

HOUSE OF LORDS

Secondary Legislation Scrutiny Committee

30th Report of Session 2019–21

Drawn to the special attention of the House:

**Draft State Aid (Revocations and Amendments)
(EU Exit) Regulations 2020**

Audiovisual Media Services Regulations 2020

Includes information paragraphs on:

2 instruments relating to COVID-19

Draft Competition (Amendment etc.) (EU
Exit) Regulations 2020

Draft Education (Exemption from School and
Further Education Institutions Inspections)
(England) (Amendment) Regulations 2020

Draft Tobacco Products and Nicotine
Inhaling Products (Amendment) (EU Exit)
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.

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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) 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.

Thirtieth Report

INSTRUMENTS DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

Draft State Aid (Revocations and Amendments) (EU Exit) Regulations 2020

Date laid: 29 September

Parliamentary procedure: affirmative

These draft Regulations propose to revoke the EU State aid rules after the end of the Transition Period, in what appears to be a shift from the previous Government's position, which sought continuity of the EU rules in a UK domestic policy context in a 'no deal' scenario. This approach raises the question whether it would have been more appropriate to take forward such a policy change through primary rather than secondary legislation, enabling Parliament to scrutinise the new approach more fully, especially as State aid continues to be a key issue in the ongoing negotiations with the EU about a free trade agreement. It is particularly relevant in relation to Northern Ireland, where there remain uncertainties, highlighted by the House of Lords European Union Committee, with regard to the impact of the State aid provisions in the Northern Ireland Protocol on the UK's new independent State aid regime. These are issues that the House may wish to explore further with the Minister.

The draft Regulations are drawn to the special attention of the House on the ground that they are politically or legally important and give rise to issues of public policy likely to be of interest to the House.

1. The purpose of these draft Regulations, laid by the Department for Business, Energy and Industrial Strategy (BEIS) with an Explanatory Memorandum (EM), is to disapply and revoke retained EU State aid rules that are preserved under the European Union (Withdrawal) Act 2018 (“the Withdrawal Act”), so that they do not form part of UK domestic law after the end of the Transition Period (TP). According to BEIS, the instrument does not affect the application of the State aid provisions in the Northern Ireland Protocol.

Background

2. BEIS defines State aid in the EM as “support in any form from any level of government which gives an undertaking (any entity that carries out an economic activity) an advantage that could not be obtained in the normal course of business”. EU provisions¹ currently govern the control of State aid, requiring Member States to notify the European Commission (“the Commission”) of any such aid in advance. According to BEIS, awarding aid before it has been approved by the Commission (during the so-called “standstill obligation”) makes the aid unlawful. While the Commission is responsible for monitoring the system and investigating whether State aid is compatible with the requirements of the internal market, national courts may enforce the standstill obligation. Competitors may apply to a national court to uphold this right.

¹ Articles 107 to 109 of the Treaty on the Functioning of the European Union (TFEU) and several EU regulations, guidelines and frameworks made under those TFEU Articles.

3. The EU regime provides for specified exemptions under which State aid does not have to be notified to the Commission in advance.² The exemptions cover specific economic sectors such as fisheries and agriculture and services of general economic interest (which the market does not provide sufficiently, such as postal services, rural transport or social housing). There are also exemptions for public transport, research, development and innovation, aid to small and medium sized businesses and for environmental protection and de minimis thresholds below which funding is exempt from the State aid requirements. Specific provisions under the Financial Transparency Directive³ require Member States to ensure that financial relations between public authorities and public undertakings are transparent so that it is clear where public funds have been received and for what they have been used.
4. The previous Government laid the State Aid (EU Exit) Regulations 2019⁴ before Parliament which would have transferred the enforcement functions of the Commission to the Competition and Markets Authority and made corrections to the deficiencies in retained law to enable the continued application of State aid law in the UK in a domestic policy context in event of ‘no deal’ exit from the EU. BEIS says that following the UK’s conclusion of the Withdrawal Agreement, the draft 2019 Regulations were withdrawn in February 2020 without being made, as the approach was no longer appropriate.

What is changing

5. Current EU law on State aid will be retained by the Withdrawal Act at the end of the TP. The Department says that the purpose of this instrument is to disapply and revoke the retained EU State aid rules to reflect the current Government’s position that the UK will have its own domestic subsidy control regime after the end of the TP. The new regime will follow existing World Trade Organisation (WTO) rules, such as the Agreement on Subsidies and Countervailing Measures, and other international commitments and obligations on subsidies agreed under free trade agreements (FTAs). BEIS says that in this context retained EU law on State aid would have no practical application in the UK after the end of the TP and would be redundant. According to BEIS, this approach will provide legal certainty to businesses that there will be no EU State aid provisions at the end of the TP except insofar as the Northern Ireland Protocol applies. The Department adds that the approach is consistent with that taken in other Regulations that disapply retained EU law that is “fundamentally deficient outside the EU Single Market”, such as the Freedom of Establishment and Free Movement of Services (EU Exit) Regulations 2019.⁵
6. We asked the Department about the potential impact of the ongoing negotiations with the EU in which State aid is a key issue, and whether further legislation may be required should there be an FTA with the EU. BEIS responded that the Government consider this instrument “to be

2 These exemptions are set out in the General Block Exemption Regulation, the Agricultural Block Exemption Regulation, the Fisheries Block Exemption Regulation, the general De Minimis Regulation, the Services of General Economic Interest De Minimis Regulation, the Agricultural De Minimis Regulation and the Fisheries De Minimis Regulation.

3 [Commission Directive 2006/111/EC](#).

4 SLSC Sub-Committee B, [15th Report](#), Session 2017–19 (HL 281).

5 [58th Report](#), Session 2017–19 (HL 415).

required in all expected scenarios to remedy deficiencies in the retained EU law”.

7. BEIS says that the Government will publish guidance for UK public authorities before the end of the TP to explain how the new subsidy control arrangement will apply from 1 January 2021. The guidance will cover the WTO rules on subsidies and any international commitments made by the Government in FTAs. The Government will also consult in the coming months on whether they should go further than those existing commitments and whether legislation is necessary.
8. The disapplication of EU State aid rules appears to be a reversal of the previous Government’s policy position, which sought a continuity approach in the case of a ‘no deal’ scenario. The instrument is to be made under the Withdrawal Act which, according to the Explanatory Notes accompanying the Act, “does not aim to make major changes to policy or establish new legal frameworks in the UK beyond those which are appropriate to ensure the law continues to function properly from exit day” and commits the Government to “introduce separate primary legislation to make such policy changes which will establish new legal frameworks”.⁶ **The House will be aware of the Committee’s concern, raised on several previous occasions,⁷ that secondary legislation is being used to introduce policy changes about important issues which should more properly be the subject of primary legislation, thus affording a higher degree of parliamentary scrutiny. This is another such occasion and one on a subject that appears central to the UK’s negotiation position with the EU. We take the view that it is neither a welcome nor indeed acceptable use of secondary legislation and would be disappointed if further instances were to occur.**

Northern Ireland

9. The Department says that the changes proposed by this instrument will not affect the application of the State aid provisions in Article 10 and Annex 5 of the Northern Ireland Protocol. According to BEIS, Article 10 of the Northern Ireland Protocol applies EU State aid rules, as listed in Annex 5, in respect of measures that affect trade between Northern Ireland and the EU in relation to goods and wholesale electricity markets, but not agricultural support measures, regional aid and services. The Department says that while the default position will be that the Northern Ireland Protocol will come into force at the end of the TP, key provisions of the Protocol, including Article 10, are “subject to a mechanism for democratic consent in Northern Ireland (Article 18) and may cease to apply if consent is not given”. BEIS further states that clauses in the UK Internal Market Bill currently before Parliament “will, if necessary, enable regulations to be made setting out how Article 10 should be interpreted for domestic law purposes”. The Committee notes that the democratic consent mechanism under Article 18 of the Northern Ireland

6 [Explanatory Notes to the European Union \(Withdrawal\) Act 2018](#), para 14.

7 See: Town and Country Planning (General Permitted Development) (England) (Amendment) (No. 3) Order 2020 ([SI 2020/756](#)) and Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020 ([SI 2020/859](#)) and three related instruments, [25th Report](#), Session 2019–21 (HL Paper 123) or [Draft Enterprise Act 2002 \(Share of Supply\) \(Amendment\) Order 2020](#) and Enterprise Act 2002 (Specification of Additional Section 58 Consideration) Order 2020 ([SI 2020/627](#)), [21st Report](#), Session 2019–21 (HL 96).

Protocol⁸ that the Department refers to will be used only two months before the end of an initial period of four years after the end of the TP.

10. The House of Lords European Union Committee has raised concerns about Article 10,⁹ highlighting that its effect is “to apply EU State aid rules to the UK in any instance in which the support at issue affects trade in goods between Northern Ireland and the EU27”, and that this “could mean that a UK State aid provision applying to the UK in general, which is above the minimum threshold provided by EU law, would be subject to the application of EU State aid rules under the Protocol, and potentially to EU intervention and judicial review”.
11. The European Union Committee concluded that the “only certain way for the UK to avoid EU intervention in its State aid decisions would be to ensure that its independent State aid policy does not allow for the level of support available to industry to exceed that available under the EU regime”, inviting the Government “to clarify the implications of Article 10 for the UK’s independent State aid regime, and the extent to which it will require the UK to adopt a model of support not exceeding the EU’s approach”. In response to this finding, the Government state that the “UK’s domestic subsidy control regime will take due account of Article 10 of the Protocol”, and that the “Government will set out further details in due course.”¹⁰
12. **We note that, while the changes proposed by this instrument would not affect the application of the State aid provisions in the Northern Ireland Protocol, there remains uncertainty as to how these provisions will impact on the UK’s new independent State aid regime. These are issues that the House may wish to explore further with the Minister.**

Concerns about potential impacts

13. We have received a submission from the National Trust which raises concerns that the “effect of the Regulations could be to remove the existing provisions before new ones are in place. Or, if the Internal Market Bill is passed, then the new, less specific provisions would become law and may rule out natural heritage from the exemptions to state support”. We put this concern to the Department which made clear that because the instrument revokes the requirement to notify State aid, the revocation of the exemption to this notification requirement in relation to State aid for culture and heritage conservation will have no practical effect. BEIS emphasised that neither this instrument nor the Internal Market Bill “will limit the ability of public authorities to support heritage activities”.
14. We have also received a submission from Client Earth which raises concerns about the proposed revocation by this instrument of a 2010 Council Decision¹¹ on aid that aims to facilitate the closure of uncompetitive coal mines. Client Earth suggests that revoking this Decision without comparable replacement

8 DExEU, ‘Article 18, Protocol on Ireland/Northern Ireland’ (last updated 18 October 2019): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840230/Revised_Protocol_to_the_Withdrawal_Agreement.pdf [accessed 14 October 2020].

9 European Union Committee, *The Protocol on Ireland/Northern Ireland* (9th Report, Session 2019–21, HL Paper 66).

10 [Government response](#) to the European Union Committee’s Report on the Protocol on Ireland/Northern Ireland.

11 [Council Decision \(2010/787/EU\)](#) of 10 December 2010 on State aid to facilitate the closure of uncompetitive coal mines.

appears “to go beyond mere corrections” and instead appears “to constitute policy changes [which] could have serious consequences for the environment, and in particular the UK’s achievement of its net zero commitments”. The Department responded that the “[Council] Decision will be redundant after the end of the transition period” and that this instrument does not make any changes to Government policy in this area, which is “to cease unabated coal power generation by 2025”, adding that “the Government intends to consult on bringing forward this deadline to 2024.”

15. We are publishing both submissions, and the Department’s full responses, on our website.¹²

Further legislation

16. BEIS told the Committee that further legislation will be required to make changes specifically in relation to the European Maritime and Fisheries Fund, as well as compensation levels for public passenger rail and road transport services, where, because of an ongoing policy review into rail reform, the Department for Transport has not yet concluded on the best way to correct the deficiencies that will arise at the end of the TP.

Conclusion

17. These draft Regulations propose to revoke the EU State aid rules after the end of the TP, in what appears to be a shift from the previous Government’s position which sought continuity of EU rules in a UK domestic policy context in a ‘no deal’ scenario. **As this Committee has highlighted previously, this approach raises questions about the use of secondary legislation to introduce policy changes about important issues which should more properly be the subject of primary legislation, thus affording a higher degree of parliamentary scrutiny, especially as on this occasion, the policy is one that appears central to the UK’s negotiation position with the EU. We take the view that this is neither a welcome nor acceptable use of secondary legislation.** The instrument is particularly relevant in relation to Northern Ireland where there remain uncertainties, highlighted by the House of Lords European Union Committee, with regard to the impact of the State aid provisions in the Northern Ireland Protocol on the UK’s new independent State aid regime. These are issues that the House may wish to explore further with the Minister. **The draft Regulations are drawn to the special attention of the House on the ground that they are politically or legally important and give rise to issues of public policy likely to be of interest to the House.**

¹² Secondary Legislation Scrutiny Committee publications page: <https://committees.parliament.uk/committee/255/secondary-legislation-scrutiny-committee/publications/>.

Audiovisual Media Services Regulations 2020 (SI 2020/1062)*Date laid: 30 September 2020**Parliamentary procedure: negative*

*This instrument implements requirements of an EU Directive in relation to certain audiovisual media services, including measures to protect audiences, especially young people, from potentially harmful and/or illegal content and incitement to hatred and violence. While the instrument aligns protection requirements for on-demand programme services with those that already exist for linear TV, such protections are introduced for the first time in relation to video-sharing platforms. After the end of the Transition Period (TP), obligations on national regulators in the EU to co-operate will no longer apply to the UK and Ofcom will rely instead on informal co-operation to achieve protection for UK users from harmful content provided by non-UK regulated audiovisual media services. The protection of young people and others from online harm is an issue in which the House has taken a strong interest previously and one that the Government have committed to address through an online harms Bill. **We urge the Government to provide a timetable for the introduction of this Bill.***

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.

18. The Department for Digital, Culture, Media and Sport (DCMS) has laid this instrument before Parliament with an Explanatory Memorandum (EM) and Impact Assessment. The purpose of the instrument is to transpose Directive (EU) 2018/1808 (“the 2018 Directive”) into UK law. The 2018 Directive amends the Audiovisual Media Services Directive 2010/13/EU (“the AVMSD”), which set out minimum content standards for service providers and governs EU-wide coordination of national legislation on certain audiovisual media. The UK is obliged to implement the 2018 Directive under the terms of the Withdrawal Agreement, as the deadline for transposition falls within the Transition Period (TP). According to DCMS, the UK already meets several of the requirements of the 2018 Directive, such as restrictions on advertising for foods that are high in fat, salt and sugar. This instrument implements the requirements of the 2018 Directive that require transposition. The key changes are summarised below.

Aligning rules for on-demand programme services with those for linear TV

19. The instrument aligns the rules for on-demand programme services (ODPS)¹³ with those that already exist for linear TV¹⁴ in relation to protecting audiences from harm. Both linear TV and ODPS will be required to protect young people (that is those under the age of 18) from harmful content using measures proportionate to the potential harm, including through selecting the time of the broadcast, age verification tools or other technical measures. According to DCMS, equal standards, protections and advertising rules for ODPS and linear TV are necessary as an increasing number of consumers access audiovisual content online and to create a level playing field between traditional broadcasters and new digital services.

13 ODPS include TV catch-up, online film services, and those providing a library of archive content.

14 Linear TV is the traditional TV broadcast: it involves a viewer watching a scheduled TV programme at the time it is broadcast and on the original channel.

Introducing rules for videosharing platforms

20. The instrument requires providers of videosharing platforms (VSPs)¹⁵ for the first time to take appropriate measures to protect young people from “content and advertising that might impair their physical, mental or moral development” and to protect the general public from “content and advertising that incites violence or hatred towards people with certain protected characteristics”, as well as from “content and advertising that is a criminal offence to circulate, such as terrorist content, content containing child sexual exploitation and abuse, and racist/xenophobic content”.
21. DCMS explains that, unlike the regulation of linear TV and ODPS, the regulation of VSPs does not involve the direct regulation of the content that these platforms provide. Instead, the regulation applies to the systems which VSPs have in place to meet the protection requirements. According to DCMS, the different approach reflects the different level of control that service providers have over their content: while linear TV and ODPS have a high level of control and editorial responsibility, VSPs do not have such editorial responsibility, as videos are uploaded by their users. VSPs are instead responsible for the organisation of the content they make available.
22. According to DCMS, content is typically arranged through the use of algorithms or automatic settings. The 2018 Directive specifies ten measures which VSPs can take to protect audiences. These include having in place and applying certain terms and conditions of service or ‘community rules’ on their platform for users; establishing and operating flagging and reporting mechanisms, age assurance and verification systems, systems to rate the content and easy-to-access complaints procedures; the provision of parental control systems; and the provision of media literacy measures and tools.
23. DCMS says that VSPs will not be required to adopt all ten measures. Instead they will decide which measures are appropriate and proportionate based on various factors, including an assessment of the risk of harm, taking into account the size and nature of the service they provide and the profile of its users. The choice of measures will impact on how the content is organised and how it appears to users on the relevant platform. Ofcom is required to draw up guidance for VSPs on which measures may be appropriate and how they may be implemented. VSPs will also be required to provide an impartial redress mechanism to settle any disputes with their users. Ofcom will issue guidance on this mechanism following consultation with industry.
24. We asked the Department about mechanisms for removing content that breaches the protection requirements. DCMS explained that:

“Should a VSP be in breach of its obligations to take appropriate measures, or to implement measures to protect users, Ofcom will have the power to take enforcement action. There is no blanket requirement for VSPs to remove harmful content from their platform, because there is a wide range of harmful material, and removal will not always be the right solution. VSPs are also not required to proactively monitor the information that is uploaded to their service. However, VSPs will be required to ensure they have the correct processes and systems in place to make it less likely that harmful material will appear on their

15 VSPs are a type of online video service where users can upload and share videos, such as YouTube.

platforms, and to apply appropriate processes and systems to deal with harmful material that does appear.

For the most harmful material, that will mean removal within a reasonable period of time once the material has been brought to the VSP's attention (the more harmful the material, the shorter the period of time will be appropriate before removal is appropriate). For less harmful material, measures other than removal may be more appropriate, such as applying warnings about the content, or applying age assurance systems."

25. The instrument further requires VSPs to notify the regulator that they provide a service that meets the statutory definition of a VSP and to pay an annual fee to be set by the regulator on a cost-recovery basis following consultation. Ofcom will establish and maintain a list of VSPs within the UK.

Enforcement

26. The EM states that the regulator will have a range of formal enforcement powers, including the power to issue an enforcement notice and impose a financial penalty of up to 5% of a VSP's "applicable qualifying revenue" or £250,000, whichever is greater. The regulator may also issue a direction to "suspend or restrict the entitlement to provide a VSP" where there is a continuing breach of requirements despite an enforcement notice and/or penalty. Ofcom will set out its approach to enforcement in guidelines.
27. Some important VSPs are based outside the UK. YouTube, for example, is based in the Netherlands and therefore falls under the jurisdiction of the relevant Dutch regulator. We asked DCMS whether this could impact on enforcement, in particular after the end of the TP when reciprocal duties on national regulators in the EU to co-operate will no longer apply to the UK. The Department explained that:

"The Country of Origin principle currently applies to broadcasting and on-demand regulation and will apply in relation to the new VSP regime when it comes into force. The AVMSD sets out mechanisms for Member States to cooperate in relation to certain matters relating to broadcasting and on-demand, such as deciding jurisdiction and the enforcement of rules that go beyond the AVMSD minimum standards. The AVMSD also provides for cooperation in relation to jurisdiction for VSP services.

Currently, there are well-established formal and informal routes for Ofcom to raise compliance concerns with regulators in other Member States in relation to broadcasting and on-demand services. However, the AVMSD does not empower a Member State to enforce against services which comply with the minimum standards of the AVMSD but do not comply with any stricter rules that another Member State has implemented.

The SI transposing the AVMSD requires Ofcom to cooperate with other Member States as necessary in order to comply with the AVMSD; Member State Regulatory Authorities are under a reciprocal duty under the AVMSD. However, after the end of the transition period, this obligation on Member State regulatory authorities to cooperate with Ofcom will cease as the UK will be a third-country. Similarly, Ofcom will not be obliged to co-operate with Member State Regulatory

Authorities, because there will not be legal obligations which need to be given effect to.

From 1 January 2021, Ofcom intends to rely on informal cooperation to try to achieve protections for UK users across non-UK regulated services. This will require regular dialogue and sharing of best practice between Ofcom and the National Regulatory Authorities in EU Member States. Ofcom is continuing to actively engage with regulatory counterparts regarding co-operation and consistency of approaches as VSP regulation develops.

Importantly, Member States will still be under an obligation to ensure services under their jurisdiction, including VSP services, meet the AVMSD requirements. Whilst the UK won't be a Member State, we will still be able to informally raise concerns. If a VSP is not meeting the minimum standards of the Directive, it would be liable to enforcement action from the regulator with jurisdiction.

Please note that we are currently in the process of drafting a SI which will clarify Ofcom's jurisdiction at the end of the transition period."

28. We note the explanation provided by the Department as to how Ofcom intends to work with the regulatory authorities in EU Member States after the end of the TP. **We are concerned, however, that the UK will have to rely on informal co-operation in this area. This also raises the issue of how UK audiences are to be protected from harmful content provided by services in non-EU countries, such as the US. The protection of young people and others from online harm is an issue in which the House has taken a strong interest previously and one that the Government have committed to address through an online harms Bill. We urge the Government to provide a timetable for the introduction of this Bill.**

Extended quotas for European works

29. The instrument introduces an obligation for ODPS to promote European works, so that ODPS must have at least a 30% share of European works content in their catalogue. They must also ensure the prominence of this content. To date, this requirement has applied only to linear TV. According to DCMS, European works are audiovisual productions originating in a Member State or a State which is a party to the European Convention on Transfrontier Television (ECTT) or made under an agreement between the EU and a third country. As the UK has ratified the ECTT, productions originating in the UK will continue to be classified as European works after the end of the TP. The 30% requirement introduced by this instrument will also continue to apply.

Other changes

30. Amongst other changes, this instrument also widens the scope of measures to increase accessibility of audiovisual media services for disabled people to encompass all disabilities, not just those concerning impairment of sight and hearing. The instrument also updates the rules for linear TV and ODPS to include a prohibition of advertising, sponsorship and product placements in relation to electronic cigarettes and electronic cigarette refill containers. Advertising of such products will also be prohibited in relation to VSPs.

Conclusion

31. This instrument implements requirements of an EU Directive in relation to certain audiovisual media services, including measures to protect audiences, especially young people, from potentially harmful and/or illegal content and incitement to hatred and violence. After the end of the TP, obligations on national regulators in the EU to co-operate will no longer apply to the UK and Ofcom will rely instead on informal co-operation to achieve protection for UK users from harmful contact provided by non-UK regulated audiovisual media services. The protection of young people and others from online harm is an issue in which the House has taken a strong interest previously and one that the Government have committed to address through an online harms Bill. **We urge the Government to provide a timetable for the introduction of this Bill. 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.**

INSTRUMENTS RELATING TO COVID-19

Changes to benefits

Social Security Contributions (Disregarded Payments) (Coronavirus) (England) Regulations 2020 (SI 2020/1065)

32. This instrument disregards payments made under the Test and Trace Support Payment Scheme in England to employees who are on a low income and have been asked to self-isolate by NHS Test and Trace because they have tested positive for COVID-19 or recently been in close contact with someone who has, so that payments made under the scheme will not be liable to employer or employee Class 1 National Insurance contributions (NICs). Employers will also not be liable to Class 1A NICs in respect of such payments.

Delayed or revoked legislation

Draft Higher Education (Fee Limits and Student Support) (England) (Coronavirus) (Revocation) Regulations 2020

33. These draft Regulations propose to revoke an earlier instrument¹⁶ which provided that, where higher education providers recruited first year students above the level that the Department for Education (DfE) had allocated to them for the academic year 2020–21 (through the so-called student number controls or SNC), reduced tuition fee limits would apply to those providers' full-time undergraduate courses in the following academic year 2021–22. This was to ensure that if providers exceeded their allocated SNC, the sums available to them through the student finance system in the subsequent academic year would be reduced proportionately. The earlier instrument also provided for a proportionate reduction of the maximum tuition fee loan amounts available to English-domiciled students starting full-time courses at institutions in Scotland, Wales or Northern Ireland in the academic year 2021–22 where the number of students exceeded the SNC for that institution in the academic year 2020–21. The aim of the earlier instrument was to prevent higher education providers from adopting admissions practices, such as the large-scale use of unconditional offers, to recruit a greater share of domestic students and secure their tuition fee income and a greater share of public funding at a time when it was expected that fewer students would chose to go to university. DfE says that following the changed approach to A-level grades this year, more students than expected are now entering higher education in the academic year 2020–21. The Secretary of State therefore announced on 17 August 2020 that the SNC policy would be withdrawn and the earlier instrument be revoked. These draft Regulations propose to implement that commitment.

¹⁶ Higher Education (Fee Limits and Student Support) (England) (Coronavirus) Regulations 2020 ([SI 2020/853](#)); [18th Report](#), Session 2019–21 (HL 78).

INSTRUMENTS OF INTEREST

Draft Competition (Amendment etc.) (EU Exit) Regulations 2020

34. This instrument proposes changes to UK competition law to implement provisions contained in the Withdrawal Agreement. According to the Department for Business, Energy and Industrial Strategy (BEIS), the Withdrawal Agreement provides for the orderly conclusion of EU antitrust and merger cases that relate to UK markets by giving the European Commission competence to conclude its ongoing investigations. This instrument proposes amendments to UK competition law that ensure that UK competition authorities, such as the Competition and Markets Authority, can continue to support ongoing EU competition cases after the end of the Transition Period (TP). This includes giving UK competition authorities powers to monitor and enforce transferred EU remedial requirements. The instrument also ensures that changes made to the competition regime by an earlier EU Exit instrument,¹⁷ which created a standalone UK competition regime, have effect with reference to the end of the TP, rather than to exit day, so that the UK regime will function as intended at the end of the TP. The instrument further proposes to revoke Regulation (EU) No 2019/452, which has direct effect in the UK and establishes a framework for the screening of foreign direct investments into the EU. Asked whether this would reduce the scrutiny of foreign direct investment into the UK, BEIS told the Committee that:

“This EU Regulation relates principally to cooperation between EU Member States on the screening of foreign direct investments. It is revoked by the draft regulations because it would be redundant and have no practical application in relation to the United Kingdom outside the membership of the EU and it would be inappropriate for it to remain on the UK statute book. The UK Government has its own system of screening foreign direct investments and has powers under the Enterprise Act 2002 to intervene in mergers between businesses on public interest grounds. The Government also announced the National Security and Investment Bill in the Queen’s Speech in December, which will reform the UK’s investment screening powers in relation to national security.”

Draft Education (Exemption from School and Further Education Institutions Inspections) (England) (Amendment) Regulations 2020

35. This instrument proposes to remove an exemption under which some schools¹⁸ and colleges¹⁹ in England that have been judged as ‘outstanding’ by Ofsted are currently not subject to regular inspections. The intention to lift the exemption was first announced in September 2019. In a consultation between 10 January and 24 February 2020, over 89% of respondents were in favour of ending the exemptions. The Department for Education (DfE) says that the exemption was introduced in 2012 to “recognise and reward high performing schools and colleges, allowing them to continue to focus on providing excellence with less intervention, and concentrating inspection

17 Competition (Amendment etc.) (EU Exit) Regulations 2019 ([SI 2019/93](#)); SLSC Sub-Committee A, [5th Report](#), Session 2017–19 (HL 221).

18 State-funded schools other than nursery schools, special schools, pupil referral units and alternative provision academies.

19 Institutions within the statutory further education sector and 16 to 19 academies.

where it was needed most”. DfE says that, with some schools and colleges not having been inspected since the 2006/7 school year, the exemption is now starting to lead to a loss of confidence in the ‘outstanding’ grade, the highest grade awarded by Ofsted, and that some schools, colleges, parents and students are not receiving an up to date independent assessment of quality and performance under Ofsted’s new inspection framework which was introduced in September 2019.²⁰ The changes proposed by this instrument mean that these schools and colleges will in future be subject to regular Ofsted inspections. Ofsted intends to prioritise inspections of formerly exempt schools and colleges that have gone the longest since their last inspection, starting with those that have not been inspected for a decade or longer. While all routine Ofsted inspections were suspended temporarily in March to alleviate pressure on schools and colleges during the pandemic, the intention is for these inspections to resume from January 2021. DfE will keep this date under review.

Draft Tobacco Products and Nicotine Inhaling Products (Amendment) (EU Exit) Regulations 2020

36. These Regulations amend the previous EU Exit Regulations²¹ to provide for different systems in Great Britain and Northern Ireland in line with the Northern Ireland Protocol that forms part of the Withdrawal Agreement.
37. In relation to Great Britain, these Regulations provide for the use of Australian picture warnings (to replace the EU picture warnings on which the Commission holds the copyright) and for the establishment of a domestic notification system for new tobacco products including herbal products for smoking and e-cigarettes.
38. In relation to Northern Ireland, because the Tobacco Products Directive (Directive 2014/40/EU) is listed in Annex 2 of the Protocol, EU law will continue to be directly applicable in Northern Ireland. This includes a requirement to continue using the EU Common Entry Gate (EU-CEG) system for the notification of tobacco and e-cigarette products.
39. The Regulations also provide that producers will only be required to pay one fee if they notify a new product on either or both of the notification systems. However, products which are required to carry picture warnings will not have mutual access to the two markets because of the different legal requirements that apply within each area.

20 Ofsted, *Education Inspection Framework* (May 2019): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/801429/Education_inspection_framework.pdf [accessed 8 October 2020].

21 Tobacco Products and Nicotine Inhaling Products (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/41).

ACKNOWLEDGEMENT

40. We are delighted to acknowledge that Jane White, Adviser to the Committee since its inception in 2003, has been made an Officer of the Order of the British Empire for services to Parliament.

INSTRUMENTS NOT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

Draft instruments subject to affirmative approval

Bearer Certificates (Collective Investment Schemes)
Regulations 2020

Competition (Amendment etc.) (EU Exit) Regulations 2020

Education (Exemption from School and Further Education
Institutions Inspections) (England) (Amendment) Regulations
2020

Higher Education (Fee Limits and Student Support)
(England) (Coronavirus) (Revocation) Regulations 2020

Jurisdiction, Judgments and Applicable Law (Amendment)
(EU Exit) Regulations 2020

Nutrition (Amendment etc.) (EU Exit) Regulations 2020

Reciprocal and Cross-Border Healthcare (Amendment etc)
(EU Exit) Regulations 2020

Tobacco Products and Nicotine Inhaling Products
(Amendment) (EU Exit) Regulations 2020

Instruments subject to annulment

SI 2020/1047 Immigration (Residential Accommodation) (Prescribed
Requirements and Codes of Practice) (Amendment) Order
2020

Si 2020/1051 Town and Country Planning (Pre-application Consultation)
Order 2020

SI 2020/1060 Official Controls (Plant Health & Genetically Modified
Organisms) (England) (Amendment) (No. 3) Regulations
2020

SI 2020/1063 Safety of Sports Grounds (Designation) (Amendment)
(England) (No. 4) Order 2020

SI 2020/1065 Social Security Contributions (Disregarded Payments)
(Coronavirus) (England) Regulations 2020

SI 2020/1072 Mental Health (Hospital, Guardianship and Treatment)
(England) (Amendment) Regulations 2020

SI 2020/1089 Official Controls (Plant Health & Genetically Modified
Organisms) (England) (Amendment) (No. 4) Regulations
2020

APPENDIX 1: 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 13 October 2020, Members declared the following interests:

Draft State Aid (Revocations and Amendments) (EU Exit) Regulations 2020

Baroness Bakewell of Hardington Mandeville, Lord Cunningham of Felling, Lord German, Lord Lisvane, Baroness Watkins of Tavistock
All members of the National Trust

Draft Higher Education (Fee Limits and Student Support) (England) (Coronavirus) (Revocation) Regulations 2020

Lord Liddle
Pro-Chancellor, University of Lancaster (interest ceased 30 September 2020)

Acknowledgement

Lord Sherbourne of Didsbury
Independent Chair, Parliamentary and Political Service Honours Committee and independent member, Main Honours Committee

Lord Lisvane
Independent member, Parliamentary and Political Service Honours Committee

Attendance:

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