that any gains that have been made in bringing peace will be lost.

Voyeurism (Offences) (No. 2) Bill

Third Reading

3.07 pm

Motion

Moved by ***Lord Keen of Elie***

That the Bill do now pass.

The Advocate-General for Scotland (Lord Keen of Elie) (Con): I beg to move that the Bill do now pass.

Baroness Chakrabarti (Lab): My Lords, at the risk of my complete and utter humiliation, I rise in these difficult and fractious times to celebrate a moment of genuine positivity, collaboration and leadership in this place and beyond it. I pay tribute to the campaigner Gina Martin, whose original indignity was converted into a powerful campaign to do something important that we can all agree on. I also pay tribute to her lawyer, Ryan Whelan, for that campaigning partnership and to parliamentarians on all sides of both Houses who made it possible—even at the expense of rivalries and through self-censoring—to allow a speedy and successful passage of this Bill. I particularly thank the government Bill team, the Minister and his colleague, the noble Baroness, Lady Vere. This was good work and very well done.

Lord Keen of Elie: I am obliged to the noble Baroness, Lady Chakrabarti, for her observations. I, too, extend my thanks to all who were engaged in bringing this Bill to fruition. I thank in particular the Bill team, which did so much work to ensure that the passage of this Bill was as simple and swift as we would all wish.

Bill passed.

Tenant Fees Bill

Third Reading

3.09 pm

Lord Taylor of Holbeach (Con): My Lords, I have it in command from Her Majesty the Queen to acquaint the House that Her Majesty, having been informed of the purport of the Tenant Fees Bill, has consented to place her prerogative and interest, so far as they are affected by the Bill, at the disposal of Parliament for the purposes of the Bill.

Clause 11: Interest on payments under section 10

Amendment 1

Moved by ***Lord Bourne of Aberystwyth***

1: Clause 11, page 8, line 31, after "10(8)" insert "—

(i) in a case within paragraph 4 of Schedule 2"

The Parliamentary Under-Secretary of State, Ministry of Housing, Communities and Local Government and Wales Office (Lord Bourne of Aberystwyth) (Con): My Lords, I will speak briefly to Amendments 1 and 2 in my name. They are minor and technical, and consequential to an amendment we agreed on Report that would require landlords and agents to be up front about why they are retaining a holding deposit. Amendments 1 and 2 to Clause 11(3)(c) specify the day on which interest is to be payable where reasons for retaining the holding deposit have not been provided within the required period, and the holding deposit needs to be repaid. This date is the day after the end of the relevant period. I beg to move.

Baroness Grender (LD): My Lords, on these Benches we accept this amendment. I take this opportunity to thank the Minister and his team for all their hard work. The last time I thanked them, they were a little busy trying to sort out a little local difficulty regarding definitions of damages. I am pleased to learn from Citizens Advice that it is now reassured that sufficient clarity will be given in guidance. If there is a latest draft of the guidance, having suggested some of the amendments, I would be happy to take a look at it. I am sure that my noble friend will do the fulsome thanks in the next bit but I just wanted to thank the ministerial team and the Minister very much for progressing the Bill. I look forward to its further rapid progress and would like to hear from the Minister when he thinks it will be enacted.

The Archbishop of York: My Lords, I too thank the Minister for listening. He has been very attentive in listening to the suggestions, comments and evidence from tenants and all those people involved with this part of the Bill. I have been in correspondence with the Minister, starting in the Moses Room. He has been very attentive to people's concerns and cares. The Bill is what it is because of that attention.

Lord Foulkes of Cumnock (Lab Co-op): I have a question for the Minister about the definition of the day. Does it include any day of the week or is it just a weekday, excluding Saturdays and Sundays?

Lord Kennedy of Southwark (Lab Co-op): I look forward to hearing the Minister's response to my noble friend. I accept that these amendments are minor and technical and I am happy to support them.

Lord Bourne of Aberystwyth: My Lords, I thank noble Lords for their contributions concerning these amendments. I will say more at the final stage of the Bill—the passage, I hope—about the points the noble Baroness, Lady Grender, raised, but I thank her very much indeed. As always, I thank the most reverend Primate very much indeed for his positive contributions and engagement, and his most kind comments. He is extremely gracious. As always, the noble Lord, Lord Foulkes, asks a question that goes straight for the middle stump. I will write to him, if I may, on that issue because I do not want to mislead him.

Lord Foulkes of Cumnock: I am grateful and anticipate being the recipient of a letter. However, if we agree it may be too late because, before we agree, should we not know if Saturdays and Sundays are included, or if it is only weekdays? I normally find that weekdays are the only days counted for this purpose, and that Saturdays and Sundays, when offices are closed and people are unable to take payments and so on, are not included. I do not know if help is on its way, but I think it would be helpful to know exactly before we agree this.

Lord Bourne of Aberystwyth: My Lords, I now have the answer, and it is "any day". I am very grateful to the noble Lord for coming back on the issue, which gave me the opportunity to get expert advice on it. I hope he is content with that. I also thank the noble Lord, Lord Kennedy, for his contribution.

Amendment 1 agreed.

Amendment 2

Moved by ***Lord Bourne of Aberystwyth***

2: Clause 11, page 8, line 33, leave out "paragraph 4 of Schedule 2" and insert "that paragraph, or

(ii) in a case within paragraph 5 of that Schedule, the day after the end of the relevant period within the meaning of that paragraph."

Amendment 2 agreed.

3.15 pm

Motion

Moved by ***Lord Bourne of Aberystwyth***

That the Bill do now pass.

Lord Bourne of Aberystwyth: My Lords, I will make a few concluding remarks. It has been clear throughout that this is a Bill that we all support, and one that will deliver important changes to the private rented sector, improving lives for millions of tenants. I am grateful

to all noble Lords from all parts of the House who have engaged so thoroughly and passionately during the proceedings in this House.

Specifically, I thank the noble Baroness, Lady Grender, for her work to date in promoting a ban on letting fees, which has been notable. I also thank the noble Lords, Lord Kennedy and Lord Shipley, for their significant contributions during our debates. I thank the noble Baroness, Lady Hayter, who is not in her place at present, for helping to ensure that the client money protection regulations work as intended and the considerable work that she has done on this, as well as the noble Lord, Lord Palmer of Childs Hill. Finally, I thank my noble friends Lady Barran and Lady Jenkin for raising the important issues of home share schemes, which I think we all value.

I firmly believe that all the amendments made in this House strengthen the Bill and offer greater protections for tenants while not unfairly impacting on landlords and agents. I thank industry groups and local authorities for their constructive engagement and support in strengthening the Bill's provisions and offering feedback on our draft guidance.

We will continue to work closely with stakeholders to ensure that the ban is properly communicated to tenants, landlords and agents, particularly with regard to contractual damages, which were the subject of debate on Report. I reassure the House again that there are already large amounts of case law that deal with what is appropriate in a damages case. Damages are generally not meant to do anything more than put the innocent party—"innocent party" being a legal term—back in the position they would have been had the contract not been breached. They are not a back door to default charges. I will repeat that: they are not a back door to default charges.

We are committed to working with Citizens Advice, Shelter and other industry groups to ensure that tenants fully understand their rights with regard to paying and challenging contractual damages. I know that it is in all our interests to ensure that this vital legislation becomes law as quickly as possible.

Implementation is, of course, subject to parliamentary timetables, and amendments we have made need to be considered in the other place. We also need to allow a period of time following Royal Assent to enable agents and landlords to become compliant with the new legislation. We therefore intend for the provisions of this Bill to come into force on 1 June 2019. This would mean that the ban on letting fees would apply to all new tenancies signed on or after this date.

I conclude by thanking officials who have worked diligently on this Bill and have performed massive tasks in ensuring that we are in the position we are now. I thank Becky Perks, Rosie Gray, Tim Dwyer, Nigel Bousfield, Elly-Marie Connolly, Laurence Morton, Jane Worthington and, from my own office, Lucjan Kaliniecki. I beg to move.

Lord Shipley (LD): My Lords, I thank the Minister for his statement. He said that the Bill would improve the lives of millions of tenants, and he is absolutely right. It is a much better Bill as a consequence of the close cross-party co-operation it has undergone in your Lordships' House.

I thank the Minister for his willingness to give a great deal of time, meeting regularly with us to identify outstanding issues. From these Benches, I thank my noble friend Lady Grender, whose assiduous campaign over a substantial period has led to fruition in this Bill, which is indeed a significant milestone in the support of tenants' rights. I also thank Sarah Pughe, in the Liberal Democrat Whips' Office, for her help. I also extend my thanks to the Bill team and all the officials who gave us a great deal of time in recent weeks while the detail of the changes that were being made in your Lordships' House was finalised.

We lowered the level of the deposit cap to five weeks' rent, listed default fees on the face of the Bill, introduced greater transparency around holding deposits, removed local authorities—I declare that I am a vice-president of the Local Government Association—and those acting on behalf of local authorities from the definition of a "relevant person", and we addressed deficiencies in the client money protection scheme, among a number of other changes. Some of those changes are very important, and enable the Minister to say that the Bill will indeed help financially a large number of tenants.

I thank the Minister for his co-operation throughout this process. The last few weeks have been very productive, making sure that the Bill will stand the test of its application.

Lord Kennedy of Southwark: My Lords, the Bill before us leaves this House in a much better state than when it arrived. It has had a positive consideration across the House, and I thank every Member who has contributed to our debates and discussions, bringing their expertise and ideas. We have made a real difference and, as the noble Lord, Lord Shipley, outlined, some improvements to the Bill, so we have made progress. We have certainly made a positive contribution to the rights of tenants in the private sector, and it is important that we do that. I also thank the Bill team from the department, who have been courteous, helpful and informative, and have engaged with me and my noble friend Lord Beecham at any time. I am very grateful to them for that.

I thank the noble Lord, Lord Bourne, for whom I have great respect. We spend a lot of time on these Benches batting things back and forwards, and I have always found him courteous, friendly and engaging, and always willing to talk to me both inside and outside the Chamber. I also thank my noble friend Lord Beecham for his support and hard work, and I thank Rhian Jones from the opposition office. She has supported me with research and draft amendments and has helped me to understand the Bill—she understands it much better than I ever would—sending me out to battle with the right papers at the right time, fully briefed, so that I can raise things here. I am very grateful for all the work she does for us in our office, and I thank her very much for that. I am delighted that the Bill is where it is today, in a much better place.

Bill passed and sent to the Commons with amendments.

Counter-Terrorism and Border Security Bill

Third Reading

3.24 pm

Clause 4: Entering or remaining in a designated area

Amendment 1

Moved by ***Earl Howe***

1: Clause 4, page 3, line 11, at beginning insert "Subject to subsections (3) and (4),"

The Minister of State, Ministry of Defence (Earl Howe) (Con): My Lords, I will also speak to the other government amendments in this group.

Government Amendments 1 to 4 return to the issue of the proper scope of the new designated area offence provided for in Clause 4. I thank the Opposition for their constructive approach to this provision. It was clear from our earlier debates that there was general support for the principle of a designated area offence to help protect the public from a real terrorist threat, such as we have seen as a result of UK nationals and residents travelling to conflict zones in Syria and Iraq. The area of dispute was how we protect those who have a legitimate reason for travelling to a designated area.

On Report, the Government sought to provide greater reassurance by building on the existing reasonable excuse defence and setting out an indicative list of such excuses. However, your Lordships preferred an alternative approach, put forward by the noble Lord, Lord Rosser, which excludes from the scope of the offence travel to a designated area for one or more specified purposes. The list of such specified purposes matched the Government's list of indicative reasonable excuses, but with a power to amend the list of specified purposes by regulations.

It is clear that, while the Opposition and the Government took different approaches to the challenge, we were ultimately striving to achieve the same result. I am pleased to say that, on reflection, the Government are content to accept the approach put forward in the Opposition's amendment. Having consulted our operational partners, we consider that this change would not materially affect the operation of the offence. Indeed, noble Lords will recall that, on Report, I indicated that, from the perspective of an individual returning to the UK from a designated area, the two approaches would, in one sense, not look very different. Either way, the police would still need to investigate to determine whether, under one approach, an exclusion from the offence applied or, under the other, whether the subject of the investigation had a reasonable excuse.

I also reminded your Lordships that the police have made very clear that they will investigate any person returning from Syria to establish what risk they may pose to the public, given the high level of terrorist threat associated with that region. It seems reasonable to expect that this is likely to be the position in relation to any area that might be designated in the future under this power, as part of the police's basic responsibility for protecting the public. This is aside from the question of whether a person returning from such an area may have had a legitimate reason for travelling under Clause 4. I accept, however, that an individual with a legitimate reason for travelling to a designated area would take greater comfort from knowing that they had not committed the offence in the first place than from knowing that they had a defence to the offence.

The Government must ensure that the law is as clear as it can be. These four amendments will help to achieve this. Amendment 1 is intended to make explicit in the Bill that there are exemptions from the offence—namely that an individual would not commit an offence if they leave a designated area within one month of the area being designated; that an individual enters or remains in a designated area involuntarily; or that an individual enters or remains in such an area in connection with one or more specified purposes.

Amendments 2 and 4 simply ensure that, consistent with the drafting of the Terrorism Act 2000, the parliamentary procedure for the new regulation-making power is set out in Section 123 of that Act rather than in new Section 58B. This in no way changes the operation of the regulation-making power or the parliamentary process for approving regulations made under it.

Finally, Amendment 3 provides for a definition of "terminally ill" where a person enters a designated area to visit a terminally ill relative. This point was raised by the noble Baroness, Lady Hamwee, on Report. This amendment will provide greater clarity for individuals who may pray in aid this reason for travelling to a designated area.

Lord Foulkes of Cumnock (Lab Co-op): Before the Minister sits down, I want to raise a particular point about the amendment: why six months? Why was six months chosen rather than three months, a year or any other period? I wondered whether there was a clear medical or legal reason for that or whether it was just taken out of the hat. What is behind the choice of six months in particular?

3.30 pm

Earl Howe: My Lords, I am advised that it is in line with provisions in other Acts. If the noble Lord will allow, I will write to him on which they are, as I do not have that information. Essentially, it was a matter of drawing a line at some point. One cannot legislate for every type of terminal illness; it seemed a reasonable line to draw.

In summary, these changes are merely intended to refine and polish the amendment agreed by the House on Report. I hope noble Lords will agree that they reflect the collaborative approach that has characterised the passage of the Bill. I beg to move.

Baroness Finlay of Llandaff (CB): My Lords, I beg the indulgence and forgiveness of the House because I have not been involved in previous stages of the Bill, but the amendment concerns terminal illness, and I should declare that that is my specialty. It may be helpful to the Minister if I explain that the DS1500

benefits are where the six-month definition has come from—we are going back many years. If someone is deemed likely to die within six months in this country, they become eligible for DS1500 benefits, which is a special fast-track benefit.

However, the problem with the six months is that it is impossible to predict. All the evidence is that you cannot accurately predict whether someone's prognosis is longer or shorter; it is really a best guess. Therefore, I completely accept the humanitarian rationale behind the amendment, but it is important that the Minister clarifies that this provision is six months with treatment available wherever that person is. I raise that because, to take the example of an insulin-dependent diabetic, if they stop their insulin and already have complications, they will die within six months, but if they carry on with their insulin, they may well live for many years.

It is important to clarify on the record that they are expected to be terminally ill given that they have accessed the treatment available wherever they are. I fully accept that in some parts of the world there is very little treatment available for a lot of diseases, but there is a very wide range of conditions which are fatal in a short time if they are not treated, and I should hate the Government to be caught out by any manipulation.

Earl Howe: I am grateful to the noble Baroness. The example she cites illustrates very well that whether the exemption applies will depend very much on the facts of the individual case and would ultimately be for a jury to determine, if a case got that far. In her example, it would need to be established whether drugs were available for the person or not and the likelihood of their being available. She will notice that the wording is very carefully drawn to say that if, at the time, the person suffers from a progressive disease and their death in consequence of that disease can reasonably be expected within six months—it is that reasonable belief that we need to focus on. It is possible, of course, that the exemption could come under one of the other headings in the amendment: for example, for aid of a humanitarian nature.

The Archbishop of York: My Lords, will the Minister contemplate another example? Megrahi was sent from a Scottish jail back to Libya and expected to die within a short period, but he lived for longer than six months. What if someone was here and the same thing applied? President Pinochet was allowed to go back. Everybody expected him to die but he walked off the plane and lived for quite some time. So the six-month period could become a problem. One needs to find a way of describing it in another way. People have died within six months but some have lived longer. Can the noble Earl help us with that quandary?

Earl Howe: I am grateful to the most reverend Primate. Again, we come down to the words "reasonable belief". If it is reasonable to believe that somebody is about to die within the six-month period, I feel sure that the police will not argue that point to the nth degree.

Baroness Hamwee (LD): My Lords, I am grateful to the Minister and the Government for pursuing the point. I looked at this for some time and came to the view that the words "reasonably be expected" were the best that one could provide to cover circumstances that cannot be listed in detail. Indeed, I confess that having complained throughout the Bill's progress that I did not want to rely on the CPS tests, the police's common sense and all the rest of it, I will do so on this one. I thank him.

However, I want to raise another point and I hope the Minister is aware of it—I emailed the Bill team about it yesterday. I am happy with the drafting amendments, which are to do with regulations, but given the supplementary delegated powers memo, I thought that I should pursue the issue of peacebuilding as a reasonable excuse. The paragraph of the memorandum dealing with "reasonable excuse defence" gives,

"purposes of a peacebuilding nature",

as a possible example of a purpose that can be referred to as a reasonable excuse. I referred to peacebuilding at the previous stage, on 3 December, and the noble Earl said:

> "I entirely accept the importance of peacebuilding activity … the government amendment does not preclude a person advancing this or any other category of reasonable excuse. I am of the view that legitimate peacebuilding activity could very well be a reasonable excuse"—[*Official Report*, 3/12/18; col. 860]—

but that it was up to a jury.

The debate continued and, as the House is aware, the amendment in the name of the noble Lord, Lord Rosser, which we supported, was agreed on a Division. Therefore, the point rather floated away. Essentially, I hope the noble Earl can commit the Government today to considering adding peacebuilding when the Bill goes back to the Commons. It seems, from correspondence I have received since I emailed the Bill team, that peacebuilding may or may not be what is understood to be a humanitarian activity. There is a particular concern that—given that this is not something that we talk about and define every day—juries may be puzzled as to what it is and not understand its value. I am not sure whether that is a fair comment. However, it has been described to me as being "complementary to humanitarian aid" and covers a large range of activities, including mediation, support to the local community, justice and reconciliation, psychosocial support and research in the area. The Government have been considering this matter. It would complete the provisions in this area if it could be referred to specifically when the Bill is enacted.

Lord Judd (Lab): My Lords, I support very strongly indeed what has just been said. Having spent much of my life working with humanitarian agencies, I know that the importance of what has been said cannot be overemphasised. We must not slip into an attitude in which relief, when things have gone badly wrong, may be interminable and highly costly, apart from anything else. There is a real need in hot situations to be working at prevention.

In broad government statements we get very reassuring remarks about the importance of conflict resolution and peacebuilding. The humanitarian agencies frequently find themselves involved in this and I think with all possible clarity that that is valid. They should not just be tolerated, they should be supported by the Government

[LORD JUDD]
and others. That is significant because anything that either intentionally or unintentionally detracts from the commitment in that area would be very unfortunate.

Earl Howe: My Lords, I am grateful to the noble Baroness, Lady Hamwee, and the noble Lord, Lord Judd. I beg your pardon. The noble Lord, Lord Kennedy, should speak first.

Lord Kennedy of Southwark (Lab Co-op): My Lords, I rise briefly to say that I support the amendments before us. I am pleased that the Government have listened to the proposal put by my noble friend Lord Rosser, who is unable to be with us today. I think that the noble Baroness, Lady Finlay, has raised an important issue as regards the medical terminology used, but the noble Earl has answered the point in terms of what can be expected. Generally, I support the amendments because they certainly clarify what we put forward in the first place and I thank the Government for listening in this case.

Earl Howe: My Lords, I am doubly grateful to all noble Lords who have spoken. I am sympathetic to the point made by the noble Baroness, Lady Hamwee, but only up to a certain point. Given that this is Third Reading, our starting point has to be that any further amendments to the Bill should be limited to those that are absolutely necessary to improve the drafting of the Bill in the light of the amendment agreed by the House at Report. I am not persuaded that adding to the list of exemptions from the offence properly falls within the category of amendments that we should now be contemplating at this late stage of the Bill, either today or when the Bill returns to the Commons to consider the Lords amendments.

However, I can assure the noble Baroness that the Government will keep the list of exempted purposes under review. The Bill now helpfully includes a power by regulations—a Henry VIII power to all intents and purposes—to add to the list of exempted purposes should it be appropriate to do so in the light of experience of operating the new offence. I am sure that officials in the Home Office will closely scrutinise the use of this power and will work with their colleagues in the Department for International Development and the Foreign and Commonwealth Office to determine if peacebuilding could usefully be added to the list of exempted reasons in the future.

But I need to make clear to all noble Lords that this is a nicety. In the absence of such an exemption the Government are clear that entering and remaining in a designated area for the purpose of engaging in peacebuilding would constitute a reasonable excuse. We have that all-encompassing provision, as the noble Baroness is aware, in the Bill. There is a problem associated with any approach that has within it a list of some kind, which is why we started out with a very short list indeed. Through our debates we persuaded ourselves that it would be helpful to augment the very short list that the Government started off with, but we have to ask ourselves where we stop.

I hope what I have said has offered some assurance to the noble Baroness and she understands that, while it would not be appropriate to add peacebuilding to the list of exemptions at the moment, that will not preclude us doing so in the future, should there be an operational imperative.

Baroness Hamwee: My Lords, to be rather blunt it is always frustrating when procedure gets in the way of substance. I ask the Minister to ensure that Home Office officials appreciate that "in the light of experience" should not just be what may happen when someone comes back and says, "I have been working on peacebuilding in Syria". It is also about deterring NGOs from going into conflict or post-conflict areas to work on peacebuilding. That could be a consequence we do not want to see from the offence we have created in the Bill.

3.45 pm

Earl Howe: I entirely agree with the noble Baroness, but I hope too that she will recognise that the wording of the first purpose set out in this amendment,

"providing aid of a humanitarian nature",

is quite broad. So humanitarian agencies of any kind could feel secure in going out for almost any humanitarian purpose one can devise.

Lord Garnier (Con): Before my noble friend sits down, I caution that sometimes lists can become exclusive and that some good things are easier to recognise than to define. He ought to stick to the way the Bill is currently drafted and allow himself the freedom to consider rather more carefully, despite the charming way in which the noble Baroness has advanced her case.

Lord Judd: My Lords, the Minister has been very helpful in the comments he has made and I most genuinely thank him for that. I just wonder whether it is possible for the Government and the Minister, when this legislation is given final consideration, to say some encouraging and positive things about the recognition of the courage and value of such work, so as to in no way whatsoever inhibit organisations that are able to make a positive contribution of this kind. Having been through this kind of situation, the trustees and leaders of the agencies concerned obviously give a great deal of deliberation to what they do and what is involved. To feel they are doing it in a climate of good will and not just acceptance is very important.

Earl Howe: I accept the point the noble Lord has made. That is why the whole tone and flavour of this part of the amendment carries the implication he would wish, in particular the provision that talks about,

"carrying out work for the government of a country other than the United Kingdom … carrying out work for the United Nations or an agency of the United Nations",

and so forth. It is clear that the value of work of this kind—whether carried out by an individual, an agency or a Government—is fully recognised. I am sure that point will not be lost on those whose job it is to implement the Bill.

Amendment 1 agreed.

Amendments 2 to 4

Moved by ***Earl Howe***

2: Clause 4, page 4, leave out lines 15 to 17

3: Clause 4, page 4, line 26, at end insert—

"(c) a person is "terminally ill" at any time if at that time the person suffers from a progressive disease and the person's death in consequence of that disease can reasonably be expected within 6 months."

4: Clause 4, page 5, line 29, after "regulations)" insert "—

(a) in subsection (4), after paragraph (b) insert—

"(ba) section 58B(7);";

(b) in subsection (5), for "or (b)" substitute ", (b) or (ba)";

(c) "

Amendments 2 to 4 agreed.

3.49 pm

Motion

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

That the Bill do now pass.

The Minister of State, Home Office (Baroness Williams of Trafford) (Con): My Lords, I extend my thanks for the wide range of expertise from around your Lordships' House that has provided such a constructive and measured approach to what is a very serious Bill that has passed through the House. I thank first my noble friend Lord Howe, who has helped me through all stages of the Bill, and my two noble friends Lady Manzoor and Lady Barran for their contribution as Government Whips.

On the Opposition Front Bench, I thank the noble Lords, Lord Kennedy and, of course, Lord Rosser—I express the feeling of the whole House in wishing him well and looking forward to seeing him back in his place very soon. On the Lib Dem Benches, I thank the noble Baroness, Lady Hamwee, and the noble Lords, Lord Paddick, Lord Marks and Lord Stunell, for their contribution. Then, of course, there are the heavyweights on the Cross Benches—I refer not to their frames but to their intellects—the noble Lords, Lord Carlile and Lord Anderson, the noble and learned Lord, Lord Judge, and the noble Baroness, Lady Manningham-Buller; I thank them all for the helpful advice they have given me in proceeding with this Bill. Finally, I thank the officials from both the Home Office and the Ministry of Justice who have supported us as the Bill proceeded.

I am very pleased at this stage that we have achieved an outcome where there is a broad consensus on all aspects of the Bill bar one: whether there should be an independent review of Prevent. We continue to reflect on that matter in advance of the Bill returning to the House of Commons. In any event, I hope that this issue will not stand in the way of the Bill securing Royal Assent. On that basis, I beg to move.

Lord Paddick (LD): My Lords, we thank the noble Baroness, the noble Earl, and their Whips and officials for the way in which they have, at least to some extent, listened and responded to the concerns that we have raised. It was interesting, having been completely opposed at one stage, to find a government amendment in accordance with the arguments we had made coming in at the next stage of the Bill, but surprises are sometimes good ones.

However, we are still concerned that a dangerous precedent is being perpetuated by this Bill adding to the list of criminal offences where those acting completely innocently commit an offence for which they can be arrested and charged, and only have a defence once they have been charged. We note that the Government, in accepting the Labour amendment excluding people with legitimate reasons from the scope of the designated area offence, recognise those concerns to some extent. Perhaps I should say to the noble Lord, Lord Carlile of Berriew, with whom I jousted on this issue, that this is a matter to which we will return when we debate the Offensive Weapons Bill in the coming weeks.

We are still concerned about people being criminalised by this Bill for what they think rather than what they do, or for being foolish or unwitting; that people can be detained at our borders without any reasonable grounds for suspicion; and that, in the exercise of these powers and the operation of Prevent, black and minority ethnic people and Muslims may be unfairly targeted. We believe the Bill amounts to a further erosion of civil liberties, and that is something the Liberal Democrats will continue to fight to prevent.

Lord Foulkes of Cumnock: Before the noble Lord sits down, I would like to ask him whether he would have been able to give that speech in exactly the same way when the Liberal Democrats were part of the coalition.

Lord Paddick: My Lords, I am grateful for the question. All I can say is that it is a hypothetical question and I did not hold a Front-Bench position during the coalition.

Lord Marlesford (Con): My Lords, this Bill was intended to do everything necessary at present to counter terrorism and protect our borders. It does not. I have made repeated attempts to persuade the Government to evaluate—just evaluate—the need for a secure personal identity number system, with biometrics held on a secure central database with which the biometrics of any UK citizen could be compared online by those authorised to do so. The Home Office has refused point blank to even consider this suggestion. This is inexcusable. I recognise that the default position of the Home Office has long been to ignore, reject or oppose external suggestions for changing its procedures, practices or policies, but that is not a satisfactory situation. That it may get away with such behaviour can of course be a reflection on the effectiveness of Ministers, some of whom are coaxed into being mere parrots of Home Office views. I suspect that a rule of the department is, whenever necessary, to remind Ministers "Theirs not to reason why".

[Lord Marlesford]

On border control, I will make three points. First, the list published in *Hansard*, in response to Written Questions I have put down periodically since 2012, of Home Office immigration officials who have been sentenced to often long periods of imprisonment, up to eight or nine years, for misconduct in public office—that is what *Hansard* describes their offence as being, in most cases—now includes over 50 such cases. This is a disgrace which should have been tackled long ago. All that has happened is that the Home Office has now decided to withhold the names of those who, in open court, have been so convicted, apparently on the grounds that it infringes their privacy or human rights. Secondly, there is still no record, for online access at entry and departure points, of other passports held by UK passport holders. Thirdly, the Home Office seems to have been caught by surprise, with the Home Secretary having had to hurry back from holiday, by the sudden increase in the number of illegal immigrants who have sought to travel to the UK across the Channel in small boats. This was both predictable and predicted, and it can be expected to increase greatly next summer unless effective action is taken to halt it.

Perhaps I could end by quoting Sherlock Holmes:

"From a drop of water a logician could infer the possibility of … a Niagara".

I am afraid there is a shortage of logicians in the Home Office.

Lord Kennedy of Southwark: My Lords, I join others in thanking the Government and in particular the noble Baroness, Lady Williams of Trafford, and the noble Earl, Lord Howe, for the way they have conducted themselves in the course of this Bill. I enjoy our tussles across the Dispatch Box very much and I have great respect for both noble Lords on the way they conduct themselves in the House, as does the whole House. I thank them very much for that. I also thank Ben Wallace MP, the Security Minister, for his engagement in this Bill—he has been very helpful. I too thank my noble friend Lord Rosser. He is much missed, and I hope he will be back in the House very soon. He is certainly more forensic in dealing with the Government, and I look forward to having him back by my side shortly.

I also thank the officials from the Bill team and other officials from the Home Office and elsewhere whom we met. They were able to discuss our concerns and look at the issues that we were raising, and they came back in a very positive way. That was very helpful for me and my noble friend Lord Rosser.

I thank noble Lords across the House for their contributions. As the Minister said, they have been wide-ranging and authoritative. Something that we certainly saw on this Bill was the authority that people spoke with on a variety of issues. In particular, as has been said, the contributions by the noble Lords, Lord Anderson of Ipswich and Lord Carlile, the noble and learned Lord, Lord Judge, and the noble Baroness, Lady Manningham-Buller, helped us to understand where we were coming from.

I thank Grace Wright from the opposition office. She has been helpful and supportive in her guidance to me, and ensured that we were able to put our arguments forward well and effectively. She is a skilful member of staff and we are very appreciative of the work that she does for us all.

All sorts of claims and counterclaims have been flying around for the last hour or two about who did what or who did not in relation to the Bill. That is all quite regrettable, and I am not going to engage in it. All I will say is that my job as the opposition spokesperson here is to table amendments and put forward suggestions and ideas to engage with the Government. Hopefully, we all agree that the Bill was necessary; it is about ensuring that we keep our country safe and can deal with the threats that are posed. At the same time it is about protecting our liberties, and that is the balance that we always have to find. That is certainly my and my colleagues' job here. I think we have got the balance right. The Government have listened on a number of issues, and I thank them very much.

I also thank the Minister for her comments on the issue of Prevent. We had certainly hoped that the Government would look at reviewing it, and clearly they will. Hopefully, in time we will have some good news about that, but if not then I am sure we will have a further debate in the House. At this stage, though, I again thank the House with respect to the Bill.

4.01 pm

Bill passed and returned to the Commons with amendments.

Occupational and Personal Pension Schemes (Amendment etc.) (EU Exit) Regulations 2018

Motion to Approve

4.02 pm

Moved by ***Baroness Buscombe***

That the draft Regulations laid before the House on 3 December 2018 be approved.

The Parliamentary Under-Secretary of State, Department for Work and Pensions (Baroness Buscombe) (Con): My Lords, these regulations make minor and technical changes to domestic legislation that would otherwise no longer operate effectively once the UK withdraws from the European Union. The regulations were specifically designed to ensure that domestic legislation continues to operate effectively in the event that the United Kingdom leaves the EU without a deal. In the event that a deal is reached, after the implementation period there will be a need to make legislative changes, but the nature of those changes will be informed by the nature of the relationship that exists between the EU and the UK.

Before I discuss the details of the regulations, it may be useful if I give some context and background. The UK is not reliant on any European institutions or agencies for essential functions in respect of private pensions such as approvals, licences, decisions or rights.

The Pensions Regulator's powers are derived from UK law. This means that the UK does not need to create any legislation to replicate domestically any EU-level activities relating to occupational and personal pensions after the UK's exit from the EU.

Nevertheless, we must ensure that domestic legislation relating to occupational and personal pensions continues to work and does not rely on any definitions, obligations or reciprocal arrangements that will no longer apply once the UK is no longer an EU or European Economic Area member state. UK domestic legislation contains various instances of references to EU law, and to the UK as a member state of the EU, which will no longer be the case once the UK exits the Union. This includes where distinctions have been made between EU or EEA member states and overseas entities that will no longer apply, where the UK is referred to as an EU or EEA member state or where the UK is obliged to share data with EU agencies or member states under reciprocal arrangements that will no longer apply.

These regulations are made using powers in the European Union (Withdrawal) Act 2018 to fix legal inoperabilities and other deficiencies in retained EU law that will arise when we leave the Union. The legal powers used are those provided for under the European Union (Withdrawal) Act, and the amendments made are completely in line with both the policy and legal intent of that Act. The use of secondary legislation to amend primary legislation—so-called Henry VIII powers—was debated at length during the passage of the withdrawal Act. The Explanatory Memorandum that supports these regulations sets out the legislation in Great Britain that is being changed.

Lord Adonis (Lab): The noble Baroness has just said that the regulations are completely in line with the EU withdrawal Act and do not go beyond any provisions in that Act. But from reading the Explanatory Memorandum and the impact assessment, my understanding is that the regulations had to be revised and re-laid, and that this is the second version of the regulations, because in the first version the regulations were defective. They were not properly consulted on and would have required pension funds to disinvest from European funds because they had not been subject to a proper consultation procedure. Furthermore, there has been no formal process of consultation on these regulations either. Could the noble Baroness inform the House about these matters?

Baroness Buscombe: I can inform the noble Lord. He is absolutely right that a formal consultation was not considered necessary for these changes as there is no policy change and they make only minor and technical amendments designed to ensure that UK legislation operates effectively on the day the UK leaves the EU.

Lord Deben (Con): My Lords—

Baroness Buscombe: I will give way to my noble friend. However, I would like to answer the question on making the changes and re-laying the regulations.

Lord Deben: I interrupted only because my noble friend might be able to answer my question at the same time. The question is this: if it were not thought necessary to have the consultation in the first place, but then it was found that by not having the consultation the orders had to be taken and re-laid, would it not have been better to have had the consultation in the first place—and would it not now be better to have consultation, because that is the fundamental issue in all these matters? It is not that they somehow get outside the withdrawal Act, but that they do not have the proper consultation we need.

Baroness Buscombe: My Lords, it was as a result of ongoing communication with our industry stakeholders that we discovered that it was important to re-lay the regulations. In a sense, there was not a formal consultation, but we do have ongoing and constant communication with industry stakeholders who will be affected by these minor and technical amendments when we leave the European Union. I stress that we were very concerned to correct a fault in terminology, which is why we withdrew the original draft.

Lord Foulkes of Cumnock (Lab Co-op): The Minister read from paragraph 10.1 of the Explanatory Memorandum for my noble friend Lord Adonis. That paragraph does confirm what she has just read out: that,

"the Department did engage with and respond to industry concerns over one aspect of the draft regulations that created an unintended consequence".

How can she know, without carrying out a full consultation, that other aspects would not create unintended consequences?

Baroness Buscombe: The noble Lord, with all his experience, will know that all legislation, however much it is consulted upon, runs the risk of unintended consequences. However, in this case, there was ongoing communication and involvement with industry, and it was industry that pointed out the risk we were taking by laying the regulations with the wrong terminology—the words "UK regulated market". We redrafted regulations that were originally laid in draft on 24 October so that we could fix an unintended consequence that industry stakeholders highlighted for us. They were concerned that the use of the term "UK regulated market" in the original draft regulations could have resulted in occupational pension schemes having to disinvest from regulated markets outside the UK. So there was a concern that this could impact further than was intended. The redrafted regulations re-laid on 3 December addressed the issue by clarifying the definition of "regulated market" to include United Kingdom, European Economic Area and other regulated markets. Industry stakeholders have welcomed the change.

The Explanatory Memorandum that supports these regulations sets out the legislation in Great Britain that is being changed. Noble Lords will see there a list of all the Acts where changes are required to be made. Primarily, the regulations make changes to reflect the UK's new status as a state independent of the EU in the event of no deal and to ensure that domestic legislation continues to operate effectively following

[Baroness Buscombe]
the UK's exit from the Union. Consequently, they deal with the authorisation of cross-border pension schemes—that is what they are really about.

The EU's cross-border authorisation regime applies to cross-border activity between member states and requires pension schemes to seek authorisation from their regulator to undertake such activity. Broadly speaking, cross-border activity is when an employer in one member state selects to base its occupational pension scheme in another.

These regulations recognise that once the UK ceases to be a member state following its exit from the Union, it will no longer be subject to the rules of the regime for any cross-border activity. Consequently, the regulations remove the requirement for UK occupational pension schemes to obtain authorisation from the Pensions Regulator to carry out cross-border activities.

As I have said, but I will repeat it for all noble Lords to make sure that I have got the message across, these regulations were originally laid on 24 October and were intended to make changes to domestic legislation. It was at that point that industry stakeholders in conversation with our department identified an unintended consequence of the draft regulations relating to its use of "UK regulated market" as a definition of regulated markets rather than "other regulated markets". Industry stakeholders were concerned that this could have resulted in occupational pension schemes having to disinvest from regulated markets outside the UK.

As this was not the original policy intent, and following engagement with industry stakeholders, we redrafted the regulations to correct this unintended consequence. The draft regulations that were re-laid on 3 December addressed this issue by extending the definition of "regulated market" to include UK, EEA and other regulated markets. A corresponding change has been made to the Northern Ireland regulations, which I will speak to shortly.

These instruments are part of a wider legislation package that my department is laying. We have already laid statutory instruments relating to social security and to the European job mobility portal, more commonly known as the EURES regime.

As I have said to noble Lords, a formal consultation on these regulations was not carried out by the Department for Work and Pensions. It was not considered to be necessary because the regulations do not make any policy changes and make only minor and technical amendments designed to ensure that UK legislation operates effectively on the day the UK leaves the EU.

Similarly, we expect the regulations to have no significant impact on business, charities, voluntary bodies or the public sector. In fact, in their absence, if elements of the UK's occupational and personal pensions legislation do not work effectively after the UK departs the EU, it will result in associated costs on all involved parties; for example, extra resource invested in trying to clarify the situation. These instruments make the changes needed to avoid this situation and, on this basis, are assessed to be at least cost-neutral or beneficial on balance to all involved parties, charities and voluntary bodies. In other words, we felt it was very important to make sure that the legislation was clear prior to leaving the EU.

4.15 pm

Lord Adonis: The Minister said that the regulations would be cost neutral and the Explanatory Memorandum says, as she has just noted, that they,

"make minor and technical changes",

but that does not appear to be the view of the sector. The journal *Professional Pensions*, which did a long article on these regulations, quoted Faye Jarvis from Hogan Lovells who said the regulations,

"could result in significant costs being incurred, the magnitude of which will depend upon the level and type of exposure that would need to be relocated to comply with the rules in the event of … no deal".

Since there has been no impact assessment, what the Minister is saying to House this afternoon is pure assertion. The only response that I have been able to discover—because although an impact assessment has not been conducted there has been a certain amount of response in the media—suggests that there might be significant costs. How does she think that the House can make a judgment between the claims of people in the sector that there could be significant costs and her assertion that there are no costs, when no impact assessment of any kind has been conducted?

Baroness Buscombe: My Lords, it is interesting that the noble Lord has taken one quote from one article on this. Certainly, our understanding from our discussions with industry is that because this focuses on cross-border activity, it is up to the industry to decide whether to do something different if we leave the EU with no deal. Our focus has to be on the resulting associated costs to all parties involved—for example, extra resources invested in trying to clarify the situation: in other words, certainty of the law post exit from the European Union.

Our focus is on what happens if there is no deal. Should different companies in the pensions industry choose to do something different post exit, there may of course be other impacts on business, but certainly in our discussions with business, that was not the impression we received.

Lord Adonis: Since there has been no formal consultation, the House has no basis on which to make any judgment at all. The Minister has simply made a number of assertions which appear to be at variance with the actual public response. She said that there have been ongoing consultations and dialogue. Can she tell the House more about them?

Baroness Buscombe: My Lords, we are constantly in touch with the Pensions Regulator, with which we have a very good relationship. We work very closely with industry. My honourable friend in another place, the Minister for Pensions and Financial Inclusion, also has ongoing discussions with the Pensions Regulator and individual companies within the pensions industry. The noble Lord will recall that I have stated that there was no formal consultation because there was no change to policy. Given that there is no change to

policy and that we are dealing with minor and technical amendments, and given our constant and ongoing involvement with the industry—those in the industry are very much in touch with each other; it is not an industry that is hard to be in touch with—and this niche area of cross-border activity of pension companies and pensions, it is fair to say that the department has done all that is reasonably necessary and, indeed, cost-effective to limit our consultation to an informal ongoing communication with both the Pensions Regulator and industry stakeholders.

Lord Foulkes of Cumnock: On this constant and ongoing activity with the industry, I wonder whether the Minister can help me. The territorial extent of this provision is the United Kingdom. What is the position if my pension is based in the Channel Islands or the Isle of Man, or if my employer has a base in the Channel Islands or the Isle of Man? How is that covered?

Baroness Buscombe: My Lords, we are talking about occupational pensions and private pension schemes. If the noble Lord has a pension in that area, it would be important for him to make sure that he is in touch with his pension provider, to make sure that payment will continue. However, these regulations have nothing to do with payment of pensions.

Lord Foulkes of Cumnock: I am not asking that. I should make it clear that I do not have a pension based in the Channel Islands or the Isle of Man. At least, if I do, then Brian Donohoe is going to be in trouble, because he is in charge of parliamentary pensions, which is all I have. I asked the question as a Member of this House, scrutinising this on behalf of people outside who may have pensions based in the Channel Islands and the Isle of Man. I have read through the whole document and there is nothing related to either. What discussions have taken place? As the Minister knows, the Channel Islands and the Isle of Man have large financial sectors. They are providers of pensions and investments that are the basis for other pension funds that may be based in the United Kingdom or elsewhere in the European Union. How are the funds in the Channel Islands and Isle of Man affected by the proposed changes? It is not clear in any part of the document and I hope the Minister can tell the House.

Baroness Buscombe: My Lords, if I am unable to give the noble Lord a full reply, or after this debate my officials tell me that there is something else to say about the Channel Islands, I will certainly write to him and share my letter with all noble Lords. We are not moving away from current legislation. We are just introducing minor technical amendments to make sure that current UK legislation carries on working seamlessly in the event of no deal. There is nothing in UK private occupational pensions legislation that prevents occupational pension schemes making pension payments overseas. We do not expect this to change as a result of the UK withdrawing from the EU. We also do not expect there to be any issues with EEA schemes making occupational pension payments to residents in the UK. However, as I have said, individuals should contact their EEA scheme to clarify whether they expect any changes as a result of the UK leaving the EU.

These regulations are not about pay, but if a pension is paid into a UK bank account the bank should contact the scheme member if it expects any changes as a result of the UK leaving the EU. In the same way, those points would extend to any arrangements that an individual had with pension providers in the Channel Islands and elsewhere.

I would like to progress and complete my opening statement. We expect these regulations to have no significant impact on business, charities, voluntary bodies or the public sector. These instruments make the changes needed to avoid a situation that could be other than cost-neutral or beneficial. All noble Lords will know that the European Union (Withdrawal) Act is a crucial piece of legislation that will ensure that, whatever the outcome of negotiations, we have a functioning statute book on exit day, providing certainty to people and businesses across the UK. The Act enables this by providing a power for Ministers in the UK Government and devolved Administrations to deal with deficiencies in the law arising as a result of our exit from the EU. I beg to move.

The Senior Deputy Speaker (Lord McFall of Alcluith): The Question is that the two Motions in the name of the noble Baroness, Lady Buscombe—

Lord Foulkes of Cumnock: I thought she had moved only one Motion.

The Senior Deputy Speaker: If the noble Lord wishes to object, he can come in when the Speaker calls the voices.

Lord Foulkes of Cumnock: The noble Lord is a long-standing friend but my understanding is that things have changed. It was originally planned that the two would be taken together but the Minister has moved only one. This was before the noble Lord was in the Chair.

The Senior Deputy Speaker: To save any problems, the Minister's Motion to move these Motions en bloc has been objected to, so the Minister should now move the first Motion on its own.

Baroness Buscombe: I beg to move.

Lord Kirkwood of Kirkhope (LD): My Lords, I am grateful to the Minister for that extended explanation. It was quite clear, but perhaps it is easier for me to say that because I am a serving member of the Secondary Legislation Scrutiny Committee, which has been looking very carefully on the House's behalf at all of these points. These regulations were cleared, and the SLSC does not clear regulations that are not properly looked at. All of the important questions were addressed. While I would encourage your Lordships to ask more questions about some regulations—because there are occasions when regulations are laid before Parliament that deserve a lot more scrutiny than they normally get—this is not one of them. This regulation is technical and I take the point that has been made about the lack of consultation. That is always something that the

[Lord Kirkwood of Kirkhope]
committee is very solicitous to understand and the explanation that we got, which was crystal clear to me, was that the objection that came in and was found by bilateral consultations with the industry was so technical that you would not expect a member of the public to be able to volunteer something of that kind.

There are two kinds of consultation, and we are always looking for consultations where there is any case for making them. In regard to this regulation, this was not a sensible judgment to make, so the department was right both to take the advice from industry and to make the change. It is standard that regulations, in the gestation between Parliament and the department, often get relaid. Often the Explanatory Memoranda are changed and that is all to the good.

Lord Foulkes of Cumnock: My noble friend—I have known him for many years—is an expert on social security and a member of the Secondary Legislation Scrutiny Committee. The two committees under the noble Lord, Lord Trefgarne, and my noble friend Lord Cunningham do a terrific job. However, is it not perfectly possible, because of the huge avalanche of legislation—the statutory instruments now coming to these committees—for things to be overlooked? Therefore, it is absolutely right that the Grand Committee and the House, where there is a wider membership and people might have looked at the regulations in some detail, might raise some of the issues. I fear that a lot of things will get through and these unintended consequences—few and far between as they have been in the past—will just become an avalanche themselves.

Lord Kirkwood of Kirkhope: My noble friend makes a good point. I certainly have serious concerns about the scale, complexity and volume—not just the number, but the extent—of some of these SIs that the two committees upstairs are struggling to deal with. One thing that we are very solicitous of—and it supports the point—is that it is very easy to reduce the standards of scrutiny, which is one thing that we must not do. I gently say to the noble Lord, however, that if parliamentary procedures are tested to the extent that it takes up more time than this normally would, there are emergency procedures available to Governments which they might resort to if you push them too hard on the Floor on the time necessary to discuss these things. Therefore, I am absolutely happy to spend time when time is due to be spent, but these regulations are not of sufficient weight or concern to justify spending a lot of time, or more time than is necessary, on them.

The point about consultation has been made. The important thing is that we need to be more agile and more flexible about how we handle these statutory instruments. But I support the regulations and I hope the Government will take on board the important points that have been made about when consultations are and are not needed.

4.30 pm

Lord Deben: My Lords, if I had not gone through earlier debates, I would have agreed with the noble Lord. I want to make it clear that whatever certain government sources may say, there may well be some sort of arrangement as far as the Opposition are concerned but it is not one in which I have been involved at all. I went to listen to some later SIs last week. In listening to the debate, it became clear to me that a number of assertions were being made by the Government which, frankly, did not stand up.

Of course, the whole problem with these SIs is that the Government constantly remind us that they hope they will never be implemented and this is all about the possibility of there being an exit with no deal. But that does not mean, as I am sure the noble Lord, Lord Kirkwood, will agree, that we can ignore these SIs because they probably will not happen. Of course, as the days go on, that becomes less and less probable, in my view. Now that the Prime Minister has said that it is more likely that we will have no Brexit than a no-deal Brexit, perhaps one may be happier about it. But I am not here because I happen to believe that Brexit is a nonsense. I am here because I believe that there are some really fundamental things in these SIs.

The first is the assertion that we do not need to work too hard on them because they are not going to happen. That seems unacceptable.

Baroness Buscombe: When have I made the assertion that we do not need to take time on them? We have spent an enormous amount of time in the department ensuring that what we carry out in relation to these SIs is detailed and careful, to the best of our ability.

Lord Deben: I was not making the assertion about my noble friend; I was referring to the meeting of the Grand Committee last week, when that was very much the underlying assertion. That is all I was doing. I do not wish to make any such implication or accusation about my noble friend, whose presentation was perfectly right and reasonable, except that it is based on falsities. I will go on to the other falsities on which it is based.

The second falsehood is that this SI is not making much difference and therefore we do not have to go through the usual procedure. The difficulty with that is that there is a definition here which I find very peculiar. The definition of "impact" refers only to the direct impact of what is in this—the impact on people in the United Kingdom who do not have anything outside the United Kingdom, and who are concerned only with the United Kingdom. There is no reference to the cost of or the damage done by these regulations to those who are in the United Kingdom but have arrangements outside the United Kingdom within the European Union, who will be seriously disadvantaged because the UK will not be within the same arrangements. I realise that that is a result of Brexit but the idea that you can assess the impact without mentioning that seems very peculiar. If you mention that, you have to have an impact assessment. I am very suspicious of this because I think the Government do not want an impact assessment that explains to people precisely why exit from the European Union is so damaging. I do not understand how we are supposed to deal with an SI when it says simply that there is no, or no significant,

"impact on business, charities or voluntary bodies".

That is the second reason that it seems to me that this is a kind of fudge.

The third reason, and this is the most important thing that I want to say, is about consultation.

Lord Adonis: The noble Lord and I have spent some time with other noble Lords in Grand Committee scrutinising a whole swathe of these regulations. Does he agree that a pattern is becoming very clear in that there has been no formal consultation on any of these regulations, whether or not they are making minor changes? In parenthesis, I say to the noble Lord, Lord Kirkwood, that the deficiencies in the first set of regulations were not minor but major in their impact and were not picked up by the engagement of the department with the industry. However, even those that involve substantial changes have not been consulted on formally. He will recall that in Grand Committee yesterday we were told that there had been selective engagement with "trusted" individuals. It became clear to us during those debates that there was a huge reluctance on the Government's part to engage formally in consultation because—until the moment that we have just reached, when it has become public knowledge—they did not want the degree of preparation made for no deal to be known. The very scale of the problem to be encountered in respect of no deal and the alarm it would create was a reason why the Government have not been consulting, as they should have been, on these and other regulations. That ought to give the House very great concern about the state of the regulations and the degree to which the Government have engaged with those who are going to be very significantly affected in the way that he suggested.

Lord Deben: The only problem is that the noble Lord's intervention was so long that my name has been changed to his on the annunciator.

Noble Lords: Oh!

Lord Deben: I have to say, there are many fates which are worse than death—though I am not quite sure that that is one.

I wonder whether I could go on to the question of consultation. It is very difficult to uphold the argument that there was no need for consultation when you have had to withdraw the SI because, as a result of publishing it, it turns out that there was a need for consultation because a very serious mistake was found in it. If this were the only case—I say this to the noble Lord, Lord Kirkwood—I would be less concerned, but last week and yesterday we found a series of really serious changes which needed to be made which had been brought to our attention by the very industry with which the particular ministry concerned had claimed to have had ongoing and general discussions.

There is, for example, a very major problem for the pharmaceutical industry because there was no such consultation. I do not want to go into detail on that because obviously that is not the subject here, but it is important to say that this is a case where, had there been consultation, there would not have had to have been a second draft of this SI. My noble friend said, "Well, we have changed it", but she has not. She has not, I think, convinced the House that there might not be something else that needs to be changed. Because you have changed one thing does not mean to say that there will not be any other.

Lord Warner (CB): Will the noble Lord agree with me, having sat through six sets of regulations which have been negatived, that there is a pattern emerging? Does he agree that the pattern is real doubt about whether there are accurate impact assessments and real doubt about whether any worthwhile consultation has taken place with interested parties? I am asking the question because this is of great importance to the House as a whole. There is a continuing assertion that these were minor and technical issues which did not involve a change of policy; but on further investigation, all showed that there were serious concerns about impact assessments, there were changes of policy, and there were great deficiencies in the consultation. As this House in Grand Committee has negatived six sets of regulations, one after the other, one can be excused for being a little sceptical about assertions from the Dispatch Box.

Baroness Buscombe: My Lords, if I may be helpful to the House, I think I made it clear to all noble Lords that, because of consultation with the industry concerning this fairly niche area within the pensions industry of cross-border activity with the EU, we learned that one word was wrong within the draft regulations. Therefore, notwithstanding what may have happened with other SIs that noble Lords have been debating in recent weeks, with regard to this SI, one word was out of place and, quite rightly, the pensions industry alerted the department, which withdrew the draft regulations. As the noble Lord, Lord Kirkwood, so helpfully stated, the reality is that this happens. It does not happen on a regular basis. I cannot believe that, when my noble friend was Secretary of State, every piece of legislation he brought forward was perfect the first time round.

Lord Deben: I perfectly agree with my noble friend that I did not always produce legislation that was perfect the first time round. However, I did consult. I would not have dreamed of having a situation like this, where after I had published the legislation and told people that there was no need for consultation, I then found that there was a need for consultation. In this case, my noble friend is coming to the House and saying, "Although we got it wrong the first time, we know we are not getting it wrong the second time". I know that she does not wish me to refer to what has gone on in other SIs, but the trouble is that there is beginning to be a pattern here. There is an assertion that proper consultation is not needed but it is then found, after they publish the document, that a series of people from the industry come up with really very serious matters. In two cases, those matters could affect the lives of people in this country because of the way in which the legislation has been framed. My noble friend really does have to understand that we are not having this argument for some esoteric reason or because we happen not to like the withdrawal Act. We are having it because, by accident, we have come to understand that when you work this out, discuss it and

[Lord Deben]
think about it, it does not turn out to be quite the legislation that we were told it was. That is the next reason why I find it difficult to accept this SI.

Then there is the question of cost. Evidently, it was not thought necessary to have a consultation because it would not be cost effective to have one. I do not know how much it costs to withdraw an SI and then to replace it, but that does not seem to be a cheap alternative to having a proper discussion in the first place. I do not understand why there could not be a consultation. After all, if the consultation had taken place at the time the original SI was laid, it would have happened, it would have been over, and we would have known that there had been such a consultation.

Lastly, I will talk for just one moment about the whole question of cross-border activity. This SI says, "If we leave the European Union, and if we leave it without an agreement, we are putting in place something that will enable us to be an island which does not have any outside connections at all but our own internal arrangements". This means that we are going to reduplicate what are, at the moment, some of the arrangements which are done across the whole EU. I do not see here the cost of having entirely our own system and the cost to pension operators in this country of having to make new cross-border arrangements themselves. That does not come into the impact assessment. There is no question about that cost, but it is not here. All we have here are the costs of that very narrow area which the Government have decided is what is defined as "cost". Yet the Government are going to have to accept that pension people in this country will have the cost of making arrangements so that they can do the things they are doing at the moment inside the European Union. This is a cost, but it is not here.

I know my noble friend is bored with it and thinks that we should let this all pass, but this House is about revision. We have made a mistake with this particular SI. We should recognise that all these SIs need to have at least a formal consultation. There should be a time when people can be asked to put in their concerns; the ability for a Minister to get up and say, "We have had a consultation". I think it is unfair on my noble friend. She can only get up and say, "Well, there has been an informal series of talks".

4.45 pm

Viscount Eccles (Con): Over how many weeks would the noble Lord suggest that the consultation should take place?

Lord Deben: My noble friend is right to say that the problem with all this legislation is that it takes time. If you are going to make fundamental changes, you have to face it: it is better to have short consultation periods in which everyone is told that there is a consultation, rather than this egregious kind of concept where you say, "We have had a bit of a consultation and we have ongoing talks". We cannot get up in this House and say that we have had a consultation that shows that we have covered everything. I agree with my noble friend that you have to have a short consultation but it must be public and clear. It is frankly not our fault that we have lost a lot of time. It is because the Government did not start two years ago to prepare for what might be a no-deal exit.

Lord Adonis: The noble Lord raises an extremely important point about the need to consult before regulations are published, rather than after. The Minister said that these were technical and that there was ongoing engagement. Responses from practitioners in the sector show that they were concerned about the mistakes made the first time round. Unlike the noble Lord, Lord Kirkwood, who thought that everything would be perfect the second time round, the response of Faye Jarvis, a partner at Hogan Lovells whom I quoted earlier, was that they were getting very significant impacts from the original version of these regulations. She warned schemes to pay attention to any further changes to the regulations in case they brought such unintended consequences again, saying:

> "People will need to be scrutinising and seeing what else is coming out in terms of draft regulations to make sure there aren't any other inadvertent errors but also to check there aren't any unexpected impacts".

Does the noble Lord agree that the whole reason one consults before presenting regulations for approval to Parliament is so that these kinds of inadvertent changes do not take place? The fact that partners in pensions law firms are saying that they have not been consulted and are not content that these regulations will not produce more inadvertent errors with a major impact entirely supports the noble Lord's argument. We need proper consultation and not the rushed, informal dialogue which is taking place because of the very rushed nature of these no-deal preparations.

Lord Deben: I will answer the noble Lord, but I do not want to prolong my remarks. I am already a bit fed up with being told that I must not talk about these things because it takes too long. I find it extremely difficult but it has to be talked about. The noble Lord is entirely right. This will be true and, if so, I have to declare my interest as chairman of PIMFA. I have some allied interests, but not as far as pensions are concerned.

I come back to my noble friend. There is national concern about the responsibility of government and Parliament. That leads me to say very seriously to her that if it looks as though you are hiding the consequences of decisions that you make, that does a great deal of harm. Not having the proper costs here—

Baroness Buscombe: My Lords, I must intervene at this point. I take great exception to any suggestion that I am seeking to hide anything at this Dispatch Box. I hope that the noble Lord—my noble friend—will apologise.

Lord Deben: Frankly, I did not say that my noble friend was hiding it. I said, "If it looks as if you"—and I am not referring to my noble friend but to the Government who have laid this SI—"are hiding". She really cannot take exception to that—well, she has taken it, and if exception was taken, I apologise for any reasonable exception—but really, I say to my noble friend that we are trying to debate this issue. I

was saying that if it looks as if you are hiding something because you do not include the costs of withdrawal, the public will find that difficult to accept. I do not think that I have accused her of anything, and trying to get upset about it is not acceptable.

All I am saying to her is that I hope that she will talk to the people who have laid these instruments and have not told us directly the costs. I believe that they intended not to tell us the costs, because if people add up the costs of Brexit in each of these SIs, they will begin to see why some of us have been so concerned.

I end by saying simply this. We need to have proper consultation and proper costings—not just generalised ones—and, when we have a changed SI such as this, which has been changed because we did not have a consultation, it would have been much more reasonable to have had a consultation before this SI was produced. I do not believe that it is possible for a Minister to get up and say that there is no need for consultation because we know that it is perfectly right. So, for all those reasons, I think it is perfectly correct that we should be having the kind of debate that we are on this SI.

Lord Tyler (LD): I intended to intervene on the noble Lord, but I realised that it would be incredibly embarrassing if my name were to be attached to his speech, so I spared him the embarrassment. However, I shall quote him in a moment.

I was struck by a point made by my noble friend Lord Kirkwood of Kirkhope about the sheer quantity of secondary legislation coming through, and the great work that he and other members of those committees are doing. I am involved in a small way because I am on the Delegated Powers and Regulatory Reform Committee, which is involved at an early stage. My noble friend rightly made the point that the sheer quantity of SIs coming before your Lordships' House is causing us real problems. I very much concur with what was said by the noble Lords, Lord Deben and Lord Warner, because we were together in the Grand Committee both last week and yesterday. A pattern seems to be developing. If I may illustrate it in this way, each time we come to one of these SIs—it is happening again today—the Minister says that this is contingency planning. It is fairly set out in the Explanatory Memorandum and very well explained that it will become applicable, relevant and of interest to Members of your Lordships' House only if there is a no-deal outcome.

So all this is speculative; it is hypothetical. When I used to ask questions of the noble Lord, Lord Deben, in the other place, he would say to the House, "The question from Mr Tyler is hypothetical and I refuse to answer it". That was perfectly reasonable. Now the Government are making a hypothetical statement: if there is no deal, this will be necessary. Most of the SIs coming before the committees of your Lordships' House, let alone here in the Chamber, are hypothetical in that sense. This is a real problem—and, as the noble Lord, Lord Deben, said a few moments ago, it is becoming more of a problem every day.

In our vote yesterday, there was a huge majority against a no-deal outcome. The Prime Minister is increasingly saying that she is against a no-deal outcome—she even thinks it is more likely that there will be no Brexit. In those circumstances, the pressure on us all—and on the Government—to get consultation right, to get the impact statement right, to get the costs allocations right are becoming, in the words of the noble Lord, Lord Deben, more and more difficult and taking up more and more of the time of Ministers, their civil servants and your Lordships' House. That means that we may be neglecting the "normal" SIs, if I may call them that, which are not related to a no-deal situation.

As we all know from the European Court of Justice judgment before Christmas, the only circumstances now in which a no-deal outcome, on which this SI is based, could happen would be as a result of a deliberate decision by the Government. It is not going to happen by accident. We were told in previous debates that there was a risk of an accidental no deal, but that is now impossible as a result of that judgment.

I will quote very speedily from the noble Lord, Lord Deben, who I hope will not be even more embarrassed than he was by being given my name. He said in Grand Committee last Wednesday that,

"I do not think this House is doing itself any good by conniving in what is manifestly a total nonsense … There is no no-deal scenario which does not mean chaos, so there is no point in having legislation which pretends that it will stop a no-deal scenario being chaos. That is inevitable, ineluctable and inextricable from the whole process".—[*Official Report*, 9/1/19; col. GC203.]

We are back at that point. Here we are, inevitably finding that in a number of ways that have been well illustrated by other Members of your Lordships' House, this SI may have serious problems. The Government are entitled to say, "We have no intention of going there. We do not want a no deal. We want the Government's deal". In that respect we are, unfortunately, jamming up and putting so much new work into your Lordships' House at every level, which may be a complete waste of time. That will distract us from doing a good job on other SIs, and that is a very regrettable situation.

Lord Adonis: Does the noble Lord not agree that another theme that came out of the Grand Committee's consideration of these statutory instruments was a more fundamental issue? The House of Commons debated and voted on no deal last Tuesday in one of the largest Divisions on Brexit since this whole process started two and a half years ago. It voted by a majority of seven against no deal and in favour of an amendment to the Finance (No.3) Bill, under which the disbursement of public funds in respect of no deal was conditional on the House of Commons having a specific vote on no deal, with it being clearly understood—because that amendment had been passed—that the House of Commons would not be favourable to it. So there is real concern among Members of your Lordships' House about the legitimacy and validity of all this planning, given that in the one opportunity the House of Commons had to express its view, it expressed a firm view against there being no-deal planning.

Lord Tyler: In the interests of brevity, all I need to say is that I agree with the noble Lord—but this evening we may of course find that there is an additional

[Lord Tyler]
expression of opinion by the other place. In that case, all this work may well turn out to be even more absurdly out of place.

The Archbishop of York: My Lords, I just wanted to ask the Minister: how much consultation was undertaken with industry before the first regulations were produced? Did industry suggest, rightly, that this would cause trouble for the Pensions Regulator and others because it was bigger than just the United Kingdom? I listened to the noble Lord who said that he did not think that these small, technical changes required the same amount of consultation. If that is the case, we must distinguish each regulation from others. If one takes a generalised view of consultation, one can never have proper legislation that requires greater scrutiny than other legislation.

As far I am concerned, I was persuaded by the noble Lord that this is purely technical. From what I am hearing, it is. If, of course, as happened yesterday, there is no question of a no deal and the House of Commons says the same thing, and the same thing happens today, these regulations may not be necessary. But any sensible planner must always plan for all contingencies. You cannot go blindly in one direction alone—so I want to know.

5 pm

Lord McKenzie of Luton (Lab): My Lords, I have stayed out of this to date and I propose to do so in the future. I want to make just one point before we lose sight of it. The Minister talked about the change involving just one word. I think that we should recognise that that word is "UK", which is a pretty substantial one.

Baroness Drake (Lab): My Lords, these draft regulations are part of a suite of instruments intended to plan for the no-deal scenario, necessitating a sweep across the stock of pension law. Such contingency regulations may well amend both primary and secondary legislation, the remit of the Pensions Regulator, the Pension Protection Fund and the Financial Assistance Scheme. What we have not received, however, is a broader assessment of what the pension landscape would look like in a no-deal scenario which sets the context for the consideration of these SIs individually. That is because to call them technical, when we stand back and look at the wider implications of no deal, is not to see some of the serious challenges and loss of member protections that could flow as the consequence of a sudden dropping out of EU legislation in a no-deal scenario.

These particular regulations address cross-border activity where an employer in one member state selects to base its occupational scheme in another member state, but they remove from the Pensions Act 2004 the requirement for occupational pension schemes to obtain authorisation from the Pensions Regulator for cross-border activities. They repeal the cross-border regime.

The UK and Ireland are the two countries between which there is significant cross-border pension provision, which will be another complication in future UK-Ireland relationships. Recent amendments to the Occupational Pension Schemes (Cross-border Activities) Regulations 2005 were made to allow for the IORP II strengthened requirements on cross-border activity which would be revoked if there is no deal. The acronym IORP comes from the EU directive meaning "Institutions for Occupational Retirement Provision". Thus a new set of regulations that has just been accepted and which puts in place protections for cross-border activity would be revoked. In the event of no deal, the Pensions Regulator would need to provide guidance to those pension schemes which are currently authorised for cross-border activities within the EU. They exist now and they will not cease to exist simply because we may leave with no deal. Can I ask the Minister what would be the effect of substituting existing Pensions Regulator authorisation with a weaker system of Pensions Regulator guidance for cross-border activities? How would the effect of that weaken the level of protection afforded to scheme members in respect of both contributions and the protection of their assets? When will the regulator's guidance be published so that we can more fully understand the implications of no deal?

Could the Minister advise whether there have been any discussions between the Pensions Regulator in the UK and Ireland on pension cross-border activities in the event of a no-deal scenario? Will the IORP II new authorisation process for schemes wishing to undertake bulk transfers of assets with a separate scheme located in another EEA state include ensuring that the cross-border transfer is approved by a majority of the members and beneficiaries or, where applicable, by a majority of their representatives? What will happen to those protections in a no-deal scenario? I do not know because I cannot find the answers to those questions. There will be UK citizens whose assets are in occupational schemes in other EU states that may be protected by ring-fencing or whatever.

The original draft of these regulations, as has been said on numerous occasions, required pension schemes to invest predominantly in UK-regulated markets. Regulation 29, the one being referred to, has been revised to allow schemes to invest in regulated markets more generally and therefore avoids the unintended consequence of large numbers of occupational pension schemes having to divest themselves of investments in regulated markets outside the UK. It illustrates how the impossible speed and pressure our departments and regulators are expected to work under to prepare simultaneously for a possible no deal and a withdrawal deal can lead to unintended consequences, which worries me. I fear that in retrospect, in the rush to prepare for no deal against a self-imposed deadline of 29 March, we will discover more unintended consequences in the canon of UK law, not simply in pension law. We have seen others, on trademarks or wherever, where people are beginning to identify unintended consequences.

I will not refer to Northern Ireland because we are now taking that separately, but on the broader point of how impact is defined and measured, there is a series of cliff-edge issues that could pose material risk to our financial markets in a no-deal scenario. UK providers will also be unable to rely on current passporting rights, could experience difficulties in servicing cross-border contracts and will not be part of the legal framework for moving data between the EU and the UK. In the absence of regulatory co-operation agreements or

memoranda of understanding between the UK and the EU in a no-deal scenario, the operation of pension schemes and the value of members' pension pots will be negatively impacted.

This takes me back to my opening point that, in considering these statutory instruments individually, the House lacks a broader assessment of what the pension landscape will look like in a no-deal scenario. To argue that somehow there is no need for consultation if the impact of no deal does not result in a change of policy is to completely fail to understand that the effect of no deal in weakening the protectors of members' rights is a policy choice if one chooses no deal, because it will consequently affect members' rights. It seems so narrow to argue that you cannot find a change of policy, though really the issue around consultation is not well argued. Although I accept that these regulations deal with the more narrow issue of cross-border activity, they are indicative of the problem of trying to look at any SI on pensions without the context of understanding the impact on pensions generally under no deal. Pension schemes everywhere are sitting and worrying about the consequences of this, particularly in financial markets. There are also UK citizens whose assets are in pension schemes in other EU states. Just walking away from the regime without any understanding, even with the Irish regulator, does not seem to be good preparation.

Lord Adonis: My Lords, my noble friend made an extremely powerful argument, which corresponds to a pattern that has emerged to those of us who have spent time in the Grand Committee discussing these regulations. They have all been prepared in a rush to meet an imminent deadline. Because of the rush, the need to meet the deadline and the secrecy inside the departments with which these regulations have been drafted and all no-deal planning has taken place, the pattern that has emerged in the debates in the House and the Grand Committee is that much wider issues have become apparent that could only become apparent through consultation.

The conclusion I can see we are already reaching—my noble friend makes an extremely powerful argument—is that it is not just the technical changes of the regulation and the precise changes in UK law, though clearly those have been very badly handled and have potentially had a dramatic impact on UK pension funds, but the whole wider context in which these funds and the professionals engaged in them will have to operate under no deal that will bring about fundamental changes. That is precisely why one would wish to have a full consultation, which has not taken place.

The noble Viscount opposite asked how long we would wish a consultation to be. There are established Cabinet Office rules on this which, when I was a Minister, we observed as a matter of course for any changes in the law; he will know this better than anyone, having dealt in this area so frequently. The rules say 12-week consultations. That is the norm. In my day, when we had a quality of Government rather higher than the one now engaging in all this helter-skelter planning for no deal, you needed a special exemption based on special emergency requirements not to go down the 12-week route, and that could happen only if the changes concerned were exceptionally minor. In this case, the Government themselves have imposed the deadline and the changes under consideration have a very wide potential impact. It is abundantly clear that the right thing to do in this and other cases is to have a 12-week consultation, with the wider policy environment under consideration being subject to consultation too.

I would like to ask the Minister some other questions about the detail of these regulations. For those of us who are not experts, it is not clear precisely how deep the impact will be. Paragraph 2.5 of the Explanatory Memorandum says that,

"UK occupational pension schemes will no longer need to obtain authorisation from the Pensions Regulator for cross-border activities".

I take that not to be a minor change in the regulatory regime but a fairly significant one, on which the Pensions Regulator should have been asked to give advice—including to the House—when we were considering these changes. Can the Minister tell us what the impact of that change will be and why the Pensions Regulator was not invited to give us advice?

On the wider issue of no-deal planning, which of course underlies all these regulations, the Government have said that they do not wish to see no deal take place. Last week, when the House of Commons debated no deal and voted that it should not take place, Robert Jenrick, the Exchequer Secretary to the Treasury, said that,

"the Government do not want or expect a no-deal scenario".—[*Official Report*, Commons, 8/1/19; col. 269.]

It is entirely within the purview of the Government not to have a no-deal scenario; if they do not want it, they can ensure that it does not take place, not least because of the ruling of the European Court of Justice before Christmas. They could revoke the notice under Article 50 to ensure absolutely that there will not be no deal.

A point was raised perfectly properly by the most reverend Primate the Archbishop of York that one should prepare for contingencies, but these are contingencies entirely of the Government's making. They are not talking about preparing contingencies for, if I may say so, acts of God or other things that happen for which one cannot be accountable. When I was Secretary of State for Transport, a volcano went off and we had to get planes flying when there were big ash clouds. One should be expected to make contingencies for those kinds of things over which one has no control. In the case of the contingency for which we are discarding all our normal consultation mechanisms, playing fast and loose with a regulatory regime and, as my noble friend said, not taking account of the wider policy context and what may happen as a result of no deal, it is all self-inflicted by the Government because they are sticking to a self-imposed deadline.

The response of noble Lords who have sat in Grand Committee is that this does not sufficiently justify not going through established consultation routes. A whole stream of statutory instruments will be coming from Grand Committee where big concerns have been raised, not least by the noble Lord, Lord Warner, in respect of a set of pharmaceutical-related SIs that we debated yesterday. Key affected partners were not consulted at

[Lord Adonis]
all; the reason for that, it appears, is that the department did not want to hold a consultation that would have made people aware that no-deal planning was taking place. Indeed, in the debate we held yesterday on one of the key regulations, the only person who we could establish firmly had been consulted was the noble Lord, Lord Warner, himself; he had phoned the relevant public authority that was engaged in the no-deal planning.

Lord Deben: My Lords, I invite the noble Lord to give way, because it gives me the opportunity to say that I think my noble friend the Minister will now understand that when I said that if one looks as if one is hiding something, I did not refer to her at all. I referred to a very long experience of exactly what the noble Lord refers to: a refusal to consult the very people who could have made sure that the SI was correct. In the case we talked about yesterday, it seems to me that the Government are very likely to have to withdraw that SI and then replace it, as they did with this SI. I did not think it was unreasonable to point that out.

5.15 pm

Lord Adonis: The noble Lord makes an extremely good point. I invite noble Lords to read the debate in the House of Commons on 8 January on no-deal planning. It lasted about an hour and, as I say, it had a vote that led to the Government being defeated on a specific proposal to rule out no-deal planning. It became very clear in that debate that Members from all sides of the House of Commons were not prepared to contemplate no deal; that they wished to rule it out and did so in their vote; and that they regarded no-deal planning as an immoral activity. The only reason it is being kept in play and detaining the House at huge length, as it has done today and in the consideration of these regulations in Grand Committee, is as a means of trying to scare Members of Parliament into thinking that if they do not vote through the Prime Minister's deal, there may be a no-deal Brexit. This is a straightforwardly immoral activity if it does not command a majority and the confidence of the House of Commons in the first place.

Lord Blackwell (Con): I must tell the noble Lord that I listen to his interventions with growing frustration, as very little of what he says is about the merits of the statutory instrument we are supposed to be debating. The noble Lord might wish it were otherwise, but Parliament voted to enact legislation which is now an Act of Parliament and states that the UK will leave the European Union on 29 March. The only way to avoid that is for Parliament to agree a deal, or repealing that legislation. Until either of those events happens, it is only sensible that we should plan for what is now on the statute book, as the most reverend Primate said. The noble Lord is wasting the time of this House.

Lord Adonis: My Lords, I do not accept that for a moment. The whole basis on which we engage in no-deal planning is fundamental to these regulations. If no-deal planning does not have the authority of the House of Commons—and it appears from the vote last week that the other place is not prepared to contemplate no-deal planning—why on earth are we detaining the House at huge length in making clearly unsatisfactory arrangements? They have not been properly consulted on and are leading to regulations that are not properly drafted, in pursuit of a contingency that will not arise. I flatly disagree with the noble Lord.

We are the subordinate House, but it appears that leading Members of the House of Commons are concerned with these affairs. The amendment last week which led to a majority against no-deal planning was a cross-party amendment tabled by Nicky Morgan and Yvette Cooper, two very senior Members of the House of Commons. In moving it, Yvette Cooper said:

> "I have heard some say that they want the imminent threat of no deal to persuade people to back the Prime Minister's deal, if not now, then later. But brinkmanship in Parliament is not the way to resolve this and get the best deal for the country. This is too serious for us to play a massive Brexit game of chicken".—[*Official Report*, Commons, 9/1/19; col. 263.]

I entirely agree with that statement and so did a majority. That leads to a huge question mark over the validity and legitimacy of all this no-deal planning and puts a particular duty on this House to see that we do not pass regulations which have been inadequately consulted on, inadequately drafted and inadequately scrutinised in pursuit of a deadline artificially imposed by the Government. The Government have the power to change it if they wish, because the European Union (Notification of Withdrawal) Act 2017, which the noble Lord just referred to, gives them the power to change the exit date and unilaterally revoke Article 50. It also does not appear to have the confidence of the House of Commons in the first place. I hope noble Lords will in no way be dissuaded by the ardent partisans of a no-deal Brexit from giving these regulations the scrutiny which they not only deserve in respect of those affected by them, but which we have a duty to give them if we are to follow the will of Parliament as expressed by the House of Commons.

Lord Warner: My Lords, I am not going to continue the discussion about our previous experiences of SIs. I just have a question that I want to put to the Minister on this set of regulations, prompted by the helpful remarks of the noble Baroness, Lady Drake. To what extent, if any, would this set of regulations require pension funds to shift their investment strategies, which could be deleterious to the beneficiaries of those pension funds?

Baroness Buscombe: My Lords—

Lord McKenzie of Luton: Forgive me; I was waiting because I thought the Minister was going to answer the question.

Baroness Buscombe: No.

Lord McKenzie of Luton: My Lords, this has been a wider debate than I anticipated when I signed to speak on these regulations but, I suggest, relevant nevertheless. Some important issues have been raised. The noble Lord, Lord Deben, implicitly shared my noble friend

Lady Drake's view of the squeezing of time to look at these things properly. My noble friend Lord Adonis went to the root of the problem and the challenges that we face on no deal.

My noble friend Lord Adonis talked about secrecy in the departments. I have to say that I have been disappointed in one respect because I have always been a supporter of the DWP. There is a note attached to each information note saying, "X at the Department for Work and Pensions, telephone number Y and email Z, can be contacted with any queries regarding the instrument". When I tried to do so, I was told that that was not really for opposition Members to use. Given that these are situations where there is highly technical stuff, I found that disappointing. We had always thought that we would have a basis of sharing technical issues, even if our conclusions may be different.

The noble Lord, Lord Kirkwood, started off by giving us robust reassurances about the degree of scrutiny and sufficient time. What came from that bit of the debates, which involved my noble friend Lord Adonis and the noble Lords, Lord Kirkwood and Lord Deben, was that we need to reflect on this issue. What started off as a narrow technical piece of legislation has raised a lot of questions about scrutiny—not only the scrutiny of this legislation but other things that we do as a result of Brexit.

I am again indebted to my noble friend Lady Drake, who has done the heavy lifting for us on this SI. She has focused particularly on the challenge caused by the absence of the Northern Ireland Assembly, and raised an important point about a weaker regulatory system for cross-border activities and the broader question of what the pensions context should look like.

I thank the Minister for her explanation of these regulations. They have a fairly straightforward intent, so we are told, despite the seemingly technical nature of the proposed adjustments. As we heard, the regulations are part of the planning that would enable UK law to operate effectively if the UK leaves the EU without a withdrawal agreement in place. One example would be the obvious problems where the UK is currently particularised in relation to the EEA, either as "with the UK" or as "other than in the UK".

The Explanatory Memorandum asserts that we do not need to make policy changes to ensure UK law in the field of occupational and personal pensions continues to operate effectively in the event of withdrawal without an agreement. I am not sure that is right; at what point is a change a policy change, and at what point is it not? For example, Regulation 2(3), among others, in reference to insurance policies or annuity contracts of security, would,

"omit 'or any other EEA state'".

Is that a minor tactical detail or a change of policy? The Pensions Act 2008 excludes Article 6 of the IORP directive, with its main administration in the EEA. Is that not a change of policy? The regulations enter into force on exit day, so could the Minister confirm what date this is? It is not specified in the regulation so far as I can see. If the UK should exit the EU on an agreed basis, how does this impact the entry-into-force date? Does it simply fade away? How much of this SI still stands or is necessary should—however unlikely—the Prime Minister's deal be supported by the Commons? Indeed, can the Minister remind us of what is in the Prime Minister's deal on the issue of pensions? The amendment to the Pension Schemes Act 1993 is focused on the security for GMP not to be allowed to be an instrument of an EEA state. May I ask the Minister why that is the case?

Further provisions are a bit convoluted; perhaps the Minister can comment on some, starting with Part 2 and Regulation 2, which amends the Pension Schemes Act 1993; what is this detail about? I tried to get clarification from the department. Can the Minister please give us a detailed explanation of this and the amendment to the Pensions Act 2004?

These are important provisions. I share with many the view that we may never have to deal with them in practice, but they should be properly introduced and scrutinised in the interim.

Baroness Buscombe: I thank all noble Lords who have taken part in the debate, and I will do my best to respond. My notes are somewhat spread, so if I may I will begin by responding to the noble Lord, Lord McKenzie. On his not being able to contact the department, I took 27 pieces of legislation through this House on behalf of Her Majesty's Opposition, and not once was I given access to civil servants or to support from any department. I recall the wonderful Lord McIntosh of Haringey, who sat in my place and whom I miss still, because he was utterly brilliant when it came to the most technical and difficult regulations. I would telephone him and he would laugh at the suggestion that I should have access to any of his civil servants. However, on one occasion he did relent, because he agreed that the support I had from industry was so exceptional that he would share his expertise with me if I shared mine with him.

My department responded to a question from the noble Lord only this morning, confirming that these regulations are focused on what will happen in the event of no deal, but in the event that there is a deal, it is very important to stress that they will no longer be required. We would then expect to defer, revoke or amend the instruments in time for the end of the implementation period to ensure that they properly reflect whatever deal scenario might be in existence. It is important to make it clear that these regulations are about legal certainty on exit day; they are not about trying with a crystal ball to know what would happen in any particular deal situation. They are about ensuring legal certainty in the event of a no deal, which would mean that we walked away from the EU on 29 March.

5.30 pm

I want to say clearly to the noble Lord, Lord Adonis, and others that there is no question of this being rushed. I have been in this department for about 19 months now and can attest that we have been working assiduously to prepare for both a deal and a no-deal situation. It is crucial that, whatever happens in another place—because the decision rests there—and until there is legal certainty on the withdrawal agreement or any other course of action, the Government behave

[Baroness Buscombe]
entirely responsibly by continuing to prepare for all eventualities. I appreciate that noble Lords may not like that, but it is the sensible and responsible thing to do.

There is no question of hiding behind any situation; there is no question of a rush. Our civil servants are working exceptionally hard across Whitehall. I have often thought that we have not been public enough about the work that we are doing to reassure the public in the event of our leaving with no deal, but in recent weeks we have been much more open on that front.

On consultation, I have a memory. I remember that the party opposite had no consultation when it introduced the Human Rights Act, so it is very difficult for us on this side of the House to take lessons about that. I have taken through a number of SIs in the past year and a half and I do not remember any of the noble Lords who have spoken today about a lack of consultation—

Lord Warner: May I just correct the Minister, as someone who was highly involved in the Human Rights Act? There was extensive consultation before the 1997 election with a whole raft of interests concerned with that Act. It therefore came as no surprise, and many external lawyers were highly involved in drafting the policy and advising on the legislation. It is simply not true that the Act was suddenly sprung on Parliament without any consultation. It was also in the Labour Party manifesto that it would be introduced after the 1997 election.

Baroness Buscombe: The noble Lord has clarified the situation, in that the Act came in some time after his then party came into power and the consultation took place prior to the general election that brought it into power.

Lord Harris of Haringey (Lab): My Lords—

Baroness Buscombe: I want to progress, my Lords, and do not have to accept any more interventions.

Lord Harris of Haringey: I am sorry, but the Minister is misleading the House on a specific point which she chose to introduce on the passage of the Human Rights Act and the consultation on it. I was a member of a body set up called the Human Rights Act taskforce, which was designed to consult and involve stakeholders in how the Act should be implemented. There was consultation because I was part of it. I was not a Member of this House at that stage; it was something that the then Government did.

Baroness Buscombe: My Lords, let me turn to the consultation that took place in relation to these statutory instruments. Other noble Lords have insinuated that there was no consultation. I made it clear at the outset that there was a form of consultation. As the noble Lord, Lord Kirkwood, made clear, there is in a sense consultation and consultation. We are talking here about consultation with those very closely connected with the industry. The Department for Work and Pensions engaged with a pension provider, an advisory firm and a trade body for occupational pension schemes, that trade body obviously representing a fair number of those in occupational pension schemes. Any suggestion by noble Lords that there has been no consultation is simply not true. I reassure the most reverend Primate the Archbishop of York that consultation took place with those involved in the bespoke part of the industry concerning cross-border activity within the EU. These SIs do not have any policy intent. They do not change policy; they are minor and technical amendments. It is not our role to look at the implications of a deal or no deal; it is more about ensuring that there is preparedness for a no deal and legal certainty when we leave the EU on 29 March.

I am grateful to the noble Lord, Lord Kirkwood, for his support and to hear that the Secondary Legislation Scrutiny Committee decided that the regulations were clear. Of course, it was necessary to re-lay them when an incorrect reference to UK regulated markets was found, but we were very quick to do that. We withdrew the draft regulations and re-laid them on 3 December. It is about making sure that we can be agile and flexible and therefore respond with certainty when we need to. Any question of there not having been consultation with those in the industry whom the regulations impact is simply not the case.

As always, the noble Baroness, Lady Drake, asked the more challenging questions. I will do my best to reply, but, if I fail with regard to any aspect of these very technical regulations, I will write to her. These statutory instruments fix elements of the UK's occupational and personal pensions legislation that will not work effectively after the UK departs the EU, including where distinctions have been made between EU or EEA member states and overseas entities, such as EEA central banks, that will no longer apply, where the UK is referred to as an EU or EEA member state, or where it is obliged to share data with EU agencies or member states under reciprocal arrangements that will no longer apply.

If someone lives in the European Economic Area and has a personal pension or annuity with a UK-based firm, the firm should have made plans to ensure that the person can still receive payments from the personal pension or annuity even if the UK leaves the EU without a deal. If the firm needs to make any changes to the personal pension or annuity, or to the way in which it provides it, it should contact the person. If the person has any concerns about whether they might be affected, they should contact their firm. The UK state pension will still be payable cross border into the EEA.

The European Union (Withdrawal) Act repeals the European Communities Act 1972 and converts into UK domestic law the existing body of directly applicable EU law and UK laws relating to EU membership. So, this body is referred to as retained EU law. The Act also gives Ministers a power,

"to prevent, remedy or mitigate … any failure of retained EU law to operate effectively, or … any other deficiency in retained EU law, arising from the withdrawal of the United Kingdom from the EU",

through statutory instruments such as these regulations.

We believe it is in the interests of both the EU and the UK for the UK to have a smooth and orderly exit from the EU, as set out in the withdrawal agreement. But it is our duty to continue to prepare for a range of potential outcomes, including no deal.

To answer the question from the noble Lord, Lord Warner, when companies invest in pension schemes it is up to those schemes and pension providers to think about their investment opportunities in future. It is not something that we can reflect through these statutory instruments.

I want to be sure that I have covered as much as I can to the best of my ability. Noble Lords have been concerned that we have not given these statutory instruments enough attention. I can only repeat that that simply is not the case.

Lord Adonis: The Minister is doing a great job of responding to the points raised. I raised the point about paragraph 2.5 of the Explanatory Memorandum, which says,

"UK occupational pension schemes will no longer need to obtain authorisation from the Pensions Regulator for cross-border activities".

Can she explain what the impact of that would be and what the regulator has said about the effect it would have on the pensions industry?

Baroness Buscombe: The noble Lord is talking about cross-border pensions that do not have to come to our Pensions Regulator once we leave the European Union. The whole point is that we have to make sure that our Pensions Regulator no longer retains a power to influence cross-border activity where it ceases after we leave the European Union.

Lord Adonis: It says "UK occupational pensions schemes". It does not say other schemes.

Baroness Buscombe: These are pension schemes operating in member states. If they are operating in member states they do not then have to make sure they abide by UK law and the UK Pensions Regulator. If they happen to be operating in the EU, they do not have to abide by UK law if we leave the EU. Does that make sense? I hope it does.

Baroness Drake: I did understand what the Minister said, and I completely accept that she always seeks to answer my questions. One of my concerns is that it is impossible. I found it difficult from the SI and the memorandum to understand, in the traffic both ways, how individuals' assets are protected if the UK is no longer in the IORP regime. I could not trace that. Given the volume of cross-border activity on pensions between Ireland and the UK, what is the realistic prospect, even in a no deal, of getting a memorandum of understanding to address that and to try to have a common regime?

Baroness Buscombe: I will be turning to the Northern Ireland regulations shortly. If we leave with no deal it is not possible at that point for our Pensions Regulator to continue to protect assets beyond what will become our borders. That is where there is a great hope that there will be a deal, so that during the implementation period we can make sure that we introduce legislation that will protect our pension assets—the very thing that concerns the noble Baroness. We hope we will be able to bring it before the House prior to the end of the implementation period. Then we could revoke the statutory instruments before your Lordships' House today.

Baroness Altmann (Con): Might it be helpful if my noble friend went back to the department and asked it to reassure itself that pension assets can be protected in the event of no deal? It strikes me that there may be an issue that has not yet come to light, and that some cross-border issues might need to be addressed a little more carefully.

Baroness Buscombe: I take on board my noble friend's question. We have to be realistic about this. I am sure noble Lords will accept that we cannot impose any legal rights, certainties and protections prior to the end of March, or prior to knowing whether we will have a deal. In the event of a no deal, it would be impossible for us to be certain on that day that we can protect things. I put my hand on my heart and say that in the event of no deal, I am sure that those in my department who are focused on this subject—including my honourable friend in another place, the Minister for Pensions—will do all they can post exit to ensure that we can negotiate and work closely with those with whom we currently have a cross-border relationship, and to reassure them that we can continue in the same vein.

However, I can make no guarantees at the Dispatch Box. It would be wrong for me to seek to try until we have certainty. I repeat: these regulations give legal certainty at the moment when we leave the EU with no deal. I hope that all noble Lords will accept that I have done my best to reassure them that these regulations are in good shape. Again, I thank most particularly the noble Lord, Lord Kirkwood—who sits on the SI Committee and has access to a whole host of regulations—for his support, saying that these regulations are effective. I hope noble Lords will show their support for them.

Motion agreed.

Occupational and Personal Pension Schemes (Amendment etc.) (Northern Ireland) (EU Exit) Regulations 2018

Motion to Approve

5.48 pm

Moved by ***Baroness Buscombe***

That the draft Regulations laid before the House on 3 December 2018 be approved.

The Parliamentary Under-Secretary of State, Department for Work and Pensions (Baroness Buscombe): My Lords, Northern Ireland's occupational and personal pensions

[Baroness Buscombe]
legislation broadly mirrors legislation in Great Britain. These regulations, therefore, make analogous minor and technical changes to Northern Ireland legislation as the regulations I have just spoken to. The intent of the regulations is the same: to make sure that Northern Ireland legislation continues to operate effectively once the UK withdraws from the European Union.

Let me explain why we are laying these regulations on behalf of Northern Ireland. The UK Government remain committed to restoring devolution in Northern Ireland. This is particularly important in the context of EU exit, where we want devolved Ministers to take the necessary actions to prepare Northern Ireland for exit. This includes ensuring that the necessary legislative corrections are made to ensure that Northern Ireland's statute book is ready for exit day. That is consistent with the action being taken at Westminster and the other devolved legislatures.

However, with exit day only a few months away, and in the continued absence of a Northern Ireland Executive, the window to prepare Northern Ireland's statute book for exit is narrowing. UK government Ministers have therefore decided that, in the interest of legal certainty in Northern Ireland, the UK Government will take through the necessary secondary legislation for Northern Ireland at Westminster. This was done in close consultation with the Northern Ireland Civil Service. This approach is being taken forward across government departments to make separate Northern Ireland statutory instruments which create a separate, transferable body of Northern Ireland legislation made at Westminster in the absence of a functioning Northern Ireland Assembly. This helps to keep a separate body of Northern Ireland law intact for when a functioning Executive and Assembly return.

It is common practice to have mirroring legislation in respect of Northern Ireland when legislating in the area of pensions. This is fundamentally no different. These regulations were developed in close co-operation with the Department for Communities in Northern Ireland, and it has cleared the text of the regulations. This approach is common to that being taken across government departments—that is, to make separate Northern Ireland statutory instruments which create a separate, transferable body of Northern Ireland legislation made at Westminster in the absence of a functioning Northern Ireland Assembly. This helps to keep a separate body of Northern Ireland law intact for when a functioning Executive and Assembly return.

The list of specific legislation that these regulations amend is lengthy, and I would be happy to provide noble Lords with a list of the Northern Ireland legislation that is being changed. We will continue to work closely with the Department for Communities in Northern Ireland, the Pensions Regulator and stakeholders to ensure that all parties are involved in the process where their interests are concerned. I beg to move.

Baroness Drake (Lab): My Lords, I will avoid repetition. In the debate on the previous SI, I logged my concerns about the UK leaving the EU pension cross-border regime, the protection of members' assets and their movement in cross-border schemes, and the significance of the cross-border issue between Ireland and the UK. That particular problem triggers a concern about a wider issue.

These draft Northern Ireland regulations apply to policy areas which are a transferred matter for Northern Ireland. In the absence of a Northern Ireland Executive, the Government are taking steps to secure a functioning statute book in the event of a no deal. The UK Government are clearly taking through the necessary secondary legislation at Westminster in consultation with Northern Ireland departments. These regulations are a classic example of doing that in the absence of the Northern Ireland Executive. The Government are able to do that through the Section 8 powers in the withdrawal Act and Schedule 3, which relates to Northern Ireland in particular.

I fully appreciate and accept the problems that the Government face in Northern Ireland, but the democratic deficit that exists there, as a consequence of the problems that we face, is even more concerning in a no-deal scenario because the risks and consequences flowing from it are even greater. That will exaggerate the consequences of no deal and having no Northern Ireland Executive to express the opinion or represent the interests of the people of Northern Ireland. Could the Government look at what they can do, even with the withdrawal agreement, to have a strong relationship with the Irish regulator? The Northern Ireland Executive are not here to articulate the significant issue of pensions in Northern Ireland.

Lord Adonis (Lab): Will the Minister tell us more about what consultation there has been with the Irish regulator and stakeholders in Northern Ireland, not just about the technical details of these regulations but also on the wider implications for pensions and pension funds in Northern Ireland if there is no deal? Can she also confirm my reading of the Explanatory Memorandum and the text of the order? It is that this order went through exactly the same process as the previous one and had to be withdrawn because the defective drafting meant that it would not be possible for UK pension funds to invest in certain European assets under the changes that were first proposed. I assume that is because it was drafted in the same way as the first regulation and had to be changed in the same way. Is that the case? Was it the same defect in both regulations that had to be corrected?

Secondly, what further consultation has there been with the pensions industry in Northern Ireland since this new draft regulation has been laid? Does it have concerns similar to those which I quoted in relation to the previous regulation, and might more issues come out of further consultation? As my noble friend Lady Drake has said, there are some concerns about there not being a Northern Ireland Assembly or Executive. This has all been done at two stages removed and, since we have special duties in respect of Northern Ireland, it would be good to have reassurance that these processes have been gone through.

Baroness Buscombe: I will respond to both noble Lords on these issues around Northern Ireland. First, in response to the noble Lord, Lord Adonis, there was the same error when the regulations were first drafted.

When that error was picked up, the situation was immediately changed. We withdrew the draft regulations and they were relaid in their current form on 3 December. It is important to stress that we have ongoing discussions. We consult with the Irish regulator and Pensions Regulator on an ongoing basis. We of course need to remove the cross-border regime that exists between two member states. We have, therefore, been in discussions with the Irish regulator and Pensions Regulator to reflect Northern Ireland and its relationship with Ireland, which will remain within the EU. These discussions will continue, as we want to make sure that we can transpose statutory instruments, doing for Northern Ireland as we do for the UK, to ensure that there is legal certainty.

In a no-deal situation, the UK cannot participate in the EU's authorisation regime for cross-border activity, as we will no longer be a member state. However, we are working with the Pension Regulator, Northern Ireland and industry stakeholders to see what can be done to support members of cross-border schemes, including where employees or Irish employers are across the border and contribute to a UK occupational pension scheme. Notwithstanding the reality that these regulations do not address that, we are cognisant of the fact that we need to do all we can to work across border in relation to Northern Ireland and Ireland to ensure that, in any event, the proper protections can be put in place and we can reassure employers and employees with regard to occupational pension schemes. I hope that that goes some way to reassure noble Lords.

It is common practice to have mirroring legislation. These instruments do not make policy changes but are designed to ensure that UK law in the field of occupational and personal pensions continues to operate effectively in the event that the UK exits the EU without a withdrawal agreement in place. I hope that noble Lords will support these regulations.

Motion agreed.

Services of Lawyers and Lawyer's Practice (Revocation etc.) (EU Exit) Regulations 2019

Motion to Approve

6 pm

Moved by ***Lord Keen of Elie***

That the draft Regulations laid before the House on 21 November 2018 be approved.

The Advocate-General for Scotland (Lord Keen of Elie) (Con): My Lords, the House will be aware that the Government have been publishing a series of technical notices to outline the implications of a no-deal exit for citizens and businesses. On 12 October, the Government published a technical notice titled, *Providing services including those of a qualified professional if there's no Brexit deal.* This notice set out the implications of a no-deal exit for professionals in scope of the two EU directives on lawyers' services and lawyers' establishment. The draft instrument that we are discussing today makes changes to the arrangements in England and Wales and in Northern Ireland relating to these directives. It remedies deficiencies in the relevant retained EU law arising from withdrawal from the EU. Scotland will be taking forward its own legislation on this matter, as it pertains to a matter of devolved competence.

I thought it would be prudent for me first to set out how these EU directives are currently applied in the United Kingdom and across the other members of the EU. The lawyers' services directive allows specified lawyers to provide regulated legal services in a member state other than the one in which they qualified—termed a "host state"—without the need to register with a host state regulator. Lawyers provide services under their existing professional title, otherwise termed their "home state" professional title. The directive clarifies the regulatory rules applicable and the conditions for providing services in a host state.

The lawyers' establishment directive allows specified lawyers in one member state to practise reserved legal activities on a permanent basis in another member state, under their home state professional title, and provides the conditions for doing so. It also allows lawyers who are practising in another member state to be admitted to the profession in that member state, after three years of practice in the law of that member state, without having to go through the usual qualification routes. European lawyers practising in the United Kingdom under the establishment directive must be registered with a UK regulator as registered European lawyers. As registered European lawyers, they have the right to own a legal business without a UK-qualified lawyer.

If we leave the EU without an agreement, the lawyers' services directive and the lawyers' establishment directive will no longer apply to the United Kingdom and there will be no system of reciprocal arrangements under which EU and European Free Trade Association lawyers can provide regulated legal services and establish on a permanent basis in the UK—and, likewise, UK lawyers in the EU. It is the deficiency in retained EU law caused by this lack of reciprocity that we are seeking to remedy.

First, EU and EFTA-qualified lawyers who have already successfully transferred into the English and Welsh or Northern Irish profession will be able to retain their qualification and related practice rights—but arrangements will be different in future. In the event that the UK leaves the EU without a deal, our services trading relationship with the EU will be governed by World Trade Organization rules. The General Agreement on Trade in Services prohibits signatory states giving preferential market access to any other signatory state in the absence of a comprehensive free trade or recognition agreement between them. We therefore need to fix the deficiencies in the relevant retained EU law caused by the lack of reciprocal arrangements with the EU, while also meeting our international law obligations. As such, we will revoke the legislation that currently implements the EU framework, and EU and EFTA lawyers will be treated in the same way as other third-country lawyers.

[Lord Keen of Elie]

The draft instrument will also provide a transition period to allow registered European lawyers time to comply with the new regulatory position. The transition period will run from exit day until 31 December 2020.

Lord Adonis (Lab): Can the Minister tell us how many lawyers will be affected by these arrangements?

Lord Keen of Elie: Yes, of course. I am obliged to the noble Lord for prompting me to go straight to that point. There are 680 European lawyers registered with the Solicitors Regulation Authority and up to 20 who are with the Bar Standards Board: far fewer in the latter case because, of course, most European lawyers who come to practise tend to find themselves practising in London's large firms, rather than seeking to establish themselves as independent barristers at the Bar. I hope that that meets the noble Lord's concern on that point.

Baroness McIntosh of Pickering (Con): As my noble friend is aware, I worked in the other way: I qualified under Scots law and then went to practise in Brussels. Under the new arrangements, what will be the reciprocal rights of those who wish to do precisely what I did after we leave the European Union?

Lord Keen of Elie: In the event of us exiting without any deal, there will be no reciprocal rights—which was one reason why, as I indicated, these regulations are required. They are necessary in order that we can establish a position in which all third-party country lawyers will be on the same standing in the absence of a free trade agreement or other agreement with a third-party country. There will be no reciprocity—that will be a matter for the relevant EU country to consider—but clearly it is a matter that we would wish to address in future negotiations consequent on our exit from the European Union. This is dealing with the position in the United Kingdom in light of the existing regulatory regime under EU law. Clearly, and quite patently, you could not address the question of how the EU 27 are going to treat our lawyers going forward.

Baroness Kingsmill (Lab): Is it correct that this applies only in the event of a no-deal situation?

Lord Keen of Elie: I have already said that.

Baroness Kingsmill: It does not say that on the face of the regulations: that is why I was checking.

Lord Keen of Elie: That is why I said it in opening—but, if the noble Baroness wishes, I can repeat it.

Baroness Kingsmill: I just wondered if it might be helpful if it were on the face of the regulations, because this situation keeps arising on many of the other ones as well. The problem is that these things have a tendency to drift on, and in the event that there was not a no deal but there was some other kind of deal, would the regulations that we are considering at the moment have some kind of half-life or a continued life of some kind or another? That is why I put the question: I am concerned that in this and in other statutory instruments that I have been considering, there is nothing on the face of the instrument that actually says that this will fall by the wayside in the event that there is any kind of deal other than a no deal.

Lord Keen of Elie: The terms of the instrument make it perfectly clear that it is to apply in the absence of a deal. My department is certainly well aware of the scope and application of the instrument, which is why I made it clear in opening that this instrument will apply in the event of there being no deal. However, in the event that there is a withdrawal agreement of some kind, clearly that would not be a situation in which the instrument would be required.

Lord Hope of Craighead (CB): I do not want to cause any difficulty, but why does paragraph 1(2) refer to the transitional period? There will not be a transitional period if there is a hard Brexit and no deal.

Lord Keen of Elie: It does not refer to the transitional period as proposed in the withdrawal agreement: it refers to a transitional period that will apply for the purposes of this particular instrument in order to ensure that there is no immediate cut-off for EU lawyers in the United Kingdom. It is for that particular purpose that this particular regulation allows that, and it is considered that that is allowable under the GATS regime as well—in other words, we are allowed a period of time to transition to a point where European lawyers registered in the United Kingdom come to find themselves in the same position as third-party country lawyers.

Baroness McIntosh of Pickering: I am sorry to belabour the point, but I am slightly confused about why we are being so nice and kind to EU lawyers—the non-British lawyers who are working here—and not seeking to protect the rights of British lawyers who are working in Brussels, Denmark, Sweden and other EU countries. Are we not trying to be reciprocal now?

Lord Keen of Elie: Clearly, over time we will address the ability of the United Kingdom to agree with the EU the possibility of reciprocal rights for United Kingdom lawyers in Europe, but it is not something that we can dictate by our legislation. What we can do, however, is facilitate the position of EU-registered lawyers who are already in the United Kingdom and contributing to the legal services in the United Kingdom so that they can be secure in the knowledge of what their position will be in the event that we exit without any agreed deal.

Lord Foulkes of Cumnock (Lab Co-op): The Minister may have said this before I came in. I apologise: I was held up at a meeting outside. He mentions the United Kingdom, but paragraph 2.1 of the Explanatory Memorandum says:

"The purpose of this instrument is to end the preferential practising rights of EU and EFTA lawyers in England and Wales and Northern Ireland".

What is the position in relation to Scotland?

Lord Keen of Elie: The noble Lord is quite right: he was not here when I began. I said that with regard to Scotland, this is a devolved issue and the Scottish Government are addressing that matter. However, in taking forward negotiations with regard to reciprocal rights in the future, we would have in mind the interests of all lawyers within the United Kingdom, wherever they qualified. But for the purposes of determining the rights of registered European lawyers in the United Kingdom, we will deal with it by way of this instrument for England and Wales and for Northern Ireland, and the Scottish Government are undertaking to address it in the context of that jurisdiction. That is where we stand. As the noble Lord is aware, this is a devolved competence.

Lord Foulkes of Cumnock: The Minister has been particularly helpful in relation to that. I know that he knows Scots law very well, as do a number of other noble Members present. What is the current state of play in relation to this being dealt with in the Scottish Parliament? Is it running parallel with us? Is it ahead of us? Is it behind us? Will it be able to get it done in time? I know they are not very keen on no deal—in fact, they are not very keen on coming out of Europe at all—in the Scottish Parliament so I wondered what the state of play was in relation to dealing with this in the Scottish Parliament.

Lord Keen of Elie: In relation to this particular instrument, I am not in a position to say where the Scottish Government are in processing such a proposal. That is a matter for them and it is not a matter that they would, as a matter of course, disclose to me. But, as I say, I have confidence that they are aware of the issue and they have decided that they will take it forward. If they had wanted to utilise the provisions of the Scotland Act to have the UK Parliament legislate for them in regard to this matter, they would of course have said so. The very fact that they have not is indicative that they are making progress to legislate for this on their own behalf. That is where we stand.

Lord Beith (LD): Perhaps I might ask the Minister to tidy up the point that was raised earlier. What ensures that if there is some kind of deal, the provisions of this instrument fall away? Does it require some further statutory provision to do so—in effect, revoking the instrument—or does it fall away if there has not been an exit day? But surely if there is a deal, there is still an exit day.

Lord Keen of Elie: My Lords, in the event that we have a deal, we will repeal this instrument. It will have no further purpose in those circumstances. This is to address the issue of there being no deal—I emphasise that again.

Baroness Kingsmill: Perhaps the Minister can clarify: it will have to be repealed? We will have to go through all of this again?

Lord Keen of Elie: We will have to address those instruments that are in force which no longer have an application in the event of a withdrawal agreement being entered into.

I referred to the arrangements that would be made for EU and EFTA-qualified lawyers because these arrangements include not only EU 27 lawyers but EFTA and Swiss lawyers, who are subject to similar arrangements.

In the event that the UK leaves the EU without a deal, as I said, we will be governed by the GATS provisions. Therefore, we will have to comply with them and we need to address that issue. The draft instrument will also provide, as the noble and learned Lord, Lord Hope, observed, a transition period to allow registered European lawyers time to comply with the new regulatory position. We consider that that will not be inconsistent with the GATS regime. As I said, the transition period will run until 31 December 2020 and will allow registered European lawyers and those in the process of achieving that status by exit day to practise in the same way as they do now but to use the time to adjust their position. This arrangement will also allow EU and EFTA lawyers with ownership interests in regulated legal businesses in England and Wales or Northern Ireland to adjust their regulatory status.

As I have set out, there will be a deficiency in retained EU law which implements the two lawyers directives, due to a lack of reciprocity, if we leave the EU without a deal. It is the purpose of this instrument to address that deficiency and to ensure that by doing so we uphold our international obligations in this context. I emphasise the point that was brought out by the noble Baroness, Lady McIntosh. It does not—indeed, it cannot—address the issue of reciprocal rights for UK lawyers in the EU 27. It is in these circumstances that I beg to move.

6.15 pm

Lord Adonis: The impact assessment refers both to registered European lawyers, of whom it says there are 693, as of last July, which I take to be the group that the Minister referred me to a few moments ago, and to "registered foreign lawyers", of whom there are apparently 2,406. But it is not clear to me what the impact is of these regulations on registered foreign lawyers and the 2,406 who are mentioned in the impact assessment. Perhaps he could tell the House.

Lord Keen of Elie: Yes, I am most obliged to the noble Lord. Registered foreign lawyers are those lawyers of third-party countries who are registered in the United Kingdom. We have lawyers from many jurisdictions—for example, the United States of America—who practise under their foreign lawyer qualification in the United Kingdom. As the noble Lord will appreciate, London is an international legal centre as well as an international finance centre. This instrument has no impact at all on those foreign lawyers but it aligns registered European lawyers with registered foreign lawyers for the reasons that I have indicated.

Baroness McIntosh of Pickering: By definition, this instrument is to be of a limited duration. Is it temporary or is it of unlimited duration? I understood my noble and learned friend to say in response to my questions

[Baroness McIntosh of Pickering]
that this could well be overtaken by events at such time as we have a negotiated withdrawal agreement. At what stage will the negotiations be expected to start to make sure that British-qualified EU lawyers practising in other member states will be aligned with those EU-qualified non-British lawyers who are practising in this country? I understood my noble and learned friend to say that we are going to have two categories of European-qualified lawyers as of 29 March. There will be those non-British EU-qualified lawyers who are qualified to practise in this country, who will continue after 29 March. But there will be those like me—clearly, I am non-practising now—who will not be able to practise in another EU country post 29 March. For the avoidance of doubt, for a newly qualified European lawyer coming through in this country, is it understood that our qualifications, whether as a Scottish advocate or solicitor or as an English barrister or solicitor, will be recognised in other EU countries as entitling that person to qualify in European law in those countries, or will they have to go through, for example, a Danish jurisdiction, an Irish jurisdiction or a Belgian jurisdiction should they wish to practise in that particular member state?

Lord Keen of Elie: My Lords, this is a permanent change in the law, which may be subject to defeasance in the event that we have a withdrawal agreement. It will then be rendered unnecessary. It applies to and is concerned with the position of registered European lawyers in the United Kingdom. It cannot make provision for United Kingdom lawyers in the EU 27 or EFTA countries. We have no competence to do that. It is our hope, however, that in due course, and following withdrawal, subject to the withdrawal agreement, we will in the course of negotiation be able to negotiate with the EU 27 the development of appropriate reciprocal recognition for lawyers going forward, but that is for the future. This is a permanent change in the law to address the prospect of our leaving on the 29 March 2019 without a withdrawal agreement.

Baroness McIntosh of Pickering: I am sorry to persist, but could my noble friend answer my second point? After 29 March, will the qualification of anybody who is newly qualified under United Kingdom jurisdiction be recognised to enable them to practise automatically in another EU country, or will they have to requalify in that country on 30 March?

Lord Keen of Elie: With great respect to the noble Baroness, we cannot legislate to ordain the EU 27 or any EFTA country to recognise the legal qualification of someone who has qualified in the United Kingdom. We simply cannot do that, so, after 29 March, in the absence of any withdrawal agreement and any negotiated arrangement with the EU 27, such people will have to do what any other third-party-country lawyer does, which is to go to the relevant jurisdiction and apply the host country's provisions on registration and qualification. There is no doubt about that.

Lord Thomas of Gresford (LD): I congratulate the Minister on his timing. This is part of the no-deal preparations along with the fake travel jam, the lorry jam in Dover and the hiring of ferries with no ships, but it is a bit late now, with about half an hour to go to the vote, to frighten the horses any further. It is extraordinary that parliamentary time should be spent in debating a statutory instrument of this nature. It is applicable only if the UK leaves the EU without reaching an agreement. The effect of that is to throw the United Kingdom on to World Trade Organization rules for general agreement on trade and services.

If that were to happen, the most-favoured-nation rules would come into operation prohibiting preferential treatment of any signatory state above another. The whole purpose of this statutory instrument, therefore, is to reduce EU and EFTA lawyers currently practising in this country to the level of the lawyers of third-party countries from around the world whose rights to practise and establish in England, Wales and Northern Ireland, absent a trade deal, are absolutely minimal, if they exist at all. As the noble and learned Lord said, this SI affects about 700 lawyers currently registered with the Solicitors Regulation Authority, 17 registered with the Bar Standards Board and some five EU lawyers registered in Northern Ireland. The other side of the coin, however, which would be of concern to the legal profession, is that the EU will obviously seek reciprocally to reduce the rights of United Kingdom lawyers practising in the EU to those WTO rights.

One of the most important differences between the WTO regime and the existing EU framework is the practice areas in which foreign lawyers are allowed to provide services in Europe. While the directives allow EU, EEA and Swiss lawyers to practise host member state law, including EU law, it is not possible under the current GATT schedule for commitments of the EU, which limits third-country lawyers to providing legal advice in home-country law and public international law, to practise in EC law.

While it is possible in theory for individual member states to grant higher levels of access to foreign lawyers, in practice most member states have not gone beyond these GATT commitments. It follows, therefore, that British lawyers will lose a number of significant rights: rights to provide legal advice on EU law; the right to requalify in host member states; and rights of audience in domestic and European courts. Further, according to the settled case law of the CJEU, lawyers from third countries practising in Europe cannot claim legal professional privilege to protect their clients' interests. Legal professional privilege is not available to them.

It is not surprising, then, that in 2016 the Law Society of Ireland received nearly 1,400 applications from practitioners to requalify in Ireland. Those were British lawyers, mostly from antitrust, competition or trade law practitioners, based in London or Brussels. Last week the Irish Taoiseach specifically said that they were looking at Ireland taking business in legal services away from the United Kingdom. This statutory instrument, therefore, risks unnecessary conflict with the EU legal profession. There will be no reciprocity. Even if there were a no-deal withdrawal from Europe, surely there would have to be an agreement to retain an open market for legal services allowing mutual rights to practise across the borders. You will see no trace of that in the political statement that accompanies

the withdrawal agreement. As the noble and learned Lord, Lord Thomas of Cwmgiedd, pointed out last week, we are in a competitive position. Commercial courts where the proceedings are conducted entirely in English have opened up already in Paris and Amsterdam. The noble and learned Lord said that they are being actively promoted as a much better alternative to the United Kingdom because their judgments will be recognised and enforceable across the EU and because of the certainty of their position.

If the EU does unto us what we are doing to it by this statutory instrument, British lawyers will have no rights of audience in these new English-speaking courts. That is a most curious result. Instead of spending time abolishing the rights of European lawyers to practise in this country, the Government might spend time in negotiating mutual rights to practise to replicate the current position. There is nothing, as I have said, in the political declaration that points to such negotiations. I ask the noble and learned Lord: where are we? Have there been any talks on this issue?

Lord Beecham (Lab): My Lords, I refer to my professional interests, although my firm has not been engaging in EU law. I want to thank in particular the Law Society and the Bar Council for very helpful briefings on an important and complex issue. The provisions of the statutory instrument appear to be acceptable, inasmuch as it will still be possible for EU-registered lawyers to be admitted to the solicitor's profession or to practise under their home title. Can the noble Lord give any indication of the numbers—the proportion of those whom we have heard are already practising in this country who would be likely to continue under this new regime? Is there any estimate of the impact of the change on the likely numbers of those who will be able to continue? What estimate have the Government made of the impact on UK lawyers currently practising in the EU? Is there any information about the likely impact on them? Can the Minister clarify what is meant by the reference in the Explanatory Memorandum to the,

"alternative examination routes open to third country qualified lawyers",

and indicate how many applicants are expected to take that course of action? What will be the position of EU lawyers currently engaged in litigation in the UK who do not choose to be admitted to the UK professions by the end of the transitional arrangements on 31 December 2020? Will they, for example, have to withdraw from cases still under way on that date?

6.30 pm

These regulations deal with the impact of Brexit on the practice of law in the UK but there is, naturally, another side of the coin: namely, the effect of leaving the EU on UK providers of legal services to clients in the EU, as the noble Lord just mentioned. There is currently in effect a single market in legal services across the EU, with 36 of the top 50 UK law firms—among which my old firm does not feature—practising in 26 EU countries and contributing significantly to the £4 billion a year net contribution to our economy of these legal services. Have the Government made any assessment of the impact of Brexit on this front?

Further, the Law Society has expressed concerns about the impact of a no-deal Brexit, which would necessitate the application, as we have heard, of World Trade Organization rules, where, I understand, progress on developing rules on services has apparently been very slow. Currently, the Law Society is expressing concerns that a no-deal scenario would have a major impact on the legal profession's future in providing services in the remaining 27 EU states. It warns that lawyers would have to navigate more than 30 different regimes in EU and EFTA states, many of which restrict practice rights for third-country lawyers, which they will then be. These include a requirement to hold local qualifications, without which UK lawyers could not advise or act on matters such as competition, internal market and trade law. In most countries, third-country lawyers would be unable to act for clients in the domestic courts.

Another problem is that most EU states do not allow so-called fly-in, fly-out services by third-country members, so that it would be impossible for UK lawyers to advise EU clients, represent them in cases involving more than one EU state, or play a leading role in global investigations. Some EU states require membership of their professional bodies, while others, such as Spain and Sweden, go as far as banning their lawyers from partnership with non-EU lawyers, and most EU states do not allow non-EU nationals even to seek admission to their national legal professions. The Explanatory Notes, in paragraph 12.1, make light of these issues, but what steps have the Government taken to clarify the EU's intentions, either collectively or at a national level, in these matters, which have a significant potential effect on the profession and indeed, therefore, on the financial return to this country?

Lord Beith: My Lords, before the Minister rises to respond to the debate, I wanted to seek a little further clarification on the fact that this instrument will have to be repealed if there is any kind of deal. We ought to know what we are doing, and in this case we are perhaps being asked to pass a statutory instrument which does not within it contain the suicide pill which it would require to cope with the situation in which there was a deal. That has implications for the timetable and for all the things we have to do before 29 March, one of which might be to repeal not only this but a whole series of other statutory instruments, presumably either by a stack of single positive or perhaps negative instruments to achieve the repeal or by one omnibus statutory instrument. We have not been told enough about what this procedure would be, and it casts further doubt on the wisdom of proceeding at this stage with a statutory instrument which, of course, has all the problems that my noble friend and the noble Lord, Lord Beecham, referred to. My objective was to clarify what the mechanism would be; I think it would be the bringing forth of a further statutory instrument to repeal this one.

Lord Adonis: Before the Minister rises, I noted in his opening remarks that he did not refer to the consultation that had taken place. This is a big theme in the way that the House is seeking to scrutinise these statutory instruments, since there has been very rushed

[Lord Adonis]

consultation or almost no consultation. Can he tell the House in his response what the consultation has been and what the response has been?

I observe, from a brief search of responses to these regulations, that they have not been particularly positive. I notice that the President of the Law Society, Christina Blacklaws, is quoted as saying that these regulations,

"will cause firms a significant amount of expense to find work arounds and, with tight margins, small and medium sized firms that employ EEA lawyers will struggle most to adapt".

I think the House will be particularly concerned about the small and medium-sized firms. The larger firms can take care of themselves and can pay a lot of the costs and associated expenses, but small and medium-sized firms under pressure should be of concern to us. Can the Minister tell us more about the engagement there has been with such firms, how the costs might be mitigated, and tell us more about the response to the consultation at large?

I also make a general point, which is that I know that in a sense, everything we are doing in response to no deal is utterly deplorable; I do not want to repeat all the remarks I made earlier, although they apply here too, about how it is almost unthinkable that we should be making these arrangements for a cliff edge and all that goes with it. What is becoming clear again, in case after case, is not just that no deal will be deplorable but that the effects for this country over the medium term of withdrawing from the European Union will also be deplorable.

The noble Lord, Lord Beecham, quite rightly referred to the very large European market in legal services. We have fantastic lawyers, some of the best law firms in the world, and as the Minister said, we are a major centre for international legal firms. I do not remember whether it was the Minister or my noble friend who referred to the proportion of the largest firms that do work across the European Union, but it was a high proportion. Essentially, we are engaging in an act of self-mutilation. We are deliberately choosing to restrict the markets in which our legal firms can work and deliberately choosing to restrict the opportunities for the next generation of lawyers to be able to practise. That is, on any reading, deplorable.

Maybe the Minister, who is such a distinguished member of his profession, might rise to the occasion and say that he regrets that and wishes that we were not limiting the opportunities for our lawyers and our country in the way that we are. When the next generation of lawyers looks back and sees that their opportunities have been stunted and that the opportunities they have to practise in European markets have been withdrawn and that if they wish to do so they will need to move to the EU, maybe some of them will look back and say that the leaders of the profession who had responsibility at this period should have had a much closer regard for the interests of the next generation than they have had.

Lord Keen of Elie: My Lords, I shall begin with the observation from the noble Lord, Lord Beith, because I omitted to identify the location of the suicide pill. I am advised that the intention is that, in the event of an agreement, it will be incorporated in the withdrawal agreement Bill, and that is the mechanism that it intend to employ's for those purposes. I apologise for not having appreciated that when the question was first raised.

Lord Foulkes of Cumnock: Will that apply to all several hundred SIs? Will they all be incorporated in the withdrawal agreement Bill?

Lord Keen of Elie: My understanding is that that is the mechanism that will be employed.

A number of noble Lords raised the question about the access of UK lawyers to the EU 27 and EFTA. That is not the purpose of this instrument, but I do not wish to ignore it. Clearly, we would like to see a withdrawal agreement that leads on, pursuant to that, to negotiations that can ensure that we have as wide a form of access to the EU 27 and EFTA countries for legal services, like other services.

The noble Lord, Lord Thomas, made a number of perfectly good and valid points about where we are without a deal and the impact it will have upon the provision of legal services. This is a matter over which I have been in discourse with the legal profession for the past two years, and I have visited with a number of firms in jurisdictions outside the United Kingdom to discuss with them where they stand with regard to these matters, in particular in Paris. Of course, as the noble Lord, Lord Beecham, has observed, this is not for the larger firms. It tends to be the very large firms—generally City-based—who are engaged in practice outside the United Kingdom, particularly in Europe.

The noble Lord, Lord Adonis, asked about small firms and the impact on them. To a very large extent, it is the City firms who are employing European lawyers for a particular form of expertise. One has to bear in mind that small firms do not tend to have non-UK qualified European lawyers practising.

It is perhaps worth noticing—lawyers will appreciate this, but others may not—that, in England and Wales any natural person may deliver legal services for pay, except in the defined, reserved areas, of which there are six. They cannot call themselves solicitors or barristers, but they are only prohibited from practising in the reserved areas, unless they are subject to appropriate regulation. In the event, EU lawyers who have not requalified—and I will come back to this point—tend only to be here in order to show expertise within the law of their own particular jurisdiction. To try to put it in context, this applies not only to EU lawyers but also, for example, to American lawyers, so that, when they are doing international transactions they have available to them expertise in another jurisdiction's law.

In addition, we have to bear in mind the mutual recognition of professional qualifications. After three years in the United Kingdom, an EU lawyer is in a position to apply to become a lawyer under the host state's regulation—in other words, a solicitor or barrister. Generally speaking—and this is a point emphasised in the Bar's briefing—those who intend to be engaged in reserved matters will take that qualification. That is why, when engaging with the profession on this matter, we have allowed for a transition period so that, by

2020, people who are intent on remaining in the United Kingdom to practise in reserved areas will have had the opportunity to move over under the three-year rule in order to have the host qualification to continue. The Bar's briefing said that, in the experience of the Bar Council, most EU practitioners who are interested in delivering reserved legal activities, obtain one of the home titles in order to be more successful in our legal market. I hope that addresses this point.

On the issue of consultation and negotiation, the question of professional legal qualifications was raised with the EU at a very early stage on the basis that it was an adjunct to citizen rights. At that stage, the EU was not prepared to negotiate on that issue as distinct from what they regarded as citizen rights. It was, therefore, not taken forward in the context of the withdrawal agreement. In the context of the political declaration, it is directed principally to goods, although others elsewhere will discuss the distinction between goods and services. At the present time, it is our present intention to engage, if we have an agreement with the EU, on the question of reciprocity and recognition going forward. We understand the importance of this.

I might add that we have discussed the matter with those firms that generally operate in the EU and outside the United Kingdom. They have been aware of these issues for some time and very many of the lawyers whom they engage in their offices—for example in Paris and Hamburg—are now locally qualified or are qualified nationals of the host state. That is the way in which these practices are carried on.

I take the point made by the noble Lord, Lord Adonis, that some restructuring has been required to allow for this, and that has to be accepted. It is restructuring that would not otherwise have been engaged in, but these firms have undertaken it in preparation for the possibility of a no-deal Brexit. However, these tend to be the major City firms. You do not get the high street conveyancing lawyer trying to open offices in Paris—if they do, I suspect it is not terribly successful.

I recognise the development of courts in other jurisdictions and, in particular, the point made with regard to potential developments in Ireland. I am well aware of many of my fellow barristers who have checked their ancestry just to ensure that they can secure an Irish passport. Lacking that, they have sought to secure a place at the Bar of Ireland. It may be apocryphal, but I understand that the fee for registration as a solicitor in Dublin went up rapidly from €300 to about €3,000. I may be doing the solicitors' branch of the profession a disservice in relying on that story, but these developments are taking place. Let us remember that, at the level of international litigation, the real competitors are Singapore, Hong Kong and New York, which are all places outwith the EU, albeit that there are specialist centres—Stockholm being one, in the context of shipping and arbitration; and Hamburg being another. We recognise that as well.

I come back to the instrument itself. We are required to pass it because, otherwise, we will be in breach of our international law obligations under the WTO and, in particular, the GATTs. So it is necessary for this purpose. I hope that it will not be required. I express this view without qualification. It is only appropriate and sensible that the Government make provision for what could be an eventuality. I am not going to revisit ground that the House has already covered in the context of earlier statutory instruments which were before it. I hope that it will not be required, but it is only proper and appropriate that we should engage with the profession in order to ensure that we are prepared for any foreseeable eventuality, however unpleasant and unrewarding it may be. I beg to move.

Motion agreed.

Civil Legal Aid (Amendment) (EU Exit) Regulations 2019

Motion to Approve

6.46 pm

Moved by ***Lord Keen of Elie***

That the draft Regulations laid before the House on 28 November 2018 be approved.

The Advocate-General for Scotland (Lord Keen of Elie) (Con): My Lords, as I indicated a moment ago, the Government published a technical notice on a number of areas which anticipated the possibility of our leaving the EU without any form of withdrawal agreement. On 13 September 2018, we published a technical notice which set out arrangements for civil legal aid cases, including arrangements in relation to the EU legal aid directive 2003, which I will refer to as the EU legal aid directive. The regulations we are discussing today will allow us to implement these arrangements and make other necessary amendments to the legal aid framework in England and Wales and Northern Ireland. These draft regulations will provide clarity for lawyers and citizens in the event of a no-deal outcome. As I indicated, that is not what we hope for, seek or wish to have as our destination. I emphasise that this will deal with the matter in England and Wales and in Northern Ireland. It is a matter of devolved competence in Scotland. The Scottish Government will address it as they see fit.

If we were to leave the European Union without a withdrawal agreement, the current reciprocal arrangements under the EU legal aid directive would be lost. The EU legal aid directive sets out rules relating to legal aid in EU member states, other than Denmark, to ensure adequate access to justice in cross-border disputes. Its application is limited to civil and commercial matters. It only applies to cross-border disputes which are, very broadly, disputes where an individual who is domiciled or habitually resident in an EU member state requires legal services in relation to proceedings or to enforcement of a decision or authentic instrument in another member state.

In a no-deal scenario, we are seeking to ensure that legal aid provision—for matters within the scope of the EU legal aid directive but not otherwise within the scope of legal aid—is not made to individuals domiciled or habitually resident in an EU member state on a unilateral basis where there is no longer reciprocity from the EU member state.

[Lord Keen of Elie]

The instrument also makes technical amendments to ensure that the legal aid legislation in England and Wales and Northern Ireland operates effectively following EU exit and makes changes to procedural requirements for legal aid applications in England and Wales. It amends the civil legal aid framework in England, Wales and Northern Ireland to remove the legislation implementing the EU legal aid directive, which will no longer apply to the United Kingdom.

Individuals who are domiciled or habitually resident in the EU member state who require legal services in relation to proceedings in England and Wales or Northern Ireland or who wish to enforce a decision will be subject to the same scope, means and merits requirements as those who are domiciled or habitually resident in England and Wales or third countries—in other words, it brings everyone on to a level playing field. Legal aid provision for those domiciled or resident in the UK participating in proceedings in EU member states will fall to each member state's particular legal aid framework—again, we cannot legislate for those states.

Repealing the legislation implementing the EU legal aid directive will ensure legal certainty and clarity regarding legal aid entitlement. In addition, we avoid a unilateral arrangement where those domiciled or habitually resident in EU member states are treated more favourably than those domiciled or habitually resident in the United Kingdom.

If I may, I shall explain the technical amendments made by the instrument. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 and the Access to Justice Order 2003 require the provision of legal aid for exceptional cases not normally within the scope of legal aid where not to do so would be a breach of enforceable EU rights. LASPO also provides that the Lord Chancellor may make an order specifying circumstances where foreign legal advice may be provided when not to do so would, again, be a breach of enforceable EU rights.

The references in LASPO and the 2003 order will be amended to "retained enforceable EU rights", because of course, pursuant to the 2018 Act, in our domestic law we will have retained enforceable EU rights, but we will not have EU rights. The terms will be defined with reference to the 2018 Act, as I said. That will enable the proper functioning of the exceptional case funding frameworks in England and Wales and, under LASPO, for the provision of foreign legal advice.

As to the procedural amendments, controlled work, which is referred to in the instrument, is a categorisation of legal aid work covering certain advice where the power to determine legal aid entitlement is generally delegated to legal aid providers—for example, initial advice and assistance. At present, it is not necessary for an individual seeking legal aid for controlled work in England and Wales to attend a legal provider's premises in person where they are present or reside in the EU. Such an individual can authorise someone to attend on their behalf.

The draft instrument changes the exception to apply to those present or resident in the United Kingdom, and these changes will allow the benefit to continue to apply to those within the UK and ensure that those residing within the European Union will now be required to meet the same criteria as those residing in third countries are currently expected to meet when applying for controlled work and not present in the United Kingdom.

Licensed work is a categorisation of work that is generally granted where there is a need for representation in court, and the procedural criteria that currently apply for individuals applying for licensed work in England and Wales who reside outside the EU and are not present in England and Wales will now apply to those who reside outside the United Kingdom and are not present in England and Wales. In other words, it will level down the playing field as between those resident in the EU and those resident otherwise in a third-party country. As such, those residing within the EU will now have to meet the same criteria as those residing in third countries for the purposes of applying for licensed work in England and Wales.

With respect to the changes made to the domestic legislation implementing the EU legal aid directive and to the procedural requirements, the draft instrument makes provision for transitional arrangements for matters that are live under the repealed or amended legislation at the time of EU exit, so at least they will continue under the same rules as before.

As regards the impact, the department carried out an impact assessment, although one would not have been required in the context of the present instrument. I say that because in 2017, there were only 27 cross-border applications made between England and Wales and the central authorities in all other EU member states with regard to legal aid and of those, 20 of the applications were from EU member states for legal aid in England and Wales and seven went the other way. In Northern Ireland, it is estimated that there have been three applications over the past two years.

The instrument is necessary to correct deficiencies arising from the UK's exit from the EU and in LASPO. As I said, the Scottish Government are taking required amendments to legal aid legislation in their jurisdiction separately, in order that that, too, can be addressed. I hope that with that explanation, noble Lords will understand the need to put this in place in the event of our proceeding without a withdrawal agreement, without a relevant transition period and without the scope for negotiation to deal with these matters. I commend the instrument to the House.

Lord Thomas of Gresford (LD): My Lords, I must confess that it is not easy to grasp the scope of these provisions, but then I last filled in an application for civil legal aid when I was campaigning politically for Britain to enter the European Common Market about 55 years ago. In a paper published by the Ministry of Justice in August 2017, *Providing a Cross-Border Civil Judicial Cooperation Framework*, the Government declared that they would seek to agree new, close and comprehensive arrangements for civil judicial co-operation with the EU. The paper stated:

"We have a shared interest with the EU in ensuring these new arrangements are thorough and effective. In particular, citizens and businesses need to have continuing confidence as they interact across borders about which country's courts would deal with any

dispute, which laws would apply, and know that judgments and orders obtained will be recognised and enforced in neighbouring countries, as is the case now".

In paragraph 7 of that paper, the benefits of the current framework are described as follows:

"This framework provides predictability and certainty for citizens and businesses from the EU and the UK about the laws that apply to their cross-border relationships, the courts that would be responsible, and their ability to rely on decisions from one country's courts in another State".

As with the previous statutory instrument, nothing appeared in the political declaration which refers to these "new, close and comprehensive" arrangements. Again, perhaps the Minister can advise us how far he has got in discussing the future.

An important feature of civil judicial co-operation at present is the mutual provision of legal aid. The legal aid directive set minimum common rules relating to legal aid to improve access to justice in cross-border disputes and it applied to all such disputes involving civil and commercial matters but, in particular, it applied to family law: problems about children, the disposal of assets and so on. As the Minister said, its provisions were incorporated into English law by LASPO, and this SI's purpose is to ensure that those domiciled or habitually resident in EU member states are not treated more favourably after we leave the EU than those who reside in England, Wales or Northern Ireland. EU residents who require legal services in relation to proceedings in our courts or who wish to enforce an overseas judgment will no longer have a right to legal aid for matters within the scope of the EU directive alone. The SI uses Henry VIII powers under Section 8 of the LASPO Act to revoke the domestic legislation implementing the EU directive in the UK, as the Minister fully explained.

So far as I can ascertain, this statutory instrument will prevent EU residents from seeking legal aid for exceptional cases that are not normally within the scope of UK domestic legal aid, but where not to do so would be a breach of "retained enforceable EU rights". Will the Minister give a concrete example of what "exceptional cases" means? He told us something of the statistics but how often have such applications for legal aid in exceptional cases been made by EU domiciled people or residents? Can he confirm that EU residents, even after Brexit, can apply for legal aid in the ordinary way for, say, a case involving children across borders in an English court, and that it would be granted if the ordinary merits and the means tests were satisfied? Does domicile or residency in the EU disqualify an applicant from legal aid in the normal way?

7 pm

Lord Beecham (Lab): My Lords, in general, the view of the Law Society and the Bar Council is that these regulations do not raise many problems but some matters appear to require clarification. I am not sure whether I am about to overlap with what the noble Lord, Lord Thomas, has just raised. He will forgive me—although the Minister may not—if I am going over the same ground.

The Law Society has raised a question on the impact on the provision for legal aid under paragraph 44 of Part 1 of Schedule 1 to LASPO, which states:

"Civil legal services provided in relation to proceedings in circumstances in which the services are required to be provided under Council Directive 2003/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes".

At present it is unclear, certainly to me, how many people are granted legal aid under this provision. I do not know whether the noble and learned Lord will have that information to hand—presumably not. Perhaps he can provide it later if it is not immediately available.

The other question is: do the Government know how many such provisions are reciprocated by the other side, so to speak? If there are significant numbers involved, the Government should surely ensure that there is funding in the event of a no-deal Brexit but if there is a Brexit deal, this provision should be included on a reciprocal basis, given the number of UK citizens residing in the EU who may well need such assistance. As I say, I do not know whether the noble and learned Lord will have that information but I certainly join the noble Lord who spoke previously in wishing for confirmation that legal aid will still be available for those who need it in these areas.

Lord Keen of Elie: My Lords, I am obliged for the contributions. The noble Lord, Lord Thomas, makes a good point about the advantages for all in securing mutual judicial recognition and enforcement. That is why, at an early stage, we sought to take forward those discussions with the profession on what was required. He is right to observe that the matter is not contained in the withdrawal agreement or the existing declaration but is an ambition. That may seem very little but, recognising that, we have taken forward what we can, which is to deal on a unilateral basis with the more recent Hague conventions that have been entered into by the EU on behalf of member states. We have engaged in discussion to become an individual state signatory to those conventions. My recollection is uncertain but I think the 2005 and 2007 conventions were involved. We have engaged with the council of the Lugano convention, which deals with the reciprocal position between EFTA states and the EU, to engage on that. Again, to become a party to Lugano, we require the consent of the EU because it is also party to it. Those steps are being taken forward and we are conscious of their importance. I underline that.

On legal aid provision, there is no question of a disqualification being applied on the basis of residence in the EU. Let me be clear about that. The point is that the scope of the EU legal aid directive is wider than the scope of the legal aid provision under LASPO. This instrument is to bring that into line with LASPO and have a situation whereby, in certain forms of civil and commercial dispute, the directive would require consideration of a legal aid application that would not otherwise fall under the LASPO provisions.

Lord Thomas of Gresford: I was asking what the exceptional cases are.

Lord Keen of Elie: I was coming to that and would point out that the exceptional case provision is there for all cases that fall under LASPO. That will apply equally to those resident in the EU, as it would apply

[Lord Keen of Elie]
to those resident in the United Kingdom. Again, I point out that there is no disqualification or discrimination in respect of that matter; it is a case of ensuring that there is a level playing field whereby the scope of legal aid availability and the qualification for that aid are the same. It may not assist your Lordships much but there are provisions in the EU directive for taking account of differences in standard of living, for example, when applying financial criteria for legal aid under the directive. It is that sort of provision that we have to deal with to ensure that there is a level playing field. I emphasise that this instrument does not seek to disqualify anyone who would otherwise qualify for legal aid under LASPO, whether under the exceptional provisions or standard provisions of that scheme. I hope I can reassure your Lordships on that point.

I have rather forgotten the other points that the noble Lord, Lord Beecham, so eloquently made, but if I sit down without answering, will he remind me afterwards and I will write to him? As I say, I want to underline the purpose of the instrument, which is to produce a level playing field, not a disqualification.

Motion agreed.

Takeovers (Amendment) (EU Exit) Regulations 2019

Motion to Approve

7.07 pm

Moved by ***Lord Henley***

That the draft Regulations laid before the House on 1 November 2018 be approved.

The Parliamentary Under-Secretary of State, Department for Business, Energy and Industrial Strategy (Lord Henley) (Con): My Lords, these regulations will be made under powers in the European Union (Withdrawal) Act 2018. They amend Part 28 of the Companies Act 2006 so that the United Kingdom's corporate takeovers regime can operate independently of the EU in the event of a no-deal exit. They provide clarity and certainty to businesses and shareholders.

The takeovers regime ensures that shareholders receive fair and equal treatment when the company in which they have invested is subject to a takeover bid. Part 28 of the Companies Act 2006 transposed the takeovers directive, 2004/25/EC, into UK law. The directive was intended to harmonise certain aspects of takeovers supervision across the European Economic Area, creating expectations of reasonable behaviour to which company shareholders could hold bidders.

The Companies Act requires the Takeover Panel to make rules to give effect to the directive in the UK. The panel has done so in the City Code on Takeovers and Mergers. These regulations preserve the statutory underpinning of the code and make only minimal changes to the way the UK regime functions.

In developing the regulations, we have worked closely with the UK's supervisory authority, the Takeover Panel. It has consulted on the changes it will need to make to the takeover code to reflect these regulations. The takeovers regime is wholly separate from the mergers regime in the Enterprise Act 2002, which considers the competition implications of mergers. These regulations have no bearing on the mergers regime, or the powers and responsibilities of the Competition and Markets Authority.

For the most part, these regulations import and correct provisions from the directive necessary for the independent operation of the UK regime, but do not change how the domestic regime operates. They make only three substantive changes. First, they remove the shared jurisdiction regime. The EEA takeovers regime includes a system of shared jurisdiction for companies registered and listed in different countries. The supervision of a company captured by the shared jurisdiction system is usually by two regulatory authorities, one in the country where the company has its registered office and the other in the country where the company is listed. The shared jurisdiction regime works on a reciprocal basis. Since the reciprocal arrangements will no longer apply to the UK after EU exit, the regulations will remove shared jurisdiction from the UK takeovers regime. The panel has consulted on how the takeover code should apply to UK-registered companies that would otherwise have fallen within the shared jurisdiction regime because they have shares trading on another EEA state's regulated market. It has proposed that the takeover code should apply to takeover bids for such companies if their place of central management and control is in the UK. Companies not fitting this criteria may be supervised by another authority.

The second feature of the regulations relates to the duty of co-operation. Section 950 of the Companies Act 2006 places a duty on the Takeover Panel to co-operate with its counterparts and certain other regulatory agencies in any country or territory outside the UK. It also imposes a duty to co-operate with EEA supervisory authorities. The duty to co-operate with supervisory authorities in the EEA is derived from the takeovers directive. After exit, EEA member states will no longer be bound to co-operate with the UK under the directive. These regulations therefore remove the obligation to co-operate with EEA supervisory authorities as it will no longer be reciprocal. However, the Takeover Panel will still be required to co-operate with the authorities of EEA member states under the duty in Section 950 to co-operate with any international supervisory authority with an equivalent role.

The third feature of the regulations relates to restrictions on the disclosure of confidential information. Section 948 of the Companies Act restricts the disclosure of confidential information obtained by the Takeover Panel during the course of its duties and sets the conditions under which this information can be shared. It applies to both the panel and the organisations with which information is shared. To breach the Section 948 restriction is a criminal offence. The Companies Act provides an exemption from the Section 948 restriction for EEA public bodies using confidential information disclosed by the panel for the purpose of pursuing an EU obligation. Instead, the EEA framework provides reciprocal protections to prevent the inappropriate disclosure of information and maintain professional

secrecy. After EU exit, these reciprocal protections will no longer apply to the UK and the removal of the exemption for EEA public bodies ensures that there is a sanction for inappropriate onward disclosure of confidential information.

In conclusion, corporate mergers and takeovers are an important part of a healthy economy. By encouraging efficiency gains, spreading knowledge and promoting innovation, they drive economic growth and job creation. It is vital that we seek to safeguard the legal framework that gives companies and their shareholders the confidence to engage in merger and acquisition activity. These regulations achieve that goal by making only those changes needed to fix deficiencies in UK law arising from EU exit. They will have a negligible overall net effect on our economy. I beg to move.

Lord Fox (LD): My Lords, this time last year I was engaged in my civilian life on one of the largest contested takeovers in the British Stock Exchange, so I have some first-hand experience of the Takeover Panel and its operations—which I will not regale the House with today. However, after that experience I was left with the realisation that there are major issues around takeover policy in this country and I beg to disagree with the last words of the Minister when he described the beneficial effects of takeovers. Many of them prove not to be beneficial. Although some are, as he says, part of a healthy and vibrant economy, many are driven by the wrong motives and have outcomes that are not necessarily favourable to the economy of the United Kingdom. However, this is not the medium through which to have that discussion or to make those changes, so I will not attempt it.

The role of the Takeover Panel is interesting. While this is not a game, the way in which it operates is very much as a referee. Two sides are contesting and the Takeover Panel acts as a referee. It has a lot of experience—although each takeover is different, so the process of learning is for the Takeover Panel as well. In essence it is a put-together team in terms of the referees as well as the contesting companies. That process of consultation is quite interesting because what kind of response you get will depend on who you speak to from the Takeover Panel. It is the same as taking 10 Premiership referees and asking them how to change the rules of association football; they would all come up with different ideas. So I would like a little more information on the consultation process.

7.15 pm

The Minister mentioned in his helpful opening remarks that the code will apply to companies where the place of central management and control remains in the United Kingdom. A definition of that comment would be helpful if the Minister can update us. His very helpful accompanying notes to the regulations state that,

"the definition of takeover bid has been amended and consolidated in paragraph 20".

Again, I would appreciate some information on what drove those changes and what amendments have been made. With that express proviso, what other amendments have been made and not stated here? I ask that because it is quite difficult to look at what was there and what is here now and understand exactly what has and has not been changed.

In conclusion, the Minister said that these regulations would have a negligible impact on the British economy. However, the notes state clearly that there will be an impact on 25 EEA companies and 10 UK companies. While everything averages itself out, that does not help you if you are on the downside of the averaging equation. Can the Minister give us some sense of the scope of the impact on those companies rather than on the overall economy?

Lord Leigh of Hurley (Con): My Lords, I rise partly in response to the noble Lord, Lord Fox, who I was worried at one point was about to decimate the industry from which I have made a modest living for some years—albeit in the private sector rather than in the public sector. I declare my interests as set out in the register and that some 10 years ago I sat on the appeal committee of the Takeover Panel.

The Takeover Panel has been a remarkable success. The way in which it resolves difficulties and issues instantaneously without litigation is envied around the world. If it did not exist, we would most certainly seek to create it. Everything that can be done to ensure its effectiveness must be applauded, including this statutory instrument.

My question to the Minister is about shared jurisdiction. Because so many companies want to be covered by the Takeover Panel, and indeed cannot be included in various listings unless they are covered by it and thus want to have more shareholders invest in them, does this mean that companies which at the moment are not satisfying the residency test will move their business to the UK to ensure that they do cover the residency test, thereby bringing more employment and more business to the United Kingdom?

Lord Stevenson of Balmacara (Lab): My Lords, I will pick up on a couple of points raised by the noble Lord, Lord Fox, and respond in part to some of the points made by the Minister in his introduction of this memorandum, about which we have very little of substance to complain because it does what it says it is going to do on the tin, as they say.

I first reinforce the wider context, which—although I think it sent shivers through a number of those sitting opposite me—we will have to return to before too long in one context or another. The arrangements under which company takeovers and mergers are taken are complex. This is bedevilled by the fact that some are statutory and some not. The role of the statutory bodies does not always fit perfectly with those of the listing arrangements under the Stock Exchange rules. The problems bedevilling British industry, which are too well known to need rehearsing here—short-termism and often acting without regard to national interest—have been raised by the Government over a number of years, but we still do not have their final conclusion or decisions, and we await them with some interest.

Having said that, this SI has similarities with a number we discussed in previous weeks. Only yesterday we talked about intellectual property. I am struck by

[Lord Stevenson of Balmacara]
the difference in approach taken by the department in this SI on takeovers and those we discussed yesterday on intellectual property, patents and trademarks. Does the Minister agree that one of the underlying themes of the debate yesterday on intellectual property was what appeared to be a fairly clear steer by the department that it wished to bring into play regulations that would future-proof discussions that may emerge should there be some form of deal or, even if there is not a deal, some sort of discussions and debates about how the country would wish to engage with partners in the EU on intellectual property, trademarks and patents? Is he struck, as I am, by the fact that the asymmetric approach taken yesterday in those SIs is not being picked up today?

The issue here is whether there should be some form of joint supervision and some mutual recognition of arrangements and structures. Companies increasingly operate across borders. It may not always be easy to identify precisely where the headquarters are. Indeed, some companies have made a virtue of having more than one headquartered operation in a number of countries. Simply doing it on a numerical basis of where securities are listed is not going to get to the same conclusion, as the SI admits. So we have a potential problem, in a sense not dissimilar to that addressed in the SIs we dealt with yesterday, which could perhaps provide an opportunity for further discussion. Does he therefore agree that this SI, as we have it before us, does not meet the asymmetry test in the terms we discussed?

On a slightly different line, consultation was raised extensively and has been raised in all these EU exit regulations. I can understand why the Minister will respond by saying that the consultation was appropriate for the circumstances. But in this case the only consultation I can see mentioned is with the Takeover Panel itself. There has been no attempt to try to look out to a wider interest—for example, to consumer interests, trade union interests or employee interests more directly—in the way these operations take place. There is no reference to the CBI or the FSB. I am a bit surprised about that, and I wonder if he would like to comment on whether he felt the department had the best advice possible in circumstances where so few people were consulted.

My final point is the question raised earlier this evening, which is relevant again now. There is nothing in the SI itself or the Explanatory Memorandum to confirm whether this statutory instrument will continue in the event that there is no no deal. As mentioned in the last debate, I wonder where the poison pill lies in this. What are the circumstances under which elements of this SI will fall away, and how will that be achieved? Does it require a further debate and discussion? Does it require a new statutory instrument? I would be grateful if we could be put in the picture. It would be interesting, if somewhat frustrating, to feel that all the effort we are putting into these statutory instruments today is simply a rehearsal for going back and redoing them should no no deal take place. We should presumably know in about 20 minutes whether that is likely to be the case.

In conclusion, it may be that elements of this SI would continue to any deal scenario. The Secondary Legislation Scrutiny Committee pointed this out on another SI that we will discuss shortly. I wonder if that is the case here and, if so, if the Minister could identify which elements of this would continue in any future discussions and negotiations.

Lord Henley: My Lords, I thank both noble Lords for their contributions, particularly the noble Lord, Lord Fox, for saying how helpful the notes attached to this order were. This does not often happen and I must thank the noble Lord on the occasions that he is as polite as that. I also welcome the experience he brings to this debate, particularly with his knowledge of takeovers, although I am not sure I fully share his view of the general helpfulness or unhelpfulness of shareholders. Perhaps I could deal with some of the questions that he, my noble friend Lord Leigh and the noble Lord, Lord Stevenson, put.

First, as always, let me remind the noble Lord, Lord Stevenson, that these are no-deal regulations only brought before the House for the eventuality that we leave the EU without a deal. In the event of a deal, as has been made clear by other colleagues from the Front Bench, there will need to be legislation in the Act that will come before us in due course to deal with that. We will have time enough to debate that.

I also do not think I accept his point—I am not sure I fully understood it—whereby he suggested we were taking an asymmetric approach to these matters when we dealt with those three orders yesterday. I imagine we will deal with them again in the Chamber in due course, but not on this occasion. I never quite understand what the noble Lord means by that asymmetric approach.

Lord Stevenson of Balmacara: I do not want to delay the House unduly, but I would not wish the evening to conclude with the Minister going off in confusion and worrying all night. Just to be certain, there was no need in the drafting we saw yesterday—let us take the trademark arrangements, for example—for us as a UK emerging from the EU as an independent state to offer to recognise trademarks registered in the EU. That does not seem to be taking back control, because one is opening up to UK manufacturers which have their own trademarks a chance to lose out to trademarks they will have to compete against which are registered elsewhere in the EU, and we are not part of the EU. I can understand the logic of it, but it certainly does not seem to fit the criteria set out for a no-deal Brexit.

The interesting arguments that emerged during the debate yesterday were that the primary reason that was there was that it might be negotiable in the future for similar arrangements for UK trademarks to be deemed to be registered also in the EU. In that sense, that symmetry of each section—the EU 27 and the UK having their own arrangements for registering trademarks which are then mutually recognised—is symmetrical, but what the SI proposed was very much asymmetrical.

Lord Henley: I take the noble Lord's point, but I do not think it is relevant to the regulations we are dealing with today, so I will get back to the various

questions that noble Lords put. I will first deal, as always, with consultation, which is so important to noble Lords. I can again give an assurance that in developing these we worked very closely with the United Kingdom supervisory authority, the Takeover Panel. The noble Lord, Lord Fox, talked about its role as a referee. I do not think it is necessary at this stage for me to get on to the composition of it. The Takeover Panel includes representatives from a range of business sectors. I can give an assurance that it consulted publicly on the changes it will need to make to the Takeover Panel to reflect these regulations. No doubt, if it is available, I will seek advice from the Takeover Panel and give a little more information to the noble Lord.

The noble Lord also asked about the impact on the companies affected. I can say that the only cost to business arising from these regulations will be that associated with compliance with a different supervisory regime. That will affect only the few companies that previously fell under the Takeover Panel's jurisdiction and will no longer do so after exit, following the loss of that shared jurisdiction regime. The cost of compliance between the different regimes is unlikely to vary significantly as the takeover directive establishes standard requirements, and these costs will arise only in the event of a takeover. I give way to the noble Lord.

7.30 pm

Lord Fox: I thank the Minister for giving way and for his answer. Am I therefore to understand that 35 companies—25 from the EEA and 10 from the UK—come out of UK jurisdiction, or is it 35 companies coming into UK jurisdiction? It is not clear.

Lord Henley: I am sorry; I miswrote down what the noble Lord originally said. It does say 35 in the order: 35 EEA companies come out and 10 UK companies go in. I think the noble Lord has got it right. Again, I will write to him on that if I am wrong. He also referred to paragraph 20, on what drove changes to the definition of a takeover and what other amendments have been made. I can give an assurance that there have been no changes to the definition of a takeover, and the scope of companies that can be subject to takeover has been narrowed, obviously, to UK companies. That would be implicit in the order.

My noble friend Lord Leigh asked, very helpfully, about shared jurisdiction. The EEA takeovers regime includes a system of shared jurisdiction for companies registered and listed in different countries. Since the reciprocal arrangements underpinning the system will no longer apply to the UK after exit, the regulations will remove shared jurisdiction from the UK takeovers regime. My noble friend then asked whether that was likely to bring more companies to the UK. He and I are always optimists in these matters and there is every chance it might have that effect, although that is a matter not for the Government but for the companies themselves. I believe I have answered all the points put to me but if I failed to deal with any I will write to noble Lords.

Motion agreed.

Insolvency (Amendment) (EU Exit) Regulations 2018

Motion to Approve

7.33 pm

Moved by ***Lord Henley***

That the draft Regulations laid before the House on 19 November 2018 be approved.

Special attention drawn to the instrument by the Joint Committee on Statutory Instruments, 42nd Report

The Parliamentary Under-Secretary of State, Department for Business, Energy and Industrial Strategy (Lord Henley) (Con): My Lords, while we believe that a deal with the EU is in our mutual interest, it would not be appropriate to assume the outcome. It is therefore important that we also plan and provide, as the instrument before us does, for a no-deal outcome.

It may be helpful if I speak briefly about the current EU framework for cross-border insolvencies. The existing EU insolvency regulation ensures that member states automatically recognise an insolvency order made in an EU country, assisting the insolvency practitioner in recovering assets and returning money to creditors, avoiding unnecessary court proceedings, time and costs, and helping return more money to creditors, or rescuing a business, or saving employees' jobs. The EU legislation contains safeguards to ensure that individual member states' own laws are respected, and cannot be overridden by an insolvency order made in another state. I give way to the noble Lord.

Lord Foulkes of Cumnock (Lab Co-op): I want to ask about a point of procedure as I am surprised that the Minister is moving this, given that the 42nd report of the Joint Committee on Statutory Instruments says, at paragraph 1.12:

"The Committee accordingly reports regulation 5(1) for defective drafting".

Further on, it says:

"The Committee accordingly reports regulation 5(2) on the grounds that it appears to make an unexpected use of the enabling power".

Given that very strong criticism from the committee, is it really the Government's intention to move ahead with this?

Lord Henley: My Lords, it is my intention so to do, and I was coming to address the points made by the JCSI. This is a perfectly regular procedure. The noble Lord is very experienced in dealing with statutory instruments and with reports from the JCSI. It often happens that a report will come with criticism from the JCSI. The department then issues its response, and that should deal with the matter. I was going to come to this in my opening remarks and it is right that I should do so. The noble Lord will be able to listen to my explanation and, I hope, will accept that I, and the Government, have dealt satisfactorily with the concerns that the JCSI put to us. We greatly respect the JCSI. It does a very good job and we are very grateful for that. Back in the long-distant past, the noble Lord—like most of us—probably served on the JCSI and, if he had that honour, I am sure that he did a very good job in so doing.

[Lord Henley]

This instrument recognises that, as we leave the EU, our European Union (Withdrawal) Act will automatically retain a version of EU regulation in UK law. However, the safeguards that the regulation provides can no longer be relied upon as the remaining member states will no longer be bound by them in respect of the UK. Many in the professional insolvency sector have argued that reciprocity is an essential part of continuing with this legislation. In the absence of a deal, it is vital that we do not indefinitely continue to apply EU rules that could override our own law and prevent us from dealing effectively with insolvencies in the UK.

The instrument therefore repeals the majority of the EU insolvency regulation, retaining only the small part necessary to keep the right to open proceedings in the UK. It provides for an orderly wind-down of the arrangements by continuing to apply the current EU rules to existing cases where main insolvency proceedings are already open on exit day. But, as a safeguard, the courts may disapply the EU rules where they will lead to a different outcome from that which would have been the case before we left.

I come now to the JCSI report, which the noble Lord, Lord Foulkes, has kindly brought to the attention of the House. I assure the noble Lord that I had every intention of raising this subject. The report refers to a lack of clarity—the noble Lord no doubt has it before him—and an unexpected use of the withdrawal Act power. I am confident that the provisions are an appropriate use of the power in the withdrawal Act. The provisions will give the court the necessary discretion to respond to unexpected outcomes from the interaction between our law and that of EU member states. There are precedents in existing insolvency legislation providing the court with the broad discretion to make orders in insolvency proceedings.

If, following EU exit, UK creditors or others with an interest in the insolvency are being treated unfavourably, it is only right that the court is allowed to apply the powers in our own cross-border insolvency regulations—which are used for non-EU insolvency proceedings—or make some other appropriate order to resolve the situation. The detailed examples that we provided to the JCSI demonstrated just some of the situations in which this might arise, and these examples were included within the JCSI's report.

The instrument also amends certain employment legislation which ensures that protection for employees is retained following the insolvency of their employer. This ensures that the current financial support given to UK-based employees when their employer in the EU becomes insolvent will continue after exit day. In the absence of a Northern Ireland Executive, the instrument updates and makes similar changes to the law on insolvency and employment rights in Northern Ireland, on behalf of the Northern Ireland Government. I commend the regulations to the House.

Lord Fox (LD): My Lords, in addition to the concerns which were very importantly raised on the nature of the drafting involved here and the use of powers, I have a couple of major technical quibbles. At the risk of treading into what may be the patented territory of asymmetry, which was just discussed, we seem to be back in an asymmetrical relationship here. We are changing our rules in the hope that Europe will reciprocate. That is my interpretation; if it is wrong, perhaps the Minister can update me. How forlorn or optimistic is this hope? What hope do those employees have of their rights and benefits being preserved—the Minister rightly highlighted that we need to have these processes in order to preserve them—for businesses which cross not just into the United Kingdom but into the rest of Europe?

The Minister's point about courts was very interesting, because that of course was what the European Court of Justice was for: dealing with cross-border disputes over a similar group of rules. What the Minister describes is complicated, expensive and fraught with the possibility of failure. Perhaps the Minister can explain what benefits we will reap from substituting what we have today with what his department has set in front of us. So I have serious concerns that there are major problems with this SI.

Lord Stevenson of Balmacara (Lab): My Lords, I thank the Minister for introducing this issue. The SI seems to be welcomed by many in the industry and deals with a particularly difficult issue in a very constructive way, according to reports from those who have written to us. I agree with the points made by the noble Lord, Lord Fox. When the Minister responds, it would be interesting if he could be quite clear about whether the SI covers the minimum necessary to get the statute book in order if there is no deal, or whether, as he suggests, the Government will go a little further and lay out some sort of attractive regulatory pas de deux for the EU post Brexit which would make it easier to legislate for an asymmetrical solution. That is probably not quite what is happening here, but it would certainly be interesting to get the Minister's response.

Given that the results are coming in of the vote in another place in which the Government's proposals have been roundly defeated, we may be witnessing a transition to a slightly different arrangement, which we do not need to comment on just yet. In the circumstances it would perhaps be best to let the Minister respond to the points made. I hope to hear from him very shortly.

Lord Lexden (Con): Before my noble friend replies, I will make just a couple of points as a current member of the Joint Committee on Statutory Instruments. I preface them by saying how greatly the committee will relish the praise that my noble friend heaped upon it at the outset.

The two points arise from the committee's report. The first relates to Regulation 5(1), where the committee points out that it would have been far better if the department, despite the explanation that it provided, had avoided the ambiguity of language to which the committee drew attention by replacing vague concepts with clearer definitions, instead of continuing with its own approach.

The second point relates to Regulation 5(2), to which the committee drew attention because it appears to give very wide powers to the courts that will be called upon to adjudicate issues. Despite the department's explanation, the committee remained concerned,

"at the breadth of the discretion conferred on a court by regulation 5(2)".

It went on to say that this regulation,

"leaves it entirely to the courts to determine—on a case-by-case basis—what law they should apply in any particular case".

I would be very grateful if my noble friend could touch on those points when he replies.

7.45 pm

Lord Foulkes of Cumnock: My Lords, I indicated earlier that I was surprised that the Minister was pressing ahead with this, given the critical report from the Joint Committee on Statutory Instruments. I do not think that the Government have dealt with it fully—and we have just heard an explanation of the concerns. As I said yesterday and last week in Grand Committee, I am surprised that the Government are pressing ahead with these instruments in the event of no deal, with all the time and expense of the excellent civil servants—not to mention Ministers—involved. Given what has just happened down the Corridor, where the Government have been defeated by a majority of 230, the largest government defeat in history, I cannot believe the noble Lord, Lord Henley, has the enthusiasm, let alone the responsibility and legitimacy, to press ahead with this. I urge him to do himself and the House a favour and withdraw this statutory instrument.

Lord Henley: I will not comment on my legitimacy in front of the noble Lord, but I can assure him that I still have enthusiasm. I await guidance on what is going on in another place. Meanwhile, it is probably right and proper that we deal with this. Irrespective of that result, there is still the possibility that we might leave the EU without a deal. The noble Lord will be aware of all the legislation that has gone through with support from all parties, setting out what we will do and that if there is no deal we will leave on 29 March. That remains the situation at this stage. So it would be useful to continue with these regulations, which are designed purely to deal with a no-deal situation.

I will deal with some of the points made, starting with those from the noble Lord, Lord Fox, who referred again to asymmetry—I was worried that he was stealing it from the noble Lord, Lord Stevenson. I will make it clear that we are making changes here, because we can, but obviously we cannot control how other member states deal with their legislation. We think it is right to do so and so give certainty to the UK in the event of no deal. That is what we will do and we will continue to negotiate to deal with other matters.

Turning to the noble Lord, Lord Stevenson, I am glad he reminded us that this regulation has generally been welcomed by industry; I think that is the case and it is very important. He also asked what assessment we had made of the total cost to business for all the no-deal SIs—I think that was the noble Lord, Lord Stevenson. On 28 November we published a robust, objective assessment of potential impacts on sectors, nations and regions of the UK, and it shows that our deal—which obviously had not been rejected by another place—would be the best available for jobs and economies. We will continue to publish individual impact assessments to accompany legislation, as we have done on many occasions, including SIs where appropriate.

I turn finally to the questions relating to the JCSI asked by my noble friend Lord Lexden. Again, I am grateful for his words. I repeat the praise for the JCSI, which I first served on some 35 years ago. We are fully aware of its concerns. As my noble friend may have seen, the department issued the very detailed memorandum to the committee that is attached to the report, setting out the reasons why the transitional provisions are important to protect the United Kingdom's position on exit day in a no-deal scenario. I do not intend to go through all the points that were raised in that memorandum, other than to say that the safeguard provided is necessary to enable the court to act where there is an adverse impact of exit on insolvency cases that are already open on exit day. That power provided to the courts to deal with cases that are ongoing on exit day is both necessary and proportionate, and is similar to provisions found in other UK insolvency law. It would not be possible to limit its scope without potentially tying the hands of the courts in dealing with these matters.

I believe that I have dealt with the points that were raised, and I beg to move.

Motion agreed.

Consumer Protection (Enforcement) (Amendment etc.) (EU Exit) Regulations 2018

Motion to Approve

7.52 pm

Moved by ***Lord Henley***

That the draft Regulations laid before the House on 4 December 2018 be approved.

The Parliamentary Under-Secretary of State, Department for Business, Energy and Industrial Strategy (Lord Henley) (Con): My Lords, this instrument is part of our EU exit contingency planning. It will not be needed should the UK conclude the withdrawal agreement with the EU.

Several laws allow for collective redress where infringements of consumer protection laws take place. The first of these is the consumer protection co-operation regulation, known as the CPC regulation. The reciprocal arrangements that this EU law sets out require enforcers to act on requests from their counterparts in another EU member state. They are required to investigate and, if necessary, take action to end infringements of EU consumer law where the collective interests of consumers in another member state are being harmed.

The second of these laws is the injunctions directive. The reciprocal arrangements in this EU directive allow enforcers to take action in the courts of other member states to stop the relevant infringement. In the UK,

[Lord Henley]

Part 8 of the Enterprise Act 2002 implements the injunctions directive as well as providing the UK's enforcement mechanism for the CPC regulation. It enables certain UK and EU enforcers to apply for enforcement orders to stop the infringement in question, where listed EU consumer laws are being breached—known as community infringements—and the collective interests of consumers are being harmed. Lastly, UK enforcers are given the necessary investigatory powers through Schedule 5 to the Consumer Rights Act 2015.

After EU exit, and in the absence of a deal, the CPC regulation and injunctions directive will no longer apply to the UK as we will cease to be a member state. In consequence, UK consumer enforcers such as the Competition and Markets Authority will no longer be part of the reciprocal cross-border enforcement arrangements. This instrument therefore revokes the CPC regulation, which will otherwise continue to apply in UK law. This prevents a situation in which UK enforcers are required to assist their EU counterparts while EU enforcers are not under the same obligation.

The instrument also amends the Enterprise Act so that EU enforcers cannot apply for enforcement orders in the UK courts. This prevents a situation whereby EU enforcers remain able to take legal proceedings under the injunctions directive in UK courts while UK enforcers lose their equivalent right to take proceedings in the EU. However, the instrument does not prevent UK enforcers co-operating with their EU counterparts. UK public bodies will remain able to share information that they hold in their capacity as enforcers under Part 8 of the Enterprise Act to assist their counterparts abroad, although we recognise that cross-border enforcement co-operation to protect consumers will become more limited in a no-deal scenario.

The instrument also ensures that UK enforcers retain the powers that they have now to continue, within the UK, to investigate and address infringements of UK consumer law, including retained EU consumer law, after exit day. These laws are set out in the new Schedule 13 to the Enterprise Act inserted by this instrument.

In conclusion, these changes are a necessary use of the powers of the EU withdrawal Act and I commend the instrument to the House.

Baroness Burt of Solihull (LD): My Lords, I thank the Minister for his letter of 7 January to my colleague, my noble friend Lord Fox, explaining much of the reasoning behind this statutory instrument. I sincerely hope that we will never ever need the provisions within the instrument; the effect of the vote that has just been held in the other place on the prospect of no deal remains to be seen. The letter says that the regulations,

"form an essential part of the government's preparations to ensure a functioning statute book should the United Kingdom leave the European Union without a deal on 29th of March 2019".

There has been much speculation about what would ensue should that happen, and we know that no one—or very few individuals, anyway—would want us to be in that situation. However, I wonder if the Minister knows how many more statutory instruments there are to come before 29 March in his own department alone? I understand that many have not yet even been drafted, but I would be very grateful, and I am sure the House would be too, for his best estimate of just how much work remains to prepare for that potentially disastrous eventuality.

The UK has a proud record of close and complex co-operation with the EU on consumer protection matters, but we know that if there is a no-deal withdrawal, UK consumer protection enforcement bodies will no longer be a part of the reciprocal cross-border enforcement arrangements in the consumer protection co-operation regulations or the injunctions directive. If the EU and the UK lose their mechanism for cross-border collaboration, we will all be the poorer for it. We will no longer benefit from reciprocal rights under EU law. As the Minister said, the instrument introduces the concept of a "Schedule 13 infringement". I think I understood what he was saying but I would be grateful if he elaborated on how this might work in practice.

The letter says that the instrument will,

"protect UK consumers in the case of infringement of EU derived UK consumer laws".

Could the Minister give an example? We know that purchased items that were manufactured in the EU but supplied through UK-based suppliers will be protected under UK rules, which will cover the vast majority of our purchases of EU-manufactured goods. Could the Minister give an example of when this Schedule 13 infringement power might be required and how it might be enacted?

It looks to me as though UK enforcement bodies can retain powers to protect UK consumers but are not obliged to co-operate with their European partners. I am sure the Minister will have some reassuring comments to make about that; it is certainly in nobody's interest not to co-operate, but it is unfortunate that we potentially find ourselves in this position.

My final question relates to the UK European Consumer Centre, which the Government will be keeping open for at least a year, until March 2020. All well and good, but what happens to EU-purchased goods after that date? If you buy something and it develops a fault after March 2020, to whom will you go for advice?

In conclusion, the UK has been a leader in consumer protection issues and has helped to shape much of existing EU legislation. The letter says that the Government are,

"fitted to agree high levels of cross-border co-operation on consumer issues".

It would be very helpful to know what this co-operation will look like and when it will happen. Any explanation the Minister can give about proposed timescales and content would also be appreciated.

8 pm

Baroness Hayter of Kentish Town (Lab): My Lords, I think everyone else on our Benches has gone away to celebrate, and we will join them soon. While thanking the Minister for setting out the reasoning behind these regulations and their purpose, I find it deeply regrettable that we have come to this: having to legislate to take away the protection of consumer rights simply because

the Government have so miserably failed to negotiate a withdrawal agreement acceptable either to this House or—as we have now learned—to the other place.

Ministers are therefore threatening to crash out of our near half-century relationship, with all the rights and benefits that have accrued to consumers over that period—threatening no deal in an attempt to persuade MPs to vote for their inadequate deal. As we have seen, it did not work.

Meanwhile, the Government pursue these no-deal regulations, each and every one of which does two things. First, they show how much we have gained from and depend on our close working relationship across the EU, not only in trade but in all those associated areas, be it the recognition of legal judgments or—as in this case—the cross-border protection of consumer rights. It is an issue which, sadly, has been lacking throughout the Government's approach to Brexit. We will have a longer debate on that tomorrow, when the Minister will also be replying, so perhaps I will just give him notice of one of the things I shall say then, which is to note the shocking failure of Ministers over two years to engage with consumer bodies and their representatives during their process of considering Brexit.

Secondly, the SIs do not only show how closely we have been intertwined with the EU; they are also testament to the disaster any no-deal exit would bring, because, literally overnight, long-standing protections would disappear. Consumers would feel this more than anyone else because it will happen immediately. The suggestion has been made, not by the Government but by some of their supporters, that somehow it would be a good idea to just wave through imports at our borders, particularly at our ports, to save congestion in Kent. That may be fine for the roads of Kent, but waving throughout unchecked lorries will mean we very quickly see shoddy, fake or unsafe goods in our shops, because we will lose all the protections that prevent that happening, and it will be consumers who pay the price.

So the regulations before us are a pitiful example of what will face us should we crash out on 30 March. As we have heard, what they show is that, with no deal, key consumer protection enforcement bodies—particularly trading standards and the CMA—will no longer be part of that absolutely essential cross-border network whereby rogue traders, rip-off companies, cartels and the makers of shoddy goods and services can be brought to book, as they can at the moment, by sharing intelligence and by pan-EU enforcement.

No matter what the Government say, consumer protection will be weaker. All these mechanisms have allowed trading standards bodies to alert their professional equivalents across the other 27 countries in the EU about unsafe products or traders, and to ensure that evidence found in one place can be used in another jurisdiction. That means that courts in one country can tackle a business located elsewhere, which is often the case when a consumer is buying something made in a different country. But under no deal—the outcome this House found unacceptable last night—our domestic enforcement authorities will no longer benefit, on behalf of consumers, from all those reciprocal arrangements and rights now granted under EU law. That is a big loss for our consumers.

But strangely and inexplicably, because of this self-injury to our consumers, the Government have decided, via these regulations, to similarly harm EU consumers by ending the requirement on our enforcement bodies to help other EU states in the interest of their consumers. They have made it voluntary rather than a requirement. That was never necessary. No rationale was given for this. Just because we have chosen to harm our consumers by leaving, I do not see why we are also willing to harm consumers in the other countries.

Furthermore, that was a policy decision. It was not automatic because of our exit. It was a policy decision to end our assistance to consumer bodies elsewhere, and therefore it was absolutely correct that our scrutiny committee insisted on this being an affirmative measure, because it is a policy and not an automatic decision. I hope there will be no further attempts to disguise policy decisions being taken by seeking to slip them through as negative orders.

Perhaps the Minister could explain the rationale for this mean-spirited decision. It is our Government—or even our people—who voted to come out, so why on earth should we make EU consumers pay the penalty? Could the Minister also explain why there has been no impact assessment for this measure? It is a vital measure for consumers and they will feel the impact, as will SMEs. They will have to do more of the checking which thus far they have not had to do because they have relied on any product coming from across the EU being safe to be sold here. Also, the cost will be paid even more by trading standards, not only because they will be hampered in their enforcement, but because they will have to do those checks on products arriving which currently they do not have to do. That should have been in the impact assessment.

Inexplicably, the Explanatory Memorandum says that the regulations will have an impact of less than £5 million. First, I do not believe it. Secondly, how on earth do the Government know without doing an impact assessment? Did they even contact trading standards to find out the impact on them of extra checks? Did they look at the costs where consumers are harmed and therefore compensation has to be paid? Did they look at the impact of enforcement taking longer when the intelligence is missing? Or is it simply that the Minister's department does not really care too much about consumers?

In the same context, what assessment was made of the cost of the extra checks at borders once we can no longer rely on intelligence from trading standards abroad? We heard it said in the debate yesterday, "Don't worry about the extra checks, because the checks at our border are done on a risk basis". That means that they are done on the basis of intelligence. The moment that we take out intelligence, we lose our basis for a risk assessment, so the idea that there will no extra checks at the border is absurd. A little clarity from the Minister would be appreciated. The loss of access to these consumer protection networks is bound to be bad for consumers. It would have been more honest had the Government acknowledged this.

[Baroness Hayter of Kentish Town]

I have one further question for the Minister. This statutory instrument is supposedly "contingency planning" for no deal, but can he detail the Government's intentions for the whole of the UK's consumer regime should we leave in a slightly more ordered way with a deal? We would like to know something about the timing of the SIs that will be needed also for those circumstances.

Lord Henley: My Lords, I thank both noble Baronesses for their comments, particularly the noble Baroness, Lady Hayter, for reminding me that we would deal again with these matters tomorrow and that I might want to respond more fully at that stage. After considering things overnight, it might be that I deal with just a few more of the noble Baroness's points in that debate on the report from the Select Committee—a debate which, dare I say it, will happen somewhat later than tonight's.

The noble Baroness, Lady Burt, raised a number of questions. She started by asking how many statutory instruments were coming from the department, how many were drafted and when she would see the figure. I regret that I do not have the figure in front of me, but I think virtually all of them are now drafted and on their way through the process. I think we will be able to get them ready in time for 29 March. I look forward to discussing those and others with her, the noble Baroness, Lady Hayter, and other noble Lords as they come before us. I will continue to write to the noble Baroness or her noble friend, depending on whether I can work out who is dealing with each SI—but I am sure that they manage to exchange letters perfectly well—just as I wrote on this occasion to the noble Lord, Lord Stevenson, who no doubt passed on that letter to the noble Baroness, Lady Hayter.

The noble Baroness asked also about the EU consumer centre and what our plans were. I am grateful to her for repeating what a good job it did and saying that it will continue to operate until March 2020. At this stage, all I can say is that we have made no final decisions, but we will review that over the coming year. Again, I will make sure that the noble Baroness is kept informed in the appropriate manner.

On engagement, I can give the assurance that discussions were held with the Competition and Markets Authority, members of the Consumer Protection Partnership, Which?, MoneySavingExpert, the devolved Administrations, the Government of Gibraltar, the Crown dependencies and other government departments with direct responsibility for the laws in the annexe to the CPC regulation. The related competent authorities were also consulted. That engagement was as wide as is appropriate.

The noble Baroness, Lady Hayter, will be aware that it is not necessary to publish a full impact assessment for this SI because it qualifies for the de minimis exemption. The de minimis exemption from a full impact assessment applies where the expected net direct impact on businesses is no more than £5 million per year. It is also important to note that, in assessing impact, we are considering the effect of the SI in question rather than the wider impacts of EU exit. These regulations are designed to correct the deficiencies in legislation after exit to maintain the status quo as much as possible. Therefore, the expected impacts are small. To form the assessment of likely impacts, the department has engaged in informal partnership with the Consumer Protection Partnership.

8.15 pm

Baroness Hayter of Kentish Town: I still do not understand how the figure of £5 million has been reached.

Lord Henley: I am not sure that I can give from the Dispatch Box a precise breakdown as to how we reach those figures. This is general guidance on all impacts in that we look at the effect on business; we make an estimate, and if it is below £5 million—this has been in existence for some time—we do not publish an impact assessment. That is a standard procedure. I will write in greater detail to the noble Baroness setting out how we do that.

I hope that I can say a little more tomorrow, because it goes wider than this SI, in response to the question asked by the noble Baroness about extra checks at borders. I think that would possibly be more relevant to that debate.

Finally, I will deal with the question from the noble Baroness, Lady Burt, relating to Schedule 13 infringements and how they differ from Community infringements. A Community infringement is a breach of the EU regulations and directives—specified in the current Schedule 13 to the Enterprise Act—as implemented by the EU member states. A Schedule 13 infringement is contravention of retained EU law that will form part of UK law post exit and thus will deal with breaches of national law. I hope that explains the issue. If not, I will no doubt receive a prod from the noble Baroness and be asked to write in further detail.

I believe I have dealt with the questions that relate to the instrument; others, as I have said, possibly went wider and might be addressed in our debate tomorrow, which I look forward to with enormous pleasure. Again, I remind the noble Baroness and possibly the noble Baroness, Lady Burt, who will also be speaking, I think, that we might be at a somewhat later hour, as there are two debates beforehand, both of which seem to have attracted a reasonable number of speakers. I commend these regulations to the House and I beg to move.

Motion agreed.

House adjourned 8.18 pm.

Grand Committee

Tuesday 15 January 2019

3.30 pm

The Deputy Chairman of Committees (Lord Brougham and Vaux) (Con): My Lords, if there is a Division in the Chamber, we will adjourn the Committee for 10 minutes.

Interchange Fee (Amendment) (EU Exit) Regulations 2018

Considered in Grand Committee

Moved by ***Lord Bates***

That the Grand Committee do consider the Interchange Fee (Amendment) (EU Exit) Regulations 2018.

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 the UK continues to have a functioning legislative and regulatory regime for financial services in the event that the UK leaves the EU without a deal or an implementation period. This statutory instrument will fix deficiencies in UK law relating to interchange fees applicable to card payments, as well as in rules for card schemes, issuers, acquirers and merchants.

The approach taken in this legislation aligns with that of other statutory instruments being laid under the European Union (Withdrawal) Act. While fundamentals of current financial services legislation will remain the same, amendments are required to ensure that it continues to function effectively. Every time someone makes a payment using their debit or credit card, interchange fees are paid from a merchant's payment service provider—for example, their bank, which is referred to hereafter as an "acquirer", to a card user's payment service provider, referred to hereafter as the "issuer".

Interchange fees are typically set by card schemes, for example Mastercard and Visa. The EU interchange fee regulation of 2015 introduced two main policy interventions. First, it imposes caps on the interchange fees where both the acquirer and the card issuer are located within the EEA. The caps do not apply where either the acquirer or the card issuer are located outside the EEA. The caps limit these interchange fees to 0.2% of the total value of the transaction for consumer debit cards, including prepaid cards and 0.3% for consumer credit cards. It allows member states to set lower caps for domestic debit and credit transactions where both acquirer and issuer are in that country. Secondly, the EU interchange fee regulation sets rules on cards schemes, issuers, acquirers and merchants; these include requiring the separation of card schemes and processing entities, for example WorldPay.

Under a no-deal scenario, the UK would be outside the EEA; the scope of the EU interchange fee regulation would therefore no longer include the UK. As a result, the interchange fees set by card schemes would no longer be capped for payments that involve a UK acquirer and an EEA card issuer.

Higher interchange fees could in turn be passed on to UK businesses and consumers directly or indirectly. Without a change in scope of the UK legislation, caps would still apply to card payments involving an EEA acquirer and a UK card issuer. This would result in asymmetrical obligations on UK businesses.

This statutory instrument will make amendments to retained EU law related to the EU interchange fee regulation 2015 to ensure that it continues to operate effectively in the UK. First, it will reduce the scope of the EU interchange fee regulation in the UK from the EEA to the UK; the result is that the interchange fee caps will continue to apply to card payments where both the merchant's acquirer and the card issuer are located in the UK. Card payments where either the merchant's acquirer or the card issuer are located outside the UK but within the EEA will no longer be subject to the interchange fee caps. This statutory instrument mirrors the EU interchange fee regulation with regard to setting the level of the cap for domestic card transactions. It allows the Treasury to set lower caps on UK consumer debit and credit card transactions by making regulations exercisable by statutory instrument, subject to the negative procedure.

The statutory instrument also transfers powers from the European Commission to the Payment Systems Regulator to make regulatory technical standards regarding the requirements for separation of card schemes and their processing entities. This is in keeping with the Treasury's general approach of delegating responsibility for technical standards to the appropriate UK regulator. The Treasury has engaged with the Payment Systems Regulator and industry in drafting the SI.

In November, the Treasury also published the instrument in the draft, along with an explanatory policy note to maximise transparency to Parliament and to the industry. The Secondary Legislation Scrutiny Committee requested further information on the costs that might result to businesses and consumers. As explained, and as is included in the updated Explanatory Memorandum that was relaid on 19 December, the most significant impact in this area is that interchange fee caps will no longer apply where either the merchant's acquirer or the card issuer are located outside the UK but within the EEA. Any adjustment to interchange fees thereafter would be a commercial decision. Such impacts would be as a result of the UK leaving the EU, rather than as a result of an approach taken in this SI. The direct costs as a result of this SI are minimal.

In summary, therefore, this SI is necessary to ensure that the UK's legislation and regulatory regime remains effective in the event that the UK leaves the EU without a deal or an implementation period. This will be to the benefit of UK businesses and consumers. I hope noble Lords will agree, and join me in supporting these regulations, which I commend to the Committee.

Baroness Bowles of Berkhamsted (LD): I thank the Minister for his introduction. It is said that if you drown, your past life floats before your eyes. I feel a bit like that every time we meet to discuss these onshoring of SIs. Not only are we drowning in them, but there is rather a lot of my past life wrapped up in them. I got a double dose yesterday. It occurs to me that if I were to

[Baroness Bowles of Berkhamsted]

pick this up for the first time, as is the case for other noble Lords, I could not rely on the Explanatory Memorandum to help me out with the complete background and context of why there was such legislation in the first place. We know what the EU did and what it does in imposing the cap, but why it is done or why it was done is relevant to remarks that I will make on how the onshoring has been done.

Placing a cap on card payment interchange fees was a hotly contested debate at the time, not for great party-political differences, but by the payment service providers, who did not want a cap on their profits or to have to be transparent about the breakdown of costs. I recall that it was incredibly difficult to get a true handle on what was or was not reasonable as a cap, because the lobbying was so confusing and lacking in transparent facts. If I further recall correctly, the UK Government were quite sensitive to the lobbying and were not among the most hawkish when it came to fixing the cap. In Parliament we harboured rather greater suspicions about the credit card companies. What was known was that EU consumers paid billions in interchange fees, because the costs, of course, are passed on to the goods. It was €9 billion in 2011. There had been competition investigations by national competition authorities and the Commission, which took proceedings against Mastercard and Visa.

The key problem was that cardholders, who are generally unaware of interchange fees, or at least their size, are encouraged to use cards that generated higher fees; at the same time the card companies competed to attract issuing banks by offering them the higher interchange fees. Those mechanisms operate to drive fees up rather than drive them down. As a consequence, that caused the disappearance of some of the cheaper cards, and the UK was among the countries that suffered—so did the Netherlands, Austria, Finland and Ireland.

On the receiving end of the fees, the merchants and consumers had no power of redress on the competitive balance, even though the cost of the interchange fees was ultimately borne by them. So market intervention was needed, and that, in the end, resulted in the agreement of these caps. The measure was copied by other countries because there are benefits to that regulation, even in an individual territory.

There was an added cross-border dimension in the EU because it enabled banks from other countries that offered lower fees to come in and compete. Prior to the legislation, card schemes were able to apply rules to prevent retailers using better-priced schemes from other countries. The difference could be significant. Interchange fees varied from 0.1% to 1.5% in 2014, prior to the cap. The UK was neither one of the worst nor one of the best. From the largest providers, debit card rates were of the order of 0.24%, and credit card rates were 0.9%. The new caps of 0.2% and 0.3% were clearly an improvement, and applied to cross-border transactions within the EEA as well as domestic ones, as has been explained.

I fully understand the logic of how the onshoring has been done, in that the UK and EEA will be third countries to one another, and the Explanatory Memorandum makes it clear that cross-border transactions with the EEA will no longer be capped. That comes from the third-country provisions of the regulation and presumably how the UK will be treated by the EU. I have no doubt that, where relieved from an obligation, credit card companies will seize the opportunity of making more profit.

In particular, I draw attention to paragraph 12.4 of the Explanatory Memorandum:

> "It is technically possible that, in this instrument, the UK could mandate interchange fee caps that apply to the interchange fees that UK card issuers would be permitted to charge to international transactions. However, this would place asymmetrical obligations on UK businesses vis-à-vis third countries, whereas the current situation provides symmetry with EEA countries. The default onshoring approach to fixing deficiencies relating to the scope, is therefore to reduce the scope of the regulations to UK-only, rather than extending the scope worldwide".

There might well have been other ways of dealing with it. I have seen a lot of these onshoring SIs now, not just from the Treasury and other departments, and sometimes symmetry is aimed at—sometimes not. Sometimes the EEA is put in the third-country box and sometimes not. Sometimes a continuing, although asymmetrical, arrangement is used. We have examples of that in the next batch of SIs on funds. We have already had it with regard to occupational pension funds.

I greatly regret the choice that the Treasury has made. It has given in to saying we will let card issuers make more profit. What is the justification beyond defaulting to symmetry? If I go on holiday and use my UK cards, will I find that merchants start to add on surcharges? Will I find that my UK cards might not be accepted? Was there really the need to aim for symmetry? If the fees on the cards are increased, those are the kinds of consequences that we saw before we had PSD1 and PSD2, the payment services directives. I cannot find a reason why the credit card companies should be protected rather than the UK consumer. Those companies are being given a windfall.

Of paragraphs 12.2 and 12.5—I think they were added in addition due to the Secondary Legislation Scrutiny Committee—the former says:

> "Businesses may potentially face more significant costs as a result of the scope of the regulations",

but that is going to rely on,

> "commercial decisions taken by card schemes".

Paragraph 12.5 addresses the effect on the consumer—it is all going to result from,

> "the commercial decisions of businesses to adjust interchange fees, as opposed to the onshoring approach taken in this instrument".

But the onshoring approach could have been taken as one to protect the consumer rather than to give the credit card companies their head. Would it not have been better to try to maintain the current state and, then, if for some reason it was not working, to give the Treasury the power to make a change?

I would like a little more information from the Minister about what efforts were made to see whether costs for the UK end could be properly pinned down. Just because the EU end can become a rip-off does not mean that the same practice should be condoned at the UK end. I do not count it as a competitive disadvantage to not be able to rip off customers. After Brexit, the issuers in the UK will no longer be in direct

competition with the issuers in the EU. To say that they are at a competitive disadvantage—I think that is what "asymmetric obligations" is meant to imply—does not hold. All that is being allowed is a potential rip off, and what is the logic of that?

3.45 pm

Finally, I turn to the cap itself. I know that the Treasury has not so far availed itself of the discretion to reduce the cap below the maximum set in the EU regulation—nor, I think, has it done the 5 cent debit card limit—but it is good to see those possibilities being onshored. Currently, the UK is stuck at 0.3% for credit card fees, although 19 EEA countries have reduced that to 0.2%. Is providing HMT with that power a precursor to using it? Would the Treasury perhaps consider using it as compensation for allowing cross-border holiday rip-offs to commence? I do not consider paragraph 12.4, or the accompanying explanations in the other paragraphs I have quoted, a good enough justification for what has been proposed. I can see the headline: "Government abandons consumers to credit card rip-offs on holiday".

This is badly done. If we had the opportunity to amend it, I would suggest that we did. On most of the things done by the Treasury, the jump has been made the right way. I regret to say that, on this, the jump has been made the wrong way. The asymmetrical approach would have been much fairer to the consumer.

Lord Tunnicliffe (Lab): My Lords, last night, the House expressly rejected no deal in its vote. That is also Labour Party policy. These orders should not be necessary, but when the Government put instruments in front of us, our role is to ensure effective scrutiny of all SIs and to expose any serious concerns. We believe that this is consistent with our role as a revising and scrutinising Chamber. Having said that, and having listened to the splendid seminar on credit cards by the noble Baroness, Lady Bowles, which leaves me better informed, if not necessarily wiser, I have very few comments to make on this particular SI.

I start by expressing my sheer irritation with the failure to provide timely impact assessments. It seems utterly absurd. Paragraph 12.5 of the Explanatory Memorandum states:

"A full Impact Assessment will be published alongside the Explanatory Memorandum on the legislation .gov.uk website, when an opinion from the Regulatory Policy Committee has been received".

That might have been snuck out in the past two or three days, but there is no reason to have an impact assessment if it arrives only after all the legislative procedures have been completed. We should have a thorough explanation from the Treasury as to why that is happening.

Once again, having said that, the Treasury produced guidance on these SIs—at paragraphs 7.1 to 7.9, I think—which are, word for word, the same in all Treasury no-deal Explanatory Memorandums. Therefore, I have had to read them in increasing detail. My favourite sentence is at paragraph 7.4:

"These SIs are not intended to make policy changes, other than to reflect the UK's new position outside the EU, and to smooth the transition to this situation. The scope of the power is drafted to reflect this purpose".

As an amateur in this field, all I can do is try to test the SIs against that promise. It seems to me that the test is whether they are necessary and whether they obeyed the constraints of new policy. An interesting new area has been introduced by the noble Baroness: was there a better solution that still stopped within the test? I am persuaded that they are necessary; indeed, the Economic Secretary to the Treasury, as is required, signed a statement to that effect. I suppose that if they were left unmade, the credit card companies could rip the public off even more than where we are. I do not think that they introduce new policy, but the theme that runs through many of these SIs concerns symmetry and asymmetry. The noble Baroness has suggested that a better solution for the UK customer would have been an asymmetric solution. I will be very interested in the Minister's response to that.

I note that the order comes into force on exit day. What I really want to know is how will the order be repealed if there is a deal. Can the Minister assure us that it is a genuine no-deal-scenario instrument and that it will be removed from the statute book if there is a deal? That seems the fundamental proof that it is a no-deal instrument.

My only other comment is that, because a no-deal solution is such a dreadful idea, virtually all these statutes create a situation in which the consumer is less well off; this is no different. As has been pointed out, consumers in the UK trading with a UK bank and suppliers will continue to enjoy protection, but there will be no protection overseas. I find it very sad that the Government believe that the chances of that happening are sufficient to require these SIs. I hope that we do not go down this road, because each of these little increments of loss of protection, particularly for consumers, is highly undesirable.

Lord Bates: My Lords, I thank the noble Baroness, Lady Bowles, and the noble Lord, Lord Tunnicliffe, for their scrutiny of these SIs and I shall seek to address the points they made. First, in relation to the noble Lord's point on the impact assessment, in line with the better regulation guidance the Treasury considers that the net impact on a business will be less than £5 million a year. There is potential for limited costs relating to compliance reporting to the Payment Systems Regulator. Firms will benefit from the reduction in uncertainty under a no-deal scenario. Without this instrument the legislation would be defective and firms would be left to deal with an unworkable and inconsistent framework that would substantially disrupt their businesses.

Lord Tunnicliffe: Is the Minister therefore offering a different reason for there being no impact statement from the one given in the Explanatory Memorandum? It seems that a different reason has been put forward.

Lord Bates: I will come to that point in a minute. There is a group of impact assessments before the Regulatory Reform Committee, the body within BEIS that reviews these. It is currently considering them and will publish an impact assessment on a wider group of SIs, including this one. If that is not the case, I shall certainly come back to the noble Lord. However, that is why it sounds as though there are two answers when in fact there is one.

Lord Falconer of Thoroton (Lab): My Lords, I missed the whole of the statement of the noble Lord, Lord Bates. I thought the beginning of the debate was at 3.30—which it was—and I arrived at 3.32. If the noble Lord, Lord Bates, takes the view that I should not intervene, I would quite understand. However, I am interested in this and I wonder if he would allow me to do so. Or perhaps the noble Lord, Lord Young, as the guardian of the procedure, will allow it. If he says no, I will accept that. I leave it to the noble Lord. I throw myself at the mercy of the Whips. Please say no if you do not want me to intervene.

Lord Bates: I am content of course to hear the noble and learned Lord, who is a senior Member of the House.

Lord Falconer of Thoroton: I am obliged. Is my understanding correct that there will be an impact assessment that covers a range of SIs—including this one—but it will be published after we have considered this?

Lord Bates: This specific SI, to which the noble and learned Lord refers, does not have a direct impact assessment of its own because it fails to reach the de minimis threshold of £5 million. Remember, we are seeking to transpose what already exists into UK law, and the costs of doing this are meant to be de minimis. A wider group of assessments is currently going through the regulatory reform process, which will look at the impact of these SIs as a group. This is one of potentially 45 affirmatives and 14 negatives which are coming through. That work will be helpful in satisfying noble Lords on this.

The noble Lord, Lord Tunnicliffe, asked whether the SI will be repealed if there is a deal—which, I underscore, we hope there will be. In the event of an implementation period—which will be delivered through separate legislation; the EU withdrawal agreement Bill—this legislation would not come into effect in March 2019 and would be delayed until the end of that period. It could be amended to reflect an eventual deal on the future relationship or a no-deal scenario at the end of the implementation period.

The Government re-laid the Explanatory Memorandum to include additional information requested by the Lords' Secondary Legislation Scrutiny Committee on impacts. Therefore we do not consider it necessary to publish the de minimis impact assessment at this stage.

Lord Falconer of Thoroton: I am trying to follow this, but is the Minister saying that all of these no-deal regulations assume that there is a deal and will therefore be repealed by the EU withdrawal implementation Bill—which is a requirement under the European Union (Withdrawal) Act at the moment—to implement a deal, or is he saying something different?

4 pm

Lord Bates: I am saying that the SIs we are dealing with derive their power from the EU withdrawal Act—in Section 8(1), as we have been through many times before. They are necessary because that Act, in whose passing the noble and learned Lord was an active participant, contains a repeal of the European Communities Act 1972. It will therefore be necessary to have something to supplement that. In the event of a deal it is anticipated that there will be an EU withdrawal agreement Bill, which would pass through both Houses, and within which provisions would be made to address the continuation of these arrangements into an implementation period. The noble and learned Lord is looking at me—

Lord Falconer of Thoroton: I am bewildered by this for the following reason. I understand that these regulations are required because if there is no deal, there is no implementation period. If there was an implementation period, everything would continue as before. Separately from that point, Section 13 of the EU withdrawal Act requires another Act of Parliament after a deal is approved by the Commons to give effect to the deal, whatever it is. I do not want to be too pressing but I am not getting clarity from the Minister about what the Government envisage—assuming we do a deal—in that Bill, which is required by the EU withdrawal Act. Will they simply repeal all these no-deal regulations? This instrument is a good example of the reason it matters. If it continues in force when there is a deal with a two-year implementation period, two regimes will on the face of it apply to the capping of the charges that can be put on consumer credit transactions via debit and credit cards. I may have misunderstood this but it is quite important that we know how the Government will prevent there being two regimes in practice.

Lord Bates: I do not think the noble and learned Lord has misunderstood it. He makes a fair point as to how this will operate. The clarification I offered in my previous comments is that the withdrawal agreement Bill, which we are talking about, will delay the need to implement the provisions and allow them to be amended or repealed. It effectively gives a choice as to how these SIs would be handled. This instrument would not be required or in force during the implementation period. In that event, current EU law would continue to apply. I think it was on that point that the noble and learned Lord sought an on-the-record response.

The noble Baroness, Lady Bowles, gave a helpful analysis of the situation with regard to why we did not cap interchange fees for UK card issuers. At the moment, the interchange fee regulations maintain symmetry for payment service providers. If HM Treasury applied the interchange fee caps vis-à-vis the EEA without corresponding commitments from the EEA, that would constitute a policy change. The noble Lord, Lord Tunnicliffe, has been consistently assiduous throughout our engagements on these matters in ensuring that there should not be—

Baroness Bowles of Berkhamsted: I am not quite sure that I buy that line. I can use the examples of the regulations we are about to debate, or the ones on occupational pensions. There, funds contain UK assets and EEA assets. When they are onshored, the symmetrical position and the one that we might expect the EEA to take is to narrow down the fund content: just to the UK for the UK and the continuing EEA for the EEA. That was what was done for occupational pensions, but then the point was made that that requires a lot of

divesting of assets for funds—it is far better to have diversity—and that is generally not good for investors or for pensions. The occupational pensions regulations were changed so that the diversity of assets could remain. That is the proposal with the regulations we are about to debate on the subgroup of funds—the venture capital and social entrepreneurship regulations.

At the same time, third countries are still treated differently, so there is not a uniform choice that we go it alone or go down the third country route. There are occasions when this midway has been chosen to continue to stick within the greater EEA area. The noble Lord, Lord Bates, was here yesterday when we discussed this regarding parallel imports. He might have been thinking about what would be coming later, but this choice between symmetry and asymmetry, and the fact that we now have divided up into three potential territories—UK only, UK plus EEA and third country—exists. There are precedents. I am afraid that I do not think that the arguments the officials have presented the noble Lord with stand up to scrutiny.

Lord Bates: I certainly recall every word of the four glorious hours we spent waiting to debate these instruments in Grand Committee yesterday. I also remember the eloquence of the noble Baroness's exposition on patents, drawn from her experience as, I believe, a patent attorney in Europe.

I can only repeat that what we are doing here might not be satisfactory to the noble Baroness. She has highlighted—it is to the benefit of the Committee that she has done so—that there is a choice here. She is making the argument that there is a choice. Our view, in consultation with the industry and the Payment Systems Regulator, is that the way we have presented this best reflects the way we have onshored this approach, remaining consistent with the commitments and undertakings given in Section 8 of the withdrawal Act. I will certainly take back to my friend the Economic Secretary to the Treasury the point the noble Baroness has made. If she will allow me, I will write to her with some more details as to why that policy choice was taken. It is a choice that is there and the one used in the statutory instrument. I commend it to the Committee.

Motion agreed.

Alternative Investment Fund Managers (Amendment etc.) (EU Exit) Regulations 2018

Social Entrepreneurship Funds (Amendment) (EU Exit) Regulations 2018

Venture Capital Funds (Amendment) (EU Exit) Regulations 2018

Considered in Grand Committee

4.08 pm

Moved by ***Lord Bates***

That the Grand Committee do consider the Alternative Investment Fund Managers (Amendment etc.) (EU Exit) Regulations 2018, the Social Entrepreneurship Funds (Amendment) (EU Exit) Regulations 2018, and the Venture Capital Funds (Amendment) (EU Exit) Regulations 2018.

The Minister of State, Department for International Development (Lord Bates) (Con): My Lords, as with the previous statutory instrument, the Treasury is in the process of laying statutory instruments under the European Union (Withdrawal) Act. These three statutory instruments are part of the same legislative programme and will fix deficiencies in UK law relating to the regulation of investments.

The approach taken in these SIs aligns with that of other SIs being laid and debated under the EU withdrawal Act by maintaining existing legislation at the point of exit to provide continuity, but amending it where necessary to ensure that it works effectively in a no-deal context. These instruments have already been debated in the House of Commons on 9 January.

The alternative investment fund managers regulations relate to the management, administration and marketing of alternative investment funds. Investment funds are investment products created to pool investors' capital and invest it in financial instruments such as shares, bonds and other securities. Alternative investment funds are investment funds that are not covered by the directive for undertakings for collective investments in transferable securities, commonly known as UCITS, which are aimed at retail investors. Alternative investment funds include hedge funds, venture capital and private equity funds, and are often aimed at professional investors. The EU alternative investment fund managers directive—AIFMD—created the alternative investment fund framework, and was domestically implemented primarily through the Alternative Investment Fund Managers Regulations 2013.

The second and third SIs relate to two subcategories of alternative investment funds. Registered venture capital funds aim to promote investment into small and medium-sized enterprises, such as start-ups, whereas social entrepreneurship funds focus on social enterprises whose main objective is tackling societal challenges, such as youth unemployment. These regulations create a UK-only regulatory framework for alternative investment funds in the UK. Regulations for alternative investment fund managers, venture capital funds and social enterprise funds enter into what is to be known as a temporary marketing permissions regime. The alternative investment fund managers regulations create a temporary marketing permissions regime. Currently, European Economic Area funds can make use of the EU passporting regime, which gives funds the automatic right to market across the EEA. In a no-deal scenario, the passporting system will no longer operate and EEA funds would lose the right to market into the UK, and would not be able to continue servicing UK customers as they would have before.

In December 2017, the Government announced they would introduce a temporary permissions regime for inbound passporting EEA firms and funds. The draft alternative investment funds regulations create a temporary marketing permissions regime for EEA managers of alternative investment funds, including the European venture capital funds and European social entrepreneurship funds. This will allow EEA

[Lord Bates]
fund managers who currently have a marketing passport to continue to market funds as they could before exit day for a temporary period. This period is for three years. However, subject to an assessment by the Financial Conduct Authority as to the effect of extending, the Treasury can extend the period by no longer than 12 months at a time.

As outlined in my letter to the noble Lord, Lord Tunnicliffe, on 7 January, the Treasury has now committed that any extension of this or any other temporary regimes would be preceded by a Written Ministerial Statement issued to both Houses of Parliament. The Statement would give Parliament advance notice of the Government's decision to extend the temporary permissions regime ahead of the extension SI being laid. This commitment responds to the concerns raised by the Secondary Legislation Scrutiny Committee and by my colleagues in this House. While it is our continued position that the negative procedure is appropriate, we take parliamentary scrutiny seriously and hope this commitment will allay the House's concerns in this regard.

The temporary marketing permissions regime provides continuity and certainty for passporting funds that enter the regime and the UK customers they serve. The FCA will have the power to oversee operation of the regime and have supervisory oversight of all funds with temporary permissions. While in the temporary marketing permissions regime, fund managers will be directed by the FCA to notify under the national private placement regime, which is the current mechanism that allows non-EU third country fund managers to market in the UK.

On the other provisions of these instruments, first, all these draft regulations remove references to the Union and to EU legislation, which are no longer appropriate, and replace them with references to the UK and UK legislation. Secondly, in the alternative investment fund managers regulations, the definition and scope of alternative investment funds will be amended to reflect the UK leaving the EU. Any fund that does not meet the new definition of UK UCITS will be defined as an alternative investment fund. This will therefore mean that all EEA UCITS will be regarded as an alternative investment fund in the UK. UCITS funds are a simple and regulated type of fund intended for retail investors, whereas alternative investment funds are more complex, aimed largely at professional investors, and have additional requirements, such as transparency of reporting. Requiring EEA UCITS to meet additional requirements for an alternative investment fund would be disproportionate. Recognising this, this instrument removes certain aspects of the regime for alternative investment funds that were not designed for retail funds, such as reporting requirements. This will ensure that UCITS funds will continue to be regulated proportionally in the UK as retail funds.

4.15 pm

As UK-located funds will no longer be part of the EEA framework and will be subject to the UK regime, UK-only labels will be created. These will replace EEA labels with the "registered venture capital fund" and "social entrepreneurship fund" labels for their respective regulations. This will ensure that the regulatory framework for investment funds and their managers in the UK is clearly distinguishable from the regulatory framework in the EU.

Moving on, in line with the general approach taken to the onshoring of EU regulations, these three SIs will transfer functions currently within the remit of EU authorities from the European Securities and Markets Authority to the Financial Conduct Authority, and from the European Commission to Her Majesty's Treasury. The FCA, as the UK's regulator for investment funds, has extensive experience in the asset management sector, and is therefore the most appropriate domestic institution to take on these functions from the European Securities and Markets Authority. The regulators undertook a public consultation on the changes they propose to make to binding technical standards, and the FCA will release consultation feedback and the final rules before exit day.

Furthermore, powers are transferred from the Commission to the Treasury, as the suitable government body, which will have powers regarding the rules and regulations of investment funds. For example, the Treasury will be able to specify conditions for alternative investment fund managers and their obligations to disclose information to investors.

These regulations will also maintain the eligible investment arrangements and rules for registered venture capital and social entrepreneurship funds. Currently, EU legislation sets out rules on what assets these subcategories of funds can invest in. To maintain continuity for investors, this instrument will maintain existing investment rules for funds located in the UK.

An amendment to the Alternative Investment Fund Managers (Amendment) Regulations 2018 will be brought forward under the related Collective Investment Scheme (Amendment Etc.) (EU Exit) Regulations 2019, which were laid in Parliament on 17 December 2018. This will amend Part 1 of the alternative investment fund managers regulations to bring forward the commencement date of the temporary marketing permissions regime to the day after the collective investment scheme regulations are made. This will ensure that the FCA has the powers to operationalise the regime. Specifically, it will give the FCA power to process notifications before exit day.

To summarise, the Government believe that these SIs are needed to ensure that the regulatory regime for investment funds and their managers will work effectively in the UK if it leaves the EU without a deal or an implementation period, and to ensure continuity for the UK customers, the funds and their managers that they serve. I hope colleagues will join me in supporting these regulations and I commend them to the Committee.

Baroness Bowles of Berkhamsted (LD): Once again, I thank the noble Lord, Lord Bates, for his explanations. I declare my interest as a director of the London Stock Exchange PLC as some of these provisions could cover funds that might list on the exchange, although nothing I say is to do with the London Stock Exchange.

The AIFMD was a controversial piece of legislation. It was improved greatly during its long passage through the European Parliament and through trilaogues with the Council and the Commission—I think it took us more than 20 trilaogue meetings, which is a large number.

I used up every ounce of my patience and innovation to keep it going until everything was in an acceptable place.

The directive started life as a way of regulating hedge funds, which were in the firing line after the financial crisis for their perceived role in the eurozone sovereign debt crisis and for selling unsuitable investments to retail investors—particularly in France which, unlike the UK, did not have any retail consumer protections in place. It was expanded to cover asset stripping. There are anecdotes around why that happened but I will not go into them here—and as I have not written my memoirs, noble Lords will not get to know them. Some hedge fund managers congratulated me on the fact that the legislation ended up in an acceptable place with nothing silly, but many resented moving from an unregulated space into a regulated space and, in the words of one manager, "having to spend time reporting things instead of just earning money". I am afraid that, as a consequence, the legislation became a recruiting sergeant for the Brexit cause, with funds to boot. That is its sad legacy. That little bit of history augments what has already been said.

Further arrangements were introduced for the specific funds we are also talking about: social entrepreneurship funds and venture capital funds. I considered those introductions very useful, not just in their own right but because it represented the first breakthrough where some people recognised that AIFs could be good; they were usually considered to be at the bad end of the spectrum.

I have no comments on the way in which the onshoring has been done in so far as it follows the kind of path we have seen before, with temporary permissions in place until transfer to the domestic regime—in this case, the UK national private placement regime—takes place. I do, however, have a couple of questions, and I gave notice to the Treasury of the first one.

I believe that, in his introduction, the noble Lord, Lord Bates, covered the reasons why there has been a change to the private placement regime's reporting requirements. The reasoning, which I understand fully, is that EEA UCITs become AIFs and therefore slot into a regime meant to cover the sort of funds used by only professional investors, whereas it has protections that correspond to the retail case from the EEA UCITs. That was given as a reason for changing the reporting requirements for those under the national private placement regime.

However, I do not understand what power the Government are using for that proportionality, and here I refer to what is said in paragraph 7.10 of the Explanatory Memorandum concerning Regulation 10(9)e. Is it a continuation of the withdrawal Act powers or are the Government using another form of empowerment? I did not perceive the withdrawal Act as giving powers to amend the national private placement regime, but I may have missed something in the logic. I hope that there is an answer there; it is quite likely that there is, which is why I gave notice of my question. Paragraph 7.10 also references the "reporting requirements for funds" recognised as retail funds under Section 272 of FSMA. It is true that they are less risky, so less reporting is needed, but where has the power to amend the private placement regime come from? Has it come from FSMA? That may be possible. If so, that should be said. I decided not to spend yet another weekend trying to work out where it came from, but to ask the question instead.

My second question concerns asset stripping. The asset stripping provisions have been contracted to apply only to UK companies. Does that mean that EU funds that are allowed to continue in the UK under the temporary regime can come here to asset-strip EU companies that they acquire? Are we going to get ourselves a bad reputation—"Come to London and we will strip your EU assets"—or are they covered by the built-in requirement of their home member state? Could they separately acquire something that is somehow ring-fenced in the UK? When they are converted to the UK national regime, will it still have all the asset stripping protections? It may not be the place to correct that here but, on a point of information, will our NPPR have UK asset-stripping protections? That was a novel aspect that was introduced into the AIFMD.

I will move on to venture capital and social entrepreneurship funds. When they were proposed, they were said not to be attracting much interest in the UK; people said that we did not need this kind of thing and we had all the funds we needed. I wonder therefore whether there are any figures for the volume of assets under management or sold in the UK using this heading.

We come now to the interesting point I have already mentioned: symmetry and continuity of assets under management. This is an instance of where we are treating the EEA preferentially and not as a third country, so that these funds can still have EEA assets within them, which I fully understand—you would not want to have to rapidly divest assets. But when they were constructed, preferential bias was built in to try to help the EU and EEA companies. Will there be a review of that in the fullness of time, for example to restore in some way the benefit of the UK footprint rather than an EEA footprint? What has been done is sensible in the immediate, but it would be interesting to know the longer-term view, partly because the logic of coming under the same jurisprudence no longer holds. The other side of that is: why not open up so that they can have all funds, including third countries, in them? How are we going to deal with that?

That is probably all that I need to say. My question is, what is the justification? The choice was between three options and the continuity option has been chosen. But where are we going to jump to next? Are we going to shrink back to the UK or are we going to open up to third countries?

Lord Tunnicliffe (Lab): My Lords, I thank the Minister for presenting these instruments. I am sorry to sound like a broken record but I want to start with my concerns about the impact assessment. The Explanatory Memorandum says:

"A full Impact Assessment will be published alongside the Explanatory Memorandum on the legislation.gov.uk website, when an opinion from the Regulatory Policy Committee has been received".

[Lord Tunnicliffe]
Is the Minister going to tell me that it is also de minimis or is this different from the last one? I had hoped that there would be an impact assessment, because I have absolutely no idea of the scale that we are talking about: I do not know whether we are talking about millions, billions or semi-trillions floating around. I would have found an impact assessment useful.

4.30 pm

Nevertheless, I felt it important to scrutinise this SI as best I could, so I went through it and tried to précis it to understand what it was doing and whether it met my tests of being necessary and not a new policy. I did quite well. There is a bit on definitions of AIFs that sounded fair enough. A bit sets out the naming convention, which seemed okay. There was a bit that set out the FCA's reporting requirements. I sort of understood that. A paragraph or two set out the transfer of functions from the Commission to the Treasury, from ESMA to the FCA.

But then I came on to the temporary marketing permission regime. I confess that I partly lost my place. It seems that this is, in the terms that the noble Baroness and I have used, an asymmetric situation. I would be grateful if the Minister could confirm that, but it seems to favour EEA managers and disfavours, or whatever the right term is, UK fund managers. I assume that there is a good reason for that, which I assume is something to do with the good brought to investors outweighing the disadvantage to managers.

I sort of felt that I had got on top of understanding this, until I came to paragraph 7.21 of the Explanatory Memorandum on third-country passports. Everything that I had read up to there seemed to say that there would not be any passporting. I would be grateful if the Minister could better inform me what that paragraph is doing. Is there a contemplation that third-country passports will be issued—I do not know what the mechanism will be—to EEA managers so that they can market in the UK after the end of the temporary marketing permission? Is it contemplated that such passporting, or whatever the right term is, is accompanied by a reciprocity regime? If it is, that will be a good thing; if not, it would seem a step too far.

Finally, we have the same debate again on the same question about what happens. The instrument comes into force on exit day. I am terribly sorry to confess that I cannot remember the definition of "exit day"; clearly, if we crash out of the EU, exit day will be 29 March, but if we go into the 21-month interim period, will exit day be at the end of the 21 months or is it still 29 March? If it is, the legislation will need either to delete the commencement provision or to put it under some control or other. I do not know whether the noble Baroness shares my concerns, but the more of these SIs we do, the more we have this worry that they might, almost by accident, seep into the future because the commencement provisions are not sufficiently clear.

Finally, this shows once again what a dreadful idea this is, because there would appear to be no mechanisms to require reciprocity. Therefore, it seems that at least part of the UK population will be served less well by this regime than it was before.

Lord Bates: I thank the noble Baroness, Lady Bowles, and the noble Lord, Lord Tunnicliffe, for their questions and for their focus on and scrutiny of these important regulations.

I shall start with the impact assessment because there is a different answer to the usual one we have given of "de minimis". The Government have undertaken an impact assessment on these instruments, which we hope to publish shortly. As a whole, these SIs will significantly reduce the costs to business in a no-deal scenario, as without them the legislation would be defective. In making these changes, we have attempted to minimise disruption to firms and their customers. We have identified the main costs to firms as familiarisation costs arising with the new legislation, transition costs because of changes in legal definitions and changes in the reporting requirements for firms using a temporary marketing permissions regime.

The noble Baroness, Lady Bowles, asked why the asset management stripping provisions have been contracted and how they will apply to EU AIFM firms in a temporary marketing permissions regime. Such firms will be able to market under the same conditions as they could pre-Brexit. That follows the consistent approach we have sought to take in drafting these SIs: by considering how they will work and consulting with the industry. They will therefore be subject to the asset-stripping provisions in their home member state, which of course—without wanting to give the noble Baroness flashbacks to her 20 trilogues in the European Parliament—will continue to govern such activities.

Lord Tunnicliffe: If I may gently challenge the Minister, he said that the Treasury has taken a consistent approach with these SIs but it has not. Sometimes it has chosen to be symmetric and sometimes it has chosen to be asymmetric. That may be perfectly reasonable if there is a good explanation—particularly for why it would choose an asymmetric approach—but such an approach, which at least disadvantages some parts of the UK's financial services industry, should be justified by the fact that it gives greater benefits than not having that asymmetric approach available.

Lord Bates: I hear what the noble Lord says. On that particular point, I was referring to the general objective of the onshoring process in which we are engaged. This is to effectively onshore the current rule book to allow for no or limited disruption to UK firms—and, most importantly, their customers and clients—in the unlikely event of no deal. I accepted that point on the previous SI. I will reflect on the point raised by the noble Baroness, Lady Bowles, and the noble Lord, Lord Tunnicliffe, about how the choice will be applied in future—how it will be arrived at—and I shall copy them in on my letter.

The noble Lord, Lord Tunnicliffe, asked me to clarify how the passporting regime will work for third countries post-Brexit. The passporting regime between the UK and the EU will cease in a no-deal scenario. There is a third-country passport, which is currently not in force. The SI transfers to the Treasury the Commission's function of appointing the day when

this passport comes into effect. If in force, the third-country passport can be used to allow third-country fund managers to be authorised to manage and market funds in the UK.

The noble Baroness, Lady Bowles, asked about opening up to third countries in the future, which is a pertinent question. This instrument deals only with the inoperability that comes with withdrawal from the EU in the event of no deal. However, the national private placement regime is a functioning regime for any third country to take advantage of.

Baroness Bowles of Berkhamsted: I understand fully that to some extent we do not need a third-country passport because our national private placement regime is sufficient to do almost the same job. But in my question I was also talking about the assets that the venture capital funds and social entrepreneur funds are allowed to hold. Would those be opened up and be able to have third-country assets in the fullness of time? I do not mind being written to about that.

Lord Bates: We may have to do that but I will go as far as I can with the information which I have. There is some more information which I can convey to the noble Baroness and the Committee. The Government recognise that the alternative investment fund managers regime and the UCITS regime aimed at retail funds do not intertwine perfectly. This is why we have made fixes, where possible, within the confines of the EU withdrawal Act.

Section 272, which the noble Baroness referred to, is to ensure that EEA retail funds are treated as any other third-country funds, in keeping with the UK's obligations under the World Trade Organization rules in a no-deal situation. It is not possible for UCITS to buy or build a controlling stake in the securities of a company or to hold private equity interests. The small number of non-UCITS recognised under Section 272 are all subject to UK-equivalent rules for retail funds on eligibility of assets, borrowing and risk spreading. I undertake to reread the record of this debate and ensure that the noble Baroness's point is addressed directly, if that did not quite cover it.

The noble Lord, Lord Tunnicliffe, asked about exit day. Is it 29 March and how will this instrument be switched off if there is a deal? Exit day is defined in the EU withdrawal Act as 29 March 2019. As I said in the previous debate, the withdrawal agreement Bill will contain provision to change the commencement date of the SI in the event of a deal.

The noble Baroness, Lady Bowles, and the noble Lord, Lord Tunnicliffe, asked about the volume of assets under management for these various fund categories. At the moment, the numbers we are referring to are fairly small. They combine fewer than 50 European venture capital funds and European social entrepreneurship funds in the UK, based on FCA estimates. But as a result of these changes and the temporary permissions regimes, we may get greater visibility of them. I share her desire regarding venture capital, which of course provides seed corn to many small and medium-sized enterprises that will be vital to our economic future, and regarding the importance of social entrepreneurship funds. I know that many departments across government are looking at those funds as a way to implement the sustainable development goals and leveraging private sector capital to meet those objectives.

I think that covers most of the points raised by the noble Lord and the noble Baroness. Again, I thank them for their assiduousness in looking through these regulations. I also recognise and thank the Secondary Legislation Scrutiny Committee for its work, which was extremely helpful in this regard, and I commend these instruments to the Committee.

Motions agreed.

Committee adjourned at 4.44 pm.

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