



HOUSE OF LORDS

Procedure Committee

5th Report of Session 2017–19

**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**

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FIFTH REPORT FROM THE PROCEDURE COMMITTEE

European Union (Withdrawal) Act 2018: Sifting of proposed negative instruments by the Secondary Legislation Scrutiny Committee

1. This report proposes new arrangements for the scrutiny of certain drafts of instruments laid under sections 8, 9 and 23(1) of the European Union (Withdrawal) Act 2018 (“the 2018 Act”) in respect of which the Minister has a choice about the level of parliamentary scrutiny (negative or affirmative) to be applied to them. These proposals build on the House’s existing scrutiny arrangements by amending the terms of reference of the Secondary Legislation Scrutiny Committee (SLSC) to enable it to carry out a new sifting function. This will give SLSC power to recommend that an instrument which the Minister proposes should be a negative instrument (described in the 2018 Act as “a draft of the instrument”) be upgraded to an affirmative instrument.
2. This new sifting arrangement would require changes to the terms of reference of the SLSC. In addition, in order to ensure that the SLSC has the capacity to undertake this new function, the revised terms of reference include the power to appoint sub-committees and the power to co-opt additional members. We also propose an additional ground for reporting statutory instruments (new ground (g)) (see Appendix A).
3. Schedule 7 to the 2018 Act sets out the sifting arrangements for the scrutiny of proposed negative instruments. The Minister must lay before both Houses “a draft of the instrument” together with a statement that in his or her opinion the negative procedure should apply and a memorandum setting out the reasons for that opinion. The SLSC will then have 10 sitting days in which to recommend, if it so decides, that the proposed negative instrument should be subject to the affirmative procedure. The recommendation is advisory. It will be a matter for the Minister to decide whether to adopt a recommendation to upgrade an instrument and lay it as an affirmative instrument or to reject a recommendation and lay it as a negative instrument.
4. Under the new scrutiny proposals the SLSC would undertake two distinct functions:
 - (a) first, the new sifting function, whereby it will consider, and make recommendations about, whether any proposed negative instrument laid under the relevant provisions of the 2018 Act should be upgraded to an affirmative instrument; and
 - (b) second, in accordance with its current terms of reference, its usual policy scrutiny function, involving making policy observations about whether any statutory instrument laid under any Act (including those instruments that have been subject to the sifting procedure) should be drawn to the special attention of the House.
5. The timetable for SLSC to report any recommendation to upgrade within 10 sitting days is potentially tighter than the SLSC’s current timetable for reporting instruments, which is usually within 12 to 16 calendar days of an instrument being laid, although, on occasion, extended by seven days if an instrument is held over by the Committee to the following week. SLSC will however continue to have that longer period afforded by its current timetable to conduct any substantive scrutiny of the merits of the instruments, once

those instruments are laid following the conclusion of the sifting procedure, in the same way as it does for all other instruments. To enable the SLSC to work within the statutory sifting timetable, the sub-committees would be empowered to agree their own reports without requiring the agreement of the main committee. The main committee would nevertheless maintain oversight of the overall scrutiny process, appoint the sub-committees and determine the allocation of instruments and members between the sub-committees.

6. The proposed sifting arrangements will only apply to relevant instruments laid under the 2018 Act and not any other legislation. The proposed changes are temporary and will lapse upon the expiry of the relevant regulation-making powers, and are in line with the procedures that we expect to be established in the House of Commons.¹
7. A further proposal is the introduction of a new Standing Order 70A (see Appendix B) to allow proposed negative instruments to be laid during a recess which is a provision already set out in the current Standing Orders in relation to negative instruments. This will not have an impact on the scrutiny period available to the sifting committees in either House because the 2018 Act specifies that the sifting committees have ten *sitting* days to scrutinise and report on an instrument. Therefore, if a proposed negative instrument is laid during a recess, the scrutiny clock will not start until the two Houses are sitting again. The advantage of allowing proposed negative instruments to be laid during recesses is that it enables staff working for the sifting committees to continue their work in recesses in order to provide papers immediately after the return of the House. The same is proposed in the House of Commons.²
8. **We recommend that the House agrees to the proposed sifting arrangements for scrutiny of drafts of negative instruments laid under the European Union (Withdrawal) Act 2018, to the changes in the terms of reference of the Secondary Legislation Scrutiny Committee (Appendix A) and to the new Standing Order 70A (Appendix B).**

1 In December 2017 the Leader of the House of Commons tabled a package of motions to implement a sifting system in that House, including a proposal for a temporary standing order to establish a European Statutory Instruments Committee.

2 This provision is included in the package of motions tabled by the Leader of the House of Commons.

Consideration of Commons Amendments

9. There is currently ambiguity in the *Companion to Standing Orders* as to what rules apply if, during consideration of Commons amendments, a member of the House with a proposition on the marshalled list is absent or says “Not moved”. It is unclear whether a ping-pong proposition is to be treated for this purpose as an amendment, in which case any other member of the House may move it, or a motion, in which case unanimous leave would be required.
10. **We recommend that if, during consideration of Commons amendments, a Member of the House with a proposition on the marshalled list is absent or says “Not moved”, any other Member of the House may move it. The following considerations point in this direction:**
 - (a) **Though motions in form since 2000, ping pong propositions are amendments in substance.**
 - (b) **Standing Order 31 says, “Leave of the House ... must be unanimous in those cases where, if leave were granted, the House ... would be deprived of a Question which would otherwise have been put from the Woolsack”. That is not the case here. On the contrary, if unanimous leave were required, debate is more likely to be closed off.**

Grand Committees on Questions for Short Debate

11. Currently the *Companion to Standing Orders* states that: “QSDs may be taken in a Grand Committee with the concurrence of those concerned. Such questions are time-limited to 1 or 1.5 hours. Once every six weeks when the House is in session a Grand Committee sits for five hours to consider five QSDs tabled by back benchers” (para 6.47).
12. We have noted that the fifth QSD slot is not always convenient for members with questions in the QSD list, and propose adjusting the distribution of QSDs in Grand Committee to improve the take-up of available time.
13. **We therefore recommend altering the requirement that Grand Committees on QSDs consider five questions and require them to cover four. At the same time we recommend an increase the frequency of Grand Committees on QSDs from once every six sitting weeks to once every five.**

APPENDIX A: PROPOSED REVISIONS TO SLSC TERMS OF REFERENCE

(new words in **bold**, deleted words ~~struck through~~)

That a Select Committee be appointed to scrutinise secondary legislation.

(1) The Committee shall report on draft instruments and memoranda laid before Parliament under sections 8, 9 and 23(1) of the European Union (Withdrawal) Act 2018.

(2) Paragraph (1) shall lapse upon the expiry of the power to make instruments under sections 8, 9 and 23(1) of the European Union (Withdrawal) Act 2018.

~~(1)~~**(3)** The Committee shall, with the exception of those instruments in paragraphs ~~(3)~~**(5)** and ~~(4)~~**(6)**, scrutinise—

(a) every instrument (whether or not a statutory instrument), or draft of an instrument, which is laid before each House of Parliament and upon which proceedings may be, or might have been, taken in either House of Parliament under an Act of Parliament;

(b) every proposal which is in the form of a draft of such an instrument and is laid before each House of Parliament under an Act of Parliament,

with a view to determining whether or not the special attention of the House should be drawn to it on any of the grounds specified in paragraph ~~(2)~~**(4)**.

~~(2)~~**(4)** The grounds on which an instrument, draft or proposal may be drawn to the special attention of the House are—

(a) that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House;

(b) that it may be inappropriate in view of changed circumstances since the enactment of the parent Act;

(c) that it may inappropriately implement European Union legislation;

(d) that it may imperfectly achieve its policy objectives;

(e) that the explanatory material laid in support provides insufficient information to gain a clear understanding about the instrument's policy objective and intended implementation;

(f) that there appear to be inadequacies in the consultation process which relates to the instrument;

(g) that the instrument appears to deal inappropriately with deficiencies in retained EU law.

~~(3)~~**(5)** The exceptions are—

(a) remedial orders, and draft remedial orders, under section 10 of the Human Rights Act 1998;

(b) draft orders under sections 14 and 18 of the Legislative and Regulatory Reform Act 2006, and subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001;

(c) Measures under the Church of England Assembly (Powers) Act 1919 and instruments made, and drafts of instruments to be made, under them.

~~(4)~~(6) The Committee shall report on draft orders and documents laid before Parliament under section 11(1) of the Public Bodies Act 2011 in accordance with the procedures set out in sections 11(5) and (6). The Committee may also consider and report on any material changes in a draft order laid under section 11(8) of the Act.

~~(5)~~(7) The Committee shall also consider such other general matters relating to the effective scrutiny of secondary legislation and arising from the performance of its functions under paragraphs (1) to ~~(4)~~(6) as the Committee considers appropriate, except matters within the orders of reference of the Joint Committee on Statutory Instruments.

That the Committee have power to appoint sub-committees and to refer to them any matters within its terms of reference; that the Committee have power to appoint the Chairmen of sub-committees; that the quorum of each sub-committee be two;

The Committee's power to appoint sub-committees shall lapse upon the expiry of the power to make new instruments under sections 8, 9 and 23(1) of the European Union (Withdrawal) Act 2018 and shall lapse entirely upon expiry of the last such remaining power;

That the Committee have power to co-opt any member to serve on a sub-committee;

That the Committee **and its sub-committees** have power to send for persons, papers and records;

That the Committee **and its sub-committees** have power to appoint specialist advisers;

That the Committee **and its sub-committees** have leave to report from time to time;

That the reports of the Committee **and its sub-committees** be printed, regardless of any adjournment of the House;

That the evidence taken by the Committee **or its sub-committees** in the last session of Parliament be referred to the Committee **or its sub-committees**;

That the evidence taken by the Committee **or its sub-committees** be published, if the Committee **or its sub-committees** so wish.

APPENDIX B: NEW STANDING ORDER 70A

After Standing Order 70, insert new Standing Order 70A:

“70A Laying of documents under Schedule 7 to the European Union (Withdrawal) Act 2018

Where, under paragraphs 3(3) and 17(3) of Schedule 7 to the European Union (Withdrawal) Act 2018, any document is to be laid before Parliament, the deposit of a copy of the document with the Clerk of the Parliaments in accordance with this Order at any time during the existence of a Parliament when the House is not sitting for public business shall constitute the laying of it before the House.”