HOUSE OF LORDS

Secondary Legislation Scrutiny Committee

31st Report of Session 2019–21

Drawn to the special attention of the House:

Draft Definition of Qualifying Northern Ireland Goods (EU Exit) Regulations 2020

Non-Contentious Probate (Amendment) Rules 2020

Health Protection (Coronavirus, Local COVID-19 Alert Level) (Medium) (England) Regulations 2020 and four related instruments

Includes information paragraphs on:

3 instruments relating to COVID-19

Draft Agriculture (Payments) (Amendment, etc) (EU Exit) Regulations 2020

Draft Common Organisation of the Markets in Agricultural Products (Producer Organisations and Wine) (Amendment etc.) (EU Exit) Regulations 2020

Draft Public Procurement (Amendment etc.) (EU Exit) Regulations 2020

Draft Defence and Security Public Contracts (Amendment) (EU Exit) Regulations 2020

Draft European Union Withdrawal (Consequential Modifications) (EU Exit) Regulations 2020

Draft Persistent Organic Pollutants (Amendment) (EU Exit) Regulations 2020

Draft Pesticides (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.

Thirty First Report

INSTRUMENTS DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

Draft Definition of Qualifying Northern Ireland Goods (EU Exit) Regulations 2020

Date laid: 7 October 2020

Parliamentary procedure: affirmative

These draft Regulations propose a definition of qualifying Northern Ireland goods, as part of the Government's commitment to legislate to guarantee unfettered access for businesses in Northern Ireland to the UK internal market. The instrument is politically significant as it underpins the UK Internal Market Bill which is to deliver the broader elements of the unfettered access policy.

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. These draft Regulations, laid by the Cabinet Office with an Explanatory Memorandum (EM), propose a definition of qualifying Northern Ireland goods. This definition is necessary in the context of the Government's commitment to legislate to guarantee unfettered access for businesses in Northern Ireland to the whole of the UK internal market through the UK Internal Market Bill ("the UKIM Bill"). The legislation needs to be in force when the Transition Period (TP) ends on 31 December 2020.

Context

2. The EM states that the draft Regulations should be seen in the wider context of proposed legislation to deliver unfettered access and to avoid any disruption in trade between Northern Ireland and the rest of the UK after the end of the TP. While this instrument sets out the initial definition of qualifying Northern Ireland goods, the broader elements of unfettered access policy are being delivered through the UKIM Bill which is currently before the House and which, according to the Cabinet Office, contains provisions that:

- prohibit any new checks or controls, or existing checks or controls being used for the first time or for a new purpose or extent, on qualifying Northern Ireland goods; and
- apply the principles of mutual recognition and non-discrimination to qualifying Northern Ireland goods, so that they can be freely placed on the market throughout Great Britain.

3. The definition of qualifying Northern Ireland goods, as set out in this instrument, will underpin those provisions in the UKIM Bill. Several other statutory instruments will be required to implement fully the unfettered access policy.

Definition of "unfettered access"

4. The Cabinet Office says that unfettered access is based on several elements:

- the absence of customs and regulatory checks and processes for qualifying Northern Ireland goods moving from Northern Ireland to Great Britain, with "only limited exceptions", such as when upholding international obligations such as those concerning the movement of endangered species;
- no requirements for additional authorisations or approvals for placing qualifying Northern Ireland goods on the market in the rest of the UK, with "only very limited exceptions for very high-risk goods"; and
- recognising qualifying Northern Ireland goods for sale on the UK market, irrespective of the fact that the goods are made according to the rules applied by the Northern Ireland Protocol, and ensuring that these goods are not discriminated against on the basis of having to adhere to those rules.

5. We asked the Cabinet Office for an explanation of the type of international obligations that may require customs and regulatory checks and processes in relation to Northern Ireland goods being placed on the market in the rest of the UK. This is an issue that we have considered previously.[1] The Cabinet Office told us that:

> "This refers to a very limited number of international obligations binding on the UK via Article 6(1) of the [Northern Ireland] Protocol (or where the UK is a signatory in its own right). The operation of Article 6(1) is a matter for ongoing discussion within the UK-EU Joint Committee, and as such we will provide for these requirements in full through legislation to be taken forward in the remainder of the year. Some measures have, though, already been laid - such as with respect to the Stockholm Convention on Persistent Organic Pollutants, where the Persistent Organic Pollutants (Amendment) (EU Exit) Regulations 2020[2] is already before Parliament. Further measures, for example on the Kimberley Process[3] will be brought forward before the end of the year."

6. We also asked for further information about the high-risk goods that may require additional authorisations or approvals for being placed on the market in the rest of the UK. The Cabinet Office explained that:

> "This refers to a very limited range of goods where further requirements may be necessary in order to ensure UK authorities and regulators have the information required to protect animal, human or environmental health. These requirements will apply to very minimal volumes of trade, and will have no overall effect on the vast majority of goods moving from NI to GB. These exceptions will be given effect through secondary

1 Draft Common Rules for Exports (EU Exit) Regulations 2020, 29th Report, Session 2019–21 (HL 138).
2 See para 57 of this Report.
3 The Kimberley Process aims to stop the trade in 'conflict diamonds'. See: https://www.kimberleyprocess.com/en/about.

legislation to be laid before the end of the year - for example, the Pesticides (Amendment) (EU Exit) Regulations 2020."[4]

Definition of "qualifying goods" in this instrument

7. The instrument proposes a definition of a qualifying Northern Ireland good as any good that falls within one of two categories:

   (1) goods that are lawfully present in Northern Ireland and are not subject to customs control, other than customs procedures arising on export from Northern Ireland; or

   (2) goods that are Northern Ireland processed products.

8. According to the Cabinet Office, the second category of goods "seeks to ensure that goods that have undergone processing in Northern Ireland can qualify for the definition even where they have been moved under customs control". The Cabinet Office says that this "initial broad definition best ensures continuity and avoids any disruption" from the end of the TP, in line with the broader approach being taken for goods arriving into Great Britain from the EU for the first half of next year under the Border Operating Model.[5]

9. Asked for an example of goods that have undergone processing in Northern Ireland and will qualify for unfettered access even where they have been moved under customs control, the Cabinet Office provided the following:

> "A practical example of this would in the agri-food sector where a GB business may move a beef carcass from Great Britain to Northern Ireland for de-boning and processing under customs supervision, therefore not needing to comply with full import formalities on entry into NI, before being returned to GB to be placed on the market there. The product will not be in free circulation in Northern Ireland, but would clearly be a good that should benefit from unfettered access protections. This second limb of the [Qualifying Northern Ireland Goods] definition therefore ensures that these goods are able to return to GB, enjoying unfettered access during that movement."

Further legislation

10. The Cabinet Office explains that the instrument is part of a phased approach and will be followed by further proposals from the UK Government, developed with Northern Ireland businesses, for qualifying status in the longer-term. This is to be taken forward through the UKIM Bill and further statutory instruments to be laid under the European Union (Withdrawal) Act 2018, with the aim of providing "robust protections that guarantee Northern Ireland goods continue to enjoy unfettered access to the UK market". Asked about the timing of the next phase, the Cabinet Office said that:

> "The second phase of the regime will be given effect during the course of 2021. However the approach there is subject to ongoing engagement with Northern Ireland business and the Northern Ireland Executive. Further details on timing will be set out in the light of that further work.

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4 See para 61 of this Report.

5 Cabinet Office, 'The Border Operating Model' (last updated 8 October 2020): https://www.gov.uk/government/publications/the-border-operating-model [accessed 15 October 2020].

> As we have done more broadly, it is right to take sensible, practical steps to phase in our approach in a way that is supported by business."

11. The Cabinet Office says some businesses may seek to "inappropriately re-route goods [through Northern Ireland] in order to avoid otherwise applicable import formalities", adding that this will be addressed "by means of separate legislation, to be brought forward before the end of the year, which would enable action to be taken where any business looked to re-route their goods through [Northern Ireland] for this purpose". Asked for further information about this additional legislation, the Cabinet Office explained that:

> "This instrument will be accompanied by anti-avoidance measures to enable action to be taken where businesses look to abuse its provisions. This will mean that action can be taken where a business looks to re-route their goods solely to avoid otherwise applicable import formalities. That legislation will be in place by the end of the year. The vehicle is at the discretion of HMT/HMRC who are leading on these provisions."

Conclusion

12. These draft Regulations propose a definition of qualifying Northern Ireland goods, as part of the Government's commitment to legislate to guarantee unfettered access for businesses in Northern Ireland to the whole of the UK internal market. The instrument is politically significant as it underpins the UKIM Bill which is to deliver the broader elements of the unfettered access policy. **While the definition provides a framework, the full impact of the Regulations will not be known until further instruments are brought forward to apply the definition to specific sectors and to set out measures to prevent potential abuse of the new arrangements. 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**.

Non-Contentious Probate (Amendment) Rules 2020 (SI 2020/1059)

Date laid: 30 September 2020

Parliamentary procedure: negative

This instrument amends the Non-Contentious Probate Rules 1987 (SI 1987/2024) to increase use of the online probate service by solicitors and other probate practitioners. The instrument also inserts into the Rules an "overriding objective" that probate business is "to be dealt with justly and expeditiously by the court and the registry". We do not find that this adds value or clarity to the law and, therefore, it does not belong in legislation. We welcome the Ministry of Justice's intention to serve the public well, but take the view that that intention would be better expressed in operational guidance or performance indicators.

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

13. This instrument has been laid by the Ministry of Justice (MOJ) and is accompanied by an Explanatory Memorandum (EM). The instrument amends the Non-Contentious Probate Rules 1987 (SI 1987/2024) which govern practice and procedure in the Probate Registry. The amendments relate to increasing use of the online probate service by solicitors and other probate practitioners by mandating use of the online process for certain types of probate application.

14. The instrument also inserts into the Rules an "overriding objective":

> "3A. The overriding objective of these Rules is to enable non-contentious and common form probate business to be dealt with justly and expeditiously by the court and the registry."

15. The EM justifies this by saying: "It is felt that this new rule will assist in applications being dealt with efficiently and expeditiously." Both the insertion and the wording seemed rather unusual, so we asked the MOJ for further background. It replied:

> "The role of an overriding objective in a set of rules is to set out explicitly an underlying principle guiding the formation and application of the procedural rules by the courts and parties. It sets out how courts will manage cases and in turn the rights and responsibilities of parties and it becomes a guiding principle in which future rule changes are measured– will they further the overriding objective of dealing with cases justly, and so forth.
>
> The query of whether it is necessary to add it at all is an understandable one, in the sense that all procedural rules are designed to ensure that courts determine cases in as fair, timely, effective and economic a way as possible.
>
> The Ministry considered that it would be beneficial to mirror provisions in the Civil and Family Procedure Rules which include an Overriding Objective provision (see, for example, Rule 1.1 of the Civil Procedure Rules1), and it also noted a recommendation from a working group established by the President of the Family Division in 20132 that one should be added to the Non-Contentious Probate Rules.

The advantages in doing so include making it explicit that the Court and Registry will, in dealing with probate applications:

- Manage them justly and fairly;
- Manage them proportionately–for example identifying issues in complex cases early and addressing those, while expeditiously processing straightforward applications;
- Make use of technology to improve the efficiency of processing cases;
- Encourage co-operation from parties in presenting all of the relevant information to support an application in an accurate and timely manner; and
- In the case of disputes, encourage co-operation between parties.
- In addition to setting out clearly the respective roles and responsibilities, in practical terms the new rule will assist courts and registrars in making case management decisions and intervening decisively in cases to expedite them and prevent costs rising disproportionately."

16. We also asked what recourse there was if an Executor suggested that their application had not been dealt with expeditiously, and—whether there was any appeal mechanism or redress.M OJ replied:

> "There is no separate appeal mechanism for the new rule as it essentially embodies the aims of the existing rules and standards of service."

17. We remain unconvinced how inserting that sentence in regulation 3 of the original instrument "made it explicit" that all those positive outcomes listed would happen. It reads more as an operational statement than as enforceable law—particularly as there is no direct redress if someone feels they have not been dealt with "justly and expeditiously".

18. MOJ's response indicates that the same device has been used in a previous instrument—which raises the question whether, if the MOJ's Rules do not include such a phrase, the requirement to deal with matters "justly and expeditiously" does not apply?W e think it would be assumed that all public service activities should be dealt with promptly and efficiently and do not see the benefit of inserting a statement to that effect.

19. The Joint Committee on Statutory Instruments some time ago issued a report on *Excluding the inert from Secondary Legislation*[6] which said:

> "We remain firmly of the opinion that Departments should remain constant in distinguishing provisions that need to be included in legislation from those that do not properly belong there."

20. **We concur; this "overriding objective" does not appear to us to add value or clarity to the law and therefore does not belong in legislation.** We welcome the MOJ's intention to serve the public well but take the view that that it would be better expressed in operational guidance or performance indicators.

6 JCSI, First Special Report, Session 2013–14 (HL Paper 6, HC Paper 167). Published 21 May 2013.

Health Protection (Coronavirus, Local COVID-19 Alert Level) (Medium) (England) Regulations 2020 (SI 2020/1103)

Health Protection (Coronavirus, Local COVID-19 Alert Level) (High) (England) Regulations 2020 (SI 2020/1104)

Health Protection (Coronavirus, Local COVID-19 Alert Level) (Very High) (England) Regulations 2020 (SI 2020/1105)

Date laid: 12 October 2020

Parliamentary procedure: made affirmative

Health Protection (Coronavirus, Local COVID-19 Alert Level) (High) (England) (Amendment) Regulations 2020 (SI 2020/1128)

Date laid: 15 October 2020

Parliamentary procedure: made affirmative

Health Protection (Coronavirus, Local COVID-19 Alert Level) (Very High) (England) (Amendment) Regulations 2020 (SI 2020/1131)

Date laid: 16 October 2020

Parliamentary procedure: made affirmative

We, in common with others, have found the previous system of locally-tailored restrictions, repeatedly amended, hard to follow. We therefore welcome the Government's new approach of restructuring the restrictions into standardised tiers. However, it is essential that the Government should also be more transparent in explaining their decision-making process, in particular explaining (in the Explanatory Memoranda accompanying future instruments) the balance between the health, social and economic interests that have been taken into account. ***We urge the Government to provide more information about theird ecision-making process and to include in the Explanatory Memorandum accompanying a relevant future instrument the data relied on in any decision to move an area between tiers.***

These 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.

21. The first three of these instruments were laid by the Department for Health and Social Care (DHSC), each accompanied by an Explanatory Memorandum (EM), on 12 October 2020. They follow the made affirmative procedure, and came into effect on 14 October 2020, the day that they were debated in the House of Lords. Two further amending instruments, SIs 2020/1128 and 2020/1131, were laid in in quick succession, also accompanied by an EM, and are included in this report.

Restructuring

22. We, in common with others, have found the previous system of locally-tailored restrictions, repeatedly amended, hard to follow. We therefore welcome the Government's new approach of restructuring the restrictions into standardised tiers. We believe that the new approach will make it easier to communicate to the public which restrictions apply in their area and, in turn, increase the likelihood of compliance.

23. The core restrictions from the previous legislation have been remodelled into a three-tiered system of Local COVID Alert Levels (LCAL) in England, set at Medium, High and Very High. Non-essential retail, schools and universities will remain open in all levels. Masks and social distancing are required at all levels.

Tier 1: Medium

- People must not socialise in groups of more than six (referred to as the 'rule of six') if meeting indoors or outdoors.
- Bars, pubs and restaurants and places of entertainment must close between 10pm and 5am.
- Weddings and funerals can go ahead with restrictions on the number of attendees.
- Organised gatherings can only be held outdoors and must not exceed 30 people.
- Organised indoor sport and exercise classes can continue to take place, provided the rule of six is followed.
- All businesses and venues can continue to operate, in a COVID-19 secure manner, other than those required to remain closed in law, such as nightclubs.

Tier 2: High

24. This is for areas with a higher level of infections, all the Medium restrictions continue to apply except where more stringent limits are applied by the High Alert Regulations.

- People must not socialise indoors with people who are not in their household or support bubble.
- Rule of six applies outdoors, including in a garden or other space.
- Associated guidance states people should aim to reduce the number of journeys they make where possible. If they need to travel, they should walk or cycle where possible, or plan ahead to avoid busy times and routes on public transport.

Tier 3: Very High

25. All Medium and High restrictions apply except where stricter limits are applied by the Very High Alert Regulations. These Regulations are particularly directed towards reducing household to household transmission. This legislation acts as a baseline, additional measures can be agreed locally (see Schedule 2A to the Regulations).

- People must not socialise with people who are not in their household or support bubble indoors or outdoors, including in pub gardens or private gardens.
- The rule of six continues to apply for meetings in other outdoor areas, such as parks, beaches or the countryside.

- Pubs and bars can only remain open if they operate as if they were a restaurant. They can only serve alcohol with a meal.
- Associated guidance states people should avoid travelling outside these areas. Exceptions to this include if people are travelling for work, education, youth services or to meet caring responsibilities.
- Associated guidance states that people resident in these areas should avoid staying overnight in another part of the UK.

1. Although described as three tiers, there is in fact a notional fourth tier, which would be where no restrictions at all apply. Given that infection rates are comparatively low in some parts of the country, for example, the South West and East Anglia, **the House may wish to ask the justification for including all areas in the Medium restrictions, and what criteria might eventually be used to remove local areas out of the Medium Alertr estrictions altogether**.

How are places moved between levels–triggers

26. Although the restrictions have been rationalised into tiers, the triggers that lead to an area being moved into or out of those tiers remain unclear.D uring the approval motion debate in the House of Lords, on 14 October, a number of speakers asked why a certain area was in the High Tier but an area with a higher R value[7] was in the Medium Tier. Lord Bethell, Parliamentary Under-Secretary for Health and Social Care, said:

> "There is no automatic trigger for an area to move into higher restrictions. Government, working with local authorities and directors of public health, will consider several factors, including the number of cases in the area, the rate of transmission, the effectiveness of current interventions, hospitalisations, the national picture and an assessment of the capacity of local health services."[8]

27. The Prime Minister's announcement, on 12 October 2020, said factors would include: "incidence and test positivity, including amongst older and more at-risk age groups, as well as the growth rate, hospital admissions and other factors".[9]

28. In response to our questions the DHSC described its methodology as follows:

> "Decisions about the appropriate Alert Level in each area are made by the Government in discussion with local leadership and Directors of Public Health. Decisions are not based upon a single epidemiological factor, nor is there an automatic trigger for escalation. Instead decisions are based upon recommendations provided by the Joint Biosecurity Centre and COVID-19 Task Force based upon the close monitoring of data and the spread of the virus across local areas. As part of this, the Joint Biosecurity Centre will consider prevalence, particularly in the over-60s, and positivity rates, as well as the capacity of local health services and the effectiveness of current interventions in the area.

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7 The "effective reproductive number", that is the calculation of how many people an infected person is thought to transmit the virus to. If the R value is one, the prevalence of the virus will remain stable, if it falls below one, the prevalence will decrease, but if the R value is only slightly above one, the numbers infected will increase rapidly.

8 HL Deb, 14 October 2020, col 1127 [Lords Chamber].

9 HM Government, Press Release: *Prime Minister announces new local COVID Alert Levels* on 12 October 2020: https://www.gov.uk/government/news/prime-minister-announces-new-local-covid-alert-levels.

> In addition consideration will be given to the specific of individual cases, e.g. specific outbreaks or characteristics and the impact of changes on the local economy and peoples' lives."

29. While it is understandable that multiple factors should be taken into account, the methodology being used for weighing them is not transparent—for example, to what degree economic factors, local levels of unemployment or the impact on the treatment of other health issues are also taken into consideration. The EM to SI 2020/1128, which moves a number of areas into Tier 2, simply says it does so "in response to recent data". **We urge the Government to provide more information about the underlying data relied on in any decision to move an area between tiers**.

Where will different local alert levels be in force?

30. The Government have published a full list of the areas in each tier.[10]

31. Under the three original Regulations, from 14 October 2020:

- Liverpool City Region will be in Tier 3, the Very High alert level.
- Tier 2, High alert, will include areas where previous local lockdown regulations had been in place. These include areas in Cheshire, Greater Manchester, the High Peak area of Derbyshire, Lancashire, West Yorkshire, South Yorkshire, Durham, Northumberland, Tyne and Wear, Tees Valley, West Midlands, Leicestershire and Nottinghamshire.
- The rest of England will be on the Medium alert level.

32. From 17 October:

- SI 2020/1128 added the following into the High alert level: Barrow-in-Furness, Chesterfield and further parts of Derbyshire, most of Essex, Elmbridge in Surrey, York and all 32 London boroughs plus the City of London.
- SI 2020/1131 moved Lancashire into the Very High alert level. Additional measures included, at the request of the local authorities in Lancashire, the closure of betting shops and adult gaming centres, casinos, bingo halls, soft play areas (with the exception for use by the disabled) and car boot sales.

33. DHSC explained, in response to our questions, that these additional requirements were an example of co-operation with the local authority, which it hoped would be the way forward:

> "For any area recommended for Local COVID Alert Level (LCAL) Very High, local authorities should co-design the package of additional measures that will apply in their area to ensure that the measures are relevant to that particular area's economic, social and public health situation. Given the severity of the public health situation in areas recommended for this level of intervention, should local areas not be prepared to work with the Government to co-design a package of measures, the Government reserves the right to impose measures if that is what is needed to reduce transmission and save lives."

10 DHSC, 'Full list of local COVID alert levels by area' (12 October 2020): https://www.gov.uk/guidance/full-list-of-local-covid-alert-levels-by-area.

Review

34. The three-tier regulations will lapse after six months. The Secretary of State must review the need for each of the restrictions in each tier at least once every 28 days from their date of coming into effect, with the first review to be carried out by 11 November 2020.

35. The Secretary of State must also review whether each area in Tier 2 needs to continue to be part of Tier 2 at least once every 14 days, with the first review to be carried out by 28 October 2020.

36. All Tier 3 areas are initially designated for 28 days from the day on which their entry into Schedule 2 of the Regulations came into force.[11] It would automatically revert to Tier 1. Should it still need to continue in Tier 3 after 28 days or be included in Tier 2 instead, a new statutory instrument will need to be laid after consultation with the local area authorities.

37. As well as these statutory review points, DHSC have told us their operational timetable for wider review:

> "Areas will be moved between LCALs when necessary through an amendment to the corresponding statutory instruments. The public health situation in each local area is kept under constant review and assessed through the weekly Local Action Committee framework. Public health recommendations to move areas between LCALs will typically take place on Wednesdays at the sitting of the GOLD Local Action Committee. For moves between LCAL Medium and LCAL High this means that ministerial decisions will generally take place after the sitting of the Committee on the Wednesday, with a public announcement on Thursday, and amendments to the corresponding statutory instruments to take effect at midnight on the Saturday.
>
> Decisions to move areas to LCAL Very High may sometimes take place to a different timescale as these moves will be subject to consultation with local areas, with the intention that local areas should co-design the package of measures implemented."

Enforcement

38. Although the tiers are simpler to understand, the exemptions have been carried forward and, as was observed during the debate in the House of Lords,t here would be some difficulty in implementing a gatherings ban that has 17 complex exceptions.[12] We also note that SI 2020/1131 makes corrections to the Very High Alert Regulations laid two days previously because even the DHSC had difficulties dealing with the complexity of the exceptions.

39. One exemption, for example, allows people to participate in a gathering of any size, inside or outside, in a Tier 2 area, if it is "reasonably necessary for work purposes": would that include team building exercises or is it more limited to actual job functions?—the definition is not clear.

40. The system of offences punishable by fines and fixed penalty notices has been broadly maintained. For individuals, the first offence carries a £200

11 SI 2020/1105, regulation 9: https://www.legislation.gov.uk/uksi/2020/1105/regulation/9.
12 See Schedule 1 of SI 2020/1104 and HL Deb, 14 October 2020, Col 1161.

penalty, which is halved if paid within 14 days, and the fine doubles for every subsequent offence up to a maximum of £6,400. For businesses and services, the first offence is £1,000, followed by £2,000, £4,000 and then £10,000 for every offence committed thereafter. **The House may wish to ask the Minister how many fines have been issued in each category and how effective enforcement action has been to date**.

Evidence

41. Very few of the individual local lockdown regulations that we have seen so far have included information in the EM about the infection rate in that area. None of the EMs accompanying the three original tiers regulations provide evidence of the reasons for selecting those areas for the tier to which they have been assigned. Neither SIs 2020/1105 or 2020/1131, placing Liverpool and Lancashire in the Very High tier, nor SI 2020/1128 adding a number of areas to Tier 2, provide detailed evidence for doing so—simply stating that it is "in response to recent data". **The House may wish to ask the Minister for an assurance that the Government will provide more detailed evidence underpinning movement between tiers in the EMs accompanying the associated statutory instrument**.

42. It is also customary, when a scheme is changed after it has been operating for a while, to explain in the EM what has worked well and what has been amended because performance has not achieved the desired effect. Apart from acknowledging that the system of local lockdowns had become confusing, there is no mention of any evaluation of the previous schemes' effectiveness in reducing infection nor any indication of how the new tiered system builds on the lessons learned from the first scheme.

43. Concern over the lack of clear explanation to support the decisions effected by these instruments has been exacerbated by the publication, on 12 October 2020, of the Scientific Advisory Group for Emergencies (SAGE) minutes of the advice it had given to the Government on 20 September 2020[13] on measures to combat the spread of COVID-19. This included a number of recommendations that the Government did not implement. The Government have not explained why they did not follow this advice and what other factors they had taken into account.

44. A question raised several times during the approval motion debate in the House of Lords related to the rationale for closing hospitality venues at 10pm, where the SAGE minutes specifically stated that a 10pm curfew would have a "marginal" effect on transmission. Similarly, Government data published in the weekly National Surveillance report showed that only around 5% of acute respiratory infections were associated with food outlets and restaurants.[14] **The House may wish to ask the Minister, in the light of this data, how effective the Government believe the 10pm curfew is likely to be**.

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13 Minutes of 58th SAGE meeting (21st September 2020): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/925853/S0768_Fifty-eighth_SAGE_meeting_on_Covid-19.pdf?utm_source=POLITICO.EU&utm_campaign=63a80bf485-EMAIL_CAMPAIGN_2020_10_13_06_13&utm_medium=email&utm_term=0_10959edeb5-63a80bf485-190182405 [accessed 19 October 2020].

14 PHE, 'National COVID-19 surveillance report: week 40' (2 October 2020): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/923668/Weekly_COVID19_Surveillance_Report_week_40.pdf [accessed 19 October 2020]. See pages 14-17.

Conclusion

45. While the new tiered approach appears sensible, it will be important, if public trust is to be maintained, for the Government to be more transparent in explaining the basis of their decision-making. That includes routinely setting out in the Explanatory Memorandum how they have balanced the competing health, social and economic interests and the data to support their decision.T his is all the more important given the speed at which this legislation has been brought into effect and the consequences, in particular, for those areas placed in the higher tiers.

INSTRUMENTS RELATING TO COVID-19

Changes to business practice and regulation: travel

Health Protection (Coronavirus, Public Health Information for Passengers Travelling to England) (Amendment) Regulations 2020 (SI 2020/1090)

46. The original Passenger Information Regulations[15] aim to ensure that those wishing to travel to England are fully informed of the latest public health guidance and legal obligations imposed top revent the spread of coronavirus, so that only those who are willing and able to comply with them complete their journey. Because levels of compliance in completing the Passenger Locator Form are below anticipated levels and vary between operators, these Regulations make amendments that give more specific instructions on how operators of commercial transport services by sea, air or rail are to display and provide the necessary information. The instrument also introduces a new requirement to provide the information specified 24 to–48 hours before the scheduled departure time of any service to the UK.

Health Protection (Coronavirus, International Travel) (England) (Amendment) (No. 18) Regulations (SI 2020/1094)

47. This instrument amends the original International Travel Regulations[16] to add the Greek islands of Lesvos, Tinos, Serifos, Santorini and Zakynthos to the list of exempt countries or territories, so that passengers arriving in England after 10 October 2020 from those destinations are not required to self-isolate.

Law and order

Prison and Young Offender Institution (Coronavirus, Etc.) (Amendment) (No. 3) Rules 2020 (SI 2020/1077)

48. These Rules amend the Prison and Young Offender Institution (Coronavirus) (Amendment) Rules 2020[17] which we drew to the special attention of the House in our 16th Report of this session.[18] While understanding the need for some special measures during a coronavirus *transmission control period*, as declared by the Secretary of State for Health and Social Care, we were critical that the subsequent *transition period*c ould be extended by the Secretary of State for Justice incrementally upt o a maximum of six months in total. We note that the Joint Committee on Statutory Instruments also expressed concern about this mechanism.[19] These amending Rules now limit the transition period to three months and remove the power of the Secretary of State to extend it any further.

49. The Rules also add another potentially psychoactive medicine to the schedule of drugs for which prisoners can be tested and clarify the rules around the temporary release of prisoners during the pandemic.

15 Health Protection (Coronavirus, Public Health Information for Passengers Travelling to England) Regulations 2020 (SI 2020/567).
16 Health Protection (Coronavirus, International Travel) (England) Regulations 2020 (SI 2020/568).
17 Prison and Young Offender Institution (Coronavirus) (Amendment) (No. 2) Rules 2020 (SI 2020/508).
18 16th Report, Session 2019–21, published 4 June 2020 (HL Paper 68).
19 JCSI, 15th Report, Session 2019–21 (HL Paper 81).

INSTRUMENTS OF INTEREST

Draft Common Organisation of the Markets in Agricultural Products (Producer Organisations and Wine) (Amendment etc.) (EU Exit) Regulations 2020

Draft Agriculture (Payments) (Amendment, etc) (EU Exit) Regulations 2020

50. These two sets of draft Regulations propose changes to retained EU law and earlier EU Exit instruments in relation to the Common Organisation of Agricultural Markets (CMO) regime to ensure that CMO rules can operate effectively after the end of the Transition Period (TP). CMO provides a framework under the EU's Common Agricultural Policy (CAP) for market measures and responses to a market crisis in the agricultural sector.

51. Amongst other changes, the draft Common Organisation of the Markets in Agricultural Products (Producer Organisations and Wine) (Amendment etc.) (EU Exit) Regulations 2020 transfer from the Commission to the Secretary of State powers to approve a Protected Designation of Origin (PDO), a Protected Geographical Indication (PGI) or a traditional term in relation to wine, or if necessary to cancel the protection of such appellations where compliance with required specifications is no longer guaranteed. The Secretary of State is also given powers to protect UK PDOs and PGIs that have been registered by the Commission or Geographical Indications (GIs) or traditional terms that the UK has agreed to protect as part of an international trade agreement. According to the Department for Environment, Food and Rural Affairs (Defra), these provisions are fundamental to the UK having a viable GI scheme for wine, which is necessary to ensure that the UK meets its World Trade Organisation (WTO) obligations and is able to ratify certain wine trade agreements that have already been signed, such as those with Australia or the USA. As some provisions in this instrument relate to the continuation of certain CMO schemes after the end of the TP under Article 138 of the Withdrawal Agreement, the instrument will not be made until after the Agriculture Bill, which also makes provisions in this area, has received Royal Assent.

52. Amongst other changes, the draft Agriculture (Payments) (Amendment, etc) (EU Exit) Regulations 2020 place the Northern Ireland Protocol as it relates to aspects of EU finance, management and monitoring rules on a legal footing as required at the end of the TP. The instrument also makes amendments to previous EU Exit instruments to ensure UK paying agencies can continue to comply with EU rules in relation to Article 138 of the Withdrawal Agreement which provides for the continuation of certain rural development and CMO schemes after the end of the TP. The instrument further amends earlier EU Exit instruments that set rules for Public Intervention (PI) and Private Storage Aid (PSA) schemes under the CMO regime. Defra emphasises that these legislative changes will not have a practical impact on farmers and land managers.

Draft Public Procurement (Amendment Etc.) (EU Exit) Regulations 2020

53. Although Public Procurement regulations were made in 2019[20] to fix deficiencies in retained EU law, there have been a number of complex changes since then, including in the Withdrawal Agreement; these draft Regulations therefore revoke the two previous instruments and start again. Although lengthy, the Explanatory Memorandum (EM) is very thorough, explaining the policy in detail and highlighting the differences between these Regulations and the previous ones: for example the transitional provisions in the Schedule now allow procedures that are in progress on Implementation Period (IP) completion day to continue.

54. Paragraphs 7.30 to 32 of the EM also explain how these draft Regulations connect with the Trade Bill currently before Parliament. The Cabinet Office states that delays to the Bill's passage through Parliament mean that the secondary legislation to be made under its powers is highly unlikely to be ready before the end of the IP. As a contingency measure, the Minister therefore considers it appropriate, to preserve in these Regulations the duties owed, and remedies currently afforded to trade partners of the World Trade Organisation Agreement on Government Procurement , for a period of 12 months.

Draft Defence and Security Public Contracts (Amendment) (EU Exit) Regulations 2020

55. These draft Regulations also implement the UK's obligations under the Withdrawal Agreement and the EEA EFTA Separation Agreement but relate specifically to those public procurement procedures which are governed by the Defence and Security Public Contracts Regulations 2011[21] and have been launched but will not have been finalised before the end of the IP. The instrument also corrects deficiencies in the 2011 Regulations to ensure that they can operate effectively after 31 December 2020.

Draft European Union Withdrawal (Consequential Modifications) (EU Exit) Regulations 2020

56. This is an important technical instrument, necessary to ensure that the statute book operates correctly after Implementation Day. To ensure consistency, it incorporates retained direct EU legislation or relevant separation agreement law into the Interpretation Act 1978 and its equivalents in the Devolved Administrations. The Regulations also include general interpretative provisions, clarify how ambulatory and non-ambulatory references to EU law will work after 31 December 2020, and make various repeals of redundant EU-derived domestic legislation to declutter the statute book. The instrument provides a general gloss to ensure that the correct interpretation of any EU instrument applies. Cabinet Office states that statutory instruments being prepared by other departments in order to implement the Withdrawal Agreement, including the Northern Ireland Protocol, are relying on these glosses.

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20 Public Procurement (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/560) and the Public Procurement (Amendment etc.) (EU Exit) (No. 2) Regulations 2019 (SI 2019/623).

21 Defence and Security Public Contracts Regulations 2011 (SI 2011/1848).

Draft Persistent Organic Pollutants (Amendment) (EU Exit) Regulations 2020

57. This instrument proposes changes to ensure that retained EU law on Persistent Organic Pollutants (POPs)[22] can function effectively in Great Britain after the end of the Implementation Period (IP), and to implement the Northern Ireland Protocol ("the Protocol"). The Department for Environment, Food and Rural Affairs (Defra) explains that the Stockholm Convention ("the Convention") came into effect in 2004 with the aim of eliminating or restricting the production and use of POPs. While the UK currently meets the Convention obligations through EU law, the UK is a Party to the Convention in its own right and will continue to be bound by its obligations after the end of the IP.

58. This instrument aims to ensure that retained EU law on POPs is operable after the end of the IP and to enable Great Britain to implement its Convention obligations independently. Amongst other changes, the instrument transfers legislative and administrative functions that are currently held at EU level to public authorities in Great Britain, so that they can regulate the production, placing on the market and use of POPs. While EU law will continue to apply in Northern Ireland in this area, the Secretary of State will represent the UK for any direct Convention activities. The instrument creates a new power to take measures to control and trace waste contaminated by POPs in relation to Great Britain. This is a recent requirement under EU law[23] and the measures have not been developed yet. Any legislative changes will be subject to the affirmative procedure and will have to made by 31 October 2023.

59. Asked about this deadline, Defra told the Committee that there was no particular implementation date in EU law and that measures concerning the traceability and control of POPs were "complex and should be implemented with consideration of the wider waste management sector"; a period of three years was "considered appropriate to allow enough time to develop the measures and use the power, if needed, to create a control and tracing system".

60. We have received a submission from ClientEarth which raises a number of questions and concerns about the approach the Department has taken in this instrument to correcting deficiencies in retained EU law. We have published the submission and Defra's response on our website.[24] We note in particular the point made by ClientEarth that the instrument omits a current requirement under EU law that, when it is decided whether specific substances are by-products rather than waste, detailed criteria on the application of conditions on by-products "shall ensure a high level of protection of the environment and human health". Asked about this omission, the Department told us that further Regulations will be needed next year to confer powers from the EU to the UK in this area, and that this will be the "appropriate place to set out any conditions on the exercise of that power" and to consider " whether to

22 POPs are chemicals that persist in the environment, bioaccumulate through the food chain and pose a risk of harm to human health and the environment. They include pesticides (such as DDT), industrial chemicals (such as polychlorinated biphenyls, PCBs) and unintentional by-products of industrial processes (such as dioxins).

23 Regulation (EU) 2019/1021 of the European Parliament and of the Council of 20 June 2019 on persistent organic pollutants (recast).

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

make the exercise of the power subject to the condition identified by Client Earth".

Draft Pesticides (Amendment) (EU Exit) Regulations 2020

61. This instrument proposes a number of amendments to earlier EU Exit instruments that converted EU law on the regulatory regimes for plant protection products (PPPs) and maximum residue levels (MRLs) of pesticides in food and feed into UK domestic law, to ensure that the national regimes can operate effectively after the end of the Implementation Period (IP). According to the Department for Environment, Food and Rural Affairs (Defra), most of the amendments are required because new EU legislation has come into force since the earlier instruments were made, and changes are needed so that the new measures can work correctly in a national context. This includes updating transitional provisions in the earlier EU Exit instrument so that they apply from the end of the IP, rather than Exit Day. The instrument also makes amendments as a result of the Northern Ireland Protocol to reflect that the EU's PPP and MRL regimes will continue to apply in Northern Ireland. The instrument removes Northern Ireland from the retained EU legislation, so that the new PPP and MRL regimes will apply only in Great Britain, rather than UK-wide. With regard to the impact of the different regulatory regimes, Defra told us that:

> "Under the current regulations, each UK administration already has competence for decisions on which plant protection products can be authorised for marketing and use in their respective territories. This will remain the case after the end of the Transition Period. In practice, all administrations delegate regulatory functions to HSE to operate on their behalf. After the Transition Period ends, decisions for Great Britain will be taken under retained law and decisions for Northern Ireland will be taken under EU law […]. HSE will continue to undertake regulatory functions on behalf of all administrations and to operate on a four countries basis, assessing product applications through a single process, wherever possible. If not possible (for example, if there had been divergence between the EU and GB regimes on relevant matters) then applications to authorise pesticides in Northern Ireland would need to be determined in accordance with the different EU requirements."

62. We have received a submission by ClientEarth which raises a number of questions about the way this instrument proposes to correct deficiencies in retained EU law. We have published this submission and Defra's response on our website.[25]

Other instruments

63. The Civil Procedure (Amendment No. 3) Rules 2020 were laid before Parliament on 17 July 2020 and came into force on 23 August 2020. We should have scrutinised the Regulations at our 24th meeting on 28 July 2020 but, due to an oversight, we did not consider the instrument then or at any subsequent meeting. Unfortunately, we only became aware of this oversight after the prayer period of the instrument had expired.

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

64. We also did not consider the Education (Induction Arrangements for School Teachers) (England) (Coronavirus) (Amendment) Regulations 2020 (SI 2020/842) and the Education (National Curriculum Assessment Arrangements, Attainment Targets and Programmes of Study) and (Pupil Information and School Performance Information) (Amendment) (England) Regulations 2020 (SI 2020/844). Both instruments were laid before Parliament by the Department for Education on 11 August 2020 and we should have considered the instruments at our 25th meeting on 8 September. However, the Department failed to send copies of these instruments to the Committee, and we only became aware of this oversight after the prayer period of the instruments had expired. We have written to the Acting Permanent Secretary to alert the Department to this oversight.

INSTRUMENTS NOT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

Draft instruments subject to affirmative approval

Agriculture (Payments) (Amendment, etc) (EU Exit) Regulations 2020

Blood Safety and Quality (Amendment) (EU Exit) Regulations 2020

Common Organisation of the Markets in Agricultural Products (Producer Organisations and Wine) (Amendment etc.) (EU Exit) Regulations 2020

Defence and Security Public Contracts (Amendment) (EU Exit) Regulations 2020

European Union Withdrawal (Consequential Modifications) (EU Exit) Regulations 2020

Food (Amendment) (EU Exit) Regulations 2020

Human Fertilisation and Embryology (Amendment) (EU Exit) Regulations 2020

Human Tissue (Quality and Safety for Human Application) (Amendment) (EU Exit) Regulations 2020

Non-Domestic Rating (Rates Retention, Levy and Safety Net and Levy Account: Basis of Distribution) (Amendment) Regulations 2020

Persistent Organic Pollutants (Amendment) (EU Exit) Regulations 2020

Pesticides (Amendment) (EU Exit) Regulations 2020

Public Procurement (Amendment etc.) (EU Exit) Regulations 2020

Quality and Safety of Organs Intended for Transplantation (Amendment) (EU Exit) Regulations 2020

Timber and Timber Products and FLEGT (Amendment) (EU Exit) Regulations 2020

Instruments subject to annulment

SI 2020/1077	Prison and Young Offender Institution (Coronavirus, Etc.) (Amendment) (No. 3) Rules 2020
SI 2020/1078	Proceeds of Crime Act 2002 (References to Financial Investigators) (Amendment) (England and Wales) Order 2020
SI 2020/1087	Ministry of Defence Police (Conduct, Performance and Appeals Tribunals) Regulations 2020
SI 2020/1090	Health Protection (Coronavirus, Public Health Information for Passengers Travelling to England) (Amendment) Regulations 2020
SI 2020/1094	Health Protection (Coronavirus, International Travel) (England) (Amendment) (No. 18) 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 20 October 2020, Members declared no interests.

Attendance:

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