



THE SIFT PROJECT

Plus ça change? Brexit and the flaws of the delegated legislation system

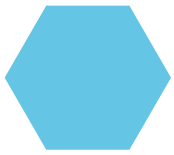
Alexandra Sinclair and Joe Tomlinson



Public
Law
Project

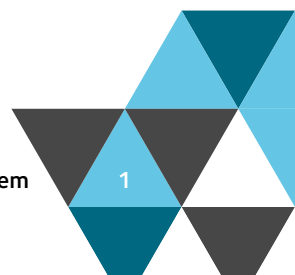


If you have any questions arising
from this report, please contact:
Alexandra Sinclair
a.sinclair@publiclawproject.org.uk
or
Dr Joe Tomlinson
j.tomlinson@publiclawproject.org.uk



Contents

	The Public Law Project and The SIFT Project	2
	<i>Plus ça change?</i> Brexit and the flaws of the delegated legislation system	3
	Foreword	4
	Introduction	5
	Anxieties about delegated legislation	7
	Delegated powers for EU withdrawal	15
	The problems with Brexit delegated legislation	20
	Towards reform?	29
	References	31



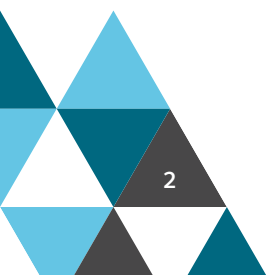


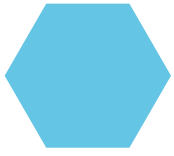
The Public Law Project and The SIFT Project

The Public Law Project ('PLP') is an independent national legal charity. We work through a combination of research, policy work, training and legal casework to promote the rule of law, improve public decision-making and facilitate access to justice.

PLP takes no position on the UK's decision to leave the EU. Rather, our work on Brexit seeks to promote Parliamentary sovereignty, ensure that the Executive is held to account and protect the interests of disadvantaged groups.

The SIFT Project was established in January 2019 to scrutinise the statutory instruments created to facilitate Brexit, to check they conform to public law standards and do not undermine fundamental rights. SIFT stands for Statutory Instruments: Filtering and Tracking.





Plus ça change? Brexit and the flaws of the delegated legislation system

Alexandra Sinclair* & Joe Tomlinson⁺

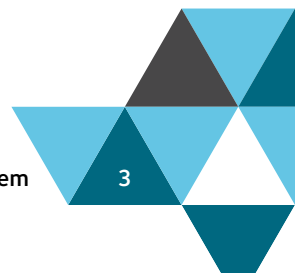
The UK's withdrawal from the European Union led to a tsunami of delegated legislation, provoking a re-examination of long-held anxieties about the role of delegated legislation in the contemporary constitution. In this report, we provide an account of Brexit delegated legislation from the 2016 referendum until Exit Day, arguing that, while the system as a whole has coped surprisingly well during this time, anxieties about delegated law-making have gained fresh traction. While Brexit is a powerful case study, the problems are essentially structural design problems within the current system of delegated law-making. If Brexit is to be an opportunity for national legislative renewal, the moment is ripe for these anxieties to be confronted squarely. Through our analysis, we highlight areas in need of reform that will foster the making of better law in a modern state that often needs to make lots of law quickly.

* Research Fellow, Public Law Project.

We are grateful to many people for discussions over the course of multiple years researching delegated legislation. We owe a particular debt of gratitude to Alison Pickup, Jeff King, Adam Tucker, Tom de la Mare QC, Ruth Fox, Brigid Fowler, Angela Patrick, Jack Simson Caird, Tom West, Tamara Hervey, Charlotte O'Brien and particularly the Hansard Society for its support. We would also like to thank the barristers who assisted with reviewing statutory instruments: Jack Williams, Ciara Bartlam, Tim James-Matthews, Charles Bishop and Leonie James. All views are our own.

+ Senior Lecturer in Public Law, University of York; Research Director, Public Law Project.

This report would not have been possible without the grants provided by Unbound Philanthropy and The Legal Education Foundation. The Public Law Project would like to thank them for their generous and continuing support.





Foreword

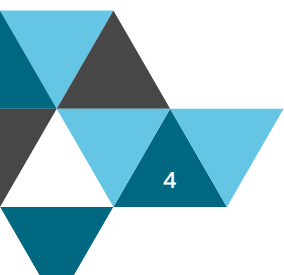
The United Kingdom is not unique in struggling to provide effective scrutiny of executive law-making. Nor is that struggle a new one: the use of delegated legislation to make policy, and the grant to the executive of power to amend Acts of Parliament by “Henry VIII clauses”, were first recognised as problematic almost a century ago.

Yet by running the legislative system at unprecedented speed, it is Brexit that has laid its defects bare. The challenge of filling the void left by EU withdrawal has prompted several skeleton Bills, replete with Henry VIII clauses, and hundreds of Brexit statutory instruments, many of them highly significant. Even when insufficiently consulted upon, explained or justified, the latter are unamendable and cannot be voted down without a constitutional crisis – as the House of Lords was reminded last time it took such a step, in 2015.

The authors report that regulations withdrawn last year would have allowed officials to amend statute, astonishingly, “by updating a website”. Minds were concentrated on that occasion by the Public Law Project’s threat of judicial review. But the democratic legitimacy of our law-making process cannot be ensured by courts alone. Parliament needs to find better ways of making its own voice heard.

David Anderson

Lord Anderson of Ipswich KBE QC





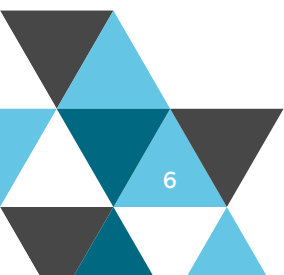
Introduction

Delegated legislation, not primary legislation, is, and has been for some time now, the principal law-making technique of the UK state. This is often seen as a necessary reality of maintaining a modern regulatory state. At the same time, this arrangement has been a persistent cause of anxiety over the last century.

The UK's withdrawal from the European Union led to a tsunami of delegated legislation, provoking a re-examination of those long-held anxieties in the context of the contemporary constitution. Two questions sit at the heart of any such re-examination. The first is descriptive: how were Brexit statutory instruments (SIs) managed? The second is interpretive: what does the story of Brexit tell us about the role of delegated legislation in the modern constitution and the anxieties that have been expressed about its role?

In this report we address both of these questions. We provide an account of Brexit delegated legislation from the 2016 referendum until Exit Day,¹ arguing that, while the system as a whole has coped surprisingly well during this time, anxieties about the delegated law-making process have gained fresh traction. We further argue that, if the UK's withdrawal from the European Union is to be an opportunity for national legislative processes to be taken more seriously, the moment is ripe for these anxieties to be confronted squarely – not on the basis of the exaggerated fears about delegated law-making that characterised earlier debates, but with an experience-led view to incremental reform that will foster the making of better law in a modern state that often needs to make lots of law quickly. Our analysis can inform what reforms may be needed.

This report has three parts. The first part explores the various concerns that have arisen in relation to delegated legislation over the last century. We identify eight specific points of sustained anxiety. The second part considers the legal framework enacted to enable the making of Brexit delegated legislation, showing it to be both representative of but also sensitive to extant anxieties. The third part of the report analyses the experience with Brexit delegated legislation, focusing on areas of practice that have proven to be problematic and generated renewed concern.





Anxieties about delegated legislation

The delegated legislation system in the UK Parliament has a certain configuration which is important to explain at the outset (see *Table 1* for a comparison of the key features of primary and delegated legislation). In practice, legislation is effectively made by ministers with the approval of Parliament. The parliamentary process that an instrument passes through varies. If an instrument is made negative (negative and affirmative are labels given to the instruments which determine the level of scrutiny required of them), an SI is laid before Parliament after it has been made into law by a minister. However, it can be annulled if it is prayed against in either House within 40 days. If an instrument is made affirmative, the SI is also laid before Parliament after it has been made into law by a minister. However, it will not continue to be law unless it is approved by the House of Commons and, typically, the House of Lords within a defined period (which is usually 28 or 40 days). If an SI is produced as a draft affirmative, it is laid before Parliament as a draft and cannot be made into law by the minister unless and until it has been approved by the House of Commons and, typically, the House of Lords. Delegated legislation is not amendable by MPs or members of the House of Lords but it is open to judicial review in the courts.

Since the early 20th Century, a similar bundle of concerns about delegated legislation's uses and misuses have recurred. Many respected commentators of the day, including Sir Cecil Carr and Lord Hewart, who famously penned *The New Despotism*, saw the use of delegated legislation as in need of close examination.² In 1932, the Donoughmore Committee was convened, following debate during the inter-war years.

Table 1: Key differences between primary and delegated legislation

Feature	Delegated legislation	Primary legislation
Who makes it?	Ministers, with the approval of Parliament	Parliament
By what procedure?	Varies, specified in the parent act: all is subject to 'technical' scrutiny by the Joint Committee on Statutory Instruments The House of Lords Secondary Legislation Scrutiny Committee reports on significant legislation	Second Reading, Committee, Report, and Third Reading in Commons and Lords Scrutiny by Joint Committee on Human Rights and Constitution Committee and other Committees
Is it amendable?	No: MPs and peers cannot suggest improvements	Yes: much of the debate is on amendments by MPs and peers
How long is the debate?	Most is not debated at all. If there is debate, it is strictly limited to 90 minutes and rarely reaches that limit	Varies according to importance and complexity – usually many days
Can the courts review it?	Yes: the courts may apply the normal grounds of judicial review and quash delegated legislation	Not generally: parliamentary sovereignty prevents this (but the courts may make a declaration of incompatibility under the Human Rights Act 1998)

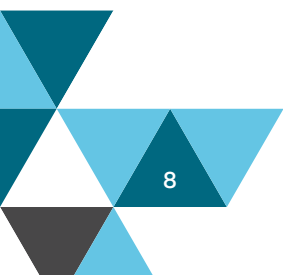
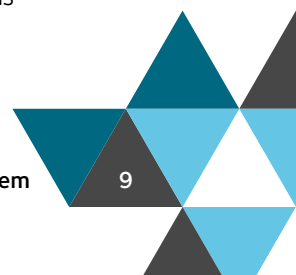


Table 2: Key anxieties about the delegated legislation system

Feature	Description	Primary anxiety
Volume	The volume of delegated legislation has increased across recent decades	Too much legislation presents an unmanageable scrutiny task for Parliament
Allocation of provisions to primary and secondary legislation	There is a lack of any central organising principles that are consistently applied to whether any given provision should be in primary or delegated legislation	Inconsistent and potentially insufficient scrutiny procedures
Significant policy is not in primary legislation	The use of delegated legislation has increasingly drifted into areas of principle and policy	Lack of appropriate parliamentary scrutiny for important legal and policy changes
Henry VIII powers	There is growing use of Henry VIII powers	Undermines parliamentary process and sovereignty
Skeleton legislation	There is growing use of skeleton bills	Marginalises scrutiny processes and pushes policy into delegated legislation
No serious risk of defeat	Parliamentary processes are virtually habituated to approve statutory instruments	Executive has a relatively free political hand
Limited opportunity for public participation	Participation extremely difficult for civil society organisations and a remote possibility for members of the general public or individual experts	Lack of external voice when laws are made and scrutiny is potentially less well-informed
Weak scrutiny procedures	Scrutiny procedures are extremely limited in time and level of detail	The scrutiny system, even at its most rigorous, is habituated to approve delegated legislation

The Donoughmore Committee had the task of ascertaining whether there were sufficient safeguards to prevent abuses of the legislative system by the executive. It concluded that delegated legislation was an ‘inevitability’ for modern government and limitations on parliamentary time made executive law-making necessary.³ It also recognised the benefits of the subject matter expertise possessed by drafters and the speed and flexibility delegated legislation offered in responding to emergencies and unforeseen events.⁴ These benefits of the system continue to exist today and their value should not be understated.

While recognising the benefits of delegated legislation, the Committee warned against the use of delegated legislation in circumstances where Parliament ‘abandoned its legislative functions.’⁵ The Committee considered the worst excesses of delegated legislation to include: where it was used to create policy; where skeleton legislation was used with the details left entirely to ministers; where Henry VIII powers allowed



ministers to rewrite, delete, and amend primary legislation, which ought to be the role of Parliament; where delegated legislation ousted the role of the court's supervisory jurisdiction; and where provisions of primary legislation were framed in such wide terms that it was impossible to know what Parliament intended when it delegated power.⁶

From one perspective, it could be said that the Committee's complaints about secondary legislation are 'exactly the same' as those made today.⁷ However, much time has passed since 1932. We therefore start our analysis here by seeking to restate the distinct strands of anxiety that have sustained over time (see *Table 2* for an overview). Our approach at this stage of our analysis is not to endorse these concerns in their general form but to conceptualise them in order to explore, in the later parts of this report, the extent to which they are valid in relation to Brexit delegated legislation in particular.

Perhaps the primary anxiety about delegated legislation stems from the simple fact of how much of it there is. While the number of Acts of Parliament has generally been in decline over the last 40 years, the number of SIs has increased (see *Figure 1* and *Figure 2*).⁸ Between 1950 and 2019 the mean number of statutory instruments laid in any one year was 2,500. The volume peaked at 4,150 in 2001.⁹ By contrast, between 2006 and 2018 the UK mean was 33 Acts of Parliament per year.¹⁰ This means that, for a long time now, delegated law-making could be considered the 'standard' form of law-making in the UK.¹¹ The high volume of delegated legislation gives rise to various concerns. Primary amongst them is that the amount of delegated legislation means there is insufficient parliamentary capacity for all of it to be appropriately scrutinised.

Second, there has long been concern about how certain provisions are allocated to primary and secondary legislation. It has been observed on multiple occasions that there is a lack of any central organising principles or criteria that can be consistently applied regarding whether any given provision should be in primary or secondary legislation. Instead, the determining factor is usually whether 'Parliament will accept the delegation.'¹² Parliamentary drafters will tend to exercise 'feel' and 'judgement' rather than apply objective criteria.¹³ What is placed in secondary legislation can also be a result of political horse-trading rather than a principled norm.¹⁴ In 2014, the then First Parliamentary Counsel, Sir Richard Heaton, observed that he was not sure 'that there are really clear principles yet that everyone is agreed on.'¹⁵ This could be problematic because there is no consistent approach to determining whether primary or secondary legislation should be used for certain types of policy proposals. Ultimately, this risks laws that arguably ought to be in primary legislation being passed through the less demanding delegated legislation procedures.

A third and connected criticism is that governments routinely use SIs to implement important policy changes and Parliament ends up almost unavoidably rubber-stamping them.¹⁶ As the Hansard Society has put it, 'delegated legislation by successive governments has increasingly drifted into areas of principle and policy rather than the regulation of administrative procedures and technical areas of operational detail.'¹⁷ There are a number of prominent recent examples, including bedroom tax reform and significant changes to legal aid eligibility.¹⁸ It has been observed that there are two main reasons why governments may seek to put

Figure 1: Volume of statutory instruments and Acts of Parliament by individual pieces of legislation

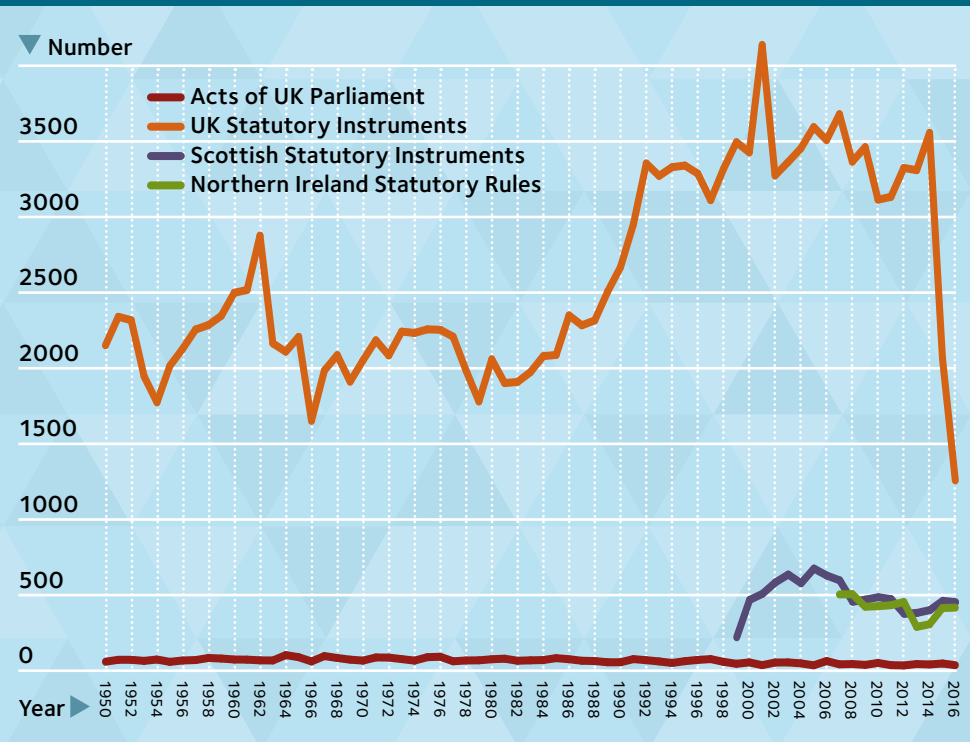
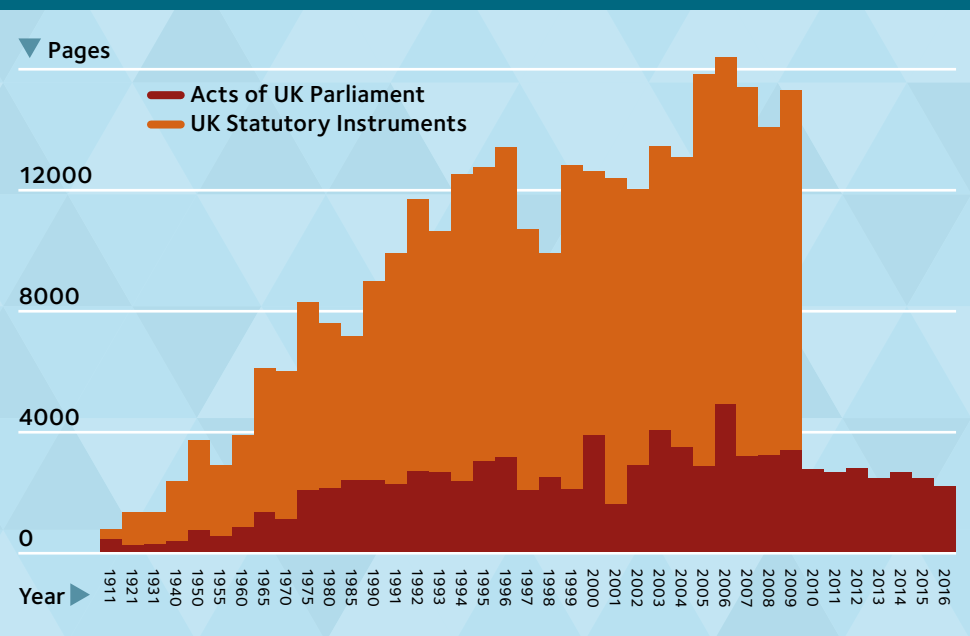


Figure 2: Volume of statutory instruments and Acts of Parliament by page number count*



*2009 is the last year for which figures in this data series are available due to changes in the way statutory instruments were published.

matters of important policy in delegated legislation.¹⁹ The first is logistical: only around 60 Acts can be passed in a parliamentary session and so the rest must go in secondary legislation. The second relates to political strategy: it is possible to manage damaging or awkward political conflicts via delegated legislation which can be ‘safely, quietly and swiftly handled in an obscure political arena.’²⁰ Whatever the rationale for the allocation of important policy change provisions to secondary legislation, the structure of the system effectively embeds incentives for governments to propose broad delegated powers in primary legislation that make it possible for ministers to effect significant policy changes in law while bypassing the full scrutiny afforded to primary legislation.²¹ The primary problem here is, again, that significant changes to law and policy risk receiving insufficient scrutiny.

Fourth, there is the well-known anxiety about the use of Henry VIII clauses – clauses which are a form of delegated power that can be used by the executive to change or repeal primary legislation.²² These clauses are widely seen as the most pernicious part of the system of delegated law-making because ‘they give the executive the authority to override the requirements of primary legislation and thereby directly violate the principle of parliamentary sovereignty.’²³ Lord Judge, a fierce critic of such clauses, described every Henry VIII provision as a ‘blow to the sovereignty of Parliament.’²⁴ From this perspective, prospective Henry VIII clauses which create a power to change Acts of Parliament passed after the empowering act are even more concerning, reaching into the province of future Parliaments.²⁵ The use of Henry VIII powers is growing too. For example, only 9 were used before 1932²⁶ but there were 120 enacted in the 2009–2010 parliamentary session.²⁷

Similarly, the use of skeleton bills has been a source of unease. Instead of enacting clear policies in the form of primary legislation, skeleton bills contain only broad empowering provisions allowing for delegated legislation to be made, yet those delegated powers are then ultimately used by the executive to act substantively in response to important policy questions.²⁸ Skeleton bills make it difficult for parliament to exercise its scrutiny function because, on the face of a provision, ‘there is nothing to scrutinise.’²⁹ Due to the weak scrutiny procedures for delegated legislation, there is often effectively very limited scrutiny at any stage of the legislative process when skeleton bills are used to make delegated legislation.³⁰ The Constitution Committee has gone so far as to say that it is ‘difficult to envisage any circumstances in which their use is acceptable.’³¹ Wide delegated powers also potentially make it more difficult for the courts to review the use of delegated powers. In principle, if powers are widely drawn then it is more difficult for the courts to say that the secondary legislation is not within the specific wording of the empowering provision. Ultimately, skeleton bills risk marginalising scrutiny processes and create a legal framework which pushes significant policy into delegated legislation.

The fact that SIs face no realistic prospect of defeat within Parliament has given rise to an inevitable concern that the system is not fit for purpose. With only 17 SIs rejected in the last sixty-five years, and none in the Commons since 1979, it has been observed that Parliamentary processes are virtually ‘habituated’ to approve statutory instruments.³² The system is one where ‘debates are rare, and defeats are all but unheard of.’³³ In practice, the only form of delegated legislation subject to any real

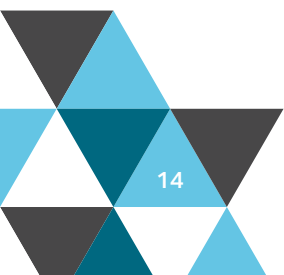
risk of defeat are instruments subject to the affirmative procedure requiring the assent of the House of Lords. Even in that context, the House of Lords exercises great restraint in declining to pass a motion approving an affirmative statutory instrument. The fact that SIs are not meaningfully vulnerable to defeat has been said to put them on the edge of a 'legitimacy precipice,' as the executive appears to have a relatively free political hand.³⁴

Another anxiety about the delegated legislation process is the lack of opportunity for the public to participate in the making of laws, either through consultations or via representatives in Parliament. Many statutory instruments have some sort of informal consultation process and fewer have a formal consultation. Edward Page describes three types of consultation processes, one or more of which are commonly undertaken in relation to an instrument: 'indirect consultation' where government consults committees and advisory boards who may themselves then conduct informal or formal consultation with outside groups; a 'staged exercise' which involves the government distributing a consultation paper to interested parties and seeking a response, normally conducted over an eight-week time frame; or an 'at large consultation' where 'officials and sometimes politicians float ideas at different stages of their development to groups or individuals sometimes by letter or phone, sometimes at meetings on the topic, sometimes at meetings on an entirely different topic.'³⁵ There is some evidence of consultations running well.³⁶ However, consultation processes are not always well-publicised and can be difficult to keep tabs on.³⁷ Consultations can also be managed sub-optimally. For instance, the government on occasion fails to publish the results of its consultations when it lays an instrument and in the past has come under fire from the Secondary Legislation Scrutiny Committee for such failures.³⁸ Once an SI has been laid, the public also has limited abilities to influence its passage. In relation to primary legislation, civil society organisations often have their own Bill response groups, are familiar with the different stages of the legislative process and know when and how to provide their views on a Bill. Bills typically also take much longer to pass through Parliament, which gives organisations time to formulate a relatively detailed view and communicate. The delegated legislation process is much more opaque. NGOs, associations, and trade bodies can have little knowledge of the delegated legislation process and the complexity of the system does nothing to ease the burden. Often, the order paper in the House of Commons which lists the SIs being debated in Delegated Legislation Committees the following week is not published until Thursday, meaning that there can be only four or five days' notice that an SI is being debated in that chamber. Organisations then need to find out which members are on the relevant Delegated Legislation Committee and contact them directly. This does not make for easy participation in the process.

A final area of consistent concern is the generally weak scrutiny of delegated legislation. While primary legislation processes are imperfect, they subject new laws to much more extensive scrutiny than delegated legislation processes do.³⁹ The starting point is that the majority of delegated legislation receives no practical scrutiny at all. The delegated legislation that is subject to the most rigorous scrutiny (i.e. the SIs that pass through the draft affirmative procedure) is still subject to a relatively light-touch process. There are multiple ways in which scrutiny of delegated legislation could be said to be weak. For instance, the government of the day has

control over whether debates on negative procedure SIs occur (only 3% were debated in the 2015–2016 parliamentary session)⁴⁰ and also has control over the membership of Delegated Legislation Committees for affirmative procedure debates. The risk here is that ‘Government influence on the membership and the involvement of party whips stifles effective scrutiny.’⁴¹ Like the public, MPs receive very little notice of Delegated Legislation Committee debates and they are not placed in committees based on their technical knowledge. The result is that MPs are often debating SIs on which they have no subject matter expertise. There is also regularly insufficient time to debate the instruments to afford them proper scrutiny. For instance, the average length of debate in the 2013–2014 parliamentary session was 26 minutes but was as short as 22 seconds on one occasion.⁴² There is also a tendency to view Delegated Legislation Committee work as politically low prestige, risking a lack of meaningful buy-in from MPs. It is symptomatic of this situation that it has been reported that MPs have been told that it is acceptable to undertake constituency correspondence during Committee time.⁴³ This risks a situation where, even at its most rigorous, the scrutiny system can be more like procedural window dressing than effective Parliament control.

Overall, the configuration of the delegated legislation system can be said to create a range of anxieties. These concerns about the system of delegated legislation must, however, be understood by reference to both the advantages of the same system and the fact that the extent to which any of these anxieties have traction may vary depending on the specific context being analysed. In the next parts of this report, we turn to analyse the specific experience with Brexit delegated legislation by reference to these anxieties.





Delegated powers for EU withdrawal

The starting point for the story of Brexit delegated legislation, or at least the part of that story we are examining in this report, is the EU (Withdrawal) Act 2018 ('EUWA').⁴⁴ This Act provides the core legal framework for Brexit delegated legislation. It is a framework which is, in many ways, representative of some of the principal anxieties surrounding delegated legislation, while also showing some sensitivity to them. It is important to state at the outset of our analysis that the framework and the process, in many ways, got the job done. This fact underlines why it is important not to undervalue the virtues of the current system. However, that headline should not overshadow the reality that there have been multiple problems in how Brexit delegated legislation has been managed, and it is from exploration and evaluation of such problems that the system can be developed and improved.

First, it is worthwhile to set out the two key principles that were said to underpin the scheme of the EUWA when it was enacted. The first of these principles is continuity. There was a deliberate policy decision in drafting the EUWA that, to minimise disruption for the public, EU law would continue to apply on Exit Day. After Exit Day, the UK could then depart from EU law as it wished. The Act creates a 'snapshot' of all EU law in the UK on Exit Day, converting existing EU law into UK domestic law, thereby preserving legal continuity. The second principle underpinning the Act is the distinction between 'the mechanical act of converting EU law into UK law,' which is a technical exercise that can be conducted via delegated legislation, and the making of 'substantive changes to certain areas currently covered by EU law,' which can only be done via primary legislation in the form of the Government's 'Brexit Bills.'⁴⁵ At the time the Bill was originally drafted, the Government guiding it through Parliament was at pains to reassure parliamentarians and civil society that this distinction would be respected. In the foreword to 'The Repeal Bill' White Paper (before that title was dropped in favour of the EUWA), the then Brexit Secretary, David Davis MP, said the Bill was 'not a vehicle for policy changes – but it will give the Government the necessary power to correct or remove the laws that would otherwise not function properly once we have left the EU.'⁴⁶

The EUWA was the flagship Bill of the 2017-2019 parliamentary session but other Brexit Bills also passed during this session, concerning both the withdrawal process generally and specific policy areas (see *Table 3*).⁴⁷ The Nuclear Safeguards Act 2018 replaced the legal framework that was provided by the UK's membership of the European Atomic Energy Community. It delegated large amounts of power to the Secretary of State to make regulations in all areas of the UK's nuclear program. The Healthcare (European Economic Area and Switzerland Arrangements) Act 2019 gave the power to Government to negotiate *ad hoc* agreements with EU and EEA member states for the provision of healthcare for their citizens and for UK citizens resident in the EU. Parliament also granted the government new powers in the area of trade and customs. Even though the Trade Bill fell, the Taxation (Cross-Border Trade) Act 2018 created a host of new powers in a similar sphere. The Direct Payments to Farmers (Legislative Continuity) Act 2020 was passed in light of concerns that the EUWA would not lawfully allow the government to make direct subsidy payments to farmers after Exit Day. Other Brexit Bills were drawn up but fell before being passed at the end of the 2017-2019 parliamentary session. These included the Trade Bill, the Agriculture Bill, the Environment Bill, and the Immigration and Social Security Co-ordination (EU Withdrawal) Bill. The European Union (Withdrawal Agreement) Act 2020 passed

shortly before Exit Day. This was approximately three months after the UK and the EU negotiated the Withdrawal Agreement.⁴⁸ The Act contains 19 delegated powers and made some important changes to the EUWA which are discussed below.⁴⁹

Table 3: Primary legislation related to Brexit passed between the referendum and Exit Day

Brexit process primary legislation	Specific policy area primary legislation
European Union (Notification of Withdrawal) Act 2017	The Sanctions and Anti-Money Laundering Act 2018
The European Union (Withdrawal) Act 2018	The Nuclear Safeguards Act 2018
European Union (Withdrawal) Act 2019 ('Cooper-Letwin Act')	The Haulage Permits and Trailer Registration Act 2018
European Union (Withdrawal) (No. 2) Act 2019 ('Benn Act')	The Taxation (Cross-border Trade) Act 2018
The European Union (Withdrawal Agreement) Act 2020	The Healthcare (European Economic Area and Switzerland Arrangements) Act 2019

It was widely recognised at the outset that the EUWA would – due to the need to adapt, amend, and revoke retained EU law in time for the UK's departure – involve 'a massive transfer of legislative competence from Parliament to Government.'⁵⁰ Section 8 implements this transfer of power from the legislature to the executive and allows the government to adapt EU law. In short, the section 8 power gives Ministers extensive powers to make such regulations that they consider 'appropriate' to deal with 'any failure of retained EU law to operate effectively or any other deficiency in retained EU law' arising from withdrawal.⁵¹ To show its scope, it is worth reproducing here in extended form:

- (1) A Minister of the Crown may by regulations make such provision as the Minister considers appropriate to prevent, remedy or mitigate –
 - (a) any failure of retained EU law to operate effectively, or
 - (b) any other deficiency in retained EU law, arising from the withdrawal of the United Kingdom from the EU.
- (2) Deficiencies in retained EU law are where the Minister considers that retained EU law –
 - (a) contains anything which has no practical application in relation to the United Kingdom or any part of it or is otherwise redundant or substantially redundant,
 - (b) confers functions on, or in relation to, EU entities which no longer have functions in that respect under EU law in relation to the United Kingdom or any part of it,

- (c) makes provision for, or in connection with, reciprocal arrangements between –
 - (i) the United Kingdom or any part of it or a public authority in the United Kingdom, and
 - (ii) the EU, an EU entity, a member State or a public authority in a member State, which no longer exist or are no longer appropriate,
-
- (3) There is also a deficiency in retained EU law where the Minister considers that there is –
 - (a) anything in retained EU law which is of a similar kind to any deficiency which falls within subsection (2), or.
 - (b) a deficiency in retained EU law of a kind described, or provided for, in regulations made by a Minister of the Crown.
- (4) But retained EU law is not deficient merely because it does not contain any modification of EU law which is adopted or notified, comes into force or only applies on or after Exit day.
- (5) Regulations under subsection (1) may make any provision that could be made by an Act of Parliament.

This section represents many of the anxieties concerning delegated legislation that we have identified above. The provision is extremely broad. The types of deficiencies in EU law listed within section 8(2) are not exhaustive and are supplemented by any similar deficiency in subsection 3. Furthermore, the terms ‘prevent, remedy or mitigate’ are not defined in the Act. The main limitation is that the section 8 power can only be used in relation to ‘retained EU law.’ The category of ‘retained EU law’ is then itself defined broadly under the Act as EU derived UK domestic legislation, EU regulations, EU decisions and tertiary legislation and rights, powers and liabilities recognised in UK law on Exit Day including EU Treaty rights and general principles of EU law as defined in EU case law.⁵² Section 8(5) contains the Henry VIII power that allows regulations under section 8 to do anything an Act of Parliament could do, including amending other Acts of Parliament.

Criticism of the section 8 power (or clause 7 as it was in the Bill) was swift and severe. The Delegated Powers and Regulatory Reform Committee said section 8 was notable for its ‘width, novelty and uncertainty.’⁵³ The Constitution Committee concluded its interim report by describing the powers contained within the EUWA as ‘an unprecedented and extraordinary portmanteau of effectively unlimited powers upon which the Government could draw.’⁵⁴ The Committee noted that the EUWA failed to distinguish between powers required to make ‘necessary amendments to the existing body of EU law’ and ‘substantive, more discretionary changes that the Government may seek to make to implement new policies in areas that previously lay within the EU’s competence.’⁵⁵ It was further observed that section 8 provided ‘considerable scope for significant policy changes to be made.’⁵⁶

As the Bill progressed through Parliament, attempts were made to place limits on section 8, most of which were unsuccessful. The Government did agree to a sunset clause for the power to end two years after Exit Day. However, this provision was amended by the EU (Withdrawal Agreement) Act 2020. The government did not accept an amendment to section 8 to restrict delegated law-making to when a minister considered it 'necessary' rather than 'appropriate.' The Constitution Committee had argued that the benefits of a necessity test included that it offered 'reassurance that the exercise of the power is more obviously litigable.'⁵⁷ The most significant concession by the Government was the institution of a sifting procedure for the SIs laid as negative instruments under section 8. This came about after the Procedure Committee deemed the proposal for scrutiny of SIs made under the EUWA inadequate and the then Chair of the Procedure Committee, Sir Charles Walker MP, tabled amendments to the Withdrawal Bill setting out the sifting procedure.

The sifting procedure was enshrined in Schedule 7 of the Act. Under the procedure, the Secondary Legislation Scrutiny Committee in the House of Lords and the specially created European Statutory Instruments Committee in the House of Commons review each negative instrument made under section 8 and make a recommendation as to whether it should be upgraded to the affirmative scrutiny procedure. The Government did not accept that the recommendations from the sifting procedure should be binding.

The Act also provided for an urgency procedure.⁵⁸ Under this procedure, the Government was able to lay an SI that would normally be laid using the draft affirmative procedure via the made affirmative procedure, as long as the minister lays a statement with it explaining the reason for the urgency. This means the instrument comes into force immediately but only stays in effect if debated and approved by both Houses within 28 days. If it is not approved within 28 days, the instrument falls and is no longer law. The urgent case procedure also allows the Government to lay proposed negative instruments as made negatives, meaning they bypass entirely the sifting process. Under this procedure, the Government could also withdraw already laid proposed negatives and draft affirmatives and re-lay them as made negatives and made affirmatives.

This legal framework itself is an artefact of the continued tensions around the use of delegated legislation. The legal framework for delegated legislation is one thing, the law-making activity it furnishes in practice is another. In the next part of this report, we explore problematic issues that have arisen in the practice of making Brexit delegated legislation. It is worth noting at this point, however, that, shortly before Exit Day and shortly after a general election which provided a clear majority in Parliament, the European Union (Withdrawal Agreement) Act 2020 was enacted. This Act modified the existing Brexit delegated legislation framework in multiple ways, including by extending the sunset clause in the EUWA so that the section 8 power (including the power to make instruments under urgency) no longer sunsets until two years after Implementation Period Completion Day (which is defined as 11 pm on 31 December 2020) and by providing that none of the 19 delegated powers under the European Union (Withdrawal Agreement) Act 2020 are subject to the EUWA sifting mechanism. While it is not relevant to the making of Brexit delegated legislation in the period our study relates to, this Act appeared to extend powers and weaken checks as regards future Brexit SIs.



The problems with Brexit delegated legislation

By Exit Day on 31 January 2020, there had been 622 Brexit statutory instruments laid. 297 laid in 2018, 318 in 2019, and 7 laid in January 2020.⁵⁹ During the 2017–2019 parliamentary session, 1,835 instruments were laid in total. This means that Brexit SIs represented 34% of all instruments during that session. Of the 622 Brexit SIs laid up until Exit Day, 418 were laid solely under powers in the EUWA, 133 under other Acts of Parliament, and 71 with powers under both the EUWA and other Acts of Parliament. 142 of the 622 SIs amended primary legislation. Inevitably, the extraordinary politics of the period – including the unusual presence of both an unstable minority government and a referendum mandate, combined with the nature of the EU withdrawal process itself – means this case study has some peculiarities. However, long-held anxieties about the delegated legislation system generally have proven to have significant traction in the Brexit context.⁶⁰

To state what is perhaps obvious, there was a large volume of Brexit delegated legislation. Not only were there lots of individual instruments but many of the instruments were particularly long and complex. The instruments laid were notably longer than in previous sessions. For instance, the word count of SIs made by Treasury and HMRC increased by 300% between the 2009–2010 and 2017–2019 parliamentary sessions.⁶¹ In the last session, the average page length of an EU Exit SI was 18 pages, in the 2015–2016 parliamentary session the average SI was 10 pages long.⁶² This ‘suggest[s] that there were consolidations of measures that were initially projected to be in different instruments into longer regulations’.⁶³ The Secondary Legislation Scrutiny Committee referred to this consolidation of measures as ‘bundling’ and said at points it went ‘too far’.⁶⁴

Given the limited capacity Parliament has to scrutinise SIs, many long and complex instruments were debated for relatively small amounts of time. For example, the Product Safety and Metrology etc. (Amendment etc.) (EU Exit) Regulations 2019 are 619 pages long and were debated in the Commons for 52 minutes and the Lords for 51 minutes. The Human Medicines (Amendment etc.) (EU Exit) Regulations 2019 are 188 pages long and were debated in the Commons for an hour and 24 minutes and the Lords for 48 minutes. The Financial Services (Miscellaneous) (Amendment) (EU Exit) Regulations 2019 are 26 pages long and made 36 different amendments to existing legislation, which Lord Tunnicliffe described as having ‘no themes or interrelationship’.⁶⁵ They were debated for 11 minutes in the House of Commons. It is patently impossible to fully debate such long and wide-ranging instruments in this amount of time, and those debates were still well above the average length for Delegated Legislation Committee debates.⁶⁶ Committees have on occasion admitted that proper scrutiny of these instruments is impossible. In relation to the Product Safety and Metrology etc. (Amendment etc.) (EU Exit) Regulations 2019, the Secondary Legislation Scrutiny Committee observed that ‘the exceptional size and complexity of the instrument inhibit effective parliamentary scrutiny of the proposals (both by this Sub-Committee and by the House in debate)’.⁶⁷

An important aspect of the scrutiny process has been the European Statutory Instruments Committee and the Secondary Legislation Security Committee which recommend negative statutory instruments for upgrade to the affirmative procedure. There were 246 instruments laid as proposed negative instruments under the EU Withdrawal Act. Of those, 70 or 29% were recommended for upgrade by either or

both the ESIC or SLSC. The government has accepted all recommendations for upgrade so far. However, the use of non-EUWA powers to make Brexit statutory instruments circumvented the EUWA's sifting procedure. It is illustrative of how many delegated powers the Government possesses in other Acts of Parliament that 133 Brexit instruments were passed without requiring the EUWA. The sifting procedure for statutory instruments has not been included in subsequent primary legislation facilitating EU withdrawal. Instruments made under powers in the EU (Withdrawal Agreement) Act 2020 are not subject to the sifting procedure unlike instruments made under section 8 of the EUWA.

Brexit SIs were also 'invulnerable to defeat,' despite the unstable parliamentary politics of the period. There were 9 prayer motions laid against over 300 negative instruments and only one of those prayer motions was debated, the Railways (Interoperability) (Amendment) (EU Exit) Regulations 2019, SI 2019/345. This was indicative of how the government can control whether debates over negative SIs occur. In relation to affirmative instruments, there was not a single debate on a fatal motion during the entire Brexit process.⁶⁸ There were only ten debates on non-fatal motions (known as motions of regret) and for only two of those motions was there a government defeat (though motions of regret have no practical effect).⁶⁹

There were consistent problems with the drafting of Brexit SIs. Not infrequently, instruments were withdrawn and replaced due to poor drafting, with the Secondary Legislation Scrutiny Committee noting that the replacement of instruments has increased on previous parliamentary sessions (with 9% of affirmative instruments requiring replacement).⁷⁰ In the 2017–2019 session, the proportion of instruments needing correction 'more than doubled from 3.7% in Year 1 to 8.4% in Year 2' and some of those were 'simply obvious mistakes.'⁷¹ As an alternative to replacing SIs, the Government has also laid many correcting SIs – also known as 'wash-up' SIs. Some of these instruments address important errors that managed to slip through the scrutiny process. For instance, The Environment (Miscellaneous Amendments and Revocations) (EU Exit) Regulations 2019 corrected a host of errors,⁷² including a 'tick box' that was 'omitted in error' but was crucial to enable endangered species to be moved within the UK and an amendment which 'inadvertently altered the operation of an Article' relating to pesticide products.⁷³ A wash-up SI was also used to correct the accidental removal by the Department for Environment, Food and Rural Affairs of the prohibition on hormone disrupting chemicals being used in pesticides in the UK, which the Department later described as an 'erroneous omission.'⁷⁴ The Civil Jurisdiction and Judgments (Civil and Family) (Amendment) (EU Exit) Regulations 2019 were necessary to rectify a mistake which prevented some Scottish claimants from being able to file for child maintenance in Scotland.⁷⁵ Somewhat extraordinarily, The Animal Health, Plant Health, Seeds and Food (Amendment) (Northern Ireland) (EU Exit) Regulations 2019 proposed amendments to a draft affirmative instrument that had not yet been laid before parliament.⁷⁶ Some errors have even attracted wider public notoriety. For instance, the European University Institute Regulations 2019 were withdrawn. These regulations indicated the Government (wrongly) thought that membership of the European University Institute was contingent on EU membership.⁷⁷ There were 97 wash-up Brexit SIs, to correct earlier mistakes, laid up until Exit Day. This compares with 4.6% of SIs being wash-ups in the 2015–2016 parliamentary session. Not only does this show that mistakes can slip through scrutiny processes, it means that the resulting legal framework is complicated further by layering regulations on regulations.

During the passage of the EUWA, politicians were at pains to state that Brexit SIs would not be a vehicle for policy changes. Despite this, many Brexit SIs, both those made under the EUWA and under other Acts of Parliament, have legislated on matters of principle and policy rather than technical matters or operational details. For instance, the EU has requirements to review minimum residue levels of pesticides within 12 months of an active substance being authorised.⁷⁸ The Pesticides (Maximum Residue Levels) (Amendment etc.) (EU Exit) Regulations 2019 extends the 12-month review period to 36 months.⁷⁹ It also states that current pesticides approvals may be extended further 'where the competent authority considers it necessary.'⁸⁰ This is a policy change which means the UK will not be applying the latest scientific advice because those products will exist on the market for longer and longer periods. Whether this change is justified or not, it is a clear policy change. The confusion around what should be in primary or secondary legislation also continued. For instance, the Immigration, Nationality and Asylum (EU Exit) Regulations 2019 changed the grounds on which a decision can be made to restrict admission to, or residence in the UK of an EEA national or their family member, or to deport an EEA national or their family. They aligned the deportation threshold for non-EEA and EEA nationals.⁸¹ That includes a presumption in favour of deportation for any EEA national sentenced to 12 months' imprisonment or longer, irrespective of the length or nature of their residence in the UK. This is a significant change to the treatment of EEA nationals. These regulations were laid on 11 February 2019, several weeks after the Immigration and Social Security Coordination (EU Withdrawal) Bill was introduced – a piece of primary legislation that was essentially a skeleton bill. During a debate on the Immigration and Social Security (Coordination) Bill on 28 February 2019, the then Immigration Minister Caroline Nokes MP said the Bill was required to 'align the positions of EU nationals and non-EU nationals in relation to the deportation regime.'⁸² However this alignment had already been achieved via the Immigration, Nationality and Asylum Regulations, revealing a lack of clear thought on which provisions should be placed in primary or secondary legislation.

Some Brexit SIs straightforwardly deleted parts of retained EU law. As a result, it was difficult to know if the government had deleted certain provisions because it does not wish to be bound by that obligation any longer, because it planned to replicate that obligation in UK law in the future, or believed it is already replicated in an existing piece of UK law. Because the explanatory notes accompanying SIs tend to only describe substantive additions or alterations made, and therefore not deletions of provisions, many of these removals are not telegraphed or the rationale for removal explained. For instance, The Food Additives, Flavourings, Enzymes and Extraction Solvents (Amendment etc) (EU Exit) Regulations 2019 remove an article which requires the European Commission and member states to make applications for new food additives publicly accessible.⁸³ It also deletes a clause which provides that 'Member States shall maintain systems to monitor the consumption and use of food additives on a risk-based approach and report their findings with appropriate frequency to the Commission and the Authority.' Perhaps the government has deleted this because it thinks its reference to the Commission and Authority no longer makes sense or maybe it has deleted it because the UK will no longer be monitoring food additive consumption. It was impossible to tell.

In terms of the procedures adopted, 272 (44%) of the 622 Brexit SIs laid during this period were affirmative and 350 (56%) were negative. This was well above the standard 80:20 ratio of negative to affirmative.⁸⁴ There may be a number of explanations for this.

Schedule 7 of the EUWA requires certain types of SIs to be laid as affirmative instruments and additionally, other negative instruments were upgraded to the affirmative resolution procedure by the Secondary Legislation Scrutiny Committee and European Statutory Instruments Committee. It has also been suggested that the government deliberately laid some instruments as draft affirmatives to avoid the sifting process because, if they had been laid initially as negatives and then had to be relaid as affirmatives, the government would have had insufficient time to pass them before Exit Day.⁸⁵

The Government also repeatedly used the urgency procedure – which gives SIs legal effect immediately and before they have been debated – to lay statutory instruments prior to the initial 31 October Exit Day and immediately prior to Parliament's prorogation, which was later declared unlawful.⁸⁶ The government laid 30 SIs under this procedure, 11 of these did not remain as law because they were not debated within 28 days after being made. For example, in the Explanatory Memorandum to the Specific Food Hygiene (Regulation (EC) No. 853/2004) (Amendment) (EU Exit) Regulations 2019, it was stated that '[d]ue to the prorogation of Parliament, we are required to use the urgent, made affirmative procedure for this SI.'⁸⁷ The Capital Requirements (Amendment) (EU Exit) Regulations 2019 were also made using the made affirmative procedure and came into force prior to debate.⁸⁸ These Regulations implement EU Directives which mandate the amount of liquid assets that a bank must hold and were created in direct response to the fact that banks were under-capitalised during the global financial crisis. The explanatory memorandum makes clear that without this SI 'significant aspects' of the UK's 'regime would become less effective or legally inoperable... the UK's ability to regulate the financial sector effectively would be compromised, affecting market confidence and creating instability.'⁸⁹ Amongst other purposes, the SI transfers enforcement functions to HM Treasury, the Prudential Regulation Authority, and the Financial Conduct Authority. These changes were brought into force under urgency in September and only debated weeks afterwards. It was unclear why many of the instruments concerned could not have been made sooner, given that many of them were not urgently responding to a new state of affairs.

A recurring problem with Brexit SIs was the provision of inadequate supporting material. The Delegated Powers and Regulatory Reform Committee and the Secondary Legislation Scrutiny Committee complained about the inadequacy of explanatory memoranda – which should make clear the purpose and content of an instrument – so often that criticism of explanatory materials was eventually added to the latter's terms of reference.⁹⁰ Explanatory memoranda need to be of a high quality because it is often difficult to understand what a statutory instrument is doing on the face of its provisions alone. As Fox and Blackwell note, 'as long as the quality of [explanatory memoranda] are below what Parliament ought to expect, it almost ensures that individual MPs and Peers are unlikely to take up issues of concern because much of the process is impenetrable.'⁹¹ Given the nature of the role that many Brexit SIs had to perform (*i.e.* adjusting existing rules), these problems were inevitably exacerbated. Many of the instruments, when read alone, are simply a string of amending provisions referring to the provisions of other legal texts. The memoranda are therefore crucial for understanding the practical effects of these omissions and substitutions. As Lord Tunncliffe put it:

The problem with British legislation is that so much of it is a statutory instrument that modifies another that amends another that amends a previous Act of Parliament which is by now a decade or so old. It is almost impossible to understand the meaning of this particular statutory instrument from looking to the instrument itself; one is entirely dependent on the Explanatory Memorandum to bring out the essence.⁹²

Poor explanatory memoranda have been pervasive in the Brexit process. A particularly egregious example is the explanatory note to The Law Enforcement and Security (Amendment) (EU Exit) Regulations 2019, which was initially longer than the 75-page instrument. The Secondary Legislation Scrutiny Committee described it as ‘impenetrable’ and asked the Home Office to re-lay it.⁹³ The Committee pointed out that the instrument gave no assessment of the costs of the instrument on the UK’s criminal justice or policing systems. As a result of these problems, the Committee relied on a BBC News article in order to assess the impacts of the legal changes and criticised the Home Office for failing to put into the explanatory memorandum information that was generally available.⁹⁴ Even after the Home Office laid a second explanatory memorandum, the Committee still found that ‘unfortunately, neither EM1 nor EM2 has proved adequate.’⁹⁵ In another episode, the explanatory memorandum to the REACH etc. (Amendment etc.) (EU Exit) (No. 3) Regulations 2019 wrongly stated that all devolved administrations had consented to the instrument when the Scottish Parliament had not yet provided such consent.

Another crucial piece of supporting material for SIs are impact assessments. Impact assessments need to be laid when a policy proposal will have more than *de minimis* effects.⁹⁶ Such assessments help MPs and peers get to grips with the changes the instrument is making, how they differ from the *status quo*, and what the economic impacts of the changes will be. Impact assessments have repeatedly not been laid during the Brexit process or have been laid too late – often after committees have reported, severely undermining their value.⁹⁷ The Treasury came under fire on this front. The Secondary Legislation Scrutiny Committee wrote to the Treasury about its straightforward failure to publish impact assessments.⁹⁸ The Committee also observed, when reviewing The Credit Rating Agencies (Amendment, etc.) (EU Exit) Regulations 2019, that the Treasury had laid a single impact assessment in order to cover 10 different statutory instruments, assessed at collectively having a financial impact of over £140 million.⁹⁹ However, the Treasury has not been the only culprit as regards the mismanagement of Brexit SIs and both the Secondary Legislation Scrutiny Committee and Delegated Legislation Committees in the Commons and Lords have been critical of the lack of impact assessments more widely. There are multiple examples of where an impact assessment was necessary but not produced. For instance, the Government gave no financial analysis of the impacts of transferring the regulation of the UK’s chemicals industry, which makes up around 7% of UK GDP, from the European Chemicals Agency back to the UK.¹⁰⁰ The Government also removed the rights of EU, EEA, Swiss and Turkish nationals to be self-employed, own, and manage companies or provide services in the UK on the same basis as UK nationals and undertook no impact assessment of this change.¹⁰¹ This failure was said to be justified on the basis that ‘[t]here is no, or no significant, impact on business, charities or voluntary bodies.’¹⁰² The Government did not lay impact assessments for regulations altering how pesticides, food safety, or genetic modification are regulated.¹⁰³ Ultimately, the lack of impact

assessments, or problems in when or how they are produced, make reviewing the effect of an SI very difficult for both Parliamentary committees and the wider public.

Participation remained difficult for civil society organisations and a remote possibility for members of the general public or individual experts in relation to Brexit SIs. In the normal course of legislative business, delegated legislation is often subject to a consultation process prior to it being laid in Parliament. This is in recognition of the fact that it is often industry experts, members of civil society, or other external actors who are best placed to comment on what can be highly specialised and technical instruments. Consultation has been minimal during the Brexit process. Full, formal consultation has been incredibly rare; we estimate only around 10% of Brexit SIs were formally consulted on but there is not clear data on the point. The consultations that were held were generally open for about a month, though some were much shorter. For instance, in the case of the Nutrition (Amendment) (EU Exit) Regulations 2019, the consultation was open for only 11 days. In some cases the Government published a draft of the proposed SI but did not formally consult or invite comments on the draft from stakeholders. Most of the SIs consulted on were financial services SIs and the Government's principal purpose seems to have been to provide information about its intentions. Lord Balmacara and Lord Hope both criticised the lack of consultation on The Freedom of Establishment and Free Movement of Services (EU Exit) Regulations 2019.¹⁰⁴ Lord Hope noted that the consultation section of the memorandum gave no consideration of the effects on businesses or the self-employed and only mentioned satellite decoders. The Secondary Legislation Scrutiny Committee highlighted the importance of consultation in its second interim report:

We acknowledge that during the Brexit period, where many instruments were intended simply to adapt EU retained law, consultation was often not undertaken because no new policy was being introduced. That said, in a small number of cases omissions, unintended policy effects or technical changes to make the legal text operate correctly were identified by interested parties outside of government and Parliament after the instrument had been published. This benefit of consultation is often overlooked.¹⁰⁵

There were, however, many examples throughout the Brexit process of government departments withdrawing SIs and re-laying them in amended form after feedback from parliamentary committees, civil society, or industry. For instance, The Plant Protection Products (Miscellaneous Amendments) (EU Exit) Regulations 2019 removed a provision which contained a blanket ban on hormone disrupting chemicals in pesticides.¹⁰⁶ After ChemTrust wrote to the Department for Environment, Food, and Rural Affairs, the Department reinstated the prohibition on endocrine disrupting chemicals and stated that the removal had been an 'erroneous omission.'¹⁰⁷ The REACH etc (Amendment etc.) (EU Exit) (No 2) Regulations were laid as a direct result of representations from the chemicals industry that the transitional import provision in the initial REACH SI would still lead to disruption in the supply chain.¹⁰⁸ The Jurisdiction and Judgments (Family) (Amendment Etc.) (EU Exit) (No.2) Regulations 2019 were laid in response to concerns by family law practitioners. There had been no formal consultation with the family law sector and practitioners were concerned that the initial SI prevented the courts from being able to issue certain financial remedies and maintenance orders.¹⁰⁹ The government laid the No. 2 regulations in response to these concerns. While there is

something to be welcomed in the responsiveness demonstrated in these examples, the underlying issue is the dysfunction of consultation and wider participation.

While there have been fewer challenges to the legality of SIs than was initially predicted by some commentators, there have still been issues around ensuring instruments are lawful. Perhaps the most notable success in challenging an SI has been The Cross-border Trade (Public Notices) (EU Exit) Regulations 2019.¹¹⁰ This instrument was challenged as being *ultra vires* its parent act, the Taxation (Cross-border Trade) Act 2018, because it sub-delegated powers to Treasury civil servants to change primary legislation via public notice. In simple terms, had these regulations stood they would have allowed officials to change primary legislation by updating a website. The government revoked these regulations at the pre-action stage of litigation. Other challenges to or questioning of the legality of instruments related to the scope of the section 8 power in the EUWA. For instance, the House of Lords strongly pushed back against the idea that ending the rights of EU nationals to be self-employed on the same basis as British nationals was a 'deficiency' in retained EU law that could be addressed via the section 8 power.¹¹¹ Lord Anderson, supported by Lord Pannick and Lord Balmacara, stated in the course of debate:

There is some suggestion in the Explanatory Memorandum that the deficiency consists of lack of reciprocity, but it is not clear... how a deficiency could arise from the possibility that others might choose to withhold equivalent rights in their own law. If that were the case, then the scope of Section 8 would be very broad indeed.¹¹²

One case has gone to the Administrative Court challenging the use of the section 8 power. ClientEarth and the Marine Conservation Society brought a challenge to the Conservation of Habitats and Species (Amendment) (EU Exit) Regulations 2019.¹¹³ The claim was ultimately refused permission as it was deemed premature.¹¹⁴ However, as the vast majority of Brexit SIs do not come into force until 31 December 2020, it is therefore likely that actions taken in the future will be more likely to generate challenges.

All of the problems detailed here align with the anxieties set out in the first part of the report. 359 Brexit SIs were laid in the four months leading up to March 2019. Those SIs touched on every part of UK life, from haulage to equality to food safety. Very significant policies such as alterations to deportation thresholds or changes to social security law were placed in secondary legislation and the rationale for why they deserved to be in delegated legislation was not explained. The decision to place important laws in delegated legislation was particularly notable because at the same time the government was passing flagship Brexit bills that were conspicuously empty of substantive policy. The Immigration and Social Security Co-ordination (EU Withdrawal) Bill is a skeleton bill that contains only two substantive clauses, both of them Henry VIII powers. The Delegated Powers and Regulatory Reform Committee said when reviewing it that:

The clear impression is that the Government are seeking these powers in order to avoid: having to prepare a detailed bill implementing their policy once it is settled, and any future arrangements with the EU are concluded; and then to submit that bill for full Parliamentary scrutiny.¹¹⁵

Parliamentary scrutiny and public input could act as vital checks and balances if they played greater roles in the delegated legislation process. The Brexit statutory instrument process has caused a significant spike in problems with the instruments themselves and the explanatory memoranda. Effective explanatory material is crucial to the quest for meaningful scrutiny as it assists parliamentarians in being able to appraise complex instruments. Industry and civil society experts who could explain to MPs the on-the-ground effects of these instruments, are all too often shut out of the process, not deliberately but due to the ad hoc nature of consultation. Statutory instruments remain invulnerable to defeat and until the Government is afraid an instrument could genuinely fall, it may have little incentive to change the current system. Brexit was one of the defining debates of the decade, it created significant, extensive and complex political disagreement within Parliament. Despite this, not one statutory instrument was even subject to a fatal motion debate.



Towards reform?

Each of the anxieties discussed in part one of this report have been evident in some form in the Brexit statutory instrument process. The impacts of this massive exercise in legal change will resonate in almost every aspect of society and the economy. While Brexit is a powerful case study, the problems we have explored here are essentially structural design problems within the current system of delegated law-making.

It was unsurprising that, within less than a year of Exit Day, delegated legislation was provoking a similar range of concerns, this time in the context of the COVID-19 pandemic (alongside the continuing Brexit negotiations). With COVID-19 delegated legislation we are again witnessing the advantages of the current system, such as speed and flexibility during a time of crisis, but also its drawbacks, leading to claims of “government by decree.”¹¹⁶ Events such as the pandemic or the outcome of the Brexit referendum may be unexpected, but the flaws of the delegated legislation system remain constant.

Through our analysis of the experience with Brexit, we have articulated both the long-running anxieties about the delegated law-making system and how they manifest in current practices. Addressing these problems should be at the centre of the contemporary reform agenda within Parliament. It is entirely possible for many of the problems we have identified to be avoided or minimised while retaining the benefits of the current system. If Brexit is to be an opportunity for national legislative renewal, the moment is ripe for incremental reform that will foster the making of better law in a modern state that often needs to make lots of law quickly.



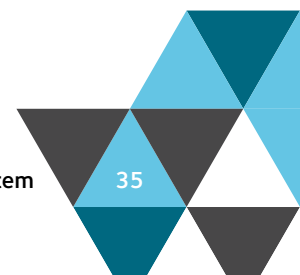
References

- 1 This represents the period from 23 June 2016 to 31 January 2020.
- 2 Gordon Hewart, *The New Despotism* (Ernest Benn Limited 1929); Cecil T Carr, *Delegated Legislation: Three Lectures* (CUP 1921), 2.
- 3 Ivor Jennings, *The Law and the Constitution* (University of London 1943).
- 4 The Earl of Donoughmore (Chair), *Report of the Committee on Ministers' Powers* (Cmd 4060, 1932) 6.
- 5 *ibid.*
- 6 Jeff King, 'The Province of Delegated Legislation' in Liz Fisher, Jeff King and Alison Young (eds), *The Foundations and Future of Public Law: Essays in Honour of Paul Craig* (Oxford University Press 2020) 150.
- 7 Ruth Fox and Joel Blackwell, *The Devil is in the Detail: Parliament and Delegated Legislation* (Hansard Society 2014) 33.
- 8 Philip Loft, *Acts and Statutory Instruments: The volume of UK legislation 1950 to 2019*, House of Commons Library, Commons Briefing papers (CBP-7438 2019).
- 9 Ruth Fox and Joel Blackwell, *The Devil is in the Detail: Parliament and Delegated Legislation* (Hansard Society 2014) 48.
- 10 Philip Loft, *Acts and Statutory Instruments: The volume of UK legislation 1950 to 2019*, House of Commons Library, Commons Briefing papers (CBP-7438 2019).
- 11 Adam Tucker, 'The Parliamentary Scrutiny of Delegated Legislation' in Alexander Horne and Gavin Drewry (eds), *Parliament and the Law* (Hart Publishing 2018) 350.
- 12 Constitution Committee, *The Legislative Process: The Delegation of Powers* (HL 2017–19, 225) 2
- 13 Ruth Fox and Joel Blackwell, *The Devil is in the Detail: Parliament and Delegated Legislation* (Hansard Society 2014) 61.
- 14 *ibid.*, 63; Edward C. Page, *Governing by Numbers: Delegated Legislation and Everyday Policy Making* (Hart Publishing 2001) 187.
- 15 Delegated Powers and Regulatory Reform Committee, *7th Report; Special Report: Quality of Delegated Powers Memoranda* (HL 2014–15, 39) para 33.
- 16 Constitution Committee, *The Legislative Process: The Delegation of Powers* (HL 2017–19, 225) para 110.
- 17 Ruth Fox and Joel Blackwell, *The Devil is in the Detail: Parliament and Delegated Legislation* (Hansard Society 2014) 28.
- 18 Adam Tucker, 'The Parliamentary Scrutiny of Delegated Legislation' in Alexander Horne and Gavin Drewry (eds), *Parliament and the Law* (Hart Publishing 2018) 351–352.
- 19 Edward C. Page, *Governing by Numbers: Delegated Legislation and Everyday Policy Making* (Hart Publishing 2001) 186.
- 20 *ibid.*, 186. See also: Jeff King, 'The Province of Delegated Legislation' in Liz Fisher, Jeff King and Alison Young (eds), *The Foundations and Future of Public Law: Essays in Honour of Paul Craig* (Oxford University Press 2020) 156.
- 21 Constitution Committee, *9th Report; Delegated Legislation and Parliament: A response to the Strathclyde Review* (HL 2015–16, 116) para 40.
- 22 Nicholas W. Barber and Alison L. Young, 'The Rise of Prospective Henry VIII Clauses and their Implications for Sovereignty' [2003] PL 112.
- 23 Adam Tucker, 'The Parliamentary Scrutiny of Delegated Legislation' in Alexander Horne and Gavin Drewry (eds), *Parliament and the Law* (Hart Publishing 2018) 359.
- 24 Lord Judge, 'Ceding Power to the Executive: the Resurrection of Henry VIII' (King's College London Lecture, 12 April 2014).
- 25 Nicholas W. Barber and Alison L. Young, 'The Rise of Prospective Henry VIII Clauses and their Implications for Sovereignty' [2003] PL 112.
- 26 Jeff King, 'The Province of Delegated Legislation' in Liz Fisher, Jeff King and Alison Young (eds), *The Foundations and Future of Public Law: Essays in Honour of Paul Craig* (Oxford University Press 2020) 155.
- 27 Lord Judge, (Lord Mayor's Dinner for the Judiciary, The Mansion House Speech, 13 July 2010). See also: Ruth Fox and Joel Blackwell, *The Devil is in the Detail: Parliament and Delegated Legislation* (Hansard Society 2014) 30.

- 28 Aileen McHarg, 'What is Delegated Legislation?' [2006] PL 557.
- 29 Lord Judge, 'Annual Bingham Lecture 2017: A Judge's View on the Rule of Law' (2017). See also: Delegated Powers and Regulatory Reform Committee, *7th Report; Special Report: Quality of Delegated Powers Memoranda* (HL 2014-15, 39) para 38.
- 30 Lord Judge, 'A Judge's View on the Rule of Law' (Annual Bingham Lecture, 2017).
- 31 Constitution Committee, *The Legislative Process: The Delegation of Powers* (HL 2017-19, 225) para 58.
- 32 Between 1950 and 2017, the House of Commons has rejected 11 SIs, and the House of Lords, 6. This is a rejection rate of 0.01% of the total number laid from 1950 to 2017. See: Hansard Society, 'Westminster Lens: Parliament and delegated legislation in the 2015-16 session' (2017) 5; Philip Loft, *Acts and Statutory Instruments: The volume of UK legislation 1950 to 2019*, House of Commons Library, Commons Briefing papers (CBP-7438 2019).
- 33 Edward C. Page, *Governing by Numbers: Delegated Legislation and Everyday Policy Making* (Hart Publishing 2001) 175; Jeff King, 'The Domain of Delegated Legislation' in Liz Fisher, Jeff King and Alison Young (eds), *The Foundations and Future of Public Law: Essays in Honour of Paul Craig* (Oxford University Press 2020) 162.
- 34 Adam Tucker, 'The Parliamentary Scrutiny of Delegated Legislation' in Alexander Horne and Gavin Drewry (eds), *Parliament and the Law* (Hart Publishing 2018) 370.
- 35 Edward C. Page, *Governing by Numbers: Delegated Legislation and Everyday Policy Making* (Hart Publishing 2001) 129.
- 36 *ibid*, 155-153.
- 37 Ruth Fox and Joel Blackwell, *The Devil is in the Detail: Parliament and Delegated Legislation* (Hansard Society 2014) 217.
- 38 The Committee's Guidance for Departments emphasises that any supporting information such as Impact Assessments (IA) or analysis of consultation responses should be published on the day the instrument is laid. See Secondary Legislation Scrutiny Committee, *Work of the Committee in Session 2017-19: Second Interim Report* (HL, 2017-19, 376) para 33.
- 39 Adam Tucker, 'The Parliamentary Scrutiny of Delegated Legislation' in Alexander Horne and Gavin Drewry (eds), *Parliament and the Law* (Hart Publishing 2018), 361.
- 40 Hansard Society, 'Westminster Lens: Parliament and delegated legislation in the 2015-16 session' (2017) 5.
- 41 Ruth Fox and Joel Blackwell, *The Devil is in the Detail: Parliament and Delegated Legislation* (Hansard Society 2014) 182.
- 42 *ibid*.
- 43 *ibid*.
- 44 For an excellent general analysis of this Act, see: Paul Craig, 'Constitutional Principle, the Rule of Law and Political Reality: The European Union (Withdrawal) Act 2018' (2019) 82(2) MLR 320.
- 45 Constitution Committee, *9th Report; The 'Great Repeal Bill' and delegated powers* (HL 2016-17, 123) para 16.
- 46 See foreword by Rt Hon David Davis MP, Secretary of State for Exiting the European Union, to *Legislating for the United Kingdom's withdrawal from the European Union* (Cm 9446 2017) 7. See also paras 3.10 and 3.17 of the White Paper and para 14 of the Explanatory Notes.
- 47 The legislation relating to the general process including legislation passed by the government and legislation passed against the government's will, to restrict it from pursuing certain options.
- 48 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community 2019/C 384 I/01.
- 49 Constitution Committee, *9th Report; Report on EU (Withdrawal Bill)* (HL 2017-19, 69) para 196.
- 50 Constitution Committee, *The 'Great Repeal Bill' and delegated powers* (9th Report, Session 2016-17, 123) [47].
- 51 Constitution Committee, *3rd Report; European Union (Withdrawal) Bill: Interim Report* (HL 2017-19, 19) para 38.
- 52 EU (Withdrawal) Act 2018, ss 2, 3, 4, and 5.
- 53 Delegated Powers and Regulatory Reform Committee, *3rd Report; European Union (Withdrawal) Bill* (HL 2017-2019, 22) para 15.

- 54 Constitution Committee, *3rd Report; European Union (Withdrawal) Bill: Interim Report* (HL 2017–19, 19) para 44.
- 55 *ibid*, para 39.
- 56 *ibid*.
- 57 Constitution Committee, *9th Report; European Union (Withdrawal) Bill* (HL 2017–2019, 69) para 163.
- 58 EU (Withdrawal) Act 2018, sch 7, para 5(2).
- 59 We define Brexit statutory instruments as all those where the explanatory memorandum stated the instrument was being made to facilitate the UK’s departure from the EU.
- 60 For further analysis of Brexit delegated legislation and what it means for the rule of law see: Jack S. Caird and Ellis Patterson, ‘Brexit, Delegated Powers and Delegated Legislation: a Rule of Law Analysis of Parliamentary Scrutiny’ (Bingham Centre for the Rule of Law, 20 April 2020).
- 61 Joe Marshall and others, ‘Parliamentary Monitor 2020: Secondary Legislation’ (Institute for Government, 20 May 2020), citing the work of Dr Matthew Williams, University of Oxford.
- 62 Hansard Society, ‘Westminster Lens: Parliament and delegated legislation in the 2015–16 session’ (2017) 13.
- 63 Jeff King, ‘The Judicial Review of Delegated Legislation under the European Union (Withdrawal) Act 2018’ 12 (forthcoming).
- 64 Secondary Legislation Scrutiny Committee, *Work of the Committee in Session 2017–19: Second Interim Report* (HL, 2017–19, 376) para 24.
- 65 HL Deb 21 March 2019, vol 796, col 1576.
- 66 The average length for a DLC debate in the 2013–2014 Parliamentary session was 26 minutes but they can be as short as 22 seconds. See Ruth Fox and Joel Blackwell, *The Devil is in the Detail: Parliament and Delegated Legislation* (Hansard Society 2014) 80.
- 67 Secondary Legislation Scrutiny Committee, 17th Report (Sub-committee B) (HL 2017–19, 293) para 55.
- 68 A fatal motion was tabled against The REACH etc. (Amendment etc.) (EU Exit) Regulations 2019, SI 2019/758 but withdrawn in advance of debate.
- 69 Those instruments were The REACH etc. (Amendment etc.) (EU Exit) Regulations 2019, SI 2019/758 and the Freedom of Establishment and Free Movement of Services (EU Exit) Regulations 2019, SI 2019/1401, see: HL Deb 26 March 2019, vol 796, col 1755 and HL Deb 23 October 2019, vol 800, col 640.
- 70 Secondary Legislation Scrutiny Committee, *60th Report* (HL 2017–2019, 420) para 11.
- 71 Secondary Legislation Scrutiny Committee, *Work of the Committee in Session 2017–19: Second Interim Report* (HL 2017–19, 376) para 41.
- 72 The Environment (Miscellaneous Amendments and Revocations) (EU Exit) Regulations 2019, SI 2019/559.
- 73 Explanatory Memorandum to The Environment (Miscellaneous Amendments and Revocations) (EU Exit) Regulations 2019, SI 2019/559, para 2.13.
- 74 The Plant Protection Products (Miscellaneous Amendments) (EU Exit) Regulations 2019, SI 2019/556 removed the prohibition which was reinstated by The Pesticides (Amendment) (EU Exit) Regulations 2019, SI 2019/1410 see also the accompanying Explanatory Memorandum at para 7.10 which describes the ‘erroneous omission’.
- 75 The Civil Jurisdiction and Judgments (Civil and Family) (Amendment) (EU Exit) Regulations 2019, SI 2019/1338.
- 76 The Animal Health, Plant Health, Seeds and Food (Amendment) (Northern Ireland) (EU Exit) Regulations 2019, SI 2019/(draft) see Secondary Legislation Scrutiny Committee, *19th Report* (HL 2017–19, 305) para 1.
- 77 The European University Institute (EU Exit) Regulations 2019 (withdrawn).
- 78 Regulation of the European Parliament and of the Council (EC) No 396/2005 of 23 February 2005 on maximum residue levels of pesticides in or on food and feed of plant and animal origin [2005] OJ L70/1.
- 79 Explanatory Note to The Pesticides (Maximum Residue Levels) (Amendment etc.) (EU Exit) Regulations 2019, para 7.25.
- 80 Explanatory Note to The Pesticides (Maximum Residue Levels) (Amendment etc.) (EU Exit) Regulations 2019, para 7.25.

- 81 The Immigration, Nationality and Asylum (EU Exit) Regulations 2019, SI 2019/745.
- 82 Caroline Nokes, Immigration and Social Security Co-ordination (EU Withdrawal) Bill Deb 26 February 2019, vol 655, cols 183-184.
- 83 The Food Additives, Flavourings, Enzymes and Extraction Solvents (Amendment etc) (EU Exit) Regulations 2019, SI 2019/860.
- 84 Secondary Legislation Scrutiny Committee, *60th Report* (HL 2017-2019, 420) para 11. See also Hansard Society, 'Westminster Lens: Parliament and delegated legislation in the 2015-16 session' (2017) 4 which showed 19% of SIs were affirmatives in the 2015-2016 parliamentary session.
- 85 Joe Marshall and others, 'Parliamentary Monitor 2020: Secondary Legislation' (Institute for Government, 20 May 2020).
- 86 *R (Miller) v The Prime Minister* [2019] UKSC 41, [2020] AC 373.
- 87 The Specific Food Hygiene (Regulation (EC) No. 853/2004) (Amendment) (EU Exit) Regulations 2019, SI 2019/1247.
- 88 The Capital Requirements (Amendment) (EU Exit) Regulations 2019, SI 2019/1232. See also: Jack S. Caird and Ellis Patterson, 'Brexit, Delegated Powers and Delegated Legislation: a Rule of Law Analysis of Parliamentary Scrutiny' (Bingham Centre for the Rule of Law, 20 April 2020) 19.
- 89 The Capital Requirements (Amendment) (EU Exit) Regulations 2019, SI 2019/1232.
- 90 Ruth Fox and Joel Blackwell, *The Devil is in the Detail: Parliament and Delegated Legislation* (Hansard Society 2014) 213.
- 91 *ibid*, 214.
- 92 HL Deb 7 October 2019, vol 799, col 1938.
- 93 Secondary Legislation Scrutiny Committee, *17th Report* (HL 2017-19, 292) para 7.
- 94 Secondary Legislation Scrutiny Committee, *17th Report (Sub-committee A)* (HL 2017-19, 292) para 18.
- 95 *ibid*, para 23.
- 96 De minimis is defined as having an impact of less than £5 million as defined in the Better Regulation framework.
- 97 The Impact Assessment for the Product Safety and Metrology etc. (Amendment etc.) (EU Exit) Regulations 2019, SI 2019/696 was not originally laid with the SI. It was laid after BEIS corrected the instrument and revised the EM.
- 98 Letter from SLSC to Philip Hammond Chancellor of the Exchequer, 19 February 2019.
- 99 Secondary Legislation Scrutiny Committee, *11th Report* (HL 2017-19, 260) para 5.
- 100 Secondary Legislation Scrutiny Committee, *15th Report* (HL, 2017-19, 281) para 23.
- 101 Freedom of Establishment and Free Movement of Services (EU Exit) Regulations 2019, SI 2019/1401.
- 102 Explanatory Memorandum to Freedom of Establishment and Free Movement of Services (EU Exit) Regulations 2019, SI 2019/1401, para 12.1.
- 103 See The Food Additives, Flavourings, Enzymes And Extraction Solvents (Amendment Etc.) (EU Exit) Regulations 2019, SI 2019/860, The Animal Health And Genetically Modified Organisms (Amendment) (EU Exit) Regulations 2019, SI 2019/1229 and The Plant Protection Products (Miscellaneous Amendments) (EU Exit) Regulations 2019, SI 2019/556.
- 104 HL Deb 23 October 2019, vol 800, cols 620 and 631.
- 105 Secondary Legislation Scrutiny Committee, *Work of the Committee in Session 2017-19: Second Interim Report* (HL 2017-19, 376) para 30.
- 106 The Plant Protection Products (Miscellaneous Amendments) (EU Exit) Regulations 2019, (SI 2019/1410).
- 107 The Pesticides (Amendment) (EU Exit) Regulations 2019, SI 2019/1410 and its Explanatory Note, para 7.12.
- 108 The REACH etc (Amendment etc.)(EU Exit) (No 2) Regulations SI 2019/858, Explanatory Memorandum, para 2.3.
- 109 Explanatory Memorandum to The Jurisdiction and Judgments (Family) (Amendment Etc.) (EU Exit) (No.2) Regulations 2019, para 7.3.



- 110 The Cross-border Trade (Public Notices) (EU Exit) Regulations 2019, SI 2019/1307.
- 111 Freedom of Establishment and Free Movement of Services (EU Exit) Regulations 2019, SI 2019/1401.
- 112 HL Deb 23 October 2019, vol 800, col 626.
- 113 The Conservation of Habitats and Species (Amendment) (EU Exit) Regulations 2019, SI 2019/579.
- 114 *ClientEarth and the Marine Conservation Society v Secretary of State for the Environment, Food and Rural Affairs* [2019] EWHC 2682 (Admin).
- 115 Delegated Powers and Regulatory Reform Committee, *Report on the Immigration and Social Security Co-ordination (EU Withdrawal) Bill* (HL 2017-19, 275) para 51 .
- 116 Keith D. Ewing, 'Covid-19: Government by Decree' [2020] KLJ 1.



**THE SIFT
PROJECT**



Public
Law
Project