



Procedure Committee

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From Charles Walker OBE MP, Chair of the Committee

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Procedure Committee report on Scrutiny of delegated legislation under the European Union (Withdrawal) Act 2018

Thank you for your letter of 16 August with observations on the Committee's recent report. The Committee considered it at its meeting yesterday.

You have identified four areas where the Government chooses to set aside the Committee's recommendations in favour of a different approach. I shall set out the Committee's observations on each of these in turn.

Government disagreement with a committee recommendation

As you will have noted, the Committee in its report warmly welcomed what we took to be an unambiguous Ministerial undertaking, given by Baroness Evans from the Lords despatch box on 18 June, that Ministers would make a Written Statement in the event of a Government disagreement with the recommendation of a sifting committee. I note that the term Written Statement, duly capitalised, remains on the record in Lords Hansard at column 1924.

We considered this to be entirely in keeping with the recognition by Ministers, during the course of debate in both Houses on the proposed sifting mechanism, that a Government disagreement with a sifting committee recommendation would carry a high political cost. This acknowledgment had reassured colleagues that the sifting system envisaged in the amendments I tabled in December 2017 would be an effective one: it was a significant factor in ensuring that the amendments from another place, which proposed a binding mechanism, did not achieve significant support here.

For the reasons above, the Committee is unimpressed with the Government's attempt to place a different interpretation on the commitment given by the Leader of the House of Lords. You argue that the means whereby the House is to be notified of a disagreement—through a section in the explanatory memorandum to be laid before Parliament only after the instrument in question has been signed into law—fulfils the statutory requirement in the Act.

We do not see how this arrangement meets the widely-held expectation of a political cost to the Government from disagreement. At the very least we would expect a statement on the Government's intentions, and the reasons for disagreement, to be made in public before, and not after, the irrevocable act of making the instrument in question. In our view it is discourteous to present a committee with a *fait accompli* in this manner.

The Act gives Ministers discretion to make statements indicating disagreement in such manner as they consider appropriate. In our view Ministers should review the appropriateness of the proposed means of notification, and introduce a process which delivers in full the Government's pledge made at the Despatch Box. Any ambiguity in relation to this pledge is a new invention.

Regular updates to ESIC

It is disappointing to learn that there are apparently practical obstacles to giving regular updates to ESIC on the progress of proposed legislation under the Act. You will no doubt be aware of the very slow rate at which proposals for instruments have been laid over the summer recess: should that pace be continued, only a fraction of the projected number of instruments could possibly be laid for scrutiny before exit day.

The recent report of the National Audit Office on the preparedness for EU exit of the Department for Environment, Food and Rural Affairs (Defra) has caused us particular concern. The NAO reports that as late as June 2018 the Department had not started work on, or was less than halfway to completion of a first draft of, over one third of the 93 instruments required to make the necessary changes in the statute book: it has found that the Department is now planning for completion of a number of these instruments in the first quarter of 2019. At that point, we assume that they will require clearance from the Parliamentary Business and Legislation (PBL) Cabinet committee before they can be laid either as affirmative instruments or proposed negative instruments.

The evidence gathered by the NAO from Defra suggests that detailed assessments of legislative requirements, and progress reports on the readiness of legislation, are already available in those departments which are bearing the greatest share of the burden of exit preparations. It does not seem unreasonable for the committees which expect to be examining this legislation to be given at the very least a regular 'forward look' estimating the number of instruments to be sent to PBL for clearance in the next two months, with appropriate caveats.

We understand that in the event of agreement on terms of the UK's withdrawal from, and future relationship with, the EU, the requirement for full legislative readiness for the repeal of the European Communities Act 1972 on exit day may be substantially moderated, and that there is in consequence a degree of uncertainty as to how many instruments will be required to be in force by 29 March 2019. Nevertheless there remains, in the absence of any deal, a clear requirement for the Government to plan for the full cessation of direct and transposed EU law in the UK from exit day.

It would be wholly unacceptable for the Government to use the urgency procedure—the made affirmative powers in the 2018 Act—to introduce, in January and February 2019, a very substantial proportion of the required legislative changes as made legislation to which Parliament would be asked to give retrospective approval. This House would rightly see this as an evasion of proper scrutiny.

Without regular updates to ESIC on progress on the preparation and implementation of the legislative change required, concerns about an unjustified use of the urgency procedure will undoubtedly persist, together with concerns that the sifting system will be put under unacceptable strain through a 'peak and trough' approach to bringing forward large volumes of proposed negatives.

'Anti-transposition' notes

I understand the concerns you have that the requirement for a full 'anti-transposition note', as we have recommended, may place a disproportionate demand on departments to produce explanatory material. You will of course appreciate that sifting committees will depend for their effectiveness on the provision of full and accurate information by Ministers on the legislative proposals submitted for consideration. The transposition history of a measure is likely to be a significant factor in a committee's assessment of the likely effect of its detransposition. Please encourage your Ministerial colleagues to be as forthcoming as possible with information about the way in which an instrument was transposed which could be material to a sifting committee's deliberations.


Sifting and the European Union (Withdrawal Agreement) Bill

You and your Ministerial colleagues have stressed that the right balance needs to be struck "between effective scrutiny and ensuring [the UK's] orderly withdrawal" from the EU. I do not think that these are opposing factors to be balanced: as a former Leader of the House observed, "good scrutiny makes for good government". Effective scrutiny is a prerequisite to an orderly exit.

Your Ministerial colleagues at DEXEU, Suella Braverman and Robin Walker, have kindly agreed to come to the Procedure Committee on 10 October to discuss the implications for parliamentary scrutiny of the legislative approach to the withdrawal agreement set out in the Government's White Paper published in July. We look forward to discussing these issues with them then.

In the absence of a satisfactory resolution to the issues set out earlier in this letter, I expect the Committee will wish, during that session, to examine the robustness of Ministerial undertakings about the operation of the sifting process which have been given to Parliament to date.

Copies of this letter go to Sir Patrick McLoughlin (European Statutory Instruments Committee), Lord Trefgarne and Lord Cunningham of Felling (Secondary Legislation Scrutiny Committee), the Leaders of both Houses and Gavin Barwell at 10 Downing Street.

A handwritten signature in blue ink, appearing to read 'Charles Walker', written in a cursive style.

Charles Walker OBE MP