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PARLIAMENTARY DEBATES
(HANSARD)

# HOUSE OF LORDS

## OFFICIAL REPORT

*ORDER OF BUSINESS*

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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 |

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# House of Lords

*Thursday 14 March 2019*

*11 am*

*Prayers—read by the Lord Bishop of Southwark.*

## Council Tax
*Question*

*11.05 am*

*Asked by* ***Lord Greaves***

To ask Her Majesty's Government what assessment they have made of the levels of council tax in England that have been announced for 2019–20.

**The Parliamentary Under-Secretary of State, Ministry of Housing, Communities and Local Government and Wales Office (Lord Bourne of Aberystwyth) (Con):** My Lords, decisions on council tax levels are for local authorities, although the Government maintain referendum thresholds to allow voters in England to have the final say on any excessive increases. Authorities have set their council tax for the next financial year, and on 27 March the Government will publish the national statistics.

**Lord Greaves (LD):** My Lords, it is amazing that most councils set it at the level set by the Government. Is it not the case that council tax levels in England are coming out at an average 4.5% increase? I declare an interest as a borough councillor in Colne, where the increase is 6% across the board. Local authorities are being hollowed out, their services are being slashed and in many areas they are teetering on the edge of an existential crisis. Will the Conservative Party go to the elections this year and tell people: "Vote Conservative—get less, pay more"?

**Lord Bourne of Aberystwyth:** My Lords, when the national statistics are published, the calculation is almost certainly going to be that the level is 4.8%, but we cannot be absolutely certain about that. Of course, local authorities have the option of going to their electorate and seeking a higher level of council tax. The fact that they do not is indicative of the fact that they know what the result would be.

**Lord Kennedy of Southwark (Lab Co-op):** My Lords, I draw the attention of the House to my relevant interest as a vice-president of the LGA. Can the Minister explain to the House the policy idea behind shifting the burden of local government funding further from central government and more on to the council tax payer?

**Lord Bourne of Aberystwyth:** My Lords, as the noble Lord will know, the Government are looking at the fair funding formula at the moment—I am trailing the next Question—but that does not transfer a burden; it ensures that we have equity across the piece. It does not make the cake any larger; it ensures that there is fairness, as the noble Lord will know. The levels of council tax contributing to local authorities vary enormously: 84% in Surrey and Buckinghamshire; 20% in the City of London. We are not seeking to address that. Although it may look innately unfair, closer attention will show that it is not.

**Baroness Gardner of Parkes (Con):** Can the Minister explain to me, because I have never understood it, why the council tax payable on a property outside London—I am talking about a small family home we have had for many years in Oxfordshire—is more than twice that in Westminster, in London?

**Lord Bourne of Aberystwyth:** My Lords, without knowing the particular circumstances that my noble friend refers to, I once again say that the fair funding formula will look at this and will seek to address any innate unfairness that exists between different authorities. Even within London there are massive differences.

**The Earl of Listowel (CB):** My Lords, will the Minister keep very much in mind the difficulties that local authorities have in meeting the needs of hard-working, low-income families through essential support for their children to do well? Will he seek to look again at what can be done to support these families; for instance, by investing and making a further commitment to the troubled families initiative, which has been so beneficial?

**Lord Bourne of Aberystwyth:** My Lords, I very much agree with the noble Earl about the troubled families programme. It is a good programme, as he rightly says. In looking at resources and needs, we are seeking to ensure that across the board there is fairness. That is why it is a fair funding formula. That is something that will be forthcoming in 2020.

**Lord Campbell-Savours (Lab):** Is one of the reasons why council tax is so low in Westminster the fact that it has huge parking revenues gained from people coming into London from all over the country?

**Lord Bourne of Aberystwyth:** My Lords, the noble Lord raises a relevant factor about parking revenues, not simply in Westminster, as it is true in other parts of London and in other cities. It is being considered in the fair funding review, which is the subject of the next Question.

**Baroness Couttie (Con):** My Lords, I declare my interest as a vice-president of the Local Government Association and an ex-leader of Westminster Council. Does my noble friend agree that this goes far deeper than parking revenues, which have to be ring-fenced for spending on roads? Westminster has low council tax because it is extremely efficient. It also has 1 million visitors a day, for which it receives no revenue from government, and the cost far exceeds parking

[Baroness Couttie]
revenues. Council tax in Westminster is about half—I am not sure of the exact figures—that in Camden and Brent, despite the fact that Westminster has four of the most deprived wards in the country.

**Lord Bourne of Aberystwyth:** My Lords, my noble friend packs a powerful punch for Westminster, but I have no desire to get dragged into a discussion of the relative merits of all the local authorities in England or more widely. That is being looked at in the review.

**Baroness Boycott (CB):** My Lords, will the Minister explain something that has long puzzled me? I ran the London Food Board for many years and in that time I found that only five boroughs in London supplied meals on wheels. That was because of council cutbacks. Councils said they could not afford to do it, and older people tended not to complain. The consequence was that councils saved, let us say, £15 a day, and people ended up in high-dependency beds from which they could not return. The saving made by the council was transferred to the NHS. Surely this is crazy.

**Lord Bourne of Aberystwyth:** The noble Baroness refers to a very valuable service which I happily endorse. I agree with the point she makes about the cost elsewhere if such a service is not provided. No doubt that is something that should be borne in mind by local authorities and more widely.

**Baroness Pinnock (LD):** My Lords, as a result of government policy, councils which have social services responsibilities have had to raise their council tax by 18% over the past four years. Does the Minister know of any employees who have had an 18% pay rise in that period? If not, are they still the hard-pressed council tax payers whom the Conservatives love to talk about?

**Lord Bourne of Aberystwyth:** My Lords, the noble Baroness should know that the level of council tax increases since 2010 has been lower than the rate of inflation judged by CPI. That was not the case in the previous decade. I think the noble Baroness should look at those figures.

**Lord Foulkes of Cumnock (Lab Co-op):** Does the Minister know that there is one part of the United Kingdom where council tax cuts have been even greater than in England? It is in Scotland, where the SNP has imposed swingeing cuts, far greater than in England, on local councils. What message does the Minister have for Nicola Sturgeon?

**Noble Lords:** Oh!

**Lord Bourne of Aberystwyth:** My Lords, I suspect this is one of the few topics where the noble Lord and I will be in total agreement. I very much endorse the spirit of the question he asked and will gladly discuss with him later what we can do.

## Local Authorities: Fair Funding Review

*Question*

*11.13 am*

*Asked by* ***Baroness Thornhill***

To ask Her Majesty's Government what progress they have made towards the completion of the fair funding review to set new baseline funding allocations for local authorities on the basis of relative needs and resources.

**Baroness Thornhill (LD):** My Lords, I beg leave to ask the Question standing in my name on the Order Paper and declare my interest as a vice-president of the Local Government Association.

**The Parliamentary Under-Secretary of State, Ministry of Housing, Communities and Local Government and Wales Office (Lord Bourne of Aberystwyth) (Con):** My Lords, we are making good progress on the development of a fair funding formula that aims to provide a simple and transparent link between local authority relative needs and resources and available funding.

**Baroness Thornhill:** I thank the Minister for that Answer, but the sooner the better, please. As this is the biggest change to local government funding in a generation, does the Minister agree that factors such as levels of deprivation are highly significant drivers of spending need in a local council's budget? Will the Minister explain why deprivation is given no prominence in the new funding formula and how areas of greatest need, with the highest levels of deprivation, will be funded in future?

**Lord Bourne of Aberystwyth:** My Lords, the noble Baroness is right about the importance of deprivation but she is wrong to say that we have not yet issued the policy. It was out for consultation until 21 February, as she will know, and we are now considering the responses. Even in that consultation we recognise the importance of deprivation in relation to, for example, adult social services, children's social services, fire and rescue services, and public health. The noble Baroness makes a powerful point but it is recognised and the policy is still being considered.

**Lord Blunkett (Lab):** Will the Minister, for whom I have a great deal of time, admit to the House that it is impossible to have a fair funding formula if you are dealing only with the specific grants that he outlined in his Answer and the business rate arrangements now being put in place? With the removal of the revenue support grant, it is impossible to have the distribution to which he has just referred.

**Lord Bourne of Aberystwyth:** My Lords, I thank the noble Lord very much for those kind comments. The redistributive element that he referenced will be done through the business rate retention scheme, which will become live at the same time in 2020. I very much agree with him about the need also to bear in mind

government grants, of which there are many, in addition to the local government settlement and many programmes such as the Future High Streets Fund, the Coastal Communities Fund, the Stronger Towns Fund and so on that we have seen recently.

**Baroness Finlay of Llandaff (CB):** My Lords, as part of fair funding, do the Government intend to recommend the solution that Cardiff City Council has put in place, which is 150% council tax on empty properties to push up occupancy, particularly where there is a shortage of rental properties?

**Lord Bourne of Aberystwyth:** My Lords, the noble Baroness raises an important point but she should be aware that we already have a procedure for a premium of up to 300%. That was introduced by this Government very recently.

**Baroness Jolly (LD):** My Lords, I declare my interest, as listed in the register, as the chair of a social care provider. Adult social care accounts for over 40% of local authority budgets and that number is rising, yet without the production of the adult social care Green Paper, which has been repeatedly delayed, how can the Government look at fair funding from a holistic perspective, and how can providers plan?

**Lord Bourne of Aberystwyth:** My Lords, the noble Baroness makes a very valid point about the importance of that paper on social care, which I hope will soon be forthcoming. She will be aware that we have made special provision for adult social care precepts in recent local government settlements.

**The Earl of Listowel (CB):** My Lords, does the Minister recognise the extreme concern of local authorities about meeting the essential needs of vulnerable children and families? Many have had to cut essential services for those groups. Will he keep those requirements very much in mind?

**Lord Bourne of Aberystwyth:** My Lords, the noble Earl raises another very important point in relation to children's care. He will be aware that we again made special provision in this year's settlement, but he is right about the continuing importance of this issue. Earlier, he referenced the troubled families programme, which is important in that regard.

**Lord Kennedy of Southwark (Lab Co-op):** My Lords, I refer the House to my relevant registered interest. Would the noble Lord dispute the statement that the top 10 most deprived councils in England are set to see cuts higher than the national average, with nine on course for cuts more than three times the national average, and will the fair funding review address that?

**Lord Bourne of Aberystwyth:** My Lords, the 10 most deprived areas in England spend on average 22% more on care per household than the 10 least deprived, and that is an important statistic in contradistinction to those the noble Lord mentioned. However, he is absolutely right that it is important that in settling the fair funding formula we look at the needs of particular areas, as well as their resources, and we will do so later this year.

**Baroness Hussein-Ece (LD):** My Lords, when the Minister talks about levels of deprivation, is he taking into account youth services and deprivation in those areas with the highest levels of youth crime, which we have been talking about a lot in this House and across the country? I declare an interest as a former councillor in two London boroughs for 16 years. Youth services used to be an excellent way of keeping young people occupied and away from crime and anti-social behaviour; community safety officers also had a key role. These have all gone. Will that be taken into account?

**Lord Bourne of Aberystwyth:** My Lords, these are factors very much in play, which we will look at. The noble Baroness is right about the importance of youth services. In relation to the integration action plan that we are pursuing throughout the country, particularly in five troubleshooting regions, youth services are given special accent. That is in addition to what is coming through the local government grants.

**Baroness Jones of Moulsecoomb (GP):** My Lords, several councils have begun to declare climate emergencies, to develop plans that will adapt to and mitigate climate change. Will the Government consider making an allocation for that purpose, which could benefit the whole of the UK?

**Lord Bourne of Aberystwyth:** My Lords, as always, the noble Baroness speaks with great experience on climate change. She will know that this policy area tends generally to be directed quite separately, over and above the local government settlement. Certainly, local authorities need to bear these issues in mind; all responsible local authorities recognise their importance, and in many cases addressing them makes perfect economic sense.

**Lord Wallace of Saltaire (LD):** My Lords, the other week, the Prime Minister recognised at last—in the derisorily small offer that she made to a number of Labour MPs for industrial towns—the link between deprivation and those areas that voted most heavily for Brexit. Regardless of what eventually happens on Brexit, do we not need, on a cross-party basis, a substantial long-term commitment to public investment in services, infrastructure and education for those deprived parts of the country that feel most neglected?

**Lord Bourne of Aberystwyth:** My Lords, first, I do not think that £1.6 billion can be described as derisory. That may be mathematics to the Liberal Democrats but it is not a true reflection of the amount offered by that programme. This offer was for communities that have been left behind, and had no necessarily causal link with how they had voted. Many of those communities are in the north of England, as the noble Lord would know. It is an important programme and, as he rightly says, we should all get behind it.

## Public Authorities: Algorithms

*Question*

*11.22 am*

*Asked by* ***Lord Clement-Jones***

To ask Her Majesty's Government what consideration they have given to the standards and certifications required for the algorithms used in decision-taking by public authorities and agencies.

**The Parliamentary Under-Secretary of State, Department for Digital, Culture, Media and Sport (Lord Ashton of Hyde) (Con):** My Lords, last year the Government published the *Data Ethics Framework*, which sets out clear principles and standards for how data is used in the public sector—an important tool guiding the ethical use of algorithms and AI technologies. The Government have also recently set up the Centre for Data Ethics and Innovation, which will provide independent, expert advice on the governance of data and AI technology. The centre's first two projects will study the use of data in shaping people's online experiences and the potential for bias in decisions made using algorithms. This work and the centre's future work will play a leading role in ensuring transparency and accountability in the ethical use and design of algorithms.

**Lord Clement-Jones (LD):** My Lords, some 53 local authorities and about a quarter of police authorities are now using algorithms for prediction, risk assessment and assistance in decision-making. The Centre for Data Ethics and Innovation, for all its virtues, is not a regulator. The *Data Ethics Framework* does not cover all aspects of algorithms. As the Minister will know, it was quite difficult finding a Minister to respond to this Question. Is it not high time that we appointed a Minister—as recommended by the Commons Science and Technology Committee—who is responsible for making sure that standards are set for algorithm use in local authorities and the public sector and that those standards enforce certain principles such as transparency, fairness, audit and explainability and set up a kitemark so that our citizens are protected?

**Lord Ashton of Hyde:** My Lords, there was no difficulty in finding a Minister in this House: answering the noble Lord's very sensible Question was pinned on me at a very early stage. The point about the Centre for Data Ethics and Innovation, which will publish its interim report on algorithms in the summer—relatively soon—is that it will look across the whole area and highlight what should be done in regulation terms. It will be one of the things that we expect the centre to look at, so the genuine concerns raised by the noble Lord can be considered at by this forward-looking body.

**Lord Geddes (Con):** Would my noble friend explain what an algorithm is? Should I be concerned about it?

**Lord Ashton of Hyde:** My Lords, I am not an expert, but I am sure that the noble Lord can go back to his school days and remember from his study of Greek that Euclid was producing algorithms in 300 BC —he will remember that this was for finding the greatest common divisor of two numbers. Essentially, an algorithm is a set of rules that precisely defines a sequence of operations. Today, they are used mainly by computers for calculations, machine learning and artificial intelligence.

**Lord Griffiths of Burry Port (Lab):** My Lords, clearly, I must voice the general opinion expressed in other ways in appreciation of the Minister's reply to a very pernickety noble friend of his, who is sitting on the Bench behind him. We have heard reports of information that will come from the data ethics people in the summer, and we have a White Paper on online harms coming very soon and then a period of consultation. I always seem to be stuck at the Dispatch Box acknowledging that the answer to the question I really want to ask will come in months' or perhaps years' time. The noble Lord who put the question is quite right: things are happening in the field of technology now, with all those local councils and police forces using algorithms to forecast possible courses of action and take policy decisions in light of what they think will happen. We are told that consultative experiences are about to happen, but is it "when" or "if"? It would be good if the Minister could somehow bypass or short-circuit the labyrinthine things that are happening elsewhere and give us some reassurance that certification for things which are already happening in the field and shaping our future can be looked at critically.

**Lord Ashton of Hyde:** It is not completely fair to say that nothing has happened. In areas where personal data is used, for example, that has to be used lawfully under the aegis of the Data Protection Act. The Information Commissioner recently said that she was minded to issue guidelines on the use of data in respect of children. The Information Commissioner is a powerful regulator who is looking at the use of personal data. We also have the Digital Economy Act, and we have set up the *Data Ethics Framework*, which allows public bodies to use the data which informs algorithms in a way that is principled and transparent. Work is going on, but I take the noble Lord's point that it has to be looked at fairly urgently.

**Baroness Grender (LD):** My Lords, when the Chancellor asks the Competition and Markets Authority to scrutinise the transparency of Google and Facebook, are the Government confident that they are applying the same rules of transparency to public services in the UK? Is not waiting for an interim report a little bit too late, when the HART system used by Durham Police to predict reoffending, for example, is already well under way? Does the Minister accept that failure to properly scrutinise these kinds of algorithms risks the racial bias revealed by the investigation into the Northpointe system in Florida?

**Lord Ashton of Hyde:** I understand that there are issues about facial recognition systems, which are often basically inaccurate. The essential point is that biometric

data is classified as a special category of data under the Data Protection Act and the police and anyone else who uses it has to do so within the law.

## Brexit: Non-Disclosure Agreements

*Question*

*11.29 am*

*Asked by* ***Baroness Wheatcroft***

To ask Her Majesty's Government how many companies have signed non-disclosure agreements with them in relation to preparations for the United Kingdom's withdrawal from the European Union.

**The Minister of State, Department for Exiting the European Union (Lord Callanan) (Con):** My Lords, government departments make use of non-disclosure agreements when structuring engagement with businesses or other organisations on preparations for leaving the EU. They are a common component of contractual arrangements that are used to protect the commercial considerations of the parties involved or to protect sensitivities around the development of government policy. With regard to my department, DExEU, as of mid-January there were seven NDAs in place covering standard commercial contracts.

**Baroness Wheatcroft (Con):** My Lords, I thank my noble friend the Minister for his response. The Government have been rightly critical of the use of NDAs in some cases that have come to light recently. It is crucial that Parliament and the public should have access to all relevant information about the potential costs and risks of Brexit, so could my noble friend assure the House that the NDAs the Government have signed are not keeping important data out of the public domain? At such a pivotal time for the country, business should not be gagged.

**Lord Callanan:** I totally agree that business should not be gagged. Many businesses have rightly spoken out with their opinions on Brexit, both for and against. But we have been extremely open about no deal and the costs of Brexit. We published 106 technical notices and there has been extensive debate. A lot of economic analysis has been published. Nobody can say that they have not had all the relevant information.

**Lord Howarth of Newport (Lab):** My Lords, if the Government subscribe to the democratic principles of transparency and accountability, should there not be a rule that Governments and their agencies do not enter into non-disclosure agreements where public interests are material? Should not pleadings for commercial confidentiality be treated with great scepticism?

**Lord Callanan:** I agree with the noble Lord that it is important for the Government to be as transparent as possible, but some of these contracts cover things such as payroll services. They are not an attempt to gag businesses or anything like that. The Comptroller and Auditor-General, the head of the National Audit Office, gave evidence to the Exiting the EU Committee in the other place that the use of NDAs in these government contracts was entirely appropriate.

**Lord Lilley (Con):** My Lords, are the Government not in rather a strange position of preparing to ensure that we can leave with no withdrawal agreement on 29 March while playing down and hiding what they have done to achieve that and what has been achieved on a reciprocal basis between ourselves and the EU—that planes may fly and hauliers will have licences et cetera? Will the Minister publish a complete list of such arrangements to reassure the House, the country and the other place that we can leave smoothly on 29 March without a withdrawal agreement if none is available?

**Lord Callanan:** I know that the noble Lord takes a close interest in these matters, but it remains the case that we do not want to leave with no deal. We do not think that is an advantageous situation. There will clearly be a lot of turbulence if that happens. But we have been open about the consequences. The problem is that the EU will not engage with us on many of the technical preparations necessary because it takes the view that it has negotiated a withdrawal agreement.

**Baroness Kramer (LD):** My Lords, I think the Minister will find that many in this House have had conversations with businesses that have said to them directly that they cannot describe the impact of Brexit on their business to politicians or the public, or speak out openly, because they are bound by NDAs that they have signed with the Government. Will he go back and look again at these NDAs in some detail, perhaps himself, and put some pressure on his lawyers, because it is very clear from all the conversations that eventually it will surface and become public that these are not just covering narrow, commercially sensitive issues? They are stretching far more broadly because the Government prefer to keep so many issues secret when they should be transparent.

**Lord Callanan:** I am afraid I do not agree with the noble Baroness. She cannot expect me to comment on hearsay or private conversations she might have had. If she gives me specific examples of where agreements have been used inappropriately, I will of course look at them.

**Baroness Symons of Vernham Dean (Lab):** My Lords, the noble Baroness, Lady Wheatcroft, asked about NDAs across the whole of government. The Minister, speaking from the Dispatch Box in this House, answers for all of government. He has given us the answer only for his department. Could he answer the noble Baroness's Question in full and tell us what the numbers are across the whole of government?

**Lord Callanan:** I would love to answer the noble Baroness, but I simply do not have that information. She will have to ask other government departments what NDAs they have in place.

**Noble Lords:** Oh!

**Lord Callanan:** I can only give the information that I have in front of me; I asked my department how many NDAs were in place and what they were. I will look at the situation and respond in writing if that is appropriate.

**Baroness Smith of Basildon (Lab):** I have to say to the Minister that he answers for the whole Government when he speaks from the Dispatch Box. If his department cannot find the information, it should ask other departments. Sometimes, when I listen to his answers, I think that there is a parallel universe: there is the Prime Minister and some of her Ministers and then there are the rest of us. Most of us saw what happened in the House of Commons again last night, when MPs ruled out a no-deal Brexit, yet here the Minister is talking about no-deal Brexit non-disclosure agreements. It is hard to understand the justifications for the secrecy the Government are insisting on. Picking up on the point made by the noble Baroness, Lady Kramer, does the Minister understand and share the frustrations of businesses and sectoral bodies subject to these gagging orders, which in many cases are deeply unhappy with the direction of travel but ultimately are unable to speak out on such a crucial issue?

**Lord Callanan:** Again, the noble Baroness is referring to hearsay conversations that she may or may not have had. They are not gagging orders but standard non-disclosure agreements. These are not unusual; they were used extensively throughout periods of Labour Governments as well. Many businesses are speaking out with their opinions on Brexit. Everybody has an opinion on Brexit. Believe me, I get a lot of contributions, a lot of letters and a lot of emails, from businesses and individuals, on the subject of Brexit. Nobody is being gagged.

## Brexit: Date of Exit

*Private Notice Question*

*11.36 am*

*Tabled by* ***Baroness Smith of Basildon***

To ask Her Majesty's Government, in the light of the resolutions of the House of Commons to reject both the negotiated withdrawal agreement titled *Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community* and leaving the European Union without a negotiated withdrawal agreement, what steps they will take to amend the date of exit as set out in the EU (Withdrawal) Act 2018.

**Baroness Smith of Basildon (Lab):** I beg leave to ask a Question of which I have given private notice.

**The Minister of State, Department for Exiting the European Union (Lord Callanan) (Con):** The Government have today deposited in the Libraries of both Houses a document making clear the necessary steps required to extend Article 50. The position of the House of Commons with regards to an extension of Article 50 will not be clear until the conclusion of the debate this afternoon.

**Baroness Smith of Basildon:** My Lords, we are back to that parallel universe I referred to a few minutes ago. I ask the Minister about a no-deal Brexit and his answer is about the extension of Article 50.

This has been an extraordinary parliamentary week. On Tuesday, the Prime Minister was again defeated on her unchanged agreement with the EU. Last night, MPs rejected leaving the EU without a deal, and the Prime Minister has now to accept that she does not have the full support of her Government, or even her Cabinet. This House has also emphatically rejected no deal. Yet, in an extraordinary, intransigent speech which followed the defeat in the Commons, Mrs May appeared to want to ignore Parliament.

We are spending a great deal of time, energy and money—millions, if not billions of pounds—on preparing for a no-deal failure. One parliamentary recess has already been cancelled, and there is serious talk of longer, later and more sittings—including on Saturdays. There are even reports that the Prime Minister intends to run down the clock further to try and get her twice-rejected deal through. She is acting like the cruel parent who, when the child will not eat its dinner, serves up the same plate of cold food day after day until they are forced to accept the unwanted, the unpalatable and the dangerous.

My question, which I would have expected the noble Baroness the Leader of the House to answer, but which I put to the Minister, is: in order to give effect to what Parliament has now agreed, and to end this dreadful waste of resources and the irresponsibility that goes with it, when will the Government bring forward the necessary legislation to prevent a no-deal exit?

**Lord Callanan:** As the noble Baroness is well aware, since I have repeated it many times in this House—noble Lords will groan and roll their eyes—the legal position, until it is changed, is that we leave on 29 March. The Government have said that if the House of Commons wishes to vote for an extension, we will table the necessary affirmative SI, but we cannot do that until it has been agreed by the EU Council. We cannot just unilaterally extend Article 50; it has to be agreed with the Council. We will do that if an extension is agreed by the House of Commons and by the European Council.

**Lord Newby (LD):** My Lords, given the decision by the House of Commons yesterday to rule out no deal, will the Government now withdraw from the Order Paper all the statutory instruments which would implement no-deal provisions, on the basis that they are a complete waste of parliamentary time?

**Lord Callanan:** No, we will not. The reason—even I am getting bored of hearing myself repeat it—is that the law of the land, as currently constituted, says that we leave the EU on 29 March. Article 50 says that in European law, which the Liberals want us to continue experiencing, and British domestic legislation says the same.

**Lord Cormack (Con):** Is my noble friend aware whether, as I have heard, certain members of the ERG are communicating with individual Governments within the European Union, seeking to persuade them to apply a veto if we request an extension? If that is happening, has he heard of it and what is his view of it?

**Lord Callanan:** I thank my noble friend for his questions. I have heard lots of things about lots of people communicating all sorts of things, including members of the Labour Party going to Brussels and talking to the negotiators and ex-Prime Ministers doing the same. I am sure that many Members of Parliament are making their views heard loudly and clearly to all sorts of actors, but I am also sure that member states will take their own view of the situation.

**Lord Hannay of Chiswick (CB):** Does the Minister not recognise that there is a good deal of confusion about the state of the statutory instruments being brought forward on 29 March? He has answered that question, but could he perhaps correct the impression that he and his noble and learned friend Lord Keen gave the House? The legislation we have which would enable a European election to take place here on 23 May has not in fact been repealed; that is the position of the Electoral Commission.

**Lord Callanan:** The noble Lord is correct, in that the legislation on European elections would have been abolished through statutory instruments laid under the EU withdrawal Act. I do not think those instruments have been tabled yet but if they were then they would not take effect, as many of those SIs do not, until our exit date. So if our exit date is postponed, they would of course take effect at that date.

**Lord Foulkes of Cumnock (Lab Co-op):** My Lords, I am surprised that the Leader of the House is not replying to this Question, since it covers a wide variety of things. Can the Minister confirm that he and other Ministers speaking from the Dispatch Box speak on behalf of the whole Government, not just whichever department they are associated with? Is it not clear to him, the Leader of the House, the Chief Whip and everyone concerned that there is absolutely no way that we are going to exit the European Union at the end of this month? Irrespective of what happens in the other place, there is no way that the legislation can get through. Will the Minister at last admit that and accept reality—and accept the financial penalty that he is going to incur?

**Lord Callanan:** I am sorry that my answering questions in the House is such a disappointment to the noble Lord but I am sure he will get to hear from the Leader in due course. I can only repeat that the legislation which this House has passed says that we leave on 29 March. That is what Article 50 says. If there are votes in the debate taking place in the other place, that may change but at the moment that is the legal position. The noble Lord may shake his head but those are the facts. It is what we have legislated for, in this House and the other place.

**Lord Howell of Guildford (Con):** My Lords, speaking for any party at the moment is a bit tricky. But as Her Majesty's Opposition have ruled out no deal—personally, I agree with them—and the only available deal, and given that we know that there is a requirement that if a delay is to be granted it has to be for a purpose, with a strategy or an aim, would it not be wonderful just to have an inkling of what Her Majesty's Opposition are proposing for the future, so that we at least know what kind of support we are going to get?

**Lord Callanan:** My noble friend makes a very good point with the benefit of his experience. The Labour Party are fond of telling us what they are against. What they have not done is tell us what they are in favour of. Ultimately, the other place will need to decide what it is actually in favour of, rather than what it is against.

**Lord Bowness (Con):** My Lords, in view of the chaotic state into which the parliamentary process concerning Brexit has been reduced, will the Government confirm that, in the event of an extension of Article 50 being sought, or indeed in any event, they will belatedly reconsider the red lines which have caused us to be in this position? We have adhered to them stubbornly and with no regard to the disastrous position to which we are heading in these negotiations. It is critical that the Minister indicate that we now have an open mind on our position for the future.

**Lord Callanan:** The difficulty with my noble friend's point—we have set out our position on the terms of negotiations very clearly—is that we have negotiated a withdrawal agreement which, in our opinion, is the best deal available and in the EU's opinion is the only deal available. Saying that you do not like no deal is not a valid course of action. If you want to leave with a deal then you either need to vote for this deal or tell us what other deal can be negotiated, which will require support. That is what the Opposition and those who are opposed to Brexit have not done.

**Lord Campbell of Pittenweem (LD):** My Lords, in the light of last night's events, what importance do Her Majesty's Government now attach to the doctrine of Cabinet responsibility?

**Lord Callanan:** The doctrine of Cabinet responsibility is, of course, extremely important. Those Ministers who voted against the Government last night have resigned. It is personally disappointing that some other Ministers did not support the Government.

## Business of the House

*Motion on Standing Orders*

*11.47 am*

*Moved by* ***Baroness Evans of Bowes Park***

That Standing Order 46 (*No two stages of a Bill to be taken on one day*) be dispensed with on Tuesday 19 March to allow the Northern Ireland (Regional Rates and Energy) (No. 2) Bill to be taken through its remaining stages that day.

**Lord Hain (Lab):** My Lords, although I understand the need for this Bill to deal with the renewable energy scandal in the main, can the noble Baroness the Leader of the House give an assurance that a much more pressing Bill will be brought forward, favoured by the Secretary of State for Northern Ireland and the Minister —the noble Lord, Lord Duncan of Springbank—to deal with the problem of pensions for the severely injured? The WAVE trauma group represents nearly 500 people in a desperate situation. I am looking here at the case of Alex, the victim of a terrorist attack, who has had a fourth stump reduction following his amputation 30 years ago. Will she raise this in Cabinet, and with the Prime Minister, to try and get them the pensions for which this House, on a cross-party basis, has asked the Government?

**Lord Foulkes of Cumnock (Lab Co-op):** My Lords, while the Leader of the House is dealing with business, will she confirm that, whichever Minister is speaking from the Dispatch Box in the House of Lords, they are answering on behalf of the whole Government, not one particular department? If a Member of this House asks a Question about, for example, non-disclosure agreements across Government, the Minister should answer right across Government, not just for his department.

**Baroness Smith of Basildon (Lab):** My Lords, this may be helpful to the noble Baroness when she is answering questions. My noble friend Lord Hain made a pertinent and important point. Does she accept that if we did not spend so much time on legislation for a no-deal Brexit—which has been ruled out by both Houses —we would have time for these other crucial issues?

**The Lord Privy Seal (Baroness Evans of Bowes Park) (Con):** My Lords, I am sorry to hear of the example which the noble Lord gave. It sounds as if he has also spoken to my noble friend Lord Duncan about these issues. I can assure him that they are taken seriously and will take back his comments. I believe that my Front Bench speaks extremely well for the whole Government from this Dispatch Box.

*Motion agreed.*

## Northern Ireland (Regional Rates and Energy) (No. 2) Bill

*Committed to Committee*

*11.49 am*

*Moved by* ***Baroness Evans of Bowes Park***

That the bill be committed to a Committee of the Whole House.

*Motion agreed.*

## Supply and Appropriation (Anticipation and Adjustments) (No. 2) Bill

*Second Reading (and remaining stages)*

*11.49 am*

*Bill read a second time. Committee negatived. Standing Order 46 having been dispensed with, the Bill was read a third time.*

*Motion*

*Moved by* ***Lord Bates***

That the Bill do now pass.

**Lord Davies of Oldham (Lab):** My Lords, it is not customary for the Opposition to make any comments on the appropriations Bill and, in normal circumstances, we would not. There is no question of us seeking to delay the Bill as this is, appropriately, a House of Commons issue. But I ought to congratulate the Government in this week when their whole strategy has been an utter and total failure; I ought to congratulate the Minister on finding a Bill on which there is unanimous support.

**The Minister of State, Department for International Development (Lord Bates) (Con):** I am grateful for the noble Lord's support. We would love to have his support on the withdrawal agreement, and then we could all have a happy future.

*Bill passed.*

## Adjournment

*11.51 am*

*Motion to Adjourn*

*Moved by* ***Lord Adonis***

That the House do now adjourn.

**Lord Adonis (Lab:** My Lords, I rise to move that the House now adjourns before we proceed with the remaining business, which is almost exclusively no-deal Brexit regulations. The House has spent months now endlessly debating no-deal Brexit regulations, some of us devoting a huge amount of time to it. The argument that has been put to us by the Government is that we need to because it is still the will of Parliament to keep no deal on the table and that, for as long as no deal is on the table, we have a duty to continue to make legislative provision, even though that is hugely diverting of the whole government machine. It is in pursuit of a policy that the Prime Minister has repeatedly said she does not wish to pursue and it is costing £4.2 billion. My noble friend Lord Davies of Oldham has just said that there is agreement across the House on appropriations. There might well by agreement that we could spend that £4.2 billion a lot more wisely than on no-deal preparations including for ferry companies with no ferries and the whole gamut of preparations we have seen. They are a colossal waste of public money and profoundly against the public interest.

My noble friend the Leader of the Opposition, in her robust and timely intervention a few moments ago, asked the Government what they intend to do in response to the crisis we now face, with the resolution of the House of Commons last night against no deal but, robotically, the continuation of preparations for

no deal. They continue imminently in this House with another string of no-deal regulations. On the Order Paper are nine no-deal regulations, which we are expected to pass in debates after this Motion, which will involve big further demands on the government machine, big further expense and further requirements. This is emphatically not just about us; it is about whole sectors of the economy, which will now have to spring into action and make preparations, at huge cost to them and inconvenience to the public, in response to these regulations being passed.

Last night at 7.45 pm, the House of Commons resolved,

"that this House rejects the United Kingdom leaving the European Union without a Withdrawal Agreement and a Framework for the Future Relationship".

That was not a capricious Motion. It was the latest in a whole series of resolutions the House of Commons has passed in the same spirit. It was passed by 321 votes to 278, so it was a decisive majority and it is now the duty of the Government to give effect to that resolution.

The Minister, the noble Lord, Lord Callanan, whose contributions we look forward to because they constantly change and develop the argument on Brexit in such a sophisticated way each time he rises, has said that the issue now is the date of an extension. Of course, he is right in the technical, legal sense: having resolved that we do not wish to proceed with no deal we now need to decide what is the period of the extension we will seek in order to avoid no deal. That is correct, although I note that the European Union has already responded positively to last night's vote. Noble Lords may not all be assiduous, like me, in their use of Twitter, but the President of the European Council, Donald Tusk, tweeted an hour ago as follows:

"During my consultations ahead of #EUCO, I will appeal to the EU27 to be open to a long extension if the UK finds it necessary to rethink its #Brexit strategy".

That is an extremely significant statement in terms of what will happen hereafter. It is abundantly clear from the resolution of the House of Commons last night that the United Kingdom does find it necessary to rethink its Brexit strategy. Any rethinking of our Brexit strategy will require two elements: first, no further contemplation of no deal, which was a ludicrous proposition to put before Parliament and the country and has finally been eliminated by the House of Commons; and secondly, an extension. The length of the extension needs to be agreed, but the principle of the extension is accepted now even by the Prime Minister, and the President of the European Council has already announced that the European Union will be open to debating and discussing that, which one assumes, therefore, will lead to agreement in the European Council next week.

**Lord Framlingham (Con):** Will the noble Lord give way?

**Lord Adonis:** I am not giving way. The noble Lord can speak after me and it is open to him to do so.

In this circumstance I cannot understand why it is in the public interest for noble Lords to proceed now to debate another string of no-deal Brexit regulations. Surely the right thing to do in the crisis situation in which we find ourselves, where the one certain fact is that we will not be proceeding with no deal, is not to proceed with these regulations, but to adjourn the House and for Her Majesty's Government to come back in good order on Monday with actual proposals for the change of the law that is required to change the exit date. They should also come back with an apology to Parliament and to the public for the billions of pounds of public money that has been wasted on no-deal preparations. This should all have been devoted to dealing with the issues of real concern to the public—the NHS, the education system, the state of our public services—and not this complete and shameful waste of money in preparations for a no-deal Brexit, which virtually no one in the country supports.

**Lord Taylor of Holbeach (Con):** My Lords, I shall ask the noble Lord to withdraw his Motion. We have seen the events of recent days in the House of Commons and it is likely that there will be further votes this evening and certainly during the course of next week. While the House of Commons continues its deliberations I think the best thing for this House to do is to continue with the thorough and measured scrutiny of the legislation before it. In fact, the House of Commons is continuing today with its scrutiny of the very same SIs that we are doing. These statutory instruments are not being forced through; they have been scrutinised by the JCSI—a Joint Committee of both Houses—and the SLSC and are being debated in the usual way. We have already discussed, in the Private Notice Question, the legal position on a default no deal. Until there is legal certainty in respect of the alternative course of action, the Government are behaving entirely responsibly by continuing to prepare for all eventualities.

Quite aside from that, the noble Lord has given no notice of his intention to adjourn the House today. Our procedures are open and they allow all noble Lords the flexibility to do all the sorts of things he is asking the House to do now, but that flexibility comes with attendant responsibility. It is the responsibility of us all. I hope the noble Lord will not seek to test the opinion of the House on his Motion to Adjourn. If he does, I trust that every responsible Member of this House will vote against it.

*Noon*

**Lord McAvoy (Lab):** My Lords, this may come as some surprise to my noble friend: I think the basis on which he is approaching this has some merit, but with the threat still there it is essential that we carry on until things become clearer. In that respect, we are looking for more consultation and response from the Government about the mechanics of how they will handle things; they will get support for process and procedure. We are looking for a better response than that given by the noble Lord, Lord Callanan, and for more co-operation and understanding of the situation. However, to return to the main issue, it is too early—with due respect to my noble friend—to come forward with such a Motion. It will not have our support, but we hope that the Government will listen and try to make amends for the shambles in the House of Commons.

**Lord Stoneham of Droxford (LD):** My Lords, I admire the energy and enthusiasm of the noble Lord, Lord Adonis. I had a phone call from him at about 10.55 am on this matter. He needs to know that we have already started to raise this issue in the usual channels; I did so last week with the Chief Whip. Obviously, we will come to a point when debating these SIs for no deal, if the Commons is determined that we will not have one, is pointless. Therefore, I hope there will come a point next week when the situation becomes clear, such that the Government will be able to respond on these matters. It is difficult at this notice to delay matters today, particularly as there is one SI which does not involve Brexit, but I reiterate the Labour Chief Whip's remarks: we expect a positive response from the Government next week clarifying the business. On that understanding, I would also argue that we should not have a vote now at this short notice. But these discussions will proceed next week; I anticipate there will also be other activity in the House to address this matter, and we should do that in due time.

**Lord Harris of Haringey (Lab):** My Lords, my noble friend Lord Adonis has put a Motion before the House. We have heard from three Chief Whips that it would not be a good idea for us to pass it. But the noble Lord made a very specific proposal: the Government, perhaps the Leader of the House or even the Chief Whip, should come to the House on Monday with a clear Statement about how this House will manage the business ahead of us in dealing with the decisions the House of Commons took yesterday and may take today. Can we have an assurance now that there will be a Statement to the House on how it will proceed to deal with these matters in the few days ahead of us?

**Lord Foulkes of Cumnock (Lab Co-op):** My Lords, I support my noble friend Lord Harris. As well as being unnecessary and redundant, considering these Motions has other deleterious effects. Next Wednesday a major debate on the Spring Statement, which normally takes place on the Floor of the House with many Members participating from all sides, has been relegated to Grand Committee in the Moses Room. That is one additional deleterious effect. I hope we will get an assurance now that there will be a Statement on Monday about how business will be dealt with properly in light of the events happening elsewhere.

**Baroness Altmann (Con):** My Lords, as the House knows, I am deeply disturbed by the prospect that we might have even considered leaving the EU without a deal, but I urge the noble Lord, Lord Adonis, to be somewhat patient. I have every sympathy with his sentiments, but I do not think that now is the appropriate time to test the opinion of the House on these matters.

**Lord Adonis:** Does the Government Chief Whip intend to respond to my noble friend Lord Harris?

**Lord Taylor of Holbeach:** A number of suggestions have been made. The truth is that during the course of today, both this afternoon and this evening, it is likely that a number of decisions will be made in the House of Commons. To a certain extent, our business is always guided by what is happening in the House of Commons. If it helps noble Lords, I will consider in particular the Moses Room being the venue for the debate on the Spring Statement. If noble Lords wish, I will discuss that in the usual channels. The usual channels in this House are active and consensual; we do not always agree with everything suggested, but we generally try to do things by collective agreement and I shall continue in that vein. In a way, I regret that the noble Lord, Lord Adonis, raised this without proper notice. It is a subject worthy of discussion, we have had a discussion about it, I have taken note of what has been said, and we will do our best to make sure that this House is a credit to the parliamentary process.

**Lord Adonis:** My Lords, I make no apology whatever for raising this matter in the way I have this morning, nor do I think I owe any apology. We are in a crisis situation. The House of Commons did not resolve clearly until 8 pm last night what its view was on no deal. Our job is to be responsive and to rise to the level of events, not to delay constantly. It is two weeks until the United Kingdom leaves the European Union, so for the Government Chief Whip not even to be in a position to undertake to come to the House on Monday to tell us what course of action the Government intend to pursue is very far below the level of his public duties. Patience is not at all an issue—the country is impatient, and rightly so, because it expects the Government to have a strategy for dealing with the crisis in which we find ourselves, according to which we will be out of the European Union in two weeks unless the Government take emergency action. As a very patient person, I would be perfectly content to wait until Monday for a way forward if the noble Lord would undertake even to make a Statement on Monday, but he has not yet done so. Is he prepared to do so?

**Lord Taylor of Holbeach:** I think I hinted that I would consider the business of the debate on the Spring Statement, and I am certainly prepared to do so. I cannot make a Statement as to what will be considered in this House until such time as I have had a chance to talk to the usual channels about that, and I will not be able to do that until Monday.

**Lord Adonis:** My Lords, I take that to be a substantial move towards the opinion of the House, which I welcome. I think the noble Lord understands that there will be a significant argument in the House on Monday if we meet and the Government are not in a position to tell us how they intend to handle business, including not proceeding with these ludicrous and deeply damaging no-deal regulations, which are inflicting huge cost on the public purse and huge inconvenience to the public.

**Lord Finkelstein (Con):** I know the noble Lord is a very intelligent person and a great viewer of political events and that, like me, he does not want a no-deal Brexit. I just wanted to check that he is 100% sure that there will not be a no-deal Brexit. Everything he has

said assumes that he is, but I do not think a single person in this House is 100% sure of that. I certainly am not.

**Lord Adonis:** My Lords, it depends on whether the Government listen to Parliament and act accordingly. As long as the Prime Minister picks and chooses which parliamentary resolutions she is prepared to respond to, of course that is the case.

**Lord Finkelstein:** The noble Lord knows that it does not depend on that but on lots of things, such as whether the House of Commons can agree a deal. I am a fan of Twitter as well; the noble Lord will know that the shadow Foreign Secretary has said that she does not approve of an extension beyond three months, and that the European Union may offer us a deal longer than that but she will not want to accept it. For all these reasons, it does not just depend on the things that the noble Lord talks about. As he addresses the House he also knows that, so I cannot see how he can say with great confidence that we should not go on with preparatory work. Of course we should.

**Lord Adonis:** My Lords, I have very great confidence that if we had a Prime Minister worthy of the title, this country would not be proceeding with a no-deal Brexit and the changes I refer to would have been introduced in Parliament. We are in this situation because of a chronic lack of national leadership. It is our job in Parliament do our best to substitute for that. We can use only the procedures available to us, but one of those is not to proceed with this deeply damaging no-deal Brexit planning.

On the basis that it appears that we will have at least some Statement from the Government on Monday, I beg leave to withdraw the Motion.

*Motion withdrawn.*

## State Aid (EU Exit) Regulations 2019

*Motion to Approve*

*12.10 pm*

*Moved by* ***Lord Henley***

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

*Relevant documents: 15th and 16th Reports from the Secondary Legislation Scrutiny Committee (Sub-Committee B)*

**The Parliamentary Under-Secretary of State, Department for Business, Energy and Industrial Strategy (Lord Henley) (Con):** My Lords, I beg to move that the draft State Aid (EU Exit) Regulations be approved. I will speak also to the draft European Structural and Investment Funds Common Provisions and Common Provision Rules etc. (Amendment) (EU Exit) Regulations 2019, which were laid before the House on 28 January.

The draft State Aid (EU Exit) Regulations transpose the existing EU state aid regime into UK domestic law by correcting deficiencies in retained EU law. In doing so, they transfer the state aid regulatory functions of the European Commission to the UK's Competition and Markets Authority. The regulations will ensure that state aid rules continue to operate in a domestic context and will come into force on exit day in the event of a no-deal exit.

State aid rules govern the way subsidies can be given, and exist to stop companies getting an unfair advantage over their competitors. The rules are not intended to prevent public authorities supporting industry, but rather to do so in a way that minimises distortions to competition. Where there are good justifications for state aid, the rules enable it to be given. The state aid rules are about supporting fair and open competition. Ultimately, they are good for taxpayers, consumers and businesses.

The existing principles for the regulation of state aid will remain substantively unchanged in the domestic regime, in accordance with the aims and powers under the withdrawal Act 2018. The provisions in the regulations will therefore have minimal impact on public authorities that grant state aid or entities that receive it.

The main practical change under the new regime is that the rules will be regulated by the CMA. To prepare for EU exit and its new state aid role, the CMA received £20 million for 2019-20. This is in addition to the £23.6 million it received for 2018-19. The Government are working to ensure that the CMA will be ready to take on this new role and have every confidence in its ability to do so.

The CMA will adopt the Commission's existing state aid guidelines, which provide clear parameters for how and when aid should be approved. It will also receive enforcement powers broadly equivalent to those of the Commission. I should, however, explain one point of divergence from the EU regime. Under EU rules, the European Council has the power in exceptional circumstances to intervene and approve aid before the Commission has reached a decision.

We do not consider it necessary or appropriate to use the regulations to vest the Government with similar powers. Ultimately, the Government could bring forward legislation to amend the state aid rules if deemed absolutely necessary. This option is not readily available to the European Council in the EU context.

**Lord Wigley (PC):** Will the Minister give way?

**Lord Henley:** I shall not give way at the moment. I will take advice from the noble Lord, Lord Adonis, who pointed out earlier that the noble Lord will have his moment to speak later. It would probably be helpful if I get through what I want to say and the noble Lord can speak later.

I mentioned earlier that state aid rules will ensure fair and open competition throughout the UK. Over the past year, the Government have engaged extensively with each of the devolved Administrations and shared drafts of the regulations. The Government have also offered to sign a memorandum of understanding about the operation of the state aid regime with the devolved Administrations, which we hope to agree. These discussions have indicated broad agreement on the substance of the Government's policy to establish

[Lord Henley]
a UK-wide state aid regime that mirrors the EU's. We will of course continue to work closely with the devolved Administrations on state aid policy.

In conclusion, as we leave the EU, these regulations will give certainty to public authorities and recipients of state aid, and help maintain confidence for businesses across the UK.

I turn now to the overview of the structural funds SI. In a no-deal scenario, this instrument will repeal the European regulations concerning the European structural funds, while ensuring that they can continue operating domestically. It will also repeal the regulations for the Cohesion Fund, for which the United Kingdom is not eligible. Structural funds include the European Regional Development Fund and its cross-border European Territorial Cooperation component, and the European Social Fund. Structural funds support regional investment across the UK and are funded via the EU budget, with match-funding from project participants. In a no-deal scenario, the United Kingdom is expected to lose access to European funding.

HM Government have guaranteed funding for structural funds projects signed before the UK leaves the EU. The guarantee also enables new projects to be signed after exit until 2020. This guarantee covers UK beneficiaries, all beneficiaries of the PEACE programme in Ireland and Northern Ireland, and Interreg VA in Ireland, Northern Ireland and Scotland.

This instrument facilitates the domestic delivery of structural funds in a no-deal situation. It repeals the European regulations for these funds, as they would become inoperable retained law. It also ensures that for European Regional Development Fund and European Social Fund projects started before exit, current fund delivery rules are upheld through existing funding arrangements—without keeping redundant EU regulations. The powers to continue paying beneficiaries for projects already exist under domestic law. This instrument does not make provisions for projects started after exit. New projects will none the less continue to be signed using existing domestic powers and delivery systems, with appropriate simplifications. Structural funds delivery will also remain a devolved matter.

The instrument also makes special provisions for European Territorial Cooperation programmes that fund collaborative projects. It includes a transitional provision that enables the guarantee to be paid out to bodies involved in a European Territorial Cooperation programme. The power to fund beneficiaries of cross-border programmes currently comes from European law, and therefore needs to be continued in domestic law through this instrument to protect beneficiaries in a no-deal situation. The EU has made special provisions to enable the United Kingdom to continue in PEACE and Interreg VA in a no-deal scenario if the United Kingdom continues to pay its share of the programmes. The transitional provisions in this instrument enable the United Kingdom to make such payments to the EU. This is consistent with the United Kingdom's commitments to PEACE and Interreg VA.

In this arrangement, the European regulations do not need to be retained. The United Kingdom will sign an agreement with the EU to ensure that programme beneficiaries continue to follow relevant rules. The EU regulation does not resolve the question of payment powers addressed by this instrument. That is why we need both the EU regulation and this instrument to safeguard these programmes. The transitional provision to pay the guarantee to European Territorial Cooperation beneficiaries also ensures that beneficiaries of cross-border programmes other than PEACE and Interreg VA can be paid through the guarantee. Without this instrument, delivery departments would lack the powers to pay out the guarantee to beneficiaries of European Territorial Cooperation programmes.

In conclusion, in a no-deal scenario, this instrument repeals redundant European law while ensuring that projects previously supported by the EU, including those supporting peace in Northern Ireland, are protected. I commend the regulations to the House and I beg to move.

*Amendment to the Motion*

*Moved by* ***Lord Stevenson of Balmacara***

At the end insert "but that this House regrets that the draft Regulations are not accompanied by a strategy or consultation on the use of state aid after the United Kingdom has left the European Union".

**Lord Stevenson of Balmacara (Lab):** My Lords, I am grateful to the Minister for his introduction. He has covered the ground very admirably. I have taken the step of putting down Motions to Regret for both the State Aid (EU Exit) Regulations 2019 and for the European Structural and Investment Funds Common Provisions and Common Provision Rules etc. (Amendment) (EU Exit) Regulations 2019 because I wish to do two things. I want to probe a little further on the detail in the regulations and I will share with the House that my focus will be primarily on the state aid regulations rather than the structural funds arrangements. I also wish to make points on the fact that little consultation and thought has been given to how these very important schemes will be continued in the long term.

In order to help the House, I shall spend a few moments on the second of the two sets of regulations covering structural funds. The main point to make is that the Government are taking the opportunity to continue the existing funds either by paying through to the EU to continue with the existing schemes or by taking on the burden themselves. The problem is that of course the first approach is obviously right, given that these are contracts which are in place, commitments have been made, there are funding streams which are currently in process with recipients who are in urgent need of these moneys. Given that, it is right that they should be continued. However, the problem is that, as and when the Government take over responsibility for these schemes and for the payment of them, that will come under the cosh of the general economic situation at the time and the question of future budgetary opportunities for changing them. To what extent can the Government guarantee that the funding will be maintained at least at current levels and that schemes

which need second and subsequent phases to complete will be considered fairly and on their merits as if the original arrangements were in place? I would be grateful for a response from the noble Lord on that point.

I turn to the state aid regulations. The issue here is the question of why it is that we are transferring across into UK legislation exactly the same procedures and processes that have existed up until now through the EU's policy of state aid. It is fair to say—the Minister should correct me if I am wrong on this—that, prior to joining the EU in 1973 and the passing of the EU Bill and Act in 1972, there was no concept of state aid as such in the UK. The arrangements under which moneys were used to fund regional activity, to promote research and development and to provide for cultural activities were paid out of general taxation funds gathered in by the Treasury and subject to annual approval by Parliament. In a sense, are the Government trying to operate in a rather odd way in this statutory instrument in relation to others that we have considered? The general premise is that the statute book should be complete at the time we leave on a no-deal basis, assuming that we do—although I hope very much that we will not. However, given that this was not a practice before 1972 and did not exist in any form in the years before that, why are we accepting lock, stock and barrel that which is currently happening in the EU?

In order to make the point, I want to spend a bit of time on state aid and how it currently operates. I acknowledge that much of the information that I am going to share with the House is contained in an excellent pamphlet, which I recommend, that was published by the Institute for Public Policy Research in January 2019 called *State Aid Rules and Brexit*. The first point to make is that state aid is a portmanteau term which does not have direct legal force. It has a definition that is broadly used in the Treaty on the Functioning of the European Union, which states that state aid is any resource made available by a state,

"which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods … in so far as it affects trade between Member States".

Two important points arise from that. It is for goods only, and it is between member states. These issues are therefore not entirely relevant to a transfer of that particular definition to the UK, where presumably we are talking about trade within the UK because we are not going to be offering state aid for trade outside the UK.

**Lord Flight (Con):** The EU has used state aid rules effectively in order to tell the British Government what to do with regard to their enterprise investment scheme; that is not goods, it is very much a financial service.

**Lord Stevenson of Balmacara:** I am grateful to the noble Lord for the intervention. I will come on to that; I was quoting a definition only to prove that it did not actually work. He has made my point for me—perhaps I will shorten that bit of my speech. I was going on to say that the rules do not work in practice, because they have been applied to a number of very different activities.

There is a definition—it is not very clear what it means in practice—and it applies to the particular issue of competition between states, and we will not have that situation. Within this, of course, there are a number of variations, one of which we have already touched on. It is generally recognised that state aid can do more than simply reduce distortions in competition. It can enhance public welfare, address inequalities, allow for investment in research and development for which there is no direct benefit to individual companies—which is probably therefore a public good—and address inequalities across various areas and regions. These do not fit very well into the definition, yet they happen and have continued to do so. Broadly speaking, the state aid rules are not really designed to prevent states aiding the enterprises that operate within those states; they aim for state aid to be targeted. Is that one of the issues that will be carried forward in these new regulations, should they be applied and there be no deal? If that is the case, we are talking about a slightly different way in which the Government will be operating to preserve some of the elements being transferred. I could list a number of issues under which state aid has been offered that would exemplify that.

If we are going to accept that state aid has in the past been used, under the general block exemption regime, for regional aid, to help SMEs, to support research and development, to support the environment and for cultural and other reasons, we have to accept that the issues are broadly interpreted. I am anxious to get on the record whether the Government see this historical use of state aid in a European context as the basis on which future state aid arrangements will be made in this country, whether done directly by the UK or by devolved Administrations.

If you look at European spending on state aid, the UK is significantly below the median level and well below the average. It was said in the IPPR document I talked about that,

"UK spending on state aid as a percentage of GDP in 2016 was 0.36 per cent, significantly lower than the EU average (0.69 per cent) and far lower than other western European countries such as Germany (1.31 per cent), France (0.65 per cent), and Denmark (1.63 per cent)".

State aid should presumably be appropriate to the need that has been defined, but if UK expenditure were on the same level that France spends we would be spending £6 billion more. If we were to raise it to the same level as Germany, we would be spending £19 billion more; if to the same level as Denmark, £25 billion more. These are huge sums of money, and we do not need to spend much time thinking about what would happen to that. Previously, that would have been money funded out of the European budget, in a sense, but obviously that can only come from taxation raised in member countries. If we are bringing this home and bringing back control, we will also have to think about where the resources for that would come. Is there any intention to set a budget figure for what state aid will be, going forward, if these regulations come through? Can the Minister speculate about where the indicative level of spending will be?

What happens after Brexit if we leave on a no-deal basis? Clearly, some of the issues here will work whether we leave with or without a deal. With a deal there will

[Lord Stevenson of Balmacara]
be implications, not just from the transition period but particularly—this is relevant to debates we had only yesterday—on the question of Northern Ireland. If we are working on a backstop arrangement, there are some specific rules, which I am sure the Minister will want to acknowledge, relating to how state aid rules will apply in Ireland, particularly with reference to differential practices across the border. Can the Minister give us some information about how that would happen? If there is no deal, we are back in WTO territory; those are the only rules that generally apply to the use of targeted financial subsidies. They are not as far-reaching or as enforceable as the EU rules, because the EU's state aid rules come with significant penalties for those who breach them. They will place limits on government, but they are not nearly as bad, so there would be no barrier in a no-deal, WTO environment for the Government to take forward a spending programme which would encourage more spending on state aid in a way which would be helpful to their overall arrangements.

*12.30 pm*

These issues lead us to a number of questions, some of which I have already asked. Can we narrow down the question of scope? At the moment, I understand the documents to say that the state aid regulations being brought forward are in connection with UK trade with other EU countries. If that is correct, will the Minister explain the reasons for that? Since we are leaving the EU, it does not seem to be appropriate for us to be bound by a rule that would have continued had we stayed in the EU. If there is no deal, there is no reason why that should happen. We would be treating with the EU as a different third country or set of countries. Will the Minister give us a bit more information on that?

The Minister said that consultation had taken place with the devolved Administrations, but in the discussion I have seen there is quite a lot of thought being given to whether Scotland, Wales and Northern Ireland will have their own state aid rules. Will the Minister explain whether that will be the case or they are to be done entirely from a UK Government point of view? The CMA will have responsibility for policing the state aid rules. In his introduction, the Minister mentioned the question of whether the equivalent powers will transfer from the EU to the UK. That might be worthy of further debate because in the EU situation—I make a very general point, but it is worth making—the power to prevent state aid includes the power to overturn legislation made by countries in the EU if it is felt by the EU that they would breach the state aid rules. I understand that the Government do not intend to provide the CMA with the same power and that it would simply have the power to point out that state aid rules had been breached. Is that the power that is being given to the CMA? Will the Minister explain why the power to overturn legislation has not been given to the CMA? Does that power also apply to any decisions taken by the Scottish Parliament, the Welsh Assembly or the Northern Ireland Assembly in relation to state aid? In other words, would the CMA be able to say to Scotland, Wales or Northern Ireland that a decision in their budget in their territory was not in line with state aid and had to be set aside?

Finally, who has the power to set the framework under which the state aid is to operate? I have already mentioned that variable limits exist across the EU at the moment. There is no absolute limit on what you can spend. There are general rules. These are all matters which should surely have political rather than administrative control. Where will that lie? As I understand it, Parliament will not have a role in this. This matter is being devolved solely to the Secretary of State, who can issue guidance on what is or is not state aid. That surely needs some further check. I beg to move.

**Baroness McIntosh of Pickering (Con):** My Lords, I welcome the opportunity to discuss these two statutory instruments and I welcome the opportunity of the amendments that have been tabled to press the Government. I shall take each in turn. I remind the House that as a very young person I spent six months working as a stagiaire in DG IV, as it then was—it is now DG COMP—of the European Commission, where we looked at measures to prevent the distortion of competition, such as state aid.

I shall press my noble friend on whether and at what stage the Government will come forward with their policy on state aid post Brexit. We do not yet know what our own destination will be. It is quite possible that we will end up remaining or applying to join the EEA and EFTA, which have a competition regime very similar to that of the European Union. If that were the case and we ended up with a sort of Norway-plus EEA/EFTA-style arrangement, would the House have to revisit the statutory instrument in that regard, and would other changes have to be made?

I cannot remember which Government were in power at the time but it is worthy of note that the United Kingdom was effectively the author of the original Articles 85, 86 and, I think, 92, which relate specifically to state aid. The noble Lord, Lord Stevenson, raised in particular the question of the Irish border. Obviously, that will have an impact, particularly in relation to the block exemption on agriculture but also to any subsidies for other products that may be deemed to be a distortion of trade. A no-deal Brexit is still a potential prospect, so what consideration has been given to the World Trade Organization rules that will apply to subsidies? If the answer is in this rather long SI, perhaps the Minister could refer us to it. That would be immensely helpful.

I now turn to the European structural and investment funds regulations. Yesterday we had a debate on the rural development agricultural fund and a short debate on the maritime and fisheries fund, and this debate on structural funds is not dissimilar. I do not know whether the investment funds cover Horizon 2020. Perhaps the Minister could confirm my understanding that it is the Government's desire to continue to participate in projects such as Horizon 2020. It would be immensely helpful to know that.

I should like to place on record—I know that the noble Baroness, Lady Crawley, will remember this only too well from her time in the European Parliament—

that we have benefited from a European Social Fund programme targeted at new opportunities for women returning to work, and there are other specific projects as well. This is something that for some reason the UK Conservative Government would never embrace: targeting and giving assistance, through funding, to workers in their 50s or older who perhaps need training before they feel confident enough to return to the employment market. I see the noble Baroness, Lady Quin, in her place. She too will remember that great training schemes were made available for youth employment, although obviously they were not that helpful. When one sees the level of youth unemployment in countries such as Spain, it is clear that these projects are never as well funded as they could be.

Therefore, can the Minister say what criteria will be used, what projects and beneficiaries might be identified, and what sums will be made available? My specific question relates to paragraph 7.5 of the Explanatory Memorandum to the structural funds regulations, which says:

"To this end, HM Government funding guarantee ensures that, in the event of a No Deal, HM Treasury will underwrite sums that would have otherwise been received from the European Commission".

I would like to pin the Minister down. Am I correct in understanding that we will have matched funding replaced by additional government funds, and am I right in assuming that HM Treasury's largesse will know no limits? That is a very big ask because, if we have been allocated £8.4 billion of funding under structural funds for 2014 to 2020, there will be a remaining period until the end of that time is reached. So I should like clarification that the matched funding will be made good by Her Majesty's Treasury for the projects that are outstanding for that period.

Finally, I will follow up on a point raised by my noble friend the Minister in his introduction, when he said that this was something to which we might return. The point was highlighted by the House of Lords Secondary Legislation Scrutiny Committee Sub-Committee B, in paragraph 42 of its report. The Government have decided not to replicate the current power granted by the European Council, which the Secretary of State could assume in the right circumstances. Will my noble friend set out the circumstances in which the Government might seek to appropriate those powers? Would it be a statutory instrument that he would intend to assume? Will he explain to the House and satisfy Sub-Committee B that there is sufficient flexibility in the statutory instrument to override any need for the Secretary of State to have the final say?

**Lord Fox (LD):** My Lords, in the event that the proposition put prior to this debate by the noble Lord, Lord Adonis, comes to pass, and this SI is not needed, my time will not have been wasted: a more cogent seminar on state aid I could not have asked for than the one I have just received from the noble Lord, Lord Stevenson. I am grateful to him for placing these amendments before your Lordships' House as this is an issue that requires greater clarity; I associate myself with the questions put by the noble Baroness, Lady McIntosh.

My remarks will be less structured than those of the noble Lord, Lord Stevenson. Regarding the question he posed of what qualifies as state aid, I put before your Lordships my experience of working in the United States and where, for example, a company might be looking to establish a new facility. When considering where that facility might be located, the company speaks to the administrations of various states—this is literally state aid. It asks about the tax structure it would receive in that state, the training regimes that universities might deliver, the buildings and planning regulations that might be needed. All these things qualify as aid which may be offered to companies to locate in a particular place.

The United States would talk about not being a country that distorts the market. Yet the local market is heavily distorted by literally billions of dollars that different US states put in to attract businesses to their location. How does this future regime of state aid fit into that pattern? We have unitary authorities. My noble friend Lord Purvis is going to ask about the role of devolved authorities, but we already have a degree of devolution to unitary authorities in England. They are required to deliver local or regional industrial strategies; LEPs are being granted money to deliver them. How does this fit into a structured state aid programme?

We talked recently about Nissan, which received a secret letter from the Government reassuring the company that it should keep one of its models in the north of England—a large sum of money was secretly committed by the Government in that letter. I contend that that was state aid; whether it would be recognised internationally as state aid is another matter. But we have a dichotomy: there is aid that the state—through a central, local or devolved budget—can give to companies or individuals to help them flourish or locate to particular areas, but it may or may not qualify in terms of whatever international agreements we are under. The noble Baroness, Lady McIntosh, is right to say that, whether we are operating under an EEA, WTO or any other regime, this will become an important distinction. What work are the Government doing on distinguishing between these various forms of state aid?

*12.45 pm*

The noble Baroness, Lady McIntosh, and the noble Lord, Lord Stevenson, also talked about the role of the CMA. There is scope for the Minister to flesh out that role. In particular, the Minister said that broadly equivalent powers were being granted to the CMA, with the one exception that he separated out. There is some disparity on the CMA's ability to claw back, or otherwise, aid given. I have been given to understand that the CMA has an advisory role in this, rather than an authority role. Can the Minister explain why the Government are seeking to diverge from reproducing the way this is done in the European Union in full?

The structural fund issue is tied in, so it is right that we debate these instruments together. It is good that those who have received funds can be assured that they will continue. It is very important that the mechanism for continuing the peace arrangements is contained in this. Everyone in this House would say that it is very

[Lord Fox]
important that we continue to support that process in every way. However, the fundamental point is that the cohesion fund worked in terms of relative poverty, or relative disparity. The reason that not much cohesion money came to this country is that, relative to other parts of Europe, particularly the east of Europe, this part is well off. However, there is huge relative disparity between regions in this country.

The Government need to recognise that while they are honouring their obligations from a European point of view, there is no indication that they realise that what the cohesion fund sought to do—to level the playing field across Europe—remains an issue because we have to level the playing field across the United Kingdom of Great Britain and Northern Ireland. The Minister needs to recognise that there is work to be done. As the noble Lord, Lord Stevenson, rightly says, those requirements will fight with all of Her Majesty's Government's other budgetary necessities. Therefore, there needs to be an element of prioritisation and ring-fencing; otherwise, the money will not be spent and we will see disparity grow in this country, rather than narrow. There is room for the Minister to explain this a little further.

**Lord Purvis of Tweed (LD):** My Lords, I am happy to follow my noble friend Lord Fox. I endorse the strong points he made towards the end of his speech, because I live in a very rural part of the Scottish Borders. On my journey to this House every week, I drive past a number of local infrastructure investments that have been made and areas where projects have been brought about by the partnership between the devolved Administration in Edinburgh and the support of the UK Government, but funded by EU structural funds. There is a whole suite of different funds, which the Scottish Borders local authority has been able to link with directly.

I can only emphasise the point made by my noble friend. The Scottish Borders can be excluded from certain types of funding from the normal budget-per-capita distribution of funds of the Scottish or UK Government. However, it has been able to use the fact that it has the second-lowest wage profile in the country to tap into cohesion funds, because these have been set at a European level on a certain set of parameters, which are not the same as the budgetary distribution formula from the Treasury used by the UK Government. This has meant that the Scottish Borders has benefited from projects from these direct funds and the way they have been established, using objective criteria that are not used in the normal way of distributing funds. Therefore, it would be most helpful if the Minister could provide a degree of clarity as to how the formula would be used for any successor support that would be provided. If it is different from what is currently used, there will need to be some urgent readjustment from the local authorities and the Scottish Government in how they will offer match funding.

Linked with that, in the multiannual financial framework 2014-20, including all European funds, Scotland received 14% of the UK funds with a population of just 8.3% of the UK. This is because of the particular circumstances of the Scottish industries and the Scottish economy. It would be a major disruption if that kind of financial balance had to be adjusted over a short period, especially in the context of a no-deal Brexit.

That leads to my next point. I have heard the Minister commit to offering security for funded projects to be supported for their lifetime. I stress, from my direct experience of having been elected in the Scottish Borders and working very closely with the then local enterprise company and the local authority, that the typical long-term basis of the six-year period of the multiannual financial framework has been pivotal, especially in the context that these funds have to secure match funding, which can be over two or three spending review periods of any Government, either a UK Government or a devolved Administration. That period has been critical when there have been other funds and they have had to secure other forms of match funding. If there will be simply a normal three-year spending review period replacing the longer-term multiannual financial framework, that will be very damaging to the ability to secure some of the projects associated with it.

That is also why it has been typical in my area of Scotland for projects often to run on from the funding period. That has been a beneficial approach by the European Commission, which instituted the principle of n+1, n+2 and n+3 so that projects that have been initiated and are operating can continue to receive funds after the formal closing of that funding period. The funding has been committed but there is no guillotine period at the end of the funding round. In certain areas that has been pivotal. An equivalent commitment would be helpful.

We now have reference to the areas linking in with the devolved Administrations, certainly for Scotland, and we have the UK fiscal framework, which has been negotiated between the UK Government and the Scottish Government and is the basis on which the non-own revenue funding that the Scottish Parliament is responsible for is distributed. Is it the Government's plan that there will be discrete funding components, as my noble friend asked for clarity on, or is it their intention that the funding will be operated through the UK fiscal framework? I can tell the Minister straightaway that if it is the latter I can see a situation where certain parts of Scotland will be harmed because they will not be able to tap into the targeted methodology of many of these project funds. Clarity on that would be very important.

Furthermore, it is also very important to know whether the Government intend to continue the principle that some funds can be bid into. Scotland has a better record of success in bidding into EU-wide funds that are open for bids because of its particular set of circumstances and its economy. In my experience, it has been a very positive element to ensure that all levels of government—local authorities, the Scottish Government and the UK Government—work together with local enterprise leaders to ensure that bids into EU projects have been the strongest they can possibly be. If that is weakened, the whole quality of economic development policy will be harmed. Do the Government intend that there will be some funds that can be bid into? That has been a positive element.

Finally, on the element of the structural funds in this support, is it the Government's intention in their negotiations that, if we are to leave the European Union, parts of the UK will be able to continue bidding into European-funded projects, as those in Norway can? I understand that the Minister may say that this will depend on a negotiation with the rest of the EU, but a signal that this is the Government's intention would be most helpful.

Turning to state aid, I am most grateful to the noble Lord, Lord Stevenson, for tabling his amendment to allow us to ask these questions. The points he raised are very important. He and I—and the noble Viscount, Lord Younger, who I see on the Government Front Bench—have debated at length the interaction with the devolved Administration on trade issues as a whole, but also on state aid as a component part of them. In leading up to this statutory instrument, the Minister said that the Government have been working closely on state aid issues. It would be helpful to know if the Government formally communicated the draft text to the Scottish Government before bringing forward this statutory instrument. The Minister will be aware of the operation of Section 2 of the Scotland Act 2016, which states:

"It is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament".

It is the view of the Scottish Government, endorsed by the Parliament, that state aid is an issue of competence, and that when areas of EU competence in state aid issues are brought back to the United Kingdom, they should fall fully within the legislative competence of the Scottish Parliament. It is an area of dispute between the UK Government and the Scottish Parliament. I am assuming—and hope the Minister can clarify—that this issue has now been resolved. It would be fairly regrettable if this statutory instrument was brought forward without any consultation with the Scottish Government, given that they believe that this will be fully within the legislative competence of that Parliament.

This leads directly on to the very good point made by the noble Lord, Lord Stevenson, and my noble friend Lord Fox: what will be the interaction with the CMA? Ordinarily, UK regulatory bodies operate within reserved areas, and the devolved Administrations know that if there is interaction between a devolved Administration and a UK regulator, whether it is Ofgem or Ofcom, the statutory underpinning is UK-reserved legislation.

This is an area where there is not agreement. The Scottish Government and Parliament believe that state aid issues are fully within the legislative competence of the Scottish Parliament. What will the interaction be of a UK regulator not operating under UK legislation when one part of the United Kingdom believes that this is fully within the scope of a devolved Administration? I can tell the Minister that conceptually it is not a new idea. When the Committee on Climate Change was established, the Scottish Parliament made a conscious decision that it would have an oversight role and a formal link to the devolved Administration. That was proactively asked for by the Scottish Parliament, and a mature relationship then developed. It would be very regrettable if this was the reverse—if the UK Government were insisting that a regulatory body had some form of oversight of devolved competences when they themselves will have no regulatory or formal relationship with that devolved Administration. I cannot see it working, but maybe the Government will be able to clarify.

I hope that the Government are able to provide a degree of clarity on the areas where I believe there is still dispute. It would be very regrettable if something so critical to many parts of the Scottish economy started with a major constitutional dispute about the competences and how it will be interactive.

**Lord Henley:** My Lords, I will start by dealing with one or two of the points made by the noble Lord, Lord Purvis of Tweed. He lives just north of the border and, as he is probably aware, I live north of Hadrian's Wall but just south of the border, so we both have an interest in that area. I presume he noticed the announcement, among many others, by my right honourable friend the Chancellor in his Statement yesterday about the £260 million available for the new borderlands deal. He is probably also aware of what my right honourable friend the Secretary of State for Scotland said about welcoming that deal. Irrespective of all other matters that we might discuss, this is a wonderful example of cross-border working which he and I, and no doubt others who have slightly less interest in the immediacy of the Anglo-Scottish border, would welcome.

*1 pm*

On the noble Lord's point about these matters and to what extent they are devolved, it is Her Majesty's Government's view that regulation of state aid is a matter that is reserved for them. I recognise that there is a difference of view. However, given that the UK Government are closely aligned with the devolved Administrations on the substance of policy and given the limited scope to depart from mirroring the EU regime by using powers in regulations, it is not necessary for us to resolve the matter at this stage, because at this stage we are just bringing in no-deal regulations to deal with these points. We will come on to others, such as the shared prosperity fund, later. I appreciate that all noble Lords who have spoken want me to say more about it. There is a certain amount I can say but I obviously cannot go quite as far as noble Lords would want on guarantees and so on.

**Lord Fox:** We would be satisfied with that kind of comment if we knew what vehicle the debate about these future issues will come in. Will it be in primary legislation brought to this House straight away? Would it be merely a series of Command Papers? If the Minister could explain the structure by which future negotiation or legislation will go ahead, we could perhaps be more satisfied by that.

**Lord Henley:** I will see how I get on in my response to the various remarks made by the noble Lord, Lord Fox, and others. I was going to start with state aid rather than on structural funds but we all know about the shared prosperity fund. I think it was back in July

[Lord Henley]
that my right honourable friend made a Written Ministerial Statement on that subject. The noble Lord will know, as that Statement made it clear, that it is designed to tackle inequalities between communities, especially in those parts of the country whose economies are furthest behind. It will achieve that by investing in the "foundations of productivity" and so on, as outlined in our industrial strategy, which is now—gosh, it is a year and a half old. But it will be an integrated, simplified fund, operating across the UK. I do not know at this stage whether it will need primary or secondary legislation, or whatever, and it would be wrong to speculate.

**Lord Purvis of Tweed:** Before the Minister moves on to the structural funds, I want to come back on the previous issue. I understand that there may well be a difference of opinion between the UK Government and the Scottish Government, in particular, on where the legislative competence on state aid issues arises. But it does not matter if there is a difference of opinion because we operate on a statutory basis. The Scotland Act 1998, as a constitutional Act, provides for the legislative competence of the Scottish Parliament to be total unless there are specific areas reserved in its Schedule 5. So it does not matter what the Government's opinion might be since unless that is reflected in Schedule 5 to that Scotland Act, as amended by the 2016 Act, the legislative competence falls within the Scottish Parliament.

Even if this statutory instrument were on an emergency basis—the basis of leaving the European Union—that statutory competence would therefore be the Scottish Parliament's, unless the Government bring forward an amendment to the Scotland Act to reserve it. It is important that this is now resolved in this statutory instrument, as in others, because unless the Government intend to amend Schedule 5 as per the Scotland Act 2016, the legislative competence for state aid will rest with the Scottish Parliament.

**Lord Henley:** My Lords, I do not accept the point that the noble Lord is making. I made it clear that we believe that state aid is a matter reserved for HMG. As I said, we recognise that there is a difference of view; that can be resolved in due course but I do not think it necessarily needs to be resolved in advance of this SI. He and I will obviously have to continue to disagree on that matter.

I was going to deal with these matters in the order that I originally set out, starting with questions relating to state aid and in particular to the amendment moved by the noble Lord, Lord Stevenson. What is important on this occasion is that we do not conflate the rules that govern the overall aid framework with the provision of aid itself. Decisions by public authorities on how and when to provide funding to business and industry after EU exit are quite separate from the decision in front of the House today, which is on whether to approve a state aid framework to ensure fair and open competition throughout the UK. By keeping the rules as close as possible to how they operate today, compared to what has been the case, will provide continuity and certainty in the immediate aftermath of the UK's departure from the EU. This will ensure that aid can be provided in a similar way to now.

Individual choices on how and when to give aid within that regulatory framework will obviously be for each public authority to make. That applies equally to successive Governments, the devolved Administrations and local authorities. As with the other public authorities granting that state aid, the Government will of course continue to consult individual spending authorities where it is appropriate to do so after the UK leaves the EU. But our strategy for supporting business and industry before and after EU exit is comprehensively set out in the industrial strategy, which we have debated on various occasions. As I said, it was launched almost a year and half ago and is already having an impact. That is how it should be set out.

As I made clear, and I repeat it, we have engaged constructively and intensively with each of the devolved Administrations on the state aid regime, including discussing the details of the proposed regulations and the accompanying set of commitments to underpin how the regime will operate. I think the noble Lord, Lord Fox, wanted more detail on this—perhaps it was the noble Lord, Lord Purvis—and we hope to conclude a memorandum of understanding in due course with the devolved Administrations. No doubt when we have concluded that, it can be published. Our discussions over the last year have shown a broad alignment on the substance of the policy to establish a UK-wide state aid regime that mirrors the EU's. We will continue to work with the devolved Administrations and, as agreed, each of them will be responsible for managing communication between their respective aid givers and the CMA. They will not need to go through my department, as is the case at the moment.

**Lord Fox:** I thank the noble Lord for beginning to flesh this out. Rather than continue the debate here, it would be helpful if the Minister could go back to his department and then write to us about the basis for the assertion by Her Majesty's Government that they have predominance on this issue over Scotland and the devolved authorities. On what basis in law do the Government assert that UK-wide role? Can he also flesh out the mechanics for the CMA operating in Scotland? Rather than detain the Minister at the Dispatch Box, a written response would be helpful.

**Lord Henley:** I am more than happy to offer a written response, but the Government have been clear throughout. My noble and learned friend Lord Keen set out our position in various debates on the withdrawal Bill and so on. I will dig that out and offer it to the noble Lord. Other Ministers, equally learned in the law, have also made similar points in another place. As I said to the noble Lord, Lord Purvis, this is a matter for the Government but we believe we should continue to consult the devolved Administrations.

The noble Lords, Lord Fox and Lord Stevenson, also wanted me to flesh out the role of the CMA and asked whether it would have the power to overturn legislation. I repeat that our intention is to make sure that the regime covers the same sectors, applies to the

same actors and does the same job as it does at the moment. It is worth noting that there are very limited circumstances in which aid is granted directly by Act of Parliament. To ensure that aid granted by any future Act of Parliament can be reviewed in a non-binding way by the CMA, which is the domestic regulator, Schedule 3 creates a process for it to consider aid that may be granted directly by an Act of Parliament. It provides for a Minister of the Crown to seek a non-binding advisory opinion on proposals for grant aid by an Act of Parliament. It also provides for interested parties to request the CMA to prepare a non-binding advisory opinion. I hope that explains the matter, but I will expand on it in any letter that I write to noble Lords in future.

The noble Lord, Lord Stevenson, also asked how we were intending to use this provision in future. I will expand on this a little more. The rules are not intended to prevent public authorities supporting industries or businesses, or even—dare I say it—nationalising assets. A rigorous state aid system is good for taxpayers and consumers and ensures an efficient allocation of resources. There is a large degree of flexibility in the rules to ensure that a wide range of interventions can still be deployed, but in a way that minimises distortions to competition. The future regime will still allow the Government to act swiftly if necessary, much as they have been able to under the existing one. EU state aid rules do not prevent, and have not prevented, the UK pursuing its active industrial strategy. In practice, the existing EU rules have always been sufficiently flexible to allow the UK to make innovative state aid interventions where necessary.

*1.15 pm*

The noble Lord, Lord Stevenson, also asked a purely factual question about how this would work with the backstop. In the unlikely event that we have not agreed a future economic partnership at the end of the implementation period, the Northern Ireland protocol, which provides for the single customs territory between the EU and the UK, would come into effect. Under Article 12 of that protocol, the full EU state aid acquis will apply dynamically for goods and the Commission will act as a regulator in Northern Ireland for measures in support of goods in so far as these affect trade between the EU and Northern Ireland. Under Article 7 of Annexe 4 of the protocol, the rest of the UK will take the state aid acquis for support of goods only in so far as it affects trade between Great Britain and the EU, and align dynamically. This will be regulated by the CMA.

The noble Lord also asked whether Parliament should have some sort of role in the guidance that the CMA would be given by my right honourable friend the Secretary of State. He will provide guidance on the approach to providing aid under Article 107(3), also known as the balancing test. That guidance will draw on the Commission's working paper, setting out how to balance the good effects of an aid measure against any potential distortions of competition. The department will publish that guidance shortly and certainly before exit day. This is appropriate because the guidance does not substantially alter the current state aid balancing test.

My noble friend Lady McIntosh was concerned about the WTO rules and whether, without a state aid regime, the UK would still be bound by the WTO's agreement on subsidies and countervailing measures. This does not regulate subsidies within countries and would not, therefore, prevent distortions of competition between the different parts of the UK. This regime also only applies to goods, not services, so does not provide cover for the whole economy. Without a state aid regime there is also no right of redress for individual companies and complaints cannot be brought against domestic aid which a company may feel unfairly benefits its competitors.

I do not want to go into detail on the question of the structural funds as, at the moment, we do not know what the new shared prosperity fund will look like. The statutory instrument in front of the House purely concerns no-deal planning for structural funds including, as I made clear in my opening remarks, its European territorial co-operation component. It enables those funds to continue to operate with no deal much as they would have done before exit. It does not make provision for the UK shared prosperity fund, which we will bring forward in future. There will be ample opportunities to discuss that.

Under the terms of our funding guarantee, structural funds projects signed before the UK exits the EU will continue to be funded even in the event of no deal. The guarantee also enables new projects to be signed after exit, until 2020, with funding from Her Majesty's Government. That practical measure ensures that beneficiaries can expect to receive the same amount of funding under the guarantee as they would have received if the UK had remained a member state. I believe that provides additional certainty to communities, businesses and local partners, guaranteeing investment in regional growth until the end of the current structural funds' programme period. As I said, we will have ample opportunity to debate the UK's shared prosperity fund, but now is not necessarily the right time or place to do that.

I intend to make two final points—

**Baroness McIntosh of Pickering:** Could my noble friend confirm the match-funding aspect of what would have been paid by Brussels, and that the UK Government will pay not just what they would have paid in match funding, but the whole amount the Commission would have paid—effectively both parts of the fund?

**Lord Henley:** The noble Baroness is too fast for me. I had two final points, one of which was to deal with concerns about match funding and whether that guarantee would underwrite it. The guarantee will underwrite the funding previously received by the EU. Match funding will continue to be provided by existing match-funding providers, such as the National Lottery.

My noble friend also asked about our future participation in Horizon. All I can say at the moment is that decisions on future such EU programmes will come as part of the spending review.

I appreciate I have not answered all the questions that have been put to me, but I believe I have answered most of those that are directly relevant to the statutory

[Lord Henley]
instruments before us. I appreciate that the noble Lord, Lord Fox, would like—and will receive—a letter. That letter will set out more about the possibilities for the future, and I will write to the noble Lord, Lord Purvis, in greater detail about our possible disagreement on where responsibility lies.

**Lord Fox:** The Minister may have answered this question, so I apologise if I missed it. In dealing with the shared prosperity fund and its disbursement, we come back to that paradigm of what happens in the United States, for example. Do the Minister and the Government foresee that the CMA will have a role in policing that process? If not, how do we prevent regions bidding up, which we have experienced in some RDAs? The Minister again said we will have ample opportunity to debate this in the future, but it is not clear to me through what vehicle this debate will continue.

**Lord Henley:** I am sure the noble Lord will find it easy to raise the subject, and will do so. Whether there will be the opportunity through primary, secondary or whatever legislation, I do not know. On his broader questions about the shared prosperity fund, he will have to wait for the guidance that the right honourable Secretary of State will provide. That might be his moment to consider such matters. With that, I beg to move.

**Lord Stevenson of Balmacara:** I notice the noble Lord did not ask me to withdraw my amendment. I am sure he therefore wants to accept it, but I am going to disappoint him because I will be withdrawing it anyway, so he does not need to panic too much.

Having said that, I am afraid we did not get answers to many of the deeper and far-reaching questions about state aid or the European structural and investment funds' continuation schemes. That is partly because the particular issue is the need to cope with a no-deal Brexit and, therefore, some of the bigger issues do not come into play. For the record, I do not feel that we have had a sensible answer to my question about why the Government are asserting that state aid rules are necessary to ensure that competition with the EU is not distorted. If we are leaving the EU under a no-deal situation, they will be a series of third countries and there is no logic in trying to make sure that our competitive approaches are maximised. There would be a good argument for saying that, if we have to leave the EU with no deal, and we are therefore just competing with them, we ought to use the maximum freedom available under the WTO to subsidise all our exporting companies as much as possible, for the benefits of UK plc. I am not supporting that; I am just saying that there is an alternative. The argument for why we need the proposed comprehensive set of rules needs to be explained better.

Secondly, we have not had an answer to why Parliament has not been brought into this process. Again, this is an issue of supreme importance to many people; the sums of money are enormous. The impact of the structural funds and European investment over the years has been fantastic; in times of austerity, they have saved many communities, economies and lives, and we should not forget that. Therefore, Parliament should have a role. We are not getting the right answers on how the devolved Administrations will operate in this new process and we are certainly not getting answers about how the CMA and its powers will operate.

However, these issues are for the future. I am sure that, once we read *Hansard*, a number of issues will be clearer. I will do that, and I also hope that a few letters will come from the mighty pen opposite, which will also help. If the Minister feels that a meeting to discuss some of these issues might help to clear the air, we would be willing to do that. With that, I beg leave to withdraw my amendment.

*Amendment to the Motion withdrawn.*

*Motion agreed.*

## European Structural and Investment Funds Common Provisions and Common Provision Rules etc. (Amendment) (EU Exit) Regulations 2019

*Motion to Approve*

*1.27 pm*

*Moved by* ***Lord Henley***

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

*Relevant documents: 16th Report from the Secondary Legislation Scrutiny Committee (Sub-Committee B)*

**The Parliamentary Under-Secretary of State, Department for Business, Energy and Industrial Strategy (Lord Henley) (Con):** My Lords, I beg to move, but I have already spoken to these regulations. I intervene only to apologise to the noble Lord for forgetting that we were speaking to his amendment and not to my Motion. I will not make such a procedural mistake again.

*Amendment to the Motion*

*Tabled by* ***Lord Stevenson of Balmacara***

At the end insert "but that this House regrets that Her Majesty's Government has still not published plans for future post-Brexit structural or regional support arrangements for the United Kingdom, or confirmed that financial support will be at least equivalent".

*Amendment to the Motion not moved.*

*Motion agreed.*

# Mobile Roaming (EU Exit) Regulations 2019

*Motion to Approve*

*1.28 pm*

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

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

*Relevant document: 17th Report from the Secondary Legislation Scrutiny Committee (Sub-Committee B)*

**The Parliamentary Under-Secretary of State, Department for Digital, Culture, Media and Sport (Lord Ashton of Hyde) (Con):** My Lords, I provided a brief outline of the Government's proposals in my answers to the Urgent Question in the House on 7 February. Since then, these regulations have been agreed in the other place. I am aware that the Secondary Legislation Scrutiny Committee reported on this instrument on 21 February. It raised the impacts of inadvertent roaming, the loss of surcharge-free roaming and one-sided regulation as areas of interest, all of which I will respond to in my speech. I am also aware that the noble Lord opposite intends to move an amendment to this instrument, and I will comment on that when I have heard his arguments and those of other noble Lords.

We have been clear about the proposed changes to the law on mobile roaming since first publishing a technical notice on 13 September last year. That notice, subsequently updated, provides clear information to consumers, businesses and mobile operators on what the UK's exit from the EU means for mobile roaming law. It also outlined what this instrument aims to do.

As I set out in this House on 7 February, within the constraints of leaving the EU, this instrument delivers the best possible outcome for all mobile users across the UK in the event of no deal. Mobile roaming is a service enabling customers to use their mobile devices to make calls, send texts and, increasingly, use data services outside the UK. Roaming offers are underpinned by commercial agreements between UK operators and operators in other countries, allowing British customers to use overseas networks at an agreed price. In the European Union and the EEA, the roaming regulation sets that agreed price. Only by limiting these wholesale rates can operators guarantee surcharge-free roaming to their customers. Obviously, the UK cannot impose limits on the wholesale rates charged by European operators once we leave the EU: only a central authority with power over all operators can do that. Despite that, the Government have examined all possible options to continue surcharge-free roaming in the event of leaving the EU without a deal.

We considered legislation to require that UK mobile operators continue to provide customers with surcharge-free roaming after exit, but if European mobile operators decide to start charging British mobile companies higher wholesale prices, which the UK has no authority to prevent, the costs of having to absorb the extra charges without harmonised wholesale charges may lead to roaming becoming unaffordable for many operators. This would lead to one of two outcomes. Either roaming services would be removed from some packages used by customers, or mobile services as a whole would become more expensive to compensate for the increased costs. In effect, consumers who do not travel would have to subsidise those who do. Neither of those outcomes is fair for consumers. We therefore concluded that it would not be feasible to guarantee surcharge-free roaming in the event of a no-deal exit from the EU.

However, leaving without a deal would not prevent UK mobile operators making and honouring commercial arrangements with mobile operators in the EU and beyond to deliver the services their customers expect, including roaming arrangements. The availability and pricing of mobile roaming in the EU in a no-deal exit would be a commercial question for the mobile operators. I am pleased to repeat that the main mobile operators—Three, EE, O2 and Vodafone, which cover more than 85% of mobile subscribers—have already said they have no current plans to change their approach to mobile roaming after the UK leaves the EU. The Government and, I am sure, the whole House welcome those statements. We want to reassure consumers further by giving them the best possible protection in the event of leaving the EU with no deal. We are doing that by retaining those protections not dependent on our membership of the single market.

We are protecting consumers by giving them control of their bills. The Government are legislating to make sure that the requirement on mobile operators to apply a financial limit on mobile data usage while abroad is retained in UK law. The limit would be set at £45 per monthly billing period, which is equivalent to the limit currently in place expressed in euros. After reaching this limit, customers are not able to consume more data unless they make an active choice to continue. This will apply worldwide, not just in the EU and the EEA.

We are also protecting consumers by letting them keep track of their data use. That is why this statutory instrument retains existing measures to ensure that customers receive alerts at 80% and 100% of data usage. Again, this will benefit customers travelling anywhere in the world.

Thirdly, we are protecting consumers in Northern Ireland. The EU roaming regulations require operators to take reasonable steps to protect customers from paying roaming charges for inadvertently accessed roaming services. This may include providing special tariffs, apps and easily accessible information so that customers can avoid incurring charges. We will be keeping obligations on mobile companies to help customers avoid paying charges for inadvertently accessed roaming services.

Retaining protection measures not linked to membership of the single market means clarity and certainty for consumers and businesses. These measures make sure that mobile users are able to manage their spending and data usage. They are working well for consumers at present, they can work well after the UK leaves the EU, and this instrument therefore retains these provisions. The retained provisions will also continue to be enforceable by the regulator, Ofcom, after we leave the EU. The Government are committed to ensuring that the law on mobile roaming will continue

[Lord Ashton of Hyde]
to function after we leave the EU. These regulations will help to do this and I commend them to the House. I beg to move.

*Amendment to the Motion*

*Moved by* ***Lord Stevenson of Balmacara***

At the end insert "but that this House regrets that the draft Regulations do not, contrary to the recommendation of several consumer bodies, make provision for the maintenance of surcharge-free roaming for customers in the United Kingdom".

**Lord Stevenson of Balmacara (Lab):** My Lords, I am very grateful to the Minister for introducing this SI and for his very clear explanation of the issues that were raised by the Secondary Legislation Scrutiny Committee, to which I may want to return. The department has had a good reputation in recent years for steering through some of the most complicated issues affecting modern society, concerning the internet, communications and related issues, with some skill. It is good that it is planning and thinking through some of the issues that have engaged this House, particularly in recent legislation concerning such issues as data protection and internet safety. We look forward to further work on that, with a White Paper coming soon. I never know what "soon" means, but the Minister is nodding so it will presumably be before Christmas.

**Lord Ashton of Hyde:** It is soon, verging on imminent.

**Lord Stevenson of Balmacara:** Variations on a theme are always interesting. However, I think that in recent weeks the department has not covered itself in glory. I thought that the decision on portability was wrong. Having seen the negotiations about that I know that there is considerable consumer interest in being able to take content that one has paid for on holiday and to use it in other territories. To find that being taken away after such a short period of time is going to be a disaster. I think that this issue about roaming is also going to be a problem for the Government when people realise what has happened and what decisions have been taken. I mention this because I want to go a little further into some of the background, although I know there has been some change and I hope that the Minister will flesh that out when he comes to respond.

We had a big discussion about roaming. I like this word "roaming". It brings visions of going with one's beloved at the end of the day with the sunset and enjoying whatever one does in those circumstances. Of course, it is not true when you cannot get the mobile signal that will allow you to communicate with your beloved these days. You cannot get it in London, let alone in the far reaches and romantic parts of the country. I do not know why I said that, but it gets us into a broader area of discussion and debate.

**Baroness McIntosh of Pickering (Con):** It is more worrying when the expression is, "roaming away from home".

**Lord Stevenson of Balmacara:** Indeed. The reason I touched on this is because of the irony around the issue of roaming, which we are going to centre this debate around. The EU regulation that brought this in is exactly as the noble Baroness said: the standard that the EU was trying to establish was that people travelling in Europe would have the same quality of service that they have at home. Indeed, the regulation was called the "roam like at home" regulation. Of course, we do not have roaming at home, in any sense of the phrase. The issue, therefore, is why? If you are in a not-spot you are not able to connect to get all the benefits of the internet and the mobile telephony that the Minister was talking about. Yet the Government have consistently set their mind against opening up the possibility of having some roaming charges in this country.

I know there is development on this, and I want the Minister to cover that, but I refer to the exchanges in the other place on the Urgent Question to which he referred, particularly that between Robert Halfon and Jeremy Wright, the Secretary of State. Robert Halfon asked why it was that,

"too many people do not get a mobile phone signal in our country? Indeed, we cannot even get one in many places in the House of Commons. Will he examine access to roaming charges, as his predecessor, the current Home Secretary, did, and allow people who cannot get a signal to roam on to other domestic networks?"

We spent a lot of time pursuing the Government on that in debate on the Digital Economy Act; although we did not get it through in the end, I still think it is an issue. However, the Secretary of State responded by saying the Government were committed to reaching,

"95% of the UK landmass with a mobile phone signal. I am determined to ensure that we meet that target, and to do so, we will rule nothing out that may achieve our objective".—[*Official Report*, Commons, 7/2/19; col. 416.]

I also note that the department put out a Statement on the same day suggesting that it is going to consider the question of roaming at home more favourably. In other words, there is a proposal in the SSP for Ofcom that consideration should be given to the possibility of making sure that access to mobile telephony is increased, possibly by looking at this question of roaming at home. Can the Minister confirm whether this is now on the table again? Could he sketch out for us the actual issue that will be assessed under the SSP, and what the timescale will be? That would help us considerably on this issue.

There is no doubt at all in my mind—and it comes up every time we talk about mobile telephony in this House—that the current situation is not working. It is predicated on a competition between those who have licences to cover the country to the maximum effect, but it is clearly not working. It does not work locally; it does not work in far reaches; it certainly will not do the job it needs to do to tie up the wi-fi high-speed rollout, which will also require mobile telephony to get to the final few per cent of our population. We have a real problem facing us; if we cannot get the investment and we cannot get the technology to work, then we will need something better than what we currently have. I hope the Minister will be able to confirm that that is now firmly on the table.

If that is the case, then I return to the narrow question about why the SI is detailed in this way. I have two particular questions. The Minister touched upon the first but did not cover it in any detail—again,

I hope there is more to come in his response. In Northern Ireland, there is obviously an issue about picking up signal from the other side of the border. In a single-country landmass, where there are no official borders or changes, one would think that this description of different approaches to the way in which people can receive signal would be entertained. What is meant by the Minister's decision that measures will be taken to ensure that existing legislation preventing inadvertent roaming is going to be brought into effect in Northern Ireland? My understanding is that there is actually a benefit to those who live in Northern Ireland; they are getting access to better signal from south of the border, and they should not be penalised by inadvertent regulation—rather than inadvertent roaming—which will prevent them getting the service benefiting them and their businesses.

I have a similar problem in relation to Scotland. When I was on top of the mountain Sgorr Ruadh only six months ago, I discovered to my considerable interest that when you point your mobile phone in a certain direction, you actually start picking up signal from Iceland—it is really quite close, and I think the wind was in the right direction. If that is the case, why are we blocking this in Scotland in respect of other countries which have services that, for whatever reason, reach our far shores? Are the Government seriously saying that that will be made illegal, or is it again something that will be dealt with in a more appropriate arrangement?

The central point here is that the Government have made all the right noises about what they want to do in terms of telephony, wi-fi and investment in broadband. They have been overtaken to some extent by the technologies moving forward faster than some of the legislative processes; until now, the department has always been quite good at spotting this, and I hope it will continue. It would be great if the Minister could respond to some of the future issues that have been raised in this debate and try to give us some confidence that the Government are ahead of the game and that future statements will be made to give us confidence that they are addressing our concerns.

*1.45 pm*

**Lord Foster of Bath (LD):** My Lords, we use strange language in your Lordships' House: we do not say "no", we say "not content"; we "adjourn at leisure" and we have "Motions of regret". On this occasion regret is the appropriate term because I suspect that if this statutory instrument is introduced, large numbers of UK citizens who wish to travel in EU 27 countries will very much regret the loss of the benefits from the EU's roaming regulation 531/2012 and the subsequent amendments.

No longer when we go to those 27 countries will we be able to "roam like at home" with guaranteed surcharge-free roaming. No longer, as we heard from the Minister, will UK mobile operators be protected by the regulations on what the mobile operators in the EU 27 countries—and the EEA countries of Iceland, Liechtenstein and Norway—can charge our operators for providing roaming services. There will be, as one website put it, a "wild west" where roaming charges are determined by commercial reasons and the relationships that exist between providers, which may lead to various preferential rates.

I therefore regret that we will return to a myriad of prices depending on which country we choose to visit, which supplier we use and which tariff or bundle we have. That said, I put on record that I welcome the decision by the Government, covered in this SI, to replicate the €50 financial limit. I note that the Government have translated that to £45, which is actually a worse pound-to-euro exchange rate than currently exists—the implication is that if we have a no-deal Brexit the situation will get worse, which I am pretty confident it will.

**Lord Ashton of Hyde:** The noble Lord will find that the pound will fall, which of course benefits foreign tourism.

**Lord Foster of Bath:** I do not for a minute deny that there are some benefits, but overall it is certainly not good news. I was praising the Government; let me continue, because I also welcome that within this SI mobile operators will be required to give the alert to users when 80% and then 100% of their data allocation has been used.

There are some pretty obvious questions for the Minister. As he knows only too well, having referred to it himself, the Secondary Legislation Scrutiny Committee has posed a number of questions. There is one in particular about which it would be helpful to hear what the Minister has to say:

> "The House may wish to invite the Minister to explain why the possible effects of removing the EU guarantee of surcharge-free roaming were not evaluated, and press for further information on the likely impact on individual and business users".

I hereby ask him, and hope that he will respond. I would also like to know what efforts the Government have made to broker some kind of deal between the UK mobile phone operators and the relatively small number of operators in the EU 27 countries. It would surely be disappointing if we were to hear that absolutely no efforts had been made.

I know that the Minister wearies whenever I raise BEREC—the Body of European Regulators for Electronic Communications—in your Lordships' House. Indeed, he is already yawning. He knows that this body, on which Ofcom—our own regulator—sits, played an absolutely vital role in bringing forward these welcome EU mobile roaming regulations. Even if we leave the EU and Ofcom is no longer a voting member, I am sure the Minister will accept that BEREC will be absolutely fundamental in determining any future changes to mobile roaming regulations, and that those changes will have a significant impact on us and on people in this country who wish to travel to the EU 27 countries.

Clearly, we should therefore be seeking to ensure the best possible relationship between Ofcom and BEREC in the future. As the Minister knows, that is the Government's position. Indeed, on 7 January in the other place the Digital Minister said that,

> "the Government recognise that Ofcom would benefit from the continued exchange of best practice with other regulators, and from the exchange of information about telecoms matters more generally".—[*Official Report*, Commons, First Designated Legislation Committee, 7/1/19; col. 6.]

[Lord Foster of Bath]

In the light of that, what steps have the Government taken in conjunction with Ofcom since I last raised this issue with the Minister to seek to sort out what the relationship is going to be following Brexit? I hope we will not get the answer that nothing has been done.

The Minister referred to the technical note that was issued on 13 September last year and which was updated subsequently, in which it says, interestingly and perhaps rather overoptimistically:

"In the likely event of a deal, surcharge-free roaming would continue to be guaranteed during the Implementation Period".

However, it goes on to say—the Minister has referred to this already—that in the event of no deal:

"Some mobile operators (3, EE, O2 and Vodafone—which cover over 85% of mobile subscribers) have already said they have no current plans to change their approach to mobile roaming after the UK leaves the EU".

Can the Minister explain exactly what "approach" means in this context?

I note a number of recent advertisements. For example, Three put out an advertisement on Tuesday saying:

"Remain roaming even if the law changes. We'll let you Go Roam at no extra cost in Europe, just the same".

Does that mean that Three has already done a contractual deal with the EU 27 mobile operators and knows what prices it will be charged? If Three can do it, why have the Government not worked with all the other operators to secure certainty for them? Can the Minister explain what EE meant when it told the BBC only a few days ago:

"We are working closely with government on this"?

Can he inform us what work is being done by the Government with EE and what benefit that will bring to British customers?

We note another issue raised by the Secondary Legislation Scrutiny Committee. It drew our attention to the Explanatory Memorandum, which says:

"Mobile operators noted that absent a cap on the charges EU operators can apply to UK operators (as currently regulated by the EU), any increases in costs would likely be passed on to customers".

It goes on to point out that the effects of all these changes could mean that,

"roaming services could be removed altogether from some customers".

Can the Minister tell us what estimate the Government have made of that possibility that roaming might disappear altogether? It is certainly not covered in the impact assessment.

The technical note to which I have referred also advises UK citizens visiting EU 27 countries post Brexit to,

"be aware that Ofcom rules allow cancellation of your contract free-of-charge if your operator makes certain price increases".

I gave the Minister advance notice that I would raise this matter, so I hope that he will be able to help us by saying what "certain price increases" enable us to cancel contracts and switch to another provider free of charge. The technical note cross-references Ofcom's *Guidance under General Condition C1—contract requirements*. I confess that I simply could not understand a word of that document and what it means, so I went to other sources, and in particular to the Which? website, which was infinitely more helpful. That says:

"Rules set by the regulator Ofcom mean that customers can leave mobile, landline or broadband contracts penalty-free if a provider ups prices mid-contract if the rise is of 'material detriment', for example a rise that's bigger than the RPI rate".

Is Which? correct in defining material detriment as a rise bigger than the RPI rate? More importantly, I—and I am sure the House—would like to know whether that applies to a rise in mobile roaming rates while abroad. After all, that is a bolt-on to the contract that we all have with our providers, not the main contract. So the question is: if the main contract conditions for calls, texts and the use of mobile data remain the same but there is a significant increase in the cost of mobile roaming when in the EU, does the material detriment rule apply in those circumstances so we can switch contract and get a better deal with another supplier?

I look forward to the Minister's response. While I was looking at the Which? website for help with some of these definitions, I noticed the words of Alex Neill of Which?, who said:

"Two-thirds of people think free roaming is important when travelling in Europe, so any return to sky-high charges for using mobile phones abroad would be a bitter blow for millions of consumers".

That is why we should regret this SI if it ever has to come into force.

**Lord Ashton of Hyde:** My Lords, I am slightly surprised that I am on my feet already. I thank noble Lords for their contributions. I will try to ask their specific questions before coming on to the point in the amendment to the Motion.

The noble Lord, Lord Foster, made a general point about "regret" being the correct word in these circumstances. Of course it is obvious that "roam like at home" in the EU 27, which has been with us for 18 months, is a good thing for consumers, and I think that many of us who have been abroad in the EU 27 or possibly even the EEA countries have benefited from that. In fact, we have had that not just in the last 18 months; wholesale charges have been capped to some extent for nearly 10 years. Therefore, I agree that there are detriments. However, it is true that consumers are used to dealing with the absence of "roam like at home" in every other country in the world, and there are now many ways by which one can alleviate that, such as the increased use of wi-fi and apps that allow you to communicate over the internet—and of course the ultimate sanction is to switch roaming off. However, I accept that it is a useful thing.

The noble Lord, Lord Stevenson, in speaking to his amendment to the Motion went a bit wide of the issue, as is his wont, but it was interesting nevertheless. He talked about roaming in the UK, which is a domestic issue, not the question of roaming when abroad. It is true that in previous debates—I remember debates with both noble Lords on the subject of domestic roaming—we have said that we were not in favour of it because it prevented investment and stopped competition, and it is true that in most countries roaming at home is not an accepted practice. However, we want to have high-quality mobile connectivity where people live,

work and travel in this country, we have committed to extending geographic mobile coverage to 95% of the UK by 2022, and we are looking at ways to achieve that target.

Particularly in rural areas, it is possible to allow customers to be switched on to a network service if their provider has none. I can confirm to the noble Lord that the new statement of strategic priorities for Ofcom, which is our suggestions for what it should consider, has recommended that it further examine the costs and benefits of domestic roaming and to retain the option of requiring operators to introduce rural roaming.

*2 pm*

The noble Lord also mentioned that the mobile signal in the UK is patchy and bad and asked what we are doing about it. Obviously, we want to extend mobile coverage and make it better, regardless of operators' international roaming plans. Ofcom has a forthcoming 700 megahertz and 3.6 to 3.8 gigahertz spectrum auction. Those airwaves provide mobile signal and data and include coverage obligations that will further improve coverage in rural areas across the UK. As I said, the SSP for Ofcom asks it to explore not just UK roaming but other options to improve mobile coverage and the choice of operators, so it is on the agenda.

As for Northern Ireland and inadvertent roaming, this issue of course applies in other areas within the EU with third countries on the border, such as Switzerland. We understand that it is of special relevance to Northern Ireland, notwithstanding the noble Lord's experience in the middle of Scotland. We are requiring operators to take reasonable steps when a phone is used in the border region of Northern Ireland and may pick up a mobile signal from another network. That means, for example, providing special tariffs which might allow them to use Irish mobile operators. We expect them to communicate alternatives, such as smartphone apps, and provide information to their customers.

We do not anticipate inadvertent roaming to be a problem in the event of EU exit, because we do not foresee that UK operators will charge those domestic customers who inadvertently roam in Ireland. In our discussion with operators, they made it clear that there are no current plans to do so. We do not expect that situation to change.

The noble Lord, Lord Foster, talked about the impact assessment and the cost on business. The reason that the impact assessment has not laid out a cost to business is that it highlighted the difference between this SI and doing nothing. We have not assessed the impact of removing the requirement for guaranteed surcharge-free roaming. That is because that impact would not be a result of the statutory instrument. The proof of the pudding is that the big four operators have no plans to implement roaming charges, even if the SI is passed and comes into force.

**Lord Foster of Bath:** On that point, the Minister said that the operators have no plans to introduce charges. In fact, the government document I referred to said that they had no plans to change their approach. Can he guarantee that he has confirmation from the big four that they have no plans to introduce mobile roaming charges following a no-deal Brexit?

**Lord Ashton of Hyde:** We have had discussions with operators, and it is correct that they have said that they have no plans to do that after Brexit. They have not said that if they are charged increased charges by foreign operators, they will absorb all the costs ad infinitum, for the rest of time, irrespective of what they are. That is not an unreasonable position. The point is that since roaming as if at home has been introduced, consumer requirements have changed, what consumers want has changed, the methods and technology has changed and consumer data usage has changed. For example, I think there is four times as much data being consumed as phone calls. It is very difficult to compare the situation 10 years ago, before any caps came in, to what will happen now.

However, in this country, there is competition between operators, which does not exist in all European countries, so the competitive element is very much at the forefront of consumers' minds, but we are not requiring operators to accept a differential status, a one-sided regulation. I shall come to that later. When the Regulatory Policy Committee considered the impact assessment, it said that it was satisfied that any impact on price changes will not be a direct result of this SI.

The noble Lord, Lord Foster, asked who we have consulted. We have consulted the big four operators O2, Vodafone, EE and Three, the mobile virtual network operators Sky, Virgin Media and Lebara, trade bodies Mobile UK, the Broadband Stakeholder Group and many consumer groups. He also asked what were the views of the mobile network operators. They expressed similar concerns about this scenario. Of course they were concerned about not being party to the EU roaming regulation, but that is a function of leaving the single market. They did not believe that the regulation mandating surcharge-free roaming could and should endure, for the reasons I mentioned, but I confirm that they said that, because of customer demand, they have no current plans to reintroduce roaming surcharges. That is not an unlimited guarantee forever, as I think I said.

As for BEREC, I agree entirely with both my honourable friend in the other place and the noble Lord, Lord Foster, that our relationship with the European regulator has been beneficial not only to us but to BEREC. We are one of the leading regulators in the EU. Of course, if there is an agreement and an implementation period, the Government will seek arrangements with the EU or BEREC and, if there is no deal, it will be desirable for the Government to seek participation in BEREC. We have agreed in government—not just in DCMS but more widely—that that is beneficial. We will therefore continue making overtures to BEREC to try to have an arrangement that will involve not full membership but, if you like, associate membership where we can contribute our views.

I turn to the amendment to the Motion, which implies that we should not have done what we said we would and capped roaming charges. I explained in my

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opening speech why the UK cannot retain surcharge-free roaming in law in the event of no deal. The instrument recognises this by correcting deficiencies in retained EU law and removing rules on wholesale and retail charges that are simply unworkable if we leave the EU without a deal.

The noble Lord, Lord Stevenson, prayed in aid the recommendations made by consumer bodies. As I said, we have had a number of conversations with them and provided detail of those interactions to the Secondary Legislation Scrutiny Committee in advance of its report. I mentioned that it noted the benefits of surcharge-free roaming, but the fact is that when the UK is outside the single market, we will not be able to control the charges levied on UK mobile operators by their European counterparts, because this Parliament has no authority over them. The consumer organisations recognise that. For example, Which? stated on its website on 7 February 2019:

"In order to keep 'roam like at home' going, it is likely a similar mutual cap"—

by which it means on wholesale prices—

"would have to be agreed for it to be cost effective for mobile operators".

Let us be clear on the implications of the noble Lord's amendment to make provisions to retain surcharge-free roaming. The policy would explicitly put British companies at a disadvantage, compared with foreign competitors, by capping their retail charges but allowing EU operators the freedom to charge them whatever wholesale rate they like. It would put roaming at risk for some operators, thus removing competition. It could therefore force British network operators to increase their overall prices to recoup the foreign charges, so the policy could increase consumers' costs.

However, it is worse than that. It would mean that people who choose to remain in this country are subsidising those travelling to Europe. The policy would increase the risk of legal uncertainty. Lastly, it would penalise heavily smaller mobile virtual network operators, because they use the physical networks of the main operators and therefore must accept the increased costs without a corresponding network usage to offer EU operators in return. To sum up, the policy could increase costs, have a negative impact on consumers and increase the legal risks around future roaming policy.

Which? suggests that the UK should seek to include mobile roaming in a deal with the EU and in trade deals with other countries. As government Ministers first set out in Answers to Written Questions last June, mobile roaming could form part of any trade negotiation we have with other countries after we leave the European Union, and the Government are exploring all options. Any arrangements on mobile roaming would be subject to negotiations. In the meantime, as I said before, there is no reason to prevent commercial negotiations between UK and EU operators.

For reasons noble Lords will understand, it is too early to detail exactly the future arrangement with our European partners. In the event of a no-deal exit, the amendments in the SI are essential. They will ensure legal clarity for consumers and businesses, retain all operable parts of current roaming law and protect consumers in the event of a no-deal exit. Meanwhile, I repeat that the largest four operators have no current plans to reintroduce charges, so on exit day and thereafter there will be no change.

I hope therefore that we can all agree that it is in the clear interests of British consumers and businesses that this SI is in place in the event of a no-deal outcome. In the light of my remarks, I hope that the noble Lord will feel able to withdraw his amendment and I hope that these regulations will be approved.

**Lord Stevenson of Balmacara:** I am grateful to the Minister for a full and wide-ranging debate. I am also grateful to the noble Lord, Lord Foster, for adding to my comments on the amendment so that we could debate and discuss it.

I am left with two thoughts. First, this Government have not been slow to interfere in a market where they felt that the competitive environment was not as perfect as it could be; I am thinking of the price cap brought in for domestic energy, which was accompanied by a commitment to look more widely at how prices are set in the market. That is not terribly different from mobile operators relying, as they do, on those who generate and those who sell. The two sides of the energy equation have analogues in what we are talking about here in mobile telephony. I take the general point that, after consideration, the Government decided that this was probably not the best decision to take, but I wonder exactly how they have balanced the interests of operators—both small and large—against those of consumers. I wonder whether we have missed an issue there. The consumer groups the Minister mentioned were unanimous in their view that there was a case for a better regulatory approach. At this stage, the arguments are pretty finely balanced.

Secondly, although I was glad to hear about the measure to look at both home roaming and the wider context, including 5G and all the other issues that must be addressed, Ofcom's capacity will be squeezed. The Minister did not provide a timescale for the consideration or when the results would come back to this House, but we can look at that outside this session. I hope that there will be time for that. I want it recorded that I am glad that, at last, there is a solution to some of the not-spots and our difficulties with our mobile telephony. We will support the Government seriously pushing Ofcom to come up with a proper plan for this going forward. With those thoughts, I beg leave to withdraw the amendment.

*Amendment to the Motion withdrawn.*

*Motion agreed.*

## Food and Feed (Chernobyl and Fukushima Restrictions) (Amendment) (EU Exit) Regulations 2019

*Motion to Approve*

*2.15 pm*

*Moved by* ***Baroness Manzoor***

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

**Baroness Manzoor (Con):** My Lords, I will speak also to the second Motion in my name. Consumers in the UK benefit from a high standard of food and feed safety and quality. The Government are committed to ensuring that this high standard is maintained when the UK leaves the European Union. The instruments are crucial to meeting our objective of continuing to protect public health from risks that may arise in connection with the consumption of food.

The instruments, which concern food and feed law, are made under the powers in the European Union (Withdrawal) Act 2018 to make necessary amendments to UK regulations. The Government's priority is to ensure that the high standard of food and feed safety and consumer protection we enjoy in this country is maintained when the UK leaves the European Union. The instruments will correct deficiencies in regulations to ensure that the UK is prepared in the event that the UK leaves the EU without a deal. They are limited and technical amendments to ensure that the legislation is operative on EU exit day.

No policy changes are made through these instruments and we have no intention of making any at this point. Leaving the EU with a deal remains the Government's top priority. That is what the public want, so we are working hard to get the reassurances that Parliament needs on the backstop. At the same time, as a responsible Government, we have been preparing for all possible scenarios, including the potential outcome of leaving the EU without a deal. We are committed to ensuring that our legislation and policies function effectively in the event of no deal, ensuring that public health continues to be protected. It is for this scenario that the instruments have been laid.

The primary purpose of the Food and Feed (Chernobyl and Fukushima Restrictions) (Amendment) (EU Exit) Regulations 2019 is to ensure that legislation covering the importation of food from areas affected by historic nuclear accidents, at Chernobyl in present-day Ukraine and Fukushima in Japan, is retained. This instrument makes alterations to the legislation governing imports of food affected by the Chernobyl nuclear accident in 1986. The Chernobyl accident resulted in widespread radioactive contamination that affected food production in many countries. Thirty-three years after the accident, levels have fallen. Now only certain products—such as wild game, wild mushrooms and berries such as blueberries and cranberries—show higher levels of contamination.

The instrument also makes alterations to similar legislation—Regulation 2016/6—that imposes special conditions on the importing of food from Japan from areas affected by the Fukushima nuclear accident in 2011. In this case, eight years after the accident, higher levels of radioactive contamination are limited to certain areas of Japan and include wild mushrooms and other wild vegetables. Wild game may also show higher levels of contamination, but these products are not eligible for import into the UK.

As these regulations relate to specific contamination incidents where radioactivity naturally decays, as well as natural and human activities that remove contamination from the environment, it is right that it is regularly reviewed to ensure that the controls are fit for purpose. Therefore, the legislation relating to the Chernobyl accident has an expiry date of 31 March 2020, while the legislation relating to the Fukushima nuclear accident must be reviewed before 30 June 2019. We will bring over these review dates into the UK legislation.

The Food and Feed (Maximum Permitted Levels of Radioactive Contamination) (Amendment) (EU Exit) Regulations 2019 will ensure that Council Regulation (Euratom) 2016/52, covering the application of maximum permitted levels of radioactivity in food and feed following a nuclear emergency, continues to function effectively after exit day.

The EU law established maximum permitted levels of radioactive contamination in food and feed, which would come into effect following a nuclear accident or any other case of radiological emergency. This regulation acts as a framework that can be enacted to promptly apply emergency levels of radioactive contamination in food and feed to protect consumers. If exceeded, these levels would have a detrimental effect on human health from the consumption of food that has been contaminated by radioactivity and would assist the response to a radiological incident.

Currently, the Commission holds a range of powers under European legislation which can enable it to respond in the event of a nuclear accident or other radiological emergency. These powers allow the Commission to put in place measures in the form of emergency implementing regulations that will apply the maximum permitted levels set out in Regulation 2016/52 and so prevent potentially contaminated food being placed on the market. Any measures put in place by this instrument must be as short as possible and in the first instance must not exceed three months. When preparing or reviewing these measures, Ministers must take into account the basic standards of radiological protection, including the justification and optimisation principles. There are no changes to policy in these instruments, beyond making the minimal changes necessary to rectify deficiencies in the retained EU legislation. For food businesses, there will be no changes in how they are regulated and how they are run. Consumers in the UK will benefit from a high standard of food and feed safety and quality. The Government are committed to ensuring that these standards are maintained.

The instruments will transfer responsibilities incumbent on the European Commission to Ministers in England, Wales, Scotland and the devolved authority in Northern Ireland. In addition, the instruments will change references to importing into the EU to references to importing into the United Kingdom. Let me be clear that these instruments do not introduce any changes for food businesses in how they are regulated and how they are run, and nor do they introduce extra burdens. They provide continuity for businesses and protection for consumers' interests, and ensure that enforcement of the regulations can continue in the same way.

The changes will ensure a robust system of controls that will underpin the ability of UK businesses to trade both domestically and internationally. It should be noted, however, that these regulations apply only after a nuclear accident or other radiological emergency and are not intended for routine activities that are governed by other regimes such as the Ionising Radiation

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Regulations 2017 and the Environmental Permitting (England and Wales) Regulations 2016. It is also important to note that the devolved Administrations have given their consent to these instruments. Furthermore, we have engaged positively with them throughout their development. This ongoing engagement has been warmly welcomed.

To conclude, these instruments constitute necessary measures to ensure that our legislation relating to food and feed safety and radiological protection continues to work effectively after exit day. The amendments proposed in the instruments ensure the continuation of effective food and feed safety and public health controls. I beg to move.

**Baroness Walmsley (LD):** My Lords, I thank the Minister for her introduction. Although these SIs are relatively non-contentious, I have some general and then some specific comments and questions. Of course, our main concern in all of this is the safety of consumers and of the food that we eat.

One of the enduring reservations in the responses to the consultation, especially by the National Farmers' Union, was about the lack of clarity on the relationship that the Food Standards Agency and Food Standards Scotland will have with the European Food Safety Authority. A common approach is necessary to harmonise trade and maintain continuity, but the UK Government have given no convincing assurances yet as to how the EU and the UK will work together on this. The feasibility of a complementary EU-UK framework is doubtful, as third-country participation is possible only if the third country applies all EU-related legislation. It also relies on good will on both sides and, given how much we have messed the EU about recently, it could be forgiven for being somewhat less than co-operative.

Neither has the UK framework yet been set up for harmonisation across our devolved authorities—although I understand that the FSA and FSS are working on proposals. This is deeply unhelpful for business as exit day draws closer. Can the Minister say what arrangements are in place now? The NFU has also noted the impact on the FSA and FSS workforces, and, although the chair of the FSA reassured the EU Environment and Energy Committee about its readiness, the chair of the committee, my noble friend Lord Teverson, warned that,

"the UK Government has no idea whether we will have full access to EU risk assessments, or any access to their surveillance and information sharing mechanisms. This is deeply concerning".

We rely heavily on and contribute heavily to the European Rapid Alert System for Food and Feed. It helps to save lives. The public portal allows consumers to look for warnings about allergens in imported foods that are not labelled as containing them on the packaging. Will we lose access to that portal when we leave and will we be immediately setting up our own—not some time during the implementation period but right away? This is a serious issue.

I have a few specific comments about the two SIs. On the first one about prohibiting food imports from areas affected by the Chernobyl and Fukushima nuclear accidents, currently there is a moratorium on imports. The Chernobyl restrictions are due to be reviewed in 2020 and the Fukushima restrictions in 2019. The SI will enshrine these dates in UK law and does not amend them. I accept that and we support these measures. However, once the UK is no longer a member of the EU or Euratom, the FSA, the FSS and local authorities will have the responsibility of checking that standards are being maintained. This is likely to lead to regulatory divergence. In addition, given how cash strapped local authorities are, how confident is the Minister that they will have enough trained staff to do this? Some local authorities no longer have a full-time food and feed officer.

On the SI that regulates the amount of radioactive contamination in food, we learn that when it is "scientifically justified", the Government can amend the permitted levels of radioactive substances through statutory instruments, following an alert from the FSA about any nuclear incidents that may affect food. The Secretary of State then decides what steps to take. Why is this additional power for the Secretary of State necessary when the head of the FSA has said that those powers will be conferred on the FSA anyway at a later, unspecified date? But why not straightaway? Why do we have to give it to the Secretary of State?

*2.30 pm*

**Lord Dubs (Lab):** My Lords, I am grateful to the Minister for her explanation of what all this is about. Of course it is important, because we have to protect the safety of our people in the event of any nuclear accident. I am quite a keen hill walker and was in the Lake District at the time of the Chernobyl disaster. I remember the shock, because I was walking on some of the hills when it was realised that the fallout from Chernobyl had moved west and was covering many areas, including parts of the Lake District. I say this from memory, but my understanding is that some of the sheep farmers had control orders placed on the movement of sheep because they were in areas where the fallout had been particularly strong, and therefore could not be moved and the meat not eaten. That lasted for some years. It was a real shock that an accident taking place so far away could have a long-term consequence for hill farmers in the Lake District. I think it is all okay now.

I remember that some years ago, when I was in Ukraine, the advice we were given was, "Don't eat any mushrooms", because they might have come from inside the exclusion area, even though they were not supposed to. I cannot verify that; all I know is what people were saying there at the time. So this is a crucial transfer of powers to protect safety.

The Explanatory Memorandum says that it is estimated that it will take each organisation,

"less than 60 minutes to read",

and understand the proposed regulations. That was increased from 30 minutes following the consultation. One can read the thing in 60 minutes, but to understand it in 60 minutes is a bit more difficult. I must be pretty slow on the uptake, because I spent a bit longer than that on this one. It is slightly optimistic. Certainly, whoever first drafted it and said that 30 minutes is long enough must have been pretty aware of all the details and did not allow for others who might not be as well informed. It is quite a burden on the organisations that have to understand and apply this measure.

One of my concerns is about the devolved Administrations and continuity. We could be days away from this having to come into effect. What has been done so far to ensure that the devolved Administrations are already taking on board the same powers that we are talking about here for England? We could well be out of time and there could be a period of days in which the powers do not exist. Given the state of uncertainty in the House of Commons, we do not know what will happen. We may have a bit longer, but we might not have more than days. Surely we need some assurance that the devolved Administrations are acting now—particularly Northern Ireland, where there is no ministerial guidance. I understand that two government departments, those covering health and agriculture, are involved.

I turn to one or two specific things. I understand that our withdrawal from Euratom is still on the cards; it may not be. Frankly, I have not been able to follow all the ups and downs of what has been going on at the other end of this building. I understand that we shall withdraw from Euratom and that some other authority will have to take over from it. In her introductory remarks, the Minister said that the retained EU legislation following the Fukushima nuclear accident will expire in March 2020 and will have to be reviewed by the Government. I wonder where we are on that. It is not very long. Can the Minister clarify? Maybe I misunderstood what she said.

I turn to who will be the appropriate authority. Can the Minister say what will be the competent, appropriate authority if we are no longer part of Euratom? Will it have the expertise to carry on with the necessary review function?

The other Explanatory Memorandum says:

"The legislation provides for deviations from the maximum permitted levels in specific circumstances and where scientifically justified",

although it says first of all that there will be no change. If deviations are to be permitted, can the Minister say a little more about the circumstances in which deviations might be permitted, and on what basis? What safeguards are in place to ensure that this deviation is used rarely and responsibly?

As the Minister mentioned, a full public consultation was carried out. Can the Minister advise us whether all the responses made have been incorporated, where appropriate, into this legislation and if the consultation raised any other concerns? Presumably the timing may have been one. Can she just give us some assurance on that? The principle is fine, but the details are pretty important.

**Baroness Manzoor:** My Lords, I thank both the noble Baroness, Lady Walmsley, and the noble Lord, Lord Dubs, for their support and constructive comments. I reiterate that these regulations make no changes to policy or to how food and businesses are regulated and run. That is really important. They are limited to the necessary technical amendments to ensure that regulatory controls for food and feed continue to function effectively after exit day if the UK leaves the EU without a deal and that public health is protected.

Both noble Lords asked a number of questions. The noble Baroness, Lady Walmsley, asked about the framework for working across the UK. I assure her that discussions are taking place now across the devolved landscape and there is a memorandum of understanding between the FSA and the FSS. She also asked about local authority resources. Local authorities and the trading standards officers and environmental health officers who work for them perform vital work to protect the health and well-being of consumers up and down the country. However, the day-to-day delivery of official controls by local authorities should remain unchanged as a result of this legislation passing. There will be no changes in responsibility for specific official controls or changes in delegation to or designation of the relevant authorities for the performance of these controls.

The noble Baroness, Lady Walmsley, also asked about loss of access to RASFF. This is very important. We want to work closely with RASFF. To mitigate the loss of full RASFF access, the FSA has strengthened its capability and capacity by building on proven mechanisms such as monitoring key data sources and a new strategic surveillance programme to enhance the capability and capacity to respond effectively to any food-borne contamination or outbreak incident that occurs in the UK.

The noble Baroness, Lady Walmsley, also asked if the FSA will be able to respond and detect effectively and very quickly. Once again, I assure her that should any food-borne contamination or outbreak incident occur in the UK, we will ensure that there is effective protection for UK consumers.

**Baroness Walmsley:** I was not referring just to things that happen in the UK. We need rapid information about things that happen in the European Union that can so easily come over here.

**Baroness Manzoor:** Of course, that does not change, even if we leave the EU. Even with the UK as a third country, if there is any contamination the EU has a responsibility to third countries. It is in law that it will report those incidences, so of course they will be reported accordingly to the UK.

The noble Baroness, Lady Walmsley, asked why we have to give powers to Ministers now. Effectively, Ministers are keeping the role of the FSA under review and may grant decision-making powers to it in future if Parliament agrees. That will come back in due course if it is the way forward.

The noble Lord, Lord Dubs, asked whether 60 minutes is long enough to go through various pieces of legislation. I assure the noble Lord that the law does not change. Business is already familiar with the issues.

The noble Lord, Lord Dubs, and the noble Baroness, Lady Walmsley, asked whether an impact assessment was carried out for this SI. The impact has been assessed according to government guidance. A full impact assessment has not been produced for these regulations, which the FSA has certified as being below the de minimis threshold of minus £5 million

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equivalent annual net direct cost to business. The regulations are designed only to fix the inoperability of retained EU law and to ensure the continued safety of food and feed after the UK leaves the EU.

The noble Lord also asked what the devolved authorities are doing to take the changes through their legislation. Again, to reassure him, these SIs fix retained EU law for the whole of the UK. The devolved authorities are making some changes to their legislation locally.

The noble Lord, Lord Dubs, also asked about the review in relation to Chernobyl and Fukushima. The Chernobyl regulations are being amended now. As he correctly said, they are due to expire on 31 March 2020. The regulations are being amended to ensure that we continue to apply the same food safety standards after the UK exits the EU. This will provide continuity to food businesses and members of the public. I assure him that the Government's intention is to review these controls before 30 March. Ministers will make a decision on future controls based on the advice of the Food Standards Agency in England, Wales and Northern Ireland and of Food Standards Scotland in Scotland.

The European Commission started the review on the Fukushima accident in January 2019. It is due by 30 June. The UK, represented by the FSA, is already reviewing recent data and the current measures and will continue to engage with the Commission's review until exit day. The FSA will assess future measures implemented by the EU and advise Ministers on appropriate controls for the UK. Any new SI will be made subject to the usual parliamentary scrutiny. Until then, the current instrument will continue to apply.

The noble Lord, Lord Dubs, asked whether all consultation responses been taken into account. They have, and they support the approach taken. I understand that the response to the consultation will be published shortly by the FSA. The noble Lord also asked when there might be deviation from maximum permitted levels. Any deviations will be based on scientific evidence. The FSA and FSS have built-in capacity to provide risk assessments and all advice from the FSA and the FSS will be made public.

These instruments will ensure that safety measures are in place, including maximum permitted levels of radioactive contamination in food and feed. A framework to apply emergency levels promptly following a nuclear accident will be in place to protect consumers. I hope I have said enough to reassure noble Lords.

*Motion agreed.*

## Food and Feed (Maximum Permitted Levels of Radioactive Contamination) (Amendment) (EU Exit) Regulations 2019

*Motion to Approve*

*2.44 pm*

*Moved by* ***Baroness Manzoor***

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

*Motion agreed.*

## Food and Feed Imports (Amendment) (EU Exit) Regulations 2019

*Motion to Approve*

*2.45 pm*

*Moved by* ***Baroness Manzoor***

That the draft Regulations laid before the House on 5 February be approved.

**Baroness Manzoor (Con):** My Lords, I shall speak to the two remaining Motions standing in my name on the Order Paper. The Government's priority is to ensure that the high standard of food safety and consumer protection we enjoy in this country is maintained when the UK leaves the European Union. I shall first address the instrument regarding imports of food and feed of non-animal origin, where the Food Standards Agency has lead responsibility. Legislation covering imports of products of animal origin is being taken forward by Defra in a separate statutory instrument. The FSA and Defra have worked collaboratively on areas of shared interest.

The UK imports food and feed from across the world, not just from the EU. Although much of it poses little risk to health, food and feed of non-animal origin is subject to an increased level of control where it is deemed likely to constitute a serious risk to human or animal health or where there are known or emerging risks associated with it. This specified higher risk food and feed is subject to official controls at authorised entry points. These controls ensure that the food and feed is safe for consumption. The Government remain committed to ensuring that it remains so after we leave the European Union. The import controls currently in place will continue once the UK leaves the EU. They will remain unchanged until the Government decide, based on evidence and surveillance, that there has been a change in risk. The instrument will ensure that legislation relating to imports of food and feed products that is in place to control contaminants such as Salmonella, aflatoxins and pesticide residues continues to function effectively after the UK leaves the EU. It also ensures that there is minimum disruption at UK seaports and airports if we do not reach a deal with the EU.

Systems are in place to monitor food and feed imports arriving in the UK. The EU rapid alert system for food and feed, which we discussed when considering the earlier Motions and to which the UK is a major contributor, facilitates vital food safety data sharing. Continued access to the RASFF system is a key priority and the FSA continues to press for full access to this system in negotiations with the EU. To mitigate risks in this area, the FSA is building on proven mechanisms to enhance its capability and its capacity to respond effectively to any food-borne contamination incidents or outbreaks. This includes engaging with other international food authorities, including the International Network of Food Safety Authorities—INFOSAN—which is managed jointly by the Food and Agricultural Organization of the United Nations and the World Health Organization.

Ensuring the safety of imported food remains a priority for the Government. If the statutory instrument is approved, the controls currently in place will continue once the UK leaves the EU. These will remain unchanged until the Government, based on evidence and surveillance, decide that there has been a change in risk. I make it clear that no policy changes are made by this instrument beyond the minimal changes necessary to rectify deficiencies in the retained EU legislation.

Secondly, I shall address the instrument amending legislation on official controls. Official controls are performed by competent authorities such as the Food Standards Agency to verify the compliance of business with food and feed law. Legislation in this area sets out operational standards for the performance of official controls by competent authorities—for example, audit and training requirements.

The legislation addresses a broad variety of areas required to underpin our world-class system for consumer protection and biosecurity, ranging from import controls to the capacity of laboratories analysing food samples. This instrument will ensure that the competent authorities of the United Kingdom retain sufficient powers to act to counter emerging threats to public health, animal health or animal welfare. Both instruments propose a transfer of responsibilities to UK entities to support a UK-specific regulatory regime. Responsibilities incumbent on the European Commission are designated to Ministers in England, Wales, Scotland and the devolved authority in Northern Ireland. It is also important to note that the devolved Administrations have provided their consent for these instruments and have been involved throughout with their development. If the UK reaches a deal with the EU, Ministers will invite Parliament to revoke or amend these instruments to reflect that deal.

In conclusion, the instruments constitute necessary measures to ensure that the high standard of food and feed safety that we enjoy in this country is maintained after exit day. I hope that, with the reassurances I have given, noble Lords can support these regulations. I beg to move.

**Baroness Walmsley (LD):** My Lords, I thank the Minister for her introduction. The general comments that I made about the first pair of SIs will apply to this second group, which concerns the relationship of the FSA and the FSS with the EFSA after Brexit. I agree with the noble Lord, Lord Dubs, on his point about the very short time that it is estimated businesses will require to familiarise themselves with and disseminate these regulations. I raised exactly the same point last week in the Moses Room on another group of SIs. I remain suspicious that this staggeringly small estimate was made to avoid the need for an impact assessment.

I accept the Minister's statement that these SIs involve no policy change, but they alter who has the power to change them in the future and who will carry them out. For example, the food and feed imports regulations give quite a bit of power directly to the Secretary of State—in this case, Mr Gove, I think—amounting to the sort of power grab we have become used to in recent government proposals. Despite assurances from government that animal welfare and public health concerning food and feed controls will not be at the mercy of upcoming trade deals, it is possible to argue that the powers conferred on the Secretary of State could allow for that. Can the Minister assure us that this will not happen? If it does happen at a later stage, she should be assured that I will come back to haunt her.

If the EFSA and FSA/FSS do not align, regulatory divergence will create difficulties for our importers and exporters, but nothing has yet been clarified. We might start with aligned regulations but the Government have always claimed that leaving the EU will allow us to be free as air to improve our regulations in the future. However, does the Minister accept that, if we do so, we will no longer be aligned, and that could cause problems for our food exporters, who may already be being hit by increased tariffs, and limit what importers can bring in? I would be very interested in her comments on that.

I turn to the second SI—the official controls for feed, food and animal health and welfare regulations—which refers to the movement of animals and goods between countries in the single market and to what can enter the market. Again, I accept that this package of regulations does not amend general hygiene laws; it just amends the methods used to verify compliance with them. However, in that respect, is the Minister confident that we have enough staff in the right places to verify compliance, and how will it be done if the Irish border remains open, as we all hope it will?

**Lord Dubs (Lab):** My Lords, I too am grateful to the Minister for introducing the debate on these two statutory instruments. Some of the points made in the first debate will be made in this one as well because there are obviously similarities, so I do not apologise for that.

I shall start with the devolved Administrations. How far have we got with them? Consultation with them on this issue is more crucial than on radioactivity because there is so much agriculture in Northern Ireland—it is the main industry there. Clearly, the movement of food and animals from north to south in Ireland will have to, or should be able to, continue. The question is whether the devolved Administrations, particularly in this case the appropriate departments in Northern Ireland, will be ready on day one, if day one is in just a few days' time. It is a very important issue and we need an assurance that they will be ready in time.

As already made clear by the noble Baroness, Lady Walmsley, there will have to be adequate transition periods. Are we sure we have a long enough transition period to allow everything to be put in place that needs to be put in place? There is also a question of costs. Some estimates have been made about the costs that businesses will incur due to these measures. Can the Minister say something about the costs and whether the businesses concerned are fully aware of what this may mean for them?

As raised by the noble Baroness, Lady Walmsley, which bodies will take over the responsibilities currently exercised by the relevant EU bodies? I think we are talking about the Food Standards Agency and other bodies in Scotland and so on. Do they have adequate time and resources to spring into action at the beginning?

[Lord Dubs]
Further, what arrangements will be made for collecting data about the effectiveness of the regulations and the reporting methods? What bodies will be able to scrutinise performance and delivery, and what assessment has been made of their capacity to take on this work?

Finally, if we have not done so already, we will shortly be entering into trade negotiations with other countries outside the EU. Some of these countries are pretty tough negotiators. Can we have an assurance from the Minister that no changes will be made to our policies as in these two statutory instruments if the Americans, in particular, play tough with us in trade negotiations? I shall not go on about chlorinated chicken but it is very clear that the Americans already have an agenda for their negotiations with us and part of it will impinge on the safeguards inherent in these statutory instruments. That would put the Government in quite a difficult position. Of course, it is not the Government's intention to change anything but, when negotiations take place and they become pretty tough, I wonder whether the Government will be equally tough and say to the Americans, "We're not changing this at all, no matter what the negotiating pressure on us". Therefore, as a real safeguard, we want to be assured that the present standards of safety and food quality will continue beyond our leaving the EU.

*3 pm*

**Baroness Manzoor:** My Lords, I start by thanking both noble Lords for their valuable contributions and saying clearly that the Government have no intention of lowering food standards in the UK, irrespective of any trade agreements there may or may not be around the world. The two issues are not interlinked; each trade negotiation will be considered on its individual merits.

As I said in my opening remarks, these instruments will ensure that the regulatory controls for food and feed continue to function effectively after exit day, and that public health is protected; that is their purpose. They will correct deficiencies in the retained EU regulations as well as references and terminology relating to European institutions such as the Commission, the European Food Safety Authority and member states. EU legislation has been amended to reflect UK institutions to ensure that the current arrangements will continue to be operable in the event that the UK leaves the EU without a deal on 29 March 2019. That is the purpose of these regulations.

I was asked a number of questions; I shall endeavour to answer them all. The noble Baroness, Lady Walmsley, asked about the relationship between the FSA, FSS, and IFSA after exit. I agree with the noble Baroness that securing a strong partnership is important. It is a matter for further discussion but we recognise its importance and are endeavouring to work together closely with that aim in mind. She also asked about RASFF with respect to the Food Standards Agency. I reassure her again that we want to secure a strong and effective partnership with EFSA. That is one of the Government's top food safety priorities and we will continue to work with EFSA as we continue our negotiations with the EU.

The agreement that we have reached for the implementation period allows the UK to participate in some EU bodies and agencies, including EFSA. It is acknowledged that this is in the best interests of both sides, particularly as UK contributions to EFSA through expert participation and the sharing of data and information are well recognised. The exact arrangements for UK participation in EFSA are a matter for the next phase of the negotiations, and part of wider discussions on co-operation between UK authorities and EU agencies. I cannot provide more details at this stage because I do not have them; they are a matter for negotiation.

**Baroness Walmsley:** Given the importance of these issues—this is life-saving information—the Government have had two and a half years to do this and we are told that it has been a top priority. We know that, even if we leave the EU at the end of March or May, or whenever, there will be years of negotiations from that point. There is no certainty on exit day; we get certainty only at the end of this very long period of renegotiation of trade deals, relationships with institutions and so on. In the meantime, we are all concerned about the safety of our food. Telling us that we are working very hard and all want a close relationship is encouraging and helpful, but it is not what we need.

**Baroness Manzoor:** My Lords, I recognise the frustrations but they are part of the negotiations. These SIs do not address the wider implications of what the noble Baroness is seeking, but I can assure her that food safety is the highest priority for the Government and that we are world leaders in ensuring the highest food standards. Those standards in food safety and quality will not be diminished. But I understand and recognise the frustration. If I had the answers or an understanding of where we are going—I do not think anybody has that at the moment—I would do my best to provide those answers.

The noble Baroness, Lady Walmsley, also asked about food and feeding ports and what she called the power grab by Ministers. The powers conferred on Ministers, as the noble Baroness will know, are subject to normal controls associated with SIs and must be informed by published, independent advice from the FSA and FSS. That will not change. The noble Baroness, and the noble Lord, Lord Dubs, asked whether the FSA has suitable resources. Some £40 million of extra funding last year and £16 million this year have been made available. It is also intended to recruit 140 new staff, who will boost the capabilities of the National Food Crime Unit. This SI programme will ensure that that is in place.

The noble Lord and the noble Baroness asked whether 60 minutes for consultations is enough. That is what we have at the moment; the law is not changing and businesses know the law already. So we are not doing anything different. Both noble Lords raised the issue that local authority capacity may be under stress. I recognise that there are challenges in local authority funding, but no major changes are intended, as I said in relation to the previous two SIs. All powers will remain in place for performance and control. The FSA has had £2 million this year and last year to support local authorities.

The noble Lord, Lord Dubs, asked about the devolved Administrations. We are of course consulting and working very closely with them; that will not change. I understand his wider points about Northern Ireland but that is not the subject of these SIs. He also asked what arrangements are in place for data security. I assure the noble Lord that the FSA has an extensive surveillance mechanism and is a very transparent organisation. As a public body it has to be audited and is responsible to Parliament. He asked which bodies will take over the various duties. Ministers will take risk-management decisions and will have adequate capacity. The FSA and FSS will take on risk assessments and we are happy that they are adequately resourced to do so.

I have already responded ON the border issues raised by the noble Baroness, Lady Walmsley. As I said, the Government will continue to uphold its commitments under the Belfast agreement, including the avoidance of a hard border. In the event of no deal, the priorities are to keep trade as frictionless as possible to minimise new borders.

The noble Lord, Lord Dubs, asked whether we have enough staff to verify complaints and how this would be done if the Irish border is left open. I have already indicated that additional resources have been made available. There is dialogue between the Republic of Ireland and the UK, and that will be maintained to protect the interests of the island of Ireland as a whole.

Finally, on the cost to business, this is a similar question to the one asked by the noble Baroness, Lady Walmsley, and I tell both Members that the answer is the same. Businesses know the current law and no impact assessment was needed because this is under the threshold of £5 million.

I hope I have reassured noble Lords that the whole purpose of these SIs is not to minimise food and feed standards in the UK, but to maintain the highest standards that we currently enjoy, and will continue to enjoy. With that, I hope noble Lords will agree to these statutory instruments.

*Motion agreed.*

## Official Controls for Feed, Food and Animal Health and Welfare (Amendment etc.) (EU Exit) Regulations 2019

*Motion to Approve*

*3.10 pm*

*Moved by* ***Baroness Manzoor***

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

*Motion agreed.*

## Challenges to Validity of EU Instruments (EU Exit) Regulations 2019

*Motion to Approve*

*3.11 pm*

*Moved by* ***Lord Callanan***

That the draft Regulations laid before the House on 12 February be approved.

*Relevant document: 18th Report from the Secondary Legislation Scrutiny Committee (Sub-Committee A)*

**The Minister of State, Department for Exiting the European Union (Lord Callanan) (Con):** My Lords, I am grateful for the opportunity to be here today to discuss the regulations presented before you. These regulations are part of the Government's wider programme of secondary legislation before exit day to ensure that the UK's legal system continues to function effectively when we leave the European Union.

The principal aim of these regulations is to ensure the effective continued delivery of justice as we leave the EU. It is clear that in separating our legal systems we must absolutely make sure that those who have sought justice through our domestic courts are not adversely affected by our exit from the EU. These regulations will guarantee that validity challenges originating in our domestic courts before exit will continue to be heard and that claimants can be assured that domestic courts will be able to hear them, independently of the Court of Justice of the European Union. These regulations would take effect when EU law ceases to apply to the United Kingdom. For example, if an implementation period is agreed, they would take effect at the end of the implementation period.

I will take a moment to remind noble Lords of the legal mechanics of validity challenges as they currently stand, before going into the details of what these regulations will change once we leave the EU. The right to challenge whether or not a law was made "validly" by the EU is currently set out in the Treaty on the Functioning of the European Union, referred to as the TFEU. The grounds are set out in Article 263 and they are: lack of competence; infringement of an essential procedural requirement; infringement of the treaties or of any rule of law relating to their application; or misuse of powers. In effect, such challenges are the EU equivalent of judicial review. It is important for noble Lords to be aware that rulings in validity challenges are always given by the CJEU. National domestic courts, both in the UK and other EU member states, do not have the legal jurisdiction to make judgments on these cases.

There are two ways in which cases make their way to the CJEU for judgment. In the first instance, claimants may bring their cases directly before the CJEU. Let me be clear: these regulations do nothing to amend or remove that right for UK nationals who may wish to pursue that route of challenge after our exit. Any UK national who complies with the relevant requirements in the TFEU and who wishes to take a case to the CJEU to challenge a relevant EU law on these grounds will continue to be able to do so after exit. However, post-exit CJEU judgments on validity will not of course apply to the UK.

I would like to highlight that the majority of challenges brought in this manner directly to the CJEU by UK-based claimants are against individual decisions that affect one business or individual, and are not generally against legislation of general effect. My officials have identified alternative domestic mechanisms for challenge post exit in the majority of these cases.

The other way in which validity challenges come before the CJEU is via the national domestic courts. During proceedings, questions of validity may arise,

[Lord Callanan]
and where and when they do—unless judges consider that the question is so obvious that no reasonable doubt is left—national courts must pass these questions on to the CJEU for judgment. This is done via the preliminary reference mechanism. After judges have sent off for a ruling, the domestic case is put on hold until the CJEU makes its judgment. In legal parlance, the case is stayed or "sisted"—not "sistered" but "sisted".

*3.15 pm*

I should note at the outset that the number of validity challenge cases referred by UK courts to the CJEU is extremely small. Over the last five years, only 12 such cases have been referred by the UK courts. Of those, only one has been partially successful. This does not diminish the importance of access to justice for those who could be affected, but it does mean that any new arrangements we create must be proportionate to the scale of the potential problem.

I turn to the effect of these regulations. As I said just a few minutes ago, the Government's intention in laying these regulations is to ensure the continued effective delivery of justice. The most obvious scenario in which access to justice would be restricted is in cases that have already begun, where reference to the CJEU has been made and cannot continue. Indeed, without these regulations, the effect of the European Union (Withdrawal) Act 2018 would be that these cases could not continue. Even if the CJEU were to rule on cases submitted by the United Kingdom, which in and of itself is not yet clear, the EU withdrawal Act makes clear that any future rulings are not binding in or on the United Kingdom and domestic courts could not find EU law invalid.

These regulations mean that those pending cases can continue. At the last count, there were three such cases. Indeed, the regulations go further, to cover cases where a domestic court has not yet made a reference to the CJEU but was planning to do so, and any case which began before exit in which a validity challenge may arise during domestic court proceedings. The effect of these regulations, therefore, will be to maintain the effective delivery of justice as we leave the EU by ensuring that all pending cases can continue. These regulations will also make sure that, where claimants have brought a case before exit day that may hinge on the validity of any EU law, they can be assured that there will still be a mechanism in place to ensure that rulings on validity can be provided domestically.

This will be done by giving judges a new, albeit time-limited, jurisdiction to rule on the validity of EU law, using the grounds set out in the TFEU immediately before exit day. This will be time-limited; domestic judges will be able to decide whether EU law was validly made only if the question was not resolved by the CJEU before exit day and if the case was started in domestic courts before exit day. Where judges do find that an EU law was not made validly, these regulations will grant them powers to declare it void. The effect of such a declaration by any domestic court will mean that the law was not valid for the purposes of migrating to the UK statute book—in effect, there was never a retained EU law version of it.

My department has of course been keen to make sure that the Ministry of Justice was closely involved in the making of these regulations. I am happy to report that senior lawyers and senior officials at the MoJ were involved in policy development and the legal drafting of the regulations. Of course, my officials have also been liaising closely with judicial policy officials to make sure that judges and Her Majesty's Courts and Tribunals Service are aware of these changes and can thus manage any changing workload accordingly. Given the historical numbers of cases I referred to earlier, officials expect there to a very limited number of potential cases, aside from the three that are already currently pending.

Finally, let me turn to the issues addressed in the last two regulations. Regulation 5 stipulates that courts must give the appropriate UK authorities notification of their intention to declare an EU law void, and Regulation 6 stipulates that any UK authorities have the right to be joined as a party to any proceedings to which the regulations apply.

I must again absolutely highlight to noble Lords that the wording "relevant UK authorities" is defined in the regulations as a Minister of the Crown or a person nominated by him, the Scottish Ministers, a Northern Ireland department, and the Welsh Ministers. The wording is born of our fruitful and close working with the devolved Administrations on these regulations. Although the laying of this SI does not require formal consent from the devolved Administrations, I and my officials were keen to make sure that they were given ample opportunity to provide their views on our proposals.

Indeed, as a direct result of this engagement, we considered it appropriate that all the devolved Administrations be given the right to be notified and be joined as a party to a validity case, given that EU law can relate directly to their legal competence also. We have, of course, thanked the devolved Administrations for their extremely helpful input. My department has received letters from the Welsh and Scottish Governments, testifying to the fact that they are content with the final product.

I hope that noble Lords will therefore agree that these regulations are extremely important in making sure that courts in the UK can continue to deliver justice effectively once we leave the European Union and, as such, are a vital part of the Government's preparations for leaving the EU. I beg to move.

**Lord Beith (LD):** My Lords, I am grateful to the Minister for his careful exposition of the statutory instrument, and for the engagement of officials with the Constitution Committee and others. This is at the more microscopic end of looking at EU matters compared with what is going on at the other end of the building, but it is nevertheless important.

My concern with the SI and that of the Constitution Committee goes back to proceedings on paragraph 1 of Schedule 1 to the withdrawal Act, which prohibits challenges to the validity of retained European law on the basis that it was invalid immediately before exit day, unless the challenge was of a kind provided for in regulations to be made by a Minister of the Crown. That is what we are discussing. No draft of the regulations

was made available when we were considering the Bill. The possibility arose that such a regulation might be selective and subjective in the type or subject matter of case permitted. Indeed, Ministers seem to be envisaging such selectivity, as I shall illustrate.

The background is that our constitutional system does not provide for courts to strike down laws on the basis that they are invalid. Parliament's word, when set out in statute, is law. The Human Rights Act allows for statute law to be challenged and that challenge is posed to Parliament, but it does not strike down the law that it challenges. Neither I nor the Constitution Committee wanted to change the situation, but European law can be struck down for invalidity by the CJEU, as the Minister made clear, so what about retained European law after exit?

The Government originally took the view that they needed to retain the possibility of challenge and striking down. The noble and learned Lord, Lord Keen of Elie, the Advocate-General, said in this Chamber:

"Where we differ is that the Government recognise that, in some circumstances, individuals and businesses may be individually affected by an EU instrument … and should have a right to challenge it".—[*Official Report*, 23/4/18; col. 1374.]

But in what circumstances, and how do you devise a statutory instrument that allows for some challenges but not others? Does this not set a dangerous precedent? Such an instrument might be hybrid, in which case you might think we would be protected from misuse by our special procedures for hybrid instruments, but not so, because provisions in paragraph 36 of Schedule 7 to the withdrawal Act allow hybrid instruments under that Act to proceed as if they were not hybrid.

No draft of the SI was produced, but we had discussions in this Chamber and I had an exchange of letters with the Solicitor-General, who was very helpful. A short consultation was arranged that enabled issues to be clarified. I appreciate that as well. My concern about selective and discriminatory use of the power to make such regulations was largely allayed by the very firm statement of the Government's intent, and the statutory instrument we have before us is general in character and confined in purpose to pending cases. At one or two points where the Minister was explaining how it would work in those cases, the House perhaps needed reminding that only in pending cases would the opportunity arise to make that challenge. These are cases entered upon before exit day and not concluded.

But we now have a statutory instrument that is so limited in its scope that if the CJEU after exit day finds a pre-exit provision of EU law to have been invalid, it will cease to be EU law in the EU but it will continue to be on our statute book. It will still be in force as retained European law, despite the fact that, as explained in paragraph 2.4 of the Explanatory Memorandum accompanying the SI, if the CJEU has declared the law to be invalid,

"it is as if the law in question never existed".

I agree with that. In my view, it therefore follows that it could not have been validly transferred into UK law on exit day. It did not exist and it could not be transferred. It was not valid and it is immaterial that we did not know that at the time. This would be an absurd situation. It could have the practical consequence that a UK business that had been penalised or disadvantaged by the application of a law that had been struck down would have no legal recourse to challenge its consequences, while EU businesses were successfully challenging it within the EU.

The Government, in correspondence with the Constitution Committee, have offered several answers to this problem. The first was that there will be very few such cases, if any, so in their view any solutions to the problem would risk being disproportionate. I do not buy that. Our job is to get the law right, not knowingly to create flaws that do not worry us because we think that not many people will be affected.

The Government's second argument is that, in this as in other situations, if Parliament wants to change the law it of course can. It could take this course if problems arose because invalid EU law was still in force in the UK. When such a case came before the courts, it would be difficult to deal with the adverse effects experienced by an individual or business without resorting to retrospective and possibly hybrid legislation—not a course to be encouraged.

The Government's third argument is much more complex and has been questioned by eminent public law specialists. Government lawyers believe that Section 6(3) of the EU withdrawal Act 2018 means that any post-exit CJEU ruling on the validity of EU law cannot affect its UK version in the form of retained European law because, under Section 6(3)(b) the courts must have,

"regard (among other things) to the limits, immediately before exit day, of EU competences".

Under Section 6(3)(a) the court must decide the question in accordance with retained EU case law—that is, pre-exit case law. The court would be precluded from considering any post-exit case law and therefore, obviously, a declaration of invalidity. This seems to negate the purpose of Section 6(2), which permits the court,

"to have regard to anything done on or after exit day by the European Court … so far as it is relevant to any matter before the court or tribunal".

I ask the Minister: what is the point of the permission in Section 6(2) to have regard to CJEU post-exit case law when it is subject to the requirement in Section 6(3)(b) that it must take account of the clear limits of EU competence after exit day? It is important because the Government's view is that the scope of this statutory instrument cannot be widened in the way I suggest it should be because of that interpretation of Section 6.

This leads me to ask: why do the Government want to rule out the obviously desirable removal from effective UK law of retained EU law provisions whose parent provisions are found by the CJEU to have been invalid in the first place? Why would they want to keep that in UK law? A law that cannot have validly existed but remains in force is a new concept for me. Maybe it is because the Government get very hung up about the European Court of Justice and insisting that it will not have jurisdiction after exit day. What we are talking about is simply allowing UK courts to have regard to any case law subsequently developed by the European Court of Justice.

My last question has been answered, but I would like the Minister to emphasise the answer. This statutory instrument comes into force on 29 March, unless exit

[Lord Beith]
day is changed by another statutory instrument. However, in the event of an agreement, do the Government intend to use the withdrawal agreement Bill to suspend the operation of this statutory instrument until the end of the implementation period? I assume the answer is yes, but it would be helpful to have it on the record.

*3.30 pm*

**Baroness Hayter of Kentish Town (Lab):** My Lords, I also thank the Minister for introducing this. As the noble Lord, Lord Beith, said, it is to correct something in paragraph 1 of Schedule 1 to the 2018 Act—which was perhaps a slightly erroneous judgment made at the time. It affects only a handful of cases, but nevertheless we certainly think that the ability to bring those cases is important.

I have a few questions. One arises from the last point made by the noble Lord, Lord Beith. My assumption is that this is a no-deal SI. Can the Minister confirm that, if we get a deal with a transition period—for the sake of this argument, if we get a deal there is bound to be a transition period—then the CJEU will, once we have amended the 2018 Act in the withdrawal and implementation Bill, have a continuing role in these matters? Can he also confirm that this is a no-deal SI, and that no deal is the only situation in which this SI would have a role?

If we have a deal, will paragraph 2.1 of the Explanatory Memorandum not be a bit misleading? It suggests that there will be no role for the CJEU. In a deal situation, there would be a role for it, not just in the transition but afterwards, because of the provisions concerning EU citizens' rights. Can the Minister confirm that this SI would not be needed if we have a deal and a transition period? In fact, now that the House of Commons has voted against us leaving without a deal, perhaps the Minister could explain in what circumstances this SI would actually be needed. Is it correct that this SI would not be needed if we have a transition period?

My second question is absolutely not a trick question; it is asked out of my own ignorance. As the Minister explained, the courts will be mandated to inform the relevant Government of a case coming before them. Can the Minister inform the House whether there are any other instances in which any of our courts have an obligation to inform the Government of proceedings that are started before them?

Paragraph 10.7 of the Explanatory Memorandum recognises that we could find ourselves in the position—this point which has just been touched on—where some former EU legislation which has subsequently been ruled invalid by the CJEU remains on the UK statute book after we have left. Can the Minister outline how either his department or a successor department would monitor future CJEU rulings after Brexit to keep abreast of any such rulings which might be relevant to the UK statute book?

Finally, there is the important issue of compensation, which was only slightly touched on by the noble Lord, Lord Beith. The 2018 EU withdrawal act makes it clear that, after exit day, there is no right to damages under the current Francovich rules, except during a two-year grace period for cases that relate to events that occurred before exit day. Under the regulations being considered today, should our domestic courts find that any of our retained law is invalid under the sort of terms outlined, would there be a similar right to damages for two years similar to those allowed under the 2018 Act? That covers cases in which the event started before exit day, but even for cases which are pending on exit day—I think there are three at the moment—if it were found that those laws were invalid, would a Francovich-type compensation be available?

**Lord Callanan:** I thank the noble Baroness, Lady Hayter, and the noble Lord, Lord Beith, for their contributions, and I pay particular tribute to the noble Lord, Lord Beith, and the noble Baroness, Lady Taylor, who is not in her place at the moment, for the interest that they have taken in this important matter. We are extremely grateful for their contributions and for their engagement with officials—I know that the noble Lord has taken a close interest in this and I thank him for that.

As I set out in my opening statement, these regulations aim to ensure the effective delivery of justice as we leave the European Union. The regulations will do this by giving domestic judges a temporary jurisdiction to rule on validity challenges to EU laws in domestic courts after exit for cases that have begun before exit.

I will now deal with the questions. The noble Lord, Lord Beith, made some extremely valid points on what might happen if, after exit, the CJEU rules that EU legislation was invalidly made. Would this invalid legislation remain on the UK statute book? As he acknowledged, the short answer to his question is yes. Decisions made by the CJEU will not affect retained EU law. Even if the CJEU makes a decision to void regulation after exit day, as he pointed out, that law would remain on the UK statute book as retained EU law. This is because the EU withdrawal Act takes a snapshot of EU law as it stands on exit day. All law on the UK statute book at that point in time will be valid, as a result of it being made law under the EU withdrawal Act. After exit, it will be for Parliament to decide if and how to diverge from EU law.

I take the noble Lord's point that, although unlikely, this may result in a law being declared void in European Union countries but not declared void in the UK. It is just a matter of policy disagreement. We would prefer that, after exit day, the Court of Justice of the EU is not given the power to strike down what will in effect be UK law at that point. However, I am sure that if such a circumstance arose, Parliament would want to take a look at the case, see if similar provisions should be made in the UK and see if the law should be changed or deleted.

In response to the noble Baroness, Lady Hayter, I can confirm that, in the unlikely event of this happening, we will of course closely monitor all pending cases that come back to Parliament with potential changes to any retained EU law. Building on that response, the rulings of the CJEU will not be binding on the UK. It would be for Parliament to decide whether to seek changes to mirror CJEU judgments.

The noble Baroness also asked about damages. Damages are already determined by UK courts. Nothing in this SI changes that scenario.

To answer both the noble Lord, Lord Beith, and the noble Baroness, Lady Hayter, the SI will be required in both a deal and a no-deal scenario. Therefore, if we agree a deal and pass a withdrawal Act, the effect of the SI will be delayed until the end of the implementation period.

The noble Baroness, Lady Hayter, also asked a good question about whether there are other instances where the courts must notify the Government of cases that are before them. The courts must issue a notice to UK Ministers and Ministers from the devolved Administrations in cases where it plans on making a declaration of invalidity. This is similar to the requirement under Section 5 of the Human Rights Act, when domestic courts issue declarations of incompatibility under that Act.

Without these regulations, no court in the UK would have the requisite jurisdiction to consider the validity of an EU instrument. Domestic courts would therefore find themselves at an impasse where a ruling on validity is simply not available, either domestically or from the CJEU. This would in turn prevent the effective delivery of justice. These regulations are intended to avoid such a clearly undesirable scenario. As I said in my introduction, my department has worked closely with the Ministry of Justice to make sure that the regulations are workable. The judges and Her Majesty's Courts & Tribunals Service are well aware of these changes.

As I also said, these regulations provide that a Minister of the Crown, a Scottish Minister or a Welsh Minister or a Northern Ireland department may become a party to any cases concerning validity at any point. There are no impediments for the devolved Administrations to do so; they need only give written notice to the court. Again, this is in recognition of the fact that they may have an interest in the outcome of the case.

Although the number of validity challenges will be extremely small, it is none the less vital, as the noble Lord, Lord Beith, pointed out, that we ensure that justice can still be delivered in the few cases in which these regulations might apply.

*Motion agreed.*

## Public Procurement (Amendment etc.) (EU Exit) (No. 2) Regulations 2019

*Motion to Approve*

*3.41 pm*

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

That the draft Regulations laid before the House on 11 February be approved.

**Lord Young of Cookham (Con):** My Lords, the Government are committed to securing an agreement on the UK's exit from the EU but we must be prepared for all outcomes, notwithstanding yesterday's votes. It is for this reason that I am today bringing forward two sets of regulations for approval: the Public Procurement (Amendment etc.) (EU Exit) (No. 2) Regulations and the Public Procurement (Electronic Invoices etc.) Regulations. To be clear, in the event that the UK enters into a withdrawal agreement with the EU, the first of these sets of regulations will not be required.

The amendments in the Public Procurement (Amendment etc.) (EU Exit) (No. 2) Regulations do not amount to a material change in public procurement policy but, to all intents and purposes, maintain the status quo for UK contracting authorities with regard to their obligations towards certain non-UK suppliers. They will ensure that the UK's procurement system continues to function as intended post-EU exit in the event of no deal, and grant certainty to UK contracting entities that they can continue to procure goods and services in the same way as they do now after exit day. In this way, the Government are ensuring that these entities continue to be able to obtain value for money for UK taxpayers.

As noble Lords will be aware, the UK Government are working to secure continuity agreements with a number of our international trading partners, which will replicate as closely as possible trade agreements to which the UK is currently a party via its EU membership. We have already laid before Parliament agreements with Switzerland, Israel and Chile. All these agreements contain substantial provisions on procurement, which will provide UK businesses with guaranteed access to lucrative procurement markets in those countries. Where the UK has entered into an agreement which contains provisions relating to public procurement, we must ensure that our domestic procurement legislation takes account of the obligations in that agreement.

In their current form the Public Procurement (Amendment etc.) (EU Exit) Regulations 2019, which were approved by this House on 20 February, would amend the existing procurement regulations so as to disapply, from exit day, the duties which UK contracting authorities currently owe towards economic operators from countries with which the EU has a trade agreement containing procurement provisions. Regulation-making powers in Clause 2 of the Trade Bill currently before Parliament would then enable the UK to reinstate these duties in such a way as to reflect the UK's transitioned continuity agreements, rather than the EU agreements which these replicate and to which of course the UK will no longer be party after exit day.

As noble Lords will be aware, the Trade Bill is yet to complete its parliamentary passage. In the consequent absence of bespoke implementing powers in that Bill, we have had to look at other measures which would enable the UK to demonstrate compliance with the agreements that we have worked hard, and continue to work hard, to conclude. It is the duty of a responsible Government to ensure that, once we have left the EU, we continue to reap the economic benefits that these agreements bring. It is also our duty to uphold our reputation as a valued and respected trading partner, by ensuring that the obligations we have committed to maintaining after our withdrawal from the EU are adhered to.

[LORD YOUNG OF COOKHAM]

I am therefore bringing forward this second EU exit instrument, which will amend the first such instrument before it comes into force so that, instead of removing from the procurement regulations the obligations owed by UK contracting authorities and other entities towards non-UK suppliers immediately on exit day, that first SI would preserve these obligations for a period of 18 months after exit day. The need for there to be a second, amending instrument was referred to during debate on the first EU exit instrument in the other place: specifically, during its consideration in the Delegated Legislation Committee on 13 February.

In practical terms, this preservation of obligations will have the effect of ensuring that, for a time-limited period, suppliers from certain non-EU trading partners will be afforded the same guaranteed rights of access to UK procurement markets that they enjoy now. This mirrors a similar provision already contained in the first SI in respect of suppliers from states which are party to the WTO government procurement agreement. That provision has already been approved by this House, but it is being extended so that it aligns with the other provisions in this instrument. By keeping alive the duties owed by contracting authorities as they exist already, the Government are ensuring that the UK can continue to meet its international procurement obligations. In turn, that will help to ensure that UK businesses continue to enjoy access to overseas public procurement opportunities and that UK contracting authorities can continue to obtain the best possible value for money when procuring, through robust supplier competition.

Noble Lords may at this point be wondering why, when the UK is leaving the EU, it is appropriate to preserve obligations arising from EU agreements to which we are no longer party, and whether doing so may produce any adverse effect on British businesses and authorities. The procurement obligations which arise from the UK's continuity agreements are, in essence, the same as those which have arisen until now from the EU's trade agreements, meaning that the amendments in this instrument represent a temporary technical solution to complying with the UK's international procurement obligations until such time as the Trade Bill is enacted.

I reassure noble Lords once again that, in practical terms, the provisions in this instrument amount to a time-limited continuation of the status quo, which will create no additional burdens or costs for UK businesses or contracting authorities. Public sector contracting authorities and other covered entities across the UK will continue to be able to procure competitive goods and services from overseas suppliers as they do currently; and UK businesses will see no change as a result of this instrument in the way they go about bidding for and winning lucrative public contract opportunities, both in the UK and in countries with which the UK has a trade agreement. It is for this reason that it has not been necessary to publish an official impact assessment.

In summary, this instrument will ensure that the UK's procurement system will continue to function as intended post EU exit in the event of no deal; that the UK can successfully ratify and comply with its international continuity agreements; and that UK suppliers and contracting authorities can continue to operate as they do now for the foreseeable future.

I now turn to the second of the two instruments: the Public Procurement (Electronic Invoices etc.) Regulations 2019. Unlike the other SIs which we have been debating today, we will need this if we secure an agreement—as I hope we will. In the event that the Government enter into a withdrawal agreement with the EU, we will be required, under the terms of this agreement, to continue to comply with EU procurement law during the implementation period. That includes this directive, which concerns electronic invoicing in public procurement. It is a short and simple measure which aims to promote the uptake of electronic invoicing in public procurement by requiring public bodies to accept electronic invoices from their contracted suppliers. Principally, this instrument is to transpose the e-invoicing directive; it also makes a small number of other technical corrections to the public procurement rules. There are numerous different types of e-invoice used across the EU. These varied formats cause unnecessary complexity and high costs for businesses and public bodies.

There are significant benefits to be realised in promoting the uptake of standardised electronic invoicing in public procurement, both in terms of a reduction in costs and administrative burdens for procuring entities and their suppliers and in terms of the environmental impact of a move away from paper-based invoicing. That is why, in 2014, the EU adopted Directive 2014/55 on electronic invoicing. This instrument transposes the e-invoicing directive into domestic law. It does so by amending existing procurement legislation applicable to the award of public contracts and contracts in the utilities sector. The Scottish Government have brought forward their own legislation to give effect to the directive, in similar terms to this instrument.

The directive contains one simple obligation for member states: to take the necessary measures to require public sector buyers and utilities to receive and process electronic invoices that comply with a common standard. Private sector suppliers, other than those privatised utilities remaining subject to public procurement rules, will not be obliged to use the e-invoicing standard unless they wish to do so. We are not imposing additional costs on suppliers. The measures we have introduced would oblige contracting authorities and other procuring entities to include within their contracts an express term requiring them to accept and process electronic invoices that comply with the standard where, of course, there is no dispute as to payment. In the absence of an express provision of the contract dealing with electronic invoicing, a term to that effect is to be implied. In that way, suppliers will be able to enforce their ability to invoice purchasers of goods and services electronically via the terms of the contract itself.

The European Committee for Standardization—CEN—was commissioned to draft the standard and the British Standards Institute was involved in its development. The standard was published in October 2017, following which the UK had 18 months to implement the directive's requirements. The deadline for implementation is 18 April 2019. This falls after the date on which it is anticipated that the UK may

leave the European Union. However, it remains the Government's aspiration and intention that the UK will secure a deal with the European Union. We would then enter a period of implementation, as provided for in the withdrawal agreement, during which the UK would continue to be bound by most aspects of EU law, including the e-invoicing directive. This instrument is, therefore, expressed to come into force on 18 April 2019.

For sub-central contracting authorities, such as local authorities and utilities, the directive confers on member states the discretion to postpone the application of implementing provisions until 18 April 2020 and we have taken advantage of that derogation. It is right that we allow procuring authorities, other than central government authorities, time to adapt to the change, although there is of course nothing to prevent those authorities from accepting electronic invoices prior to that date. In the event of no deal being reached by 29 March, we are free to implement the European e-invoicing standard and we will consider the options available to us for this instrument. The UK will be free to set its own policy on electronic invoicing.

As set out in further detail in the Explanatory Memorandum, we have also taken the opportunity in this instrument to make minor amendments to the way in which the Public Contract Regulations 2015 and the Concession Contracts Regulations 2016 refer to offences under the Modern Slavery Act 2015. The aim of the amendment to the Public Contract Regulations 2015 is to ensure legal certainty as to which offences under the Modern Slavery Act constitute grounds for mandatory exclusion from award of a contract. More specifically, the amendment omits a duplicate reference to offences under Sections 2 and 4 of the Act. That duplicate reference was included in error in 2016.

For the Concession Contracts Regulations 2016, the amendment is to ensure that offences under Section 1 of the Modern Slavery Act 2015 are included within the mandatory grounds for exclusion from participation in a concession award procedure, and ensure consistency in the grounds for exclusion across the procurement regulations. With this instrument, therefore, we have the opportunity to provide real benefits to both the supplier community and the public sector, and I look forward to seeing it progress through both Houses.

I hope noble Lords will agree that both sets of regulations brought forward today are necessary for the UK to adhere to the commitments it has made, both in its trade continuity agreements and under the terms of the withdrawal agreement. I hope they will also agree that these instruments will provide benefits to the public sector and to UK businesses. I commend them to the House.

**Viscount Waverley (CB):** I wonder whether the Minister's notes allow him to comment on the following and, if not, he will agree to write. Currently, all UK public sector opportunities are published on Tenders Electronic Daily—TED—which is the EU service on which all public sector tender opportunities within the European Union are listed and updated, constantly. What might be the plan for UK public sector tender opportunities either to continue to be published on Tenders Electronic Daily or to be published separately? If so, where might they be published?

**Baroness Neville-Rolfe (Con):** My Lords, I welcome the opportunity to debate these SIs, but I have one or two questions of clarification. Luckily, the Minister has already answered my question about the Modern Slavery Act.

As I understand it, the first of the two SIs, in practice, relates to third-country public procurement by the UK. I admit to having a concern about the interests of our own UK businesses and small operators that are involved in procurement. I refer to my registered interests, just in case any might be affected, although the impact assessment suggests that the impact of this order is negligible.

My experience is that we in the UK are more punctilious about enforcement of procurement rules based on,

"transparency, non-discrimination, equal treatment and proportionality",

and the remedies for breach of any of those; I picked up the wording from paragraph 6.2 of the Explanatory Memorandum. Perhaps the Minister would be kind enough to comment on the risk that the changes will put us at a future disadvantage and not be fully reciprocated by the third countries concerned in the procurement process. If there is a risk, how long will it last? The SI lasts for 18 months, but I am not clear whether that is 18 months altogether or 18 months during which contracts might be let. Of course, procurement contracts often go on for many years.

I was sorry to see that there was no public consultation on this SI, but perhaps my noble friend the Minister can let me know if any concerns have been raised since the SI was published. I fully support the second SI on electronic invoicing. The UK has led the charge in Brussels on permitting businesses and citizens, and people around the world, to take advantage of the magic of online. That includes invoicing, contracts and many basic things. Both in business and as a Minister, this is an area that I have strongly supported and I am glad to see that electronic invoicing continues to apply. Our support for online should continue in third-country and EU procurement, although I know that the latter may be more peripherally affected on this occasion.

**Lord Arbuthnot of Edrom (Con):** My Lords, I wonder whether my noble friend can help me. In view of the contingent nature of these SIs, is it the Government's policy to honour the result of last night's vote in another place?

**Lord Beith (LD):** My Lords, that is a question I shall leave on the charge sheet for the Minister to deal with in a moment. Indeed, there is a wider political question around these statutory instruments to which the Minister delicately referred, in careful language, which is that there are those Brexiteers who argued for Britain's departure from the EU on the basis that we would be free of all these rules and restrictions, including those which, in sum and on balance, genuinely benefit

[Lord Beith]
British industry but which do not always suit either a particular business or a local authority which wants to give the business to some more local concern. This was one of the things that was so often quoted during the referendum debate as something we would get rid of, whereas most of us knew that these were so much to our advantage that, even if Brexit did happen, we would retain many of them, as we see is happening today.

*4 pm*

I thank the Minister for explaining the two statutory instruments, displaying his usual ability, which we all need to emulate, to acquire and deploy new knowledge in areas that might not hitherto have been familiar; he does it so well. First, I have a technical point about the coming into force. I was rather puzzled that the exiting the European Union public procurement order uses a different formula from most of the other no-deal statutory instruments that we have been dealing with, because it comes into force "immediately before exit day". Almost all the others I have dealt with come into force on exit day. Of course, for this purpose, exit day might be a moveable feast, in the light of discussions happening at the other end of the building. I also take it that this statutory instrument would be suspended by a withdrawal agreement Bill, if there were such an agreement and such a Bill: that would be the mechanism for deferring its operation until the actual exit day.

Both these orders seem to be pragmatic responses to the need to maintain things which have proved of real value from our work in the European Union—work which has often been led by the UK and has led to beneficial multinational and international commitments. The order I have started with explicitly allows for a transition as we move towards a wider range of countries being involved in agreements of this kind. That is very welcome and something we would want to encourage. It always seems a bit perverse when we amend statutory instruments passed only last year, but it seems to be the way of things at the moment.

The other order, the one about electronic invoices, is again something we developed together with other European countries, valuably, but of course it is different in character because it is part of the ongoing work we are engaged in as current members of the EU, rather than being a special provision for EU exit. It introduces, in effect, the EU-wide regulations. It aims to modernise and reduce costs for public procurement invoicing and we certainly support that. It is welcome and has the potential to allow efficiency savings across the public sector, but British companies will lose out on EU funds to implement this if they have not already applied for them. It is not clear to me whether any provision will be made by the Government for those companies that move into this process later, when they can no longer take advantage of the Connecting Europe Facility—the CEF programme—from which funding is currently available for companies engaging in this kind of improvement. This seems to me something that is desirable and to be encouraged and is a reminder that our participation in the European Union has been the source of many benefits which we do not want to throw away: many of us would prefer not to be engaging in this operation at all, but if it is to happen, let us preserve the best of what we have achieved.

**Baroness Hayter of Kentish Town (Lab):** I join the congratulations to the Minister for the breadth of expertise he brings each time he does one of these. We will now test him with some questions.

I turn first to the Public Procurement (Amendment etc.) (EU Exit) (No. 2) Regulations, which, as the Minister set out, require contracting authorities for 18 months after exit to continue to meet the obligations to third countries which have procurement arrangements with the EU. As he said, it is an obligation on which we legislated recently—it was actually in February of this year, just a few weeks ago. That SI also provided for the eight-month period concerning signatories to the WTO government procurement agreement.

I have just three points arising from that. One to which I know he will not want to reply concerns the complete chaos in government which makes this sort of change necessary. We do not know when we are going to leave; we do not know whether there will be a deal; we have no idea what sort of trade agreements will exist, either with the EU or with other countries; and we have absolutely no idea if or when we will see the Trade Bill back in the Commons, let alone on the statute book—and of course it is the Trade Bill that the SI in February would have covered. In fact, now that in this House we have made sure that the Trade Bill rules out being commenced if there were to be no deal—and that we have included in it a requirement for the customs union—I have a funny feeling that the Bill might do a slippery little disappearing trick. In a sense, that is symptomatic of where we are at the moment. We are having to do legislation on the hoof. It is two weeks tomorrow that the Government still seem to think we might be able to leave the EU, and we are still having to do these little amendments.

My second question, to which the Minister will probably be more willing to respond, is on the substance of this SI. I understand the purpose: it is, a bit like the noble Lord, Lord Beith, said, to make up for the botched idea of Messrs Fox, Johnson, Rees-Mogg and the others that coming out of the EU was simple and painless. In fact, it raises lots of issues, and my major concern is exactly that mentioned by the noble Baroness, Lady Neville-Rolfe. While these regulations preserve the rights of suppliers within the EU system to have fair access to UK procurement, there is nothing in the Explanatory Memorandum to indicate whether reciprocity has been negotiated. Obviously it could not be allowed for in a domestic SI, but we are hoping that it has been negotiated so that our UK suppliers will have equal access to the procurement markets of interest to them during the various transition periods allowed for in these regulations. Could the Minister clarify whether such reciprocal access has been similarly preserved, albeit understandably not in a bit of UK domestic legislation?

If it is not provided for, it looks on the face of it as if these regulations unilaterally maintain the openness of our procurement market to a number of countries across the world—allowing them access to enjoy the benefits of our procurement market, which I appreciate

can also be good for our procurers—without any assured obligations in return. It would be a bit like throwing British industry under the proverbial bus, competing with non-UK companies here and unable to compete elsewhere. Given yesterday's 7 am announcement on tariffs, which is already frightening a number of businesses, some reassurance here would be very welcome. I know that at an earlier stage the Minister in the other place simply said that he would "expect" reciprocity, but a Minister's expectation is probably not sufficient for those companies that need a degree of certainty on this issue. They need to know whether they are going to be able to bid for outside contracts.

My third point—although I appreciate that it might be only the second to which the Minister wishes to respond—is that we know from the Department for International Trade that the Government are anticipating what they call a short gap between the "in principle" agreed accession to the GPA and the "in law" joining of the GPA by the UK. When we did the earlier SI, I think we were told that the gap was because a number of countries needed to agree to our signing up. Could the Minister update us on how long the Government anticipate that the gap would be? Is it days or weeks? I hope it is not months.

The second instrument is a deal rather than a no-deal SI about electronic invoicing. Rather like the noble Baroness, we support anything that promotes the uptake of electronic invoicing in public procurement. I will ask only a couple of questions. First, if we leave two weeks tomorrow—although that does not look likely—can we assume that the regulations would apply, albeit on a voluntary basis, until April of next year, and that they would therefore apply immediately on exit, introducing that common standard that was agreed by the BSI in 2017, which would come in immediately as a standard for government, albeit not for the other authorities for another year? Once they have been introduced, whether it is this year for government or over a longer period for other agencies, what would happen if we were outside the EU at that stage and its European standards were reviewed and amended? Does the UK remain a party to discussions that take place on the standards in the European Committee for Standardisation, where the BSI has been Britain's voice? Will we retain, through the BSI, a role in the standard-setting done by that committee after we have left? Would we then be able, if we wished, to adapt our own standards and the regulations that go with them so that they continue to follow those in the EU, even if we are outside it, in order that suppliers in particular will use the same format for invoicing, whether they are invoicing in our public procurement system or in that of other countries?

Secondly, when my honourable friend asked a question in the other place she received no reply at that stage—but that was a week ago, so I hope that the Minister now has an answer. It touches on the issue raised by the noble Lord, Lord Beith, on what support might be available for small businesses. At the moment, the Connecting Europe Facility provided, I think, €430 million between 2014 and 2016 to help UK businesses adapt to these types of changes—but, obviously, after we leave that source of funding will not be there. While the regulations will always remain voluntary, so businesses will not have to do that, we also know that if they do not use electronic invoicing, their paper invoices might be settled a little more slowly than if they were able to use it. Therefore, even though these standards will remain voluntary for businesses, it is obviously important for their cash flow and liquidity that they are able to do the e-invoicing and adapt to it, and in particular to the new standards that will come in. Once we leave the EU and do not have access to the Connecting Europe Facility funding, will the Government commit themselves now to replacing that sort of funding for issues such as these, which are, after all, laid down in legislation?

Finally, as a final cheeky little question, will the Minister confirm that the Government always use e-invoicing themselves, including between departments?

*4.15 pm*

**Lord Young of Cookham:** I am grateful to all noble Lords who have taken part in this debate. On the last question, the fast ball which the noble Baroness bowled, I shall have to take advice on the extent to which the Government use electronic invoicing when they invoice. Of course, under the regulations, we will be obliged to process e-invoices if they arrive, but it is a good question and I shall make inquiries on the extent to which we are up to speed on e-invoicing.

As I said, I am grateful to all those who have taken part and will try to go through the questions asked—not necessarily in order. The noble Lord, Lord Beith, asked what would happen if there was an agreement. The answer is that the SI would indeed be suspended, probably by the withdrawal Act. It would be switched off, as with a lot of the other no-deal SIs which have already been passed.

The noble Viscount, Lord Waverley, asked about the plan for the UK public sector and the arrangements for publication of notices on the OJEU TED. The withdrawal agreement provides for publication of notices on that site. If there is no deal, the UK has developed its own UK e-notification that will be ready for exit date if it is needed. This is called the Find a Tender Service—FATS. Details were set out in the Explanatory Memorandum to the first EU exit instrument and published in a procurement publicity notice, the latest of which was published on 7 February.

My noble friend Lady Neville-Rolfe asked what the impact of the SI would be. The basic thrust of the SI is to ensure that there is no change, so, to the extent that there already is a problem, it makes it neither worse nor better: it is neutral. On the issue of public consultation, because the SI imposes no new regulatory burdens on UK businesses and as, as I said, its purpose is to maintain, in so far as possible, existing obligations on contracting authorities as regards suppliers, it has no direct impact on the public sector or the private sector, so it has been unnecessary to undertake consultation with industry. I shall come to my noble friend's other points in a moment.

The noble Lord, Lord Beith, asked why this will come into force immediately before exit day, whereas everything else comes into effect on exit day. This SI comes into force immediately before exit day because it needs to amend the first SI before that one comes into force at the start of exit day, so we need to cancel

[Lord Young of Cookham]
the SI to which the noble Baroness referred before it comes into effect. That is why that has to be done the day before, but we hope that none of this will be necessary. The provision will expire after 18 months, after which guaranteed access will cease for suppliers from countries with which we have not made a continuity agreement.

My noble friend Lord Arbuthnot asked about last night's vote. I hope that the Government will respect the decision of the other place. As my noble friend knows, the legal default in UK and EU law remains that the UK will leave the EU without a deal unless something else is agreed. We are planning for all eventualities with this SI, but I very much hope, as I am sure my noble friend does, that there will be an agreement and we will not need to leave without a deal. As former Members of the other place—as are a number of those who contributed to this debate—I am sure that we hope that the view expressed yesterday there will be respected.

The noble Baroness, Lady Hayter, and other noble Lords raised the issue of EU funds being available to support. As she said, no small business will be obliged to use e-invoicing. I am afraid that I do not have a direct answer to her question. The Government have guaranteed that certain grants paid out by the EU before we leave will be funded by the Government up to a certain date. I do not have the details to hand to say whether that guarantee applies to this particular funding issue but I undertake to write to noble Lords with the details. On whether certain invoices would go further down the queue if they were not e-invoices but paper ones, we have very strict rules about the prompt payment of invoices, whether they are e-invoices or paper ones. Certainly as far as the Government are concerned, there would be no such discrimination.

**Baroness Hayter of Kentish Town:** Does that apply to the Cabinet Office, which I gather has a rather bad record on paying promptly?

**Lord Young of Cookham:** I did not catch the noble Baroness's last words, but the Cabinet Office sets the targets so I would hope that it would be the first government department to ensure that it met them. If she has a specific invoice in mind, I will certainly make inquiries.

**Baroness Hayter of Kentish Town:** For the record, it was noted in the other place—this may well have been because of a glitch—that the Cabinet Office has one of the worst records on this matter. There were assurances that this would change but it is a bit frightening when the department supposed to be leading on prompt payments is not itself very good.

**Lord Young of Cookham:** I stand rebuked on behalf of my department. I will make further inquiries about our prompt payment record and write to the noble Baroness and noble Lords who took part in the debate.

I was asked what would happen to this SI in the event of Article 50 being extended. I think I answered that. The withdrawal Act confers powers to enable the Article 50 period to be extended pending further negotiations so that the definition of exit day can align with the date and time that the EU treaties cease to apply.

On the 18-month extension, if no deal with the EU is reached and we do not yet have powers enabling us to give effect to the UK's obligations under its own international agreements, the 18-month extension of rights would begin from the new exit day.

My noble friend Lady Neville-Rolfe made the point that we may be more punctilious in enforcement than other countries, and asked how we can guarantee reciprocal access. As I said, the SI makes no change to the terms of trade she referred to, but we are working with other countries to agree continuity agreements. Many of our discussions are at an advanced stage; some have already been agreed. That will ensure that our access is reciprocated. We will also have guaranteed access to markets in GPA countries, which account for the majority of contract opportunities by value to which the UK currently has access. All our agreements contain provisions relating to remedies for suppliers that have been treated unfairly.

I have just received some in-flight refuelling concerning the serious allegation made by the noble Baroness, Lady Hayter, about prompt payment. She is absolutely right that there was a decline in Cabinet Office prompt payment, which was due to the adoption of a new invoicing system—straight out of "Yes Minister". That problem is common in other departments. I think I updated either her or another Opposition Member in the House on our progress in that regard a couple of weeks ago. In fact, in recent months, we have come back up to standard in the speed of prompt payments, but I would be happy to write to her to set out those figures in detail.

Turning to whether we will still have access to EU procurement markets if we keep EU obligations, after exit, UK businesses will still enjoy guaranteed access to many of the same procurement opportunities in the EU covered by the WTO's government procurement agreement through the UK's GPA membership. This provides access to £1.3 trillion of contract opportunities annually. However, the EU-linked continuity obligations, which we are retaining in this instrument, are obligations towards non-EU countries and so do not have a bearing on UK suppliers' access to public procurement opportunities in the EU.

The noble Baroness, Lady Hayter, asked when we are expecting formally to accede to the GPA. As I think she knows, the GPA committee formally adopted a decision on the UK's accession to the GPA in its own right at a meeting in Geneva on 27 February. At the moment we are members through our membership of the EU. The Government intend to deposit their instrument of accession by exit day in a no-deal scenario. Once we have deposited the instrument of accession, there will be a period of 30 days before it takes effect. We are exploring solutions to mitigate the impact of any short gap in the UK's GPA participation. That is the responsible thing to do and it aims to minimise to the greatest extent any impact on business. In fact, the Government are expecting the short gap in participation

to have a minimal impact on UK businesses. In many cases, UK suppliers will have similar rights under the domestic laws of the relevant jurisdiction.

I was asked about the BSI and our continued membership of CEN. CEN is a European institution rather than an EU one. I have a press release from the BSI which states that,

"following the decision taken in the general assemblies of both organizations, BSI will continue to be a full member of CEN and CENELEC regardless of the conditions under which the UK leaves the EU, including in the event that the UK leaves the EU without an agreement".

I hope that gives the noble Baroness the assurance she seeks.

**Baroness Hayter of Kentish Town:** My Lords, on CEN and CENELEC, I think the one that dealt with this was the standards one. If it is a different one, perhaps the noble Lord would care to write to me. I refer to the European Committee for Standardization as opposed to CEN and CENELEC, which deal with electrical safety. Some clarification by letter would be helpful.

**Lord Young of Cookham:** My understanding is that the BSI will continue to be involved in any future discussions about e-invoicing and standards, but I will certainly write to the noble Baroness.

I think that I have come to the end of the issues raised by noble Lords, but if by chance I have left any out, I will of course write. I beg to move.

*Motion agreed.*

## Public Procurement (Electronic Invoices etc.) Regulations 2019

*Motion to Approve*

*4.26 pm*

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

That the draft Regulations laid before the House on 31 January be approved.

*Motion agreed.*

*House adjourned at 4.27 pm.*