



Mick Antoniw AM  
Chair  
Constitutional and Legislative Affairs Committee  
National Assembly for Wales  
Cardiff Bay  
CF99 1NA

28 August 2018

Dear Mick,

I am writing with regard to your Committee's recent report on operational matters relating to the scrutiny of regulations made under the European Union (Withdrawal) Act 2018 ("the 2018 Act"), and in particular recommendation 2, which stated:

*We recommend that as the Committee assigned the function of sifting regulations under the 2018 Act, we should be required by the National Assembly's Standing Orders to publish the criteria that we will apply to regulations subject to the sifting process.*

You first identified and recommended criteria that should be applied to regulations subject to the sifting process in your report of February 2018, and reproduced these criteria on page 20 of your most recent report, linked to the above recommendation.

Since your Committee first developed its proposals on the sifting criteria, the Procedure Committee of the House of Commons and the Secondary Legislation Committee of the House of Lords have also published reports recommending criteria that should be applied by the sifting committee of each House.

The House of Commons' Procedure Committee identified in its report<sup>1</sup> published on 9 July:

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

- Legal importance: does the instrument amend existing law or make new law in a way which is significant? Would it normally fall within the "Brooke criteria", which since the 1970s have been a general guide as to whether an instrument ought to engage the affirmative procedure?*
- Political importance: is the Government proposing a legislative change which involves a substantive change in policy?*

<sup>1</sup> <https://publications.parliament.uk/pa/cm201719/cmselect/cmproced/1395/1395.pdf>

- *Overall significance: is a proposed legislative change, taken together with other proposals, significant enough to merit the affirmative procedure?*

In its report<sup>2</sup> published on 20 July, the House of Lords' Secondary Legislation Committee concluded:

*"...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 [of the report] 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."*

I note that whereas the two Parliamentary committees propose to focus on the substance of the subject matter within each SI, and in particular, the extent to which it might involve a substantive change of current government policy, the criteria proposed by your Committee focus on the clarity and transparency of the explanatory memoranda accompanying the instruments.

While clarity as to what is being proposed is essential to the Committee being able to do its job in terms of sifting, I agree with the arguments put forward by Assembly Committees, in the Brexit context, that the different legislatures of the United Kingdom ought to act in concert on these matters.

I would therefore suggest that your Committee might consider revisiting your proposed criteria in light of the reports of the UK Parliamentary committees and, indeed, any proposals made by the Scottish Parliament in this regard.

I also wish to provide an initial response to the proposed approach to Standing Orders.

In your report in February, you recommended that *'the sifting criteria... should be set out in the National Assembly's Standing Orders'*. By contrast, your July report, as noted above, recommends that Standing Orders should only require the relevant Committee to publish the sifting criteria that will be applied to regulations subject to the sifting process. In making this change, the report refers to the Welsh Government's response to your February report, which stated the government was not persuaded the criteria should be included in Standing Orders. This was because the government was of the view that the criteria would need to be consistent with the final framework for the sifting mechanism, which was not known at that time. We now have clarity about what is provided for by the 2018 Act, including certain correcting regulations that must be made according to the affirmative procedure and the sifting process for those regulations that are proposed to be made according to the negative procedure.

Accordingly, the Government is now of the view that the recommendation within your Committee's February report is sensible and that the criteria to be applied by the sifting

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<sup>2</sup> <https://publications.parliament.uk/pa/ld201719/ldselect/ldsecleg/174/174.pdf>

committee should indeed be set out in the Assembly's Standing Orders. This would be consistent with Standing Orders 21.2 and 21.3, which set out the grounds on which a responsible committee may report when considering all statutory instruments and draft statutory instruments laid before the Assembly.

The Business Committee, and the Assembly itself, will of course return to this matter when the Assembly returns in September, and will consider the proposed changes to its Standing Orders to establish procedures for the scrutiny of regulations made under the 2018 Act.

I am grateful to the Committee members for their work on this matter. The Government will provide a formal response to the recommendations in your Committee's report in due course.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Julie', with a large, sweeping initial 'J'.

**Julie James AC/AM**

Arweinydd y Tŷ a'r Prif Chwip  
Leader of the House and Chief Whip