



HOUSE OF LORDS

Secondary Legislation Scrutiny Committee

3rd Report of Session 2023–24

Drawn to the special attention of the House:

Draft Agriculture (Delinked Payments and Consequential Provisions) (England) Regulations 2023

Draft Employment Rights (Amendment, Revocation and Transitional Provision) Regulations 2023

Draft Strikes (Minimum Service Levels: Border Security) Regulations 2023 and three linked instruments

Includes information paragraphs on:

Draft Data Protection (Fundamental Rights and Freedoms) (Amendment) Regulations 2023

Draft Equality Act 2010 (Amendment) Regulations 2023

Draft Financial Services and Markets Act 2000 (Financial Promotion) (Amendment) (No. 2) Order 2023

Draft Financial Services and Markets Act 2023 (Benchmarks and Capital Requirements) (Amendment) Regulations 2023

Draft Trade Union (Deduction of Union Subscriptions from Wages in the Public Sector) Regulations 2023

Information as to Provision of Education (England) (Amendment) 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.

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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 Jennifer Mills (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/ukxi>

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.

Third Report

PROPOSED NEGATIVE INSTRUMENTS LAID FOR SIFTING UNDER THE RETAINED EU LAW (REVOCATION AND REFORM) ACT 2023

**Proposed negative instrument about which no recommendation to
upgrade is made**

- Railways and Freight Transport etc (Revocation) Regulations 2024

DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

Draft Agriculture (Delinked Payments and Consequential Provisions) (England) Regulations 2023

Date laid: 7 November 2023

Parliamentary procedure: affirmative

*These draft Regulations propose to introduce delinked payments in 2024 to replace Direct Payments which are currently made to farmers under the Basic Payment Scheme (BPS) in England during the agricultural transition period after Brexit. The instrument also proposes to revoke the law relating to the BPS, including the associated cross-compliance requirements according to which recipients have to meet certain standards for the environment, animal welfare and public, animal and plant health. We note the Department for Environment, Food and Rural Affairs' explanation of how it intends to maintain and enforce standards after cross-compliance ends. **We are concerned, however, whether all relevant cross-compliance requirements which will be revoked by this instrument are replicated fully in domestic legislation and whether there will be any regulatory gaps. We note that some elements of the new compliance regime are still work in progress, while other cross-compliance requirements will be set out in guidance, codes of practice or incentive schemes. This raises questions as to whether they can be enforced as effectively as the current statutory requirements. 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 draft Regulations are drawn to the special attention of the House on the ground that they are politically or legally important and give rise to issues of public policy likely to be of interest to the House.

1. These draft Regulations propose to introduce delinked payments in 2024 to replace Direct Payments to farmers under the Basic Payment Scheme (BPS) in England. The instrument also proposes to revoke the law relating to the BPS, including the associated cross-compliance provisions which currently require recipients to meet certain standards for the environment, animal welfare and public, animal and plant health.

Background

2. Direct Payments have been the main income-support schemes for farmers under the EU's Common Agricultural Policy. Payments are currently made through the BPS in England and include a top-up payment for young farmers and, until the end of the 2020 claim year, a greening payment. According to the Department for Environment, Food and Rural Affairs (Defra), the BPS is largely based on the amount of land a farmer has. Following Brexit, the Government announced in 2018 that it would simplify and phase out Direct Payments in England during an agricultural transition period from 2021 to 2027,¹ including by ending the BPS and introducing delinked payments.

¹ Department for Environment, Food and Rural Affairs, 'Health and Harmony: the future for food, farming and the environment in a Green Brexit - policy statement' (14 September 2018): <https://www.gov.uk/government/publications/the-future-for-food-farming-and-the-environment-policy-statement-2018/health-and-harmony-the-future-for-food-farming-and-the-environment-in-a-green-brexit-policy-statement> [accessed 20 November 2023].

In 2020, the Government announced its intention to introduce delinked payments in England in 2024.²

How will delinked payments work?

3. This instrument would introduce delinked payments in 2024 and establish the rules under which payments will be made. Unlike the BPS, delinked payments will not be based on the amount of land a farmer has, and there will be no requirement for the recipient to continue to have land. Instead, payments will be based on the average BPS payments made in the 2020 to 2022 claim years, the so-called reference period, disregarding any payments made under the Lump Sum Exit Scheme.³ Recipients must have claimed and been eligible for the BPS in the 2023 claim year to qualify for delinked payments. People will not have to apply to receive delinked payments: Defra says that the Rural Payments Agency already has the data needed to check eligibility and calculate the payments.
4. Delinked payments will be made in two instalments each year to help recipients with their cashflow until the end of the agricultural transition period. Payments will be reduced by a certain percentage each year between 2024 and 2027 to phase out the scheme; the reduction will be set out in a further statutory instrument. Defra may recover any overpayments with interest, and people may appeal against decisions made under this instrument.
5. The Department concludes in the Explanatory Memorandum (EM) that delinked payments “best meet the widespread desire for simplification expressed by respondents to its 2018 consultation”,⁴ and that it would be “disproportionate” at this stage, over halfway through the transition period, to maintain the current BPS rules.
6. We asked for further explanation of the Department’s rationale for delinking financial assistance from the ownership or use of land. Defra responded that:

“We are phasing out Direct Payments in England because they are untargeted, poor value for money and can inhibit productivity improvements and we are doing this over seven years to give farmers time to adapt. The introduction of delinked payments in place of the payments under the current Basic Payment Scheme (BPS) is part of this transition away from Direct Payments. Introducing delinked payments enables us to pay eligible former BPS recipients for the rest of the agricultural transition, but without the bureaucracy associated with the land-based BPS. For example, recipients of delinked payments will not need to worry about how much eligible land they have or to complete an application form. As we are phasing Direct Payments out, the Government considers that by 2024 the rules and administration currently associated with BPS would be disproportionate.

2 Department for Environment, Food and Rural Affairs, ‘Agricultural Transition Plan 2021 to 2024’ (30 November 2020): <https://www.gov.uk/government/publications/agricultural-transition-plan-2021-to-2024> [accessed 20 November 2023].

3 See explanatory memorandum to the *Agriculture (Lump Sum Payment) (England) Regulations 2022* (SI 2022/390), *30th Report* (Session 2021–22, HL Paper 161).

4 Department for Environment, Food and Rural Affairs, ‘Consultation outcome: The future for food, farming and the environment’ (13 September 2018): <https://www.gov.uk/government/consultations/the-future-for-food-farming-and-the-environment> [accessed 20 November 2023].

As the payments will no longer be based on land area, the introduction of delinked payments should also help to speed up restructuring of the farming industry. Some may decide to downsize or leave farming altogether. This could create further opportunities for businesses to expand or diversify and for new entrants to join the industry.

There was a strong desire from respondents to our 2018 consultation on “The future for food, farming and the environment” to simplify Direct Payments.⁵ The Government’s decision to introduce delinked payments, which are a simpler form of payment, took account of this. Some respondents to that consultation and to our 2021 consultation on “Direct Payments to farmers: Lump sum exit scheme and delinked payments in England” highlighted the need for strong legal standards, including environmental standards, to be in place for those who continue to farm.⁶ The Government is committed to maintaining strong standards.”

Which environmental standards will apply in future?

7. The instrument proposes to revoke the BPS cross-compliance provisions which currently require recipients of Direct Payments to meet standards for the environment, animal welfare and public, animal and plant health. The Department explains in the EM:

“Once cross compliance ends, laws will continue to protect the environment, public, animal and plant health and animal welfare. Compliance will be monitored and regulated in a fair, consistent and proportionate way. However, the cross compliance rules for hedgerows are not fully covered by existing UK law. A consultation on protections for hedgerows closed in September 2023.⁷ [...] The Government will announce its response to this consultation once it has considered the responses. For other rules within cross compliance which are not in existing UK law, protections will be in place through more generalised and outcome-focussed rules in existing regulation, guidance such as the Code of Practice for Plant Protection Products, or standards within the Sustainable Farming Incentive. There will be no link between these standards and the receipt of delinked payments.”

8. Asked whether removing the link between standards and payments meant that recipients would receive payments irrespective of whether they are meeting the relevant standards, the Department responded:

“There will be no connection between delinked payments and the recipient’s compliance with standards previously linked to payments. However, all farmers must comply with the law governing domestic standards for the environment, public, animal and plant health and animal welfare.”

5 Department for Environment, Food and Rural Affairs, ‘Consultation outcome: The future for food, farming and the environment’ (13 September 2018): <https://www.gov.uk/government/consultations/the-future-for-food-farming-and-the-environment> [accessed 20 November 2023].

6 Department for Environment, Food and Rural Affairs, ‘Consultation outcome: Direct Payments to farmers: lump sum exit scheme and delinked payments in England’ (14 April 2022): <https://www.gov.uk/government/consultations/direct-payments-to-farmers-lump-sum-exit-scheme-and-delinked-payments> [accessed 20 November 2023].

7 Department for Environment, Food and Rural Affairs, ‘Consultation on Protecting Hedgerows’ (28 June 2023): <https://consult.defra.gov.uk/legal-standards/consultation-on-protecting-hedgerows/> [accessed 20 November 2023].

9. We have previously raised concerns about the removal of cross-compliance in relation to Rural Development schemes,⁸ where we concluded that it was not clear whether cross-compliance standards would be fully replicated by other legislation. We therefore asked the Department for a fuller explanation of how Defra will ensure that the revocation of statutory cross-compliance requirements will not lead to any regulatory gaps, and how the remaining standards will be enforced. The need for strong environmental standards was also an issue raised during public consultation on the new arrangements.⁹ Defra responded:

“There is an existing and ongoing strong domestic legal framework for protecting the environment, animal, plant and public health and animal welfare that will continue when cross compliance ends.

We have published guidance for farmers to help them understand which rules apply on a Rules for Farmers page on Gov.uk.¹⁰ Existing regulators will continue to be responsible for monitoring, inspection and enforcing against this domestic regulation. 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 the Environment Agency will continue to regulate, amongst other things, to protect water.

As cross compliance ends, we believe protections for hedgerows could be improved to avoid potential environmental impacts. We have recently consulted about introducing new protections and we will publish the outcome shortly. Otherwise, it has been assessed that the gaps between cross compliance rules and regulatory requirements in regard to water, soil and stone walls are either mitigated by regulation such as through generalised provisions in Farming Rules for Water and the Water Resources Act, guidance like the Code of Practice of the use of Plant Protection Products, and standards in the Sustainable Farming Incentive scheme. As a result of these, we do not believe farmers will lower standards and there will not be significant negative environmental impacts in these areas. However, we will continue to monitor the impact of farm activities and consider introducing regulation if it is needed.”

10. Defra added that its Agricultural Transition Plan set out the approach to reform farm regulation that will improve farm standards, and that the Department was making “good progress in delivering fairer, more proportionate and more effective regulation”. Defra gave the following examples of its new approach:

- “We are also working with regulators to implement a more preventative, advice-led approach to monitoring and enforcement. The Environment Agency have been working with farmers to support them back to compliance—expanding from c. 300 visits

8 See: Agriculture (Removal of Cross-Compliance and Miscellaneous Revocations and Amendments, etc.) (England) Regulations 2023 ([SI 2023/816](#)), *52nd Report* (Session 2022–23, HL Paper 256).

9 Department for Environment, Food and Rural Affairs, ‘Consultation outcome: Direct Payments to farmers: lump sum exit scheme and delinked payments in England’ (14 April 2022): <https://www.gov.uk/government/consultations/direct-payments-to-farmers-lump-sum-exit-scheme-and-delinked-payments> [accessed 20 November 2023].

10 Department for Environment, Food and Rural Affairs and others, ‘Guidance: Rules for Farmers and Land Managers’ (25 October 2023): <https://www.gov.uk/guidance/rules-for-farmers-and-land-managers> [accessed 21 November 2023].

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.”

- “We have established the slurry infrastructure grant to help livestock farmers tackle pollution from slurry and have committed to spend over £200m on ongoing grant support for slurry equipment and infrastructure.”
- “As mentioned above, we have also made it easier for farmers to find which rules apply to them, by putting them in one place on Gov.uk.”
- “Since January 2020, we have provided over £400,000 worth of funding to the Farming Advice Service (FAS) which helps farmers understand what regulations mean in practice and how they should be applied. FAS sends monthly newsletters to over 70,000 farmers and, up to September 2023, answered over 2,300 enquiries and delivered webinars to almost 4,000 farmers and advisors.”

11. We note Defra’s explanation of how it intends to maintain and enforce standards after cross-compliance ends. As with the revocation of cross-compliance for Rural Development schemes,¹¹ **we are concerned, however, whether all relevant cross-compliance requirements which will be revoked by this instrument are replicated fully in domestic legislation and whether there will be any regulatory gaps. We, note in particular, that some elements of the new compliance regime, such as standards in relation to hedgerows, are still work in progress, while it appears that other standards will be set out in guidance, codes of practice or incentive schemes. This raises questions as to whether they can be enforced as effectively as the current statutory cross-compliance requirements. 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.**

11 [*52nd Report*](#) (Session 2022–23, HL Paper 256).

Draft Employment Rights (Amendment, Revocation and Transitional Provision) Regulations 2023

Date laid: 7 November 2023

Parliamentary procedure: affirmative

*As part of the Government's programme of reforming, restating and revoking retained EU law under the Retained EU Law (Revocation and Reform) Act 2023 ("the REUL Act"), these draft Regulations propose changes to employment law in relation to recording working time, calculating annual leave and holiday pay and consultation with employees when a business is transferred. The instrument also proposes to restate certain principles of EU law to ensure employment rights are maintained following the removal of interpretive effects of EU law on the UK statute book by the REUL Act. The Department for Business and Trade says that the changes aim to minimise unnecessary bureaucracy for businesses, including additional costs that would arise from implementing a judgement of the Court of Justice of the European Union, without reducing workers' overall level of entitlement and protection. We welcome the publication of helpful Impact Assessments. **We note, however, that changes to employment law can be politically sensitive, and that some concerns were raised by the Scottish and Welsh Governments and during consultation.***

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

12. As part of the Government's programme of reforming, restating and revoking retained EU law (REUL), these draft Regulations propose changes in three areas of employment law in Great Britain:
 - record keeping requirements under the Working Time Regulations 1998 (WTR);
 - annual leave and holiday pay calculations under the WTR; and
 - consultation requirements under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE Regulations).
13. The Department for Business and Trade (DBT) says that these areas of employment law are "currently either too onerous on business to be used effectively or too complex for workers to know, understand and use". **We welcome that the Department has produced three helpful Impact Assessments for the three reform areas.**

Record-keeping requirements under the WTR

14. DBT explains that under regulation 9 of the WTR, employers must keep adequate records to demonstrate compliance with the WTR, such as the maximum weekly working time and length of night work. A 2019 judgment of the Court of Justice of the European Union (CJEU) ("the CCOO case")¹² ruled that employers must also have an objective, reliable and accessible system for recording the time worked by each worker each day. The Department says that implementing this judgment would be "disproportionate, particularly while the economy is recovering from the impact of the Covid-19 pandemic

¹² Federación de Servicios de Comisiones Obreras (CCOO) v Deutsche Bank SAE, [ECLI:EU:C:2019:402](#).

and the impacts of war in Ukraine”, and that the UK Government intervened in the CJEU hearing to set out some of its concerns.

15. This instrument proposes to clarify in law that the requirements for record keeping will not be as set out in the CJEU’s judgment in the CCOO case, but that employers will still need to keep adequate records to demonstrate compliance with the WTR, as is currently required. DBT estimates that implementing the judgment would have led to a one-off, upfront cost of around £450 million and ongoing costs of around £1 billion per year for business.

Calculating annual leave and holiday pay under the WTR

16. The Department says that, over time, the legislation and case law on the right to paid annual leave has become complicated to interpret and follow correctly, especially for employers of irregular hours workers or agency workers. A Supreme Court judgement in 2022 (“the Harpur Trust judgment”)¹³ ruled that the holiday entitlement for part-year workers should not be pro-rated to reflect the actual time worked. DBT says that following this judgment, part-year workers are entitled to a larger holiday entitlement than part-time workers who work the same total number of hours across the year.
17. This instrument proposes a new method for the accrual of annual leave which seeks to address this disparity and to ensure that workers’ holiday entitlement is proportionate to the time they work. Under the proposed method, entitlement is calculated at 12.07%¹⁴ of hours worked in a pay period for irregular hour workers and part-year workers. According to DBT, this will ensure that workers’ holiday entitlement better reflects the hours they work across the year, make it is easier for businesses to calculate accurately entitlement for workers with irregular hours where the use of a reference period is not practical and give workers a clearer understanding of their entitlement. DBT told us that the method was widely used by employers prior to the Harpur Trust judgment, and that feedback from consultation confirmed this as the preferred method of calculating entitlement for irregular hour and part-year workers.
18. The instrument further proposes to introduce so-called rolled-up holiday pay (RHP). Under RHP workers receive their holiday pay as an enhancement with every payslip rather than receiving it when they take annual leave. The Department says that a 2006 CJEU judgment¹⁵ declared the practice to be unlawful, holding that payment needed to be made at the same time as leave was taken, to address concerns that workers may otherwise be disincentivised from taking leave.
19. The Department says that introducing RHP will ensure that holiday pay is as closely aligned as possible to the pay that workers would receive if they were working. According to DBT, RHP is already used in many sectors due

¹³ Harpur Trust (Appellants) v Brazel (Respondent); [2019] [EWCA Civ 1402](#).

¹⁴ The 12.07% is obtained by dividing 5.6 (the statutory amount of annual leave in a leave year) by 46.4 (the amount of weeks work in a leave year for a full-year worker – that is 52 minus 5.6). See: Department for Business and Trade, ‘Holiday Pay and Entitlement reforms in relation to Retained European Union Law Impact Assessment’ (1 November 2023): https://www.legislation.gov.uk/ukia/2023/150/pdfs/ukia_20230150_en.pdf, para 25.

¹⁵ Joined cases of C. D. Robinson-Steele v R. D. Retail Services Ltd (C-131/04), Michael Jason Clarke v Frank Staddon Ltd and J. C. Caulfield & Others v Hanson Clay Products Ltd (C-257/04), [ECLI:EU:C:2006:177](#).

to the simplicity it offers to calculate holiday pay for irregular hour workers. We note, however, that 45% of respondents to the consultation¹⁶ did not support this approach because of concerns that it could lead to missed leave or reduced pay. Asked about the concern that RHP may discourage workers from taking annual leave, DBT told us:

“We know there is concern that allowing rolled up holiday pay may disincentivise workers from taking leave. However, we consider that existing safeguards are proportionate in addressing these concerns. [...]

Employers should also benefit from the administrative simplicity of the rolled-up holiday pay approach. This should make it easier to understand and apply, reducing administrative costs and potentially reducing non-compliance, from both employers and employees.”

20. Asked about the position of the Scottish and Welsh Governments on these changes, DBT said:

“Workers employed in agriculture in Scotland and Wales are covered by legislation that is within the legislative competence of the devolved administrations. This legislation disapplies certain provisions of the Working Time Regulations 1998 (WTR) that we will be reforming. We agreed with the Scottish and Welsh Governments that we will maintain the status quo for workers covered by Agricultural Wages (Scotland) Act 1949 and the Agricultural Sector (Wales) Act 2014.”

21. The Department explained further that there are a few regulations where workers employed in agriculture in Wales and Scotland are currently broadly carved out and that this would continue to be the case. For example, the accrual method of leave for irregular hours and part-years workers will not cover agricultural workers to whom the Agricultural Wages (Scotland) Act 1949 applies: assuming there is no other relevant legislation, these workers will continue to be entitled to their full leave without having it pro-rated to reflect time actually worked.

22. The Department added that:

“[T]he Welsh Government called for the Government to introduce a single annual leave entitlement and rolled-up holiday pay. The Scottish Government raised concerns about the rate of holiday pay and rolled up holiday pay, more specifically that it may disincentivise workers from taking leave. However, existing safeguards are proportionate in addressing these concerns. For example, employers are already required to provide an opportunity for workers to take leave and we have heard through our stakeholder engagement that this is taking place. We also have safeguards in relation to the 48-hour working week, where a worker cannot work more than 48 hours a week on average, unless they choose to opt out.”

¹⁶ Department for Business and Trade, ‘Consultation outcome: Retained EU employment law reforms’ (8 November 2023): <https://assets.publishing.service.gov.uk/media/654a62bae2e16a001242ab26/government-consultation-response-for-retained-eu-employment-law-reforms.pdf> [accessed 21 November 2023].

Restating REUL

23. The instrument proposes to restate certain principles of EU law to ensure relevant employment rights are maintained following the removal of interpretive effects of EU law on the UK statute book by the Retained EU Law (Revocation and Reform) Act 2023:

- the right to carry over annual leave where an employee has been unable to take it due to being on maternity or other family related leave or sick leave, or where the employer has failed to inform the worker of their right to paid annual leave or enable them to take it; and
- the rate of pay for four weeks of annual leave accrued under regulation 13 of the WTR (also known as EU-derived leave).

24. The Department says that this aims to maintain workers' rights to paid annual leave "as far as possible". Asked whether this meant that some principles from retained EU case law may not be incorporated into domestic law, DBT responded:

"There is a large amount of EU case law concerning holiday pay and which elements of a worker's pay should be included in holiday pay. The underlying EU principle that pervades the case law is that a worker should be paid the same while on annual leave as they would be paid if they were at work. This has led to a significant amount of case law concerning different forms of remuneration such as bonuses, commissions and overtime payments, but generally speaking EU derived holiday pay is paid at the "normal remuneration rate". Such case law applies only to the four weeks of EU leave under regulation 13 of the Working Time Regulations 1998, and not to the additional UK derived leave of 1.6 weeks under regulation 13A, which is paid at the rate of "a week's pay in respect of each week of leave" (regulation 16(1)).

When the [Explanatory Memorandum] states that the aim has been to maintain as far as possible workers' enjoyment of the right to paid annual leave, this statement reflects the volume and complexity of the case law, as well as nuance of individual case circumstances, which is difficult to be certain we have entirely captured in statute. We have sought to pull out the various strands running through case law and incorporate them into regulation 13 derived holiday pay as follows:

- (1) payments intrinsically linked to the performance of tasks which a worker is contractually obliged to carry out (*BA v Williams* [2011] IRLR 948 (CJEU));
- (2) payments relating to professional or personal status (*Williams*);
- (3) payments reflecting a results-based commission scheme, when the commission is linked to tasks required under the terms of engagement (*Lock v British Gas Trading Ltd* [2014] ICR 813); and
- (4) payments which are made with sufficient regularity over a sufficient period of time for them to be considered "normal" (*Bear Scotland Ltd v Fulton* and another UKEATS/0047/13).

In the context of the elements of holiday pay we are satisfied that, having conducted a review of the case law, we have incorporated into

the Working Time Regulations those rights which had the highest risk of being lost due to the removal of interpretive effects, and also those that were likely to have the most significant impact on workers.”

Revocations

25. The instrument proposes to revoke the *Working Time (Coronavirus) (Amendment) Regulations 2020*, which ensured that workers for whom it was not reasonably practicable to take annual leave because of the coronavirus pandemic could carry over their leave into the following two leave years. DBT says that these arrangements are no longer needed following the end of the pandemic. In addition, the *European Cooperative Society (Involvement of Employees) Regulations 2006* are revoked which have no longer any effect after Brexit and following the repeal of the main European Cooperative Society Regulations in 2021.

Consultation requirements under the TUPE Regulations

26. Under the TUPE Regulations, before a relevant transfer of a business, the current and the new employer have to inform and consult with the affected workforce’s existing representatives or arrange elections for employees to elect new representatives if they are not already in place before the transfer. The TUPE Regulations apply when a business transfers to a new employer or changes owner or when a service transfers to a new provider, for example when another company takes over a cleaning contract.
27. Under the current rules, microbusinesses (those with fewer than ten employees) are exempt from having to elect new worker representatives if they do not already have them in place. Instead, these businesses can consult their employees directly. This instrument proposes to extend this exemption, so that small businesses (those with fewer than 50 employees) and businesses of all sizes involved in transfers of fewer than ten employees, will be eligible to consult directly with their employees if they do not already have worker representatives in place; they will not have to facilitate elections for new worker representatives.
28. DBT says the current consultation requirements can be burdensome, and that extending the exemption “will make transfers easier and quicker for eligible businesses, introducing additional flexibility for more businesses while retaining important protections for employees”. During consultation, business representative organisations agreed that the changes would make TUPE transfers simpler, while trade unions criticised that the reforms could undermine the position of unions in the workplace and change the balance of power between employers and employees in TUPE transfers. The Scottish and Welsh Governments expressed concern that the changes could undermine employees’ collective bargaining rights.
29. Asked about engagement with the Scottish and Welsh Governments, DBT told us that:

“We have engaged positively with the devolved Governments throughout the consultation and SI development process at official and ministerial level, most recently to inform them of the publication of the Government’s response to the consultation. This has ensured we have been able to understand their views and to allay any concerns raised regarding the consultation’s proposals or the SI’s policy intent. [...]

We have made clear in our engagement with both devolved Governments that the Government recognises the importance of consultation with employees and employee representatives on TUPE transfers. However, we know that employers can find certain aspects of the consultation process burdensome.

This is why we consulted on extending the flexibility for employers to consult directly with employees of small businesses (with fewer than 50 employees) and of businesses of all sizes involved in transfers of fewer than 10 employees where there is no existing appropriate representative in place.

The instrument will change the consultation process in instances where businesses do not have employee representatives to consult. Where employee representatives—including trade unions—are in place, employers will still be required to consult them.

This reform will simplify the TUPE transfer process, while ensuring that workers' rights continue to be protected.”

Conclusion

30. According to DBT, the proposed changes to employment law aim to minimise unnecessary bureaucracy for businesses without reducing workers' overall level of entitlement and protection. **We note, however, that changes to employment law can be politically sensitive, and that some concerns were raised by the Scottish and Welsh Governments and during consultation. The House may wish to explore these issues further with the Minister.**

Draft Strikes (Minimum Service Levels: Border Security) Regulations 2023

Draft Strikes (Minimum Service Levels: NHS Ambulance Services and the NHS Patient Transport Service) Regulations 2023

Draft Strikes (Minimum Service Levels: Passenger Railway Services) Regulations 2023

Date laid: 7 November 2023

Parliamentary procedure: affirmative

Draft Code of Practice on Reasonable Steps to be taken by a Trade Union (Minimum Service Levels)

Date laid: 13 November 2023

Parliamentary procedure: affirmative

The first tranche of legislation to underpin the operation of the Strikes (Minimum Service Levels) Act 2023 has been laid before the House. This comprises three sets of Regulations defining the Minimum Service Levels for border security, ambulance services and passenger railway services. A draft Code of Practice to assist the trade unions in the performance of their obligations under the Act has also been laid by the Department for Business and Trade. This report summarises the conditions that apply in each case. The Department for Transport (DfT) could have provided more information about its policy choices in the Explanatory Memorandum on rail services and we regret that DfT has been unable to provide the required Impact Assessment with its legislation.

We have received a submission from the Trades Union Congress (TUC) which is published in full on our website, expressing concerns about the practicalities and scope of this group of instruments. This report includes the Government's response to the main issues the TUC raises, with further detail published online. Given the Delegated Powers Committee's criticism of the primary legislation as a skeleton Bill, we take the view that the Government could have allowed more time for employers and unions to get to grips with the practical details of its implementation.

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

Background

31. The Strikes (Minimum Service Levels) Act 2023 ("the 2023 Act") amended the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULCRA") so that minimum service levels can be applied during strikes in services within six key sectors. They are:
 - Border security
 - Health services
 - Transport services
 - Fire and rescue services
 - Education services

- Decommissioning of nuclear installations and management of radioactive waste and spent fuel.
32. Minimum service levels are to be defined by regulations in each case. (This Report describes below regulations relating to three of the sectors.) When a trade union gives an employer a notice of strike action, the employer may issue a ‘work notice’ identifying the people who are required to work, and the work that they are required to carry out during the industrial action with the objective of maintaining services to at least the levels defined.¹⁷
33. Work notices should generally be given to a trade union seven days in advance of a proposed strike, and that union must take ‘reasonable steps’ to ensure that members who are identified in a work notice for a strike day do not take part in strike action and comply with the work notice. If a trade union fails to take these reasonable steps, the employer could seek damages from the trade union or an injunction to prevent the strike taking place. If the individual takes part in a strike nonetheless, they would lose protection against unfair dismissal.
34. During the passage of the 2023 Act the Joint Committee on Human Rights published a legislative scrutiny report.¹⁸ One of its recommendations was for the Government to provide greater clarity on the requirement for trade unions to take ‘reasonable steps’, so they will know when this duty has been met and when it has not. The draft Code of Practice is the Government’s response to those concerns.¹⁹

Draft Code of Practice

35. The draft Code of Practice, issued by the Department for Business and Trade (DBT), is subject to affirmative resolution, and would apply to all six sectors equally. The Code imposes no legal obligation: failure to observe it does not make any person liable to proceedings, but compliance with it may be taken into account if the matter comes to court. It does, however, advise the union on how to ensure that its actions do not breach the law. The Code was subject to consultation and was amended in response. Its advice includes:
- Step 1: Identifying the members on the work notice so the union can act as required.
 - Step 2: Encouraging those individual members to comply with a work notice and not to strike (a sample format for this ‘compliance notice’ is provided in the Code).
 - Step 3: Picket supervisors are to be instructed by the union to make reasonable endeavours not to call on those identified in a work notice to take strike action, and those called on to work may show the compliance notice as evidence to the pickets.

17 Department for Business and Trade, ‘Minimum Service Levels: issuing work notices, a guide for employers, trade unions and workers’ (16 November 2023): <https://www.gov.uk/government/publications/minimum-service-levels-msl-issuing-work-notices/minimum-service-levels-issuing-work-notices-a-guide-for-employers-trade-unions-and-workers> [accessed 22 November 2023].

18 *JCHR, 10th Report* (HL Paper 157, Session 2022–3).

19 Department for Business and Trade, ‘Draft Code of Practice on Reasonable Steps to be taken by a Trade Union (Minimum Service Levels)’ (November 2023): https://assets.publishing.service.gov.uk/media/655272498a2ed4000d720dc4/13112023_-_For_laying_-_Minimum_Service_Levels_Draft_Code_of_Practice_1_.pdf [accessed 20 November 2023].

- Step 4: Assurance—a trade union should ensure that neither it, nor any of its officials, undermines the other steps by acting in a contrary way. For example, its communications to members about the strike should clearly state that members who have been identified in the work notice are required to comply.

Border Security

36. To avoid people smugglers or terrorists exploiting any gap in border security during a strike, the Home Office Regulations define the minimum service level as “no less effective than they would be if the strike were not taking place that day.” The Explanatory Memorandum (EM) states that the requirement applies to staff involved in the examination of people arriving in or leaving the UK, the examination of goods entering or leaving the UK, those patrolling ports and airports and those collecting and disseminating intelligence for the purposes of those services. We note, however, that the instrument only applies to Great Britain.
37. Minimum service levels are also imposed on the staff of His Majesty’s Passport Office, who are required to maintain those services which are necessary in the interests of national security at the same level as they would on a non-strike day.

Ambulance services

38. These Regulations list the ambulance services in England which are in scope of the legislation. That also includes non-emergency patient transport where provided by an ambulance service. These provisions do not extend to Scotland or Wales.
39. The Regulations require that on each day of the strike, requests from health professionals or emergency calls to 999 or 112 should be answered and triaged as they would be were the strike not taking place. Appropriate responses should then be provided for each request which is initially triaged as, or escalated to, a life-threatening condition or illness, or that relates to a person for whom there is no reasonable clinical alternative to either providing assistance at the scene of an incident or transporting the person to a healthcare facility (or both).
40. Similar requirements apply to the Inter-Facility Transfer (IFT) service which is required to answer calls and provide services for a life-threatening incident or for a patient for whom there is no reasonable clinical alternative to IFT services. In relation to the non-emergency patient transport service (NEPTS), the Regulations also provide for the answering and triaging of requests made on the strike day, or previously agreed for the strike day, relating to patients for whom there is no reasonable clinical alternative to receiving health services on the strike day.
41. The Department of Health and Social Care’s (DHSC) consultation document acknowledged that, during past strikes, emergency provision has been delivered through voluntary arrangements, but states the objective of setting minimum service levels is to improve the predictability and consistency of that provision throughout England.

Rail services

42. The definition of minimum service levels for the rail industry is more complex. The Regulations require:
- mainline train operators in Great Britain to achieve 40% of the normally timetabled services on the priority routes set out in the schedule, which includes destinations in Scotland and Wales (Category A);
 - infrastructure services for those trains, such as reactive maintenance or clearing the line of obstructions to operate between 06.00 and 22.00 (Category B); and
 - trams and light railways such as the Docklands Light Railway or underground train systems to achieve 40% of their scheduled timetable (Category C).
43. Further information from the Department for Transport (DfT) explains how these targets were decided:
- “The 40% provision was chosen because it “still represents a significant reduction compared with normal services, which will limit the impact of the policy on the bargaining power of unions and will still allow a substantial proportion of workers to strike on a given strike day.”
 - “An MSL [minimum service level] of 40% will provide benefits to passengers by raising the number of journeys that are able to take place during peak periods (which would support access to work) than presently operate during strike action. The MSL will also allow more services to operate at other times of the day, which would facilitate other aims of MSLs including mitigating economic damage and providing access to education and health services.”
 - “The list of priority routes was informed by evidence of the usage of different routes and was designed to include routes with high volumes of passengers, particularly those that are used for commuting. We have also considered evidence on the locations of health and education sites in relation to the rail network.”
 - “The Department also took into account the operational feasibility of opening different routes, and the approach taken by industry during recent infrastructure strikes—for which Network Rail have operated a Key Route Strategy approach, whereby some routes were open, and some were closed. Use of this MSL should improve the geographical coverage of the network on strike days.”
44. Unlike the other Regulations for the other two sectors which will apply from the date of making, this instrument includes a retrospective element. DfT explained:
- “The Strikes (Minimum Service Levels) Act 2023 enables all Regulations made under the relevant power in the Act (in all categories of service covered by the Act not just rail) to have retrospective effect, in relation to strikes where the date of the ballot in respect of the strike was on or before the date that the Act came into force, which was 20 July 2023. There are strike mandates in rail for which the ballot took place

on or before 20 July 2023, and, as the strike mandate lasts for a period of six months, they therefore still remain valid. These mandates would not be captured by the Regulations without the Regulations having retrospective effect.”

45. **More of this information to explain the policy decisions made should have been included in the EM.**
46. We also note with regret that DfT was not able to publish a final Impact Assessment (IA) at the time of laying. The Regulatory Policy Committee found the first version “insufficiently robust” and comments that the revised IA was submitted on 7 November, the same day as the draft legislation was laid before Parliament.²⁰ **This suggests that the legislation has been prepared in a rush, without adequate information, which is not good practice.**
47. Although the EM does provide some indications of the areas likely to be affected, there is no broad estimate of costs and benefits.²¹ Examples provided in the policy section of the EM however indicate that the economic benefits to business of maintaining a minimum level of rail services could be high:

“A report by the Centre for Economic and Business Research²² estimated that rail strikes between June 2022 and January 2023 would result in a loss of UK economic output of around £500m due to people outside of the rail sector not being able to work. Several sectors, including the hospitality sector, have reported loss of revenue directly from the impact of rail strike action.”
48. The Delegated Powers and Regulatory Reform Committee was very critical of the primary legislation as a skeleton Bill, which defined neither the “minimum service levels” nor the “relevant services” to which they would apply.²³ We are pleased to note that there has been a consultation exercise for each of these instruments, but take the view that the Government should allow sufficient time for employers and unions to get to grips with the practical details of the legislation’s implementation.

Submission from the TUC

49. We have received a submission from the Trades Union Congress (TUC), which is published in full on our website, expressing concerns about the practicalities and scope of this group of instruments. The Government’s full response to the points we raised from it is published alongside.²⁴

20 Regulatory Policy Committee, ‘The Strikes (Minimum Service Levels: Passenger Railway Services) Regulations 2023: Statement from the RPC’ (7 November 2023): <https://www.gov.uk/government/news/minimum-service-legislation-for-rail-statutory-instrument-ia-statement-from-the-rpc> [accessed 20 November 2023].

21 See also the Impact Assessment at consultation stage: Department for Transport, ‘Minimum Service Levels for Passenger Rail Consultation’ (21 February 2023): <https://assets.publishing.service.gov.uk/media/64020e26e90e0740dafbbc0a/msl-for-passenger-rail-consultation-ia.pdf> [accessed 20 November 2023].

22 CEBR, ‘Eight months of strike action to have cost the UK economy at least £1.7bn, adding to existing recessionary pressures’ (December 19 2022): <https://cebr.com/reports/eight-months-of-strike-action-to-have-cost-the-uk-economy-at-least-1-7bn-adding-to-existing-recessionary-pressures/> [accessed 20 November 2023].

23 DPRRC, *27th Report* (Session 2022–23, HL Paper 159) pages 4–6.

24 ‘Scrutiny evidence’ webpage: <https://committees.parliament.uk/committee/255/secondary-legislation-scrutiny-committee/publications/8/scrutiny-evidence/>.

Right to strike

50. The TUC objects in principle to the reduction of a person's right to strike. In particular the letter comments that it will take more than 40% of railway staff to run a 40% service, and that about 75% of Border Security staff will be required to provide the required service levels. DBT responded:

“The strikes, against which the 2023 Act provides a measure of protection, are called and organised by trade unions. It therefore follows that some proportionate degree of interference in the relationship between a trade union and its members is unavoidable, if the legislation is to achieve its legitimate aim. That is why section 234E of [TULCRA] (inserted by the 2023 Act) provides that a union which calls a strike, and which fails to take reasonable steps to ensure that all its union members identified in a work notice comply with the notice, will lose its statutory protection from proceedings in tort by the employer [...] During the passage of the 2023 Act, evidence provided to the Joint Committee on Human Rights stressed the importance of clarity and foreseeability as to what constitute ‘reasonable steps’ [...] The Government is therefore satisfied that the steps set out in the Code are proportionate and consistent with the rights of unions and their members to freedom of association.”

51. We asked the Government what strike action Border Force staff could take without engaging these Regulations. The Home Office declined to be specific on security grounds but said that there will be a “strike by strike” assessment of what the minimum service levels need to be and therefore which staff will be required in order to meet the required level. In the EM to its regulations the Home Office cited a number of examples of countries where the security forces are banned from striking: further information on that is included in the supplementary material on our website.²⁵
52. The TUC highlighted that, in its response to the consultation on the instrument, the Government gave a commitment, that in compensation for restricting worker's rights in this way, the Home Office will agree to engage in conciliation for national disputes in relation to border security, where the relevant unions agree this would be helpful.²⁶ This is not in the legislation, as the Home Office states that conciliation may not always be the appropriate solution.
53. By contrast DHSC has clarified ambulance workers can withdraw their labour on any activity not listed in the Regulations. This would cover most non-critical accidents and incidents, although each case will be judged clinically on a case by case basis, taking all factors into account when determining the appropriate response.

Picketing

54. The TUC also objected to the scope of the Code of Practice which, they state, both dictates how a union should communicate with its members and

²⁵ *Ibid.*

²⁶ Home Office, ‘Government response to consultation on border security: minimum service levels during strike action’ (8 November 2023): <https://www.gov.uk/government/consultations/border-security-minimum-service-levels-during-strike-action/outcome/government-response-to-consultation-on-border-security-minimum-service-levels-during-strike-action#summary-of-responses> [accessed 22 November 2023].

restricts the way picketing is conducted, which, they say goes beyond the provisions of the 2023 Act. DBT responded:

“While the 2023 Act does not expressly refer to picketing, section 234E (inserted by the 2023 Act) of [TULCRA] and section 219 (as amended by the 2023 Act) are clear that a trade union which fails to take reasonable steps to ensure that all members identified in the work notice comply with the notice, will lose its protection from certain liabilities in tort. The Government therefore considers it would be difficult for a trade union to comply with the requirement to take reasonable steps without moderating its picketing activities in any way.

Furthermore, step 3 of the Code of Practice only requires the picket supervisor or other picketers to respect the position of a union member who decides to explain that they are identified in a work notice, and who may therefore need to cross the picket line to comply with it. The picket supervisor and other pickets remain free to exercise lawful persuasion as normal in relation to other workers. Consequently, there is no conflict between sections 220–220A (“Peaceful picketing” and “Union supervision of picketing”) and section 234E (“Work notices: no protection if union fails to take reasonable steps”) of [TULCRA] and nothing to prevent a union from acting consistently with each of those sections and with the draft Code.”

Practical issues

55. The TUC also raised a number of practical issues about identifying the correct individuals when a strike may involve hundreds of thousands of workers. DBT responded:

“To be clear, the Act does not provide for any penalty on trade unions, but a failure to take reasonable steps could leave a union exposed to a damages claim by an employer.

Trade unions should take each of the recommended steps in the Code of Practice to help ensure their statutory protection from liability in tort and the automatic protection of employees from unfair dismissal are maintained. However, trade unions are not restricted from, and indeed should consider, taking additional or different steps if it is reasonable to do so. They should satisfy themselves that, both individually and cumulatively, the steps taken are reasonable to ensure that their members comply with the work notice. Ultimately it is for the courts to decide whether the steps taken were sufficient.

Paragraph 21 of the Code of the Practice is clear that a failure by the union to identify a small number of their members, and therefore missing these members from subsequent steps, may not constitute a failure in carrying out the overall obligation to take reasonable steps, as long as the union made a reasonable attempt to identify such members. Paragraph 31 of the Code also makes clear that where the union takes steps to send promptly the compliance notice to members identified in the work notice, an accidental failure to reach a small number of identified members is unlikely to be a failure to take reasonable steps. In both situations, it would be for a Court to determine based on the facts of each case.”

56. DHSC added helpful advice:

“The work notice can generally include the names of workers, but employers should consider whether identifiers other than names can be used to accurately identify workers in the work notice. For example, if both the trade union and employer hold a unique identifier, that could be used as an alternative.²⁷ In certain circumstances, such as in a small number of sensitive sectors where there may be security or safeguarding considerations, the employer may want to consider alternative ways to identify workers to the trade unions.”

Timetable

57. Employers have to provide a work notice seven days before action starts and can amend it up to four days before. The TUC commented that this leaves unions only three days to reach members, which may include weekends and Bank Holidays when those without an email address could not practically receive a letter in time. DBT explained the timetable:

“The Government recognises the time that trade unions will have to take the reasonable steps required by section 234E of [TULCRA] (inserted by 2023 Act) is relatively short. These timings are largely dictated by the period of notice of industrial action required under section 234A of [TULCRA]: a minimum of 14 days. Following such a notice, it will take time for employers to decide whether to issue a work notice and, if so, to prepare it. Broadly speaking, section 234C therefore divides the period of 14 days into two halves: the first half for the employer and the second half for the trade union.

The Code does not seek to recommend further time limits within the period of 7 days for the trade union to take its reasonable steps. In the Government’s view, this would place unnecessary limits on the flexibility permitted to trade unions. The Government considers that the time within which the trade union is required to take reasonable steps such as sending the compliance notice, whilst short, is adequate, particularly given the use of email as the primary method to contact members.”

58. As above DBT continue by referencing para 31 of the Code “that where the union takes steps to send promptly the compliance notice to members identified in the work notice, an accidental failure to reach a small number of identified members is unlikely to be a failure to take reasonable steps. This would be for a court to determine based on the facts of each case.”

27 See Section 10 on data protection within the work notice guidance document for further information: Department for Business and Trade, ‘Minimum Service Levels: issuing work notices, a guide for employers, trade unions and workers’ (16 November 2023): <https://www.gov.uk/government/publications/minimum-service-levels-msl-issuing-work-notices/minimum-service-levels-issuing-work-notices-a-guide-for-employers-trade-unions-and-workers> [accessed 22 November 2023].

INSTRUMENTS OF INTEREST

Draft Data Protection (Fundamental Rights and Freedoms) (Amendment) Regulations 2023

59. These draft Regulations propose to replace the definitions of “fundamental rights” and “fundamental freedoms” in the United Kingdom General Data Protection Regulation and the Data Protection Act 2018. 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, as enshrined in the UK’s Human Rights Act 1998.
60. The instrument was initially laid as a proposed negative instrument for sifting 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. We recommended an upgrade of the instrument to the affirmative procedure in our 53rd Report of Session 2022–23²⁸ because of concerns about a potential reduction in rights protection.
61. The Department for Science, Innovation and Technology (DSIT) stated that the impact on organisations and individuals as a result of the proposed changes was expected “to be minimal”, and that the changes would replicate the current position “as far as possible”, but it was unable to rule out entirely potential differences in the rights and freedoms. We concluded that while DSIT had not identified any discernible impact, any changes in this sensitive area could be regarded as politically significant and something on which the House may wish to seek assurance from the Minister.

Draft Equality Act 2010 (Amendment) Regulations 2023

62. The Equality Act 2010 (‘the 2010 Act’) is currently interpreted in accordance with subsequent retained EU case law. To prevent those principles disappearing at the end of 2023 as a result of the Retained EU Law (Revocation and Reform) Act 2023, these Regulations amend the 2010 Act to incorporate provisions relating to:
 - direct discrimination which allow special treatment for pregnancy, maternity and breastfeeding;
 - indirect discrimination where a person without a relevant protected characteristic suffers substantively the same disadvantage as those with that protected characteristic;
 - whether public statements made in relation to access to employment with an organisation can count as discriminatory, even when there is not a recruitment process underway;
 - the right to equal pay where employees’ terms are attributable to a single source: the 2010 Act required an actual comparator, whereas subsequent EU case law broadened the scope; and
 - the broader definition of disability established in EU case law covering a person’s ability to participate in working life on an equal basis with other workers.
63. The Cabinet Office states that the amendments in this instrument serve to reproduce the effects of retained EU law and do not change current policy.

28 *53rd Report* (Session 2022–23, HL Paper 260).

Draft Financial Services and Markets Act 2000 (Financial Promotion) (Amendment) No. 2) Order 2023

64. This Order would update the exemptions to the financial promotions regime that allow promotions for unlisted companies to be made to ‘high net worth individuals’ and ‘self-certified sophisticated investors’. HM Treasury (HMT) states that the exemptions were last substantively updated in 2005, since when there have been “significant economic, social and technological changes” and concerns about the misuse of exemptions. HMT says that the modifications do not impose any new burdens on businesses. The proposed changes include:
- Raising the financial thresholds that determine eligibility for the exemptions, in line with Consumer Price Index (CPI) inflation. The new criteria would be income of at least £170,000 (increased from £100,000) or net assets of at least £430,000 (increased from £250,000).
 - Removing the criterion of having made more than one investment in an unlisted company in the previous two years, because “following the rise of online investing, it is much easier for individuals to invest in unlisted companies. This criterion is no longer an indicator of investor sophistication”.
 - Updating the relevant investor statements to improve their format, simplify language and to require greater engagement from the investors completing them.
65. Given high current inflation rates (prices have already risen nearly 5% since the January 2023 data used to reset the thresholds in this instrument), we asked HMT when it next plans to review the thresholds. HMT said that it will keep them “under review”, but that it “does not have plans to reset the thresholds to a specific timeframe”. **We encourage HMT to reassess the thresholds on a more timely basis than this revision.**

Draft Financial Services and Markets Act 2023 (Benchmarks and Capital Requirements) (Amendment) Regulations 2023

66. These Regulations would make amendments to two parts of Retained EU Law (REUL) in the area of financial services regulation. In each case, REUL is operating while UK-specific regimes are being designed under the ‘Smarter Regulation Framework’.
67. The first change would reintroduce a ‘discount factor’ that acts to reduce the amount of capital small- and medium-sized firms hold for their trading and derivative activities. HM Treasury (HMT) says the discount factor was “unintentionally” removed from the relevant regulation in both the UK and the EU. HMT told us that the factor was removed from UK law in January 2022, and that this was identified as an issue in July 2023. However, HMT also told us that the factor was reinstated by the EU in its own laws in September 2021. **It is curious that a mistake was introduced in the UK after it had already been corrected in the EU.**²⁹ HMT told us that

²⁹ The January 2022 changes to UK law were introduced by a commencement order made in June 2021 (the Financial Services Act 2021 (Commencement No. 1) Regulations 2021 ([SI 2021/671](#))), prior to the EU correction, but the Government could have considered steps to revoke, reverse or otherwise correct the mistake before it came into force, if the EU’s actions had been identified.

“the government does not have a policy of mirroring developments in EU law. The government makes decisions about the appropriate regulatory requirements, with the approval of Parliament, or the regulators do so where Parliament has entrusted them with that responsibility”. It is logical that, following Brexit, the Government does not seek to “mirror” changes in EU law. However, **keeping up to date with developments in the EU where parallel measures remain part of UK legislation would mean that avoidable errors, such as this, do not occur.** HMT also told us that there was no central government function that monitored developments in the EU. Instead, each Department is responsible for reviewing and then amending, assimilating or revoking its own REUL.

68. The second change extends the end of the transitional period for the ‘third country benchmarks’ regime from 31 December 2025 to 31 December 2030. A benchmark is an index used to determine the amount payable under a financial contract or instrument, or to measure the performance of an investment fund. The third country regime ensures that only benchmarks approved in set ways can be used in the UK. However, during the transition period, there are effectively no restrictions on the use of third country benchmarks. HMT said this is because some benchmark administrators may not have incentives to secure approval, and that “losing access to these benchmarks could have serious repercussions given their widespread use by UK firms for a range of business activities”. We asked why, if benchmark regulation is desirable in theory, it is appropriate to have a transitional regime that entirely bypasses it. HMT said that, in practice, there were significant concerns about the third country benchmark regime; for example, the EU has not yet been able to “switch on” its rules in this area. HMT also stated that the risks arising were “small, manageable and temporary” and provided further justifications. **These are helpful responses, but the information should have been included in the Explanatory Memorandum, which should provide a balanced discussion of the issues and associated risks.**

Draft Trade Union (Deduction of Union Subscriptions from Wages in the Public Sector) Regulations 2023

69. The Trade Union Act 2016 introduced a number of reforms to Britain’s industrial relations framework which included provision that, where union subscriptions are deducted from wages (“check-off”), a public sector organisation must charge a reasonable sum for the service. It also required that workers have the option to pay their subscriptions by other means such as direct debit, which involve no cost to the taxpayer.
70. The Cabinet Office cites research which shows that less than a quarter of such employers are currently charging trade unions, resulting in an estimated cost of £1.63 million per year to the taxpayer. This instrument seeks to implement the legislation as intended and lists 207 public sector organisations in England and Scotland which must make a reasonable charge for check-off services with effect from 9 May 2024.

Information as to Provision of Education (England) (Amendment) Regulations (SI 2023/1186)

71. These Regulations amend the requirements in the annual collection of data relating to school capacity, which is used to calculate capital funding for local authorities to provide new school places. The Department for Education (DfE) states that the data collected has not been changed since 2016, and that, in this time, DfE's data needs have changed; for example, it is seeking to gather more information at school level, rather than overall capacity in a given planning area, and wishes to make better use of online systems.
72. DfE says that key changes relate to capacity for Special Educational Needs (SEN) places. DfE states that it is "aware of evidence showing that the system is facing significant place pressures in respect of pupils with SEN" and that the new approach will enable it to understand and address these issues better.
73. **We were pleased that these Regulations were accompanied by a very helpful Explanatory Memorandum that contained a good explanation of the policy change and why it is being made, and, in particular, very good summaries of the consultation process and the impact.**

INSTRUMENTS NOT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

Instruments subject to affirmative approval

Draft	Data Protection (Fundamental Rights and Freedoms) (Amendment) Regulations 2023
Draft	Equality Act 2010 (Amendment) Regulations 2023
Draft	Financial Services and Markets Act 2000 (Financial Promotion) (Amendment) (No. 2) Order 2023
Draft	Financial Services and Markets Act 2023 (Benchmarks and Capital Requirements) (Amendment) Regulations 2023
Draft	Financial Services and Markets Act 2023 (Consequential Amendments) Regulations 2023
Draft	Higher-Risk Buildings (Keeping and Provision of Information etc.) (England) Regulations 2023
Draft	Hydrogen Production Revenue Support (Directions, Eligibility and Counterparty) Regulations 2023
Draft	Trade Union (Deduction of Union Subscriptions from Wages in the Public Sector) Regulations 2023
Draft	York and North Yorkshire Combined Authority Order 2023

Draft instruments subject to annulment

Draft	Nuneaton & Bedworth (Electoral Changes) Order
Draft	Rossendale (Electoral Changes) Order
Draft	Tunbridge Wells (Electoral Changes) Order

Instruments subject to annulment

SI 2023/1169	Public Procurement (Agreement on Government Procurement) (Amendment) Regulations 2023
SI 2023/1172	Social Security (Contributions) (Amendment No. 7) Regulations 2023
SI 2023/1175	Council Tax (Chargeable Dwellings and Liability for Owners) (Amendment) (England) Regulations 2023
SI 2023/1177	Civil Legal Aid (Financial Resources and Payment for Services and Remuneration) (Amendment) Regulations 2023
SI 2023/1181	Direct Payments to Farmers (Reconsideration and Appeal) (Modification) (England) Regulations 2023
SI 2023/1182	Energy Savings Opportunity Scheme (Amendment) Regulations 2023
SI 2023/1184	Education (Student Loans) (Repayment) (Amendment) (No. 3) Regulations 2023

SI 2023/1185	Enterprise Act 2002 (Merger Fees and Determination of Turnover) (Amendment) and Energy Network Mergers (Consequential Amendments) Order 2023
SI 2023/1186	Information as to Provision of Education (England) (Amendment) Regulations 2023
SI 2023/1187	Hydrocarbon Oil (Marking and Designated Markers) (Amendment) Regulations 2023
SI 2023/1190	Financial Services and Markets Act 2023 (Resolution of Central Counterparties: Deferment of Provisions in Resolution Instruments) Regulations 2023
SI 2023/1195	Financial Services and Markets Act 2023 (Resolution of Central Counterparties: Calculation of Maximum Amounts for Cash Calls and Use of Specified Funds) Regulations 2023
SI 2023/1196	Feed Additives (Authorisations) (England) Regulations 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 21 November 2023 and included in this report, Members declared the following interests:

Draft Agriculture (Delinked Payments and Consequential Provisions) (England) Regulations 2023

Lord de Mauley

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

Draft York and North Yorkshire Combined Authority Order 2023

Baroness Harris of Richmond

Resident of Richmond, North Yorkshire

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, Lord Russell of Liverpool and Lord Thomas of Cwmgiedd.