

# HOUSE OF LORDS

## Secondary Legislation Scrutiny Committee

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### 53rd Report of Session 2022–23

**Drawn to the special attention of the House:**

**Alcohol Licensing (Coronavirus) (Regulatory Easements) (Amendment) Regulations 2023**

**Data Protection (Adequacy) (United States of America) Regulations 2023**

**Correspondence: Update from the Department for Transport on its maritime backlog**

**Includes information paragraphs on:**

Draft National Minimum Wage (Amendment) (No. 2) Regulations 2023	Statement of Changes in Immigration Rules (HC 1780)
Draft Representation of the People (Postal Vote Handling and Secrecy) (Amendment) Regulations 2023	Central Counterparties (Transitional Provision) (Extension and Amendment) Regulations 2023
Draft Non-Party Campaigner Code of Practice	Judicial Discipline (Prescribed Procedures) 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*

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[Baroness Harris of Richmond](#)

[Lord Hunt of Wirral](#) (Chair)

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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 [hseclegscrutiny@parliament.uk](mailto:hseclegscrutiny@parliament.uk).

# Fifty Third Report

## PROPOSED NEGATIVE INSTRUMENTS

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### Instruments laid for sifting under the Retained EU Law (Revocation and Reform) Act 2023

#### Instrument recommended for upgrade to the affirmative procedure

#### *Data Protection (Fundamental Rights and Freedoms) (Amendment) Regulations 2023*

1. This proposed negative instrument would replace the definitions of “fundamental rights” and “fundamental freedoms” in the United Kingdom General Data Protection Regulation (UK GDPR) and the Data Protection Act 2018 (DPA). Currently, these terms are defined by reference to rights contained in retained EU law. The new references would be to an alternative source of fundamental rights and freedoms under the European Convention on Human Rights (ECHR), as enshrined in the UK’s Human Rights Act 1998. The instrument has been laid using powers to revoke or replace secondary retained EU law under section 14(1) and (2) of the Retained EU Law (Revocation and Reform) Act 2023 (REUL).
2. The Department for Science, Innovation and Technology (DSIT) states in the Explanatory Memorandum (EM) that the “impact on organisations and individuals as a result of these changes is expected to be minimal because these changes seek to replicate the current position as far as possible, while providing clarity on the rights that need to be considered in a domestic law context”. **This explanation indicates that the current position may not be replicated fully.** Asked whether there could be a reduction in rights protection, the Department told us that:

“The rights that will come into play when considering Convention rights relevant to the processing of personal data are unlikely to differ significantly from the rights which should currently be considered under retained EU law, where relevant to a processing activity. The rights most likely to be relevant to processing of personal data under EU law are the right to private life and right to freedom of expression, which were recognised as general principles of EU law before the end of the EU Exit Transition Period. The right to private and family life and right to freedom of expression also constitute rights under Article 8 and Article 10 of the ECHR and will therefore continue to be captured by the new definitions of “fundamental rights and freedoms”. No discernible impact on standards of data protection has therefore been identified as a result of the changes made by this statutory instrument.”
3. The Department’s statement suggests that potential differences in the rights and freedoms cannot be ruled out entirely. Even if the Department has not identified any discernible impact, any changes in this sensitive area may be regarded as politically significant and something on which the House may wish to seek assurance from the Minister. **We therefore recommend an upgrade of the instrument to the affirmative procedure.**

4. We have received a submission from a Professor of Law at Cambridge University which suggests that the proposed changes may be more significant than indicated in the EM and which raises concerns about the instrument seeking to amend primary legislation. We have published the submission on our website.<sup>1</sup>

**Instrument about which no recommendation to upgrade is made**

- European University Institute Regulations 2023

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<sup>1</sup> SLSC, 'Scrutiny evidence': <https://committees.parliament.uk/committee/255/secondary-legislation-scrutiny-committee/publications/8/scrutiny-evidence/>.

## DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

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### Alcohol Licensing (Coronavirus) (Regulatory Easements) (Amendment) Regulations 2023 (SI 2023/990)

*Date laid: 11 September 2023*

*Parliamentary procedure: made affirmative*

*These Regulations further extend temporary licensing provisions, put in place during the Covid-19 pandemic, that allow premises with a licence that only permits sales of alcohol for consumption on the premises (“on-sales”) to also sell alcohol for consumption off the premises (“off-sales”) without further application or fee. The move is intended to support the hospitality industry as it continues its recovery from the pandemic. As with previous extensions, the Home Office has provided minimal evidence to support its approach, and in a consultation earlier this year a majority of respondents opposed the move. **The Government intend to use this 18-month extension to formulate and bring forward a long-term policy in the area. When doing so, we expect the Government to provide Parliament with a more robust evidence base, including addressing concerns put forward in the consultation.***

**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.**

#### *Background*

5. These Regulations further extend temporary licensing provisions, put in place during the Covid-19 pandemic, to allow premises with a licence that only permits sales of alcohol for consumption on the premises (“on-sales”), such as pubs and restaurants, to also sell alcohol for consumption off the premises (“off-sales”) without further application or fee. These provisions were first introduced in the Business and Planning Act 2020, with an expiry date of 30 September 2021. They have been extended twice prior to these Regulations, each for a year. The current Regulations extend the provisions by 18 months, to 31 March 2025.
6. The Explanatory Memorandum (EM) laid with the instrument states that the reason for the further extension is to “help to mitigate the fact that the hospitality sector is continuing to feel the effect of the coronavirus pandemic; whilst there are no remaining restrictions in place, many businesses continue to face significant debt burdens as a result of the pandemic”.
7. The Regulations follow the made affirmative procedure and took effect on 28 September 2023.

#### *Lack of robust evidence*

8. When these provisions were extended for a second time, in September 2022, we drew the regulations to the special attention of the House, highlighting the lack of a robust evidence base for the move.<sup>2</sup> The EM for these Regulations contains even less information, with no data at all on the position of the sector or what impact the extension will have. In response to our questions, the Home Office provided the following information:

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<sup>2</sup> SLSC, *13th Report* (Session 2022–23, HL Paper 86), paras 1–9.

- Industry survey data shows that the hospitality sector emerged from the pandemic with £10 billion of Covid-19 related debt.
  - Office for National Statistics data shows that 6.6% of hospitality firms reported that their debt repayments exceeded 100% of their turnover in July 2023, above the economy-wide average of 1.9%, and up from 5.1% on May 2023.
  - Operating costs reached record levels in 2021 at 55.2%, compared with 52.5% pre-pandemic.
  - Industry data suggests that whilst turnover was up 6.7% in the last year to £137bn, compared to 2019, it remains almost 20% behind in real terms when accounting for inflation.
  - One in seven hospitality businesses is still operating at a loss.
  - Hospitality insolvencies in the six months to July 2023 were 58% higher than the 2019 average, as cost pressures place significant demand on profit margins.
9. Although some of these figures are out of date and relate to the position of the sector rather than the effects of the instrument, **the information is helpful in understanding the rationale for the instrument and should have been included in the EM.**

*Consultation and the longer-term policy stance*

10. While our previous report criticised the lack of data presented, it welcomed the fact that the Home Office was intending to consult on whether to maintain these arrangements in the longer term, in order to obtain a stronger evidence base for the policy.
11. The consultation was published on 6 March 2023.<sup>3</sup> The results suggested that 65% of respondents opposed the off-sales extension, instead supporting a return to the pre-Covid situation. The Government’s response said that it intended to proceed with the extension anyway, saying that this decision was “due to the ongoing covid-related economic ramifications faced by the hospitality sector [...] This will help to support economic recovery for a sector that has faced many financial challenges”.
12. The Home Office told us that the 18-month extension put in place by these Regulations was the “optimal timeframe” to ensure that a “permanent long-term solution” would be put into place, taking into account the “complex views and evidence” provided during the consultation. We applaud the intention to produce a permanent solution before another extension is required and, again, we welcome the Home Office’s intention to proceed on the basis of more robust evidence than it has currently produced, including that provided by the consultation. We note that the headline outcome of the consultation was opposed to the Government’s current policy, underscoring our earlier point that even a decision to maintain the status quo has consequences. When bringing forward its long-term approach, the Government should address concerns expressed in the consultation.

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3 Home Office, ‘Licensing Act 2003: Regulatory easements consultation responses’ (15 August 2023): <https://www.gov.uk/government/consultations/licensing-act-2003-regulatory-easements/outcome/licensing-act-2003-regulatory-easements-consultation-responses> [accessed 11 October 2023].

*Impact Assessment*

13. An Impact Assessment (IA), published with the consultation,<sup>4</sup> reported a best estimate of the gains from the policy to businesses of around £1 million a year. However, this figure only reflects the reduction in licence application fees. No estimate was included for the potential increased profits from higher sales because of a “lack of robust data” on which an assessment could be based. Nevertheless, the Home Office told us that it was “confident that this extension will provide businesses with the opportunity to increase profits”. Likewise, a lack of reliable data prevented any quantification of wider social benefits, such as possible higher employment and increased outside socialising. **The lack of information on the key effects of the policy makes proper scrutiny impossible.**
14. The IA discusses the possibility that making off-sales easier will increase crime, anti-social behaviour and adverse health impacts, given the links between these factors and alcohol consumption. Again, the IA did not make any estimates of these effects. **This is another significant omission.** However, the IA did suggest that any adverse implications may be limited because of substitution effects; in other words, that increased alcohol purchased through off-sales from premises with on-sale licences may be offset by lower purchases from off-sales only venues, such as corner shops and supermarkets. **This may be correct, but we note that the argument is double-edged: if substitution effects reduce the adverse consequences for crime, anti-social behaviour and health, they are also likely to reduce the overall economic benefits by increasing profits in one sector only by lowering them elsewhere.**

*Conclusion*

15. The key aim of this policy is to improve the financial position of hospitality businesses by facilitating them to generate additional sales and profits. It is, therefore, surprising that the Government have no estimate of the extent to which the Regulations will achieve this aim, or of the size of important knock-on effects such as the consequences for other related sectors and the impact on crime, anti-social behaviour and health. **When formulating and bringing forward its long-term policy, we expect the Home Office to provide Parliament with a more comprehensive evidence base.**

**Data Protection (Adequacy) (United States of America) Regulations 2023 (SI 2023/1028)***Date laid: 20 September 2023**Parliamentary procedure: negative*

*These Regulations specify the United States (“the US”) as a country which provides an adequate level of protection for the transfer of personal data. In practice, this will allow certain transfers of personal data from the UK to the US without the controller or processor of that data being required to use safeguards or authorisations under the United Kingdom General Data Protection Regulation. While the explanatory material that has been provided with these Regulations makes clear the effect of the instrument, it fails to link to or explain key elements of the policy and how they fit into*

<sup>4</sup> Home Office, ‘Impact Assessment: Alcohol licensing regulatory easements: off-sales and temporary events notices’ (15 February 2023): [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1137854/150223\\_HO\\_Alcohol\\_licensing\\_IA\\_-\\_Regulatory\\_easements\\_v.4\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1137854/150223_HO_Alcohol_licensing_IA_-_Regulatory_easements_v.4_.pdf) [accessed 16 October 2023].

*the policy decision to grant adequacy to the US. In addition, the Department did not provide a full Impact Assessment when the Regulations were laid before Parliament, even though the Government expect significant benefits from the adequacy decision for UK service exports to the US. We also found the Department's explanation of why it did not conduct a public consultation unsatisfactory. **We regret the absence of the Impact Assessment and public consultation and recommend that the EM be revised to include the missing contextual information.***

**The 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*

16. Section 17A of the Data Protection Act 2018 empowers the Secretary of State to make adequacy regulations (also known as “data bridges”) to permit the free flow of personal data to another country if the Secretary of State considers that the country provides an adequate level of protection for such personal data. Once a country is the subject of adequacy regulations, UK controllers and processors can make transfers of personal data freely, without requiring additional safeguards or authorisations, such as standard contractual clauses, or a derogation where the data subject has consented explicitly to the proposed transfer, after having been informed of the possible risks of such transfers, under the United Kingdom General Data Protection Regulation (“the UK GDPR”).<sup>5</sup>

### *What this instrument does*

17. These Regulations specify the United States of America (“the US”) as a country which provides an adequate level of protection for certain transfers of personal data. The new arrangement is also referred to as the “UK-US data bridge”.
18. The Department for Science, Innovation and Technology (DSIT) explains that, with regard to the scope of the new arrangement, all personal data that “will be in the scope of the EU-US Data Privacy Framework Principles” can be transferred without the need for any specific authorisation to persons in the US who “participate in the UK Extension to the EU-US Data Privacy Framework”. The Explanatory Memorandum (EM) that has been supplied with the Regulations does not offer an explanation of what the EU-US Data Privacy Framework Principles are or of what they may require.
19. Asked for further information, the Department told us that:
 

“The EU-US Data Privacy Framework Principles (including the Supplemental Principles and Annex I of the Principles) are requirements in relation to data protection which organisations who certify to the Framework commit to abide by. They cover how an organisation collects, processes and discloses personal data, and include matters such as the information that must be given to data subjects and the taking of

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<sup>5</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (United Kingdom General Data Protection Regulation)(Text with EEA relevance): <https://www.legislation.gov.uk/eur/2016/679/contents> [accessed 16 October 2023].



appropriate security measures to protect personal data. Each of these Principles are covered in detail within our published analysis.

The EU-US Data Privacy Framework Principles have been published in multiple locations, including on gov.uk via the ‘UK-US data bridge: supporting documents’ page<sup>6</sup> [...] and through a link provided within the Statutory Instrument”.<sup>7</sup>

20. We note that the link to the EU-US Data Privacy Framework Principles is provided in the Regulations. **It should, however, also have been included in the EM, alongside a brief summary of the Principles and a short description of their purpose.**
21. The Department further states in the EM that the instrument has been made because the Secretary of State, following an assessment by DSIT officials, considers that the US ensures an adequate level of protection of personal data for certain transfers, and that “DSIT’s full analysis of the US framework of laws and practices and its assessment of the UK Extension to the EU-US Data Privacy Framework will be made publicly available on GOV.UK”. According to DSIT, this full analysis sets out the reasoning as to why the Secretary of State considers the US to provide an adequate level of protection for personal data.
22. The EM does not, however, include a link to the published analysis, and it fails to explain what the UK Extension to the EU-US Data Privacy Framework is or how it was developed or negotiated. It is not clear, for example, whether the UK sought an extension of an existing EU-US Framework rather than agree a bespoke framework with the US. Asked for further information, the Department told us that:

“The wider context of the EU-US Data Privacy Framework, and the UK Extension, is explained in our published analysis in the ‘Context’ section (see pages 6-7).<sup>8</sup>

In brief, after lengthy discussions over the past few years, the EU and US agreed to bring into force the EU-US Data Privacy Framework. An agreement in principle on this Framework between the EU and the US was announced in March 2022 and it was finally brought into effect on 10 July 2023. The EU-US Data Privacy Framework replaced the previous EU-US Privacy Shield Framework, which the UK had previously participated in while we were an EU Member State. The UK Department for Science, Innovation and Technology (previously Department for Digital, Culture, Media and Sport) had been in parallel discussions with the US Department of Commerce for the past few years about ensuring protections for UK personal data transfers to the US. Discussions between the EU and US and between the UK and US took place in parallel but were independent of each other.

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6 HM Government, ‘EU-US Data Privacy Framework Principles’: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1185184/annex\\_a\\_ue-us\\_dpf\\_principles.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1185184/annex_a_ue-us_dpf_principles.pdf) [accessed 17 October 2023].

7 Department for Science, Innovation and Technology (DSIT), ‘UK-US data bridge: Data Privacy Framework Principles and List’: <https://www.gov.uk/government/publications/uk-us-data-bridge-data-privacy-framework-principles-and-list> [accessed 17 October 2023].

8 DSIT, ‘Analysis of the UK Extension to the EU-US Data Privacy Framework’: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1185427/analysis\\_of\\_the\\_uk\\_extension\\_to\\_the\\_eu-us\\_data\\_privacy\\_framework.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1185427/analysis_of_the_uk_extension_to_the_eu-us_data_privacy_framework.pdf) [accessed 17 October 2023].

As a result of the UK-US discussions, the US agreed to extend the protections of the EU-US Data Privacy Framework to transfers of personal data from the UK - this represents the ‘UK Extension to the EU-US Data Privacy Framework’, which will be fully effective from the 12 October when the UK’s adequacy regulations take effect. Relying on an extension to the EU-US Data Privacy Framework for transatlantic data transfers, rather than a separate framework approach, reduces the administrative and compliance burden for US organisations certifying to the framework. The UK data bridge for the UK Extension is distinct from the EU’s own adequacy decision and does not directly rely on the EU to have an adequacy decision in place for the US in order to continue to function.”

23. We also asked the Department about the nature and legal status of the UK Extension to the EU-US Data Privacy Framework. DSIT told us:

“The UK Extension is a programme administered and operated by the US Department of Commerce, as an extension of the EU-US Data Privacy Framework. It is not an international agreement in legal terms. The [DSIT] Secretary of State independently took the decision to establish a data bridge to allow personal data to be transferred to organisations participating in that programme, under Section 17A of the Data Protection Act 2018, after a thorough technical assessment of the programme and other associated US laws, regulations and practices.

The details of the UK Extension and how it will be operated by the US Department of Commerce and other relevant US bodies are set out in the letters provided by the US Department of Commerce (Annexes B and C, to the analysis), the US Federal Trade Commission (Annex D) and US Department of Transportation (Annex E).<sup>9</sup> These letters contain commitments and explanations from the US government and Federal Trade Commission concerning the enforcement and extension of the protections of the EU-US Data Privacy Framework to personal data transfers from the UK under the UK Extension.<sup>10</sup>

[...] As explained in the letters referenced above, in relation to the UK Extension references to the EU (and similar) within the EU-US Data Privacy Framework documentation (the Principles etc) should be read as referring to the UK (and similar). Certified US organisations who have elected to opt-in to the UK Extension are required to treat UK personal data in accordance with the Principles, Supplemental Principles and Annex I of the Principles.<sup>11</sup>”

24. **We regret that this important context to the UK Extension to the EU-US Data Privacy Framework was not included in the EM. While the purpose of the Regulations is made clear by the EM, without the additional information provided by the Department and the link to the Government’s analysis, it is not possible for a reader of the EM to understand fully the policy context and framework of the adequacy**

9 DSIT, ‘UK-US data bridge: supporting documents’,: <https://www.gov.uk/government/publications/uk-us-data-bridge-supporting-documents>, see annexes A to H.

10 See footnotes 2 and 3 of Annex C, ‘International Trade Administration (Department of Commerce) letter from Under-Secretary for International Trade Marisa Lago’ (13 July 2023): [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1185186/annex\\_c\\_ita\\_letter\\_uk\\_extension\\_to\\_the\\_eu-us\\_dpf.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1185186/annex_c_ita_letter_uk_extension_to_the_eu-us_dpf.pdf) [accessed 17 October 2023].

11 The Annex C letter further explains this through footnotes 1–3.

**decision and how this policy was developed. We therefore ask the Department to revise the EM to include the contextual information and the links to relevant external material.**

### *Reciprocity*

25. The UK-US data bridge will make certain data transfers to the US easier. We asked the Department whether there were reciprocal arrangements for the transfer of data from the US to the UK. DSIT told us:

“The US does not have a comprehensive data protection framework, like the UK GDPR. Privacy requirements in the US are mostly contained with various sector-specific laws, for example finance and healthcare, and in state-level legislation.

Notably, US privacy laws generally do not restrict the transfers of personal data internationally. As a result, there are few barriers to US personal data transfers to the UK, with transfers likely relying, where necessary, on contractual mechanisms, or sector or state-level requirements.”

### *Impact*

26. According to DSIT, the US is a vital trading partner for the UK when it comes to data-enabled exports. The EM states that in 2022, 89% of the UK’s service exports to the US were data-enabled, amounting to £99 billion and representing about 32% of the UK’s total global data-enabled services exports. The Department expects this figure “to grow with a data bridge, by removing the need for alternative transfer mechanisms for transfers to certified organisations in the US”, and that in addition to trade, the data bridge will be beneficial to political, scientific and research relationships between the UK and the US, potentially leading to onward innovation benefits.
27. DSIT says that a full Impact Assessment (IA) has been submitted to the Regulatory Policy Committee (RPC) for review and that it will be published “in due course” once the RPC’s response has been received. According to DSIT, the IA is an updated version of an IA that the RPC rated green (‘fit for purpose’) in September 2022.
28. In a statement, the RPC explained that the updated IA was first submitted by DSIT for scrutiny on 4 August 2023, and that the RPC’s initial review of the IA, sent to DSIT on 15 September, found that it was not sufficiently robust, identifying areas for improvement which if not addressed adequately “would generate a red-rated opinion”.<sup>12</sup> The RPC says that DSIT submitted a revised IA on 20 September, the same day the Regulations were laid.
29. **We are disappointed that the Department was unable to provide a final, green-rated IA when the Regulations were laid before Parliament.** As we have emphasised previously, a lack of impact information undermines Parliament’s ability to scrutinise legislation effectively. Since

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12 Regulatory Policy Committee (RPC), ‘The Data Protection (Adequacy) (United States of America) Regulations 2023 – UK extension to the EU-US Data Privacy Framework - Impact Assessment statement from the RPC’ (22 September 2023): <https://www.gov.uk/government/news/the-data-protection-adequacy-united-states-of-america-regulations-2023-uk-extension-to-the-eu-us-data-privacy-framework-impact-assessment-stat> [accessed 17 October 2023].

our special report on IAs,<sup>13</sup> we have repeatedly raised concerns about the absence of impact information when instruments are laid. **We regret that this is a further example of relevant impact information not being shared with Parliament at the right time.**

### *Consultation*

30. The Department says that it consulted the Information Commissioner on the decision to grant adequacy to the US. Given that the transfer of personal data, especially to other countries, is a matter of public interest and that the new arrangements will be important for trade with the US, we asked the Department why there had not been a full public consultation. DIT responded that:

“Article 36(4) of the UK GDPR requires the Secretary of State to consult the Information Commissioner when preparing a proposal for a legislative measure for processing. Section 182(2) of the Data Protection Act 2018 also requires the Secretary of State to consult the Information Commissioner and such other persons as the Secretary of State considers appropriate prior to making regulations under the Act.

We did not publicly consult when making prior adequacy regulations for the Republic of Korea data bridge in 2022. Additionally, the Department has issued statements in relation to the UK-US data bridge since 2021 which are in-line with our approach to conduct such assessments transparently. Such publicly available information in relation to our stated aims and progress on the UK-US data bridge have provided opportunities for the general public and members of Parliament to raise questions concerning the approach and appropriateness of progressing with a UK-US data bridge. Related public statements can be found [here<sup>14</sup>].”

31. We welcome the Department’s publication of statements and updates as its policy on the UK-US data bridge developed, delivering transparency on the process. We take the view, however, that this is not a substitute for a public consultation: unlike formal consultation, the published updates and statements did not offer a comment function or contact details to raise questions or concerns. We also question whether the Department’s previous approach to the Republic of Korea sets a precedent: transfers of personal data to the US are likely to be significantly larger than those to the Republic of Korea, so in both scale and economic significance the adequacy regulations in relation to the Republic of Korea may not be a suitable comparator. Finally, we consider that it would have been desirable to offer experts, such

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13 SLSC, *Losing Impact: why the Government’s impact assessment system is failing Parliament and the public* (12th Report, Session 2022–23, HL Paper 62).

14 ‘International data transfers: building trust, delivering growth and firing up innovation’ (August 2021): <https://www.gov.uk/government/publications/uk-approach-to-international-data-transfers/international-data-transfers-building-trust-delivering-growth-and-firing-up-innovation>. ‘UK - US joint statement on deepening the data partnership’ (December 2021): <https://www.gov.uk/government/news/uk-us-joint-statement-on-deepening-the-data-partnership>. UK and US progress tech and data partnership (October 2022): <https://www.gov.uk/government/publications/uk-and-us-progress-tech-and-data-partnership>. Inaugural Meeting of U.S.-UK Comprehensive Dialogue on Technology and Data (January 2023): <https://www.gov.uk/government/news/inaugural-meeting-of-us-uk-comprehensive-dialogue-on-technology-and-data>. ‘UK and US reach commitment in principle over ‘data bridge’’ (June 2023): <https://www.gov.uk/government/news/uk-and-us-reach-commitment-in-principle-over-data-bridge> [accessed 17 October 2023].

as specialist lawyers, the opportunity to comment and give feedback on the UK-US data bridge, a highly technical and complex policy area.

32. We have previously explained that formal public consultation can provide opportunities not only to improve a policy and its practical implementation but that it can also help to improve confidence in a policy.<sup>15</sup> This is particularly relevant here, as granting adequacy to the US appears to be economically significant, highly technical and complex and potentially sensitive as it involves the transfer of personal data. **We take the view therefore that it would have been desirable to carry out a public consultation.**

### *Conclusion*

33. While the explanatory material that has been provided with these Regulations makes clear the effect of the instrument, it fails to provide key contextual information that is needed for the reader to understand fully the nature of the new arrangement for data transfers to the US and how the Government made the decision to grant adequacy to the US. In addition, despite expected significant benefits for trade with the US, the Department failed to provide a full IA when the Regulations were laid before Parliament and did not consult publicly on the policy. **We regret the absence of the IA and of a public consultation and recommend that the EM be revised to include the missing contextual information.**

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<sup>15</sup> SLSC, *Interim Report on the Work of the Committee in Session 2022–23* (42nd Report, Session 2022–23, HL Paper 205), para 24.

## CORRESPONDENCE

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### Update from the Department for Transport on its maritime backlog

34. Some years ago we noted a significant number of Department for Transport (DfT) instruments that were long overdue in implementing certain legal commitments.<sup>16</sup> Two years ago, following an oral evidence session, the then Maritime Minister, Mr Robert Courts MP, provided a list of the DfT’s legislative “backlog” and gave an undertaking to eliminate it by the end of 2023.
35. The House has also shown its concern about these extended delays, most recently in a debate on the *Merchant Shipping (Fire Protection) Regulations 2023*.<sup>17</sup>
36. We have received regular progress reports from the relevant DfT Minister over the years, including one from the current Minister, Baroness Vere of Norbiton, on 28 April 2023 which reassured us that the programme was on track and that sufficient resource, in particular legal resource, would be available to complete both this programme and the legislation required to implement the requirements of the Retained EU Law (Revocation and Reform) Act 2023.<sup>18</sup> The reassurance that DfT was “committed and on track to lay all the maritime SIs in the backlog by the end of the year” was reiterated in the Government Response to our Interim Report received in July 2023.<sup>19</sup>
37. We were therefore disappointed to receive a letter from Baroness Vere on 18 September (published in Appendix 1) stating that the Department’s self-imposed deadline would be missed. One piece of legislation has been delayed until January 2024, and two have yet to commence consultation. **This delay once again causes us grave concerns about DfT’s ability to manage effectively its legislative programme.**

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16 See SLSC, *21st Report* (Session 2017–19, HL Paper 88) and SLSC, *17th Report*, (Session 2019–21, HL Paper 73), which included correspondence setting out the size of the backlog and how DfT was planning to address it.

17 HL Deb, 2 May 2023 [cols 1469-1481](#).

18 SLSC, *38th Report* (Session 2022–23, HL Paper 189) Appendix 3

19 SLSC, *50th Report* (Session 2022–23, HL Paper 245) pp 9–10.

## INSTRUMENTS OF INTEREST

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### Draft National Minimum Wage (Amendment) (No. 2) Regulations 2023

38. These draft Regulations would remove the ‘live-in domestic worker exemption’ from the National Minimum Wage (NMW) Regulations 2015, so that work done by a worker who resides in an employer’s home and is treated as a member of the family will in future qualify for the NMW/ National Living Wage (NLW). The exemption was originally introduced to facilitate affordable au pair placements.
39. The Department for Business and Trade (DBT) explains that the Low Pay Commission found in 2021<sup>20</sup> that the current exemption enables exploitation: most people working under the exemption are migrant women undertaking domestic rather than au pair work, with some employers not genuinely treating them as a member of the family as intended under the exemption. As this is difficult for workers to prove, however, the exemption provides a loophole for employers which allows them to require live-in domestic workers such as housekeepers and cleaners to work long hours for low pay.
40. The removal of the exemption will mean that all live-in domestic workers, including au pairs and live-in carers, will be entitled to the NMW/NLW. According to the Low Pay Commissions, the impact on the au pair sector will be limited, as the sector has been “virtually decimated” by changes to the migration system following Brexit. Regarding the effect on live-in carers, DBT will work with other departments to assess the financial impact on local authorities which support individuals with their care costs. Asked for further information on the potential impact on the live-in care sector, the Department told us:

“The removal of the exemption for live-in domestic workers is not expected to impact the live-in care sector significantly for the following reasons:

All live-in carers employed via direct payments from local authorities should have policies in place that these workers must be paid at least the National Minimum Wage and are typically treated as employees, with employment contracts and terms of employment. This makes this type of work more in line with an employee-employer relationship than a family relationship. The exemption only applied when the person working is treated like a family member (i.e. for the exemption to apply).

There is evidence that median pay for Personal Assistants is higher than the National Living Wage. For instance, Skills for Care report estimates that the median pay for all the Personal Assistants was £10.50 in December 2022, higher than the National Living Wage at the time (£9.50).

If live-in carers and Personal Assistants are paid less than the National Minimum Wage, they can raise a complaint to HMRC who are responsible for enforcement.”

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20 Low Pay Commission, ‘Low Pay Commission Report 2021’ (December 2021): <https://www.gov.uk/government/publications/low-pay-commission-report-2021> [accessed 16 October 2023].

## Draft Representation of the People (Postal Vote Handling and Secrecy) (Amendment) Regulations 2023

### Draft Non-Party Campaigner Code of Practice

41. These two pieces of secondary legislation support the implementation of provisions which were introduced by the Elections Act 2022 (“the 2022 Act”). The draft Regulations propose updates to the rules for Parliamentary elections and other polls, with the aim of strengthening the security of postal and proxy voting, in particular in relation to the handling and handing in of postal votes and the secrecy of postal and proxy voting. For example, the draft Regulations provide that in addition to their own postal vote, an individual may hand in at a polling station or to the Returning Officer the postal votes of up to five other electors.
42. The draft statutory code of practice (“the Code”) sets out guidance to support third party campaigners in following the rules contained in Part VI of the Political Parties, Elections and Referendums Act 2000 (PPERA). The guidance refers to third-party campaigners as “non-party campaigners”: these are individuals or organisations who are not registered political parties or candidates, but campaign for or against political parties, candidates or issues before an election. The Department for Levelling-Up, Communities and Housing explains that the draft Code was prepared by the Electoral Commission (“the Commission”) in response to a statutory review of the operation of Part VI of PERA by Lord Hodgson of Astley Abbots.<sup>21</sup> The review recommended that the Commission consider issuing codes of practice in relation to third-party campaigning, and the 2022 Act introduced a duty on the Commission to produce such a code. The Code will apply to third-party campaigners operating at UK Parliamentary general elections and Northern Ireland Assembly elections as well as to Senedd or Scottish Parliament elections where the regulated period coincides with the regulated period for a UK Parliamentary election.

### Statement of Changes in Immigration Rules (HC 1780)

43. Amongst other changes to the immigration rules, this instrument removes the right for appeals against decisions made under the EU Settlement Scheme (EUSS) to be made via administrative review. Judicial appeals will still be available. The Home Office told us that the change was needed because administrative review has not operated as intended: it was designed to provide “a quick means of correcting a decision where there had been a caseworking error”, but, in practice, reviews take 18 months or more. In addition, the Home Office said the administrative appeal route is not required under the Citizens’ Rights Agreements between the UK and the European Economic Area/Switzerland, and neither is it available elsewhere in the immigration system. The Home Office told us that administrative reviews and judicial appeals are usually a very similar process, incur the same fee of £80 (for judicial appeals on paper) and are considered “similarly accessible”. **We note that the Home Office has chosen to scrap this part of the system, rather than inject more resources to make it work as intended.**
44. The instrument also removes one ground for refusal of an Electronic Travel Authorisation (ETA), namely if an applicant has failed to pay NHS

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21 See Third Party Campaigning Review, *Third-Party Campaigning: Getting the Balance Right*, Cm 9205 (March 2016): [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/507954/2904969\\_Cm\\_9205\\_Accessible\\_v0.4.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/507954/2904969_Cm_9205_Accessible_v0.4.pdf) [accessed 17 October 2023].



charges for overseas visitors of at least £500. The Home Office said this change is necessary because “current systems are not capable of processing information on NHS debt quickly enough to deliver an ETA decision at the required speed”. The Home Office states that a successful ETA application does not guarantee that a person will be granted permission to enter at the UK border, and so those with outstanding NHS debts may still be refused entry at the UK border on arrival. We are not clear whether such checks will actually be undertaken at the border and, if so, why they could not also be included in the system for screening ETAs. In any case, it is regrettable that shortcomings in technology prevent those who have run up large unpaid NHS charges from being barred from obtaining an ETA, which is intended to be a simpler method than border controls for sifting out those who should not be permitted entry. **The Government should seek to improve its systems in this area to make this possible.**

45. We have previously expressed doubts about ETA legislation that relies on technological solutions before they are available.<sup>22</sup> The Home Office has assured us that in other respects the technology required for ETA will operate as planned.

#### **Central Counterparties (Transitional Provision) (Extension and Amendment) Regulations 2023 (SI 2023/999)**

46. This instrument extends two post-Brexit transitional periods relating to the regulation of overseas Central Counterparties (CCPs). CCPs sit between the buyers and sellers of financial instruments and reduce risk by providing assurance to the parties that contractual obligations will be fulfilled. HM Treasury (HMT) says that the extensions are necessary to ensure UK firms do not face sudden increases in risks and/or capital requirements if they cease to have access to CCPs as a result of the transitional regimes expiring.
47. When the transition periods were first extended, we criticised one of the regimes that allows any firm to benefit from the status of a Qualifying Central Counterparty (QCCP) simply by applying to be recognised.<sup>23</sup> We urged HMT to consider reforms before any further extension. We also expressed disappointment that a new, permanent regime for regulating CCPs had not yet been established.
48. Alongside these Regulations, HM Treasury (HMT) told us that the most appropriate way to proceed was to establish a permanent regime as part of the ‘Smarter Regulatory Framework’ programme under the Financial Services and Markets Act 2023. HMT stated that the “first phase” of this work was complete but did not provide a date when it would be operational. **We remain concerned about the regulatory arrangements in this area and look forward to seeing further progress on establishing the permanent regimes.**

#### **Judicial Discipline (Prescribed Procedures) Regulations 2023 (SI 2023/1005)**

49. These Regulations are part of a package of measures to reform the system for considering complaints of misconduct against judicial office-holders. The Ministry of Justice (MoJ) says this will deliver “a more streamlined,

22 SLSC, *35th Report* (Session 2022–23, HL Paper 177), paras 65–6.

23 SLSC, *24th Report* (Session 2022–23, HL Paper 123), paras 1–14.

proportionate and effective process”. Changes made by the instrument include:

- Revising the composition of disciplinary panels, which consider some of the most serious complaints, from four members (two judges and two lay) to three (one judge and two lay).
- Creating a new role in the process for dealing with complaints about magistrates, known as a ‘nominated committee member’.
- Enhancing the role of regional conduct advisory committees in filtering new complaints about magistrates.
- Replacing three-person conduct panels, which hear complaints against magistrates, with a single role “analogous to a judge”.

## INSTRUMENTS NOT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

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### Instruments subject to affirmative approval

Draft	National Minimum Wage (Amendment) (No. 2) Regulations 2023
Draft	Representation of the People (Postal Vote Handling and Secrecy) (Amendment) Regulations 2023
Draft	Pensions Act 2004 and the Equality Act 2010 (Amendment) (Equal Treatment by Occupational Pension Schemes) Regulations 2023
Draft	Occupational Pension Schemes (Amendment) (Equal Treatment) (Northern Ireland) Regulations 2023
Draft	Pensions Act 2004 (Amendment) (Pension Protection Fund Compensation) Regulations 2023
Draft	Pensions (Pension Protection Fund Compensation) (Northern Ireland) Regulations 2023
Draft	Greenhouse Gas Emissions Trading Scheme (Amendment) (No. 2) Order 2023

### Made instruments subject to affirmative approval

SI 2023/1061	Northern Ireland (Ministerial Appointment Functions) (No. 2) Regulations 2023
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### Draft instruments subject to annulment

Draft	Wokingham (Electoral Changes) Order 2023
Draft	Non-Party Campaigner Code of Practice

### Instruments subject to annulment

SI 2023/984	Merchant Shipping (Inspections of Ro-Ro Passenger Ships and High-Speed Passenger Craft) Regulations 2023
SI 2023/987	Court Funds (Amendment) Rules 2023
SI 2023/995	Health and Care Professions Council (Miscellaneous Amendment) Rules Order of Council 2023
SI 2023/998	Armed Forces Pensions (Remediable Service) Regulations 2023
SI 2023/999	Central Counterparties (Transitional Provision) (Extension and Amendment) Regulations 2023
SI 2023/1005	Judicial Discipline (Prescribed Procedures) Regulations 2023
SI 2023/1008	Immigration (Notices) (Amendment) Regulations 2023
SI 2023/1017	Social Security Additional Payments (Second Qualifying Day) Regulations 2023
SI 2023/1018	Financial Services (Gibraltar) (Amendment) (EU Exit) Regulations 2023

- SI 2023/1025 Response to the Committee on Climate Change Report  
(Extension of Period) Order 2023
- SI 2023/1040 Income-related Benefits (Subsidy to Authorities) Amendment  
Order 2023
- SI 2023/1048 Export Control (Amendment) (No 2) Regulations 2023
- SI 2023/1052 Building (Restricted Activities and Functions) (England)  
Regulations 2023
- SI 2023/1054 Sea Fisheries (Amendment) (England) Regulations 2023
- HC 1780 Statement of Changes in Immigration Rules

## APPENDIX 1: UPDATE FROM THE DEPARTMENT FOR TRANSPORT ON ITS MARITIME BACKLOG

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### Letter from Baroness Vere of Norbiton, Minister for Aviation, Maritime and Security at the Department for Transport, to The Rt Hon. Lord Hunt of Wirral MBE, Chair of the Secondary Legislation Scrutiny Committee

Following my letter of 17 April 2023 addressing the maritime secondary legislation programme, I wanted to write again to provide an update on our progress.

In October 2021, Robert Courts MP (former Maritime Minister) made a commitment to the Secondary Legislation Scrutiny Committee (SLSC) that a backlog of amendments to international maritime conventions, that had not been implemented in UK law, would be cleared by the end of 2023. The amendments were to be implemented through 13 Statutory Instruments.

Robert Courts MP also noted seven domestic maritime measures which he considered to be overdue.

In my letters of 17 April 2023 and 6 September 2023, I assured the Committee that we were on track to clear the backlog. I am pleased to say that just three out of the 13 instruments currently remain to be made.

However, I regret to inform the Committee that my Department is unable to meet the commitment with the final three international instruments. The **draft Merchant Shipping (Special Measures to Enhance Maritime Safety) Regulations** will now commence consultation on 15 September 2023 for eight weeks. This has taken longer than anticipated due to the need for extended consideration of new offences and penalties required for these regulations. The regulations are subject to the negative resolution procedure and are planned to be made by the end of January 2024.

The **draft Merchant Shipping (Carriage of Dangerous Goods and Harmful Substances) Regulations** and the draft Merchant Shipping (Carriage of Cargoes) Regulations are being considered for consultation.

These regulations are also subject to the negative resolution procedure and are planned to be made by Spring 2024.

Three out of the seven domestic measures have been completed, two are due to be made and laid this year and two are at pre-consultation stage. We expect good progress on all the outstanding domestic instruments by the end of 2023. Annex A summarises the current position for the international maritime backlog and outstanding domestic legislation.

In terms of planning for the implementation of future amendments to international maritime conventions, as I explained in my letter of 17 April, my Department is reviewing all forthcoming convention amendments, including amendments that are still at the negotiating stage in the International Maritime Organization (IMO) and the International Labour Organization (ILO). However, the Committee should be aware that there is often a short amount of time between adoption of the final, agreed, text and the international in-force date. This is the case in both the IMO and ILO. As I have previously noted, early planning will assist with timely implementation, but full legislative planning can only realistically begin once the agreed text is known, and this may, in some cases, result in a delay in

implementation. The objective is very much that such delay will be the exception rather than the rule.

The use of ambulatory reference provision in instruments which implement international conventions that are regularly updated has assisted greatly in ensuring that the majority of amendments to those conventions are automatically implemented into UK law. I have previously noted that this is already significantly reducing the number of Statutory Instruments which need to be made, for example in relation to the vast majority of the amendments to the International Convention for the Safety of Life at Sea, 1974 (SOLAS), due to come into force on 1 January 2024. Without ambulatory reference provision, several additional Statutory Instruments implementing these amendments would have been needed this year. The risk of a build-up of backlog in the future is therefore much reduced.

With the Retained EU Law (Revocation and Reform) Act 2023 now having received Royal Assent, my Department continues to plan the legislative programme to deploy the new powers in the Act. Much of this programme will involve the reform of EU derived legislation implementing international obligations and will be addressed alongside the existing international implementation programme. We will continue to ensure that sufficient resource, in particular legal resource, is available to complete both legislative programmes.

I hope that this information continues to reassure the Committee that my Department takes the issue of any outstanding secondary legislation very seriously and are taking the necessary steps to ensure that we have greater resilience and capability to protect against this happening again.

### **Annex A – Maritime Secondary Legislation Programme**

**Table 1: Maritime SI Programme – Maritime Programme (1 to 20 measures are outstanding maritime legislation, of which 1 to 13 measures are international backlog)**

<b>No</b>	<b>Title</b>	<b>Category</b>	<b>Finalisation Status</b>	<b>Update</b>
1	The Merchant Shipping (Prevention of Air Pollution from Ships) (Amendment) Regulations 2021	International Backlog	Complete	In force
2	The Merchant Shipping (Radiocommunications) (Amendment) Regulations 2021	International Backlog	Complete	In force
3	The Merchant Shipping (Polar Code) Regulations 2021	International Backlog	Complete	In force
4	The Merchant Shipping (Entry into Enclosed Spaces) Regulations 2022	International Backlog	Complete	In force

No	Title	Category	Finalisation Status	Update
5	The Merchant Shipping (Standards of Training, Certification and Watchkeeping) (Amendment) Regulations 2022	International Backlog	Complete	In force
6	The Merchant Shipping (Nuclear Ships) Regulations 2022	International Backlog	Complete	In force
7	The Merchant Shipping (Additional Safety Measures for Bulk Carriers) Regulations 2022	International Backlog	Complete	In force
8	The Merchant Shipping (Fire Protection) Regulations 2023	International Backlog	Complete	In force
9	The Merchant Shipping (Cargo and Passenger Ship Construction) Regulations 2023	International Backlog	Complete	In force
10	The Merchant Shipping (High Speed Craft) Regulations 2022	International Backlog	Complete	In force
11	The Merchant Shipping (Special Measures to Enhance Maritime Safety) Regulations	International Backlog	Statutory Instrument in draft for consultation – consultation planned to be completed by early Nov 2023.	8-week consultation due to launch w/c 15 Sept. Consultation and post consultation analysis to be completed in 2023.
12	The Merchant Shipping (Carriage of Cargoes) Regulations	International Backlog	Statutory Instrument is planned to be completed by Spring 2024	Statutory Instrument in draft and being considered for consultation.

No	Title	Category	Finalisation Status	Update
13	The Merchant Shipping (Carriage of Dangerous Goods and Harmful Substances) Regulations	International Backlog	Statutory Instrument is planned to be completed by Spring 2024.	Statutory Instrument in draft and being considered for consultation.
14	The Merchant Shipping (Control and Management of Ships' Ballast Water and Sediments) Regulations 2022	Delayed Domestic (UK commitment to accede to a convention)	Complete	In force
15	The Merchant Shipping (Standards for Passenger Ships on Domestic Voyages) (Miscellaneous Amendments) Regulations 2022	Delayed Domestic (Thames Inquiry)	Complete	In force
16	Merchant Shipping (Inspections of Ro-Ro Passenger Ships and High-Speed Passenger Craft) Regulations 2023	Delayed Domestic	Statutory Instrument is planned to be made in 2023.	Statutory Instrument laid on 14 September and comes into force on 5 Oct 2023.
17	The Merchant Shipping (Cargo Ship) (Bilge Alarm) (Amendment) Regulations 2023	Delayed Domestic	Complete	In force
18	Fishing Vessels (Standards of Training, Certification and Watchkeeping) Regulations	Delayed Domestic (UK commitment to accede to a convention).	Statutory Instrument is planned to be made mid 2024.	At pre-consultation stage
19	Merchant Shipping (Vessels in Commercial Use for Sport or Pleasure) Regulations 2024	Delayed Domestic (MAIB recommendation)	Statutory Instrument is planned to be made Spring 2024.	At pre-consultation stage
20	Merchant Shipping (Workboats) Regulations 2023	Delayed Domestic (MAIB recommendation)	Statutory Instrument is planned to be made in December 2023.	At post consultation stage

**18 September 2023**



## APPENDIX 2: INTERESTS AND ATTENDANCE

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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 17 October 2023 and included in this report, Members declared no interests.

### **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, Baroness Ritchie of Downpatrick, Lord Rowlands, Lord Russell of Liverpool and Lord Thomas of Cwmgiedd.