

Dear House of Lords Secondary Legislation Scrutiny Committee

The Merchant Shipping (Ship-to-Ship Transfers) Regulations 2020 ([SI 2020/94](#), “*the new Regulations*”) were made on 31 January and laid before Parliament on 4 February with an accompanying Explanatory Memorandum (*EM*) prepared by the Department for Transport (*DfT*). By virtue of section 306 of the Merchant Shipping Act 1995, the Regulations are subject to annulment in pursuance of a resolution of either House of Parliament.

I draw to your attention two specific points of potential interest and one general point arising.

1. DfT allowed the predecessor Regulations to expire last year leaving a gap in its enforcement powers.

The EM reveals that there has been an interval of nearly a year since the expiration at the end of 31 March 2019 of the statutory instrument which the new Regulations supersede, the Merchant Shipping (Ship-to-Ship Transfers) Regulations 2010 (SI 2010/1228, “*the old Regulations*”).

The old Regulations (as amended by SI 2011/2183) first came into force on 1 April 2012 and (by virtue of an amendment made by SI 2012/742) automatically ceased to have effect seven years later, as part of the Government’s sunset policy.

Since then, and continuing until the new Regulations come into force on 26 February 2020, the EM delicately notes that “a regulatory gap has existed”:

“In the event, the Department was unable to amend the 2010 Regulations before the sunset clause was activated.” (paragraph 7.9).

No explanation is given for this supposed inability to legislate in anticipation of 1 April 2019 between the outcome of DfT’s Post-Implementation Review (*PIR*) in July 2017 and the ministerial signing of the new Regulations on 31 January 2020.

DfT does, however, explain something of the actual and potential consequences of the resulting vacuum:

“without this instrument, we cannot require operators to keep their operations to designated locations, nor require them to provide contingent response capability on scene, or on standby, where and when appropriate. While industry has continued to operate in line with the 2010 regime, these transfers could have been undertaken anywhere in UK territorial waters prior to the introduction of these Regulations, including in environmentally sensitive areas. The new legislation reinstates control and oversight by the MCA and further reduces the risk of a pollution incident from this activity.” (paragraph 7.7)

It seems DfT has relied on industry goodwill or ignorance of the expiration of its law for there to be no risk of disastrous consequences.

Given the importance of protecting the environment and life at sea, as well as compliance with parliamentary and international expectations, it is surprising that DfT neither acted sooner to implement the new Regulations nor as an interim measure amended the old Regulations so as to remove or defer the sunset provision before its activation.

Q1.1: Why the delay between July 2017 and 31 January 2020?

The new Regulations do not contain a sunset clause. The EM explains:

“Although the 2017 PIR in relation to the 2010 Regulations indicated that the Department would retain a sunset clause in any future legislation, the Department no longer considers that this is justified. In part, this is because the 2017 PIR concluded that the previous Regulations were effective in controlling transfer activities in United Kingdom waters, helping to reduce the risk of oil spills near environmentally sensitive sites. The Department also considers that it would be disproportionate to include a sunset clause, given the modest costs of compliance and the fact that few, if any, small companies on the United Kingdom Shipping Register are affected by the Regulations. The [2025] PIR will provide an opportunity to reflect on any necessary amendments.” (paragraph 14.2)

Q1.2: Has the Government’s failure to cope with the above sunset affected its wider policy on the appropriateness of sunset clauses?

Q1.3: Are Departments on top of all other sunseting deadlines as they approach; and if not, which other laws have lapsed or will lapse with an unintended gap in their replacement?

2. DfT may have failed without explanation to implement an international obligation on time.

The EM states: “The Regulations implement Chapter 8 of Annex I to the International Convention for the Prevention of Pollution from Ships 1973, as modified by the Protocol of 1978 (‘MARPOL’)...” (paragraph 6.3). It goes on to state that the “most significant changes” in the new Regulations include (fifthly and finally) “to align UK legislation with Annex I of MARPOL...” (paragraphs 7.9 and 7.12).

That implies that the old Regulations were not already aligned with Chapter 8 of Annex I of MARPOL in some significant respect. No details are given of the date of any changes, other than that MARPOL as a whole was modified in 1978.

It is therefore unclear from the EM whether the UK is now implementing a new MARPOL provision on time or whether the UK has to some extent been in breach of an obligation in international law to comply with MARPOL (even aside from the sunseting gap), and if so when the breach began.

Q2.1: (a) What was the specific MARPOL provision which is implemented for the first time by the new Regulations (including a link to the relevant text), (b) when was it formally agreed, and (c) when did it become binding on the UK?

Q2.2: What if any other international obligations were broken by the expiration of the old Regulations some time prior to the commencement of the new Regulations?

3. General: Information that should be included in EMs when international obligations are implemented late.

Despite your Committee's past concerns at the DfT's backlog, Departments continue to be late in implementing numerous EU and other international obligations, as is evident from other EMs on their face or from verifying implementation deadlines in the underlying international laws to which Departments more or less obliquely refer.

If Parliament is to scrutinise legislation effectively, it should be aware of any implementation delays and of the Government's reasoned assessment of the causes and consequences.

Accordingly, I submit (as I have done before) that your Committee should require all EMs, as a matter of respect for Parliament, to explain any such delays; stating in particular (a) the date on which the relevant treaty or EU law was amended, (b) the date on which the international obligation began, (c) the date on which it is being implemented in the UK, (d) the reason for the Department not legislating sooner, and (e) any mitigation for the effects of the delay.

Yours sincerely

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