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8 January 2019

Dear Conveners,

On 11 September I wrote to you to set out our intention to work with the UK Government to prepare the devolved statute book for the potential shock of leaving the EU without a deal. That work is going well, and I would like to thank the committees of the Scottish Parliament for all their work in the technical task of scrutinising notifications in relation to UK SIs over the last few months.

The notifications will continue in to the New Year. We must also turn to the task of completing a programme of SSIs that the make changes to the statute book that Scottish Ministers consider to be necessary for a no deal scenario. To aid this, my officials have worked with Scottish Parliamentary officials to develop an SSI protocol. This will add to existing SSIs processes, and honours commitments I made to the Parliament during the passage of the Scottish Continuity Bill. It is set out in the annex to this letter, but in summary does the following:-

- Establishes categories of significance to help committees determine their approach to scrutiny
- Establishes a sifting process to enable the Scottish Parliament to request that the procedure under which an SSI has been laid can be changed
- Sets out the additional information which the Scottish Government will provide when laying Brexit-related SSIs

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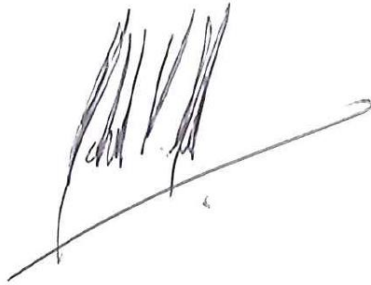
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My officials will continue to liaise with Scottish Parliamentary colleagues with regards to our legislative preparations for EU exit. In addition, the Minister for Parliamentary Business and Veterans will continue to write to committees on a monthly basis with information about all forthcoming legislation.

A handwritten signature in black ink, appearing to read 'Michael Russell', written over a horizontal line.

MICHAEL RUSSELL

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Protocol on the scrutiny of SSIs made using powers under the European Union (Withdrawal) Act

Introduction

1. This protocol sets out a shared understanding between the Scottish Government and the Scottish Parliament on the process for considering Scottish Statutory Instruments (SSIs) under the European Union (Withdrawal) Act (“the Act”).
2. The protocol does not replace the Parliament’s existing processes for the scrutiny of SSIs. The existing procedures for the consideration of SSIs under the Interpretation and Legislative Reform (Scotland) Act 2010 and in the Parliament’s Standing Orders continue to apply. The protocol augments those processes to assist committees in their scrutiny of SSIs.
3. The protocol sets out an approach which categorises SSIs. This is intended to assist committees in prioritising their scrutiny in view of the novel issues which arise in relation to the correction of legislative deficiencies and/or in the event that the Scottish Ministers lay large numbers of instruments under the Act in a relatively short time period before the Parliament. The protocol also establishes a role for the Delegated Powers and Law Reform Committee (“the DPLR Committee”) to “flag” instruments to lead committees where it holds a contrary view to the Scottish Government on the significance of an instrument.
4. The protocol also provides for a process of “sifting” to apply to certain instruments made under powers conferred by Schedule 2 the Act. That is to say, a process whereby a lead committee for an instrument can recommend that the parliamentary scrutiny procedure attached to that instrument on laying should be changed and the Scottish Government should take steps to change the procedure accordingly. The purpose of the sifting process is to enable committees to recommend a change where they consider that the matter is of such significance that it requires active Parliamentary approval (or conversely is not so significant that it requires Parliamentary time to be allocated to its approval).
5. There is a separate protocol setting out the process for obtaining the approval of the Scottish Parliament to the Scottish Ministers’ consent to the exercise of powers by the UK Ministers under the Act in relation to proposals within the legislative competence of the Scottish Parliament.

Categorisation

Background

6. The Scottish Government and the Scottish Parliament agree that when dealing with the novel issues which arise in the correction of legislative deficiencies and/or the high volumes of SSIs under the Act, Scottish Parliament committees will wish to have as clear an indication as possible of which instruments are likely to be most significant, so as to prioritise their scrutiny
7. Categorisation is intended as a guide to committees to assist in prioritisation. It neither requires committees to apply particular scrutiny to instruments nor does it limit what committees can do.

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8. The Scottish Government will take a case by case view of what category an instrument should fall into. It is for the Scottish Parliament, and more specifically, the DPLR Committee to take a case by case view of whether or not it agrees with the category applied to the instruments by the Scottish Government.

Categories

9. The protocol sets out three different levels of prioritisation based on the significance of the SSI.

10. Standard scrutiny processes would still apply to the consideration of laid only, negative and affirmative instruments. That is to say, all instruments will be considered by the DPLR Committee from a technical perspective irrespective of what category they fall into. Furthermore, all instruments will be referred to a lead committee, again irrespective of the category they fall into and they will be considered in the normal way that a laid only, negative or affirmative instrument would be considered.

11. The categories make no provision for particular policy areas to fall into any one of the categories, but it may become apparent that there are policy areas where there is significant stakeholder interest and substantive SSIs within this policy should normally fall into a higher category.

12. The protocol does not prescribe a process that lead committees should apply to the scrutiny of matters falling into the different categories, but by categorising instruments it provides committees with a guide as to what they might wish to prioritise.

13. As a guide, however, committees might consider not taking evidence on matters falling into the low category, but might wish to at least take evidence from the Scottish Government on matters falling into the medium category. On matters falling into the high category the Committee might wish to take evidence from the Scottish Government and stakeholders.

Low

It is expected that proposals for instruments falling into this category will have one or more of the following characteristics:

- Minor and technical in detail;
- Ensuring continuity of law with no policy change;
- Clear there is no significant policy decision for Ministers to make;
- Updating references which are no longer appropriate once the UK has left the EU, such as provisions which refer to “member states other than the United Kingdom” or to “other EEA states”.

This is an illustrative list and not a comprehensive view of what falls into this category. It would be expected that instruments falling into this category would be negative instruments.

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Medium

It is expected that proposals for instruments falling into this category will have one or more of the following characteristics:

- Instruments predominantly concerned with technical detail but which include some more significant provisions that may warrant subject committee scrutiny;
- Instruments where Ministers have a limited policy choice but with more significant implications,

This is an illustrative list and not a comprehensive view of what falls into this category.

High

It is expected that proposals for instruments falling into this category will have one or more of the following characteristics:

- Instruments in which a more significant policy decision is being made by Scottish Ministers;
- Transfer of functions - providing for a function of an EU entity to be exercised by a public authority in the UK where there is a policy choice with significant implications about which public authority it should be e.g. a regulatory function exercisable by either SEPA or Scottish Water where Parliament may have an interest in the policy choice made by Scottish Ministers;
- Replacement, abolition, or modification of certain EU functions that have significant implications e.g. reporting (both receiving and making reports), monitoring, compliance and enforcement;
- Sub-delegation – creating or amending a power to legislate, including transferring EU legislative powers to Scottish Ministers or to another UK public authority;
- Provision which materially increases or otherwise relates to a fee in respect of a function exercisable by a UK public authority. This could include changes to the group of bodies or individuals required to pay such fees;
- Provision which creates, or widens the scope of, a criminal offence, or which increases the penalty which may be imposed in respect of a criminal offence;
- Provision which involves a significant financial impact on individuals, business, public sector or the economy;
- Provision which creates, widens the scope of, or increases the level of fine for a fixed penalty.

This is an illustrative list and not a comprehensive view of what falls into this category.

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Sifting process

14. The Scottish Ministers have discretion about whether instruments made in exercise of the powers in Schedule 2 to the Act should be subject to the affirmative or the negative procedure, unless the instrument makes provision falling within one of the categories which attracts the mandatory affirmative procedure¹. This section of the protocol establishes a sifting process for instruments made in exercise of the powers in Schedule 2 to the Act (except where the joint procedure applies). That is to say, this section sets out a process whereby a lead committee for an instrument can recommend that the parliamentary scrutiny procedure attached to that instrument on laying should be changed and the Scottish Government should take steps to change the procedure accordingly. This enables committees to recommend a change where they consider that the matter is of such significance that it requires active Parliamentary approval (or conversely is not so significant that it requires Parliamentary time to be allocated to its approval).

15. In performing its sifting role, that lead committee may recommend that an instrument made under Schedule 2 to the Act following the negative procedure and subject to sifting should be revoked and laid as an affirmative instrument. Equally, where an instrument has been laid under the affirmative procedure and is subject to sifting, that committee may recommend the negative procedure is more appropriate.

16. The approach to the sifting process in this protocol is based on the following three principles:

- that the sift only applies to instruments made in exercise of the powers in schedule 2 to the Act where there is discretion about the procedure to apply to an instrument;
- that the decision of a lead committee should be followed by the Scottish Ministers; and
- that where the Scottish Ministers consider it necessary, they should be able to designate certain instruments as urgent and that those instruments should not be subject to the sift process.

17. There will be instruments made under the Act not subject to the sifting process. As noted above, the sifting process will not apply to instruments made under the joint procedure. The sifting process also applies only to instruments made under schedule 2 where discretion over the choice of procedure applies.

18. It is recognised that it is not necessary to change the procedure applied to an instrument to enable additional scrutiny.

19. A lead committee can choose to undertake more extensive scrutiny irrespective of the procedure.

¹ See paragraph 1(4) and 2 (deficiencies power) and paragraph 6(5) (implementing withdrawal agreement power) of Schedule 7 to the Act.

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Instruments not subject to the process

20. This protocol allows the Scottish Ministers to make a declaration that an instrument that would otherwise have been subject to the sifting process will not be subject to that process by reason of urgency. Such a declaration would be made as part of the information to accompany the instrument at laying and would include a justification for the instrument not being subject to the sifting process.

Process of categorisation and sifting

Phase 1 – categorisation of SSIs by the Scottish Government and information to accompany SSIs

21. As is currently the case, the Scottish Government will share information with the Scottish Parliament about upcoming SSI activity. This information sharing will help identify when there are likely to be increased volumes of SSIs overall, and increased volumes that may impact particular subject Committees.

22. As part of that information, the Scottish Government will indicate the procedure that is to attach to upcoming instruments and why that procedure is considered appropriate.

23. The laying process for SSIs under the Bill in the Scottish Parliament will be identical to the process for laying at present.

24. However, as a consequence of the sifting process, there is the potential for a lead committee to recommend that the procedure attached to an instrument on laying should change.

25. In addition, the information to be supplied to support an instrument on laying is more extensive.

26. Amongst other things, the Scottish Government will advise the Scottish Parliament as to which category it considers the SSI falls into (see paragraphs 9 to 13 of this Protocol). In doing so the Scottish Government will apply the approach set out in this protocol. The Scottish Government will, however, consider each SSI on a case-by-case basis to assess whether the categorisation is appropriate.

27. SSIs that are laid in the Scottish Parliament have an explanatory note that sets out what the instrument does and are accompanied by a separate policy note. These will contain much of the information that the Scottish Parliament requires to aid scrutiny of the SSIs. The information in the policy note normally includes:

- a summary of the consultation carried out,
- the policy objectives of the instrument
- a note of any impact assessments undertaken or prepared,
- a note of significant financial implications.

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28. For SSIs made under this Act, the Policy Note will also include:

- an explanation of the law being amended by the regulations,
- the reasons for and effect of the proposed change or changes on retained EU law,
- a statement that the Minister considers that the regulations do no more than is appropriate,
- a statement why the Minister considers there are good reasons for the regulations and that this is a reasonable course of action,
- a statement of whether the SSI amends, repeals or revokes any provision of equalities legislation and, if it does, an explanation of the effect of that amendment, repeal or revocation,
- a statement that Scottish Ministers have, in preparing the regulations, 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,
- a statement that Scottish Ministers have, in preparing the regulations, had due regard to the guiding principles on the environment and animal welfare (see para 29),
- a statement explaining the effect (if any) of the instrument or draft on rights and duties relating to employment and health and safety and matters relating to consumer protection (so far as is within devolved competence),
- if the instrument or draft is laid when the Scottish Parliament is in recess, a statement explaining why the instrument or draft was laid at that time,
- an indication of how the instrument should be categorised in relation to the significance of the change proposed,
- a statement setting out the Scottish Ministers' reasons for their choice of procedure to attach to the regulations,
- if the instrument is not to be subject to the sifting process by reason of urgency, a statement explaining the urgent circumstances.

29. The guiding principles on the environment and animal welfare are derived from the equivalent principles provided for in Articles 13 and 191(2) in Titles II and XX respectively of the Treaty on the Functioning of the European Union, and are:

- (a) the precautionary principle as it relates to the environment,
- (b) that preventative action should be taken to avert environmental damage,
- (c) that environmental damage should as a priority be rectified at source,
- (d) that the polluter should pay,
- (e) that regard must be had to the welfare requirements of animals as sentient beings.

Phase 2 – DPLR Committee consideration

30. Once an instrument has been laid before the Scottish Parliament under the Act the DPLR Committee will normally have three tasks to undertake:

- sifting,
- categorisation, and
- technical scrutiny.

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31. Wherever possible, the instrument will be considered by the DPLR Committee at the first committee meeting following the weekly Wednesday midday laying deadline.

32. At that meeting the DPLR Committee will normally consider the appropriateness of the procedure attached to the instrument. The Committee will also consider, where appropriate, the justification for not submitting an instrument to the sifting process.

33. Where the DPLR Committee considers that the lead committee should recommend a change in the procedure it will make a report to the lead committee for the instrument. Where the DPLR Committee is content with the proposed procedure then it may simply minute that, but could still report its conclusions to the lead committee.

34. At that same meeting, the DPLR Committee will normally consider whether it agrees with the category applied to the instrument by the Scottish Government.

35. Where the DPLR Committee considers that the categorisation of the instrument by the Scottish Government is not correct, it will flag this in its report to the lead committee. In flagging this to the lead committee the intention is to assist committees to prioritise the level of scrutiny applied to the instrument. However, flagging an instrument does not mean that the lead committee is obliged to undertake the level of scrutiny suggested by the DPLR Committee. Nothing in this protocol or the sifting process changes the ability of committees to scrutinise as they think appropriate.

36. Where the DPLR Committee is in a position to do so, the Committee may also undertake technical scrutiny of the instrument at the first meeting after laying and report on the instrument in its normal way.

37. The DPLR Committee's report to the Parliament on the appropriateness of the procedure applied to the instrument and the categorisation of the instrument may be part of the Committee's normal report on the instrument, or the Committee may produce a separate report on this matter if it wishes to do so. Such a report may also consider the appropriateness of not subjecting an instrument to the sift process. In any event the Committee will draw its report to the attention of the relevant lead committee.

Phase 3 – lead committee consideration

38. Lead committees will have two roles to undertake:

- sifting; and
- policy scrutiny of the instrument.

39. It is expected that a lead committee would undertake its sifting role at the committee meeting in the first week following the Wednesday midday laying deadline. A lead committee will also consider, where appropriate, the justification for not submitting an instrument to the sifting process.

40. Wherever possible, a lead committee's consideration of the appropriateness of the procedure attached to the instrument or the reasons for not submitting an instrument to the sifting process will be informed by any recommendation of the DPLR Committee. However, a lead committee may report without a recommendation from the DPLR Committee.

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41. Where a lead committee recommends a change in the procedure it should make a report to the Parliament. Where a lead committee is content with the proposed procedure then it may simply minute that, but could still report its conclusions to the Parliament.
42. Where a lead committee recommends a change in procedure, the Scottish Government would be expected to meet that recommendation and to do so as soon as possible.
43. In the event that the recommendation is to change the procedure attached to the instrument from negative to affirmative, the Scottish Government will normally lay an instrument to revoke the original instrument and lay an affirmative instrument in its place.
44. Where the recommendation is to change the procedure attached to the instrument from affirmative to negative, the Scottish Government will normally withdraw the affirmative instrument and lay a negative instrument in its place.
45. In any event, a change in the procedure attached to the instrument would not normally be expected to mean a change in the content of the instrument. Accordingly, while subject to a different procedure, the instrument would normally be treated as the same instrument for the purposes of timing and the 40-day scrutiny period allowed by Standing Orders for the original instrument will normally continue to run.
46. Having undertaken its sifting role, a lead committee would then perform its normal policy scrutiny role, informed by the categorisation process.
47. Where an instrument requires Parliamentary approval, this need not have a significantly differential impact on the scrutiny a lead committee undertakes on an instrument.

Revisions to this protocol

48. This protocol will be kept under review. The Scottish Government or the Scottish Parliament may propose revisions to the protocol and both will need to agree to any revisions made.