

HOUSE OF LORDS

Secondary Legislation Scrutiny Committee

37th Report of Session 2017–19

**Sifting “proposed negative
instruments” laid under the
European Union (Withdrawal)
Act 2018: criteria and working
arrangements**

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Secondary Legislation Scrutiny Committee

The Committee's terms of reference, as amended on 11 July 2018, are set out on the website but are, broadly:

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

And, to 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 the terms of reference.

The Committee may also consider such other general matters relating to the effective scrutiny of secondary legislation as the Committee considers appropriate, except matters within the orders of reference of the Joint Committee on Statutory Instruments.

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Lord Chartres	Lord Goddard of Stockport	Baroness O'Loan
Rt Hon. Lord Cunningham of Felling	Lord Haskel	Lord Sherbourne of Didsbury
Lord Faulkner of Worcester	Rt Hon. Lord Janvrin	Rt Hon. Lord Trefgarne (Chairman)
Baroness Finn	Lord Kirkwood of Kirkhope	

Registered interests

Information about interests of Committee Members can be found in the last Appendix to this report.

Publications

The Committee's Reports are published on the internet at www.parliament.uk/seclegpublications

The National Archives publish statutory instruments with a plain English explanatory memorandum on the internet at <http://www.legislation.gov.uk/uksi>

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Sifting “proposed negative instruments” laid under the European Union (Withdrawal) Act 2018: criteria and working arrangements

CHAPTER 1: INTRODUCTION

Purpose of this Report

1. During the passage of the European Union (Withdrawal) Bill (“the withdrawal Bill”) through the House of Lords, the Leader of the House, the Rt Hon. Baroness Evans of Bowes Park, set out her proposal that the Secondary Legislation Scrutiny Committee (SLSC) should carry out a new sifting function in relation to certain instruments laid under the European Union (Withdrawal) Act 2018 (“the withdrawal Act”).¹ This proposal has since been agreed by the Procedure Committee² and by the House.³ We are grateful to the Leader for her recognition of the “constructive engagement” she had had with the SLSC in developing this proposal,⁴ and note that the Government’s recent White Paper on the future relationship between the UK and the European Union looks forward to further engagement in the months to come:

“The Government has already demonstrated during the passage of the EU (Withdrawal) Bill that it will actively engage with suggestions from both Houses about the oversight of secondary legislation, adapting scrutiny arrangements as appropriate, and recognising the quality and expertise in the existing scrutiny structures in the Commons and the Lords.”⁵

2. The purpose of this Report is twofold:
 - First, to describe the new sifting function and to set out the Committee’s conclusions on the sifting criteria it proposes to apply (Chapter 2).
 - Second, to set out aspects of the Committee’s working arrangements in relation to the new function and that function’s relationship with the Committee’s current function and how the change might affect our interaction with other scrutiny committees.⁶ (Chapter 3)

1 HL Deb, 9 March 2018, [col 152](#).

2 House of Lords Procedure Committee, [5th Report](#), Session 2017–19, HL Paper 163.

3 HL Deb, 11 July 2018, [cols 915 - 919](#).

4 HL Deb, 19 March 2018, [col 153](#).

5 Department for Exiting the European Union, The Future Relationship between the United Kingdom and the European Union, Cm 9593, July 2018, p 95, para 55 <https://www.gov.uk/government/publications/the-future-relationship-between-the-united-kingdom-and-the-european-union> [accessed 17 July 2018].

6 The Committee published a similar report when it was set up in 2003: Merits of Statutory Instruments Committee, [3rd Report](#), Special Report: the Committee’s Methods of Working, Session 2003–04, (HL Paper 73).

3. In Chapter 4 we list the Committee's conclusions.

Sifting function under the withdrawal Act

4. The powers conferred on Ministers by the withdrawal Act are exceptional. In its first report on the Bill, the Delegated Powers and Regulatory Reform Committee (DPRRC) described it as “one of the most important Bills in the constitutional history of the United Kingdom”, giving to Ministers “a range of powers, unique in peace-time, to override Acts of Parliament by statutory instrument ...”.⁷ In an interim report on the Bill, the Constitution Committee referred to how “the number, range and overlapping nature of the broad delegated powers” in the Bill “would create what is, in effect, an unprecedented and extraordinary portmanteau of effectively unlimited powers upon which the Government could draw” which would “fundamentally challenge the constitutional balance of powers between Parliament and Government”.⁸
5. When Parliament delegates a power to Ministers by Act of Parliament, often the delegation is conditional on Parliament retaining a say in how it is used. This usually takes the form of requiring the power to be exercised by statutory instrument subject to either the affirmative or negative procedure, where the affirmative procedure requires an instrument to be agreed by both Houses and the negative procedure enables an instrument to come into, or remain in, force so long as neither House objects to it.⁹ The parent Act containing the power will almost always specify the level of parliamentary scrutiny to be applied to the exercise of the power. The withdrawal Act, however, like the European Communities Act 1972, is an exception in that, for some of the regulation-making powers contained in the Act, the level of parliamentary scrutiny is not specified and the choice is left to Ministers.
6. As a result, the House of Commons Procedure Committee, in a report published in November 2017 on the scrutiny of delegated legislation under the withdrawal Bill,¹⁰ asked the question: “should decisions on the appropriate level of scrutiny for specific but so far undefined instruments be made by Ministers before they are presented to Parliament, or are they matters for the House?”¹¹ It concluded that they were matters for the House and recommended the establishment of a scrutiny committee to examine all instruments laid under the withdrawal Act. The DPRRC made a similar point. In its second report on the withdrawal Bill, it observed that the Government had not explained why it was “Ministers rather than Parliament who should have the final say on the appropriate level of parliamentary scrutiny in those cases where either the affirmative or negative procedure is capable of applying”.¹² It too recommended that a sifting committee should be established.
7. Whilst in the House of Commons, the withdrawal Bill was amended to introduce a sifting mechanism whereby instruments for which the Minister

7 Delegated Powers and Regulatory Reform Committee, [3rd Report](#), Session 2017–19 (HL Paper 22), para 1.

8 Constitution Committee, [3rd Report](#), Session 2017–19 (HL Paper 19), para 44.

9 On occasion, statutory instruments are subject to Commons-only procedure or may be subject to an enhanced scrutiny procedure.

10 House of Commons Procedure Committee, *Scrutiny of Delegated Legislation under the European Union (Withdrawal) Bill: interim report*, [First Report](#), Session 2017–19, HC 386.

11 *Ibid.*, para 18.

12 DPRRC, [12th Report](#), Session 2017–19 (HL Paper 73), para 54.

had a choice of procedure, and had opted for the negative, would first be laid as “proposed negative instruments”. These proposed negative instruments would then be scrutinised by a committee in the House of Commons which could recommend, where appropriate, that the instrument be subject to the affirmative rather than the negative procedure. Further amendments were made to the Bill, and the withdrawal Act now contains a parliamentary sifting mechanism for instruments laid under sections 8, 9 and 23(1) by which committees in both Houses can make a recommendation that a proposed negative instrument should be upgraded to an affirmative instrument.

8. Such recommendations will be advisory only: under the Act, Ministers will still have the final say on whether to accept an upgrading recommendation.¹³ We note, however, the commitment made by the Leader of the House of Lords during the passage of the withdrawal Bill:

“... if both sifting committees were to reach the same ... and persuasive recommendation, I assure your Lordships that the Government’s expectation is that such recommendations are likely to be accepted”.¹⁴

9. We also note the further commitment made by the Leader about how, if Ministers disagree with a recommendation to upgrade an instrument to the affirmative procedure, they will publicise their reasons for the disagreement:

“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.”¹⁵

This is embodied in Schedule 7 to the Act, paragraphs 3 and 17.

13 An amendment was made to the withdrawal Bill in the House of Lords, later rejected by the House of Commons, which would have made the sifting committees’ recommendations binding. The House of Commons Procedure Committee commented in its most recent report that “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 explain why”. See House of Commons Procedure Committee, *Scrutiny of delegated legislation under the European Union (Withdrawal) Act 2018* ([Sixth Report](#), HC Paper 1395) para 51.

14 HL Deb, 19 March 2018, [col 154](#).

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

10. In the House of Lords, this sifting function is to be carried out by the SLSC. It is anticipated that a new European Statutory Instruments Committee will act as sifting committee in the House of Commons.
11. To reflect this additional function, the Committee has new terms of reference which are set out in Appendix 1 to this Report.

Inquiry

12. As a result of the Leader's proposal that the SLSC should undertake the sifting function, in April 2018 the Committee launched an inquiry into what criteria should be applied when deciding whether to recommend that a proposed negative instrument be subject to the affirmative procedure. The following questions were asked:
 - (1) What criteria should the SLSC apply in deciding whether to recommend that a proposed negative instrument laid under the withdrawal legislation should be upgraded to an affirmative instrument?
 - (2) Should those criteria reflect or differ from the grounds for reporting currently contained in the SLSC's terms of reference?
 - (3) Are there any categories of subject matter, aside from those stipulated on the face of the legislation ... for which there should be a presumption in favour of the affirmative procedure?
 - (4) How should the SLSC work with the Joint Committee on Statutory Instruments?
 - (5) How should the SLSC work with the House of Commons European Statutory Instruments Committee?
13. Sifting instruments is not a novel activity in Parliament. The SLSC in its current role, as determined by the House when the Committee was established in 2003, can be said to act as a sifting committee in that it identifies instruments of particular significance and draws them to the special attention of the House. Other legislative committees in both Houses play a similar or related role:
 - The DPRRC in the House of Lords and the Regulatory Reform Committee in the House of Commons scrutinise enhanced procedure orders, most commonly Legislative Reform Orders, and make (binding) recommendations about the level of parliamentary scrutiny applied to them.
 - The Joint Committee on Statutory Instruments (JCSI), on occasion, reports an instrument on the ground that it should be subject to a different level of parliamentary scrutiny.¹⁶
 - The European Union Committee (EUC) uses a sifting mechanism with regard to draft European Union legislation whereby an initial sift is undertaken by the Chairman, with the Committee's legal advisers,

¹⁶ For example, see the report of the JCSI on SI 2018/135 Financial Services and Markets Act 2000 (Benchmarks) Regulations 2018 where the Committee reported the Regulations "for having been made using the inappropriate parliamentary procedure". See Joint Committee on Statutory Instruments, [16th Report](#), Session 2017–19 (HL 101), HC 542-xvi.

who may sift a document to either the Select Committee or one of the EUC sub-committees for examination.¹⁷

- The DPRRC considers the delegations of power contained in primary legislation and their associated level of parliamentary scrutiny and, amongst other things, makes recommendations where it is found that the level proposed on the face of the Bill is inappropriate.¹⁸

14. We were therefore keen to hear the views of these committees on how they approached the task.
15. A list of those who responded to our Call for Evidence is set out in Appendix 2 to this Report. We are grateful for all their contributions which are published on the Committee's webpage.

Flexibility and adapting to the challenge

16. We are publishing a report at this early stage not only to inform members of the House about how we intend to undertake the new sifting function, but also to assist those government departments involved in the preparation of proposed negative (and other) instruments to be laid under the withdrawal Act, and to assist individuals and organisations who may wish to know how and when to make their views on a particular instrument known to the Committee. Details on how to contact the Committee are set out on the inside front cover of this Report and information about when to contact the Committee during the sifting process is set out in paragraph 80 below.
17. That said, because we are at such an early stage in exercising this new function, we may, of course, in the light of experience, wish to change our practices and procedures. Given the uncertainty about when instruments will be laid and their rate of flow, over what period, how many we shall be considering, and their complexity and length, inevitably the Committee must be prepared to respond flexibly and to adapt to the challenges that lie ahead. **The Committee welcomes this opportunity to contribute to the important task of scrutinising, to the high standards to which the House has become accustomed, the secondary legislation laid under the withdrawal Act, whether as proposed negative instruments or as fully-fledged statutory instruments.**

17 See written evidence from the European Union Committee ([TSC0001](#)), paras 12 and 13, where the sifting mechanism is described in detail.

18 The DPRRC's functions will contrast with that of the SLSC's sifting function, however, in that the DPRRC makes recommendations about the level of scrutiny associated with the exercise of a power (and will therefore have in mind the furthest extent to which a power might be used) whereas the SLSC will be considering a single incidence of the exercise of a power.

CHAPTER 2: SIFTING CRITERIA

Instruments subject to the sifting mechanism under the withdrawal Act

Relevant regulation-making powers

18. Ministers have a choice about whether regulations should be subject to the affirmative or the negative scrutiny procedure under the following provisions of the withdrawal Act:
- section 8 (dealing with deficiencies arising from withdrawal) which enables a Minister, by regulations, to make such provision as he or she considers appropriate “to prevent, remedy or mitigate (a) any failure of retained EU law¹⁹ to operate effectively, or (b) any other deficiency in retained EU law, arising from the withdrawal of the United Kingdom from the EU”;
 - section 9 (implementing the withdrawal agreement) which enables a Minister, by regulations, to make such provision as he or she considers appropriate “for the purposes of implementing the withdrawal agreement ...”; and
 - section 23 (consequential and transitional provision) and, in particular, section 23(1) which enables a Minister, by regulations, to make such provision as he or she considers appropriate “in consequence of this Act”.

Restrictions on exercising these powers

19. These powers are at the very heart of the withdrawal process and, not surprisingly, their exercise is subject to certain restrictions. For regulation-making powers in sections 8 and 9, certain matters are either prohibited from being the subject of regulations altogether or, if not prohibited, must be subject to the affirmative procedure:
- Section 8(7) specifies that the regulation-making power under section 8(1) may not–
 - (a) impose or increase taxation or fees;
 - (b) make retrospective provision;
 - (c) create a “relevant criminal offence”;²⁰
 - (d) establish a public authority;
 - (e) be made to implement the withdrawal agreement;
 - (f) amend, repeal or revoke the Human Rights Act 1998 or any subordinate legislation under it; or

19 “Retained EU law” is defined in section 6(7) of the withdrawal Act as meaning “anything which, on or after exit day, forms part of domestic law by virtue of section 2, 3 or 4 or subsection (3) or (4) [of section 6] (as that body of law is added to or otherwise modified by or under this Act or by any other domestic law from time to time)”. So, for example, an EU Regulation which has direct effect in UK law immediately before exit day (subject to amendments made under section 8 to remedy “deficiencies”) will be “retained EU law” by virtue of Section 3.

20 See footnote 43 below.

- (g) amend or repeal the Scotland Act 1998, the Government of Wales Act 2006 or the Northern Ireland Act 1998.²¹
- Section 9(3) makes similar provision in respect of section 9.²²
 - Schedule 7 states that certain provisions made under sections 8 (see paragraph 1(1) and (2) of that Schedule) and 9 (see paragraphs 10(1) and (2)) *have* to be made by the affirmative procedure. For these instruments, the Minister has no choice. These are provisions which—
 - (a) provide for any function of an EU entity or public authority in a Member State of making an instrument of a legislative character to be exercisable instead by a public authority in the United Kingdom;
 - (b) relate to a fee in respect of a function exercisable instead by a public authority in the United Kingdom;
 - (c) create, or widen the scope of, a criminal offence; or,
 - (d) create or amend a power to legislate.
20. Furthermore, the powers in sections 8, 9 and 23(1) are time-limited because each is subject to a sunset provision.²³ Section 8(8) states that that no regulations may be made under that section “after the end of the period of two years beginning with exit day”. For section 9, the deadline is “after exit day” (section 9(4)), and for section 23(1) it is “after the end of the period of ten years beginning with exit day” (section 23(4)).

Instruments where Ministers have a choice of procedure

21. Where regulations laid under sections 8 and 9 do not fall within the exclusions described above, and for all regulations laid under section 23(1), the Minister can choose whether they should be subject to the affirmative or negative procedure. Where the Minister chooses the negative procedure, he or she will lay a proposed negative instrument and this Committee (and the equivalent committee in the House of Commons) will consider whether they agree with the Minister in his or her choice or whether to recommend that the affirmative procedure should apply.²⁴
22. The remainder of this Chapter will set out the factors which the Committee is likely to take into account when considering whether to make such a recommendation.

Sifting criteria

Where the proposed negative instrument contains material excluded by the Act

23. We have noted in paragraph 19 that certain matters are either prohibited from being the subject of regulations made under sections 8 and 9 or, if not prohibited, must be subject to the affirmative procedure. **We would not expect any proposed negative instruments to contain material**

21 (g) is subject to a proviso.

22 Section 9(3) includes the same provision as section 8(7)(a) to (d) and (f).

23 A sunset provision is a section of an Act of Parliament which imposes a time limit on powers conferred by the Act on Ministers to make secondary legislation.

24 See paras 64 to 67 below which describe the Minister’s duty under para 3(3) of Schedule 7 of the Act to lay before Parliament a statement setting out why the Minister thinks the negative procedure is appropriate and his or her reasons.

relating to these excluded matters. However, part of our scrutiny will include ensuring that they do not.²⁵

SLSC's current grounds for drawing an instrument to the special attention of the House

24. In considering possible sifting criteria, our starting point is the Committee's current grounds for reporting, and we asked in our Call for Evidence whether the sifting criteria should reflect or differ from those grounds.
25. Under our current terms of reference, the Committee is charged with considering whether or not the special attention of the House should be drawn to an instrument on one or more of the following grounds:
 - (a) that it is politically and 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.²⁶

Brooke Committee criteria

26. We have also borne in mind the findings of the Joint Committee on Delegated Legislation under the chairmanship of Lord Brooke of Cumnor ("the Brooke Committee") which, in 1973, set out three circumstances where the affirmative procedure would normally be appropriate;²⁷ namely, where a delegation of power:
 - (1) substantially affects provisions of Acts of Parliament;
 - (2) imposes or increases taxation or other financial burdens on the subject or raises statutory limits on the amounts which may be borrowed by or lent or granted to public bodies; or,
 - (3) involves considerations of special importance not falling under the first two heads (for example, powers to create new varieties of criminal offence of a serious nature).

25 It is, of course, the case that, once the proposed negative instrument is laid as a statutory instrument, it will be subject to the scrutiny of the JCSI which will, amongst other things, be considering the vires of the instrument ([Public Business Standing Orders](#) 73 (2)(f)). See written evidence from the Delegated Powers and Regulatory Reform Committee ([TSC0008](#)), para 11.

26 Ground (g) was agreed by the House on 11 July 2018, along with the other changes in the SLSC's terms of reference. See footnote 3 above.

27 Delegated Powers Scrutiny Committee, 1st Report, Session 1992–93 (HL Paper 57), Appendix 3

An overarching test

27. The third Brooke Committee criterion of “special importance” reflects a suggestion made by a number of respondents that the Committee’s current terms of reference, particularly the first ground, might provide the principal ground for a decision to upgrade:
- The Constitution Committee said: “Your committee’s existing criteria for considering statutory instruments includes “(a) that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House”. We believe this should be the foundation of your consideration of instruments under the Bill”.²⁸
 - The DPRRC said: “... the overriding criteria for recommending the affirmative procedure are reflected in the SLSC’s current grounds for reporting. And the first ground may be regarded as particularly relevant ...”.²⁹
 - The EUC said: “The current terms of reference of the SLSC appear, to us, to contain a suitable overarching ground for upgrading a statutory instrument ...”, and the EUC went on to reference the first ground.³⁰
28. We also note the recent report of the House of Commons Procedure Committee on the scrutiny of delegated legislation under the withdrawal Bill, in which it suggests that the House of Commons sifting committee, in deciding whether a proposed negative instrument should be subject to the affirmative procedure, will be likely to take into account the following matters:
- whether the instrument proposes a change which is legally important
 - whether the instrument is politically important
 - whether a proposed change in legislation, taken together with other proposals, is significant enough to require further scrutiny.³¹
29. Under the heading of “legal importance”, the Procedure Committee suggests that:
- “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.”³²
30. It is perhaps not surprising that the SLSC’s first ground for reporting might provide the basis for an overarching test to be applied to the sifting decision. In both cases—that is, the decision to report an instrument and the decision to recommend an upgrading—the purpose of a recommendation is, as the DPRRC suggests,³³ the same: “to subject the instrument to the scrutiny afforded by a debate”.

28 Written evidence from the Constitution Committee ([TSC0012](#))

29 Written evidence from the Delegated Powers and Regulatory Reform Committee ([TSC0008](#)), para 15.

30 Written evidence from the European Union Committee ([TSC0001](#)), para 4.

31 House of Commons Procedure Committee, *Scrutiny of delegated legislation under the European Union (Withdrawal) Act 2018*, HC 1395, para 30.

32 *Ibid.*, para 35.

33 Written evidence from the Delegated Powers and Regulatory Reform Committee ([TSC0008](#)), para 11.

31. It is also consistent, we believe, with the test of “significant public interest” that the Leader of the House told us Ministers will apply in making the initial choice between negative and affirmative procedure. She said:

“There may be some SIs made under the deficiencies and withdrawal agreement powers that do not fall within the criteria [for affirmative procedure] in the withdrawal Bill but that a Minister considers, either individually or as a group, should be subject to the affirmative procedure. We envisage these could be SIs dealing with matters where, due to a combination of what they do and the matters they cover, are of significant public interest.”³⁴

32. **We believe that the starting point in the Committee’s approach to its new sifting function is to apply an overarching test, based on the Committee’s existing “politically or legally important” ground for reporting, namely: “is the subject matter of this instrument and the scope of any policy change effected by it of such significance that the House would expect to debate it?”**

33. Given this conclusion, we note with interest the recommendation of the House of Commons Procedure Committee, in considering the issue of “political importance”, that “when determining the appropriate procedure for an instrument, [the European Statutory Instruments Committee] should in our view have regard to the likely level of interest in the House in debating the matter raised”.³⁵

Applicability of the SLSC’s other grounds for reporting

34. The Leader of the House suggests in her evidence that the SLSC’s existing grounds for reporting (see paragraph 25 above) are not a good fit for the sifting function: “(a) in EU exit terms, is very broad; neither (b) nor (c) seem relevant to the sifting process; and we would expect that (d), (e) and (f) would be addressed as part of existing SLSC scrutiny procedures for the next phase of SI scrutiny post sifting”.³⁶
35. Whilst we agree to some extent—for example, we agree with the Leader in respect of grounds (b) and (c)—we have already identified ground (a) (in paragraph 32 above) as the foundation for an overarching test and, we believe, other of the grounds may also be applicable to the sifting process. For example, the EUC suggests that the Committee should have regard to proposed negative instruments which do not appear adequately to implement retained EU law either because the instrument would imperfectly achieve its policy objective or because of poor drafting. Of those, the former is similar to one of the Committee’s current grounds for reporting, namely that an instrument may “imperfectly achieve its policy objectives”. It also has a bearing on the Committee’s new ground (g) that the instrument appears to deal inappropriately with deficiencies in retained EU law.³⁷ We note also that the House of Commons Procedure Committee suggests that the Commons sifting committee “may take advantage of its remit to report on any matter arising

34 Written evidence from the Leader of the House of Lords (TSC0014).

35 House of Commons Procedure Committee, *Scrutiny of delegated legislation under the European Union (Withdrawal) Act 2018*, 6th Report, Session 2017–19, HC 1395, para 38.

36 Written evidence from the Leader of the House of Lords (TSC0014). The Leader does not mention ground (g) which was added after her evidence was submitted.

37 Of course, poor drafting – once a proposed negative instrument is laid as a statutory instrument – will be of particular interest to the JCSI.

from its consideration of proposals for negative instruments” to, amongst other things, “report on whether it imperfectly achieves its policy objectives”.³⁸

36. We believe that there may also be occasion when some of the other grounds for reporting are relevant as well—for example, where the explanatory material (ground (e)) or the consultation process (ground (f)) has been found wanting.
37. **We have already described the relevance of the Committee’s first ground for reporting. Although not all of the remaining grounds are a good fit for the sifting function, some of them are. We shall, therefore, have regard to them, where appropriate.**

Other features indicative of “significance”

38. We acknowledge that the overarching test, expressed in paragraph 32 above, provides only limited guidance as to how the Committee might determine whether to recommend the affirmative procedure in a particular instance. We have, therefore, considered what other features, in addition to those suggested by the Committee’s current grounds for reporting, might indicate significance. Respondents made a number of suggestions. They are broadly of two types: (a) substantive—whether the instrument concerns certain policy matters; and (b) procedural—whether the instrument contains significant amendments to primary legislation.

Substantive

39. Respondents suggested a range of policy matters which might indicate that the affirmative procedure is justified. Some of the suggestions relate to matters which are restricted under sections 8 and 9, and we have identified these in the footnotes to the following list. We also recognise that some of the suggestions are overlapping.
40. The suggestions include:
- **Where the subject matter of the proposed negative instrument is related to those matters which are either outside the regulation-making powers in sections 8 or 9 or have to be subject to the affirmative procedure** (see paragraph 19 above).³⁹
 - **Where an instrument effects a significant policy change or would have the effect of causing significant divergence from the EU acquis.**⁴⁰ Linklaters, for example, suggested that the main criterion for upgrading should be that an instrument “changes what a person or business can or can’t do or makes substantive changes to how it does it”. The City Remembrancer made a similar point, saying that “the determining factor should be whether the instrument introduces a material change which is likely to impact on what individuals and businesses can do, or affect how they are able to operate”.⁴¹ The Constitutional Law Subcommittee of the Law Society of Scotland

38 House of Commons Procedure Committee, *Scrutiny of delegated legislation under the European Union (Withdrawal) Act 2018*, 6th Report, Session 2017–19, HC 1395, para 39.

39 Written evidence from the Constitution Committee ([TSC0012](#))

40 The *acquis* (*Acquis Communautaire*) is the accumulated body of EU law and obligations from 1958 to date. It includes all the EU’s treaties and laws (directives, regulations, decisions), declarations and resolutions, international agreements and the judgments of the Court of Justice.

41 See also the written evidence from the European Union Committee ([TSC0001](#)).

suggested a sifting criterion which would take into account “what the new order proposes which is different from the original”.⁴²

- **Where an instrument concerns the scope of, and penalty relating to, criminal offences.**⁴³
- **Where an instrument changes the remit of a public authority.**⁴⁴
- **Where an instrument imposes a financial burden.**⁴⁵
- **Where an instrument relates to a power conferred on other individuals or bodies to legislate (that is, to make tertiary legislation).**⁴⁶
- **Where an instrument seeks to achieve reciprocity.** Linklaters define this along the lines: “if we can no longer do X in the EU, they can’t do it here”.⁴⁷
- **Where an instrument changes standards.**⁴⁸ Wildlife and Countryside Link and Greener UK make specific reference to environmental standards.
- **Where an instrument imposes an administrative burden.**⁴⁹
- **Where an instrument affects equality or human rights.**⁵⁰

41. We read with interest this range of suggestions and see merit in them all. The list set out above is not however definitive. And it is, of course, the case

42 Written evidence from the Constitutional Law Subcommittee of the Law Society of Scotland ([TSC0013](#)).

43 See written evidence from the Delegated Powers and Regulatory Reform Committee ([TSC0008](#)) and the European Union Committee ([TSC0001](#)), and third Brooke Committee criterion. Paragraphs 1(2)(c) and 10(2)(c) of Schedule 7 to the withdrawal Act require that where powers in sections 8 and 9 respectively are used to make provision which “creates, or widens the scope of, a criminal offence”, their exercise must be subject to the affirmative procedure. Sections 8(7)(c) and 9(3)(c) prohibit the powers in sections 8 and 9 from being used to make regulations which “create a relevant criminal offence”. “Relevant offence” is defined in section 20 as an offence for which an individual could be sentenced to imprisonment for two years.

44 See written evidence from the Constitution Committee ([TSC0012](#)) and Wildlife and Countryside Link and Greener UK ([TSC0006](#)). Sections 8(7)(d) and 9(3)(d) prohibit the powers in those sections from being used to “establish a public authority”.

45 See written evidence from the Delegated Powers and Regulatory Reform Committee ([TSC0008](#)), the European Union Committee ([TSC0001](#)) and Joint Committee on Statutory Instruments ([TSC0009](#)), and second Brooke Committee criterion. Paragraphs 1(2)(b) and 10(2)(b) of Schedule 7 to the withdrawal Act require that where powers in sections 8 and 9 respectively are used to make provision which “relates to a fee in respect of a function exercisable by a public authority in the United Kingdom”, their exercise must be subject to the affirmative procedure. Sections 8(7)(a) and 9(3)(a) prohibit the powers in those sections from being used to “impose or increase taxation or fees”.

46 Paragraphs 1(2)(d) and 10(2)(d) of Schedule 7 to the withdrawal Act require that where powers in sections 8 and 9 respectively are used to make provision which “creates or amends a power to legislate”, their exercise must be subject to the affirmative procedure.

47 See written evidence from Linklaters LLP ([TSC0002](#)), para 1.7.1. See also written evidence from the Office of the City Remembrancer ([TSC0004](#)), para 1.5.

48 See written evidence from Linklaters LLP ([TSC0002](#)), para 1.7.2. See also written evidence from the Office of the City Remembrancer ([TSC0004](#)), para 1.5.

49 See written evidence from the European Union Committee ([TSC0001](#)).

50 See written evidence from the Equality and Human Rights Commission ([TSC0010](#)), the European Union Committee ([TSC0001](#)), the Joint Committee on Statutory Instruments ([TSC0009](#)) and Constitutional Law Subcommittee of the Law Society of Scotland ([TSC0013](#)). Sections 8(7)(f) and 9(3)(e) prohibit the powers in those sections from being used to “amend, repeal or revoke the Human Rights Act 1998 or any subordinate legislation made under it”.

that the impact of any of these matters will depend on how significantly it features. So, for example, the Committee will make a judgment on the extent to which there is a divergence from the EU acquis or on the degree of administrative or financial burden before deciding whether to recommend upgrading the instrument to the affirmative procedure. Nonetheless, **the list in paragraph 40 provides an indication of matters which the Committee will be looking for in deciding whether to recommend the affirmative procedure.**⁵¹

Procedural

42. An instrument which amends, repeals or otherwise alters the effect of an Act of Parliament, including whether the power is expressed as a “modification”, is an exercise of what is commonly known as a Henry VIII power. The DPRRC told us that, in scrutinising the delegation of powers in bills, it applies a presumption that Henry VIII powers should be subject to the affirmative procedure unless there is a full explanation why the negative procedure is appropriate. The same point is made by the JCSI and reflected in the first Brooke Committee criterion.
43. We note that Linklaters does not favour this criterion on the ground that amendment to UK primary legislation may well be purely technical and uncontroversial. The City Remembrancer makes a similar point. And we note that the JCSI suggests that the presumption should, in the circumstances of the withdrawal Act, be applied with greater flexibility than normal. Given that the presumption is rebuttable, we believe that these views are not inconsistent with our conclusion that **the presence of significant amendments to primary legislation should create a presumption in favour of the affirmative procedure, rebuttable by a full and convincing explanation for choosing the negative procedure.**
44. During the report stage of the withdrawal Bill in the House of Lords, amendments to the withdrawal Bill were introduced by the Government concerning the status of retained EU law. Lord Callanan, Minister of State at the Department for Exiting the European Union, explained:

“We have proposed, broadly, that EU regulations and Clause 4 rights should be treated as primary legislation for the purpose of amendability and that tertiary legislation should be treated as subordinate legislation. Regulations and Clause 4 rights will therefore be amendable only by primary legislation and the very limited stock of powers to amend primary legislation on the statute book.”⁵²

The retained EU law which is to be treated, for the purposes of amendability, as primary legislation is called “retained direct principal EU legislation”.⁵³ **Given the status of retained direct principal EU legislation, we believe that, as with primary legislation, the presence of significant amendments to such EU legislation should create a presumption**

51 The written evidence from the Federation of Private Residents’ Associations ([TSC0005](#)) suggested that statutory instruments bringing leasehold law into operation should be subject to the affirmative procedure. We welcome this contribution but our approach, as set out in this report, is that specific policy areas will not determine whether the instrument should be upgraded but rather the significance of the change in relation to that policy area.

52 HL Deb, 23 April 2018, [col 1413](#).

53 See the definition in section 7(2) of the withdrawal Act. It includes, in particular, an EU Regulation which has direct effect in UK law immediately before exit day.

in favour of the affirmative procedure, rebuttable by a full and convincing explanation for choosing the negative procedure.

45. **As a consequence of our conclusions in paragraphs 43 and 44, the Government should ensure that the Explanatory Memoranda accompanying proposed negative instruments and statutory instruments laid under the withdrawal Act should include a clear indication, where appropriate, of any amendments to primary legislation or to retained direct principal EU legislation.**

Conclusion

46. In its response, the DPRRC describes how, when it was first set up, “it concluded that it was not possible to set out a list of criteria which would give precision to the test of appropriateness. Instead it was decided that the merits of the proposed use of a delegated power [had] to be considered on a case by case basis”.⁵⁴ And the Leader of the House told us that, although there were no categories which the Government believed should give rise to a presumption of the affirmative procedure, nonetheless there would be “other occasions where the Minister might determine, on a case by case basis, that the affirmative procedure is appropriate”.⁵⁵ **We propose, at this stage, to adopt a similar approach:**

- **We shall consider each proposed negative instrument on its merits, taking into account the Minister’s reasons for his or her opinion that the negative procedure should apply.**⁵⁶
- **We shall apply the overarching test: “is the subject matter of this instrument and the scope of any policy change effected by it of such significance that the House would expect to debate it?”**
- **In assessing whether the test is met, the Committee will take into account features of an instrument such as those listed in paragraph 40 above, although we stress that this is not a definitive list.**
- **The Committee will also apply a presumption of the affirmative procedure where a proposed negative instrument contains significant amendments to primary legislation or to retained direct principal EU legislation, rebuttable by a full and convincing explanation for choosing the negative procedure.**

54 Written evidence from the Delegated Powers and Regulatory Reform Committee ([TSC0008](#)), para 7.

55 Written evidence from the Leader of the House of Lords ([TSC0014](#)).

56 The Minister, when laying a proposed negative instrument, is required under paragraphs 3(3) and 17(3) of Schedule 7 to the withdrawal Act to lay a memorandum setting out his or her opinion that the negative procedure should apply and the reasons for that opinion. See paragraph 64 below.

CHAPTER 3: WORKING ARRANGEMENTS

47. In this Chapter we set out some of the practical aspects of the sifting process, including the relationship between the sifting function and the Committee's current policy scrutiny function, setting up sub-committees, the flow of instruments, supporting documentation, the relationship with other parliamentary committees, publicising the work of the Committee, and involving external individuals and organisations.

Sifting procedure

48. Under the sifting procedure set out in paragraphs 3 and 17 of Schedule 7 to the withdrawal Act, where a Minister has a choice between the negative or the affirmative procedure under sections 8, 9 and 23(1) of the Act, he or she cannot make the instrument (thereby enabling it to become law) unless the following conditions are met:
- First, a Minister has made a statement in writing to the effect that he or she is of the opinion that the instrument should be subject to the negative procedure, and has laid before each House (i) the instrument in the form of a proposed negative instrument (described in the Act as “a draft of the instrument”) and (ii) a memorandum setting out the statement and the reasons for the Minister's opinion (Condition 1).⁵⁷
 - Second, either the sifting committees in each House have, within “the relevant period”, made a recommendation as to the appropriate procedure for the instrument (Condition 2) or “the relevant period” has ended without Condition 2 being met (Condition 3).⁵⁸
49. “The relevant period” is ten sitting days, beginning the day after the proposed negative instrument is laid and ending after the period of ten Commons sitting days or of ten Lords sitting days, whichever is the later. After the committees have reported, and before an instrument can be made, the Minister has to decide whether to accept any recommendation of the committees. Where he or she disagrees with a recommendation, the Minister has to make a statement explaining why or, if the Minister fails to do so, then a Minister must make a statement explaining that failure.⁵⁹ Where the sifting committees in the two Houses come to different conclusions and only one committee recommends an upgrade, it will be for the Minister to choose whether to follow that recommendation and, if he or she chooses not to, to explain to the committee why not.
50. The period of ten sitting days for the Committee to examine and report on a proposed negative instrument is tight. To assist the Committee in its work therefore, not only in meeting this deadline but also in handling the increased volume of instruments (see paragraph 54 below), the House has agreed that the SLSC should have power to form sub-committees and to co-opt members to them. Furthermore, in the interests of saving time, the sub-committees will have power to report directly to the House if necessary.

⁵⁷ See paragraphs 3(3) and 17(3) of Schedule 7.

⁵⁸ See paragraphs 3(4) and (5) and 17(4) and (5) of Schedule 7.

⁵⁹ See paragraphs 3(7) and (8) and 17(7) and (8) of Schedule 7.

Relationship between the sifting function and the Committee's current terms of reference

51. With the addition of the new sifting arrangement, the Committee will now have two distinct functions:
- Stage 1: the new sifting function, whereby it will consider, and make recommendations about, whether any proposed negative instrument should be upgraded to an affirmative instrument.
 - Stage 2: its usual policy scrutiny function, in accordance with its current terms of reference, involving making policy observations about whether any instrument laid under any Act (including those instruments that have already been subject to the sifting procedure) should be drawn to the special attention of the House.
52. In Chapter 2, we concluded that our overarching test for recommending that a proposed negative instrument should be upgraded will be whether the instrument is “of such significance that the House would expect to debate it” which, we acknowledged, was based on the Committee’s current “politically or legally important” ground for reporting a statutory instrument. The Committee will therefore be applying a similar test at both the sifting stage (Stage 1) and at the later policy scrutiny stage (Stage 2). In these circumstances, it seems likely that where the Committee has recommended that a proposed negative instrument should be upgraded, whether or not the Minister accepts that recommendation, the Committee will wish, at the policy scrutiny stage, to draw the instrument to the special attention of the House.
53. The reverse however is not true. If the Committee does not recommend that an instrument be upgraded at Stage 1, it may nonetheless wish to draw the instrument to the special attention of the House at Stage 2. The period in which the Committee has to undertake the sifting function is, as we have said, tight and decisions will have to be made quickly. It may well be that, during Stage 2, the policy scrutiny stage, further information comes to light and, as a result, the Committee may wish to draw an instrument to the special attention of the House. **At the policy scrutiny stage the Committee will consider all statutory instruments, whether or not they have been through the sifting process, in the same way. Proposed negative instruments will not be fast-tracked through Stage 2 scrutiny despite having been through the Stage 1 sifting process.**

Sub-committees

When they will be set up

54. The Government anticipate that Brexit-related primary legislation will give rise to 800 to 1,000 statutory instruments. In addition, the Committee will be giving Stage 1 consideration to about 600 proposed negative instruments (which will, we assume, in due course be laid for Stage 2 consideration among those 800 to 1,000 instruments) and also to non-Brexit-related instruments.⁶⁰ On average, the Committee considers about 1,000 statutory instruments a session (of which about 20% are affirmative and 80% negative instruments). Assuming that most of the Brexit-related instruments may have to become law before the end of March 2019, but also taking into account that there

60 See, for example, HL Deb, 19 March 2018, [col 155](#).

may be a decrease in non-Brexit-related instruments, we anticipate an approximate doubling of our workload.

55. As we have said in paragraph 17 above, the timing, volume, rate of flow, complexity and length of the instruments is uncertain. If, to begin with, the number of instruments laid is similar to the number to which the Committee is accustomed, the Committee will continue as usual, as a single entity. When it is clear that the number of instruments is likely to rise beyond our capacity then we will form sub-committees.
56. At that point, each sub-committee will consist of half the current membership, supplemented by members co-opted by the main Committee to serve on the sub-committees.

How instruments will be divided between the sub-committees

57. We propose to allocate the instruments between the sub-committees by simply dividing the instruments received each week among them in equal numbers. This means that each sub-committee will consider instruments laid by the entire gamut of departments. We had considered an alternative allocation of instruments based on assigning to the sub-committees specified government departments. Whilst this would have had the advantage of enabling each sub-committee to specialise in certain policy areas, because the Government have not been able to provide us with any breakdown of the likely flow of instruments, we took the view that this advantage was outweighed by the risk that the sub-committees could have significantly different workloads. Furthermore, we believe that the approach we propose will have the advantage of promoting cohesion between the two sub-committees since each will be aware of the recommendations of the other when considering similar policy areas and each is more likely therefore to build on a shared body of “case law”.

Reports

58. We anticipate that we shall continue our current practice of weekly meetings. We shall therefore make weekly reports. Reports will have distinct sections setting out the sub-committees’ conclusions in relation to:
 - Stage 1: the proposed negative instruments laid under sections 8, 9 and 23(1) of the withdrawal Act and subject to the sifting mechanism; and
 - Stage 2: all business as usual instruments and statutory instruments which have been laid, whether as affirmative or negative instruments, following the sifting process.

Flow of instruments

59. From the outset, the Committee has pressed the Government to ensure that the flow of instruments laid under the withdrawal Act should be properly managed, without surges which could place an unacceptable pressure on the Committee’s capacity. In a submission to the House of Commons Procedure Committee, in April 2017, the SLSC urged the Government to ensure “proper management of the flow of instruments and clustering of associated instruments, offering advance information about the planned flow”.⁶¹ We

61 SLSC, [33rd Report](#), Special Report: Submissions to the House of Commons Procedure Committee inquiry on the delegated powers in the “Great Repeal Bill”, Session 2016–17, HL Paper 165, para 29. See also SLSC, [25th Report](#), Session 2017–19, HL Paper 120, Appendix 2, p 20.

note, and endorse, the comments of the House of Commons Procedure Committee in its recent report which, referring to the fact that approval from the Parliamentary Business and Legislation (PBL) Cabinet committee was now necessary for the laying of secondary legislation, concluded:

“We expect the [PBL Committee] 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.”⁶²

60. We therefore welcomed the Leader’s comment in her speech to the House on 19 March 2018 which referred to “ensuring a steady flow of statutory instruments”.⁶³ We also welcome the statement by the Government that they will not lay proposed negative instruments until the necessary procedures for establishing the new committee in the House of Commons and the expansion of the remit of the SLSC are concluded.⁶⁴
61. **If the Committee is to maintain its current high standard of scrutiny, it is critically important that statutory instruments laid during the coming months, whether under Brexit-related legislation or other legislation, should be laid in as near a “steady flow” as possible, and that Parliament, in particular the relevant scrutiny committees, should be kept fully informed of the Government’s forward plans for laying instruments.**
62. We note in passing that the flow of instruments will of course have implications for the conduct of business in the House. Many of the instruments to be laid under the withdrawal Act will be required by the provisions of the Act to be subject to the affirmative procedure, and more may become subject to that procedure as a result of recommendations from this Committee or its Commons equivalent through the sifting of proposed negatives. Time must be allocated for the House to consider affirmative instruments, and such time will be at a premium as the session moves towards the end of March 2019 and the date fixed for the UK’s exit from the EU.

Supporting documentation

Explanatory memoranda

63. All statutory instruments subject to the negative or affirmative procedure are laid before Parliament with an Explanatory Memorandum (EM) and sometimes other documents such as an impact assessment. The EM should set out in plain English the background to the legislation and the case for making the proposed change.⁶⁵ The Government have issued a revised EM template which requires an explicit description of the instrument’s relevance (or otherwise) to the UK’s withdrawal from the European Union.⁶⁶ The EM

62 House of Commons Procedure Committee, Scrutiny of delegated legislation under the European Union (Withdrawal) Act 2018, [6th Report](#), Session 2017–19, HC 1395, para 71.

63 HL Debs, 9 March 2018, [col 155](#).

64 [HLWS802](#), 4 July 2018, p 1. The Government indicated however that proposed negative instruments would, meanwhile, be published on Gov.uk to increase transparency and to give Parliament and the public early sight.

65 All such documents are published with the instrument on the [Legislation.gov.uk](#) website.

66 Section 8 of the EM.

will include, in an Annex, all the Ministerial explanatory statements required by the withdrawal Act (see paragraph 65 below).

Explanatory statements for instruments laid under the withdrawal Act

64. Condition 1 of the sifting procedure (see paragraph 48 above) requires a Minister to lay with every proposed negative instrument a memorandum setting out a statement in writing to the effect that in the Minister’s opinion the instrument should be subject to the negative procedure and the reasons for his or her opinion.
65. In addition, paragraph 28 of Schedule 7 to the withdrawal Act sets out a number of statements that the Minister must make before a statutory instrument or a proposed negative instrument is laid. He or she must make a statement:
- “to the effect that in the Minister’s opinion the instrument or draft does no more than is appropriate”;
 - “as to why, in the Minister’s opinion, (a) there are good reasons for the instrument or draft, and (b) the provision made by the instrument or draft is a reasonable course of action”; and, where the instrument or draft creates a criminal offence, the statement must “include an explanation of why, in the relevant Minister’s opinion, there are good reasons for creating the offence and for the penalty provided in respect of it”;⁶⁷
 - “(a) as to whether the instrument or draft amends, repeals or revokes any provision of equalities legislation, and (b) if it does, explaining the effect of each such amendment, repeal or revocation”;
 - “to the effect that, in relation to the instrument or draft, the Minister has, so far as required to do so by equalities legislation, had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010”;
 - “otherwise explaining (a) the instrument in draft, (b) its purpose, (c) the law before exit day which is relevant to it, and (d) its effect (if any) on retained EU law”.
66. Where the Minister fails to make a statement required under paragraph 28, paragraph 28(8) requires a Minister to make a statement “explaining why the relevant Minister has failed to do so”.
67. Under paragraph 30, where a statutory instrument or a proposed negative instrument laid under section 8(1) or 9 contains regulations “which create a relevant sub-delegated power”, before it is laid the Minister must make a statement “explaining why it is appropriate to create a relevant sub-delegated power”. As with paragraph 28, where the Minister fails to do so, a Minister must make a statement explaining his or her failure.

67 Baroness Taylor of Bolton, Chairman of the Constitution Committee, enclosed with her Committee’s submission a letter dated 10 May 2018 from Baroness Goldie, on behalf of the Government, to Lord Beith. In it, Baroness Goldie explains: “Given the sensitivities of the provisions that will be sought by those instruments creating a criminal offence, the Government has committed to taking a different approach to that of the other statements required under the Bill, by making this statement available to Parliamentarians in advance of the instrument being laid.” See also [HLWS803](#), 4 July 2017, page 1.

Need for good explanatory material

68. We share the view expressed by the EUC about “the importance of good explanatory material” and the need for explanatory material “to be of the highest standard”.⁶⁸ We also note the suggestion of the House of Commons Procedure Committee that the explanatory material provided by the Government should include an “anti-transposition note”, “indicating how the original EU obligation was transposed into UK law and the process whereby this transposition is being reversed”.⁶⁹
69. One of the grounds on which the SLSC may report an instrument is “that the explanatory material laid in support [of an instrument] provides insufficient information to gain a clear understanding about the instrument’s policy objective and intended implementation”. Whilst this is not a ground we use often,⁷⁰ the Committee polices the quality of explanatory material with vigilance and, where necessary, will ask departments to replace an EM with an improved version. **The Committee will apply the same rigour when scrutinising the explanatory materials accompanying proposed negative instruments laid under the withdrawal Act as it does in discharging its current function, with the option of either proposing that an EM should be replaced for Stage 2 scrutiny or recommending upgrading the proposed negative instrument to the affirmative procedure.**

*Relationship with other committees**House of Commons sifting committee*

70. In its recent report, the House of Commons Procedure Committee suggested that it was “clearly desirable that both [sifting] committees should seek to move in step as far as is possible and is allowed by their respective orders of reference” but acknowledged that, although it “ought to be possible to reach a measure of common understanding between the committees on what constitutes legal importance”, there were 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”.⁷¹
71. The DPRRC expressed a similar view: “each House will wish to apply its own independent judgment, drawing on the experience and expectations of its own members. That said, however, there is, we believe, much to be gained from a collaborative approach between the Houses in order to ensure effective scrutiny of instruments and effective use of the resources available to the committees”.⁷² **We agree and endorse the recommendation of the House of Commons Procedure Committee that the two sifting**

68 Written evidence from the European Union Committee ([TSC0001](#)), para 17.

69 House of Commons Procedure Committee, Scrutiny of delegated legislation under the European Union (Withdrawal) Act 2018, [6th Report](#), Session 2017–19, HC 1395, para 81.

70 In Session 2016–17, we reported seven instruments (13.7% of the total) on this ground (see [32nd Report](#), Session 2016–17, HL Paper 161, p 13, para 41). In the first half of the current session (until end April 2018), we reported two instruments (3.8%) (Session 2017–19, [26th Report](#), HL Paper 125, p 19, para 53).

71 House of Commons Procedure Committee, Scrutiny of delegated legislation under the European Union (Withdrawal) Act 2018, [6th Report](#), Session 2017–19, HC 1395, para 53.

72 Written evidence of the [DPRRC](#), para 19.

committees “should seek to establish and maintain good working relationships and common understanding” with each other.⁷³

Joint Committee on Statutory Instruments

72. The Leader of the House of Lords said that the Government “envisage that the sifting process would take place before formal JCSI involvement, and the SLSC, in performing its sifting function, would be carrying out a distinct role from its usual consideration of the merits of an SI”. There was, the Leader suggested, “unlikely to be much need for the two committees to work together ...”⁷⁴
73. Whilst we believe this to be right in principle,⁷⁵ **we also note, and endorse, the remarks of the JCSI in their submission that the sifting committees and existing committees should adopt a “complementary approach to the examination of legislation” and “this approach will be best achieved by ensuring a mutual understanding of the work of the various committees and a commitment to consider each other’s work when coming to our own recommendations.”**⁷⁶

Information sources

74. In her submission, the Leader of the House of Lords said: “One additional area that we would like to add into your thinking is how, together, we make the process understandable to those outside Parliament”.⁷⁷ We share the Government’s view that, now more than ever, it is important that individuals and organisations throughout the country should have easily accessible information about the secondary legislation before Parliament, and about its purpose and implications.
75. The Government publish all statutory instruments laid before Parliament, with the EM and any other supporting documents, on their Legislation.gov.uk website.⁷⁸ Because of their slightly different nature, proposed negative instruments laid under the withdrawal Act will be published, with their supporting documents, on a dedicated page of the Gov.UK website.⁷⁹
76. On the Parliament.uk beta website, an “SI Service”⁸⁰ has been made available, which will set out which stage any statutory instrument currently before Parliament has reached in either House, and include links to any committee reports and Hansard reports of debates. This is currently a work in progress and will be further refined over the next few months. The Parliament.uk site also has improved pages setting out what terms such as “affirmative” and “negative” mean.

73 House of Commons Procedure Committee, Scrutiny of delegated legislation under the European Union (Withdrawal) Act 2018, [6th Report](#), Session 2017–19, HC 1395, para 54.

74 Written evidence from the Leader of the House of Lords ([TSC0014](#)).

75 See House of Commons Procedure Committee: “JCSI is barred by its own standing order from considering proposals for negative instruments, and is therefore unlikely to report substantively on such proposals.” House of Commons Procedure Committee, Scrutiny of delegated legislation under the European Union (Withdrawal) Act 2018, [6th Report](#), Session 2017–19, HC 1395, para 48.

76 Written evidence from the Joint Committee on Statutory Instruments ([TSC0009](#)). See also written evidence from the Constitutional Law Subcommittee of the Law Society of Scotland ([TSC0013](#)).

77 Written evidence from the Leader of the House of Lords ([TSC0014](#)), question 5.

78 See <http://www.legislation.gov.uk/> [accessed 18 July 2018].

79 See <https://www.gov.uk/eu-withdrawal-act-2018-statutory-instruments> [accessed 18 July 2018].

80 See <https://beta.parliament.uk/statutory-instruments> [accessed 18 July 2018].

77. In the light of these improved information sources, the Committee's own webpages will only need a few changes. We will extend our current practice of publishing a list of the instruments on the Committee's agenda (and, when appropriate, sub-committees' agendas) for the following meeting to include all proposed negative instruments. There will also be a dedicated page listing any proposed negative instruments that the Committee (or a sub-committee) has recommended should be upgraded to the affirmative procedure, including the Government's response to that recommendation.
78. Due to its anticipated length we do not propose publishing a complete list of all proposed negative instruments considered on our webpage, but those wishing to check on the progress of a particular item will be able to consult the list included in each of our published reports, which are posted on our webpage.⁸¹ Those with an interest in seeing (only) the items that we have either proposed to be upgraded under Stage 1 scrutiny or drawn to the special attention of the House under Stage 2 scrutiny can subscribe to an email alert which sets out the Committee's conclusions.⁸²

Involvement of external individuals and organisations

79. The consumer organisation Which? suggest that, in order to ensure "the highest level of scrutiny" and that "committee members are able to make fully informed decisions", it was "vital that external stakeholders are able to input into this process".⁸³ As always, we welcome submissions offering constructive criticism about the way any instrument will operate and our webpage offers guidance on how to send such comments to the Committee.⁸⁴
80. In the case of proposed negative instruments, the sifting process (Stage 1) is subject to a ten-day time limit (see paragraph 49 above). **We would therefore suggest that anyone who wishes to comment on such a proposed negative instrument should make a submission on our generic email (hlseclegscrutiny@parliament.uk) as soon as possible and preferably within five working days of the instrument being laid.** We can however give the reassurance that any such submission that arrives too late to be considered alongside the Committee's Stage 1 scrutiny will be taken into account when Stage 2, the policy scrutiny stage, takes place.

81 See <https://www.parliament.uk/business/committees/committees-a-z/lords-select/secondary-legislation-scrutiny-committee/publications/> [accessed 18 July 2018].

82 To subscribe for the highlights of Committee's weekly report, please email hlseclegscrutiny@parliament.uk with your name and preferred email address.

83 Written evidence from Which? (TSC0007).

84 See <https://www.parliament.uk/business/committees/committees-a-z/lords-select/secondary-legislation-scrutiny-committee/guidance/> [accessed 18 July 2018].

SUMMARY OF CONCLUSIONS

Chapter 1

1. The Committee welcomes this opportunity to contribute to the important task of scrutinising, to the high standards to which the House has become accustomed, the secondary legislation laid under the European Union (Withdrawal) Act, whether as proposed negative instruments or as fully-fledged statutory instruments. (paragraph 17)

Chapter 2

2. Certain matters are either prohibited from being the subject of regulations made under sections 8 and 9 or, if not prohibited, must be subject to the affirmative procedure. We would not expect any proposed negative instruments to contain material relating to these matters. However, part of our scrutiny will include ensuring that they do not. (paragraph 23)
3. We believe that the starting point in the Committee's approach to its new sifting function in relation to proposed negative instruments is to apply an overarching test, based on the Committee's existing "politically or legally important" ground for reporting, namely: "is the subject matter of this instrument and the scope of any policy change effected by it of such significance that the House would expect to debate it?" (paragraph 32)
4. Although not all of the Committee's remaining grounds for reporting are a good fit for the sifting function, some of them are. We shall, therefore, have regard to them, where appropriate. (paragraph 37)
5. Respondents suggested a range of policy matters which might indicate that the affirmative procedure is justified. Whilst not definitive, the list of many of those suggestions provides an indication of matters which the Committee will be looking for in deciding whether to recommend the affirmative procedure:
 - Where the subject matter of the proposed negative instrument is related to those matters which are either outside the regulation-making powers in sections 8 or 9 or have to be subject to the affirmative procedure.
 - Where an instrument effects a significant policy change or would have the effect of causing significant divergence from the EU acquis.
 - Where an instrument concerns the scope of, and penalty relating to, criminal offences.
 - Where an instrument changes the remit of a public authority.
 - Where an instrument imposes a financial burden.
 - Where an instrument relates to a power conferred on other individuals or bodies to legislate (that is, to make tertiary legislation).
 - Where an instrument seeks to achieve reciprocity.
 - Where an instrument changes standards.
 - Where an instrument imposes an administrative burden.

- Where an instrument affects equality or human rights. (paragraphs 40 and 41)
6. Respondents also suggested a procedural matter which might give rise to a recommendation to upgrade to the affirmative procedure. This procedural matter concerns an instrument which amends either primary legislation or retained direct principal EU legislation:
 - The presence of significant amendments to primary legislation should create a presumption in favour of the affirmative procedure, rebuttable by a full and convincing explanation for choosing the negative procedure. (paragraph 43)
 - Given the status of retained direct principal EU legislation, we believe that, as with primary legislation, the presence of significant amendments to such EU legislation should also create a presumption in favour of the affirmative procedure, rebuttable by a full and convincing explanation for choosing the negative procedure. (paragraph 44)
 7. As a consequence of the conclusions set out above, the Government should ensure that the Explanatory Memoranda accompanying proposed negative instruments and statutory instruments laid under the withdrawal Act should include a clear indication, where appropriate, of any amendments to primary legislation or to retained direct principal EU legislation. (paragraph 45)
 8. In conclusion, we propose, at this stage, to adopt a case by case approach:
 - We shall consider each proposed negative instrument on its merits, taking into account the Minister’s reasons for his or her opinion that the negative procedure should apply.
 - We shall apply the overarching test: “is the subject matter of this instrument and the scope of any policy change effected by it of such significance that the House would expect to debate it?”
 - In assessing whether the test is met, the Committee will take into account certain features of an instrument (such as those listed in paragraph 5 above), although we stress that this is not a definitive list.
 - The Committee will also apply a presumption of the affirmative procedure where a proposed negative instrument contains significant amendments to primary legislation or retained direct principal EU legislation, rebuttable by a full and convincing explanation for the negative procedure. (paragraph 46)

Chapter 3

9. At the policy scrutiny stage the Committee will consider all statutory instruments, whether or not they have been through the sifting process, in the same way. Proposed negative instruments will not be fast-tracked through Stage 2 scrutiny despite having been through the Stage 1 sifting process. (paragraph 53)
10. If the Committee is to maintain its current high standard of scrutiny, it is critically important that statutory instruments laid during the coming months, whether under Brexit-related legislation or other legislation, should be laid in as near a “steady flow” as possible, and that Parliament, in

particular the relevant scrutiny committees, should be kept fully informed of the Government's forward plans for laying instruments. (paragraph 61)

11. The Committee will apply the same rigour when scrutinising the explanatory materials accompanying proposed negative instruments laid under the withdrawal Act as it does in discharging its current function, with the option of either proposing that an EM should be replaced for Stage 2 scrutiny or recommending upgrading the proposed negative instrument to the affirmative procedure. (paragraph 69)
12. We endorse the recommendation of the House of Commons Procedure Committee that the two sifting committees "should seek to establish and maintain good working relationships and common understanding" with each other. (paragraph 71)
13. We endorse the remarks of the JCSI in their submission that the sifting committees and existing committees should adopt a "complementary approach to the examination of legislation" and "this approach will be best achieved by ensuring a mutual understanding of the work of the various committees and a commitment to consider each other's work when coming to our own recommendations." (paragraph 73)
14. We suggest that anyone who wishes to comment on a proposed negative instrument should make a submission on our generic email (hlseclegscrutiny@parliament.uk) as soon as possible and preferably within five working days of the instrument being laid. (paragraph 80)

APPENDIX 1: NEW TERMS OF REFERENCE

The following terms of reference were agreed by the House on 11 July 2018:

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.
- (3) The Committee shall, with the exception of those instruments in paragraphs (5) and (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 (4).
- (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.
- (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.

- (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.
- (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 (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 2: EVIDENCE SUBMISSIONS

Delegated Powers and Regulatory Reform Committee	<u>TSC0008</u>
Equality and Human Rights Commission	<u>TSC0010</u>
House of Lords Constitution Committee	<u>TSC0012</u>
House of Lords European Union Committee	<u>TSC0001</u>
Joint Committee on Statutory Instruments	<u>TSC0009</u>
Law Society of Scotland	<u>TSC0013</u>
Leader of the House of Lords	<u>TSC0014</u>
Linklaters LLP	<u>TSC0002</u>
Office of the City Remembrancer	<u>TSC0004</u>
The Federation of Private Residents' Associations	<u>TSC0003</u>
Which?	<u>TSC0007</u>
Wildlife and Countryside Link and Greener UK	<u>TSC0006</u>

APPENDIX 3: MEMBERS INTERESTS

Committee Members' registered interests may be examined in the online Register of Lords' Interests at <http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests>. The Register may also be inspected in the Parliamentary Archives.