



House of Commons  
European Statutory  
Instruments Committee

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**Eighth Report  
of Session 2017–19**

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**Documents considered by the Committee on  
20 November 2018**

**Drawing attention to:**

The Fertilisers and Ammonium Nitrate Material (Amendment) (EU Exit)  
Regulations 2018

*Report, together with formal minutes*

*Ordered by the House of Commons  
to be printed 20 November 2018*

## European Statutory Instruments Committee

The European Statutory Instruments Committee is appointed by the House of Commons to examine and report on:

- (i) any of the following documents laid before the House of Commons in accordance with paragraph 3(3)(b) or 17(3)(b) of Schedule 7 to the European Union (Withdrawal) Act 2018—
  - (a) a draft of an instrument; and
  - (b) a memorandum setting out both a statement made by a Minister of the Crown to the effect that in the Minister's opinion the instrument should be subject to annulment in pursuance of a resolution of either House of Parliament (the negative procedure) and the reasons for that opinion, and
- (ii) any matter arising from its consideration of such documents.

### Current membership

[Rt Hon Sir Patrick McLoughlin MP](#) (*Conservative, Derbyshire Dales*) (Chair)

[Kirsty Blackman MP](#) (*Scottish National Party, Aberdeen North*)

[Nic Dakin MP](#) (*Labour, Scunthorpe*)

[Mr Philip Dunne MP](#) (*Conservative, Ludlow*)

[Ms Angela Eagle MP](#) (*Labour, Wallasey*)

[Rt Hon Sir David Evennett MP](#) (*Conservative, Bexleyheath and Crayford*)

[Vicky Ford MP](#) (*Conservative, Chelmsford*)

[Patrick Grady MP](#) (*Scottish National Party, Glasgow North*)

[Trudy Harrison MP](#) (*Conservative, Copeland*)

[Julia Lopez MP](#) (*Conservative, Hornchurch and Upminster*)

[Ian C. Lucas MP](#) (*Labour, Wrexham*)

[Bridget Phillipson MP](#) (*Labour, Houghton and Sunderland South*)

[Mary Robinson MP](#) (*Conservative, Cheadle*)

[Andrew Selous MP](#) (*Conservative, South West Bedfordshire*)

[Jo Stevens MP](#) (*Labour, Cardiff Central*)

[Liz Twist MP](#) (*Labour, Blaydon*)

### Powers

The Committee's powers are set out under a Temporary Standing Order of 16 July 2018.

### Publications

The reports of the Committee are published in print by Order of the House. All publications of the Committee are available on the Internet from [www.parliament.uk/esic](http://www.parliament.uk/esic).

### **Committee staff**

The current staff of the Committee are Mike Winter (Clerk), Yohanna Sallberg (Second Clerk), Paul Simpkin (Senior Committee Assistant) and Zsofia Kiss (Committee Assistant). Advisory Counsel: Daniel Greenberg, Klara Banaszak and Vanessa MacNair.

All correspondence should be addressed to the Clerk of the European Statutory Instruments Committee, House of Commons, London SW1A 0AA. The telephone number for general inquiries is: 020 7219 7597; the Committee's email address is: [esic@parliament.uk](mailto:esic@parliament.uk).



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## The work of the Committee

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1.1 Our experience in sifting over 70 instruments has made it possible to set out the principles that we are applying in our consideration of each proposal. We hope that publishing this information will benefit the Government and other stakeholders in their understanding of our approach.

### Diminution of rights

1.2 As part of assessing each proposal, we consider whether an instrument significantly diminishes rights, whether in a consumer context or in other contexts. The threshold is one of significance—but when in doubt we are inclined to assume that an instrument which in disengaging from EU obligations results in a diminution of rights should be subject to affirmative resolution.

### Explanatory Memoranda

1.3 It would be helpful to the Committee if the impact of the diminution of rights could be better evaluated and evidenced in the Explanatory Memoranda (EMs) that are laid alongside every proposed negative statutory instrument, and which contain information explaining the purpose and policy background of the instrument. This should include information on any consultation with the affected parties, the current reliance on the rights and the anticipated practical impact of the diminution of those rights. Information provided on consultations has varied significantly and ranges from no information at all to significant Impact Assessments (IAs) published in addition to the EM. We have recently commented adversely where the impact on UK business and consumers had not been provided by the department on the basis that the impacts did “not arise out of any domestic UK policy” but as a direct result of exiting the European Union. Similarly, we note that a department had “*not been able to publicly consult in order to minimise sensitivities in advance of negotiations with the EU*”.

### Territorial Extent and Application

1.4 We note that departments have explained the territorial extent and application as being the same as the instruments which they amend. This is insufficient, particularly where a proposal amends more than one instrument, and we expect this information to be set out in full in the EM.

### ‘Sifting’ Statements

1.5 The European Union (Withdrawal) Act 2018 requires that a Minister of the Crown makes a ‘sifting’ statement for each proposal. On more than one occasion a government department has failed to identify correctly the instrument to which the ‘sifting’ statement in the memorandum related. The approach we take in these circumstances is set out in full in the technical note attached as an Annex which will be of interest to those drafting instruments.

1.6 We have also identified the following issues which relate to ‘sifting’ statements and which will generally meet with our disapproval:

- the required opinion mostly consists of references to information provided elsewhere in the EM;
- a particularly narrow interpretation of the requirements for the statement is used. This includes where the appropriate procedure is proposed by the Minister on the basis that the instrument does nothing specifically prohibited by the Act; and
- it is stated that the proposal should be subject to the negative procedure because “*the contents of the instrument are not of such significance that Parliament would expect to debate it*”.

### Amending Primary Legislation

1.7 In relation to the use of secondary legislation to amend primary legislation, commonly known as ‘Henry VIII powers’, we have judged each case based on the volume and importance of the changes being proposed.

1.8 We have not necessarily followed the presumption that the affirmative procedure is appropriate when such powers are being used in cases where the number and effect of amendments has been modest. However, we also consider the cumulative impact of large numbers of amendments being made throughout an Act and on that basis may recommend that the additional safeguard of affirmative resolution is appropriate.

### Mandatory Affirmative

1.9 In the technical note (attached as an annex), we set out the approach we are taking to cases of mandatory affirmative procedure as provided for in the European Union (Withdrawal) Act 2018.

### Mixed-vires Instruments

2.0 We believe that the provisions of the European Union (Withdrawal) Act 2018 require us to consider the totality of an instrument, including provisions made under domestic vires as well as provisions under the Withdrawal Act. Although it is helpful for Explanatory Memoranda to continue to identify the vires for individual provisions of instruments, in mixed-vires cases we will consider the overall effect of the instrument, not just the effect of the provisions under the Withdrawal Act.

2.1 In a case where the Department had originally proposed to combine in one instrument the exercise of powers under the Withdrawal Act and other domestic vires, one result of the Government’s acceptance of a recommendation by the Committee that the Withdrawal Act powers should be handled through the affirmative procedure is that it may be necessary to produce two separate instruments, one containing the negative resolution domestic powers and one dealing with the exercise of the powers under Withdrawal Act.

2.2 The principles set out above are not intended to be exhaustive but arise from our experience to date. The Committee will include other points of interest as appropriate in our future reports.



# Instruments recommended for the affirmative procedure

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At its meeting on 20 November 2018 the Committee considered proposed negative instruments laid by the Government and has recommended that the appropriate procedure for the following instrument is for a draft of it to be laid before, and approved by a resolution of, each House of Parliament before it is made (i.e. the affirmative procedure).

## 3 The Fertilisers and Ammonium Nitrate Material (Amendment) (EU Exit) Regulations 2018

3.1 This instrument amends regulation EC No 2003/2003 (“the EU Regulation”) which lays down rules on the designation, definition, composition, identification and packaging of EC fertilisers which can be freely traded throughout the EU.

3.2 The Explanatory Memorandum (EM) states that the instrument “will replace the ‘EC fertiliser’ regime in EU law with a new domestic regime, providing for a ‘UK fertiliser’ label which will function in the same way. It will also allow a two-year transitional period during which ‘EC fertilisers’ can still be sold in the UK without a requirement to be relabelled, to ensure continued supply and reduce burdens on businesses”.

3.3 Schedule 7 to the EU (Withdrawal) Act 2018 (“the Act”) sets out four criteria that would require a statutory instrument made under section 8(1) to be laid under the affirmative procedure. These include that the instrument:

- provides for any function of an EU entity or public authority in a member State of making an instrument of a legislative character to be exercisable instead by a public authority in the United Kingdom (paragraph 1(2)(a));
- relates to a fee in respect of a function exercisable by a public authority in the United Kingdom (paragraph 1(2)(b)); or
- creates or amends a power to legislate (paragraph 1(2)(c)).

3.4 The Committee is concerned that these criteria appear to be met in relation to this instrument, notwithstanding the fact that additional provisions relating to fees and powers to legislate are envisaged and will be contained in a separate instrument.

3.5 The effect of regulation 5(13) is that the Secretary of State, the Welsh Ministers, the Scottish Ministers and the Northern Ireland Department of Agriculture, Environment and Rural Affairs will be permitted to charge fees to cover the cost of tests needed for official control measures they have imposed on UK Fertilisers. Although this fee-charging power already exists (in relation to member States) in the EU Regulation, the criterion in Schedule 7 does not require that an instrument creates a new fee, merely that it “relates to” a fee. This is sufficient to make the instrument mandatory affirmative under paragraph 1(2)(b) of Schedule 7 to the Act.

3.6 In addition, the effect of regulation 5(3)(b)(iv) is to confer on public authorities listed above the power to prescribe how the contents of fertilisers placed on their respective

markets are expressed, to prohibit or place conditions on the placing on the market of specified fertilisers, and to subject UK fertilisers to official control measures. These appear to the Committee to be powers to legislate.

3.7 In the Committee's view, a provision that changes the basis on which a public authority has power to legislate is caught by the wording of paragraph 1(2)(a) or (d) of Schedule 7 to the Act. To the extent that the authorities listed above already exercise the powers conferred by the EU Regulation, it is on the basis that powers are conferred in respect of the United Kingdom as a member State. Regulation 5(3)(b)(iv) has the effect of conferring the power to legislate directly on those Ministers in their domestic ministerial capacity. This is sufficient to make the instrument subject to mandatory draft affirmative procedure under paragraph 1(2)(a) or (d) of Schedule 7 to the Act.

3.8 Additionally, the Committee is concerned about the impact of the amendments made by regulation 8 to safety regulations governing the import of ammonium nitrate materials from outside the EU. The Committee expects that where such a change is made, the EM should be more explicit in setting out the government's approach and the anticipated practical impact on safety standards. Paragraph 7.2 of the EM states only that the instrument "ensures that all ammonium nitrate fertilisers are subject to these rules".

3.9 Finally, the Committee draws the attention of the House to the Minister's 'sifting' statement (the requirement of which is set out in paragraphs 3(2)(a) and 3(3) of Schedule 7 to the European Union (Withdrawal) Act 2018), which states that the proposal should be subject to the negative procedure because "the contents of the instrument are not of such significance that Parliament would expect to debate it". This may be the opinion of the Minister, but the Committee requires an evidential basis, not provided by the Department's memorandum, to support the Minister's assertion.

**3.10 The Committee recommends that the appropriate procedure for the instrument is for a draft of it to be laid before, and approved by a resolution of, each House of Parliament before it is made (i.e. the affirmative procedure), on the grounds that it appears to fall within paragraph 1(1) of Schedule 7 to the Act and that it is of legal importance.**

## Instruments recommended for the negative procedure

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**At its meeting on 20 November 2018 the Committee considered proposed negative instruments and has recommended that the appropriate procedure for the following instruments is for them to be subject to annulment in pursuance of a resolution of either House of Parliament (i.e. the negative procedure).**

The Bank of England (Amendment) (EU Exit) Regulations 2018

The Control of Mercury (Amendment) (EU Exit) Regulations 2018

The European Enforcement Order, European Order for Payment and European Small Claims Procedure (Amendment etc.) (EU Exit) Regulations 2018

The Exotic Disease (Amendment etc.) (EU Exit) regulations 2018

The Exotic Disease (Amendment) (England) (EU Exit) Regulations 2018

The INSPIRE (Amendment) (EU Exit) Regulations 2018

The Local Government (Miscellaneous Amendments) (EU Exit) Regulations 2018

The Persistent Organic Pollutants (Amendment) (EU Exit) Regulations 2018

## Annex—Technical Note

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### ‘Sifting’ Statements

1.1 The European Union (Withdrawal) Act 2018 requires that a Minister of the Crown makes a ‘sifting’ statement (see below). On more than one occasion a government department has failed to identify correctly the instrument to which the ‘sifting’ statement in the memorandum related.

1.2 The requirement for the ‘sifting’ statement is set out in Schedule 7 to the European Union (Withdrawal) Act 2018 (the Act). When proposing to make a statutory instrument under section 8(1) of the Act using the ‘negative’ procedure, Paragraph 3(3)(a) establishes a condition requiring that a Minister of the Crown ‘has made a statement in writing to the effect that in the Minister’s opinion the instrument should be subject to annulment in pursuance of a resolution of either House of Parliament’. Additionally, Paragraph 3(3)(b)(ii) requires that ‘a memorandum setting out the statement and the reasons for the Minister’s opinion’ is laid before each House of Parliament.

1.3 Failure to identify correctly the instrument to which the memorandum relates is not a mere typographical error of the kind that can be corrected informally but amounts to a failure to comply with the requirements of the Act. In such circumstances, the Committee believes that the memorandum must be corrected and re-laid before Parliament.

1.4 The Committee further notes that the ‘relevant period’ in which it is required to make a recommendation is set out in Paragraph 3(10) of Schedule 7 to the Act. The Act specifies that for the purposes of the ‘relevant period’, the beginning of the period is triggered by the laying of the relevant draft instrument before each House as required by Paragraph 3(3)(b)(i).

1.5 The Committee believes to begin its work all the statutory information must be provided. Paragraph 3(3)(b) is therefore taken as a single indivisible obligation in relation to the instrument and the memorandum, and both will need to be re-laid if there is an error in the ‘sifting’ statement. The ‘relevant period’ will not begin until that statutory obligation has been met and the Committee has the correct information before it on which to consider its recommendation.

1.6 The Committee sets out this information to ensure departments understand its expectations in these circumstances and is pleased to note that the departments concerned have so far followed this procedure.

### Mandatory Affirmatives

1.7 Schedule 7 to the European Union (Withdrawal) Act 2018 provides for mandatory affirmative resolution in the case of an instrument which “creates, or widens the scope of, a criminal offence”: it has been suggested that a de minimis threshold or significance test should be attached to this provision. Such a test was not included in the legislation expressly. The Committee believes that paragraph 1(2)(c) of Schedule 7 is clear: in any event, whether or not affirmative resolution is mandatory as a matter of law, the Committee expects to recommend affirmative resolution in all such cases.

1.8 In contrast, Schedule 7, paragraph 1(2)(a) and (d) are expressly confined to powers to legislate: in relation to other sub-delegations of power, the Committee is applying a significance threshold, and will not take the mere fact of delegating a power to Ministers or to another public authority as a trigger for affirmative resolution.

### **Standard Legislative Presumptions**

1.9 Although no instances have yet arisen for in which this has been determinative of the Committee's consideration of an instrument, it may be helpful to record that the Committee expects to recommend for affirmative resolution any instrument which disapplies any of the standard legislative presumptions (such as the presumption against ouster of judicial jurisdiction) or makes significantly retrospective provision.

# Formal Minutes

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**Tuesday 20 November 2018**

Members present:

Rt Hon Sir Patrick McLoughlin, in the Chair

Nic Dakin	Bridget Phillipson
Ms Angela Eagle	Mary Robinson
Rt Hon Sir David Evennett	Andrew Selous
Vicky Ford	Jo Stevens
Ian C. Lucas	Liz Twist
Julia Lopez	

Draft Report (*Eighth Report*), proposed by the Chair, brought up and read.

*Ordered*, That the Chair's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 3.10 agreed to.

Annex agreed to.

*Ordered*, That the Report be the Eighth Report of the Committee to the House.

*Ordered*, That the Chair make the Report to the House.

[Adjourned till 27 November at 3.30pm]