How will regulations under the Withdrawal Act be made?

Over 800 statutory instruments (SIs) are expected under the European Union (Withdrawal) Act 2018. Several hundred more are expected under other Brexit-related Acts. This compares with 1,290 SIs in total in 2017 and 1,290 in 2016. The SIs will make changes to many thousands of provisions in EU regulations and domestic legislation to make them work properly in the UK context after Brexit.

There are detailed procedural rules on how a negative SI can be annulled or an affirmative one objected to. The political reality is that approval is a formality and that annulment is extremely rare. Also, unlike Acts (which are difficult to amend), the effect of an SI can be amended by the Government introducing a new one. The critical time for comment and amendment is before the SI reaches Parliament. This is of course dependent on there being any consultation or other opportunity for input.

This note looks at how the SIs under the Withdrawal Act will become law. Parliamentary procedure is very complicated with a lot of very technical jargon. This is a simplified overview.

Whitehall drafts the SI

Each Department is responsible for drafting the SIs that relate to its areas of responsibility. It may but is not obliged to seek any external input on its proposals. Each SI must have an explanatory memorandum to explain the changes made and if it is to go under the negative procedure (see below), the reasons why the Minister considers this to be appropriate.

Draft is sent to Parliament

The draft SI (with its explanatory memorandum) goes to Parliament. To become law, as is normal for secondary legislation, the SI will be subject either to the “negative procedure” or the more onerous “affirmative procedure”. These are explained below. The draft will indicate which procedure is to be followed. The affirmative procedure must be used for more significant legislative instruments such as ones which create criminal offences, further delegate powers, or allow taxes or fees to be levied. For other SIs under this Act the Minister has a discretion.

Most SIs follow the negative procedure and Government has an interest in using this as much as possible to speed up the process and reduce the scope for Parliamentary objection. It is expected that about 20-30% will follow the affirmative procedure.

Sifting

Before going through the negative procedure, the SI will go to the House of Commons “sifting committee”. This will be a new committee solely to look at the draft SIs under the Withdrawal Act (but not other Acts – there is currently no plan for the Commons to sift SIs under other Acts). It will have “10 sitting days” to recommend that the SI should, despite the Minister’s decision, be subject to the affirmative procedure. Their criteria have not yet been decided. Their recommendations are not binding on the Government. Sitting days are days that Parliament sits. They exclude most Fridays and the Parliamentary recesses. The House of Lords has had its own sifting committee for several years (the Secondary Legislation Scrutiny Committee). It may draw specific SIs to the attention of the House for a variety of reasons and delay approval of affirmative SIs by a week while discussions are held with Ministers and others.

Joint Committee on Statutory Instruments

This committee (a joint Commons and Lords one) reviews draft SIs to assess their technical qualities (including the quality of the drafting but not the policy content). It issues reports which have no binding effect. The Lords (but not the Commons) will not approve an SI under the affirmative procedure without the JCSI having reported on it but the JCSI has no power to block an SI.

Negative procedure

After the sifting, the Minister can make a negative SI that is then subject to annulment (but not amendment) by either House within 40 days (including weekends but not recesses) failing which it becomes law.

Affirmative procedure

For those SIs which are to follow the affirmative procedure, the SI has to be approved by both Houses. For these purposes the Houses generally act through delegated legislation committees rather than in plenary session. This normally takes at least six weeks. The Lords does not have to wait for the Commons. The SI cannot be amended. It can only be approved or rejected in its entirety.

Urgent cases

There is an exception which allows Ministers to make SIs without a draft being laid before or approved by Parliament if it contains a declaration that the Minister is of the opinion that, by reason of urgency, it is necessary to make the regulation in that way. In that event it lapses if not approved by both Houses within 28 days.

Date of taking effect

After the SIs have been made, the amendments made by them will not generally have effect until the exit date, or if there’s a transition period, the end of the transition period.

Parliamentary recesses

This year Parliament will be in recess from:
- 25 July to 3 September
- 14 September to 8 October
- 7 – 11 November
- 21 December – 6 January

For further reading on statutory instruments and in particular the affirmative and negative procedures, see the House of Commons Briefing Paper.

For a critical analysis of the sifting process, see the Hansard Society’s commentary.