Introduction

1. It is expected that the Act repealing the European Communities Act 1972 (“the Repeal Act”) will confer a broad swathe of powers, similar to section 2(2) of the 1972 Act, to disengage from obligations of the European Union over a period of time, through a series of statutory instruments unravelling transposition and implementation legislation.

2. This Note considers the role that the Joint Committee on Statutory Instruments can be expected to play in relation to those instruments under the Repeal Act.

3. References in this Note to the Joint Committee on Statutory Instruments should be taken as including references to the Commons Select Committee on Statutory Instruments in relation to matters falling within the House of Commons’ financial privilege.

Scope of JCSI terms of reference

4. The first point to note is that any statutory instrument arising out of the Repeal Act is likely to fall within the terms of reference of the JCSI as set out in Standing Order 151 (HC) without any expansion or modification.

5. Broadly speaking, the JCSI is required to consider all statutory instruments of a public general nature, which is likely to account for everything done under the Repeal Act.
**Reporting grounds**

6. Standing Order 151 sets out a number of specific grounds on which the Committee is expected to bring instruments to the special attention of both Houses.

7. The two grounds of reporting set out in the Standing Order that are most likely to be relevant to Brexit-related statutory instruments are *vires* and unexpected or unusual use.

8. These are already key issues for the Committee and feature heavily in its Reports to the two Houses. Both of these reporting grounds, in particular, are deployed regularly in relation to section 2(2) instruments made under the European Communities Act 1972, which raise *vires* and unexpected use issues likely to be very similar to those raised by the disengagement powers under the Repeal Act.

9. In addition, it should be noted that the Committee has a catch-all reporting ground set out in the Standing Order of any other matter that the Committee thinks should be brought to the attention of the Houses that does not relate to the merits or policy of the statutory instrument. That should be sufficient to allow the Committee to consider technical issues relating to the powers under the Repeal Act, although of course it will be clearer what those issues might be once the shape of the Brexit powers under the Act is clear.

10. At present, it is difficult to conceive the shape of an additional reporting ground that might be necessary to address issues raised by the Brexit legislation. But this is something that the JCSI’s legal advisers will keep under consideration as the shape of the Brexit powers becomes clear.

**Special Brexit issues**

11. One concern that might be felt in relation to the handling of Brexit instruments by the JCSI is the potential for diluted impact as a result of their inclusion in a general series of the Committee’s Reports relating to statutory instruments generally.

12. This concern is likely to be slight, however, because many instruments will in any event become mixed *vires* instruments (as is presently the case for section 2(2)) dealing with disengagement issues as well as new issues of domestic policy; and this is likely to become more and more the case over time.

13. To the extent, however, that the JCSI identifies emerging trends in relation to Brexit instruments that it feels require to be considered as distinct areas of concern, a number of techniques are open to achieve that in accordance with the Committee’s present practice.
14. In particular, it is not uncommon for Committee Reports to combine instruments which display connected features; and it is already the practice of the Committee to issue occasional Special Reports bringing together common themes in relation to a range of instruments and drawing attention of the two Houses to those themes.

15. Both of those techniques, and others, are likely to recommend themselves to the JCSI to ensure that any emerging special issues in relation to Brexit are not submerged in the Committee’s business-as-normal consideration of instruments.

Resources

16. As to whether the existing resources of the Joint Committee on Statutory Instruments will be sufficient to handle the amount of work expected to arise under the Repeal Act, there are two key points to remember.

17. First, until 2014, the Committee was habitually handling something in the region of 3000 statutory instruments every year. In the last couple of years that number has diminished, and in 2016 only around 1200 instruments were made. The Committee is therefore well used to handling significantly larger numbers of instruments than it has been required to handle in the last couple of years, and both in terms of corporate memory and present resourcing structure it stands ready to handle up to 4000 instruments a year without changing its present approach to the work or requiring significant additional resources. It is most unlikely that the Government will have the ability or will to produce larger quantities of statutory instruments than that for Brexit disengagement purposes.

18. Secondly, it should be remembered that a large part of the Committee’s existing business is to consider instruments wholly or partly made under section 2(2) of the European Communities Act 1972, to give effect to obligations of the European Union. The Committee is therefore already resourced and prepared to consider issues of European Union law and policy. Those issues are likely to be the same, in large part, as those arising in relation to disengagement from the EU as part of the Brexit process; indeed, as noted above, it is expected that the disengagement stream of policy will become increasingly conflated with emerging independent domestic policy in many areas over the next few years.

19. For these two reasons, it is reasonable to assume that the present resources of the JCSI in terms of support, capability and experience should suffice to deal with the work arising from the Brexit.

20. It is, of course, possible that this assumption will be falsified by emerging events. Most obviously, it is possible that the Government will secure resources to produce a larger quantity of disengagement legislation than this Note assumes and that, at least as a short term spike, resources will be needed to handle an unprecedented number of instruments.
21. It is also possible that it will become clear that Brexit legislation presents challenges
and issues that require additional support for other reasons.

22. Should either of these possibilities begin to emerge, however, it should be possible to
address them by the acquisition of additional short-term resources, which it is likely to
be relatively easy to recruit and deploy within a reasonably short period of time.

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