

HOUSE OF LORDS

Secondary Legislation Scrutiny Committee

40th Report of Session 2017–19

**Proposed Negative Statutory
Instruments under the European
Union (Withdrawal) Act 2018**

Includes 1 Information Paragraph on 1 Instrument

**Draft Newcastle Upon Tyne, North
Tyneside and Northumberland
(Combined Authority)
(Establishment and Functions)
Order 2018**

Includes 3 Information Paragraphs on 3 Instruments

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Secondary Legislation Scrutiny Committee

The Committee's terms of reference, as amended on 11 July 2018, are set out on the website but are, broadly:

To report on draft instruments and memoranda laid before Parliament under sections 8, 9 and 23(1) of the European Withdrawal Act 2018.

And, to scrutinise –

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

(b) every proposal which is in the form of a draft of such an instrument and is laid before each House of Parliament under an Act of Parliament,

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

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

Members

Rt Hon. Lord Chartres	Lord Goddard of Stockport	Baroness O'Loan
Rt Hon. Lord Cunningham of Felling	Lord Haskel	Lord Sherbourne of Didsbury
Lord Faulkner of Worcester	Rt Hon. Lord Janvrin	Rt Hon. Lord Trefgarne (Chairman)
Baroness Finn	Lord Kirkwood of Kirkhope	

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 <http://www.parliament.uk/seclegpublications>

The National Archives publish statutory instruments with a plain English explanatory memorandum on the internet at <http://www.legislation.gov.uk/uksi>

Committee Staff

The staff of the Committee are Christine Salmon Percival (Clerk), Paul Bristow (Adviser), Nadine McNally (Adviser), Philipp Mende (Adviser), Jane White (Adviser), Louise Andrews (Committee Assistant) and Ben Dunleavy (Committee Assistant).

Information and 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.

Fortieth Report

PROPOSED NEGATIVE STATUTORY INSTRUMENTS UNDER THE EUROPEAN UNION (WITHDRAWAL) ACT 2018

Proposed Negative Statutory Instruments about which no recommendation to upgrade is made

Animal Health and Welfare (Miscellaneous Amendments) (England) (EU Exit) Regulations 2018

Cat and Dog Fur (Control of Import, Export and Placing on the Market) (EU Exit) Regulations 2018

1. The Department for International Trade has laid the Cat and Dog Fur (Control of Import, Export and Placing on the Market) (EU Exit) Regulations 2018 as a Proposed Negative instrument. The effect is to maintain the existing prohibition under EU legislation on the import, export and placing on the market in the UK of cat and dog fur, as well as the criminal penalties currently in force for any breach of the prohibition, after the UK leaves the EU. Among other things, the Regulations confer a power on the Secretary of State to make regulations (by negative resolution procedure) to maintain existing derogations from the prohibition for educational and taxidermy purposes. **While, in line with the Committee's remit, we do not express a definitive view on the issue, it is arguable that the effect of conferring a regulation power on the Secretary of State is to trigger the requirement under the EU (Withdrawal) Act 2018 for the affirmative resolution procedure to apply.**

Cultural Tests (Films, Television Programmes and Video Games) (EU Exit) Regulations 2018

Electricity (Guarantees of Origin of Electricity Produced from Renewable Energy Sources) (Amendment) (EU Exit) Regulations 2018

Friendly Societies (Amendment) (EU Exit) Regulations 2018

Health and Safety (Amendment) (EU Exit) Regulations 2018

Public Lending Right Scheme 1982 (Amendment) (EU Exit) Regulations 2018

Return of Cultural Objects (Revocation) Regulations 2018

Seal Products (Amendments) (EU Exit) Regulations 2018

Timber and Timber Products and FLEGT (EU Exit) Regulations 2018

INSTRUMENTS DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

Draft Newcastle Upon Tyne, North Tyneside and Northumberland (Combined Authority) (Establishment and Functions) Order 2018

Date laid: 24 July 2018

Parliamentary procedure: affirmative

Summary: The Order proposes to set up a mayoral Combined Authority for the areas of only three of the seven councils which were previously brought together in the North East Combined Authority (NECA) in 2014. Three of the other NECA councils support continued regional joint working, but are concerned that the creation of the new mayoral Combined Authority may have adverse consequences for councils not participating in it. Key business stakeholders appear to view the latest proposal as a second-best option and still favour an approach based on participation by all seven councils. It will be important that all involved keep under review the effectiveness of cooperation between the new Combined Authority and the other councils, and that the Government should be ready to adapt arrangements in the light of experience.

We draw this Order to the special attention of the House on the ground that it gives rise to issues of public policy likely to be of interest to the House.

2. In the last four years, the Government have laid several instruments relating to the devolution of powers to authorities in the North east.

2014 Order

3. The Durham, Gateshead, Newcastle Upon Tyne, North Tyneside, Northumberland, South Tyneside and Sunderland Combined Authority - known as the North East Combined Authority (NECA) - was established in April 2014. In the Explanatory Memorandum (EM) to the instrument concerned,¹ the Department for Communities and Local Government (DCLG) said: “Establishing the Combined Authority will materially strengthen collaboration and joint working between the local authorities and with their Local Enterprise Partnership on economic development, regeneration and transport, thereby promoting more effectively economic growth and prosperity for the area concerned.”

2016 Order

4. In July 2016, DCLG laid a draft Order proposing the creation of an elected mayor for the NECA.² We drew this draft Order to the special attention of the House in our 7th Report of the 2016–17 Session,³ noting that DCLG had explained that, while the other councils comprised in the NECA had provided the consents needed for the Order to proceed, Gateshead Council had not done so. DCLG said that, if Gateshead continued not to provide consent by the time that the Order was made, the Secretary of State would be required to make another Order removing the area of Gateshead Council from the existing NECA area. In September 2016, however, the Government

1 The Durham, Gateshead, Newcastle Upon Tyne, North Tyneside, Northumberland, South Tyneside and Sunderland Combined Authority Order 2014 ([SI 2014/1012](#)).

2 The [Draft](#) Durham, Gateshead, Newcastle Upon Tyne, North Tyneside, Northumberland, South Tyneside and Sunderland Combined Authority (Election of Mayor) Order 2016.

3 [7th Report](#), Session 2016–17 (HL Paper 32).

withdrew the draft Order after local leaders in the North East decided not to proceed with the underlying Devolution Deal for their region.

2018 Order

5. In the EM to the latest draft Order, the Ministry of Housing, Communities and Local Government (MHCLG) says that it establishes a new Combined Authority for the area of Newcastle upon Tyne, North Tyneside and Northumberland, including provision for a directly elected Mayor, and for the date of the first and subsequent elections to the role of Mayor and the term of office. MHCLG says that the Order removes the local government areas of Newcastle upon Tyne, North Tyneside and Northumberland from the area of the Durham, Gateshead, Newcastle Upon Tyne, North Tyneside, Northumberland, South Tyneside and Sunderland Combined Authority and renames it the Durham, Gateshead, South Tyneside and Sunderland Combined Authority.
6. MHCLG says that the Order is a significant step in implementing the devolution deal that the Government announced that they were minded to agree with the North of Tyne councils (Newcastle upon Tyne, North Tyneside and Northumberland) at Budget 2017. When the four councils south of the Tyne (Durham, Gateshead, South Tyneside and Sunderland) chose not to participate in the North East devolution deal in September 2016, the Government were clear about continuing to work with those committed to devolution. The North of Tyne devolution agreement provides for a new mayoral combined authority and for powers to be conferred on the new authority, with certain powers to be exercised by the mayor, as well as devolving significant budgets, including an investment fund of £600 million over 30 years. The agreement also provides for the establishment of a joint transport committee to exercise the transport functions of both the new authority and the existing NECA, so as to maintain integrated transport across the whole of the North East.

Consultation

7. The Department explains that the three North of Tyne councils undertook a consultation on the proposals contained in their scheme for the new Combined Authority, over seven weeks from 14 December 2017 to 5 February 2018. They submitted a summary of consultation responses to the Secretary of State in February 2018.⁴ In the EM, MHCLG provides a good deal of information about the consultation. There were 1,082 responses to a question that asked whether respondents agreed or disagreed with the proposals to change the way the councils in the North East worked together in order for the devolution deal for the North of Tyne to be implemented: 541 (50%) respondents agreed with the proposals, 129 (12%) neither agreed nor disagreed with the proposals, and 412 (38%) disagreed with the proposals.
8. MHCLG says that key business stakeholders⁵ voiced a preference for a devolution covering the geography of all seven councils in the North East, and that they saw the implementation of the North of Tyne devolution deal

4 Newcastle City Council, North Tyneside Council, Northumberland County Council, North of Tyne Consultation Report (February 2018): <https://northoftynedevelopment.com/wp-content/uploads/2018/02/North-of-Tyne-devolution-consultation-report.pdf> [accessed 5 September 2018].

5 These included the NELEP, Confederation of British Industry North East, Entrepreneurs Forum, Federation of Small Business, North East Chamber of Commerce, North Tyneside Business Forum, Port of Tyne and Northumberland Business Support Limited.

as an important first step. The Department notes that others expressed concern over the deal, including Unison and Unite, who specifically raised concern over the impact of the deal on the NECA, and Historic England, who had reservations regarding the geography.

9. MHCLG also says that the responses from Durham, South Tyneside and Sunderland councils showed a commitment to continuing support for joint regional working to enable the growth of the regional economy, while being clear that any establishment of a new mayoral combined authority should not be to the detriment of the area south of the Tyne. Those responses have been published as Appendix E to the February 2018 consultation summary. They make it clear that the councils involved are concerned that the advent of the new Combined Authority should be accompanied by “safeguards [to] ensure there is no prejudicial treatment of any future funding bid from NECA, or a dilution of NECA’s working relationship with Government ... “, as stated in the letter of 7 February 2018 from Sunderland City Council.

Conclusion

10. Progress towards establishing a mayoral Combined Authority in this part of the North East has not been straightforward. The latest Order proposes such an authority for the areas of only three of the seven councils which were previously brought together in the NECA in 2014. Three of the other NECA councils support continued regional joint working, but are concerned that the creation of the new mayoral Combined Authority may have adverse consequences for councils not participating in it. Key business stakeholders appear to view the latest proposal as a second-best option and still favour an approach based on participation by all seven councils. It will be important that all involved keep under review the success of cooperation between the new mayoral Combined Authority and the other councils, against the objective identified by DCLG in 2014 of promoting more effectively economic growth and prosperity for the area concerned; and that the Government should be ready to adapt arrangements in the light of experience.

INSTRUMENTS OF INTEREST

Final Version of the Regulatory Action Policy to be issued by the Information Commissioner

11. This Regulatory Action Policy sets out how the Information Commissioner's Office (ICO) proposes to use its investigatory and enforcement powers under the Data Protection Act 2018 ("the DPA"). The Policy has been laid before Parliament by the Department for Digital, Culture, Media and Sport (DCMS) on behalf of the ICO as required by section 160 of the DPA and replaces previous guidance. According to DCMS, the Policy sets out a risk-based approach to taking regulatory action against organisations and individuals that have breached the law in relation to data protection and freedom of information. It includes guidance on how the ICO proposes to use tools such as information notices, assessment notices, enforcement notices and penalty notices. It also sets out how the ICO intends to deal with legally privileged communications which it obtains or has access to in the course of carrying out its functions, and how it will comply with restrictions and prohibitions in relation to such communications.

Framework Agreement on the establishment of the International Solar Alliance (Cm 9672)

12. The International Solar Alliance (ISA) is a UN treaty organisation sponsored by India which aims to mobilise \$1,000 billion of private finance to increase the use of solar energy to combat the effects of climate change. It aims to support the installation of 1,000 Giga watts of solar power (roughly 15 times the UK's electricity supply) which should reduce global CO₂ emissions from fossil fuels by approximately three Giga tonnes per year or roughly 10%. Although ISA membership is only open to countries located between the Tropics of Capricorn and Cancer, the UK qualifies due to the location of certain of its Overseas Territories, who have agreed to UK membership of ISA.⁶
13. ISA is the first significant climate initiative to be promoted by a developing country. The Department for International Development states that it is important for the UK to support this new initiative, which puts the emphasis on addressing the shared global problem of climate change collectively. India's Prime Minister Modi has made ISA his flagship international initiative and UK support for ISA is important in the evolution of the UK's relationship with India.

Marine Licensing (Application Fees) (Amendment) Regulations 2018 (SI 2018/850)

14. These Regulations amend the fee structure and fee rates for marine licence applications made under Part 4 of the Marine and Coastal Access Act 2009. According to the Department for Environment, Food and Rural Affairs (Defra), the system of marine licences seeks to facilitate the sustainable use of the marine environment and ensure that activities such as construction or dredging are permitted only after any potential environmental, economic or social impact has been assessed. Defra says that the current licensing fees regime has been in place since 2014 and that the Regulations are intended to

⁶ Anguilla, British Indian Ocean Territory, Cayman Islands, Montserrat, St Helena, Ascension and Tristan da Cunha, Turks and Caicos Islands and the Virgin Islands.

achieve full cost recovery for the Marine Management Organisation (MMO) and greater efficiency in the administration process. During a six-week public consultation on the proposed changes, stakeholders supported proposals for a simplification of some of the fees, while strongly opposing a planned 30% increase in the hourly fee rate for certain marine licence applications and suggesting a cap for the licence fees for the most expensive or complex projects. Defra has not taken up the suggestion of a cap and says that it will proceed with the 30% fee increase on the basis that the methodology used to calculate the increase is in line with government guidance and has been assured by HM Treasury. Defra expects the additional costs to licence applicants as a result of the changes to be less than £700,000 per year over a ten-year period. We sought additional information from the Department about the timing of the consultation exercise and its position on the suggested cap. We are content with Defra's response and are publishing it at Annex 1.

INSTRUMENTS NOT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

Draft instruments subject to affirmative approval

Department for Transport (Fees) (Amendment) (EU Exit) Regulations 2018

Merchant Shipping (Monitoring, Reporting and Verification of Carbon Dioxide Emissions) (Amendment) (EU Exit) Regulations 2018

Draft instruments subject to annulment

Final Version of the Regulatory Action Policy to be issued by the Information Commissioner

Instruments subject to annulment

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| Cm 9659 | Agreement Establishing the Inter-American Investment Corporation |
| Cm 9672 | Framework Agreement on the establishment of the International Solar Alliance |
| SI 2018/850 | Marine Licensing (Application Fees) (Amendment) Regulations 2018 |
| SI 2018/874 | Cross-border Railway Services (Working Time) (Amendment) (EU Exit) Order 2018 |
| SI 2018/902 | Animals (Scientific Procedures) Act 1986 (Fees) (No. 2) Order 2018 |
| SI 2018/908 | Food and Rural Affairs (Miscellaneous Revocations) Regulations 2018 |
| SI 2018/924 | Combined Authorities (Spatial Development Strategy) (Amendment) Regulations 2018 |
| SI 2018/927 | Hartpury College (Transfer to the Higher Education Sector) Order 2018 |
| SI 2018/933 | School Teachers' Incentive Payments (England) Order 2018 |
| SI 2018/939 | Export Control (Amendment) (No 2) Order 2018 |
| SI 2018/942 | Environment, Food and Rural Affairs (Miscellaneous Amendments and Revocations) Regulations 2018 |
| SI 2018/946 | Apprenticeships (Modifications to the Specification of Apprenticeship Standards for England) Order 2018 |
| SI 2018/947 | Architects Act 1997 (Amendments etc.) Order 2018 |
| SI 2018/952 | Public Sector Bodies (Websites and Mobile Applications) (No. 2) Accessibility Regulations 2018 |

APPENDIX 1: MARINE LICENSING (APPLICATION FEES) (AMENDMENT) REGULATIONS 2018 (SI 2018/850)

Additional information obtained from Defra

Q1: The EM says that the consultation ran from 21 December 2017 to 2 February 2018. This is six weeks but included the Christmas and New Year holiday. Would it not have been more practical to run the exercise from early January to mid-February to give stakeholders more time to respond?

A1: Although the consultation was run over the Christmas period, the Marine Management Organisation (MMO) made every endeavour to ensure that stakeholders were aware that the consultation was open and actively sought views, this included both e-mail and mail shot exercises prior to and during the exercise. This resulted in 76 responses, which is favourable compared to the 2014 SI consultation which ran for an 8-week period and received 32 responses.

Q2: The outcome of the consultation which concluded in February was only published in June of this year, and the instrument laid in July. Is there a reason why it took this time to publish the outcomes of the consultation and to lay the instrument?

A2: Preparation of the Government response to the consultation was delayed as it took longer than originally anticipated to analyse the consultation responses in conjunction with the MMO. The planned changes (post-consultation) were subsequently agreed by Ministers at the end of April 2018. The formal Government response to the consultation was then drafted. Two recess periods in May then caused further delay to securing clearance of the response document. Ministers' agreement to publication of the Government response and to seeking write round clearance of publication was secured on 14 June 2018. We secured confirmation of write round clearance on the 29 June 2018. The Government response to the consultation was then published.

The date agreed with Parliamentary Business and Legislation Committee for making and laying the Statutory Instrument was 18 July 2018. With agreement, and in response to a request from Ministers, we were able to lay the SI two days early on 16 July.

Q3: The consultation response suggests that some respondents called for a cap on Band 3 fees but there doesn't seem to be anything in the Department's response regarding why it was decided not to apply such a cap. Is there a reason why the suggestion for a Band 3 cap was not accepted?

A3: Marine licence applications that fall within the Band 3 category have a project value of at least £1m or anything upwards of that figure and / or are considered extremely complex due to the often unique characteristics in terms of their scope and proposed location; resulting in the need for bespoke consideration of the proposed activity and its potential impact on the marine environment. The determination of these marine licence applications may therefore require significant investment of time and resources by the MMO commensurate with the complexity of the proposed activity.

The introduction of a cap on fees for a Band 3 marine licence may result in a constraint on the MMO in terms of its ability to fully recover the costs incurred in the determination of individual marine licence applications. As a consequence

any shortfall in recovered costs would need to be met by the UK tax-payer. This would be inconsistent with current guidelines.

Furthermore, because of the nature of Band 3 marine licence applications it is very difficult to try to predict the scope and range of future Band 3 marine licence applications—the basis upon which a potential cap might be calculated. Any attempt to set a cap on fees for Band 3 marine licence application might therefore result in some applicants being required to pay full costs, whilst others only partial costs, with the remainder subsidised by the UK tax-payer—dependent on what level the caps on fees was set. This would introduce an inequality into the arrangements.

The planned arrangements with no cap on fees for Band 3 marine licence applications simply means that the applicant will be required to meet the full cost of the determination of their marine licence application. The applicant who benefits from the marine licence paying for the cost of the service received.

As set out on its website, the MMO agrees an estimate of likely costs in advance with applicants, which the applicant must agree prior to work commencing on their application, and renegotiates this should the need for additional unanticipated costs become apparent. Alongside this, potential applicants are able to seek pre-application advice from the MMO, and have opportunity to raise the matter of anticipated costs at this stage should this be a specific concern.

August 2018

APPENDIX 2: INTERESTS AND ATTENDANCE

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

For the business taken at the meeting on 11 September 2018, Members declared the following interests:

Public Lending Right Scheme 1982 (Amendment) (EU Exit) Regulations 2018

Lord Janvrin

Board Member, British Library

Attendance:

The meeting was attended by Lord Cunningham of Felling, Lord Faulkner of Worcester, Baroness Finn, Lord Goddard of Stockport, Lord Haskel, Lord Janvrin, Lord Kirkwood of Kirkhope, Baroness O'Loan, Lord Sherbourne of Didsbury and Lord Trefgarne.