



House of Commons
Procedure Committee

Scrutiny of delegated legislation under the European Union (Withdrawal) Act 2018

Sixth Report of Session 2017–19

*Report, together with formal minutes relating
to the report*

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Procedure Committee

The Procedure Committee is appointed by the House of Commons to consider the practice and procedure of the House in the conduct of public business, and to make recommendations.

Current membership

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[Bob Blackman MP](#) (*Conservative, Harrow East*)

[Mr Peter Bone MP](#) (*Conservative, Wellingborough*)

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Powers

The powers of the Committee are set out in House of Commons Standing Orders, principally in SO No. 147. These are available on the internet via www.parliament.uk.

Publication

Committee reports are published on the Committee's website at www.parliament.uk/proccom and in print by Order of the House.

Evidence relating to this report is published on the [inquiry publications page](#) of the Committee's website.

Committee staff

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Summary

The European Union (Withdrawal) Act 2018 contains very broad delegated powers for Ministers to amend existing primary and secondary legislation in consequence of the repeal of the European Communities Act 1972. This is to ensure that on the day after exit day—the day the 1972 Act is to be repealed—the statute book functions as usual.

The Committee has examined the mechanism the Act provides for Parliamentary scrutiny of delegated legislation proposed under the Act. In a number of cases, where the Government proposes changes to the existing law by secondary legislation, the changes will have to be approved by both Houses following debate. These include regulations to set fees and charges for functions which UK public authorities will take over from EU institutions, and regulations to repeal provisions in devolution acts relating to devolution restrictions.

There are three main categories of instrument where the Government has the choice to introduce regulations under the negative procedure—where law is made and continues in force unless either House objects—or the affirmative procedure—where both Houses have to agree to the legislation before it can become law. These are:

- regulations to amend the law to correct deficiencies in EU law brought over into UK law, or exiting UK law implementing EU law;
- regulations to change the law to implement any withdrawal agreement, and
- regulations to make any changes to existing legislation which Ministers consider necessary in consequence of the implementation of the European Union (Withdrawal) Act.

Where the Government proposes to make regulations in these categories under the negative procedure, it must lay proposals for the regulations before Parliament together with an explanation as to why they should be subject to the negative procedure. Committees in both Houses have ten sitting days to examine the proposals and decide whether they are content for the negative procedure to be used, or whether they recommend using the affirmative procedure. After the ten sitting days have elapsed the Government may lay the regulations in their final form before Parliament, specifying whether they should be subject to the affirmative or the negative procedure.

The Committee makes proposals to establish a committee in the Commons to sift these proposals and recommend to the Government whether they should be continued with as negative procedure instruments or whether they should be upgraded to affirmative procedure.

The Committee proposes that this new committee—the European Statutory Instruments Committee—should be established with sixteen Members. To facilitate its swift establishment it is proposed that the Committee should choose its own chairman rather than having one elected by the House. The Committee is to have support from Speaker’s Counsel, in common with the House’s other legislative scrutiny committees.

The remit of the new committee will be to examine each proposal for a negative instrument and to recommend whether it ought to be proceeded with under the affirmative procedure. The committee will be expected to identify whether the instrument has any provisions which would normally require the affirmative procedure, either under the European Union (Withdrawal) Act's own provisions or under the criteria which are generally understood to govern the use of the affirmative procedure.

The Procedure Committee has identified a number of factors which the new committee may want to consider when deciding whether the instrument ought to be subject to the affirmative procedure. The main ones are:

- Legal importance: does the instrument amend existing law or make new law in a way which is significant? Would it normally fall within the “Brooke criteria”, which since the 1970s have been a general guide as to whether an instrument ought to engage the affirmative procedure?
- Political importance: is the Government proposing a legislative change which involves a substantive change in policy?
- Overall significance: is a proposed legislative change, taken together with other proposals, significant enough to merit the affirmative procedure?

The new committee will be open to receiving representations from a range of interested parties when determining whether an instrument ought to be proceeded with as an affirmative. Stakeholders and representative groups will wish to contribute their views, as will members of the public. Committees in the devolved institutions may wish to make representations about further scrutiny, in cases where they believe their competences are affected by proposed legislative changes. Other committees of the House may contribute their views, and the Government will in each case have to explain to the committee why it has chosen the negative procedure. The Procedure Committee does not stipulate criteria for the new committee to use when making its recommendation, though it suggests that the committee should recommend the affirmative procedure in cases where there is substantial demand in the House for an instrument to be debated in a delegated legislation committee or on the floor of the House.

The Procedure Committee makes suggestions for the scope of the new committee's activities within a general remit to report on any matter arising from its consideration of a proposal for an instrument. The new committee could, for instance, draw attention to an instrument's drafting; report on whether the instrument is drafted to achieve the effects claimed for it; and report on any issues raised by external organisations which it considers the House should be aware of.

In each instance where the Government disagrees with a recommendation of the new committee, Ministers have given a commitment that the reasons of the decision will be explained in a written Ministerial statement. The Procedure Committee recommends that this commitment be honoured in full, and that on every occasion the Minister should be prepared to appear before the new committee to justify the decision unless the committee indicates this will not be necessary. The new committee will be able to hold an instrument under scrutiny after it has been laid before Parliament in its final form.

The Procedure Committee highlights the importance of collaboration with the new committee across the Commons committee system. It also draws attention to the need for the new committee to have good working relationships and to develop a common understanding on sifting tasks with the Secondary Legislation Scrutiny Committee in the House of Lords, which that House will designate as the committee to undertake sifting.

The Government will be laying a very large number of instruments before the House under the powers in the Act before exit day on 29 March 2019. Ministers still estimate the overall volume of instruments to be over 800. Not all of these will fall to be scrutinised by the new committee, but a rough estimate of the sitting time available to the committee suggests that between 35 and 45 instruments could be laid each sitting week. The Procedure Committee calls on the Government to maintain a steady and even flow of instruments for scrutiny, and to provide regular updates to the new committee on the progress of instruments through the Parliamentary Business and Legislation Cabinet committee.

Should the Government, through the proposed European Union (Withdrawal Agreement and Implementation) Bill, claim further powers to amend existing legislation in consequence of any withdrawal agreement, the Procedure Committee recommends that a similar sifting mechanism be established to provide for Parliamentary scrutiny of any discretion to be given to Ministers over procedures for approval of secondary legislation.

The Procedure Committee recommends that, in addition to the statutory requirements for information to be provided about proposed instruments, the Government should provide a detailed 'anti-transposition' note for each instrument, setting out the drafting approach the Government is taking to disengage UK law from EU obligations in each case.

The new committee is to be set up under a temporary standing order until the end of the present Parliament. The Committee's power to consider and report on proposals for negative instruments expires once the corresponding power in the Act expires. For regulations connected with withdrawal from the EU, this is on exit day; for regulations correcting deficiencies, this is two years after exit day, and for regulations making consequential provision, this is ten years after exit day. While the bulk of the new committee's work is likely to fall before exit day, it is therefore likely to have a substantial scrutiny task in the two years after exit day, and probably beyond. The Procedure Committee recommends that immediately before the dissolution of the present Parliament the Government should make a statement setting out the powers in the Act which remain in force and the plans the Government has to make further use of those powers, to assist the new House in determining whether the committee should be re-established in the new Parliament.

1 Developments since the Committee's interim report

1. This report is about the scrutiny of delegated legislation proposed under the European Union (Withdrawal) Act 2018, which received Royal Assent on 26 June 2018. We have previously issued an interim report with recommendations on the scrutiny of delegated legislation under the Bill as it was introduced to the House of Commons.¹ Our Chairman, Mr Charles Walker MP, subsequently tabled amendments to the Bill in Committee of the whole House: these were accepted without division.² An initial proposal by the Lords for an alternative model of scrutiny was rejected by the Commons.³ The Lords subsequently made a revised proposal which applies the model first proposed in the Commons to both Houses.⁴ This forms the basis of the scrutiny system now provided for in the Act.

2. In our interim report we outlined a system to examine, and to authorise the exercise by Government, of the powers it has claimed in the Bill to change existing law by regulations. The amendments subsequently tabled by our Chairman were drafted following discussions on the scrutiny system most likely to command the support of the House. This report provides a manual for the implementation of this system in the House, including the establishment of a new European Statutory Instruments Committee.

3. Our objective for the scrutiny system has not changed: we maintain that the scrutiny system we propose will have achieved its aims if the House is thereby recognised:

- to have overseen the implementation of all the necessary changes contemplated under the Bill by exit day;
- to have taken its scrutiny responsibilities seriously;
- to have taken ownership of the parliamentary processes;
- to have represented the interests of constituents; and
- to have improved the outcomes for the people of the UK.⁵

Our inquiry, and this report

4. This report is prepared as part of our general inquiry into *Exiting the European Union: scrutiny of delegated legislation*, which we launched in September 2017. The inquiry was established to examine two issues of concern to the House in the course of this session of Parliament, during which the Government proposes to pass a substantial proportion of the legislation required to effect the UK's exit from the European Union and to deliver the Government's policy objectives for the UK after exit. These are:

1 Procedure Committee, *Scrutiny of delegated legislation under the European Union (Withdrawal) Bill*, First Report of Session 2017–19, HC 386

2 Amendments 392 to 398 to [Commons Bill 147: Votes and Proceedings](#), 13 December 2017.

3 Lords Amendments 110 and 128, printed in [Commons Bill 212](#); disagreed to by the Commons on 12 June 2018. [Votes and Proceedings](#), 12 June 2018.

4 Lords Amendments 110B to 110J, printed in [Commons Bill 229](#): agreed to by the Commons on 20 June 2018. [Votes and Proceedings](#), 20 June 2018.

5 [HC 386](#), para 21

- the provisions being made for Parliamentary scrutiny of delegated legislation in the European Union (Withdrawal) Bill and in the subsequent “Brexit bills” announced in the Queen’s Speech and expected to be introduced during the present two-year session of Parliament, and
- the adequacy of procedures in the House of Commons for appropriate scrutiny of such delegated legislation.

In this section of the inquiry we took oral evidence from the Clerk Assistant, Dr John Benger, and the Clerk of Committees, Paul Evans, and from the Leader of the House, Rt Hon Andrea Leadsom MP and the Parliamentary Under-Secretary, Department for Exiting the European Union, Mr Steve Baker MP. We received ten written submissions, four of which supplemented submissions made to the initial stage of our inquiry. We are grateful to all those who gave oral evidence and submitted written evidence.⁶

⁶ A list of the oral evidence taken and written evidence received in this stage of the inquiry is at pages 38 and 39. The evidence to the earlier stage of the inquiry is listed in [HC 386](#), pages 22 and 23.

2 The sifting system under the Act

Powers exercisable by regulations under the Act

5. The European Union (Withdrawal) Act 2018 confers powers on Ministers to make a very broad range of amendments to existing primary and secondary legislation in order to deal with issues arising from the UK's withdrawal from the EU.

6. The main powers delegated to Ministers in the Act, listed by the procedure applicable to the instruments exercising those powers, are:

Affirmative procedure, or procedure determined after sifting

- a) Dealing with deficiencies in retained EU law arising from withdrawal (section 8 of the Act)
- b) Implementing any withdrawal agreement (section 9)⁷
- c) Making consequential provision (section 23(1))⁸

Affirmative procedure only

- d) Providing for fees and charges in relation to functions which public authorities may have as a consequence of regulations made under (a) or (b) above (section 14(1) of and Schedule 4 to the Act)
- e) Authorising challenges to the validity of retained EU law (section 5(6) and Schedule 1)
- f) Repealing provisions in devolution acts relating to devolution restrictions in retained EU law (section 12(9))
- g) Providing for the admissibility of evidence in legal proceedings (Schedule 5, paragraph 4)
- h) Amending the definition of 'exit day' in the Act (section 20(4))

Affirmative, negative or no procedure, at Ministerial discretion

- i) Making transitional, transitory or saving provision considered by Ministers to be appropriate in connection with the coming into force of any provision of the Act (section 23(6))⁹

7 "Withdrawal agreement" is defined in s. 23 of the Act as "an agreement (whether or not ratified) between the United Kingdom and the EU under Article 50(2) of the Treaty on European Union which sets out the arrangements for the United Kingdom's withdrawal from the EU". The use of the power is subject to the prior enactment by Parliament of a statute approving the final terms of an agreement.

8 Provision considered by Ministers to be appropriate in consequence of the Act.

9 A saving provision allows reservations or exceptions to the general application of a statute.

7. Each of the powers listed above are exercisable by statutory instrument.
- Where powers listed at (a) to (c) above are exercised, the statutory instrument, if not subject to the affirmative procedure, is subject to the sifting procedure described at paragraphs 12 and 13 below.
 - Where the powers listed at (d) to (h) are exercised, the statutory instrument is subject to the affirmative procedure.
 - Where the powers listed at (i) are exercised, the statutory instrument may be subject to the affirmative or the negative procedure, or to no procedure, subject to the opinion of the Minister making the instrument as to the appropriateness of the procedure.

Urgency procedure for affirmative instruments

8. Where a Minister decides that, for reason of urgency, an instrument exercising powers under (a) to (e) subject to the affirmative procedure must be made and brought into force before the regulations have been approved by both Houses, the instrument may be made and brought into force before being laid before Parliament, but must be approved by resolution of both Houses within 28 days of the date of laying if it is to remain in force.¹⁰

9. An instrument made under this procedure must contain a declaration of urgency. Such an instrument is not subject to a sifting procedure.¹¹

Ministerial discretion and sifting

10. Where powers to remedy deficiencies (section 8(1)) or to implement a withdrawal agreement (section 9(1)) are exercised, the statutory instrument is subject to the affirmative procedure if it:

- provides for any legislative power currently sub-delegated under EU legislation to be sub-delegated to a UK public authority;
- relates to a fee for a function to be exercised by a UK public authority;
- creates or widens the scope of a criminal offence, or
- creates or amends a power to legislate.¹²

11. All other statutory instruments exercising powers under these sections are to be subject to the negative procedure, unless the Minister decides to make them subject to the affirmative procedure.

12. Where the Minister is contemplating using the negative procedure, he must lay before both Houses a proposal comprising a draft of the proposed instrument and a memorandum giving the Minister's opinion that the instrument should be subject to the negative procedure and setting out the reasons why.¹³

¹⁰ Schedule 7, paragraphs 5 and 19. The period of 28 days does not include days on which Parliament is dissolved or prorogued or either House is adjourned for more than four days.

¹¹ Schedule 7, paragraphs 5(7), 5(8), 19(8) and 19(9).

¹² Schedule 7, paragraphs 1(1) and 1(2) and paragraphs 10(1) and 10(2).

¹³ Schedule 7, paragraphs 3(3) and 17(3).

13. Within a period of 10 sitting days, starting with the first sitting day after the instrument is laid before each House, a committee of either House may make a recommendation as to the appropriate procedure for the instrument. If the 10-day consideration period elapses without a committee of either House having made a recommendation, the Minister may make the instrument and lay it before Parliament under the negative procedure.

14. Where a committee has recommended a procedure for the instrument, and the Minister disagrees with the recommendation, the Minister may make the instrument and lay it, but not until he has made a statement explaining why he disagrees with the Committee's recommendation.

Expiry of powers in the Act

15. The regulation-making powers in the Act are in certain cases time-limited. The powers expire as follows:

- a) Implementing any withdrawal agreement: expiry on exit day¹⁴
- b) Amending the definition of 'exit day' in the Act: expiry on exit day¹⁵
- c) Dealing with deficiencies in retained EU law arising from withdrawal: expiry two years after exit day¹⁶
- d) Providing for fees and charges in relation to functions which public authorities may have as a consequence of regulations made under (a) or (b) above: expiry two years after exit day, except for instruments altering such fees¹⁷
- e) Making consequential provision: expiry 10 years after exit day¹⁸

16. There is no time limit on the exercise of the following powers:

- a) Authorising challenges to the validity of retained EU law;
- b) Repealing provisions in devolution acts relating to devolution restrictions in retained EU law;
- c) Providing for the admissibility of evidence in legal proceedings, and
- d) Making transitional, transitory or saving provision considered by Ministers to be appropriate in connection with the coming into force of any provision of the Act.

14 Section 9(4)

15 No statutory authority, but self-evidently the case

16 Section 8(8)

17 Schedule 4, paragraph 5

18 Section 23(4)

3 The operation of a sifting system

17. In December 2017, following the Chairman's tabling of amendments to the European Union (Withdrawal) Bill in Committee, the Leader of the House of Commons tabled, at the Chairman's request, notice of a series of motions to the Remaining Orders section of the Order Paper.¹⁹ This tabling effectively constituted the publication of draft proposals to establish a sifting system in the Commons.

18. We have reviewed the draft motions against the final provisions of the Act to ensure that the system as envisaged is sufficient to meet our objectives for the sifting system, and we publish a revised draft at Annex 1.

The European Statutory Instruments Committee

Establishment

Size and membership

19. The draft motion for a temporary standing order for a European Statutory Instruments Committee (ESIC) provides for a committee of 16 Members. This is equivalent in size to the existing European Scrutiny Committee.

20. Strict application of the formula used by the Selection Committee to determine the party composition of a select committee would give a party breakdown on ESIC of 8 Conservatives, 6 Labour and 2 Scottish National Party members. The House does of course have discretion to vary its application of the formula.²⁰

21. In common with other committees with legislative scrutiny tasks which require swift establishment, it is not proposed to require the parties to organise elections to places on ESIC prior to the submission of nominations.

Chair

22. Chairs of committees with legislative scrutiny tasks are generally not elected by the House, and in ESIC's case it is proposed that the committee should choose its chair at its first meeting. The motions tabled by the Government propose that the chair of the committee should receive the additional salary paid to most select committee chairs and should be appointed to the Liaison Committee.

Sub-committees

23. ESIC is to have the power to appoint sub-committees, with no restriction on the number to be appointed. We note that the House of Lords Secondary Legislation Scrutiny Committee, which is to perform the sifting task in the Lords, is to be given the power

19 Future Business B: business of which notice has been given and which can therefore theoretically be taken on the sitting day on which the notice paper is published, but is not expected to be taken on that day.

20 Motions to appoint Members to a committee established under a temporary standing order are not subject to the requirements of notice in Standing Order No. 121(2), and are not required to be moved by the Chair or another member of the Selection Committee, though nothing in that Standing Order prohibits the Selection Committee from proposing the membership of such a committee.

to appoint sub-committees which may report independently from the main committee.²¹ While there may be merit in ESIC considering the establishment of sub-committees as the nature of the scrutiny task envisaged becomes clear, the power of independent reporting is not envisaged in the motion to establish ESIC. Should ESIC decide to appoint sub-committees, and should it appear that independent reporting by such committees will benefit the scrutiny process, it will be open to the committee to make the case for a change.

Advice to the Committee

24. In addition to the support the House Service provides to each select committee, the motion authorises Speaker's Counsel to advise the Committee and any sub-committees, and authorises the Committee to appoint specialist advisers. The Office of Speaker's Counsel (OSC) already advises the Joint and the Select Committee on Statutory Instruments through Counsel (Legislation) and the European Scrutiny Committee through Counsel for European Legislation. Authorising OSC support to ESIC will enable legislative scrutiny committees to achieve consistency in their approach.

Remit

25. ESIC's overall remit, as expressed in the draft motion, is

- i) to examine and report on the proposals for negative instruments which Ministers are required by statute to lay before the House before making instruments exercising powers under the negative procedure, and
- ii) to examine and report on any matter arising from its consideration of such documents.

By making the temporary standing order the House will in effect designate ESIC as the committee charged with making recommendations on proposals for negative procedure instruments under the sifting provisions of the Act.

26. Under the draft motion, ESIC is to consider, when examining proposals for negative instruments, whether the instruments contain provisions which, under statute, require the affirmative procedure, and whether the instruments otherwise make inappropriate use of the negative procedure. If the Committee considers, for whatever reason, that the negative procedure is inappropriate for the instrument, it shall report its recommendation of the procedure which should apply.²²

27. There is statutory provision for Ministers to consider recommendations made by ESIC as to the procedure to be adopted if the recommendation is made within the ten sitting day consideration period.²³ The instruction to ESIC contained in the proposed standing order requires it to make any recommendation on upgrading instruments to affirmatives within the consideration period, but does not require ESIC to report on an instrument if it is satisfied that it can proceed as a negative.

21 House of Lords Procedure Committee, *European Union (Withdrawal) Act 2018: Sifting of proposed negative instruments by the Secondary Legislation Scrutiny Committee; Consideration of Commons Amendments; Grand Committees on Questions for Short Debate*, Fifth Report of Session 2017–19, HL Paper 163, paras 1–8.

22 Schedule 7, paragraphs 3(4) and 17(4)

23 Schedule 7, paragraphs 3(6) and 17(6)

'Inappropriate use of the negative procedure'

28. The key judgments for ESIC to make in respect of each proposed negative instrument will be:

- a) whether it contains provisions which, under the European Union (Withdrawal) Act, require it to be subject to the affirmative procedure, and
- b) whether it otherwise merits being subject to the affirmative procedure.

29. In coming to recommendations under (a) the Committee will be able to draw on the advice of the Office of Speaker's Counsel as to whether provisions in the proposal ought to require the instrument to be subject to the affirmative procedure pursuant to the requirements of the Act.

30. The determination to be made under (b) is likely to bring a greater range of considerations to bear. Among these are likely to be:

- Whether the instrument proposes a change which is legally important—that is, whether it proposes to amend existing law or make new law in a way which is significant
- Whether the instrument is politically important—for instance, whether the Government is proposing a legislative change which involves a change in policy which merits further debate before it is approved
- Whether a proposed change in legislation, taken together with other proposals, is significant enough to require further scrutiny

The Joint Committee on Statutory Instruments (JCSI) expressed the view that the process of distinguishing instruments which should be subject to the affirmative rather than the negative procedure would 'largely be a political process based on relative importance of policy issues and prioritisation'.²⁴

31. JCSI has pointed out that successive governments have accepted, as a general presumption, that instruments which amend primary legislation ought to be subject to the draft affirmative procedure unless there is a reason to the contrary.²⁵ JCSI observed that there was a risk in requiring instruments which made 'relatively mundane' amendments to primary legislation to undergo the affirmative procedure: doing so might make it more difficult to give attention to the instruments making significant changes which required the scrutiny attendant on the affirmative procedure. JCSI recommended that, nevertheless, ESIC should in all cases require the Government to justify its choice of the negative procedure for such instruments.²⁶

24 Joint Committee on Statutory Instruments ([EUX0022](#)), para 1

25 *Ibid.*, paras 3 and 5

26 *Ibid.*, para 6

Legal importance: the ‘Brooke criteria’

32. The ‘Brooke criteria’ for determining instruments appropriate for affirmative resolution were established by the Joint Committee on Delegated Legislation in 1973 and have been accepted by successive Governments as general presumptions.²⁷ There are three criteria:

- Do the powers ‘substantially affect’ the provisions of an Act of Parliament?
- Do the powers allow the imposition or increase of taxation?
- Are there other powers of special importance—for example, creating serious criminal offences?²⁸

In each case JCSI has suggested an approach which ESIC might take in interpreting these criteria and applying them to the instruments likely to be proposed under the Act.

33. Some of these criteria are reflected in the Act’s requirements that certain instruments be subject to affirmative resolution: but by no means all of them are.²⁹ The powers granted by Parliament to the Government to amend primary legislation by secondary legislation are particularly broad. In addition to the power to correct deficiencies in legislation arising from UK withdrawal from the EU, and making provision for implementation of a withdrawal agreement, Ministers have claimed the power to make ‘such provision as [they] consider appropriate in consequence of [the] Act’ for a period of up to ten years after exit day, including modifying any provision made in legislation which has been passed before the end of the 2017–19 Session.

34. JCSI has pointed out two examples of provisions which might be serious enough to require the affirmative procedure:

- provisions which disapply standard presumptions, in, for example, the Interpretation Act 1978
- provisions which confer or apply intrusive powers, for example rights of entry.

35. We draw to the attention of the new Committee, and the House more generally, the ‘Brooke criteria’ which have over the last 45 years generally governed presumptions over the use of the affirmative procedure. Ministers should have regard to the ‘Brooke criteria’ when using their discretion to determine the procedure for instruments under the Act, and, when proposing that an instrument which engages the criteria should be subject to negative resolution, ought to explain why this procedure is considered appropriate. Should the Committee consider that a proposal for a negative instrument contains provisions which engage the Brooke criteria, it should draw the matter to the attention of the House, and take it into account when reaching its recommendation on the procedure to be used.

27 *Ibid.*, para 9. The criteria are set out in the Second Report from the Joint Committee on Delegated Legislation, Session 1972–73, HL 204 / HC 468, para 46.

28 *Ibid.*, para 8

29 The requirements are listed in paragraphs 1(2) and 10(2) of Schedule 7 to the Act.

Political importance

36. We do not here seek to guide the work of ESIC by trying to define issues of political importance. The Committee will itself have a range of views to draw upon in trying to make a recommendation based on political importance:

- the views of Committee members
- representations from stakeholders and the general public
- the views of devolved institutions, in circumstances where devolved competences may be affected
- submissions invited from, or representations made by, other committees
- the Government's own views, submitted in explanatory material and in any subsequent material required by the Committee

We nevertheless make one observation to assist the Committee in coming to a view on whether proposals are sufficiently legally or politically important that they require the affirmative procedure rather than the negative.

37. ESIC, when making recommendations for the use of the affirmative procedure, should bear in mind that a recommendation for affirmative procedure will generally require an instrument to be debated for up to ninety minutes in a Delegated Legislation Committee or (in very significant circumstances) on the floor of the House.

38. **When determining the appropriate procedure for an instrument, ESIC should in our view have regard to the likely level of interest in the House in debating the matter raised.** Delegated legislation committees arising from ESIC recommendations ought to be lively affairs, attended by Members not nominated to the committee who wish to take part in debate on the instrument on the basis of sectoral, constituency or other concerns. We envisage a high level of participation in such debates, potentially from non-nominated Members, and meetings which take up the majority of the time allotted for debate in each case.

Scope of the Committee's activities

39. We expect the new Committee to act on the House's behalf as gatekeeper and monitor of the new procedure. As such we envisage that the Committee may take advantage of its remit to report on any matter arising from its consideration of proposals for negative instruments to do the following:

- Identify any issues with the drafting of the instrument
- Report on whether it imperfectly achieves its policy objectives
- Report any substantive concerns raised on its drafting or purpose by external organisations, where the Committee considers they merit further attention

In circumstances where an instrument is clearly deficient—where it is defectively drafted, or where it manifestly does not achieve the results it claims to—ESIC may wish to draw the special attention of the House to the proposal, and may wish to recommend that it should not be proceeded with in its present form.

Disagreement with the Government

40. Concerns were expressed in both Houses during the passage of the Bill that a sifting system which did not give statutory force to a committee recommendation would be insufficiently strong to be effective. Ministers sought to address these concerns by committing from the Despatch Boxes of both Houses to full explanations as to the Government's reasons for disagreement.³⁰

41. The Leader of the House of Lords, Baroness Evans of Bowes Park, made the following commitments when introducing the Government's proposals for a sifting mechanism for the Lords on 18 June:

I know that there has been concern that Ministers may ignore the committees. I echo the sentiment of my right honourable friend the Secretary of State for Exiting the European Union when he said that there is likely to be a “political cost which will be significant” to going against a sifting committee recommendation.

As I made clear in our previous debates on this issue, the Government have always expected to have to justify themselves to the sifting committees where they agree, with Ministers either being called in person before the committee or writing to explain their views. I hope the House does not think that this is a commitment which Ministers would shirk or seek to shy away from.

However, in order to put this beyond doubt, the Government are happy to put their commitment into statute, and this is reflected in the amendments before us tonight. Ministers will be required to make and provide to Parliament a Written Statement explaining themselves if they disagree with a recommendation from one or both of the sifting committees. Your Lordships can be assured that there will be no hiding place from the light of your scrutiny.³¹

The Minister thereby explained how the Government intended to discharge the requirement in the Act for a Minister to make a statement explaining any disagreement with the recommendation of a committee.³²

42. We welcome the clear and unambiguous commitment of the Government, delivered on 18 July 2018 from the Despatch Box by a Minister during proceedings on the Bill, to making a written Ministerial statement to both Houses on every occasion

30 For instance, the Secretary of State for Exiting the European Union agreed with the Chairman's assessment of the political cost to the Government of going against a committee recommendation: HC Deb, [12 June 2018](#), col. 735.

31 HL Deb, [18 June 2018](#), col. 1924.

32 Paragraphs 3(7) and 17(7) of Schedule 7

they disagree with a recommendation from one or both of the sifting committees. We require this commitment to be honoured in full in each case that there is disagreement with a committee of either House.

43. *In the event that a Minister disregards a recommendation of ESIC, we recommend that the Minister should, in addition to making a written Ministerial statement, be prepared to appear before ESIC at an early opportunity to discuss the difference of view, unless ESIC indicates that such an appearance will not be necessary.*

44. Where the Government maintains its decision to press ahead with a negative instrument, it will be open to Members, whether or not in response to a Committee recommendation, to oppose the resulting negative by tabling a ‘prayer’ against the instrument. This could be for the purpose of demonstrating opposition to the legislative change made in the instrument, or for the purpose of securing a debate on its purpose and effect.

45. ESIC may of course retain a matter under scrutiny after its initial recommendation on affirmative or negative procedure. Where the Government disagrees with the finding of ESIC in respect of the drafting of an instrument or the policy issues it raises, ESIC may similarly choose to pursue the matter through correspondence with Ministers, oral evidence, and subsequent reports informing the House of its views.

Relations with other committees

46. The temporary standing order as originally proposed would have given ESIC power to request an opinion on an instrument from each departmental select committee and several other subject-based Commons committees, together with the Joint Committee on Human Rights and the Joint Committee on Statutory Instruments. We found that this draft was unnecessarily laborious in stipulating the committees which may be consulted. In the draft we propose at Annex 1, this permissive power is expressed more generally.

47. We support ESIC’s use of this power to the extent that it is necessary and feasible to use it within the timescales imposed on it to report on the procedure to apply to instruments. As we note above, it is also possible for ESIC to report on other matters relating to an instrument after the statutory consideration period has expired: it may therefore consider referring an affirmative or negative instrument laid in the form of an earlier proposal to another committee for further scrutiny.

Relations with the Joint Committee on Statutory Instruments

48. The proposed temporary standing order envisaged the Committee having regard to any relevant report of the Joint Committee on Statutory Instruments when considering proposed negatives. JCSI is barred by its own standing order from considering proposals for negative instruments, and is therefore unlikely to report substantively on such proposals. While we have removed this requirement from the draft, we consider that ESIC would nevertheless benefit from having regard to any general report JCSI might make about the exercise by Ministers of the broad powers granted to them under the Act.

49. ESIC and JCSI will be operating in similar spheres, both with the benefit of the advice of Speaker's Counsel. There will be matters with ESIC cannot examine because they fall outside its remit or because there is no provision in the Act for such scrutiny. One such matter is the discretion given to Ministers to choose the appropriate procedure for instruments making transitional, transitory or saving provision under section 23(6) of the Act: affirmative, negative or no procedure. Such instruments are not subject to sifting and there are therefore no grounds for ESIC to examine the choice of procedure by Ministers and either to validate it or indicate whether another would be more appropriate. Where discretion to determine procedure is being used in an unusual or unexpected way, JCSI might be expected to draw cases to the special attention of the House under the provisions of its own order of reference.³³

Relations with the House of Lords

50. The committees of either House designated for the purpose may recommend that a proposed negative be upgraded to an affirmative. During the passage of the Bill, this House rejected a proposal from the Lords that a system be established to provide that an upgrade recommendation from either committee be binding on the Government unless overturned by a vote in the House where it was made.³⁴

51. As we have observed above, and as the Government accepts, in place of this binding statutory requirement there is a strong political obligation on the Government to follow the recommendations of the respective sifting committees, or to explain why.

52. In the absence of any binding statutory requirement, there is also an obligation on the committees in both Houses to operate in a way which benefits the scrutiny function of Parliament as a whole. A procedural recommendation of one committee which is not shared by the other tends to diminish the overall value of the sifting process, and allows the Government to ignore a recommendation in one House in favour of a less onerous recommendation in the other.

53. It is clearly desirable that both committees should seek to move in step as far as is possible and as is allowed by their respective orders of reference. There are areas, such as the observation of the Brooke criteria on affirmative instruments, where it ought to be possible to reach a measure of common understanding between the committees on what constitutes legal importance. Conversely, there are areas where it may be less easy to reach common understanding on the political importance of an instrument because of the particular conditions which prevail in either House.

54. *We recommend that the European Statutory Instruments Committee, once appointed, should seek to establish and maintain good working relationships and common understanding with its counterpart in the House of Lords.*

33 House of Commons Standing Order No. 151(1)(B)(vi)

34 Lords Amendments 110 and 128.

Scheduling the flow of instruments and managing the workload

55. We estimate that on present sitting patterns the House will sit on 106 days in 26 sitting weeks between the date of publication of this report and exit day on 29 March 2019. We publish at Annex 2 an illustrative calendar demonstrating, for each day of the week on which a proposed negative is laid, the date on which the ten-day consideration period would expire and the number of calendar days between the date of laying and the date of expiry of the consideration period, inclusive of both dates.³⁵

56. We expect that Departments will wish to ensure that most, if not all, of their proposals for negative instruments are laid so as to ensure that the statutory ‘praying time’ of 40 days (excluding periods during with both Houses are adjourned for more than four days) has expired on or before exit day.

- We estimate that the latest day on which an instrument subject to negative resolution can be laid so that praying time expires on 29 March 2019 is **Monday 18 February 2019**.
- The latest day on which a proposed negative can be laid before Parliament so that the period for consideration expires before 18 February 2019 is **Friday 25 January 2019**.
- There are 203 calendar days between the date of publication of this report and Friday 25 January 2019. We estimate that the House is likely to sit on 72 of these days, spread over 17 sitting weeks.

57. Under the terms of the Act, the period for the committee to consider its recommendation on an instrument starts on the sitting day after the instrument is laid and elapses ten sitting days later. Where the sitting patterns of both Houses do not coincide and the ten days elapse on different days, the consideration period for both Houses is reckoned to end on the later date. Depending on the day of the week an instrument is laid, the committee will generally have between 17 and 20 calendar days, including the day of laying, to consider an instrument before the statutory period elapses.

58. There are 10 Commons sitting days between the date of publication of this report and 24 July 2018, the day on which the House is expected to rise for the summer recess. During this period we expect the new committee to be established and to hold initial meetings to determine its working methods.

59. We do not think that it is reasonable or feasible to expect ESIC to begin to make substantive determinations about the sifting of instruments in the period before the House adjourns for the summer recess on 24 July 2018. The earliest the Committee ought to be expected to make a substantive report with recommendations on the procedure to be followed on proposed negative instruments is during the week of 10 September 2018, the second week of the September sitting.

35 In the calendar in Annex 2, recess dates until the end of January 2019 are based on the adjournments agreed to by the House on 20 March 2018. Recess dates thereafter are estimated only. For the purposes of illustration, a February adjournment from Tuesday 12 to Monday 18 February 2019 is included.

60. *We recommend that no proposal for an instrument subject to negative resolution under the European Union (Withdrawal) Act 2018 should be laid before Parliament until Wednesday 18 July at the earliest, so that the consideration period elapses no earlier than Thursday 14 September, the last day of the September sitting.*

61. We anticipate that the committee will wish to meet at least once in each of the 18 sitting weeks between the week of Monday 10 September 2018 and the week of Monday 11 February 2019. The week of 11 February 2019 is the last week during which proposed negatives can be reported on in time to be laid as made negatives by 18 February.

62. Steve Baker told us that he anticipated that the total number of instruments amending existing legislation to be laid under the powers in the Act would be “towards the lower end of the range” between 800 and 1000 which the Government has consistently cited as its overall estimate of the total number of amending instruments required.

63. Not all these instruments will fall to be sifted by the new committee. The committee will not be required to sift the following:

- Instruments where Ministers have a choice of procedure and opt for the affirmative procedure
- Instruments which are automatically subject to affirmative resolution under paragraphs 1(2) and 10(2) of Schedule 7 to the Act
- instruments subject to the urgent procedure under paragraphs 5 and 19 of Schedule 7 to the Act, which, in order to remain in force, are required to be approved by both Houses within 28 days of being made.

Even on the generous assumption that 20 per cent of the estimated 800 to 1000 instruments fall into this category, the committee will still be expected to consider on average between 35 and 45 instruments each sitting week.

64. The draft package of standing order changes proposed to the House includes a provision to modify Standing Order No. 159 in its application to proposals for negative instruments, so that they may be laid on days when the House is not sitting.³⁶ We consider this to be a sensible modification which will allow a more measured flow of instruments to the committee.

65. Departments should nevertheless bear in mind that the facility to lay proposed negatives during recesses—in particular the summer and conference recesses—carries an attendant risk of creating ‘bunching’ in the committee’s overall workflow. The committee will be required to consider all proposed negatives laid during the summer recess no later than its meeting in the week of 9 October 2018, the first sitting week after the conference recess and the second week in which it is expected to be making substantive recommendations. Similarly, all proposed negatives laid during the conference recess will have to be considered by the week of 24 October 2018, the fourth week in which the committee is expected to make recommendations.

36 Standing Order No. 159 provides that any paper on which proceedings may be taken in pursuance of an Act of Parliament may only be laid on a sitting day.

Volume and flow of instruments

66. While Ministers have consistently estimated the total number of instruments to be laid before Parliament under the Act as between 800 and 1000, no further information has been provided to the House on the number of instruments each Department is expecting to lay before Parliament, nor on the likely schedule for laying.

67. In our earlier report we expressed concern at the implications for the Parliamentary timetable, and the operation of any scrutiny system, of a ‘peak and trough’ approach to laying by Departments.³⁷ The scrutiny system to be established would be much better served by an approach where a consistent flow of instruments is maintained, preferably to a schedule of which notice is given in advance, to enable ESIC to plan its work. The Secretary of State for Exiting the European Union responded to our recommendation on this point as follows:

Let me reassure you that the Government entirely understands and sympathises with the intention behind this recommendation, and is actively considering what it can do to allow all those with an interest in the legislative process to be suitably prepared.³⁸

68. While the Department for Exiting the European Union has published a number of dummy instruments to illustrate, among other things, the general drafting approach being taken, there is as yet no reliable indication of the scope of each instrument contemplated, or the likely length and complexity of many of them.³⁹ Writing to the Chairman in January 2018, the Secretary of State suggested that the process of negotiating a withdrawal agreement has been having an effect on the information the Department has been able to make available about the proposed process of secondary legislation:

I’m sure that you understand that it is challenging to identify now reliably what exact sequence of legislation might be needed, when much is still to be negotiated.⁴⁰

69. Approval for laying of all secondary legislation before Parliament must now be sought from the Parliamentary Business and Legislation (PBL) Cabinet committee, chaired by the Leader of the House. The Leader has consistently assured us that the introduction of PBL into the secondary legislation process is a means of ensuring quality control of instruments before they are laid before Parliament.⁴¹ The objective of ensuring that Parliament considers good quality secondary legislation is welcome. There is nevertheless a substantial risk that the quality control process may become a bottleneck if not robustly managed.

70. The Secretary of State for Exiting the European Union undertook to inform the Chairman when the Government was “ready to discuss other arrangements around the flow of secondary legislation, including how we will work with the sifting committee on

37 [HC 396](#), para 34.

38 Letter to the Chairman. Mr Charles Walker MP, from the Secretary of State for Exiting the European Union, Rt Hon David Davis MP, January 2018, reproduced at Annex 3.

39 Illustrative drafts of instruments, with explanatory notes, have been published at <https://www.gov.uk/government/publications/information-about-the-withdrawal-bill>

40 *Ibid.*

41 Q65 ([18 October 2017](#)) and Q177 ([2 May 2018](#))

a process that works for everyone.”⁴² While we have not yet received this signal from the Government, we trust that Ministers will soon be in a position to provide robust and useful information to ESIC on the likely flow of instruments.

71. We expect the Parliamentary Business and Legislation Committee of the Cabinet to take an active role in managing the flow of secondary legislation under the Act. The Government must ensure a steady and even flow of instruments for scrutiny for the Parliamentary process to work effectively. It will not be acceptable for the flow of instruments to be held up in PBL because of inadequate preparation in Departments, still less because of disagreements between Ministers.

72. *We recommend that the Leader of the House, as chair of the Parliamentary Business and Legislation Committee of the Cabinet, provide regular updates to the European Statutory Instruments Committee after each PBL meeting on the flow of Withdrawal Act instruments through that Committee. Such updates might include:*

- *A list of instruments which PBL has agreed may be laid, with the target date of laying of each*
- *A list of instruments prepared by each Department either awaiting consideration in PBL or held under consideration*
- *An estimate, by Department, of the number of instruments being prepared for submission to PBL.*

Variation in the total number of instruments to be laid

73. We surmise that the total number of instruments to be made under the Act is likely to depend upon the content of a withdrawal agreement, which may contain provisions on the elements of the existing *acquis communautaire* which will be subject to transition arrangements and therefore potentially requiring a different legislative treatment. Legislative provision for a transition and withdrawal agreement, should one be reached, may be made in a European Union (Withdrawal Agreement and Implementation) Bill.⁴³

74. **Should a transition and withdrawal agreement with the European Union be agreed pending ratification, we expect the Leader of the House to inform the House of the implications of such an agreement for the process of examining secondary legislation under the European Union (Withdrawal) Act.**

75. *Should further powers to amend primary legislation by secondary legislation be envisaged in a European Union (Withdrawal Agreement and Implementation) Bill, we recommend that the Bill should make corresponding provision for Parliamentary scrutiny of the powers exercised. We further recommend that proposals for amendments to Standing Orders be brought forward to allow a commensurate level of scrutiny in this House.*

42 Annex 3

43 On 13 November 2017 the Secretary of State for Exiting the European Union announced the Government’s intention to bring forward a bill should a withdrawal agreement be reached. HC Deb, [13 November 2017](#), col. 37.

Provision of information to the Committee

Statutory requirements to make statements in writing

76. Schedule 7 of the Act provides that Ministers must make certain statements in writing before instruments, or draft instruments, exercising certain powers are laid before Parliament. These statutory statements are “to be published in such manner as the Minister [making the statement] considers appropriate”.

77. These statements are to be made in respect of instruments, or draft instruments, which deal with deficiencies in retained EU law arising from withdrawal (section 8 of the Act), implement any withdrawal agreement (section 9), or make consequential provision (section 23(1)).

Content of statements

78. The statements required of Ministers are:

- a) An explanation of the instrument or draft, its purpose, the law before exit day which is relevant to it, and its effect (if any) on retained EU law (paragraph 28(6))
- b) A statement that, in the Minister’s opinion, the instrument or draft does no more than is appropriate (paragraph 28(2) of Schedule 7)
- c) An explanation why, in the Minister’s opinion, there are good reasons for the instrument or draft, and why the provision to be made is a reasonable course of action (paragraph 28(3)), and, where the instrument creates a criminal offence, why in the Minister’s opinion there are good reasons for creating the offence and for the penalty provided in respect of it (paragraph 28(7))
- d) A statement as to whether the instrument or draft will amend, repeal or revoke any provision of equalities legislation, and, if so, to explain the effect of the change (paragraph 28(4))
- e) A statement that the Minister has, so far as required to do so by equalities legislation, had due regard to the need to eliminate all conduct prohibited by or under the Equality Act 2010 (paragraph 28(5))⁴⁴

Statements for made affirmatives under urgency procedures

79. Where an instrument has been made and laid before Parliament under the urgency procedure in paragraphs 5(2) or 19(2) of the Act, the Minister who made the instrument is to publish a statement explaining why in his opinion the affirmative instrument had to be made without a draft having been laid before each House for approval (paragraph 34(2) of the Act).

44 “Equalities legislation” is defined in the Act as the Equality Act 2006, the Equality Act 2010 and any subordinate legislation made under either of those Acts.

Statements for proposals to sub-delegate powers

80. Statements are also required where instruments which are (a) to correct deficiencies, (b) to implement a withdrawal agreement or (c) to provide for public authorities to implement fees and charges arising from changes made under (a) or (b), themselves make provision to sub-delegate a power to another authority. In such instances Ministers are required to make statements setting out why it is appropriate to create a sub-delegated power.⁴⁵

Material which will assist Parliamentary scrutiny and Committee sifting

81. In order to determine the effect of each proposed change to UK primary or secondary legislation, and to assess the significance of the amendment proposed, it is likely that ESIC will require an explanation of the transposition history of the original provision, indicating how the original EU obligation was transposed into UK law and the process whereby this transposition is proposed to be reversed.

82. The statutory requirement in paragraph 28(6) of Schedule 7 to the European Union (Withdrawal) Act requires an explanation of the effect of the proposed negative instrument on retained EU law. This is unlikely to provide ESIC with sufficient information to determine the significance of the instrument in the context of the transposition into UK law of the original EU legislative requirement.

83. We recommend that each Department, as part of the explanatory material accompanying each instrument subject to sifting, provides an ‘anti-transposition’ note setting out:

- *The transposition history of the provision which is to be corrected*
- *The approach taken to transposition*
- *The approach proposed to disengaging from EU obligations and the changes required.*

Duration

84. ESIC is to be set up under a temporary standing order. The proposed standing order provides that once the power to make new regulations under each of sections 8, 9 or 23(1) of the Act expires, the corresponding power of ESIC to consider and report on proposals for regulations shall expire. Once the last of those powers expires, the order itself shall lapse. Regulation-making powers under section 9 (implementation of the withdrawal agreement) expire on exit day, while powers under section 8 (correcting deficiencies in legislation) expire two years after exit day and powers under section 23(1) (consequential provision) expire 10 years after exit day.⁴⁶

85. While the bulk of the Committee’s initial work will fall in the period between its establishment and exit day in March 2019, there is a continuing requirement for the committee to operate for as long as the power to make correcting regulations is in

⁴⁵ Paragraph 30 of Schedule 7 to the Act

⁴⁶ See paragraph 15 above.

force. Once that power has expired, in March 2021, the Committee will still be required to monitor the Government's use of the power to make consequential provision by instruments subject to the negative procedure.

86. The temporary standing order will automatically lapse at the end of the present Parliament and will have to be renewed in the next Parliament if the House requires a committee to continue the sifting function. Assuming that the present Parliament runs the full term provided for in the Fixed-term Parliaments Act 2011, ESIC will pass out of existence in the spring of 2022, seven years before the power to make consequential provision in the Act expires. It will be for the next House to determine how it wishes to sift any instruments proposed to be made under this remaining power.

87. We recommend that, upon the dissolution of the present Parliament and the lapse of the temporary standing order establishing ESIC, the Government make a statement setting out the relevant powers in the European Union (Withdrawal) Act which are still in force and the Government's plans to make further use of such powers. This statement will assist the next House to determine whether ESIC should be established in the next Parliament and, if not, how the sifting function provided for in the Act should be discharged.

Conclusions and recommendations

The operation of a sifting system

1. We draw to the attention of the new Committee, and the House more generally, the ‘Brooke criteria’ which have over the last 45 years generally governed presumptions over the use of the affirmative procedure. Ministers should have regard to the ‘Brooke criteria’ when using their discretion to determine the procedure for instruments under the Act, and, when proposing that an instrument which engages the criteria should be subject to negative resolution, ought to explain why this procedure is considered appropriate. Should the Committee consider that a proposal for a negative instrument contains provisions which engage the Brooke criteria, it should draw the matter to the attention of the House, and take it into account when reaching its recommendation on the procedure to be used. (Paragraph 35)
2. When determining the appropriate procedure for an instrument, ESIC should in our view have regard to the likely level of interest in the House in debating the matter raised. (Paragraph 38)
3. We welcome the clear and unambiguous commitment of the Government, delivered on 18 July 2018 from the Despatch Box by a Minister during proceedings on the Bill, to making a written Ministerial statement to both Houses on every occasion they disagree with a recommendation from one or both of the sifting committees. We require this commitment to be honoured in full in each case that there is disagreement with a committee of either House. (Paragraph 42)
4. *In the event that a Minister disregards a recommendation of ESIC, we recommend that the Minister should, in addition to making a written Ministerial statement, be prepared to appear before ESIC at an early opportunity to discuss the difference of view, unless ESIC indicates that such an appearance will not be necessary.* (Paragraph 43)
5. *We recommend that the European Statutory Instruments Committee, once appointed, should seek to establish and maintain good working relationships and common understanding with its counterpart in the House of Lords.* (Paragraph 54)
6. We do not think that it is reasonable or feasible to expect ESIC to begin to make substantive determinations about the sifting of instruments in the period before the House adjourns for the summer recess on 24 July 2018. The earliest the Committee ought to be expected to make a substantive report with recommendations on the procedure to be followed on proposed negative instruments is during the week of 10 September 2018, the second week of the September sitting. (Paragraph 59)
7. *We recommend that no proposal for an instrument subject to negative resolution under the European Union (Withdrawal) Act 2018 should be laid before Parliament until Wednesday 18 July at the earliest, so that the consideration period elapses no earlier than Thursday 14 September, the last day of the September sitting.* (Paragraph 60)
8. We trust that Ministers will soon be in a position to provide robust and useful information to ESIC on the likely flow of instruments. (Paragraph 70)

9. We expect the Parliamentary Business and Legislation Committee of the Cabinet to take an active role in managing the flow of secondary legislation under the Act. The Government must ensure a steady and even flow of instruments for scrutiny for the Parliamentary process to work effectively. It will not be acceptable for the flow of instruments to be held up in PBL because of inadequate preparation in Departments, still less because of disagreements between Ministers. (Paragraph 71)
10. *We recommend that the Leader of the House, as chair of the Parliamentary Business and Legislation Committee of the Cabinet, provide regular updates to the European Statutory Instruments Committee after each PBL meeting on the flow of Withdrawal Act instruments through that Committee. Such updates might include:*
 - *A list of instruments which PBL has agreed may be laid, with the target date of laying of each*
 - *A list of instruments prepared by each Department either awaiting consideration in PBL or held under consideration*
 - *An estimate, by Department, of the number of instruments being prepared for submission to PBL. (Paragraph 72)*
11. Should a transition and withdrawal agreement with the European Union be agreed pending ratification, we expect the Leader of the House to inform the House of the implications of such an agreement for the process of examining secondary legislation under the European Union (Withdrawal) Act. (Paragraph 74)
12. *Should further powers to amend primary legislation by secondary legislation be envisaged in a European Union (Withdrawal Agreement and Implementation) Bill, we recommend that the Bill should make corresponding provision for Parliamentary scrutiny of the powers exercised. We further recommend that proposals for amendments to Standing Orders be brought forward to allow a commensurate level of scrutiny in this House. (Paragraph 75)*
13. The statutory requirement in paragraph 28(6) of Schedule 7 to the European Union (Withdrawal) Act requires an explanation of the effect of the proposed negative instrument on retained EU law. This is unlikely to provide ESIC with sufficient information to determine the significance of the instrument in the context of the transposition into UK law of the original EU legislative requirement. (Paragraph 82)
14. *We recommend that each Department, as part of the explanatory material accompanying each instrument subject to sifting, provides an ‘anti-transposition’ note setting out:*
 - *The transposition history of the provision which is to be corrected*
 - *The approach taken to transposition*
 - *The approach proposed to disengaging from EU obligations and the changes required. (Paragraph 83)*

15. *We recommend that, upon the dissolution of the present Parliament and the lapse of the temporary standing order establishing ESIC, the Government make a statement setting out the relevant powers in the European Union (Withdrawal) Act which are still in force and the Government's plans to make further use of such powers. This statement will assist the next House to determine whether ESIC should be established in the next Parliament and, if not, how the sifting function provided for in the Act should be discharged. (Paragraph 87)*

Annex 1: Proposed changes to Standing Orders and Orders of the House

European Statutory Instruments Committee (Temporary Standing Order)

(1) There shall be a select committee, called the European Statutory Instruments Committee, 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.

(2) In its consideration of a document referred to in paragraph 1(i) the committee shall include, in addition to such other matters as it deems appropriate, whether the draft instrument—

- (i) contains any provision of the type specified in paragraph 1(2) or 10(2) of Schedule 7 to the European Union (Withdrawal) Act 2018 in relation to which the Act requires that a draft of the instrument must be laid before, and approved by a resolution of, each House of Parliament (the affirmative procedure);
- (ii) otherwise appears to make an inappropriate use of the negative procedure; and shall report to the House its recommendation of the procedure which should apply.

(3) The committee shall have regard to the reasons offered by the Minister in support of the Minister's opinion that the instrument should be subject to the negative procedure.

(4) Before reporting on any document, the committee shall provide to the government department concerned an opportunity to provide orally or in writing to it or any subcommittee appointed by it such further explanations as the committee may require except to the extent that the committee considers that it is not reasonably practicable to do so within the period provided by the Act.

(5) It shall be an instruction to the committee that it shall report any recommendation that the affirmative procedure should apply within the period specified by the Act.

(6) The committee shall consist of sixteen Members.

(7) The committee and any sub-committees appointed by it shall have the assistance of the Counsel to the Speaker.

(8) The committee shall have power to appoint specialist advisers either to supply information which is not readily available or to elucidate matters of complexity within the committee's order of reference.

(9) The committee shall have power to send for persons, papers and records, to sit notwithstanding any adjournment of the House, to adjourn from place to place, and to report from time to time.

(10) The committee shall have power to appoint sub-committees and to refer to such subcommittees any of the matters referred to the committee.

(11) Each such sub-committee shall have power to send for persons, papers and records, to sit notwithstanding any adjournment of the House, to adjourn from place to place, and to report to the committee from time to time.

(12) The committee shall have power to report from time to time the evidence taken before such sub-committees, and the formal minutes of sub-committees.

(13) The quorum of each such sub-committee shall be two.

(14) The committee shall have power to seek from any committee of the House, including any committee appointed to meet with a committee of the Lords as a joint committee, its opinion on any document within its remit, and to require a reply to such a request within such time as it may specify.

(15) Unless the House otherwise orders each Member nominated to the committee shall continue to be a member of it for the remainder of the Parliament, or until this Standing Order lapses, whichever occurs sooner.

(16) This Standing Order, to the extent that it relates to a regulation making power provided to the Government under sections 8, 9 or 23(1) of the European Union (Withdrawal) Act 2018 shall lapse upon the expiry of the power to make new regulations under those sections and shall lapse entirely upon expiry of the last such remaining power.

Liaison Committee

That the Order of the House of 6 November 2017 (Liaison Committee: Membership) be amended, in the second paragraph, by inserting, in the appropriate place, "European Statutory Instruments Committee".

Positions for which additional salaries are payable for the purposes of section 4a(2) of the Parliamentary Standards Act 2009

That the Order of the House of 19 March 2013 (Positions for which additional salaries are payable for the purposes of section 4A(2) of the Parliamentary Standards Act 2009) be amended, in paragraph (1)(a), by inserting, in the appropriate place, "the European Statutory Instruments Committee".

Presentation of documents under paragraph 3(3)(b) or 17(3)(b) of Schedule 7 to the European Union (Withdrawal) Act 2018

Where, under paragraph 3(3)(b) or 17(3)(b) of Schedule 7 to the European Union (Withdrawal) Act 2018, any document is to be laid before this House, the delivery of a copy of the document to the Votes and Proceedings Office on any day during the existence of a Parliament shall be deemed to be for all purposes the laying of it before the House; and the proviso to Standing Order No. 159 shall not apply to any document laid in accordance with this Order.

Annex 2: Illustrative calendar of consideration periods

	Mon	Tues	Wed	Thurs	Fri
Date of laying	9 July	10 July	11 July	12 July	13 July
Consideration period expires	4 Sept	5 Sept	6 Sept	10 Sept	10 Sept
Calendar days for consideration	57	57	57	60	59
Date of laying	16 July	17 July	18 July	19 July	20 July†
Consideration period expires	11 Sept	12 Sept	13 Sept	9 Oct	9 Oct
Calendar days for consideration	57	57	57	82	81
Date of laying	23 July	24 July	25 July	26 July	27 July
Consideration period expires	10 Oct	11 Oct	11 Oct	11 Oct	11 Oct
Calendar days for consideration	81	80	79	78	77
<i>Summer Adjournment: both Houses rise on Tuesday 24 July, returning on Tuesday 4 September</i>					
Date of laying	3 Sept	4 Sept	5 Sept	6 Sept	7 Sept†
Consideration period expires	11 Oct	15 Oct	16 Oct	17 Oct	17 Oct
Calendar days for consideration	39	42	42	42	41
Date of laying	10 Sept	11 Sept	12 Sept	13 Sept	14 Sept
Consideration period expires	18 Oct	22 Oct	23 Oct	24 Oct	24 Oct
Calendar days for consideration	39	42	42	42	41
<i>Conference Adjournment: both Houses rise on Thursday 13 September, returning on Tuesday 9 October</i>					
Date of laying	8 Oct	9 Oct	10 Oct	11 Oct	12 Oct
Consideration period expires	24 Oct	25 Oct	26 Oct	29 Oct	29 Oct
Calendar days for consideration	17	17	17	19	18

	Mon	Tues	Wed	Thurs	Fri
Date of laying	15 Oct	16 Oct	17 Oct	18 Oct	19 Oct
Consideration period expires	30 Oct	31 Nov	1 Nov	5 Nov	5 Nov
Calendar days for consideration	16	16	16	19	18
Date of laying	22 Oct	23 Oct	24 Oct	25 Oct	26 Oct
Consideration period expires	6 Nov	12 Nov	13 Nov	14 Nov	15 Nov
Calendar days for consideration	16	21	21	21	21
Date of laying	29 Oct	30 Oct	31 Oct	1 Nov	2 Nov
Consideration period expires	19 Nov	20 Nov	21 Nov	22 Nov	22 Nov
Calendar days for consideration	22	22	22	22	21
Date of laying	5 Nov	6 Nov	7 Nov	8 Nov	9 Nov
Consideration period expires	23 Nov	26 Nov	26 Nov	26 Nov	26 Nov
Calendar days for consideration	19	21	20	19	18
Date of laying	12 Nov	13 Nov	14 Nov	15 Nov	16 Nov
Consideration period expires	27 Nov	28 Nov	29 Nov	3 Dec	3 Dec
Calendar days for consideration	16	16	16	19	18
Date of laying	19 Nov	20 Nov	21 Nov	22 Nov	23 Nov
Consideration period expires	4 Dec	5 Dec	6 Dec	10 Dec	11 Dec
Calendar days for consideration	16	16	15	19	19
Date of laying	26 Nov	27 Nov	28 Nov	29 Nov	30 Nov
Consideration period expires	12 Dec	13 Dec	17 Dec	18 Dec	18 Dec
Calendar days for consideration	17	17	20	20	19
Date of laying	3 Dec	4 Dec	5 Dec	6 Dec	7 Dec
Consideration period expires	19 Dec	20 Dec	7 Jan	8 Jan	8 Jan
Calendar days for consideration	17	17	34	34	33

	Mon	Tues	Wed	Thurs	Fri
Date of laying	10 Dec	11 Dec	12 Dec	13 Dec	14 Dec
Consideration period expires	9 Jan	10 Jan	14 Jan	15 Jan	15 Jan
Calendar days for consideration	31	31	34	34	33
Date of laying	17 Dec	18 Dec	19 Dec	20 Dec	21 Dec
Consideration period expires	16 Jan	17 Jan	21 Jan	22 Jan	22 Jan
Calendar days for consideration	31	31	34	34	33
<i>Christmas and New Year Adjournment: both Houses rise on Thursday 20 December, returning on Monday 7 January 2019</i>					
Date of laying	7 Jan	8 Jan	9 Jan	10 Jan	11 Jan
Consideration period expires	23 Jan	24 Jan	28 Jan	29 Jan	29 Jan
Calendar days for consideration	17	17	20	20	19
Date of laying	14 Jan	15 Jan	16 Jan	17 Jan	18 Jan
Consideration period expires	30 Jan	31 Jan	4 Feb	5 Feb	5 Feb
Calendar days for consideration	17	17	20	20	19
Date of laying	21 Jan	22 Jan	23 Jan	24 Jan	25 Jan#
Consideration period expires	6 Feb	7 Feb	11 Feb	12 Feb	12 Feb
Calendar days for consideration	17	17	20	20	19
Date of laying	28 Jan	29 Jan	30 Jan	31 Jan	1 Feb
Consideration period expires	18 Feb	19 Feb	20 Feb	21 Feb	21 Feb
Calendar days for consideration	22	22	22	22	21
Date of laying	4 Feb	5 Feb	6 Feb	7 Feb	8 Feb
Consideration period expires	25 Feb	26 Feb	27 Feb	28 Feb	28 Feb
Calendar days for consideration	22	22	22	22	21

	Mon	Tues	Wed	Thurs	Fri
Date of laying	11 Feb	12 Feb	13 Feb	14 Feb	15 Feb
Consideration period expires	4 Mar	5 Mar	5 Mar	5 Mar	5 Mar
Calendar days for consideration	22	22	21	20	19
Date of laying	18 Feb [§]	19 Feb	20 Feb	21 Feb	22 Feb
Consideration period expires	6 Mar	7 Mar	11 Mar	12 Mar	12 Mar
Calendar days for consideration	17	17	20	20	19
Date of laying	25 Feb	26 Feb	27 Feb	28 Feb	1 Mar
Consideration period expires	13 Mar	14 Mar	18 Mar	19 Mar	19 Mar
Calendar days for consideration	17	17	20	20	19
Date of laying	4 Mar	5 Mar	6 Mar	7 Mar	8 Mar
Consideration period expires	20 Mar	21 Mar	25 Mar	26 Mar	26 Mar
Calendar days for consideration	17	17	20	20	19
Date of laying	11 Mar	12 Mar	13 Mar	14 Mar	15 Mar
Consideration period expires	27 Mar	28 Mar	1 Apr	2 Apr	2 Apr
Calendar days for consideration	17	17	20	20	19

Bold type denotes a sitting day in both Houses

†—Sitting Friday in Lords but not Commons

§—18 February 2019: estimated latest date for laying so that 'praying time' expires on or before exit day

#—25 January 2019: estimated latest date for laying so that period for consideration expires before 18 February 2019

Sitting days up to January 2019 are based on dates agreed by both Houses. The notional recess in February 2019 is included as it reflects the recent sitting patterns of the House of Commons. Sitting Fridays included are those agreed by each House as of 9 July 2018.

Annex 3: Letter to the Chair of the Committee from the Secretary of State for Exiting the European Union

Thank you once again for all of your support in the production and tabling of amendments to the European Union (Withdrawal) Bill to establish a sifting process for negative statutory instruments under the Bill. This amendment, along with our tabled amendment on the content of explanatory memoranda, will play an essential role in ensuring Parliament and those outside it can have trust in the quality of scrutiny that secondary legislation will receive; and I am grateful for your and your Committee's support in making this process work.

In the debate on clause 7 on 12 December, you asked whether the Government would publish a schedule for the laying of instruments to help the sifting committee prepare. This is one of the remaining points in the interim report of the Procedure Committee on the scrutiny of delegated legislation under the Bill.

Let me reassure you that the Government entirely understands and sympathises with the intention behind this recommendation, and is actively considering what it can do to allow all those with an interest in the legislative process to be suitably prepared. I'm sure that you, in turn, understand that it is challenging to identify now reliably what exact sequence of legislation might be needed, when much is still to be negotiated. As the Leader of the House of Commons said before the Procedure Committee on 18 October, though, the Parliamentary Business and Legislation Cabinet Committee is overseeing a process to help, for the first time, smooth the flow of non-exit related statutory instruments. We will also be applying this process to exit related secondary legislation, and we therefore expect the flow of statutory instruments to be more manageable compared to previous sessions. Coupled with work we are doing to drive up the quality of the statutory instruments themselves and the explanatory material alongside them, we hope this will have a significant impact on the achievability of the task.

I will write to you again when we are ready to discuss other arrangements around the flow of secondary legislation, including how we will work with the sifting committee on a process that works for everyone.

January 2018

Formal minutes

Wednesday 4 July 2018

Members present:

Mr Charles Walker, in the Chair

Bob Blackman

David Linden

Sir Christopher Chope

Alison Thewliss

Nic Dakin

Mr William Wragg

Sir David Evennett

Draft Report (*Scrutiny of delegated legislation under the European Union (Withdrawal) Act 2018*), proposed by the Chair, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 87 read and agreed to.

Annexes 1, 2 and 3 agreed to.

Summary agreed to.

Resolved, That the Report be the Sixth Report of the Committee to the House.

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

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

[Adjourned till Wednesday 11 July at 2.30 pm.]

Witnesses

The following witnesses gave evidence to this stage of the Committee's inquiry. Transcripts of all oral evidence sessions in the inquiry can be viewed on the [inquiry publications page](#) of the Committee's website.

Wednesday 21 February 2018

Question number

Dr John Benger, Clerk Assistant, and **Paul Evans**, Clerk of Committees, Chamber and Committees Team, House of Commons Service

[Q136–173](#)

Wednesday 2 May 2018

Rt Hon Andrea Leadsom MP, Lord President of the Council and Leader of the House of Commons, and **Mr Steve Baker MP**, Under-Secretary of State for Exiting the European Union

[Q 174–235](#)

Published written evidence

The following written evidence was received and can be viewed on the [inquiry publications page](#) of the Committee's website.

EUX numbers are generated by the evidence processing system and so may not be complete.

- 1 38 Degrees ([EUX0005](#))
- 2 Association of British Insurers ([EUX0004](#))
- 3 Clerk of the House of Commons ([EUX0010](#))
- 4 Delegated Powers and Law Reform Committee ([EUX0014](#))
- 5 Dr Antonios Kouroutakis ([EUX0021](#))
- 6 Dr Mike Gordon ([EUX0006](#))
- 7 Equality and Human Rights Commission ([EUX0007](#))
- 8 Hansard Society ([EUX0018](#))
- 9 House of Commons Service ([EUX0015](#))
- 10 Joint Committee on Statutory Instruments ([EUX0017](#))
- 11 Joint Committee on Statutory Instruments ([EUX0022](#))
- 12 Mr Richard Ebley ([EUX0012](#))
- 13 Professor Michael Dougan ([EUX0001](#))
- 14 Social Security Advisory Committee ([EUX0003](#))
- 15 The Equality and Diversity Forum ([EUX0002](#))
- 16 The Law Society of Scotland ([EUX0019](#))
- 17 UK Finance ([EUX0009](#))
- 18 Unlock Democracy ([EUX0011](#))
- 19 Unlock Democracy ([EUX0013](#))
- 20 Which? ([EUX0008](#))
- 21 Which? ([EUX0016](#))

List of Reports from the Committee during the current Parliament

All publications from the Committee are available on the [publications page](#) of the Committee's website. The reference number of the Government's response to each Report is printed in brackets after the HC printing number.

Session 2017–19

First Report	Scrutiny of delegated legislation under the European Union (Withdrawal) Bill: interim report	HC 386
Second Report	Written Parliamentary questions: progress report for Session 2016–17, monitoring in the 2017 Parliament, and electronic tabling	HC 661
Third Report	Debates on Estimates days: piloting new arrangements	HC 739
Fourth Report	Term limits for select committee chairs in the 2017 Parliament	HC 816
Fifth Report	Proxy voting and parental absence	HC 825