

HOUSE OF LORDS

Secondary Legislation Scrutiny Committee

26th Report of Session 2019–21

Drawn to the special attention of the House:

Town and Country Planning (Border Facilities and Infrastructure) (EU Exit) (England) Special Development Order 2020

Correspondence: Provision of information by departments

Includes information paragraphs on:

15 instruments relating to COVID-19

Draft Prevention of Trade Diversion (Key Medicines) (EU Exit) Regulations 2020

Criminal Legal Aid (Remuneration) (Amendment) Regulations 2020

Waste (Circular Economy) (Amendment) Regulations 2020

Channel Tunnel (International Arrangements and Miscellaneous Provisions) (Amendment) Order 2020

Channel Tunnel (Arrangements with the Kingdom of the Netherlands) Order 2020

Welfare Reform (Northern Ireland) Order 2015 (Cessation of Transitory Provision) Order 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

<u>Baroness Bakewell of Hardington Mandeville</u>	<u>Viscount Hanworth</u>	<u>The Earl of Lindsay</u>
<u>Rt Hon. Lord Chartres</u>	<u>Lord Hodgson of Astley Abbotts</u>	<u>Lord Lisvane</u>
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<u>Lord German</u>	<u>Lord Liddle</u>	<u>Baroness Watkins of Tavistock</u>

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 <https://committees.parliament.uk/committee/255/secondary-legislation-scrutiny-committee/publications/>

Committee Staff

The staff of the Committee are Christine Salmon Percival (Clerk), 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://committees.parliament.uk/committee/255/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.

Twenty Sixth Report

INSTRUMENTS DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

Town and Country Planning (Border Facilities and Infrastructure) (EU Exit) (England) Special Development Order 2020 (SI 2020/928)

Date laid: 3 September 2020

Parliamentary procedure: negative

This Order grants temporary planning permission for the development of border facilities and infrastructure on inland sites in England that will be needed where ports do not have enough capacity to carry out new controls of goods imported from the EU from 1 January 2021. With fewer than four months until the end of the Transition Period, the Government say that this Order is an important component of the preparations for the new border arrangements.

The instrument is drawn to the special attention of the House on the ground that it gives rise to issues of public policy likely to be of interest to the House.

1. The Ministry of Housing, Communities and Local Government (MHCLG) has laid this Order with an Explanatory Memorandum. The purpose of the instrument is to grant temporary planning permission for the development of border facilities and infrastructure on inland sites in England that will be needed where ports do not have enough capacity to process all the vehicles, including lorries, which will enter or leave Great Britain after the end of the Transition Period (TP) on 31 December 2020. The Secretary of State for Housing, Communities and Local Government (“the Secretary of State”) has written to the Committee about the Order. We are publishing his letter at Appendix 1.

What this instrument does

2. MHCLG explains that from 1 January 2021, the UK will introduce new controls for all goods imported from the EU into Great Britain, requiring new border facilities for carrying out the necessary checks, such as customs compliance, transit and sanitary and phytosanitary checks. The changes will be needed irrespective of whether an agreement is reached on the new relationship between the UK and the EU. While port operators would usually provide the necessary infrastructure, MHCLG says that there is limited space at some ports and the pandemic may have affected the ability of port operators to provide the infrastructure by the end of the year. Where there is limited space at ports, the Government have committed to providing new inland sites where the checks and other border processes can take place.

Use of a Special Development Order

3. The development of border infrastructure involves a material change in the use of land and therefore requires planning permission. In this case, MHCLG has used a Special Development Order (SDO) under the Town and Country Planning Act 1990 to grant temporary planning permission.

According to MHCLG, SDOs are designed for handling planning proposals of national significance and allow permission to be granted urgently, while also providing effective mechanisms to ensure development is appropriate. Previous instruments¹ used the same legislative route in 2019 to grant planning permission for border infrastructure that could have become necessary if the UK had left the EU without a Transition Period.

Location of the new sites

4. MHCLG says that the Government are currently working with port operators to understand their capacity to accommodate and deliver the required infrastructure from January 2021. The Government are also assessing the exact number and location of new inland sites that will be needed. MHCLG says that these sites will be either close to ports with relevant EU trade or with access to the strategic road network serving those ports, and that final decisions on these sites will be made once the Government have established how much of the new infrastructure will be delivered at ports. With fewer than four months until the end of the TP, we asked MHCLG about the state of preparations and when it expected the final decisions on sites to be made. MHCLG responded that:

“The Government has been engaging with the port operators to understand their infrastructure requirements and what support the Government could provide to ensure any required infrastructure is in place for the end of the transition period. The Border Operating Model,² which was published on 13 July, provides further details on how the Great Britain / European Union border will work and the actions that traders and hauliers need to take. The Government has also set out the measures it will put in place to support port operators to be ready. These consist of providing inland sites where port operators have clearly demonstrated no capacity to accommodate the required infrastructure at port or a financial mechanism to support those port operators with capacity to build at port.

Government is in the process of finalising requirements with ports to enable further decisions to be made very shortly on any additional sites that may be required, to ensure delivery by January and July 2021 in line with the phased approach set out in the Border Operating Model.

It is for border departments to come forward with proposals for specific sites and MHCLG will be making the decisions whether they fit the requirements of the Special Development Order. We understand, and you may also be aware, that departments have acquired potential sites in Ashford, Kent and in Warrington: commercial discussions are ongoing on others. MHCLG has not received any submission seeking the Secretary of State’s approval to develop of a specific site.”

1 Town and Country Planning (North Weald Airfield) (EU Exit) Special Development Order 2019 ([SI 2019/1228](#)), Town and Country Planning (Waterbrook Ashford) (EU Exit) Special Development Order 2019 ([2019/1230](#)) and Town and Country Planning (Car Park D Ebbsfleet International Station) (EU Exit) Special Development Order 2019 ([SI 2019/1231](#)); see [61st Report](#), Session 2017-19 (HL 422).

2 Cabinet Office, *The Border Operating Model* (13 July 2020): <https://www.gov.uk/government/publications/the-border-operating-model> [accessed 10 September 2020].

Approval of new infrastructure developments

5. Any developments under this Order will have to be approved by the Secretary of State and will have to meet a number of conditions: the development can only be carried out by or on behalf of defined border departments; the development must end by 31 December 2025; and all reinstatement works must be completed by 31 December 2026. The border departments specified in the Order are HM Revenue and Customs, the Department for Business, Energy and Industrial Strategy, the Department for Environment, Food and Rural Affairs and the Department for Transport. Developments will not be permitted if they would have significant effects on the environment or would take place on land within sensitive areas such as protected environmental habitats, National Parks, Areas of Outstanding Natural Beauty and European (Protected) sites. Proposals for development will need to set out how the construction of the new facilities and their operation will be managed.
6. We asked MHCLG about the reinstatement work and what would happen if the facilities and infrastructure were still required after 2025. MHCLG explained that the Order is:

“a temporary measure until the new long-term border arrangements are agreed and in place. Should a specific facility be needed for any longer period then a border department can seek to secure this by making a subsequent planning application.

The Special Development Order requires the cessation of the use, and removal of all buildings, for which permission is granted on a site and the restoration of the site to its condition before such development commenced except as specified in a reinstatement plan approved by MHCLG. Reinstatement plans must be submitted on or before 30 June 2025 and all work must have been completed by 31 December 2026.

Subject to the specific facilities provided, all temporary structures, plant or machinery brought onto a specific site must be removed unless, having considered a reinstatement plan, the Secretary of State for Housing Communities and Local Government agrees in writing that they may remain. Without pre-empting future decisions, examples of works that might be exempted from removal could include improvements to the land such as improved drainage, safer access or action to enhance biodiversity.”

Local engagement

7. Developments will only be permitted if there has been “substantive local engagement”. The Order specifies those who must be given an opportunity to comment on the proposed development, such as owners, residents and occupiers of the site and on access routes to the site, the relevant parish council, the local planning, highway, police and fire authorities, and the statutory environmental bodies. A report on engagement with these parties, and their views, must be included in the department’s submission to the Secretary of State.
8. MHCLG says that the Order does not affect the commercial rights of the landowner or existing occupiers: the use of any specific site will be negotiated with the landowner by a third-party mediator, who will act for the relevant

border department, on market-rate terms and will not disrupt any existing business operations without compensation.

9. We asked for further information about the impact of potential local objections on the approval of development proposals. MHCLG said that:

“MHCLG is the decision-maker. Any submission seeking the Secretary of State’s approval to use a specific site must include: a report summarising the methods used; the information provided to, and outcomes of, engagement with the engagement parties specified in the Special Development Order. These parties include those that are likely to be affected by the development and that live or run businesses adjacent to a site or along its access road. Those invited to make representation must have had no less than 14 days to do so; copies of the main representations received must be provided to MHCLG.

MHCLG will consider and reach a view on whether there has been adequate local engagement by a border department, based on the information provided in the report accompanying any submission.

Any decisions on a request to approve the use and development of a specific site will be made following independent assessments by qualified town planners in the Ministry and independent scrutiny by Ministers who are not the promoter of the facilities will take decisions without pre-determination. There is no presumption that site specific proposals will be approved. In making decisions MHCLG will consider the planning merits any proposal, including any representations received.”

Conclusion

10. This Order grants temporary planning permission for the development of border facilities and infrastructure on inland sites in England that will be needed where ports do not have enough capacity to carry out new controls of goods imported from the EU from 1 January 2021. With fewer than four months until the end of the Transition Period, the Government say that this Order is an important component of the preparations for the new border arrangements. **The instrument is drawn to the special attention of the House on the ground that it gives rise to issues of public policy likely to be of interest to the House.**

CORRESPONDENCE

Provision of information by departments

Universal Credit (Exceptions to the Requirement not to be receiving Education) (Amendment) Regulations 2020 (SI 2020/827)

11. On the face of it, Universal Credit (Exceptions to the Requirement not to be receiving Education) (Amendment) Regulations 2020 (SI 2020/827)³ simply clarify the sequence in which decisions must be made for a claim to Universal Credit to be allowed in specific circumstances. The instrument was, however, brought into immediate effect. The reason for the urgency was not fully explained in the Explanatory Memorandum (EM) which said only that it was being brought into immediate effect “because of the need to ensure the continuity of existing policy so as to maintain the effective administration of UC at a time when the Department has considerable capacity constraints because of the need to respond to the COVID-19 pandemic.”
12. We asked the Department for Work and Pensions (DWP) for a fuller explanation. They declined to explain the urgency, so we wrote to the Minister. The correspondence is set out in Appendix 2.
13. The Minister told us:

“DWP sought to bring the S.I. into force as soon as possible after it had been made and laid to ensure that the regulations met the original policy intent following a decision to concede a claim for judicial review challenging regulation 14(b) of SI 2013/376.”

Contrary to the Minister’s letter, this explanation was not contained in the EM and, had it been, we would have been satisfied and not pressed the department for further explanation.

14. **It is deeply regrettable that, in this case, the full explanation was not provided from the outset. It is essential, if we — and the House — are to perform our scrutiny role effectively, that departments should answer the questions we ask on behalf of the House fully, accurately and promptly. Unless this standard is met, the democratic principles of transparency and accountability are compromised and confidence in the government of the day commensurately diminished.**

³ Mirrored in Northern Ireland by the Universal Credit (Exceptions to the Requirement not to be receiving Education) (Amendment) Regulations (Northern Ireland) 2020 (SR 2020/SR 166).

INSTRUMENTS RELATING TO COVID-19

Restrictions on businesses and public gatherings

Health Protection (Coronavirus, Restrictions) (Blackburn with Darwen and Bradford) (Amendment) (No. 2) Regulations 2020 (SI 2020/930)

Health Protection (Coronavirus, Restrictions) (Blackburn with Darwen and Bradford) (Amendment) (No. 3) Regulations 2020 (SI 2020/935)

15. On 28 August 2020, a further review of data shared by Public Health England and the Joint Biosecurity Centre indicated that the incidence of COVID-19 in some parts of the City of Bradford Metropolitan District Council was decreasing. SI 2020/930 therefore amends the original restrictions⁴ to only include in the “protected area “ the wards of: Bolton and Undercliffe, Bowling and Barkerend, Bradford Moor, City, Clayton and Fairweather Green, Eccleshill, Great Horton, Heaton, Idle and Thackley, Keighley Central, Keighley East, Keighley West, Little Horton, Manningham, Queensbury, Royds, Thornton and Allerton, Toller, Tong, Wibsey, Windhill and Wrose, and Wyke. SI 2020/935 makes an immediate correction to the previous instrument to also remove the ward of Windhill and Wrose from the protected area for the purposes of these restrictions.

Health Protection (Coronavirus, Restrictions) (North of England) (Amendment) (No. 2) Regulations 2020 (SI 2020/931)

16. On 28 August 2020, data shared by Public Health England and the Joint Biosecurity Centre indicated that the incidence rates of COVID-19 in certain areas covered by the North of England Regulations⁵ were no longer significantly above the national average. These Regulations therefore remove those areas from the protected area and make them subject only to the remaining national restrictions and guidance: Stockport Metropolitan Borough Council, Burnley Borough Council, and Hyndburn Borough Council. Additionally, within Calderdale Metropolitan Borough Council and Kirklees Metropolitan Council, only the specific wards listed remain within the “protected area” for these purposes.

Health Protection (Coronavirus, Restrictions) (Greencore) Regulations 2020 (SI 2020/921)

17. During the period 9–15 August 2020, Northampton saw an increase of 8% in COVID-19 infections, raising the weekly incidence rate to 116.4 per 100,000 population (up from 38.6 the preceding week). Based on NHS Test and Trace data, most transmissions were traced back to workers at the Greencore Factories in Northampton. Greencore arranged for mass testing of the workforce of 1,140 workers, of which 214 were positive (19%). A further 79 cases were identified through NHS Test and Trace. These Regulations impose specific restrictions on anyone who worked at the factory from 7–21 August. The Department for Health and Social Care states that these measures were taken to prevent wider geographic lockdown measures similar to those introduced in Leicester but will expire after 28 days. We note that regulation 7 introduces a provision that a person who, without reasonable

4 Health Protection (Coronavirus, Restrictions) (Blackburn with Darwen and Bradford) Regulations 2020 ([SI 2020/822](#)).

5 Health Protection (Coronavirus, Restrictions) (North of England) Regulations 2020 [SI 2020/828](#), as amended by [SI 2020/846](#), [SI 2020/865](#), [SI 2020/897](#) and [SI 2020/907](#).

excuse, wilfully obstructs any person carrying out a function under these Regulations commits an offence subject to a fine of £1,000.

Changes to business practice and regulation

Coronavirus Act 2020 (Residential Tenancies: Protection from Eviction) (Amendment) (England) Regulations 2020 (SI 2020/914)

Assured Tenancies and Agricultural Occupancies (Forms) (England) (Amendment) and Suspension (Coronavirus) Regulations 2020 (SI 2020/924)

18. These instruments amend temporarily certain rules in relation to residential tenancies. SI 2020/914 amends Schedule 29 to the Coronavirus Act 2020 (“the Act”), which introduced emergency measures requiring residential landlords to provide extended notice periods of three months when seeking possession of either a social or privately rented property in England and Wales. These measures were introduced to protect tenants from eviction, by delaying when landlords could begin possession proceedings. The original measures were brought into force for an initial period of six months, which will expire on 30 September 2020. The Ministry of Housing, Communities and Local Government (MHCLG) says that in the light of the ongoing pandemic and the need to provide tenants with additional protections during the Winter months, this instrument extends the relevant period during which the emergency measures apply until 31 March 2021 and lengthens the required notice period to six months in most cases. According to MHCLG, this is appropriate given that the stay on housing possession proceedings in court will only be in force until 20 September,⁶ after which landlords will be able to progress cases through court. Extending the notice period will also help give tenants more time to find new accommodation. MHCLG says that to balance the interests of landlords and tenants, the notice periods are reduced to four weeks for cases that cause particular stress and financial strain for landlords, other tenants and local communities, such as cases of serious rent arrears (arrears of at least six months), anti-social behaviour and domestic abuse. SI 2020/924 extends the period for which certain notices are valid from six to ten months, to provide additional time in light of the change in notice period to six months, as provided for by SI 2020/914.

Competition Act 1998 (Coronavirus) (Public Policy Exclusions) (Amendment and Revocation) Order 2020 (SI 2020/933)

19. This Order amends four earlier instruments⁷ which were made to exclude certain business agreements from a ban on certain forms of anti-competitive behaviour, such as collusion and cartels, under Chapter 1 of the Competition Act 1998 (“the Act”). The aim of the earlier instruments was to allow coordination between businesses to enable them to provide essential services during the pandemic. This Order removes from these earlier instruments provisions which allow the Secretary of State to end the so-called “disruption period”, during which the exclusions apply, by specifying an end-date in a published notice. Instead, the disruption period will end when the respective

⁶ Civil Procedure (Amendment No. 5) (Coronavirus) Rules 2020 ([SI 2020/889](#)); see [25th Report](#), Session 2019-21 (HL 123).

⁷ Competition Act 1998 (Health Services for Patients in England) (Coronavirus) (Public Policy Exclusion) Order 2020 ([SI 2020/368](#)), Competition Act 1998 (Groceries) (Coronavirus) (Public Policy Exclusion) Order 2020 ([SI 2020/369](#)), and Competition Act 1998 (Solent Maritime Crossings) (Coronavirus) (Public Policy Exclusion) Order 2020 ([SI 2020/370](#)); see [11th Report](#), Session 2019-21 (HL 49). Competition Act 1998 (Health Services for Patients in Wales) (Coronavirus) (Public Policy Exclusion) Order 2020 ([SI 2020/435](#)); see [14th Report](#), Session 2019-21 (HL 60).

instrument is revoked by another statutory instrument. The Department for Business, Energy and Industrial Strategy says that the changes are made in response to concerns raised by the Joint Committee on Statutory Instruments that the current provisions may constitute sub-delegation beyond what was envisaged under the Act.⁸ This Order also revokes a fifth related instrument, the Competition Act 1998 (Dairy Produce) (Coronavirus) (Public Policy Exclusion) Order 2020 (SI 2020/481),⁹ which has expired, and the Competition Act 1998 (Groceries) (Coronavirus) (Public Policy Exclusion) Order 2020 (SI 2020/369), as the Secretary of State is satisfied that the exceptional reasons for which SI 2020/369 was required have now abated as contracts to supply essential groceries to shielded people are ending.

Insolvency (Moratorium) (Special Administration for Energy Licensees) Regulations 2020 (SI 2020/943)

20. This instrument modifies how the moratorium regime in Part A1 of the Insolvency Act 1986, as inserted by the Corporate Insolvency and Governance Act 2020, applies in relation to certain energy companies.¹⁰ According to the Department for Business, Energy and Industrial Strategy (BEIS), the main purpose is to require a relevant energy company to notify the Secretary of State and the Gas and Electricity Markets Authority (Ofgem) when it applies for, enters, extends or ends a moratorium, so as to inform the Secretary of State's decision as to whether to apply for a special administration order under an energy special administration regime. The instrument also modifies the restrictions that apply on enforcement and legal proceedings during the moratorium to enable Ofgem to carry out any legal process without having to seek the court's permission, where this is necessary to protect the interests of consumers. This may involve enforcing licencing obligations or revoking licences. BEIS explains that the pandemic has increased significantly financial pressures on energy companies which are expected to become more acute in the Autumn and Winter, and that the changes are needed urgently to support the Secretary of State and Ofgem in considering whether to apply for special administration for any energy company to protect consumers.

Public Services

Local Government (Structural Changes) (Coronavirus) (Amendment) Regulations 2020 (SI 2020/809)

21. Current legislation¹¹ specifies a period of two years for certain plans, reviews, schemes, statements and strategies which new unitary authorities have to prepare, for example in relation to homelessness, housing assistance or accessibility. This instrument extends this deadline by 12 months for single tier authorities with reorganisation dates in 2019, 2020 or 2021, so that the new unitary authorities have a total of three years from their reorganisation date to prepare the documents. The Ministry of Housing, Communities and Local Government says that the extension has been requested by a number

8 See: JCSI, [12th Report](#) (HL 64, HC 75-xii) and [13th Report](#) (HL 70, HC 75-xiii), Session 2019-21.

9 See: [14th Report](#), Session 2019-21 (HL 60).

10 These companies are “protected energy companies” which hold an electricity distribution or transmission licence or a gas transporter licence, the “smart meter communication licensee” which is responsible for linking smart meters in homes and small businesses with energy suppliers, network operators and energy service companies, and “energy supply companies” which hold an electricity or gas supply licence.

11 Local Government (Structural Changes) (Transitional Arrangements) (No.2) Regulations 2008 ([SI 2008/2867](#)).

of unitary authorities and is necessary because the resources required to meet the two-year deadline have been impacted significantly by the pandemic.

School Discipline (England) (Coronavirus) (Pupil Exclusions and Reviews) (Amendment) (No. 2) Regulations 2020 (SI 2020/908)

22. This instrument deals with arrangements for the exclusion of pupils from school during the pandemic. The instrument extends most of the time limited arrangements made by an earlier instrument, so that they apply to exclusions occurring between 25 September 2020 and 24 March 2021.¹² The measures that are extended in full are the provisions for meetings of responsible bodies¹³ and independent review panels to take place virtually if participants agree to meet remotely and if certain conditions can be met to ensure procedural fairness; and the extension by ten school days to the application window for an independent review, where a permanently excluded pupil is not reinstated by a responsible body. To ensure that reinstatement decisions are made promptly, the instrument specifies that if a responsible body or independent review panel has not been able to meet in person or virtually within the normal timescales, the time limit will be extended for only such period as is reasonably necessary for a reason related to the pandemic. This is a stricter time extension than that set out in the earlier instrument. The Department for Education says that this is to ensure a return to normal timescales where this is possible, as timely reinstatement decisions benefit pupils and their families. The Explanatory Memorandum includes a helpful summary of discussions the Department had with teaching unions, head teachers, local authorities, representatives of governors and trustees, the Office of the Children’s Commissioner for England, advocacy groups, and stakeholders representing parents and pupils (including the Special Educational Consortium) to assess the effectiveness of and support for the arrangements made by the earlier instrument.

Adoption and Children (Coronavirus) (Amendment) (No.2) Regulations 2020 (SI 2020/909)

23. This instrument follows an earlier instrument laid in April, which relaxed a significant number of statutory requirements relating to children’s social care to support children’s services during the pandemic. This earlier instrument lapses on 25 September 2020. The Department for Education (DfE) explains that the flexibilities were used infrequently and that, following public consultation, it has decided that most of the flexibilities should not be extended. Several key flexibilities will be retained, however, to assist the delivery of children’s social care during the recovery stage of the pandemic.
24. The Committee welcomes that, as part of the consultation on this instrument, DfE discussed its approach with the Office of the Children’s Commissioner, major children’s charities and others.¹⁴ We had criticised a lack of consultation on the earlier instrument. DfE says that a majority of respondents agreed

12 School Discipline (England) (Coronavirus) (Pupil Exclusions and Reviews) (Amendment) Regulations 2020 (SI 2020/543); see *17th Report*, Session 2019-21 (HL 73).

13 The ‘responsible body’ is the governing body in the case of a maintained school, the management committee in the case of a pupil referral unit, and the proprietor (Academy Trust) in the case of an Academy.

14 DfE, *Children’s Social Care: Government consultation response* (August 2020): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/915980/Childrens_social_care_-_Government_consultation_response_3.pdf [accessed 10 September 2020].

with the proposals and that the changes will expire on 31 March 2021. The key flexibilities that will be retained include the following:

- Social workers may continue to conduct virtual visits of looked after children where appropriate via video conference, telephone, or any other electronic means, but only when face to face contact would be contrary to any official public health guidance or would not be reasonably practical because of the incidence or transmission of coronavirus. The decision to allow the use of a virtual visit will have had to be carried out in accordance with any recommendations given by a nominated officer.
- Virtual visits of residential family centres and interviews with residents and staff there as well as virtual visits of children and young people in children's homes by family members and social workers may also continue, but only when face to face contact would be contrary to any official public health guidance or would not be reasonably practical because of the incidence or transmission of coronavirus.
- The minimum frequency of Ofsted inspections set out in the earlier instrument will remain suspended until 31 March 2021. In the interim, Ofsted will use a risk-based approach for assurance visits and inspections. If there are concerns about a specific provider, Ofsted retains the ability to undertake any necessary regulatory action.

25. DfE has published guidance on how the changes should be applied as well as a Children's Rights Impact Assessment¹⁵ and an Equality Impact Assessment.¹⁶ The Department will continue to monitor the use of the flexibilities and a further statutory instrument would be required to extend the measures should the pandemic or its impacts last longer.

Early Years Foundation Stage (Learning and Development and Welfare Requirements) (Coronavirus) (Amendment) (No. 2) Regulations 2020 (SI 2020/939)

26. This instrument enables the Secretary of State for Education to disapply and modify temporarily certain requirements in the Statutory Framework for the Early Years Foundation Stage (EYFS) for an early years provider in England, where it is not reasonably practicable for that provider to comply with the learning and development requirements, the progress check at age two and specific elements of the safeguarding and welfare obligations set out in the EYFS due to legislative prohibitions, requirements or restrictions related to the pandemic. The instrument also modifies certain requirements relating to the qualifications of staff and staff holding a paediatric first aid (PFA) certificate. The measures may apply in either a national or local lockdown and will expire on 31 August 2021. The Department for Education (DfE) explains that the measures build on an earlier SI which provided for similar disapplications and modifications, but that because the earlier instrument expires on 25 September, it has become necessary to allow the adjustments to continue, but only in the event of a period of intervention either at national or local level. At all other times the EYFS requirements will apply as usual.

15 DfE. *Children's Rights Impact Assessment* (August 2020): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/913234/Children_s_rights_impact_assessment.pdf [accessed 10 September 2020].

16 DfE, *Public Sector Equality Duty: Equalities Impact Assessment* (August 2020): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/913027/Equalities_impact_assessment.pdf [accessed 10 September 2020].

DfE adds that the removal of the EYFS Profile assessment for the school year 2019-20 in the earlier instrument is not replicated for the 2020-21 school year. As under the earlier instrument, providers should use either reasonable or, in relation to PFA, best endeavours to deliver the EYFS during any periods of intervention. Any disapplication will apply automatically to providers who are prevented to comply with EYFS requirements due to national or local coronavirus related restrictions or requirements.

Changes to benefits

Local Government Pension Scheme (Amendment) (No. 2) Regulations 2020 (SI 2020/893)

27. This instrument makes changes to allow the 87 administering authorities in the Local Government Pension Scheme (LGPS) to amend the contributions of Scheme employer(s) between actuarial valuations in certain situations, for example where there has been a significant change in liabilities in respect of a Scheme employer. The instrument also provides that when a Scheme employer is exiting the LGPS, administering authorities may spread a Scheme employer's exit payment or defer an exit payment under a deferred debt agreement with the Scheme employer. The Ministry of Housing, Communities and Local Government (MHCLG) explains that the changes were consulted on in 2019 but have been prioritised as a result of the impacts of the pandemic on the financial health of local government employers. According to MHCLG, Scheme employers have asked the Government to bring forward the changes to assist them in managing and mitigating COVID-19 risks.

Tax Credits (Coronavirus, Miscellaneous Amendments) (No. 2) Regulations 2020 (SI 2020/941)

28. This instrument makes changes to ensure that payments under the various coronavirus schemes and grants to support self-employed people are counted as income only once in calculating any entitlement to tax credits. The instrument also ensures that payments made under the new Department for Health and Social Care self-isolation payment scheme are disregarded in calculating entitlement to tax credits. In addition, the instrument removes the disregard of payments under the NHS and Social Care Life Assurance Scheme. HM Revenue and Customs (HMRC) explains that an earlier instrument¹⁷ provided that payments under this Scheme were not counted as income for the purposes of entitlement to tax credits, but that this was unnecessary as the payments would not count as income in any event because they are capital payments. This instrument therefore removes references to the payments to avoid confusion. The instrument also deals with changes to flexible-furloughing, as set out in the Chancellor's Direction on 25 June 2020¹⁸ in relation to Coronavirus Job Retention Scheme eligibility. HMRC says that currently the definition of "furloughed" in the tax credits regulations does not provide cover to employees who are flexibly-furloughed.

17 Tax Credit (Coronavirus, Miscellaneous Amendments) Regulations 2020 (SI 2020/534); see [16th Report](#), Session 2019-21 (HL 68).

18 HM Treasury, *The Coronavirus Act 2020 Functions of her Majesty's Revenue and Customs (Coronavirus Job Retention Scheme) Direction* (25 June 2020): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/895778/Further_Treasury_Direction_made_on_25_June_2020_under_Sections_71_and_76_of_the_Coronavirus_Act_2020.pdf [accessed 10 September 2020].

This instrument ensures that they remain covered and eligible to Working Tax Credit.

Delayed or revoked legislation

Postponed Elections and Referendums (Coronavirus) and Policy Development Grants (Amendment) Regulations 2020 (SI 2020/926)

29. These Regulations make consequential provision to deal with the postponement of local and parish elections, and elections for the Greater London Assembly, the Mayor of London and police and crime commissioner posts, which did not take place in May 2020. Although these elections were cancelled, preparations were advanced and these Regulations provide for postal votes already cast to be declared void, documentation to be filed and Returning Officers' expenses already incurred to be paid. Donations to and expenses of candidates are also covered.

INSTRUMENTS OF INTEREST

Draft Prevention of Trade Diversion (Key Medicines) (EU Exit) Regulations 2020

30. These draft Regulations propose amendments to retained EU law on the control of imports of certain medicines, referred to as “tiered-priced products”. This system aims to ensure that the poorest developing countries have access to affordable essential medicines for the treatment of communicable diseases, such as HIV/AIDS, tuberculosis or malaria. Under this system, medicines are sold to developing countries at heavily reduced prices, while their diversion to other, richer markets is prevented through safeguards, including certain criteria which medicines must fulfil to be placed on the list of tiered-priced products. The Department for International Trade explains that the amendments in this instrument seek to ensure that the tiered-priced products system can operate effectively after the end of the Implementation Period. **The Committee welcomes this continuity approach.**

Criminal Legal Aid (Remuneration) (Amendment) Regulations 2020 (SI 2020/903)

31. The Advocates’ Graduated Fee Scheme (“AGFS”) is the fee scheme through which criminal defence advocates are paid for carrying out publicly funded work in the Crown Court. The Litigators’ Graduated Fee Scheme (“LGFS”) similarly ensures criminal litigators are paid for carrying out publicly funded work in the Crown Court. This instrument amends the AGFS and the LGFS to alter the way in which:
- advocates and litigators are paid for work on unused material;
 - advocates are paid for work on paper heavy cases within AGFS;
 - advocates are paid for cracked trials in the Crown Court within AGFS and;¹⁹
 - litigators are paid for work relating to the sending of cases to the Crown Court.
32. In consultation some measures were supported and some not.²⁰ In light of the evidence provided by litigators on sending cases to the Crown Court, the Government decided to increase the payment from two hours’ worth of work to four hours, and will now make payment under the magistrates’ court scheme: **we regard this as an example of good consultation practice.**

Waste (Circular Economy) (Amendment) Regulations 2020 (SI 2020/904)

33. This instrument transposes six amending EU Directives in relation to the 2020 Circular Economy Package (CEP) into UK domestic law. The areas

¹⁹ A criminal trial is described as ‘cracked’ where a trial date has been set but the defendant pleads guilty on the day, or the prosecution has no evidence to give. This means that, although all the preparatory work has been done, the case is resolved without a trial.

²⁰ MoJ, *Criminal Legal Aid Review: An accelerated package of measures amending the criminal legal aid fee schemes* (21 August 2020): <https://www.gov.uk/government/consultations/criminal-legal-aid-review-an-accelerated-package-of-measures-amending-the-criminal-legal-aid-fee-schemes> [accessed 10 September 2020].

covered include landfill of waste, end-of-life vehicles, electrical and electronic equipment, hazardous waste, batteries and accumulators, packaging and packaging waste. According to the Department for Environment, Food and Rural Affairs (Defra), the CEP package introduces a “revised legislative framework, identifying steps for the reduction of waste and establishing an ambitious and credible long-term path for waste management and recycling”. The UK, Welsh, Scottish and Northern Ireland Governments published a statement in July, explaining their approach to transposing the CEP requirements.²¹ The amendments in this instrument include the alignment of definitions, terms and powers as well as measures to tackle specific waste issues. This includes measures to prevent waste generation and to monitor implementation; to ensure that waste collected separately for preparing for re-use or recycling is not incinerated or landfilled; and to ensure that unlawfully mixed hazardous waste is separated where that is technically feasible, with economic viability of separation no longer being a consideration. The Committee has received a submission from Green Alliance asking questions about timeliness and a potential transposition gap. We are publishing Green Alliance’s submission and Defra’s response on our website.²²

Channel Tunnel (International Arrangements and Miscellaneous Provisions) (Amendment) Order 2020 (SI 2020/915)

Channel Tunnel (Arrangements with the Kingdom of the Netherlands) Order 2020 (SI 2020/916)

34. The UK currently operates its border controls in France and Belgium for trains using the Channel Tunnel. This allows Border Force officers to conduct immigration, and in some locations, policing and goods checks, on passengers and freight destined for the UK before they begin their journey. This is a reciprocal arrangement, with French officers completing entry checks at certain ports in the UK on passengers and freight destined for continental Europe. These Regulations implement a revision of the 1993 Agreement between France, Belgium and the United Kingdom that underpins the operation of juxtaposed immigration controls on international passenger rail services. They also implement provisions of a new bilateral treaty with the Netherlands to extend the regime to all four countries accessible by Eurostar.

Welfare Reform (Northern Ireland) Order 2015 (Cessation of Transitory Provision) Order 2020 (SI 2020/927)

35. To ensure that the people of Northern Ireland continued to receive the same benefits as those in Great Britain during the absence of a Northern Ireland Executive, from January 2017 the Department for Work and Pensions exercised temporary powers on social security matters under Article 4(1) of the Welfare Reform (Northern Ireland) Order 2015. This instrument specifies that, from 23 September 2020, those powers will cease and such statutory instruments will then be the responsibility of the Northern Ireland Department.

21 Defra, Circular Economy Package policy statement (30 July 2020): <https://www.gov.uk/government/publications/circular-economy-package-policy-statement/circular-economy-package-policy-statement> [accessed 10 September 2020].

22 Secondary Legislation Scrutiny Committee, Publications page: <https://committees.parliament.uk/committee/255/secondary-legislation-scrutiny-committee/publications/>.

INSTRUMENTS NOT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

Draft instruments subject to affirmative approval

European Qualifications (Health and Social Care Professions) (EFTA States) (Amendment etc.) (EU Exit) Regulations 2020

Prevention of Trade Diversion (Key Medicines) (EU Exit) Regulations 2020

Made instruments subject to affirmative approval

SI 2020/921 Health Protection (Coronavirus, Restrictions) (Greencore) Regulations 2020

SI 2020/930 Health Protection (Coronavirus, Restrictions) (Blackburn with Darwen and Bradford) (Amendment) (No. 2) Regulations 2020

SI 2020/931 Health Protection (Coronavirus, Restrictions) (North of England) (Amendment) (No. 2) Regulations 2020

SI 2020/935 Health Protection (Coronavirus, Restrictions) (Blackburn with Darwen and Bradford) (Amendment) (No. 3) Regulations 2020

Instruments subject to annulment

SI 2020/809 Local Government (Structural Changes) (Coronavirus) (Amendment) Regulations 2020

SI 2020/827 Universal Credit (Exceptions to the Requirement not to be receiving Education) (Amendment) Regulations 2020

SI 2020/887 Fertilising Products Regulations 2020

SI 2020/893 Local Government Pension Scheme (Amendment) (No. 2) Regulations 2020

SI 2020/894 School Information (England) (Amendment) Regulations 2020

SI 2020/903 Criminal Legal Aid (Remuneration) (Amendment) Regulations 2020

SI 2020/904 Waste (Circular Economy) (Amendment) Regulations 2020

SI 2020/908 School Discipline (England) (Coronavirus) (Pupil Exclusions and Reviews) (Amendment) (No. 2) Regulations 2020

SI 2020/909 Adoption and Children (Coronavirus) (Amendment) (No.2) Regulations 2020

SI 2020/911 National Health Service (General Medical Services Contracts and Personal Medical Services Agreements) (Amendment) (No. 2) Regulations 2020

SI 2020/914 Coronavirus Act 2020 (Residential Tenancies: Protection from Eviction) (Amendment) (England) Regulations 2020

- SI 2020/915 Channel Tunnel (International Arrangements and Miscellaneous Provisions) (Amendment) Order 2020
- SI 2020/916 Channel Tunnel (Arrangements with the Kingdom of the Netherlands) Order 2020
- SI 2020/924 Assured Tenancies and Agricultural Occupancies (Forms) (England) (Amendment) and Suspension (Coronavirus) Regulations 2020
- SI 2020/926 Postponed Elections and Referendums (Coronavirus) and Policy Development Grants (Amendment) Regulations 2020
- SI 2020/927 Welfare Reform (Northern Ireland) Order 2015 (Cessation of Transitory Provision) Order 2020
- SI 2020/933 Competition Act 1998 (Coronavirus) (Public Policy Exclusions) (Amendment and Revocation) Order 2020
- SI 2020/939 Early Years Foundation Stage (Learning and Development and Welfare Requirements) (Coronavirus) (Amendment) (No. 2) Regulations 2020
- SI 2020/941 Tax Credits (Coronavirus, Miscellaneous Amendments) (No. 2) Regulations 2020
- SI 2020/943 Insolvency (Moratorium) (Special Administration for Energy Licensees) Regulations 2020
- SR 2020/166 Universal Credit (Exceptions to the Requirement not to be receiving Education) (Amendment) Regulations (Northern Ireland) 2020

APPENDIX 1: TOWN AND COUNTRY PLANNING (BORDER FACILITIES AND INFRASTRUCTURE) (EU EXIT) (ENGLAND) SPECIAL DEVELOPMENT ORDER 2020

Letter from the Rt Hon. Robert Jenrick MP, Secretary of State for Housing, Communities and Local Government to Lord Hodgson of Astley Abbots, Chair of the Secondary Legislation Scrutiny Committee

I am writing to you, as Chair of the House of Lords Secondary Legislation Scrutiny Committee, to inform you that the Town and Country Planning (Border Facilities and Infrastructure) (EU Exit) (England) Special Development Order 2020 was laid on the 3 September and will come into force on 24 September.

On 31 December 2020 the transition period with the European Union will end and the United Kingdom will operate our border as a sovereign nation once again.

Border controls for EU goods imported into Great Britain will be introduced from 1 January 2021. The Special Development Order is an important component of the Government's preparations to enable an orderly transition to the new system of controls.

The Order is available here <http://www.legislation.gov.uk/id/uksi/2020/928>.

Port operators would normally provide these new border facilities, however, where there is limited space at some ports or where the impact of coronavirus may have affected the ability of port operators to provide the necessary infrastructure, the Government has committed to building some new inland sites where these checks will take place.

The Special Development Order grants temporary planning permission for the development of border facilities and associated infrastructure in specified administrative areas of England either close to the ports or with access to the strategic road network serving those ports with relevant EU trade.

Final decisions on inland sites will not be made until my Ministerial colleagues in the border facing departments have established the extent of new infrastructure that will be delivered at ports. Where the need for an inland site is identified, it is a condition of the temporary planning permission that the relevant department must seek my approval before development can start. They must have carried out substantive local engagement ahead of seeking such approval. I will be considering each proposal independently, advised by my officials.

As either I or a member of my Ministerial team will make decisions on site specific proposals it is not appropriate for us to comment on potential sites that may be the subject of a proposal; we will take decisions without pre-determination and on the basis of the evidence and advice in front of us. My officials will, however, be happy to respond to any queries you may have about the legislation.

7 September 2020

APPENDIX 2: CORRESPONDENCE: PROVISION OF INFORMATION BY DEPARTMENTS

Letter from Lord Hodgson of Astley Abbotts, Chair of the Secondary Legislation Scrutiny Committee, to Justin Tomlinson MP, Minister of State at the Department for Work and Pensions

The Secondary Legislation Scrutiny Committee was unable to properly scrutinise this instrument at its most recent meeting, because your officials refused to expand on the Explanatory Memorandum to provide adequate reasons why this instrument is being treated as a matter of urgency. I am therefore writing to you, as the responsible Minister, with the same questions.

This instrument brings the amendment to SI 2013/376 into effect within 24 hours, stating that this is “because of the need to ensure the continuity of existing policy so as to maintain the effective administration of UC at a time when the Department has considerable capacity constraints because of the need to respond to the COVID-19 pandemic.” (EM, para 3). This appears to be saying that Parliament’s normal scrutiny process is being restricted because of DWP’s own resourcing issues, but I would be grateful if you could be more explicit about what this section intends to convey.

Although the change the SI makes is simply to ensure that the sequencing of decisions is clear in this context, the Explanatory Memorandum does not explain what makes it a matter of urgency. The questions your officials felt unable to answer were:

- If the system has been operating like this since 2013, what has changed which now makes correcting legislation necessary?
- If this has been an issue since 2013, why is it suddenly so important that it must be brought into effect overnight? Has there been a court case or are there interim regulations that came into effect on 5 August that you were trying to pre-empt?

This was a request for basic information to explain why Parliament’s normal scrutiny processes are being curtailed, and why a breach of the 21-day convention is justified. It is surprising that your Department declined to provide a Parliamentary Select Committee with information and you may also wish explain that decision.

8 September 2020

Letter from Justin Tomlinson MP to Lord Hodgson

Thank you for your letter of 8 September. I apologise for the fact that officials had been unable to provide the Committee with sufficient information to explain the urgency of the Universal Credit (Exceptions to the Requirement not to be Receiving Education) (Amendment) Regulations 2020, which breached the 21-day convention.

As set out in the Explanatory Memorandum, DWP sought to bring the S.I. into force as soon as possible after it had been made and laid to ensure that the regulations met the original policy intent following a decision to concede a claim for judicial review challenging regulation 14(b) of SI 2013/376. Officials were not able to provide details earlier as we were in confidential discussions. The urgency was driven by confidential discussions to settle the claim in relation to the (then) Regulations, which we anticipated would be concluded within days.

DWP acted urgently to avoid any risk of receiving additional claims to UC under the (then) regulations ahead of amending regulations coming into force. It was this risk of a substantial influx of additional claims to UC which we needed to avoid, due to the ongoing and considerable capacity constraints in responding to COVID-19 and to ensure the continuity of existing policy in a fair way. As it transpires, we are still finalising agreement on the precise terms of a Consent Order and those details must still remain confidential pending final agreement.

14 September 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 15 September, Members declared the following interests:

Local Government Pension Scheme (Amendment) (No. 2) Regulations 2020 (SI 2020/893)

Lord German

Has a local government pension

Attendance:

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

