HOUSE OF LORDS

Secondary Legislation Scrutiny Committee

46th Report of Session 2022–23

Drawn to the special attention of the House:

Draft Postal Packets (Miscellaneous Amendments) Regulations 2023

Russia (Sanctions) (EU Exit) (Amendment) (No. 3) Regulations 2023

Correspondence: Draft Pensions Dashboards (Amendment) Regulations 2023

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Secondary Legislation Scrutiny Committee

The Committee's terms of reference, as agreed on 12 May 2022, are set out on the website but are, in summary:

To report on draft instruments published under paragraph 14 of Schedule 8 to the European Union (Withdrawal) Act 2018; to report on draft instruments and memoranda laid before Parliament under sections 8 and 23(1) of the European Union (Withdrawal) Act 2018 and section 31 of the European Union (Future Relationship) Act 2020.

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), Chris Smith (Adviser), Jane White (Adviser) and Riona Millar (Committee Operations Officer).

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.

Forty Sixth Report

INSTRUMENTS UNDER THE EUROPEAN UNION (WITHDRAWAL) ACT 2018

Consideration of published draft instrument under Schedule 8 to the European Union (Withdrawal) Act 2018

Published draft on which the Committee makes no recommendations

Public Health England (Dissolution) (Consequential Amendments) Regulations 2023

This draft instrument was published under a procedure set out in Schedule 8 to the European Union (Withdrawal) Act 2018. The procedure was abolished by the Retained EU Law (Revocation and Reform) Act 2023 and so this is the last item of its type.

DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

Draft Postal Packets (Miscellaneous Amendments) Regulations 2023

Date laid: 29 June 2023

Parliamentary procedure: affirmative

These Regulations would implement part of the Windsor Framework by applying certain customs requirements to parcel movements from Great Britain to Northern Ireland. We have received submissions that criticise the Regulations, including for contravening the principle of unfettered access within the UK, for introducing a "customs border" compared to current arrangements and for being contrary to the Good Friday Agreement. The Government, on the other hand, have stressed the reduced frictions compared to those that would have been in place had the Northern Ireland Protocol, which the Windsor Framework replaces, been implemented in full.

It is not our place to adjudicate on this difference of views. However, we do note that the information provided with the instrument is deficient in some respects. For example, the absence of a consultation and of any impact information has not been well accounted for. Moreover, the Regulations would make some changes to existing requirements that were not mentioned at all in the initial Explanatory Memorandum and have not been adequately explained since. We also do not understand the rationale for bringing the instrument into force on 31 August 2023, given the Government's arguments in response to other questions. ***The House may wish to probe the Minister further in these areas.***

These draft Regulations are drawn to the special attention of the House on the ground that the explanatory material laid in support provides insufficient information to gain a clear understanding about the instrument's policy objective and intended implementation.

Background

1. These Regulations would provide the UK with powers in relation to parcels ('postal packets') moving from Great Britain (GB) to Northern Ireland (NI). HM Revenue and Customs (HMRC) states that these powers are required under new arrangements agreed between the UK and the EU as part of the Windsor Framework.

2. The new arrangements under the Framework will reduce customs requirements for parcels moving from GB to NI, compared to those envisaged under the NI Protocol, which the Framework replaces. For example, for parcels moving from consumer to consumer (C2C), business to consumer (B2C) or consumer to business (C2B), requirements under the NI Protocol, such as for customs declarations, pre-notification and presentation of goods, would be removed. Instead, parcel carriers would manage a process of data sharing with HMRC. In addition, parcels moving from GB businesses to NI businesses (B2B) that are not destined for onward moves to the EU would be able to use a 'green lane' in the same way as freight movements. Movements in the green lane would not require the completion of international customs requirements but would use a new system, which HMRC describes as "based on commercial information". Parcels that are destined for onward movement to the EU would need to use a 'red lane' and would be subject to customs requirements.

3. Within this broader context, this instrument would provide the powers to police the 'green lane' and the risks of smuggling into the EU, including by seizing, detaining or inspecting parcels moving from GB to NI, and by charging duty where relevant; for example, for goods destined for onwards movement into the EU.

4. The Regulations would come into force on 31 August 2023, and the new arrangements for parcels moving from GB to NI are to apply from 30 September 2024.

5. However, HMRC states that the instrument would also allow powers in relation to "existing requirements", such as those for restricted goods; for example invasive alien species or ozone depleting substances.

The current position

6. At present, customs provisions such as duty collection and enforcement powers only apply to parcels entering or leaving the UK, with some limited exceptions in relation to prohibited and restricted goods. Apart from these exceptions, parcels moving within the UK cannot currently be searched, seized or intercepted by HMRC.

7. The NI Protocol came into force on 1 January 2021. Its provisions include a range of more stringent customs requirements, including customs declarations for all parcel movements from GB to NI. However, the Protocol has not yet been fully implemented, including in this area. Instead, 'grace periods' are operating, which simplify some procedures and temporarily suspend the full application of EU law to NI.[1] The Windsor Framework replaces the Protocol.

Submissions

8. We received six submissions on the Regulations, including from the Democratic Unionist Party (DUP) and the Road Haulage Association (RHA). We asked HMRC for a response to each of the submissions. The submissions and the Government's response can be found on our website.[2]

NI's position in the UK

9. The submissions suggested that the Regulations contradict statements by the Prime Minister and Secretary of State for NI when introducing the Windsor Framework around NI's position in the UK. For example, the RHA quotes a Government statement that the Framework "removed any sense of Border in the Irish Sea and it would be as easy to move goods from Birmingham to Belfast as it would be to move goods from Birmingham to the Isle of Wight". The DUP also said that the Prime Minister promised that the Framework would allow "unfettered access" in movements between GB and NI.

10. RHA argued that, instead, the Regulations "add additional obstacles, bureaucracy, and costs", introduce "a customs border" between GB and NI and treat NI "as if it's a foreign country". The DUP argued that "unfettered access" required that "goods services and all factors of production can move freely without customs barriers", but that the Regulations instead introduce

1 House of Commons Library, 'Northern Ireland Protocol' (28 February 2023): https://commonslibrary.parliament.uk/research-briefings/cbp-9548/ [accessed 11 July 2023].

2 https://committees.parliament.uk/committee/255/secondary-legislation-scrutiny-committee/publications/8/scrutiny-evidence/.

new fettering in the form of customs barriers. Several of the submissions suggested that the result of the new arrangements would be increased costs and/or reduced choice for NI consumers.

11. The Government's response described the reduced frictions under the Framework compared to the Protocol, had it been fully implemented, including the green lane for B2B movements. The Government further stated that "there will also be no routine checks or controls applied to consignments, with interventions only on the basis of a risk-based, intelligence-led approach. This will mean consumers in Northern Ireland will be able to receive parcels from Great Britain without burdens."

12. The submissions and the Government are approaching this question from different angles. The submissions state that the changes in the instrument introduce some frictions in GB to NI parcel movements compared to the current position, under the grace periods in the NI Protocol. The Government argue these frictions are less than they would have been if the NI Protocol had been fully implemented and without the Windsor Framework. **It is possible that both these positions are correct, and it would not be appropriate for us to express a further view on the debate.**

Consistency with the Good Friday Agreement

13. The DUP submission argues that the Regulations are contrary to the Belfast Good Friday Agreement (GFA) and, as such, break international law. The DUP states this is because the Regulations breach the commitment in the Agreement that "it would be wrong to make any change in the status of Northern Ireland save with the consent of a majority of its people", because the Regulations "plainly change the status of Northern Ireland, such that it is to be treated as foreign with respect to the rest of the United Kingdom, for some customs purposes".

14. Nevertheless, the DUP recognises that because the GFA has not been given effect in domestic law, Parliament does have the option to approve these Regulations. The DUP says:

> "Parliament has the option of effectively rendering the relevant part of the [Good Friday] Agreement null and void by allowing it to be contradicted by these regulations or, given that no Parliament can bind its successors, it can reject these regulations and bring forward new legislation to give effect to the protections in the Belfast Agreement in domestic law."

15. The Government's response to the submissions stated that "neither the Windsor Framework, nor this instrument change the constitutional status of Northern Ireland. Northern Ireland remains an integral part of the UK." The Explanatory Memorandum (EM) laid alongside the Regulations states that the instrument "does not diminish the rights, safeguards and equality of opportunity provisions" set out in the GFA.

16. Again, it would not be appropriate for us to express a view on this question.

Timing and powers in relation to existing requirements

17. The Regulations, with an initial version of the EM, were laid on 29 June 2023. The EM was deficient in several respects, and we asked that it was revised and relaid.

18. On 30 June 2023, the Government requested that we expedite our consideration of the Regulations, to ensure that they could be debated before Parliament's summer recess. However, no reason was given other than "to introduce these powers at the earliest opportunity". In general, to provide expedited consideration, we expect a clear explanation of why this is urgently needed. Given that the arrangements in the Regulations do not apply until September 2024, we did not find the arguments presented compelling.

19. In response to a request for further explanation, HMRC added that the instrument would also allow powers in relation to "existing requirements". We asked HMRC to expand on this point in the revised EM. Specifically, we asked for information on:

- what existing requirements are being referred to;
- why the powers to enforce those arrangements do not currently exist;
- why they are needed; and
- what "appropriate" powers, that are now being taken, means in practice.

20. HMRC laid a revised EM on 6 July 2023. This version included a statement that the Regulations "will also allow appropriate powers to detect where GB to NI postal packets do not meet existing requirements such as those for restricted goods, for example invasive alien species or ozone depleting substances". In its response to the submissions, the Government further stated that the powers in the instrument "are also needed under existing arrangements currently in place to better manage any risks of smuggling".

21. **This is not a clear explanation of what powers are being introduced that have effect before 30 September 2024 and why they are needed now. The House may wish to question the Minister further on the changes made by the Regulations in relation to "existing requirements".**

22. We also asked HMRC why, if the Regulations make changes that are needed to existing requirements, they are not being brought into force until 31 August 2023, rather than immediately after the Regulations are approved by Parliament. HMRC did not respond on this point.

23. **We do not understand HMRC's approach to bringing these Regulations into force.** If the instrument relates to requirements being applied from September 2024, it should not need to be treated urgently. If the instrument relates to deficiencies in existing powers, it would make more sense to bring it into force at the earliest possible opportunity. **Again, the House may wish to question the Minister on this point**.

Lack of consultation and impact information

24. The EM stated that no consultation had been undertaken on the instrument because it "implements requirements under the Windsor Framework".

25. The DUP submission described this "failure" to consult as "particularly stark" given the "constitutional implications" of the Regulations. The Government's response to the submissions did not address this point.

26. We accept that it might not have been appropriate to consult on the principle of *whether* to introduce the changes in the instrument, given that they are

required by the Windsor Framework. However, the Government have not addressed the question of whether it may have been appropriate to consult on the details of how the changes are implemented. As we have previously noted, consultation can provide opportunities to improve a policy and can also help to improve confidence in the policy, especially in a controversial area such as this.[3]

27. The RHA submission also noted the absence of an impact assessment on the changes. The EM stated that an impact assessment had not been prepared "because impacts on businesses and the public sector are limited and not easily quantified". In response to our questions, HMRC argued that, because the measures in the instrument are linked to other changes brought about by the Windsor Framework, it is "difficult to easily quantify the effect until new arrangements are in place and as such the impact is limited and not easily quantified".

28. We appreciate that the Regulations are part of a wider set of changes. **However, as they introduce quite specific changes in relation to customs procedures, we are surprised that HMRC were not able to offer any information at all on impact and resourcing.**

Conclusion

29. These Regulations would apply certain customs requirements to parcel movements from GB to NI. The explanatory material was inadequate; for example, even with the EM being relaid, we are still not entirely clear on one aspect of the instrument and on why it is being brought into force on 31 August 2023. **The Regulations are in a controversial area, as is clear from the submissions we have received. This makes it even more important to observe our normal requirements for clear and comprehensive explanatory material and supporting information.**

3 *Interim Report on the Work of the Committee in Session 2022–23* (42nd Report, Session 2022–23, HL Paper 205), para 24.

Russia (Sanctions) (EU Exit) (Amendment) (No. 3) Regulations 2023 (SI 2023/713)

Date made: 27 June 2023

Parliamentary procedure: made affirmative

This instrument closes a gap in the sanctions regime so that no UK person, wherever located, may provide legal advisory services on any type of contract with a Russian interest that would be prohibited by the UK sanctions regime. This includes transactions between a Russian entity and third party, regardless of the nationality of the third party and regardless of the location of the transaction. We have received representations from an international law firm based in the UK which says this prevents them from conducting any international business. The Foreign, Commonwealth and Development Office confirms their interpretation of the comprehensiveness of the ban but states that the Government are urgently considering mitigating measures. ***The House may wish to ask the Minister for further information.***

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.

30. This instrument further reinforces the restrictions on the provision of legal services so that UK lawyers cannot advise on any contracts anywhere that involve Russian interests. Exemptions remain in place so that lawyers representing firms or people in criminal court cases may still act or may provide advice on how various sanctions might apply.

31. The Foreign, Commonwealth and Development Office (FCDO) states that the law of England and Wales is often chosen as the law governing international commercial activities and, as such, the services of UK lawyers are frequently engaged in relation to those activities, even if the activity is not conducted in the UK or by UK persons. This instrument supplements other restrictions on providing legal services, so that no UK person or person in the UK can provide legal advisory services in relation to financial or trade activity which would be prohibited under the UK sanctions regime if the activity was done by a UK person or was taking place in the UK.

32. We have been contacted by a representative of international law firm, Covington and Burling LLP, on behalf of themselves and other similar firms. Their submission, published in Appendix 1, suggests that this legislation goes beyond the policy intention and

> "effectively prohibits, in a wide range of circumstances, practitioners of non-UK law who work in the UK from providing critical advice to international companies concerning compliance with US and EU sanctions and export controls in relation to Russia, as well as other areas of compliance-related advice (such as non-UK anti-corruption and anti-money laundering advice, for example)."

The legislation came into immediate effect and has, therefore, had the effect of criminalising advice already in progress.

33. We asked whether this was the policy intention of the instrument, which the FCDO confirmed:

> "At present, if the conditions are met, where commercial activity is already sanctioned by the UK, UK legal professionals are not able to enable or facilitate that activity if the sanctioned activity: a) takes place within the UK, or b.) is undertaken by a UK person anywhere in the world.
>
> In practice, this means that a UK lawyer cannot intentionally provide legal advisory services where the object or effect of the legal advisory service directly or indirectly circumvents prohibitions on commercial activity between Russian persons and UK persons. However, until the introduction of the new legal advisory services measure, it was possible that UK lawyers could advise on some commercial activities if they took place between a person or entity associated with Russia and a non-UK third country person or entity. This is because the UK sanctions regime does not generally apply to third country persons undertaking commercial activity outside of the UK.
>
> The new measure ensures that this gap is closed, meaning that no UK person, wherever located, may provide legal advisory services on any type of transaction that would be prohibited by the UK sanctions regime between a Russian entity and third party–regardless of the nationality of the third party and regardless of the location of the transaction.
>
> The measure includes an exception for advice in relation to such transactions that concern compliance with the UK sanctions regime. This exception is necessary to ensure that individuals and organisations are able to fully understand (by obtaining legal advice, where necessary) the implications of our sanctions framework.
>
> The correspondent is correct that the measure could be interpreted as preventing them from advising an international client on issues of compliance with a non-UK sanctions regime (in relation to a transaction with a Russian party that would be prohibited under UK sanctions). We have heard from the sector that this will cause issues with providing wrap-around advice to aid compliance with multiple sanctions regimes, and we are urgently considering the introduction of a general license which would put this matter beyond doubt. We will say more about this issue soon."

34. This instrument follows the made affirmative procedure, which allows urgent legislation to come into immediate effect, but requires an approval motion within 28 days for the legislation to remain in effect. **The House may wish to note the sector's concerns and ask the Minister for further information.**

CORRESPONDENCE

Draft Pensions Dashboards (Amendment) Regulations 2023

35. Our Interim Report on the Work of the Committee, published in May 2023, drew attention to the current poor quality of Explanatory Memoranda (EMs) from a number of departments in the preceding 12 months.[4]

36. Disappointingly, in our 44th Report, in which we reported on the draft Pensions Dashboards (Amendment) Regulations 2023, we provided extensive additional information that we felt was needed to supplement the EM on these Regulations so that the House could understand the policy intention.[5] We therefore wrote to the Department for Work and Pensions (DWP), to seek an explanation of why, since it had the information, it had chosen not to include that material in the EM laid with the Regulations.

37. The correspondence from the Minister, Laura Trott MP, is published at Appendix 2. While her letter reassuring us that DWP is taking action to address the deficiencies is welcome, we would prefer to see it evidenced by a rapid improvement in the quality of the EMs being laid by the Department.

4 *Interim Report on the Work of the Committee in Session 2022–23*, (42nd Report, Session 2022–23, HL Paper 205) paras 30–37.

5 44th Report (Session 2022–23, HL Paper 217), paras 19–28.

INSTRUMENTS NOT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

Draft instruments subject to affirmative approval

Draft	Human Medicines (Amendment Relating to Original Pack Dispensing) (England and Wales and Scotland) Regulations 2023

Made instruments subject to affirmative approval

SI 2023/704	Money Laundering and Terrorist Financing (High-Risk Countries) (Amendment) Regulations 2023

Draft instruments subject to annulment

Draft	Cannock Chase (Electoral Changes) Order 2023
Draft	North Hertfordshire (Electoral Changes) Order 2023

Instruments subject to annulment

SI 2023/698	Civil Enforcement of Moving Traffic Contraventions Designation Order 2023
SI 2023/712	Relevant Licensee Nuclear Company Administration (England and Wales) Rules 2023
SI 2023/718	Direct Payments to Farmers (Eligible Hectares and Afforested Areas) (Amendment) (England) Regulations 2023
SI 2023/727	Aviation Security (Air Cargo Agents) (Amendment) Regulations 2023

APPENDIX 1: RUSSIA (SANCTIONS) (EU EXIT) (AMENDMENT) (NO. 3) REGULATIONS 2023 (SI 2023/713)

Correspondence from David Lorello, Covington & Burling LLP, to the Rt Hon. Lord Hunt of Wirral MBE, Chair of the Secondary Legislation Scrutiny Committee

The attached letter [*see letter below addressed to the Joint Committee on Statutory Instruments*] describes our concerns with regard the latest amendment to the UK-Russia sanctions regulations, issued last Friday, which introduces a new prohibition on legal advisory services relating to Russia. For the reasons noted in the attached letter, the new legislation effectively prohibits, in a wide range of circumstances, practitioners of non-UK law who work in the UK from providing critical advice to international companies concerning compliance with U.S. and EU sanctions and export controls in relation to Russia, as well as other areas of compliance-related advice (such as non-UK anti-corruption and anti-money laundering advice, for example). We do not believe that the intention of the regulation is to criminalize the provision of such advice by lawyers in the UK, but that has been its effect, and that effect is causing immediate challenges for law firms such as ours, and for our clients. Having consulted, over the last several days, with many other UK-based lawyers who advise on non-UK law, it is our understanding that many other law firms face the same challenges that we do.

Attached letter:

We write in relation to the Russia (Sanctions) (EU Exit) (Amendment) (No. 3) Regulations 2023 (SI 2023/713) (the "Amending Regulations"), which modified the Russia (Sanctions) (EU Exit) Regulations 2019 (SI 2019/855) (the "Russia Regulations"). The Amending Regulations were laid before Parliament on 29 June 2023 under section 55(3) of the Sanctions and Anti-Money Laundering Act 2018 (the "Act"), and entered into force on 30 June 2023. In accordance with the Act, the Amending Regulations are subject to the made affirmative procedure.

We wish to draw the Committee's attention to an aspect of the Amending Regulations which, in our view, would have the counterproductive effect of impeding the provision of coordinated, multi-jurisdictional economic sanctions, export controls and related legal compliance advice to multinational businesses headquartered outside the United Kingdom by lawyers operating in the United Kingdom, including members of our firm. In short, the Amending Regulations make it a crime to provide a broad range of non-UK legal compliance advice, which many companies around the world depend on UK-based lawyers to provide.

We respectfully submit that such a measure is unprecedented, unnecessary, and likely unintended, and its continued implementation in the Russia Regulations presents immediate and substantial challenges to UK-based lawyers and their international clients, which the Government should take immediate action to remediate. Many international companies depend on UK-based lawyers, for example, to provide urgent consolidated advice concerning the UK, US, and EU sanctions in relation to Russia, and some of those clients already are questioning how they will be able to continue seeking critical compliance advice from us in light of the Amending Regulations.

As we understand that the responsible minister for the Amending Regulations was Anne-Marie Trevelyan MP, and the Amending Regulations were signed by David Rutley MP, we are in touch with the Foreign, Commonwealth and Development

Office ("FCDO") in relation to the matters set out in this letter. The issues created by the Amending Regulations are immediate, and we therefore wish for the Government to act on an immediate basis in addressing them. However, given the likely adverse impact of the Amending Regulations, we also urge you and the other members of the Committee to give this matter your prompt attention.

Section I of this letter provides background information concerning our firm. Sections II and III highlight the key provisions of the Russia Regulations and Amending Regulations, and outline our concerns with the Amending Regulations. Section IV explains why the issuance of guidance, or a general licence, would not be an adequate solution to the problems created by the Amending Regulations. Finally, in Section V, we offer specific wording for further amendments to the Regulations that could address the concerns identified.

I: About our Firm

Covington & Burling LLP is an international law firm headquartered in Washington, DC. It has offices in several cities and countries outside the United States, including London. The firm has one of the world's largest and most recognised international economic sanctions and export controls practices. It is one of only two firms to be recognised in "Band 1" of the *Chambers USA 2023* peer review publication for economic sanctions and export controls matters, and several lawyers (including UK-based lawyers) are individually recognised for their expertise in such matters. Our firm also regularly provides, through its London-based lawyers, advice on compliance with other non-UK laws, such as US and EU anti-bribery and anti-money laundering laws.

Since Russia's full-scale invasion of Ukraine, Covington's advice has been instrumental in enabling many multinational companies, including many headquartered outside the United Kingdom, to wind down their business activities in Russia, and to aid clients that have remained in the Russian market to ensure that their ongoing activities do not breach economic sanctions and export controls. This includes, for example, global pharmaceutical companies that are continuing to provide critical medical supplies to Russia.

The London office is the centre of the firm's economic sanctions and export controls practice outside of the US, and clients depend on the London office to provide seamless advice regarding UK, US and EU economic sanctions and export controls laws. The team also coordinates the provision of advice regarding equivalent laws in EU Member States and other jurisdictions, either via our offices in Brussels and Frankfurt, or via relationships with appropriately qualified local counsel. This approach ensures that our clients are able to obtain coordinated economic sanctions and export controls compliance advice in all relevant jurisdictions, as well as advice regarding related financial crime risks (such as advice under UK and EU anti-money laundering regulations). It is essential for the firm's UK-based lawyers to be involved in that work, in order to ensure that our clients receive the advice they need.

It is not the intention of the firm or its individual lawyers to assist international companies in circumventing Russia-related sanctions, and the team does not provide commercial law advice to aid companies in doing business with Russia. Indeed, the London- based vice chair of the practice has deep family connections in Ukraine, and the firm is acting for the Government of Ukraine and other Ukrainian persons and entities in various matters adverse to the Government of the Russian Federation, including ongoing proceedings in the International Court of Justice.

II: Purpose and Key Provisions of the Amending Regulations

According to the Explanatory Note that accompanied the Amending Regulations, their purpose is to address a potential gap relating to the provision of legal advisory services that were not previously covered by the Russia Regulations. Specifically, paragraphs 7.6 and 7.7 of the Explanatory Memorandum state (in relevant part):

> *"7.6 […] [W]ithout these Regulations, it would potentially be lawful for a UK legal services provider to support commercial activity which advances the interests of Russia, where that activity does not have sufficient connection to the UK to be prohibited under the UK sanctions regime. This is a particular concern given that the law of England and Wales is often chosen as the law governing international commercial activities, and as such, the services of UK lawyers are frequently engaged in relation to those activities, even if the activity is not conducted in the UK or by UK persons.*
>
> *7.7 This instrument addresses this issue and supplements other restrictions on providing legal services. It means that no UK person or person in the UK can provide legal advisory services in relation to certain financial or trade activity which would be prohibited under the UK sanctions regime if the activity was done by a UK person or was taking place in the UK."*

The Amending Regulations seek to achieve that objective by inserting into the Russia Regulations a new regulation 54D. However, that provision actually goes further than the stated objective, as it does not just make it unlawful for a UK legal services provider to "support commercial activity which advances the interests of Russia". Instead, regulation 54D prohibits the direct or indirect provision of legal advisory services to any person who is not a United Kingdom person in relation to, or in connection with, any activity which would be prohibited by the Russia Regulations if the relevant activity were to be done by a UK person or were to take place in the UK.

For purposes of regulation 54D, the Amending Regulations also insert a new definition of "legal advisory services" into paragraph 8A of Schedule 3J of the Russia Regulations. In relevant part, the definition in paragraph 8A(1)(a) includes:

> *"the provision of legal advice to a client in non-contentious matters, involving any of the following—*
>
> (i) *the application or interpretation of law;*
>
> (ii) *acting on behalf of a client, or providing advice on or in connection with, a commercial transaction, negotiation or any other dealing with a third party; [and]*
>
> (iii) *the preparation, execution or verification of a legal document[.]"*

Finally, the Amending Regulations introduce certain exceptions to the general prohibition by adding new regulation 60DB to the Russia Regulations. Again, in relevant part, this provision states:

> *"(2) The prohibitions in regulation 54D are not contravened by any act done by a person in satisfaction of an obligation in respect of the provision of legal advisory services to any person where the services are provided in relation to the discharge of or compliance with UK statutory or regulatory obligations.*

> *(3) The prohibitions in regulation 54D are not contravened by any act done by a person for the purpose of providing legal advice to any person as to whether an act or a proposed act complies with these Regulations."*

In other words, the exception only permits the provision of legal advisory services where a client approaches a UK-based lawyer for advice in connection with UK law compliance obligations.

III: Impact of the Amending Regulations

The practical impact of the Amending Regulations is to severely—and, we assume, unintentionally—impede the provision of non-UK compliance advice to non-UK clients by our firm, and other firms that offer similar services out of the UK. The Amending Regulations criminalise the practice of non-UK law in the UK to a degree that we believe may be unprecedented in UK law. The interest of individuals and corporate entities to clearly understand, through the advice of counsel, their statutory and regulatory obligations is one of the most critical services provided by lawyers, but it is fundamentally impeded by the Amending Regulations. We note that the FCDO did not conduct any consultation before announcing the Amending Regulations and laying them before Parliament. There is no clear rationale for the lack of consultation in this context.

The following examples highlight the substantial adverse consequences of the Amending Regulations:

- Consider a client headquartered in the US, but with UK and EU operations, that is seeking advice from our London office regarding a transaction involving a person designated for sanctions under the Russia Regulations. In that scenario, we would be permitted to provide advice on compliance with the Russia Regulations and other relevant provisions of UK law. We would obviously need to advise the client that it would generally breach UK sanctions for a UK person to engage in commercial activities with such a designated person, unless a relevant exception or licence applies. However, if we were to provide advice to the same client about whether the same transaction would breach the US and EU economic sanctions and export controls laws, we would commit a criminal offence under regulation 54D.
- Similarly, consider a client headquartered in an EU Member State, but with UK operations, that is seeking advice from our London office regarding receipt of funds from a person designated for sanctions under the Russia Regulations via a UK bank account. In that scenario, we would be permitted to provide advice on compliance with the Russia Regulations and any related UK anti-money laundering law compliance obligations.

  However, we would not be able to provide advice regarding the equivalent EU anti-money laundering or sanctions standards.
- In a similar vein, consider a scenario where a US client of our firm seeks guidance from one of our London-based experts in the US Foreign Corrupt Practices Act ("FCPA"), concerning whether a payment of funds to a member of the Russian federal parliament breached the FCPA. If, as would be likely, the parliament member is designated for UK asset-freezing sanctions (we understand that the UK has sought to designate all Russian parliament members), the payment of a bribe to the Russian parliament member would breach UK sanctions if undertaken within the UK (i.e., by providing funds to a person subject to UK asset-freezing sanctions). We therefore would,

under the current Russia Regulations, commit a crime if we were to give our US client advice concerning the application of the US FCPA in that context.

These outcomes are nonsensical, and would have a highly disruptive impact on the ability of multinational clients to comply with the multiple economic sanctions and export controls laws to which they are subject, as well as other international legal regimes. This includes, in particular, the laws implemented by jurisdictions that are broadly aligned with UK Government objectives for economic sanctions and export controls, such as the US, EU, and EU Member States.

It is, moreover, not an adequate solution for our clients to seek advice from UK-based lawyers on UK compliance matters, and advice from non-UK based lawyers on non-UK matters. Our clients need *coordinated and consolidated* advice, in a single legal analysis, on key compliance issues across the UK and other jurisdictions, in order to enable them to efficiently develop and implement a coherent, global compliance programme. It is precisely for that reason that our firm—and we understand many others—have invested for years in building export controls, economic sanctions, anti-corruption and anti-money laundering practices (among other areas of law) in the UK, to serve as a hub for providing advice in these areas to multinational clients. Unsurprisingly, we have already received a number of queries from clients who are concerned that the Amending Regulations may prevent them from obtaining such advice in the future.

While we recognise that the Amending Regulations include a short wind-down provision[6] allowing for the continued provision of legal advice under pre-existing contracts until the end of September 2023, that provision does not capture new engagements with clients who seek our advice on a time-sensitive basis, and with whom we do not currently have an engagement. That wind-down provision also offers no long-term comfort to our clients, almost all of whom will require the continued advice of our London-based lawyers after September 2023.

Likewise, the Amending Regulations[7] allow the provision of legal advisory services when done to assist with the urgent prevention or mitigation of an event likely to have a serious and significant impact on human health or safety, infrastructure or the environment, but that provision will not be applicable in most circumstances in our practice (and presumably those of our peer firms in the UK).

IV: Issuance of Guidance or a General Licence Will Not Adequately Address the Problems Created by the Amending Regulations

Based on informal comments made by officials during a meeting of the Office of Financial Sanctions Implementation Legal Sector Forum on 4 July 2023, we understand that the UK Government has been surprised by the adverse impacts created by the Amending Regulations and is considering how to respond. One potential solution considered during that meeting was the provision of statutory guidance regarding the interpretation of the Amending Regulations. With respect, that would not solve the problems summarised above: statutory guidance cannot modify the content of the Amending Regulations, and there is no way to interpret the Amending Regulations in a manner that would permit the provision of non-UK law compliance advice of the kinds that we and other firms provide to our multinational clients.

We also understand that consideration is being given to the issuance of a general licence allowing the provision of certain non-UK compliance advice. That, again,

6 Regulation 5 of the Amending Regulations, establishing regulation 60DB(4) of the Russia Regulations.
7 Regulation 6 of the Amending Regulations, modifying regulation 61(1A) of the Russia Regulations.

is not a viable solution. Under regulation 77 of the Russia Regulations, parties that take action under the authority of general licenses are required, upon the instruction of the Secretary of State, to make available a broad range of records for inspection. Adopting that standard in the present context—through the issuance of a general licence—would effectively require law firms to disclose client confidential information, which is protected from disclosure under legal professional privileges, to the UK Government. The Government has, we respectfully submit, no legitimate interest in having a generalised right to review the text of confidential legal advice that we are providing our clients concerning compliance with non-UK sanctions, export controls, and anti-corruption laws, or compliance with other US and EU legal and regulatory obligations.

For the same reasons, although we may be able to seek a licence as an interim risk mitigation measure, we do not regard that as a viable long-term solution to the adverse impacts presented by the Amending Regulations.

V: Request for Modification to Correct the Problems Created By the Amending Regulations

In the circumstances, our view is that the only viable option is for the FCDO to modify the Amending Regulations on an urgent basis, before they receive approval via the made affirmative procedure. The Russia Regulations should, we submit, never have been broadened in the first place to criminalise the provision of legal compliance advice, and the only adequate way to address the issue is to remove that prohibition. In principle, there are three approaches that could be workable in our judgment, as set out below.

A. Option 1: Limit Scope of Prohibition to Cover UK Law Only

The first approach would be to modify the definition of "legal advisory services" in regulation 8A(1) as follows:

"(1) "Legal advisory services"—

(a) *means the provision of* ***UK*** *legal advice to a client in non- contentious matters, involving any of the following—*

- (i) *the application or interpretation of* ***UK*** *law;*
- (ii) *acting on behalf of a client, or providing advice on or in connection with a commercial transaction, negotiation or any other dealing* ***governed by UK law*** *with a third party;*
- (iii) *the preparation, execution or verification of a legal document* ***governed by UK law****[.]"*

This approach would fully mitigate the adverse impacts that we have identified. In particular, it would cease to be unlawful for a UK legal services provider to deliver legal advisory services to non-UK persons under non-UK laws in relation to, or in connection with, any activity which would be prohibited by the Russia Regulations if the relevant activity were to be done by a UK person or were to take place in the UK. This approach would appear to address the Government's stated concern, noted above, concerning the use of English law in contractual arrangements that advance the interests of Russian parties.

B. Option 2: Expand Exemption to Cover Non-UK Statutory or Regulatory Obligations

The second approach would be to modify the exemption under regulation 60DB(2) to read as follows:

> *"(2) The prohibitions in regulation 54D are not contravened by any act done by a person in satisfaction of an obligation in respect of the provision of legal advisory services to any person where the services are provided in relation to the discharge of or compliance with UK* ***or non-UK*** *statutory or regulatory obligations,* ***or understanding the meaning and consequences of UK or non-UK statutes or regulations."***[8]

This exemption would retain a general prohibition against providing purely commercial law advice in circumstances triggered by regulation 54D, while exempting advice under non-UK laws that focus on assisting a client in understanding their non-UK statutory and regulatory compliance obligations.

C. Option 3: Expand the Compliance Exemption

The third approach (which could be undertaken in tandem with the second approach) would be to modify the exemption under regulation 60DB(3) to read as follows:

> *"(3) The prohibitions in regulation 54D are not contravened by any act done by a person for the purpose of providing legal advice to any person as to whether an act or a proposed act complies with these Regulations,* ***or whether the act complies with or would trigger the application of adverse consequences under other economic sanctions, export controls, anti- corruption, anti-money laundering or criminal laws implemented outside of the UK that are applicable to the act or proposed act."***[9]

This approach also would mitigate the most immediate adverse impacts that we have identified. It is, however, a less favourable approach in isolation—unless undertaken in tandem with Option 2—as this option would cover only the specific areas of law noted in the text. It might not capture, for example, regulatory obligations that do not arise pursuant to criminal laws. Again, we do not understand why it would facilitate UK-Russia sanctions policy to make it a crime for UK-based lawyers to provide foreign regulatory advice in the circumstances captured by regulation 54D.

We note that Options 2 and 3 would far better achieve, as compared to the current Amending Regulations, the FCDO's objective of prohibiting UK-based providers of legal advisory services from facilitating restricted commercial transactions in Russia. For instance, they would allow UK-based lawyers to holistically and comprehensively advise a client concerning *all* legal and regulatory risks associated

8. We have added the phrase "understanding the meaning of UK or non-UK statutes or regulations" because there are certain aspects of the US sanctions — known as "secondary sanctions" — that authorise the United States government to impose retaliatory trade measures against non-US companies that engage in certain types of business activities relating to Russia (among other jurisdictions). As a formal matter, one does not "comply" or fail to "comply" with US secondary sanctions, as those sanctions do not trigger criminal or administrative penalties, but one must avoid conduct falling within the scope of those sanctions (including, for instance, engaging in dealings with sanctioned Russian persons and entities) in order to avoid the risk of being targeted for US retaliatory trade measures

9 The reference to "adverse consequences" is again intended to ensure that US secondary sanctions fall within the scope of the exemption.

with doing business in Russia, rather than advising only on UK law in isolation. A given client might, for instance, not be particularly motivated to cease doing business in Russia on account of UK sanctions restrictions, but might be persuaded to cease that business if the client's UK-based lawyers are able to advise the client concerning parallel risks under EU or US laws. Moreover, if the contemplated transaction or act is impermissible under UK law and only permissible under US and EU law, the UK-based lawyers would not be able, under the amendments we have proposed, to provide commercial law advice to the hypothetical client to facilitate and implement the transaction or act under either UK or non-UK law.

A slight variant of Options 2 and 3 would be to specifically stipulate that the exception allows advice to be provided on compliance with the laws of named allied jurisdictions only, such as the US, EU, EU Member States, and other allied countries (e.g., European Economic Area state parties that are not EU Member States, Switzerland, Japan, Australia, New Zealand, Canada). This variant is undesirable, however, as it introduces unnecessary complexity to the Russia Regulations—requiring the Government to determine which countries should be considered to have similar Russia-related foreign policy objectives as the UK sufficient to warrant their inclusion. Limiting the exemptions in this manner is also unnecessary, as there is no apparent policy objective behind prohibiting compliance-related advice in *any* jurisdiction. Alternatively, the exemption could capture the laws of all jurisdictions other than Russian law.

10 July 2023

APPENDIX 2: CORRESPONDENCE: DRAFT PENSIONS DASHBOARDS (AMENDMENT) REGULATIONS 2023

Letter from the Rt Hon. Lord Hunt of Wirral MBE, Chair of the Secondary Legislation Scrutiny Committee, to Laura Trott MBE MP, Parliamentary Under Secretary of State at the Department for Work and Pensions

I am writing to you in my capacity as Chair of the House of Lords Secondary Legislation Scrutiny Committee. In our 44th Report, published today, the Committee again criticises regulations laid by the. Department for Work and Pensions (DWP)—on this occasion, the Draft Pensions Dashboards (Amendment) Regulations 2023—on the ground that the Explanatory Memorandum (EM) accompanying the instrument contains inadequate explanation. The Committee has asked me to draw the matter to your attention.

Although the EM states that the change in the implementation programme is being made, it fails to explain adequately the reasons for the change or its consequences. The fact that your Department was able to answer our many questions promptly and fully suggests that either it was decided that the information should not have been included in the EM or it was not understood that it should have been.

We also note. that the section on consultation states that a consultation has taken place but gives no indication of industry's reaction to the delay in the compliance date. Similarly, the section on impact says that the Impact Assessment has been updated but does not separately identify the additional costs caused by the delay.

We were pleased to have recently received a letter from Joanne Gibson, Senior Responsible Owner for Secondary Legislation at DWP, in response to our Interim Report, which assured us that action is already under way to strengthen the DWP's quality assurance processes. We hope that, with the example provided by these Regulations in mind, that review will also address the authorisation process that clears the content of the EM for laying.

We would be grateful if, before the debate in the House on these regulations, the accompanying EM is revised to include the additional information.

22 June 2023

Letter from Laura Trott MBE MP to the Rt Hon. Lord Hunt of Wirral MBE

Thank you for your letter of 22 June 2023 with respect to the publication of the Secondary Legislation Scrutiny Committee's 44th Report and the Draft Pensions Dashboards (Amendment) Regulations 2023.

I was sorry to note that the Committee felt that the Draft Regulations should be drawn to the special attention of the House on the ground that the Explanatory Memorandum (EM) provided insufficient details. I am however pleased to note that officials in my Department were able to provide you with all of the details you requested when asked.

As you have requested, the Department will withdraw the previous EM and table a revised version which provides additional details in relation to the points highlighted by your Committee.

As set out in Joanne Gibson's letter of 9 June 2023, DWP recognises the value of Parliamentary scrutiny, the requirement for clear, accessible, and comprehensive explanatory material, and action is already underway to strengthen the Department's assurance process. We will of course consider your Committee's comments in its 44th Report as part of this action.

28 June 2023

APPENDIX 3: INTERESTS AND ATTENDANCE

Committee Members' registered interests may be examined in the online Register of Lords' Interests at http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests. The Register may also be inspected in the Parliamentary Archives.

For the business taken at the meeting on 11 July 2023 and included in this report, Members declared no interests:

Russia (Sanctions) (EU Exit) (Amendment) (No. 3) Regulations 2023 (SI 2023/713)

Lord Hunt of Wirral

Practising Solicitor and Partner, DAC Beachcroft LLP (international commercial law firm)

Attendance:

The meeting was attended by Lord Hunt of Wirral, Baroness Lea of Lymm, Lord Powell of Bayswater, Baroness Randerson, Baroness Ritchie of Downpatrick, Lord Rowlands, Lord Russell of Liverpool and Lord Thomas of Cwmgiedd.