HOUSE OF LORDS

Secondary Legislation Scrutiny Committee

52nd Report of Session 2022–23

Drawn to the special attention of the House:

Draft Retained EU Law (Revocation and Reform) Act 2023 (Revocation and Sunset Disapplication) Regulations 2023

Agriculture (Removal of Cross-Compliance and Miscellaneous Revocations and Amendments, etc.) (England) Regulations 2023

Building (Higher-Risk Buildings Procedures) (England) Regulations 2023

Immigration (Passenger Transit Visa) (Amendment) (No. 2) Order 2023

Includes information paragraphs on:

Draft Counter-Terrorism and Security Act 2015 (Risk of Being Drawn into Terrorism) (Revised Guidance) Regulations 2023

Financial Services and Markets Act 2000 (Exemptions from Financial Promotion General Requirement) Regulations 2023

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Secondary Legislation Scrutiny Committee

The Committee's terms of reference, as agreed on 17 July 2023, are set out on the website but are, in summary:

To report on draft instruments and memoranda laid before Parliament under section 23(1) of the European Union (Withdrawal) Act 2018 and sections 11, 12 and 14 of the Retained EU Law (Revocation and Reform) Act 2023.

And, to scrutinise –

> (a) every instrument (whether or not a statutory instrument), or draft of an instrument, which is laid before each House of Parliament and upon which proceedings may be, or might have been, taken in either House of Parliament under an Act of Parliament;
>
> (b) every proposal which is in the form of a draft of such an instrument and is laid before each House of Parliament under an Act of Parliament,

with a view to determining whether or not the special attention of the House should be drawn to it on any of the grounds specified in the terms of reference.

The Committee may also consider such other general matters relating to the effective scrutiny of secondary legislation as the Committee considers appropriate, except matters within the orders of reference of the Joint Committee on Statutory Instruments.

Members

Lord De Mauley
Baroness Harris of Richmond
Lord Hunt of Wirral (Chair)
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Baroness Lea of Lymm
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Baroness Ritchie of Downpatrick
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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.

Fifty Second Report

DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

Draft Retained EU Law (Revocation and Reform) Act 2023 (Revocation and Sunset Disapplication) Regulations 2023

Date laid: 4 September 2023

Parliamentary procedure: affirmative

When adding the long schedule of items of retained EU Law to be sunsetted on 31 December 2023 to the Retained EU Law (Revocation and Reform) Act 2023, the Government also added a short term "preservation" provision as a precautionary measure. Following further analysis, Schedule 1 to these Regulations seeks to reinstate four pieces of legislation for the UK and three pieces in relation to Northern Ireland only.

Schedule 2 revokes a further 93 pieces of now redundant EU legislation. We have no reason to doubt the Department of Business and Trade's assertion that these are simply loose ends being tied off. It is a pity, however, that the Explanatory Memorandum (EM) failed to give any broad explanation of the topics of the legislation being revoked (of which more than half relate to Euratom) or to give the public access to the more detailed "explainer document" which the Department has prepared via a direct weblink. ***We recommend that the EM is revised to correct that oversight.***

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

Schedule 1

1. When adding the long schedule of items of retained EU Law to be sunsetted on 31 December 2023 to the Retained EU Law (Revocation and Reform) Act 2023 (REUL Act), the Government also added a short term 'preservation' provision as a precautionary measure. Following further analysis, Schedule 1 to these Regulations seeks to reinstate four pieces of legislation for the UK (relating to the testing of road vehicles, the investigation of marine accidents and the use of copper in biocides), and three pieces in relation to Northern Ireland only, which deal with the information to be provided with agricultural products. The preservation power under the REUL Act will expire on 31 October 2023.

Schedule 2

2. Separately, Schedule 2 to the Regulations lists a further 93 pieces of Retained EU Law to be revoked under section 14(1) of the REUL Act on the grounds that they are redundant or no longer effective. It is disappointing that that is all the Explanatory Memorandum (EM) has to say about them. Although the impact section mentions that a "line by line explainer document is being published on the Gov.uk website", the EM fails to provide a direct link to

it.[1] **In the interests of long-term transparency, that list might also be published alongside the instrument on the legislation.gov website.**

3. As may be anticipated, the list is eclectic, but 48 of the items—that is, just over half—relate to the UK leaving Euratom. As Euratom deals with nuclear energy and related matters such as radiation, it might have been appropriate to explain briefly in the EM why so many items are being revoked now and why their revocation has no safety risks. The Department for Business and Trade (DBT) told us:

> "All REUL being revoked is inoperable in the UK and has no practical effect since the UK left Euratom and the EU.
>
> The European Union and Euratom are uniquely legally joined, so when the UK left the European Union, we also left Euratom. To continue cooperating effectively with Euratom in the civil nuclear sector, a new Nuclear Cooperation Agreement was signed between the two parties. This came into force on 1 January 2021.
>
> Nuclear Cooperation Agreements are commonly used international treaties that facilitate nuclear trade and cooperation by providing a legal underpinning. They provide key non-proliferation assurances, including in respect of nuclear safeguards.
>
> The UK is a responsible nuclear nation with an internationally well-respected regulatory system reflecting international best practice. The UK actively engages with the International Atomic Energy Agency to ensure that the UK's safety practices and regulations meet international standards and best practice."

4. Additionally, we note that a number of the items in Schedule 2 were obsolete long before the word Brexit was coined: for example, there are four items to revoke legislation made under the Companies Act 1985 that was itself repealed by the Companies Act 2006. We asked the Department for an explanation. DBT said:

> "There are many reasons why entries from Acts or SIs revoked before the UK's exit from the EU are only being repealed now. Firstly, there has been a lack of necessary powers required to revoke REUL. This was identified as part of the Government's REUL Substance and Status reviews. Now Departments have the necessary power to revoke redundant legislation via the power to revoke and replace in the REUL Act.
>
> Furthermore, as much of this legislation has had no legal effect in the UK, Departments have not prioritised its removal, nor would it have been a good use of Parliamentary time to consider hundreds of individual repealing instruments. This SI represents a cross-government coordinated effort to revoke redundant legislation in an efficient way to ensure our statute book is clear for businesses and citizens.

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1 Draft Retained EU Law (Revocation and Reform) Act 2023 (Revocation and Sunset Disapplication) Regulations 2023, Schedule 2 - Sunset of Subordinate Legislation and Retained Direct EU Legislation Explainer: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1182382/retained-eu-law-revocation-explainer.pdf [accessed 19 September 2023].

> Finally, Departments have been conducting thorough reviews of retained EU law for over a year. Before this process there had not been an exercise to identify each piece of REUL, how it applies to the UK following Brexit, and most importantly whether each piece of legislation worked best for the UK's unique circumstances. This process is now well underway and this SI reflects the progress made in this ongoing programme of work."

5. It is accepted best practice that, wherever possible, consequential amendments and repeals should be included in the bill or statutory instrument that triggers the change, and departments should plan and resource its legislative programme accordingly.[2] To deal with those laws overlooked in that process, **the House may wish to encourage the Government to "spring clean" and consolidate the statute book more frequently.**

Conclusion

6. We have no reason to doubt the Department's assertion that these are simply loose ends being tied off to clean up the statute book, and the "explainer" is a thorough and helpful document describing all 93 provisions. It is a pity however, that the EM failed to give any broad explanation of the topics of the legislation being revoked (of which more than half relate to Euratom) or to give the public easy access to the more detailed "explainer document" via a direct weblink. **We recommend that the EM is revised to correct that oversight.**

Agriculture (Removal of Cross-Compliance and Miscellaneous Revocations and Amendments, etc.) (England) Regulations 2023 (SI 2023/816)

Date laid: 18 July 2023

Parliamentary procedure: negative

These Regulations will remove cross-compliance requirements for recipients of payments under the legacy Rural Development schemes, in line with a Government commitment to remove all cross-compliance by 1 January 2024. While the Department for Environment, Food and Rural Affairs' (Defra) states that "nearly all cross compliance requirements mirror existing domestic legislative requirements", ***it is not clear from this statement and additional information that Defra has provided whether all the cross-compliance requirements which this instrument removes are fully replicated in domestic legislation, or whether there will be any regulatory gaps.*** *This concern was also raised in submissions we have received from Client Earth, the Wildlife and Countryside Link and Green Alliance. The further explanation that the Department has provided does not fully allay our concerns.*

With elements of the new compliance regime still work in progress, we question the sequencing of the policy of removing existing cross-compliance now, before the new regime has been fully established. We are concerned that the Department may be prioritising meeting its commitment to removing all legacy cross-compliance by 1 January 2024 over ensuring that the compliance requirements are replicated

2 Cabinet Office, 'Guide to making legislation: Section B: Preparing the Bill for Introduction': https://www.gov.uk/government/publications/guide-to-making-legislation/guide-to-making-legislation-html#section-b-preparing-the-bill-for-introduction [accessed 18 September 2023].

fully in domestic legislation. The House may wish to seek further assurance from the Minister that there will not be any regulatory gaps as a result of this instrument.

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.

7. These Regulations have been laid before Parliament by the Department for Environment, Food and Rural Affairs (Defra) with an Explanatory Memorandum (EM). The Regulations will remove cross-compliance requirements for recipients of payments under the legacy Rural Development schemes in England.

8. We received submissions from Client Earth, the Wildlife and Countryside Link and Green Alliance which raised several concerns, including about regulatory gaps, a reduction in the monitoring and enforcement role of the Rural Payments Agency and the lack of an environmental impact assessment. We have published the submissions and Defra's response in full on our website.[3]

Background

9. Cross-compliance sets minimum requirements that recipients of income-support schemes under the EU's Common Agricultural Policy (CAP) must meet. Following Brexit, Direct Payments have continued to be the main legacy income-support schemes for farmers. In England, they are currently made through the legacy Basic Payment Scheme (BPS). In addition, payments are made to farmers and land managers under the legacy Rural Development schemes, primarily through Countryside Stewardship, Environmental Stewardship and the Farm Woodland element of the English Woodland Grant Scheme.

10. Recipients under these schemes must meet certain standards regarding the environment; public, animal and plant health; and animal welfare. The RPA manages this cross-compliance in England, including through inspections, guidance and financial deductions from payments for non-compliance with the requirements.

11. Following Brexit, the Government arephasing out the legacy CAP support schemes in England as part of the transition to the new domestic Environmental Land Management (ELM) schemes.[4] Defra says that in line with a commitment made by the Government, cross-compliance across all legacy CAP schemes will end from 1 January 2024, and that doing so requires removing or amending regulations in relation to Direct Payments and Rural Development.

12. This instrument does not deal with Direct Payments: Defra intends to lay before Parliament a separate instrument at the end of October/early

3 SLSC 'Scrutiny evidence' webpage: https://committees.parliament.uk/committee/255/secondary-legislation-scrutiny-committee/publications/8/scrutiny-evidence/ [accessed 18 September 2023].

4 Department for Environment, Food and Rural Affairs (Defra), 'Policy paper: Environmental Land Management (ELM) update: how government will pay for land-based environment and climate goods and services' (June 2023): https://www.gov.uk/government/publications/environmental-land-management-update-how-government-will-pay-for-land-based-environment-and-climate-goods-and-services/environmental-land-management-elm-update-how-government-will-pay-for-land-based-environment-and-climate-goods-and-services [accessed 18 September 2023].

November 2023 to delink Direct Payments[5] (that is, remove the link between land and payments) and, at the same time, remove the cross-compliance rules in relation to BPS.

The changes made by this instrument

13. This instrument removes cross-compliance from all farm payments under the legacy Rural Development schemes. It retains the ability to recover, by way of financial deductions, payments where recipients fail to comply with requirements and where a breach of the cross-compliance rules occurred prior to the Regulations coming into force on 1 January 2024. The instrument also retains the appeals process for cases when such deductions are disputed.

14. The instrument also:

- amends the requirements for data to be published on beneficiaries of rural payments below EUR 1,250, to give the RPA discretion over whether to publish that data;
- amends the requirements for a financial reduction to be imposed against rural payments for late submission of payment claims, giving the RPA discretion over whether to impose that reduction;
- removes the legislative deadline by which beneficiaries of rural payments must inform the RPA of their intention to amend their payment claim; and
- amends the scrutiny requirements for commercial documents under the system of financing of Common Market Organisation (CMO) support[6] to introduce further flexibility for the RPA.

Concerns about compliance under the new arrangements

15. The EM offers little explanation of whether or how the removal of cross-compliance requirements will impact on the environment and public, animal and plant health. The EM simply states that "nearly all cross compliance requirements mirror existing domestic legislative requirements".

16. **We find this statement too vague: it fails to make clear whether all relevant cross-compliance requirements which will be removed by this instrument are fully replicated elsewhere in domestic legislation, or whether there will be any regulatory gaps**.

17. Asked for further information, the Department explained that:

> "Cross compliance rules apply to anyone receiving payments under the legacy Common Agricultural Policy schemes (Basic Payment Scheme, Countryside Stewardship and Environmental Stewardship and the Farm Woodland element of the English Woodland Grant Scheme). The rules are mostly also in underlying domestic legislation, and the rules that are, apply to all farmers and will continue. The rules within cross compliance that are not in underlying domestic legislation are either already being consulted upon, covered in statutory guidance such as

5 Defra, 'Guidance: Delinked payments: replacing the Basic Payment Scheme' (May 2023): https://www.gov.uk/guidance/delinked-payments-replacing-the-basic-payment-scheme [accessed 18 September 2023].

6 The CMO is the EU framework for the market measures provided for under the CAP.

> the Code of Practice for Plant Protection Products or we are developing Sustainable Farm Incentive standards to manage and improve specific features. We have also made other improvements and simplifications such as the removal of the three crop rule."

18. The Department further states in the EM that once cross-compliance ends, "responsibility to ensure compliance with all other regulations that protect the environment, animal health and welfare and plant health will continue with existing regulators within their current legal remits", adding that "Defra has committed to a better targeted and more proportionate approach to the enforcement of farm regulation". It is not clear to us what a "better targeted and more proportionate" approach would look like in practice. In its submission Client Earth questioned how, given the changes made by this instrument and "evidence of the Environment Agency's poor enforcement of current agricultural regulations, such as the Farming Rules for Water", Defra intended "to identify and enforce the breaches […] after January 2024".

19. Asked for further explanation, the Defra responded that:

> "Existing regulators will continue to be responsible for monitoring, inspection and enforcing against domestic regulation that underpins most cross compliance rules. For example, Natural England's role in enhancing protected sites and protecting biodiversity will not change, the Health and Safety Executive will continue to regulate use of Plant Protection Products and EA will continue to regulate, amongst other things, to protect water.
>
> Defra is working with regulators to implement a more preventative, advice-led approach to monitoring and enforcement. For example, the Environment Agency have been working with farmers to support them back to compliance–expanding from c. 300 visits p.a. to over 4,000 in 22/23, with proportionate action such as over 5,500 improvement notices issued in the same year (over 3,000 of which have already been actioned) and, where necessary for the most egregious situations, stop notices or court action. To help support a transparent and proportionate enforcement we are considering the introduction of Penalty Notices for animal health and welfare offences. The consultation on the scope of Penalty Notices closed on the 20th July and we are currently analysing the responses."

20. The Department's response does not fully allay our concerns. According to Defra, cross-compliance rules that will be removed by this instrument are "mostly" in underlying domestic legislation, while some of the new compliance measures and requirements, such as the sustainable farm incentive standards, are still being developed or, like the scope of penalty notices, have just completed the consultation stage. In addition, it appears that some statutory cross-compliance rules will be covered by statutory guidance instead, such as on plant protection products. This raises questions about whether the provision which is now to be contained in guidance can be as effectively enforced as when its equivalent was set out in legislation. **The House may wish to seek clarification about this from the Minister**. We have previously expressed concern about the use of statutory guidance as an alternative to legislation, most notably in our report *Government by*

Diktat: A call to return power to Parliament.[7] Some guidance is purely advisory but guidance which requires those to whom it is addressed "to have regard to" such guidance "carries with it an expectation that it will be followed unless there are cogent reasons for not doing so" and it is for this reason that the Delegated Powers and Regulatory Reform Committee has on numerous occasions recommended that it should be subject to some form of parliamentary scrutiny.[8]

21. Given that elements of Defra's new compliance regime are still a work in progress, we asked the Department whether it would have been preferable to complete the development of the new requirements first before revoking the current cross-compliance requirements, to avoid any regulatory gaps. The question of regulatory gaps, especially in relation to hedgerows, was also raised in the three submissions we received. Defra responded:

> "The delinking of the Basic Payment Scheme will end cross compliance for most farmers and Ministers have taken the decision to end it for all CAP schemes to provide consistency for farmers and delivery bodies. Ministers have assessed this change, and the underlying rules that are in domestic legislation (which cover most areas) and concluded that new legislation is potentially required to protect hedgerows.[9] As previously stated, we are currently consulting on hedgerows regulation to address this. If following consultation Ministers decide new regulations are needed, we plan to introduce this before the cutting ban period so there is no drop in protections. Ministers will ensure that we are providing clear messages about the intentions for hedgerows as soon as we have analysed responses to the consultation, to ensure the direction is clear before the end of cross compliance.
>
> With regards to the other rules not in domestic legislation, protections are in place through existing and forthcoming guidance, regulation or Sustainable Farm Incentive standards meaning that it was not necessary to retain cross compliance.
>
> Introducing delinking payments and the subsequent end of cross compliance for those in receipt of CAP schemes (Basic Payment Scheme, Countryside Stewardship and Environmental Stewardship and the Farm Woodland element of the English Woodland Grant Scheme) is an important step in our transition to new schemes which are intended to achieve more for the environment and better value for money for the taxpayer."

22. **We are concerned that the Department may be prioritising meeting its commitment to remove all legacy cross-compliance by 1 January 2024 over ensuring that the compliance requirements are replicated fully in domestic legislation.**

23. Wildlife and Countryside Link questioned specifically whether, before this instrument comes into effect, Defra would publish a transition plan

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7 Paragraphs 47 to 59, *Government by Diktat: A call to return power to Parliament*, 20th Report (Session 2021–22, HL 105).

8 Paragraphs 89 to 100 , Delegated Powers and Regulatory Reform Committee, *Democracy Denied? The urgent need to rebalance power between Parliament and the Executive*, 12th Report (Session 2021–22, HL 106).

9 Defra, 'Open consultation: Protecting hedgerows in England' (28 June 2023): https://consult.defra.gov.uk/legal-standards/consultation-on-protecting-hedgerows/ [accessed 19 September 2023].

to cover the gaps between cross-compliance, the ELM schemes and future regulations. The Department responded that:

> "We have already set out our plan in the Agricultural Transition Plan and subsequent updates. We are consulting on further legislative protections for hedgerows and depending on the outcomes of that consultation will look to bring in those additional protections as quickly as possible to minimise any environmental impacts. We will remind farmers nearer to the end of the year of our approach."

24. Wildlife and Countryside Link also raised a concern about the shift in language from mandatory to voluntary obligations, for example moving from 'shall' to 'may' in parts of the instrument, including in relation to the publication of beneficiaries, late claims and scrutiny of transactions. In response, the Department explained that:

> "The majority of rules under cross compliance are already in domestic law and farmers and land managers must still follow them."

25. Client Earth questioned the absence of an environmental impact assessment. The Department explained that:

> "A full environmental impact assessment of this policy was not required. The removal of cross compliance is not considered to be in scope of either the Environmental Assessment of Plans and Programmes Regulations 2004 or The Conservation of Habitats and Species Regulations 2017. Cross compliance is a set of conditions placed on legacy CAP payments which applied to those farmers in receipt those payments. It is not a plan or programme directly impacting environmental sites that requires an assessment as set out in the regulations. Even if the removal of cross compliance was in scope, its removal is not likely to have a significant environmental effect. This is because cross compliance rules in underlying domestic legislation will continue to apply to all farmers. The rules within cross compliance that are not in underlying domestic legislation are either planned to be replaced such as new hedgerow protections which are being consulted on or there are other existing measures to provide ongoing protections."

Conclusion

26. **The Department's answers to our questions and to the concerns raised in the submissions we received do not fully allay our concerns about potential regulatory gaps.** It appears that elements of the new regime, such as further legislative protections for hedgerows, sustainable farm incentive standards or the scope of penalty notices for animal health and welfare offences are still a work in progress. **We therefore question the sequencing of the policy of removing existing cross compliance now, before the new regime has been fully established. We are concerned that the Department may be prioritising meeting its commitment to remove all legacy cross-compliance by 1 January 2024 over ensuring that the compliance requirements are replicated fully in domestic legislation. The House may wish to seek further assurance from the Minister that there will not be any regulatory gaps as a result of this instrument**.

Building (Higher-Risk Buildings Procedures) (England) Regulations 2023 (SI 2023/909)

Date laid: 17 August 2023

Parliamentary procedure: negative

This instrument sets out some of the detail of the new building control regime for higher-risk buildings, as provided for in the Building Safety Act 2022 ("the Act"). It specifies the process requirements when a new higher-risk building is being designed and constructed or when building work is being done to an existing higher-risk building. The instrument is part of a wider legislative package. We do not wish to comment on how the instrument implements provisions under the Act. We have, however, concerns about the poor Explanatory Memorandum (EM) that was originally provided by the Department for Levelling Up, Housing and Communities (DLUHC) with this and three other building safety regulations.

The overly long and detailed original EM suggests a lack of understanding of the purpose of an EM, and it is worrying that the evident flaws were not identified by the Department's quality assurance and approval processes. We have repeatedly raised concerns about the general quality of explanatory material and have questioned the effectiveness of the existing system for checking the quality and accuracy of such material across Whitehall. ***DLUHC should review its processes to ensure that future explanatory material meets the quality standards expected by Parliament.***

The 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.

27. This instrument has been laid by the Department for Levelling Up, Housing and Communities (DLUHC) with an Explanatory Memorandum (EM). It sets out some of the detail of the new building control regime for higher-risk buildings, as provided for in the Building Safety Act 2022 ("the Act"). The Act establishes a new building safety regime for higher-risk buildings as part of the new approach to managing fire and structural safety risks in response to the Grenfell Tower fire tragedy. This instrument specifies the process requirements when a new higher-risk building is being designed and constructed or when building work is being done to an existing higher-risk building.

28. The instrument is part of a wider legislative package which also includes the following three instruments:

- **SI 2023/906** which, amongst other changes, specifies the length of registration for registered building control approvers and building inspectors.
- **SI 2023/907** which sets out the statutory requirements on the Building Safety Regulator, accountable persons, residents and others regarding building safety, including in relation to the 'golden tread information'[10] and the need for a strategy for engagement with residents.

10 This is essentially accessible and transferable information or data that ensures that the right people have the right information, at the right time, to manage the building and its fire and structural risks.

- **SI 2023/911** which introduces new definitions, strengthens arrangements for the handover of fire safety information and makes changes to support the establishment of the Building Safety Regulator as the only building control authority for higher-risk buildings.

29. We do not wish to comment on or raise any specific questions or concerns about how these instruments implement provisions under the Act. We have, however, concerns about the explanatory material that was originally provided to support all of these the instruments, in particular in relation to the EM that was laid in support of SI 2023/909.

The standards we apply to EMs

30. EMs play a key role in helping Parliament and the general public understand the legislative changes made by an instrument. The Government's guidance[11] for policy officials states that:

> "The purpose of an EM is to provide the public with an easy-to-understand explanation of the legislation's intent and purpose–why the legislation is necessary. […]
>
> [The] explanation should be concise but comprehensive, and should not generally exceed four to six pages. Use plain English and avoid (or explain) jargon."

31. Our own guidance for departments on effective EMs[12] mirrors this and also highlights that an EM "is not meant for lawyers". Legal explanations should be provided in the Explanatory Note to an instrument.

32. Our role is to scrutinise the policy merit of secondary legislation that has been laid before Parliament and to share any concerns with the House. Section 7 of the EM, which sets out the policy background of an instrument, is therefore of particular importance to us. Specifically on Section 7, our guidance[13] states:

> "To assist the Committee, the Houses and the public, the explanation of the policy background and purpose of the instrument contained in the EM should be clear, complete and succinct, and able to be fully understood without having to refer to other documents. The policy background section should explain:
>
> - Purpose: the purpose of the SI and how the instrument fulfils the policy objectives of the parent Act;
> - Context: the current position, including the size and nature of the problem that the instrument is addressing;
> - Effects: the effect of any policy change on the target group, numbers affected, and the degree to which they are affected;

11 National Archives, 'Statutory Instrument Practice', 5th edition, (November 2017): https://www.legislation.gov.uk/pdfs/StatutoryInstrumentPractice_5th_Edition.pdf [accessed 19 September 2023], para 2.9.2.

12 SLSC, 'Guidance for Departments laying instruments': https://committees.parliament.uk/publications/28455/documents/202651/default/, [accessed 19 September 2023], part 2.

13 'Guidance for Departments laying instruments': https://committees.parliament.uk/publications/28455/documents/202651/default/ [accessed 19 September 2023], part 2.

- Evidence: the evidence which demonstrates why the policy change is likely to achieve the policy objective and, where appropriate, the measurement of that objective […]

- Significance: whether the change is politically or legally important."

33. **We regret that the original EM laid in support of SI 2023/909 failed to meet these standards.** Instead of providing a succinct explanation of the changes, it contained a highly detailed description of each individual regulation in the instrument over a total of 69 pages. Section 7 alone contained 475 paragraphs, making it inaccessible to anyone who is not an expert in building safety and undermining Parliament's ability to scrutinise the legislation. We therefore asked the Department to revise the EM.

34. We also raised concerns about the EMs that were originally provided for SI 2023/906, SI 2023/907 and SI 2023/911 which were all overly technical and detailed: the original EM to SI 2023/907 had 20 pages, with Section 7 alone running to 48 paragraphs, while the EM to SI 2023/911 contained numerous cross-references to other pieces of legislation. An EM, especially Section 7, is not intended for lawyers (see paragraph 31) but needs to be accessible to any lay reader with an interest in the policy.

35. When we raised our concerns about the EMs, especially with regard to SI 2023/909, the Department responded that:

> "[T]he sector has and will be looking at the EM for a detail explanation of the changes taking effect and how these interact with the rest of the regime. […] the sector is already looking at the EMs and using them to inform their business decisions."

36. **We are concerned that there appears to be a misunderstanding in the Department of the purpose of an EM. The EMs, as originally laid, should not have been signed off**.

37. We agree that the building sector requires detailed explanation of the new requirements and of any new processes that it will have to follow. This type of detailed and practical explanation, however, should be set out in sector guidance. DLUHC told us this guidance is not available yet and is being developed by the Health and Safety Executive (which has taken on the role of the new Building Safety Regulator). **As the new arrangements are coming into force on 1 October 2023, it seems unsatisfactory that the guidance is not yet available.**

38. There were also problems with Section 10 of the EMs on consultation outcome which constitutes another important element of the explanatory material. While consultation is not always required and should be proportionate to the policy change being made, it can provide opportunities to improve a policy and can also help to increase confidence in a policy. Where a department carries out a public consultation, an analysis of the outcome of the consultation is a key part of the policy making process and should be publicly available at the same time the instrument is laid before Parliament, so that it can inform Parliament's scrutiny of the legislation. Our guidance states that Section 10:

> "should briefly set out who was consulted, over what period and how many people responded. There should be some analysis of the key points

raised in responses and a short justification of why the department did or did not make changes to its policy in the light of the opinions expressed. A full analysis should be available at the time the instrument is laid before Parliament, and a weblink included in the EM."

39. The EM to SI 2023/909 failed to explain the feedback received during the consultation exercise and whether this feedback had led to any changes in the policy. The EM also failed to provide a link to the Department's consultation response. This was also an omission in the EMs of several of the other building safety instruments. We asked the Department to revise the EMs of all four building safety regulations to provide more succinct explanations and to include any missing information on the outcome of the consultation exercises.

Conclusion

40. **Over the last few months, we have repeatedly raised concerns about the quality of explanatory material and have questioned the effectiveness of the existing system for checking the quality and accuracy of such material across Whitehall.**[14] **These instruments are further examples of poor practice**.

41. While we acknowledge that the Department has revised and re-laid the EMs, so that more concise and improved explanatory material is now available to Parliament and the general public, **we are particularly concerned about what appears to be DLUHC's lack of understanding of the purpose of an EM. It serves a very different purpose from guidance and the sector should not have to use it as a substitute for the proper material. Given the absence of the guidance to date, the House may wish to ask the Minister whether the regime is ready to be implemented on 1 October**.

Immigration (Passenger Transit Visa) (Amendment) (No. 2) Order 2023 (SI 2023/980)

Date laid: 7 September 2023

Parliamentary procedure: negative

This Order requires Russian and Georgian nationals to obtain a visa to be able to transit through the UK. The rationale for the change relies on a statement that nationals of these countries are high on the list of those "abusing" the transit system to claim asylum. However, the Home Office has not provided data to substantiate this claim. ***We reiterate the need to provide information relied on to formulate policy alongside the instrument.*** *Similarly, the reason for bringing the policy into force immediately, without allowing the conventional 21-day period to allow parliamentary scrutiny, appears weak, based on the information we have.*

We were not clear on a number of practical aspects of the transit visa regime and asked the Home Office a series of questions. ***The answers were helpful but might usefully have appeared in the EM so that readers could better understand the practical implementation of the policy.***

14 See paras 31-32, *Interim Report on the Work of the Committee in Session 2022–23* (42nd Report, Session 2022–23, HL 205).

This Order is 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

42. This Order requires Russian and Georgian nationals to hold a transit visa if they wish to pass through the UK without entering while transiting to another country.

43. Prior to the Order, nationals of Russia and Georgia could travel to the UK without a visa if they had booked an onward ticket to another destination where they either held a visa or they were not required to have one.

44. The Home Office argues that the move is necessary to prevent people from these countries "travelling to the UK on the pretence of transiting but claiming asylum on arrival".

45. The UK offers two forms of transit: airside and landside. A different type of transit visa is required for each one. Airside transit is when individuals travel to the UK and are not seeking permission to cross the border but are waiting in the airport's transit zone to board an onward flight (from the same airport) on the same day. Landside transit is when individuals are given permission to cross the border by an Immigration Officer, enroute to another country, and must leave the UK within 48 hours of arrival. Scenarios include changing airports, collecting baggage or arriving at airports where no airside transfer is possible.

Extent of the problem

46. The Home Office states that "Georgian and Russian nationals have consistently ranked top in the nationalities abusing the UK's transit provisions to claim asylum". However, no supporting data was provided in the Explanatory Memorandum (EM) and when we asked the Home Office, it replied that "there is no published transit abuse data therefore we were unable to reference figures in the EM".

47. Questioned further on whether there was no transit abuse data, or whether it existed but could not be published, the Home Office said that "the datasets used to support the recommendation are owned by Home Office Intelligence. They are compiled to monitor and understand the changing threat picture facing the UK". The Home Office also noted that transit abuse data is published at a global level,[15] but not by country of origin.

48. We have previously made clear that, as a fundamental principle of transparency and accountability, any information relied on to formulate policy should be published alongside the instrument or, at a minimum, be made available to Parliament on request.[16] The Home Office has not provided good reasons (for example, national security) why this principle could not be complied with in this instance. **Where departments are relying on statistical information in making policies, it must be included in the EM.**

15 Home Office, 'Irregular migration to the UK, year ending June 2023' (24 August 2023): https://www.gov.uk/government/statistics/irregular-migration-to-the-uk-year-ending-june-2023/irregular-migration-to-the-uk-year-ending-june-2023 [accessed 15 September 2023].

16 For example, see *24th Report* (Session 2022–23, HL Paper 123), para 24; *35th Report* (Session 2022–23, HL paper 177), para 56.

49. In the absence of the precise statistics referenced, we looked at published Home Office data on overall asylum applications and asylum rejections.[17] The table below shows Russian and Georgian asylum claims, and asylum refusals, as a percentage of those from all countries in the last 12 months for which data is available (Q3 2022 to Q2 2023).

Total asylum claims and asylum refusals by nationality, Q3 2022 to Q2 2023

	Total claims		**Refusals**	
	Number	Percentage	Number	Percentage
Russia	305	0.6%	45	0.5%
Georgia	298	0.6%	52	0.6%
Total	47,493	100%	8,403	100%

50. The table shows that Russia and Georgia represent a very small percentage of both asylum applications and asylum refusals. When we put this put to the Home Office, it replied that "asylum refusals are not the only relevant metric. One of the requirements of the Visit route (including Transit) […] is that the applicant will leave at the end of their visit". This is correct, but the stated intention of the instrument is to "prevent these nationals from travelling to the UK on the pretence of transiting but claiming asylum on arrival" and, as previously mentioned, to prevent Georgian and Russian nationals from "abusing the UK's transit provisions to claim asylum". In those circumstances, and in the absence of country-based data on transit abuse, we continue to believe that asylum applications and refusals are relevant statistics. **The data that is available suggests that the problem being addressed may be less significant than indicated in the EM**.

Timing

51. The Order came into force on 8 September, the day after the instrument was laid before Parliament, breaching the convention that at least 21 days should be allowed between laying an instrument and bringing it into effect. The EM stated that this was justified because giving greater notice may have triggered "a substantial increase in Georgian and Russian nationals travelling to the UK and potentially claiming asylum on arrival, before the visa regime comes into force. This would place an unpredictable and potentially unmanageable strain upon the UK's Migration and Borders system".

52. The statistics above do not provide clear evidence that asylum applicants from these countries are likely to be so numerous as to place an "unmanageable strain" on the immigration system. **Breaches of the 21-day rule should only take place when urgent action is necessary.**

Additional information

53. We sought clarification of the operation of the policy in a number of other areas. First, we were interested in whether the change would make a difference in practice, or whether potential asylum seekers could simply apply for a transit visa and then proceed as before. The Home Office said that under the

17 Home Office, 'Immigration System Statistics (Year ending June 2023)': https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1178017/asylum-applications-datasets-jun-2023.xlsx [accessed 18 September 2023].

visa regime, "full security and identity checks can be made ahead of travel to the UK and enable full consideration to be given of whether the applicants are genuinely seeking to transit the UK and their intention to proceed to their country of final destination". The Home Office also told us that the visa system is "an effective tool in reducing immigration abuse", citing a drop in asylum claims from El Salvador, following imposition of the regime, from 294 in Q2 2022 to five in Q3 2022 and one in Q2 2023.

54. Second, we asked what type of information is requested during the transit visa application process. The Home Office said the person will be asked to provide evidence that they are allowed to enter the country they are travelling on to, and they may also be asked to prove that their onward journey is booked or confirmed.

55. Third, we asked under what circumstances a transit visa application might be refused. The Home Office referred us to its caseworker guidance, which said that grounds for refusal included a criminal history, previous deception or breaches of UK immigration law, or the caseworker not being satisfied that the person:

- genuinely intends to transit the UK airside;
- intends to proceed to their country of final destination;
- has provided a "reasonable and credible" explanation for their routing;
- has credible reasons for travelling to the final destination; or
- will be admissible in the country of final destination.

56. **The type of background information included in this section is helpful to understand the practical implementation of the policy. It could usefully have appeared in the EM**.

Conclusion

57. The Government's response to our Interim Report recognised that providing supporting material was "vital" when laying statutory instruments.[18] We have already observed occasions where departments have not met the commitment; for example, in relation to consultations and impact information.[19] **This Order demonstrates that departments can also fall short in relation to key statistical information, where departments should provide either the data or good reasons why it cannot be published.**

18 *50th Report* (Session 2022–23, HL Paper 245), p 7.
19 *51st Report* (Session 2022–23, HL Paper 250), paras 26 and 48.

INSTRUMENTS OF INTEREST

Draft Counter-Terrorism and Security Act 2015 (Risk of Being Drawn into Terrorism) (Revised Guidance) Regulations 2023

58. These draft Regulations propose the first update of the 'Prevent' guidance since it was introduced in 2015. The guidance is part of the UK's counter-terrorism strategy, CONTEST, and aims to stop people becoming terrorists and to support the rehabilitation and disengagement of those already involved. Specified authorities, including in the education and health sectors, local authorities, police and criminal justice agencies, must have regard to the guidance.

59. The update follows an Independent Review of Prevent (IRP), published in February 2023, that made 34 recommendations.[20] Resulting changes to the guidance include:

- amending the first Prevent objective from "respond to the ideological challenge of terrorism and the threat we face from those who promote it" to "tackle the ideological causes of terrorism";
- stressing the need for concern about an individual's path to radicalisation; in particular, focussing on the "ideological" causes of terrorism and extremism; and
- outlining the new Security Threat Check (STC), a set of questions intended to ensure that decision-making within Prevent fully considers the terrorism threat picture.

60. The Home Office told us that the revised guidance contributed to meeting more than half the recommendations in the IRP, and that the Government are "on track" to implement all the recommendations in full by "shortly after" February 2024.

Financial Services and Markets Act 2000 (Exemptions from Financial Promotion General Requirement) Regulations 2023 (SI 2023/966)

61. The Financial Services and Markets Act 2023 introduces a regulatory 'gateway' for the approval of financial promotions. The gateway requires any authorised person wishing to approve financial promotions of an unauthorised person to first obtain permission from the Financial Conduct Authority (FCA), unless an exemption applies. This instrument specifies when exemptions apply, which HM Treasury says are intended to cover promotions "related to activity for which the authorised person had expressly taken responsibility, or where there is sufficient involvement of the authorised person". Specifically, an authorised person will not need to obtain permission if they are approving financial promotions:

- that they themselves prepared, but which are communicated by unauthorised persons (for example, in a newspaper);
- of unauthorised entities that are part of the same group; or
- of their appointed representatives, in relation to business for which the authorised person has accepted responsibility.

20 Home Office, 'Independent Review of Prevent's report and government response' (8 February 2023): https://www.gov.uk/government/publications/independent-review-of-prevents-report-and-government-response [accessed 20 September 2023].

INSTRUMENTS NOT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

Instruments subject to affirmative approval

Draft	Counter-Terrorism and Security Act 2015 (Risk of Being Drawn into Terrorism) (Revised Guidance) Regulations 2023
Draft	Dormant Assets (Distribution of Money) (England) Order 2023

Instruments subject to annulment

SI 2023/906	Building (Approved Inspectors etc. and Review of Decisions) (England) Regulations 2023
SI 2023/907	Higher-Risk Buildings (Management of Safety Risks etc) (England) Regulations 2023
SI 2023/911	Building Regulations etc. (Amendment) (England) Regulations 2023
SI 2023/965	Building Safety (Regulator's Charges) Regulations 2023
SI 2023/966	Financial Services and Markets Act 2000 (Exemptions from Financial Promotion General Requirement) Regulations 2023
SI 2023/967	Employment Appeal Tribunal (Amendment) Rules 2023
SI 2023/968	Countryside Stewardship (England) (Amendment) (No. 2) Regulations 2023
SI 2023/971	Petroleum Act 1998 (Specified Pipelines) (Amendment) and Importation and Storage of Combustible Gas (Designation of Substance etc.) Order 2023
SI 2023/972	Local Government Pension Scheme (Amendment) (No. 3) Regulations 2023
SI 2023/975	Accounting Standards (Prescribed Bodies) (United States of America and Japan) (Amendment) Regulations 2023
SI 2023/978	Coroners and Justice Act 2009 (Alteration of Coroner Areas) (No. 2) Order 2023
SI 2023/981	Electricity (Individual Exemption from the Requirement for a Transmission Licence) (Moray East) (Scotland) Order 2023
SI 2023/985	National Health Service Pension Schemes (Remediable Service) Regulations 2023
SI 2023/986	Firefighters' Pension Schemes (England) (Amendment) Order 2023

APPENDIX 1: INTERESTS AND ATTENDANCE

Committee Members' registered interests may be examined in the online Register of Lords' Interests at https://members.parliament.uk/members/lords/interests/register-of-lords-interests. The Register may also be inspected in the Parliamentary Archives.

For the business taken at the meeting on 19 September 2023 and included in this report, Members declared the following interests:

Agriculture (Removal of Cross-Compliance and Miscellaneous Revocations and Amendments, etc.) (England) Regulations 2023 (SI 2023/816)

Lord de Mauley

Farmland and other property in Oxfordshire and Gloucestershire, including residential properties

Attendance:

The meeting was attended by Baroness Harris of Richmond, Lord Hunt of Wirral, Lord Hutton of Furness, Baroness Lea of Lymm, Lord de Mauley, Lord Powell of Bayswater, Baroness Randerson, Baroness Ritchie of Downpatrick, Lord Rowlands and Lord Russell of Liverpool.