

HOUSE OF LORDS

Secondary Legislation Scrutiny Committee  
(Sub-Committee A)

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15th Report of Session 2017–19

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

**Draft Common Fisheries  
Policy (Amendment etc.)  
(EU Exit) Regulations 2019**

Includes 4 Information Paragraphs on 6 Instruments

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### *Secondary Legislation Scrutiny Committee (Sub-Committee A)*

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*

Baroness Bowles of Berkhamsted	Lord Haskel	Rt Hon. Lord Trefgarne (Chairman)
Rt Hon. Lord Chartres	Lord Hogan-Howe	Rt Hon. Lord Walker of Gestingthorpe
Lord Faulkner of Worcester	Rt Hon. Lord Lilley	Lord Wood of Anfield
Baroness Finn	Lord Sharkey	

### *Registered interests*

Information about interests of Committee Members can be found in the last Appendix to this report.

### *Publications*

The Sub-Committee's Reports are published on the internet at <http://www.parliament.uk/seclegapublications>

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), Helen Gahir (Adviser), Nadine McNally (Adviser), Philipp Mende (Adviser), Jane White (Adviser), Louise Andrews (Committee Assistant), Ben Dunleavy (Committee Assistant) and Paul Bristow (Specialist Adviser)

### *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](mailto:hlseclegscrutiny@parliament.uk).

# Fifteenth Report

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

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

- Agriculture, Food and Horse (Miscellaneous Amendments) (Northern Ireland) (EU Exit) Regulations 2019
- Environmental Impact Assessment (Amendment) (Northern Ireland) (EU Exit) (No.2) Regulations 2019

## INSTRUMENTS DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

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### Draft Common Fisheries Policy (Amendment etc.) (EU Exit) Regulations 2019

*Date laid: 17 January 2019*

*Parliamentary procedure: affirmative*

*The purpose of these draft Regulations is to amend EU-retained legislation on fisheries to ensure that fishing within UK waters can continue to be regulated in a sustainable manner after EU exit. While the Department for Environment, Food and Rural Affairs says that the instrument is not expected to result in any reduction in regulatory oversight, it is clear that the UK's future fisheries policy is a politically sensitive and significant aspect of the UK's withdrawal from the EU. The Committee received a submission from Green Alliance raising concerns about the proposals which the Department has addressed. Given the significance of fisheries as a policy issue, the House may wish to explore further the approach the Government have taken with this instrument.*

**We therefore draw the draft Regulations to the special attention of the House on the ground that they give rise to issues of public policy likely to be of interest to the House.**

#### *Background*

1. These draft Regulations, laid by the Department for Environment, Food and Rural Affairs (Defra), propose extensive amendments to EU-retained legislation on the Common Fisheries Policy (CFP). According to Defra, the CFP comprises approximately 100 EU Regulations which impose a common approach to the sustainable management of fisheries across the EU and its waters, including UK waters.
2. This instrument proposes amendments to 31 of these 100 Regulations to ensure that the provisions can continue to operate effectively after EU exit. According to Defra, the instrument proposes the minimum technical changes that are necessary to preserve the status quo and to ensure that fishing within UK waters can continue to be regulated in a sustainable manner after EU exit. The Minister of State for Agriculture, Fisheries and Food, George Eustice MP, explains in the Explanatory Memorandum (EM) to the instrument that “further, and more substantive, amendments to retained EU law in relation to the common fisheries policy will be made via the Fisheries Bill and later amendment instruments, including amendments transferring functions from EU institutions to the UK”.
3. The Department told us that it intends to lay two further fisheries statutory instruments before exit day, one under the affirmative procedure in early February dealing with the transfer of powers from the European Commission (“the Commission”) to UK authorities, and the other under the negative procedure in late February, dealing with the most recent CFP Regulations which were not in force in time to be amended in this and earlier statutory instruments.

4. Defra explains that the draft Regulations are not expected to lead to any practical changes for the fisheries industry and that they do not alter the devolution settlements. The Department says that the devolved administrations were involved in the drafting of the instrument, and that it engaged with key stakeholders from the fisheries sector, food industry and environmental non-governmental bodies who were broadly supportive of the approach taken.

#### *Initial sifting of the draft Regulations*

5. The Committee considered the draft Regulations when they were initially laid before Parliament as a proposed negative instrument under the EU (Withdrawal) Act 2018.<sup>1</sup> The Committee recommended an upgrade to the affirmative procedure at the time, noting that the EM failed to demonstrate that the proposals would not change the management or regulation of UK fisheries, or adversely impact on the sector. The Committee also noted that the instrument dealt with a politically sensitive and significant policy area, and appeared to confer legislative functions and fee-raising powers which could be seen to trigger the requirement under Schedule 7, Part 1, paragraphs 1(2) (a) and (b) of the EU (Withdrawal) Act 2018 for the affirmative resolution procedure.
6. The House of Commons European Statutory Instruments Committee recommended an upgrade of the instrument to the affirmative procedure on similar grounds.<sup>2</sup>
7. The Committee welcomes that the Department has accepted the recommendations of the sifting Committees and has laid the instrument under the affirmative procedure, providing Parliament with the opportunity to debate the proposals.
8. The Committee also welcomes that the Department has revised the EM in response to our concerns. Annex B of the EM now sets out comprehensively the rationale for, and impact of, the proposed amendments. This is helpful additional information: the draft Regulations propose to remove a number of requirements in relation to the reporting, monitoring and enforcement of the CFP and, while it is clear that some of these requirements currently relate to the Commission and therefore need to be corrected in the context of the UK's withdrawal from the EU, the original EM did not explain whether the instrument would replicate or retain these requirements in any way, or whether their removal would result in a loss of oversight, protection and transparency.

#### *Concerns raised by Green Alliance*

9. We received a submission from Green Alliance that raised concerns about the instrument, suggesting that the proposals fail to correct deficiencies in retained EU law in important areas. We put these concerns to the Department and are publishing Defra's response alongside the submission of Green Alliance on our website.<sup>3</sup>

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1 [9th Report](#), Session 2017–19 ([HL Paper 251](#)).

2 European Statutory Instruments Committee, 11th Report of Session 2017–19 ([HC 1795](#)).

3 Secondary Legislation Scrutiny Committee (Sub-Committee A) Publications page: <https://www.parliament.uk/business/committees/committees-a-z/lords-select/secondary-legislation-scrutiny-committee-sub-committee-a/publications/>.

10. The key concern raised by Green Alliance is that the draft Regulations, by removing, for example, reporting requirements to the Commission and the European Parliament, fail to replicate important oversight functions that the Commission and European Parliament currently perform. Green Alliance said that this could undermine accountability and transparency in relation to the UK's performance in meeting the requirements of its future fisheries policy after exit. Green Alliance also expressed concerns that the draft Regulations fail to replace the key role that the Commission currently plays in the control and enforcement of the rules of the CFP.
11. In response, the Department explained that:

“When the UK leaves the European Union, it will no longer be a Member State. Therefore, the Commission will not be able to oversee the application of the CFP within the UK. Consequently, references to evaluation by and reporting to the Commission have been removed in this instrument. The implementation and oversight of fisheries management in the UK will be the subject of new arrangements, as proposed in the draft Fisheries Bill and 2018 Fisheries White Paper, as well as the draft Environment Bill, consistent with the devolution settlements. The oversight function that the Commission currently holds over Member States could, for England at least, be provided by the Office for Environmental Protection (OEP), as detailed in the draft Environment Bill, published 19 December 2018. The OEP will be capable of holding government to account, is able to take enforcement action, and is required to monitor progress in improving the natural environment, as well as produce its own annual reports.”
12. The Department added that:

“[F]isheries administrations already have the power to adopt appropriate measures for ensuring control, inspection and enforcement of activities under domestic legislation. In addition, clause 31(4) of the draft Fisheries Bill would confer a power to make provision on matters including monitoring, or enforcing, compliance with the regulation of any matters mentioned”.
13. Green Alliance criticised the fact that there were no proposals to replace the important role that the EU's Advisory Councils currently play in advising on, amongst other things, the implementation of measures, minimising unwanted catches and scientific research.
14. The Department explained that:

“Advisory Councils advise the EU on fisheries matters and will, therefore, have no involvement with the UK after exit. They play an important role for the EU, but we already have extensive involvement with stakeholders, including environmental NGOs and the fishing industry. We have a number of other models for consultation with stakeholders; work closely with fisheries science partnerships around the country; and have a multi-stakeholder expert advisory group to consider EU exit issues. We are working with the industry and NGOs to establish a replacement fisheries advisory infrastructure for the UK that can be put in place after we leave the EU.”

*Conclusions*

15. These draft Regulations propose extensive amendments to EU-retained legislation in relation to the CFP to ensure that fishing within UK waters can continue to be regulated in a sustainable manner after EU exit. While the Department says that the instrument is not expected to result in any reduction in regulatory oversight, the UK's future fisheries policy is nevertheless a politically sensitive and significant aspect of the UK's withdrawal from the UK, as demonstrated by the concerns raised with us by Green Alliance. The House may wish to explore further the approach the Government have taken with this instrument. **We therefore draw the draft Regulations to the special attention of the House, on the ground that they give rise to issues of public policy likely to be of interest to the House.**

## INSTRUMENTS OF INTEREST

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### Draft Benchmarks (Amendment and Transitional Provision) (EU Exit) Regulations 2019

### Draft Money Market Funds (Amendment) (EU Exit) Regulations 2019

### Draft Official Listing of Securities, Prospectus and Transparency (Amendment etc.) (EU Exit) Regulations 2019

16. Benchmarks are used in a wide range of markets to help set prices, measure performance, or work out amounts payable under financial contracts. The Benchmarks Regulation<sup>4</sup> places requirements on administrators (a natural or legal person that has control over the provision of a benchmark), supervised users of, and supervised contributors to, benchmarks. These relate to a range of issues including benchmark methodology, governance and transparency. Approved administrators and/or benchmarks are placed onto the publicly available European Securities and Markets Authority (ESMA) Benchmarks Register (“the ESMA register”). The Government is creating a Financial Conduct Authority (FCA) register of approved benchmarks and benchmark administrators to replace the register maintained by ESMA. Benchmarks and administrators who appeared on the ESMA register as the result of a successful application to the FCA will be migrated onto the FCA register.
17. Benchmarks which appear on the ESMA register at exit day, as a result of a successful application outside of the UK, will be temporarily migrated to the new FCA register for a period of 24 months after exit day. Supervised entities will automatically be able to continue to use these benchmarks, or benchmarks provided by these administrators, in the UK for up to 24 months after exit day, unless and until an application for approval in the UK is refused. These administrators or benchmarks must become approved by the FCA to enable their continued use in new contracts within the UK beyond this 24-month period.
18. A money market fund (MMF) is a fund that invests in liquid assets such as treasury bills, commercial paper and certificates of deposit.<sup>5</sup> The draft Money Market Funds Regulation (“the MMF Regulation”)<sup>6</sup> regulates the use of the designation “MMF” for funds to ensure that no fund may use that designation without authorisation. MMFs are structured as either undertakings for collective investment in transferable securities (UCITS) or alternative investment funds (AIFs) and can be currently marketed across the EU under the marketing passports rules. The MMF Regulation is amended so that after exit day it applies to MMFs established in the UK only. As set out in the Government’s “temporary market permissions regime”,<sup>7</sup> European Economic Area (EEA) funds that satisfy the relevant conditions

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4 [Regulation EU 2016/11](#), introduced after a number of high-profile misconduct cases, including the attempted manipulation of crucial interest rate benchmarks such as the London Interbank Offered Rate (LIBOR) and the European Inter Bank Offered Rate (EURIBOR).

5 They are source of short-term financing, as they are a cash management tool generally used by financial institutions, corporates and governments to invest their excess cash over a short timeframe.

6 [Regulation \(EU\) 2017/1131](#) of the European Parliament and of the Council of 14 June 2017 on money market funds.

7 The design and structure of the regime for funds, the ‘temporary marketing. permissions regime’ (TMPR) is set out in the [Collective Investment Schemes \(Amendment etc.\) \(EU Exit\) Regulations 2019](#) for EEA UCITS (including MMFs which are UCITS), and the [Alternative Investment Fund Managers \(Amendment etc.\) \(EU Exit\) Regulations 2018](#) for AIFs marketed by EEA AIFMs (including MMFs which are AIFs).



can continue to access the UK market on the same basis as they did before exit day for a period of up to three years from exit day, with a power for HM Treasury (HMT) to extend the regime by no more than 12 months at a time in certain circumstances. EEA funds which wish to access the UK market will need to gain the necessary permission to market into the UK as a third party.

19. A prospectus contains important information that investors use to decide whether to invest in a company's securities. The Prospectus Directive<sup>8</sup> contains the harmonised rules governing the content, format, approval, and distribution of the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market in an EEA State. After exit day, all prospectuses for securities to be offered to the public in the UK or admitted to trading on a UK regulated market will be required to be approved by the FCA, rather than allowing prospectuses approved by another EEA regulator to be passported in for use in the UK, as is currently the case. However, any prospectus approved by the regulator in an EEA State prior to exit can continue to be used in the UK after exit day, up to the end of their validity (up to 12 months after the prospectus is first approved).
20. Each of these three instruments transfers responsibilities and functions that currently sit with EU bodies to the appropriate UK body. HMT will have responsibility for equivalence determinations and the power to make delegated acts. However, each instrument also introduces a legislative sub delegation power to the FCA, with the powers of the ESMA transferred to the FCA to draft binding technical standards. The Government considers that the FCA is the appropriate body to carry out these functions due to its technical expertise.<sup>9</sup>

### **Draft Motor Vehicles (Compulsory Insurance) (Amendment etc.) (EU Exit) Regulations 2019**

21. The Motor Insurers Bureau (MIB) is the UK's appointed Compensation Body, enabling UK residents who are victims of motor traffic accidents in another European Economic Area (EEA) Member State to make claims in the UK ("the visiting victims scheme"). The MIB estimates that 5,000 UK road traffic victims make claims via the visiting victims scheme each year. Of these 5,000, 4,300 are made against insurers and 700 made against the MIB.<sup>10</sup> In the event of 'no deal' with the EU, this instrument removes the Compensation Body requirements from the MIB. UK residents who have already commenced court proceedings against the MIB prior to exit day will be able to continue pursuing visiting victims claims. The Department for Transport anticipates "more UK residents issuing legal proceedings from November 2018 to exit day in order to ensure their claim can continue to be made in the UK" and estimates that this "could be up to 240 personal injury cases" resulting in the average levy increasing by £15,000.<sup>11</sup> All other victims of road traffic accidents in the EEA will continue to be able to pursue claims for compensation, but will now need to do so in the Member State where

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8 [Directive \(EC\) No 71/2003](#).

9 See also the main Committee's report on Financial Regulators' Powers (Technical Standards) (Amendment etc.) (EU Exit) Regulations 2018, [38th Report](#), Session 2017-19 (HL 179).

10 [Impact Assessment](#), p 8.

11 The average levy that MIB collects from each member is £3.2million. However, this is an estimated figure and the figure changes yearly. Each levy is calculated based on the premium income for each member.

the accident occurred. When this instrument was previously presented as a proposed negative, the Committee recommended that this instrument be upgraded to the affirmative resolution procedure.

### **Town and Country Planning (Manston Airport) Special Development Order 2019 (SI 2019/86)**

22. Operation Stack is a co-ordinated multi-agency response to situations when the capacity of the Port of Dover and/or Channel Tunnel becomes restricted. It involves closing sections of the M20 motorway to hold freight traffic in several phases and locations within the Port and Tunnel approach and along the M20 motorway. The disused Manston Airport was identified as an option capable of holding large numbers of goods vehicles. This Order extends the planning permission for Manston Airport originally granted in 2015 (as amended in 2016 and 2017) so that it will now expire on 31 December 2020. This instrument came into force on 24 January 2019, the day after it was laid. The Department for Transport (DfT) expresses regret in the Explanatory Memorandum that it was unable to observe the 21-day rule in laying the instrument. However, it also states that:

“given the urgent need to ensure the site has planning permission to provide this expanded use in time for preparatory works to be completed prior to the UK’s exit from the EU, taken with the detailed work needed before the Order could be made, we consider the breach of the 21-day rule for this Order is justified.”

23. We asked DfT why it could not go through all the necessary steps sooner, so that it could comply with the 21-day rule. DfT has said that it is planning for all outcomes for traffic management in Kent ahead of the UK’s exit from the EU. In particular, DfT saw a need for extra contingency capacity to hold goods vehicles in Kent, including that provided for at Manston under the terms of the existing Order. This required consideration of the potential for providing additional capacity and facilities at Manston, which would in turn require a new Order. DfT has told us that:

“to do this, we needed to undertake a range of environmental and habitat analysis to inform how the site could be managed with additional capacity, including the limitations and conditions of its use that have subsequently been contained in the new Order. Furthermore, we needed sufficiently robust modelling of likely traffic flows to justify the extension of capacity. This work was only completed earlier this month [January]. Given the urgent need to ensure the site has planning permission in time for preparatory infrastructure works to be completed prior to the UK’s Exit from the EU, we then needed to bring the Order into force on 24 January.”

**The Committee is disappointed that DfT has failed to plan sufficiently well to enable the 21-day rule to be observed.**

**Electronic Identification and Trust Services for Electronic Transactions (Amendment etc) (EU Exit) Regulations 2018 (SI 2019/89)**

24. The EU Regulation on electronic identification and trust services for electronic transactions (“the eIDAS Regulation”)<sup>12</sup> sets out rules for electronic identification and trust services. These services help verify the identity of individuals and businesses online or the authenticity of electronic documents. The electronic identification aspects of the eIDAS Regulation require EU Member States and participating European Economic Area countries to recognise certain electronic identification schemes from other Member States to enable citizens to carry out transactions electronically for access to public sector digital services. The EU electronic identification schemes must first have gone through a peer review process (‘pre-notification’) before becoming formally notified schemes that are obliged to be accepted. This instrument, laid by the Department for Digital, Culture, Media and Sport, seeks to repeal the electronic identification aspects of the eIDAS Regulation in the event of ‘no deal’ with the EU, as the UK will no longer have access to the interoperability framework for electronic identification and these aspects will therefore be redundant as a result of exit. However, as the German electronic identification system is the only one which has been notified to date, the Explanatory Memorandum explains that “...there is therefore no significant impact”. The trust services aspects of the eIDAS Regulation relating to electronic signatures, electronic seals, timestamps, electronic delivery services, and website authentication are being retained.

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<sup>12</sup> Electronic identification, authentication and trust services (eIDAS).

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

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### **Draft instruments subject to affirmative approval**

Armed Forces Act (Continuation) Order 2019

Benchmarks (Amendment and Transitional Provision) (EU Exit) Regulations 2019

Common Agricultural Policy and Agriculture and Horticulture Development Board (Amendment etc.) (EU Exit) Regulations 2019

Cross-Border Mediation (EU Directive) (EU Exit) Regulations 2019

Money Market Funds (Amendment) (EU Exit) Regulations 2019

Motor Vehicles (Compulsory Insurance) (Amendment etc.) (EU Exit) Regulations 2019

Official Listing of Securities, Prospectus and Transparency (Amendment etc.) (EU Exit) Regulations 2019

Shipments of Radioactive Substances (EU Exit) Regulations 2019

### **Instruments subject to annulment**

SI 2019/74	Air Quality (Amendment of Domestic Regulations) (EU Exit) Regulations 2019
SI 2019/85	Social Security (Contributions) (Amendment) Regulations 2019
SI 2019/86	Town and Country Planning (Manston Airport) Special Development Order 2019
SI 2019/87	Electronic Commerce (Amendment etc.) (EU Exit) Regulations 2019
SI 2019/89	Electronic Identification and Trust Services for Electronic Transactions (Amendment etc.) (EU Exit) Regulations 2019
SI 2019/96	Control of Mercury (Amendment) (EU Exit) Regulations 2019
SI 2019/100	Fertilisers (Amendment) (Northern Ireland) (EU Exit) Regulations 2019
SI 2019/102	EU Export Credits Legislation (Revocation) (EU Exit) Regulations 2019
SI 2019/107	Greenhouse Gas Emissions Trading Scheme (Amendment) (EU Exit) Regulations 2019

## APPENDIX 1: INTERESTS AND ATTENDANCE

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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 4 February 2019, Members declared the following interests:

### **Draft Common Fisheries Policy (Amendment etc.) (EU Exit) Regulations 2019**

Lord Chartres

*Associated with Green Alliance*

### **Draft Benchmarks (Amendment and Transitional Provision) (EU Exit) Regulations 2019**

### **Draft Money Market Funds (Amendment) (EU Exit) Regulations 2019**

### **Draft Official Listing of Securities, Prospectus and Transparency (Amendment etc.) (EU Exit) Regulations 2019**

Baroness Bowles of Berkhamsted

*Non-executive Director, London Stock Exchange plc (as part of this role, the member is also Chair, Regulatory Advisory Group, London Stock Exchange Group plc)*

### **Draft Common Agricultural Policy and Agriculture and Horticulture Development Board (Amendment etc.) (EU Exit) Regulations 2019**

Lord Walker of Gestingthorpe

*Gestingthorpe Farming Company Limited*

### **Attendance:**

The meeting was attended by Baroness Bowles of Berkhamsted, Lord Chartres, Lord Hogan-Howe, Lord Lilley, Lord Sharkey, Lord Trefgarne and Lord Walker of Gestingthorpe.