HOUSE OF LORDS

Secondary Legislation Scrutiny Committee

7th Report of Session 2019–21

Correspondence: Lapsed sunset clauses

Includes information paragraphs on:

Draft National Minimum Wage (Amendment) (No. 2) Regulations 2020

Office of Communications (Provision of Information) Regulations 2020

Communications (Television Licensing) (Amendment) (No. 2) Regulations 2020

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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 Union (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.

Members

Baroness Bakewell of Hardington Mandeville
Rt Hon. Lord Chartres
Rt Hon. Lord Cunningham of Felling
Viscount Hanworth
Lord Hodgson of Astley Abbotts (Chair)
Lord Kirkwood of Kirkhope
Lord Liddle
The Earl of Lindsay
Lord Lisvane
Lord Sherbourne of Didsbury
Baroness Watkins of Tavistock

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 http://www.parliament.uk/seclegpublications

Committee Staff

The staff of the Committee are Christine Salmon Percival (Clerk), Helen Gahir (Adviser), Philipp Mende (Adviser), Jane White (Adviser), Louise Andrews (Committee Assistant) and Ben Dunleavy (Committee Assistant).

Further Information

Further information about the Committee is available at https://www.parliament.uk/business/committees/committees-a-z/lords-select/secondary-legislation-scrutiny-committee/

The progress of statutory instruments can be followed at https://statutoryinstruments.parliament.uk/

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

Contacts

Any query about the Committee or its work, or opinions on any new item of secondary legislation, should be directed to the Clerk to the Secondary Legislation Scrutiny Committee, Legislation Office, House of Lords, London SW1A 0PW. The telephone number is 020 7219 8821 and the email address is hlseclegscrutiny@parliament.uk.

Seventh Report

CORRESPONDENCE

Lapsed sunset clauses

Merchant Shipping (Ship-to-Ship Transfers) Regulations 2020 (SI 2020/94)

Draft Private Security Industry (Licence Fees) Order 2020

1. We have no comment on the policy content of these instruments. Our concern is that both instruments reinstate legislation that had been allowed to lapse. We raised this matter with the relevant Ministers and asked for clarification of how each gap arose.

2. The Department of Transport (DfT) left a gap of 11 months in an anti-pollution measure that restricted transfers of oil between ships to designated areas of UK territorial waters. The Minister's response (see Appendix 1) makes clear that the Department was aware in advance that the legislation was due to lapse but, in the pressure of the Brexit period, had decided that it was not a priority to reinstate the measure. **We welcome the Minister's assurance that the Department has a mechanism in place to monitor sunset clauses or post-implementation review dates systematically**.[1]

3. In the case of the Home Office, the gap was of 11 years and related to an accounting waiver that allows for the charging of fees for Security Industry Authority licences to be averaged over busy and quiet years. The Minister's response (see Appendix 2) explains that it was initially believed that demand for the service would even out by the time the original waiver lapsed. However, in 2013–14, when it became clear that demand had not flattened out over a three-year cycle, the opportunity to address the problem was missed. The Minister states that the Home Office will now undertake a trawl across the Department to identify any similar time-limited instruments and will put in place a central system to monitor these in the future. **We are surprised that such a mechanism does not already exist in the Home Office**. **To avoid similar lapses, we urge the Government to ensure that such mechanisms are in place within all departments**.

1 The Committee received a submission from Mr Richard Greenhill, which is published on our website: https://committees.parliament.uk/committee/255/secondary-legislation-scrutiny-committee/publications/.

INSTRUMENTS OF INTEREST

Draft National Minimum Wage (Amendment) (No. 2) Regulations 2020

4. This instrument proposes to widen the range of pay arrangements that are compatible with the rules for the National Minimum Wage (NMW) in relation to salaried hours workers (those paid an annual salary in equal instalments). The proposals involve extending the range of compatible payment cycles (such as being paid every two or four weeks — currently only weekly or monthly payment cycles are compatible); and allowing premium payment schemes, for example for working on bank holidays, in respect of workers' basic hours which are currently incompatible with NMW rules. The instrument also proposes to enable employers to specify the 'calculation year' for their salaried workers. This is the reference point used to identify when in a year a worker's basic annual hours, for which they receive their salary, are exceeded. Currently, the calculation year depends on an individual worker's starting date, making it difficult for employers to monitor when annual basic hours are exceeded. The instrument also proposes to adjust the rules for when workers make a purchase from their employer that is in connection with their employment, for example for a new uniform, so that this no longer reduces pay for NMW purposes if the employer reimburses the worker. The Department for Business, Energy and Industrial Strategy (BEIS) explains that the proposed changes address evidence from a consultation on salaried work and salary sacrifice schemes which suggested that certain elements of the NMW rules placed burdens on employers without generating any benefits for workers. We asked BEIS whether any objections were raised during the consultation, including by the unions. The Department told us that:

> "We received consultation responses from several unions - some objected generally to changes to the NMW Regulations in order to safeguard worker protections. The changes to the NMW Regulations set out in this SI were agreed by Ministers because they do not remove any protection or benefit to workers. As we expect the change to lead to increased compliance, this is also in workers' interests."

Office of Communications (Provision of Information) Regulations 2020 (SI 2020/125)

5. This instrument specifies the type of information that is exempt from a new duty under section 24A(1) of the Communications Act 2003 on the Office for Communications (Ofcom) to share information with the Secretary of State 24 hours before publication. The Department for Digital, Culture, Media and Sport (DCMS) explains that the main purpose of the new duty is to ensure that Ministers and officials are kept informed of key research and decisions made by Ofcom in a timely manner, so that they can formulate policy and advise on the Government's response. This instrument is the first time that the power of the Secretary of State to specify exemptions from the duty has been used. The Department explains that the current 'protocol of pre-disclosure' between DCMS and Ofcom is not legally binding and that, under Ofcom's Statement of Strategic Priorities the regulator has a statutory duty to have regard to the Government's policy priorities when carrying out its functions in relation to telecoms, radio and postal services. Having consulted Ofcom, the following will in future be exempt from the duty: information relating to Ofcom's Broadcasting Code (which sets out

programme and fairness standards for TV and radio); information on the enforcement of TV and radio licences; and information relation to Ofcom's constitutional and funding arrangement and its management. According to DCMS, exempting this information is to "avoid any suggestions of interference, real or perceived, from government in the setting of broadcasting standards or licence decisions". The Department emphasises that there are also statutory limits on what Ministers and officials can do with information shared by Ofcom, including a ban on making any representations to the regulator on the information disclosed. The Committee notes that in the early stages of consultation Ofcom sought exemptions for the publication of its Public Service Broadcasting Review and its Annual Report on the BBC. These publications will not be exempt. The Department says that it is in the process of agreeing a Memorandum of Understanding (MoU) with Ofcom which will set out how the new duty will work in practice. The MoU will be published before the duty is brought into force by this instrument on 1 April 2020.

Communications (Television Licensing) (Amendment) (No. 2) Regulations 2020 (SI 2020/160)

6. This instrument provides for the continuation of an instalment scheme for the TV licence fee, known as the Simple Payment Plan (SPP). The Department for Digital, Culture, Media and Sport explains that, following publication of its 2016 BBC White Paper[2], the BBC trialled a more flexible payment plan, the SPP, between April 2018 and September 2019 for those who have difficulties in paying the TV licence fee. Three types of customers were eligible: (i) people who have been questioned under caution for TV licence evasion and may therefore face prosecution; (ii) people who have sought advice from a debt advice charity about their financial obligations; and (iii) people who have recently become unlicensed and missed payments on their previous licence. The Department says that the SPP should be made permanent across the UK as it has had a positive impact, decreasing the number of people who may be prosecuted for TV licence fee evasion. Under the SPP, the TV licence costs the same as the colour TV licence (£157.50 per year from 1 April 2020), but people may pay in monthly or fortnightly instalments in a pay-as-you-go model without having to pay for their first licence within six months ('frontloading'), as is the case with other instalment schemes. The instrument also enables the BBC to issue 'shortdated' simple payment licences. These are full-cost licences with an expiry date of less than 12 months in the future which allow the BBC to recuperate any revenue lost from unlicensed periods in which customers allowed previous licences to lapse.

2 Department for Digital, Culture, Media and Sport, *A BBC for the Future: a Broadcaster of Distinction* (12 May 2016): https://www.gov.uk/government/publications/a-bbc-for-the-future-a-broadcaster-of-distinction [accessed 27 February 2020].

INSTRUMENTS NOT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

Draft instruments subject to affirmative approval

Licensing Act 2003 (Victory in Europe Day Licensing Hours) Order 2020

National Minimum Wage (Amendment) (No. 2) Regulations 2020

Private Security Industry (Licence Fees) Order 2020

Instruments subject to annulment

SI 2020/94	Merchant Shipping (Ship-to-Ship Transfers) Regulations 2020
SI 2020/123	Local Government Pension Scheme (Buckinghamshire Structural Changes) (Amendment) Regulations 2020
SI 2020/124	Local Government (Structural Changes) (Further Financial Provisions and Amendment) (Amendment) Regulations 2020
SI 2020/125	Office of Communications (Provision of Information) Regulations 2020
SI 2020/133	Council Tax and Non-Domestic Rating (Demand Notices) (England) (Amendment) Regulations 2020
SI 2020/135	Family Procedure (Amendment) Rules 2020
SI 2020/137	First-tier Tribunal and Upper Tribunal (Chambers) (Amendment) Order 2020
SI 2020/138	Personal Injuries (NHS Charges) (Amounts) (Amendment) Regulations 2020
SI 2020/139	Elections (Policy Development Grants Scheme) (Amendment) Order 2020
SI 2020/146	Energy Act 2004 (Assistance for Areas with High Distribution Costs) (Amendment) Order 2020
SI 2020/160	Communications (Television Licensing) (Amendment) (No. 2) Regulations 2020

APPENDIX 1: MERCHANT SHIPPING (SHIP-TO-SHIP TRANSFERS) REGULATIONS 2020

Letter from Lord Hodgson of Astley Abbotts, Chair of the Secondary Legislation Scrutiny Committee, to Rachel Maclean MP, Parliamentary Under-Secretary at the Department for Transport

I am writing in my capacity as Chair of the Lords Secondary Legislation Scrutiny Committee.

The Merchant Shipping (Ship-to-Ship Transfers) Regulations 2020 were laid before Parliament on 4 February 2020. When they come into effect on 26 February, they will close a regulatory gap that has lasted almost a year. To assist the Committee in its scrutiny of these Regulations, I would be grateful if you could explain why this lapse occurred and, in particular:

- When the fact that the previous Regulations had lapsed on 1 April 2019 was identified;
- Whether the Department for Transport has a system for tracking sunset clauses in the legislation for which it is responsible to ensure this sort of lapse will not happen again; and
- Whether the lapse is likely to trigger any infraction proceedings from the European Union.

We also noted your Department's explanation of why the sunset clause in these Regulations is not being reinstated, but would be interested to know what your current policy is on the use of sunset clauses more generally.

Please could you reply by 10 am on Monday 2 March so that it may be considered at the Committee's next meeting.

25 February 2020

Letter from Rachel Maclean MP to Lord Hodgson

Thank you for your letter of 25 February concerning the regulatory gap in the UK's ship to ship transfer regime, that has now been remedied by the introduction of the Merchant Shipping (Ship-to-Ship Transfers) Regulations 2020 which came into effect on 26 February 2020.

The Department was aware that the sunset clause in 2012 legislation needed to be revoked before the lapse occurred. It was on the Department's list of Statutory Instruments and our original intention was to revoke the clause before the existing regulations lapsed on 31 March 2019. The post implementation review on the 2010 and 2012 regulations which was published in 2017, also highlighted several small revisions which would update and clarify the ship to ship regime. At the time, we decided to delay implementing these amendments until after we had revoked the sunsetting clause, as incorporating these changes would not be a quick or simple procedure.

Once it was clear that the deadline could not be met, it was decided that the new instrument should introduce the minor modifications which were identified in the post implementation review of the original regulations. The improvements should ensure that no further amendments will be needed for several years - something which would not have been the case had we simply removed the sunset clause from the 2012 regulations.

All regulations which contain a sunset clause must be reviewed two years before the clause is activated. The Department's Better Regulation Unit has a record of all legislation which requires a post implementation review, and systematically circulates reminders. So, there are systems in place which prompt officials to consider the impact of existing legislation and take appropriate action regarding sunset clauses. Not every regulation which needs to be reviewed has a sunset clause. The clause is normally reserved for new legislation which may affect business in ways which are hard to predict.

Sunset clauses were routinely considered, on a case by case basis, for all new DfT legislation during the 2012–2014 period. Whilst they are still recommended best practice for legislation used to tackle a temporary problem, or where there is a risk of uncertain outcomes and where it is difficult to predict the behaviour responses of those affected, they are now very rarely used. Currently, there is only one such clause for which the Department is responsible which has yet to expire.

As I said, the timing of amendments to the Merchant Shipping (Ship-to-Ship Transfers) Regulations was unfortunate, falling as it did during a period of unprecedented activity in delivering high priority legislation. However, I am confident that this sort of lapse will not happen again.

Finally, I can assure you that the risk of infraction proceedings from the European Union over this matter was negligible. The only EU legislation implemented by these Regulations is a small component of Article 6 of Council Directive 92/43/EEC on the conservation of natural habitats and wild fauna. Our view is that the EU would be very unlikely to take infraction proceedings in relation to an implementation gap of only a single year which has now been addressed, particularly given that there have been no practical consequences.

27 February 2020

APPENDIX 2: DRAFT PRIVATE SECURITY INDUSTRY (LICENCE FEES) ORDER

Letter from Lord Hodgson of Astley Abbotts, Chair of the Secondary Legislation Scrutiny Committee, to Victoria Atkins MP, Parliamentary Under Secretary of State at the Home Office

I am writing in my capacity as Chair of the Lords Secondary Legislation Scrutiny Committee.

The draft Private Security Industry (Licence Fees) Order 2020 was laid before Parliament on 3 February 2020. When they come into effect on 1 April 2020, they will close a regulatory gap that has lasted 11 years. To assist the Committee in its scrutiny of these Regulations, I would be grateful if you could explain why this lapse occurred and, in particular:

- When the fact that the previous Regulations had lapsed on 31 March 2009 was identified;
- whether the Home Office has a system for tracking sunset clauses in the legislation for which it is responsible to ensure this sort of lapse will not happen again.

Please could you reply by 10 am on Monday 2 March so that it may be considered at the Committee's next meeting.

25 February 2020

Letter from Victoria Atkins MP to Lord Hodgson

Thank you for your letter of 25 February relating to the Private Security Industry (Licence Fees) Order 2020 and the opportunity to provide clarity and an explanation as to why the previous Order relating to the SIA [Security Industry Authority] was timebound and why this new Order is now needed.

When the SIA was established (in 2003), it was predicted that the SIA would have a 3 year fee cycle where demand would even out within two or three fee cycles. It is now clear that demand did not even out as anticipated and has in fact continued to be uneven across the five 3 year cycles since it was established.

In 2007/08 and 2008/09, the SIA were planning on making a surplus and an Order (The Private Security Industry (Licence Fees) Order 2007) was put in place to cover this period. At that time, it was anticipated that the SIA would break even in future years, thus negating the need for this Order to continue in perpetuity. The 2012 SIA fee review also anticipated that the SIA would break even over the next 2 years, thus negating the need for a new Order at that time.

In 2018, after the SIA had made cumulative surpluses, planning commenced to calculate a new fee level to take into account the significant transformation the SIA had recently delivered, combined with uncertain volumes and expected efficiencies. The fee reduction following this review took place in 2019 with the Private Security Industry Act 2001 (Licences) (Amendment) Regulations 2019. This Order to reduce the fees highlighted the need for this new Private Security Industry (Licence Fees) Order 2020 to be put in place.

A new Order therefore could have been considered in or around 2013/14 when actual demand was not as predicted, and it was clearer that demand did not flatten out over the 3 year cycle. We are confident that this would not happen again because the SIA have improved their demand modelling and we have improved partnership working with our ALBs [Arms-Length Bodies].

We will now undertake a trawl across the department to identify any similar time limited Statutory Instruments and will put in place a central system to monitor these.

I hope this explanation provides the reassurance you (Chair) and the Lords Secondary Legislation Security committee are seeking.

2 March 2020

APPENDIX 3: INTERESTS AND ATTENDANCE

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.

For the business taken at the meeting on 3 March 2020, Members declared no interests.

Attendance:

The meeting was attended by Lord Chartres, Lord Cunningham of Felling, Viscount Hanworth, Lord Hodgson of Astley Abbotts, Lord Liddle, the Earl of Lindsay, Lord Lisvane, Lord Sherbourne of Didsbury and Baroness Watkins of Tavistock.