HOUSE OF LORDS

Secondary Legislation Scrutiny Committee
(Sub-Committee B)

15th Report of Session 2017–19

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

Includes 1 Recommendation

Draft REACH etc. (Amendment etc.) (EU Exit) Regulations 2019

Draft State Aid (EU Exit) Regulations 2019

Includes 5 Information Paragraphs on 6 Instruments

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Secondary Legislation Scrutiny Committee (Sub-Committee B)

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 Cunningham of Felling (Chairman)	Rt Hon. Lord Janvrin	Lord Sherbourne of Didsbury
Baroness Donaghy	Lord Kirkwood of Kirkhope	Rt Hon. Lord Rooker
Lord Goddard of Stockport	Baroness O'Loan	Baroness Watkins of Tavistock
Lord Hodgson of Astley Abbotts	Baroness Redfern	

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/seclegbpublications

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

Fifteenth Report

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

Instruments recommended for upgrade to the affirmative resolution procedure

Aviation Statistics (Amendment etc.) (EU Exit) Regulations 2019

Date laid: 25 January 2019

Sifting period ends: 11 February 2019

1. The EC Statistical Returns Regulation[1] required airport operators to provide statistical data to EU Member States, which was in turn transmitted to Eurostat (the European Commission's statistical body). In the event of 'no deal' with the EU, airport operators will instead be required to send statistical data to the Civil Aviation Authority (CAA), and the CAA will be obliged to collect that data and send it to the Secretary of State (if directed). The Department for Transport has explained that "a review of the existing implementation of the Statistical Returns Regulation highlighted that a domestic enforcement mechanism was not previously created, but is required to ensure that the UK meets its existing responsibilities as a Member State." This instrument therefore provides a mechanism whereby the CAA can enforce the obligation on airport operators to provide it with the statistical data and impose a civil penalty of up to £5,000 if they do not provide the required data. Given that this proposed negative instrument introduces a new policy of creating a civil offence, the House may wish to have the opportunity to debate the instrument. As such, **the Committee recommends that this proposed negative should be upgraded to the affirmative resolution procedure.**

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

- UK Statistics (Amendment etc.) (EU Exit) Regulations 2019

1 Regulation No. 437/2003.

INSTRUMENTS DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

Draft REACH etc. (Amendment etc.) (EU Exit) Regulations 2019

Date laid: 9 January 2019

Parliamentary procedure: affirmative

The purpose of these draft Regulations is to replicate the current EU regime for the regulation and control of chemicals in a UK domestic context, as part of the contingency planning of the Department for Environment, Food and Rural Affairs for a 'no deal' scenario. The aim is to ensure regulatory continuity after EU exit and to provide legal certainty for business regarding their duties when managing chemicals and placing them on the UK market. The Committee is deeply concerned about the possible impact of the proposed changes, especially in relation to the additional responsibilities being transferred to the Health and Safety Executive and its readiness to act as the national regulator, the potential costs for the UK chemical industry, and the lack of information that the Department has provided in relation to this impact.

The Committee received a submission from Green Alliance, to which the Department has responded.

The draft Regulations are drawn to the special attention of the House on the ground that the explanatory material laid in support of them provides insufficient information on their expected impact and that they give rise to issues of public policy likely to be of interest to the House.

2. The Department for Environment, Food and Rural Affairs (Defra) has laid these draft Regulations with an Explanatory Memorandum (EM) and Impact Assessment (IA). The instrument forms part of the contingency preparations of the Department for a possible 'no deal' withdrawal of the UK from the EU.

Background

3. The purpose of this instrument is to establish a stand-alone UK regulatory regime ("UK REACH") to control the production, import and placing on the market of chemicals, and to identify hazards and manage risks in relation to the production and use of chemicals. At present, chemicals are regulated by EU Regulation (EC) No 1907/2006 ("the EU REACH Regulation"), which sets out statutory requirements for the registration, evaluation, authorisation and restriction of chemicals, and establishes a European Chemicals Agency (ECHA) as the EU-wide regulator. The aim of this instrument is to ensure the continuation of the current regulation and control of chemicals in the UK after exit, and to provide legal certainty for business regarding their duties when managing chemicals and placing them on the UK market.

4. The EU Energy and Environment Sub-Committee of the House of Lords European Union Committee has conducted an inquiry on the regulation of chemicals in the UK after EU exit, raising concerns about the progress

the Government is making in preparing for a functioning stand-alone UK regulatory regime.[2]

5. The Committee has received a submission from Green Alliance that also raises concerns about the draft Regulations. We are publishing this submission and the Department's response on our website.[3]

Transfer of functions and decision-making powers

6. The instrument proposes to transfer the functions currently carried out by the ECHA to the Health and Safety Executive (HSE). HSE already exercises some functions under the EU REACH regime, as the UK's delivery agency and the lead on UK policy in this area. HSE is to take on responsibility for managing the new UK REACH regime, with the Environment Agency (EA) and environmental regulators in the devolved administrations, providing advice on environmental matters where appropriate.

7. Decision-making powers that are currently held by the European Commission ("the Commission") in relation to putting restrictions on the use of substances, adding substances to a list of authorised substances and granting authorisations are to be transferred to the Secretary of State.[4] Under the new arrangements, the Secretary of State would make such decisions on the basis of an opinion put forward by HSE, with the consent of the devolved administrations where appropriate. The instrument proposes a power for devolved administrations to take urgent, temporary restriction action where there are concerns about a substance.

8. The instrument would require HSE to commission external scientific advice to ensure that its opinions on chemicals are based on robust evidence and analysis. Where the ECHA has already published an opinion on a particular substance, HSE would be able to draw on that evidence rather than having to seek its own external advice, but would have to justify its decision to do so. The instrument would also require HSE to publish all its opinions on substances and to consult on its approach to external scientific advice.

9. The instrument provides for appeals against decisions to be heard by the First-tier Tribunal, to replace the current ECHA Board of Appeal. Defra says that while ECHA appeals require payment of a fee, appeals to the First-tier Tribunal will be free.

Transition from the EU regulatory regime to a stand-alone UK regime

10. The Department explains that the underlying principle of the EU REACH Regulation is the rule of "no data, no market", and that this instrument seeks to replicate this principle as the basis for the registration process under the new UK REACH regime. The instrument proposes an automatic transfer of all existing EU REACH registrations held by UK-based companies into the new UK REACH system. This is to ensure that companies will not have to re-register their substances and pay further fees, and will continue to

2 House of Lords European Union Committee, 23rd Report, Session 2017–19 (HL Paper 215).

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

4 Under the current EU REACH regime, authorisations are needed for substances that are deemed to be of "very high concern" because of their harmful effects. This includes, for example, substances that cause cancer. The aim of the authorisation process is to encourage industry to substitute these substances with safer ones.

be able to place substances on the UK market. The IA estimates that, in October 2018, UK companies held over 12,000 EU REACH registrations. The instrument proposes an automatic transfer of all registrations held by UK-based companies during a period of two years before exit to ensure that companies which have transferred their EU REACH registrations to an EU affiliate, to secure continued access to the EU market after exit, will also have a valid UK REACH registration.

11. UK companies whose EU REACH registrations are transferred into UK REACH would have to resubmit their registration data to HSE, but the instrument proposes a two-stage process to ease the transition. During the first stage, companies would have to submit certain basic data to HSE within 60 days after exit, including their company details, the chemical registered, the quantities produced and evidence of their existing ECHA registration. During the second stage, and within two years after exit, they would have to submit to HSE the full information that is currently required for registration under the EU REACH regime.[5]

12. The instrument also proposes a transition period for so-called "downstream users" of chemical substances. These are companies that use registered substances but do not hold an EU REACH registration themselves. While under the EU REACH regime, they do not have to register the substances, Defra explains that after EU exit, UK companies that are downstream users of registered substances from the European Economic Area (EEA) would become importers into the UK market, requiring them to register the substances under the UK REACH regime. The instrument proposes an interim notification system, so that those importing chemicals from the EEA would only need to submit basic data on the company, substances and information on safe use within 180 days. After two years, they would have to seek full UK REACH registration. Defra says that this transition is to enable UK companies to buy substances from the EEA without interruption after exit. The instrument provides for a new IT system and database to hold the registration information.

13. The instrument proposes to retain the ECHA's current level of fees and charges, including reduced fees for medium, small and micro companies. Under the UK REACH regime, companies would pay fees to HSE rather than the ECHA but Defra emphasises that no charges would apply for registrations during the transition periods set out above.

Consultation

14. The Department says that it had informal discussions with 23 stakeholders from the sector, including large and small companies, trade associations, non-governmental organisations, professional bodies and scientists, and that the devolved administrations were involved in the drafting of the instrument. According to Defra, stakeholders supported the Department's approach in relation to the transfer of current EU REACH registrations into the new UK REACH system and the interim notification system for UK downstream users of chemicals from the EEA. Concerns were raised about the potential additional costs to industry, disruption to supply chains, scientific advice and transparency.

5 The EU REACH regime requires all companies manufacturing or placing a substance on the EU market in quantities greater than 1 tonne per year to register that substance with the ECHA. The information that needs to be provided as part of that registration process depends, amongst other factors, on the tonnage band, that is the amount of chemicals produced or put on the market per year.

Impact

15. The EM and IA consider the impact of the introduction of the UK REACH regime on regulatory authorities, such as HSE, and companies producing, marketing or using chemicals. Defra and HSE have published additional guidance[6] for business and other relevant stakeholders and a Technical Notice[7] setting out the impact of a 'no deal' scenario. Additional information is available on the ECHA website.[8]

Impact on public authorities

16. Defra says that HSE, Defra and the EA would require additional resources to carry out the functions which are to be transferred from the ECHA and the Commission but neither the EM nor the IA provide any estimate of these additional resources. In its submission to the Committee, Green Alliance expressed concerns about HSE's capacity and expertise to carry out its new role, highlighting that in 2017-18, HSE received £1.2 million for "Provision of REACH services to Defra", down from £1.4 million in 2016-17, and that by contrast, the total spend for REACH per year at EU level was around €100 million.

17. We put this concern to the Department, which told us that:

> "Defra is working closely with HSE and EA on preparations for implementing a national regime to ensure that change is as smooth as possible. Extra public funding is required compared to the funding HSE currently receives as the UK REACH Competent Authority, the majority to operate a national regime through additional staff in Defra, HSE and EA, and for a UK REACH IT system. This additional staffing is not all required to be in place immediately upon Exit Day, and neither is full IT capability. Should it become clear that we are in a "no deal" scenario, staffing levels will be scaled up as required over a period of several years, allowing time for recruitment and training."

18. In its inquiry on the regulation of chemicals after exit, the EU Energy and Environment Sub-Committee expressed concerns about the Government's ability to establish a UK chemicals database and populate it with the necessary data in time for exit.[9] We asked the Department about the progress made with the development of the new UK REACH IT system. Defra told the Committee that:

> "The UK REACH IT system will replicate critical functionality of the EU REACH IT system to provide continuity for UK business. REACH IT is being built in a phased approach, prioritising all essential industry user functions, such as those relating to the registration of new substances for Day 1.
>
> In building this system we are taking a phased approach, prioritising user requirements should we leave the EU without a deal. The priority for Day

6 Department for Environment, Food and Rural Affairs (Defra), UK REACH additional guidance if there is no Brexit deal: http://www.hse.gov.uk/brexit/uk-reach-additional-guidance.pdf [accessed 4 February 2019].

7 Defra, *Regulating chemicals (REACH) if there's no Brexit deal* (19 December 2018): https://www.gov.uk/government/publications/regulating-chemicals-reach-if-theres-no-brexit-deal/regulating-chemicals-reach-if-theres-no-brexit-deal [accessed 4 February 2019].

8 European Chemicals Agency, *How will the UK withdrawal affect you?:* https://echa.europa.eu/uk-withdrawal-from-the-eu [accessed 4 February 2019].

9 House of Lords European Union Committee, 23rd Report, Session 2017–19 (HL Paper 215), p 9.

> 1 is to have in place the functionality for registration of new substances and to support grandfathering and notification; full functionality will follow on a slower timescale There is an ongoing programme of user needs testing which has validated the approach we have taken to the design and industry usability of the IT system.
>
> Project targets for this work are regularly reviewed to ensure delivery standards and milestones are met. We also have a contingency plan in place in case it is needed."

19. The Committee is concerned that the Department has not provided an analysis of the additional resources that HSE, Defra and the EA will need to manage the proposed new UK REACH regulatory regime. **The House may wish to seek assurance from the Minister that UK authorities have sufficient resources to prepare and provide an effective regulatory regime for chemicals, including a functioning IT system and database, from day one after exit.**

20. Green Alliance raised concerns about the composition of HSE as the national regulator for chemicals, criticising that key stakeholders would no longer be able to participate in the decision-making process, as they are currently able to with the ECHA. Green Alliance also criticised an alleged weakening of arrangements to ensure decisions are based on scientific knowledge and advice under the proposed Regulations. The Department responded that:

> "ECHA is established under Title 10 of EU REACH. The legislation sets up a range of scientific and technical committees, forums and management boards within ECHA as part of its regulatory processes alongside its permanent Secretariat. REACH specifies that these committees and boards should consist of representatives of the EU Member States. It is not possible to replicate such a committee structure within the UK.
>
> The aim in the UK is that decisions and opinions should be based on robust science, and that transparency and independent input should remain an intrinsic part of the process. The REACH SI requires the UK Agency to commission scientific knowledge and advice from suitably qualified or experienced persons who are independent of the Agency when it is forming its opinions. Although it may, on a case by case basis, decide not to commission such advice it must publish its reasons for doing so. Within 3 months of exit the Agency must also consult on and publish a statement about how it will comply with these duties. The statement must include information about the qualifications or relevant experience required of independent experts, and examples of situations in which the Agency envisages that it might be appropriate to take existing knowledge or advice into account, rather than commissioning new advice.
>
> Currently, in relation to ECHA's committees, accredited stakeholders can apply to attend for one or more agenda items to witness the discussions and considerations taking place. We envisage that similar arrangements would be put in place in UK REACH to allow stakeholders to observe discussions where independent scientific advice is provided, and read publicly available minutes of these meetings, subject to the commercially sensitive nature of some applications for authorisation. We will work with stakeholders to develop these arrangements.

> REACH also requires ECHA to carry out public consultations. These requirements will continue in the UK system."

21. The Committee notes the assurances provided by the Department in relation to the requirements on HSE to seek scientific advice, consult publicly and engage with stakeholders.

Impact on the chemical industry

22. The IA highlights the significance of the UK chemical industry, suggesting that the UK chemicals manufacturing sector directly accounted for £12.7 billion of the UK economy's Gross Value Added[10] and 95,000 direct jobs in 2017. The EU Energy and Environment Sub-Committee reiterates this significance, describing the chemicals sector as "the UK's second biggest manufacturing industry after the food and drink sector" and highlighting that "61% of chemical exports went to the EU in 2017, with a value of £18 billion" and that "73% of chemical imports came from the EU".[11]

23. **The Committee deeply regrets that, despite the economic importance of the UK chemical industry, neither the EM nor the IA provide any financial analysis of the potential costs of the proposed regulatory regime and a 'no deal' scenario for the industry.**

24. In terms of access of UK companies to the EU market (see paragraph 10) after exit, the EM states that the UK cannot legislate to enable this. We asked the Department whether the impact of a potential loss of market access for the UK chemical industry had been assessed. In its response, the Department only pointed to the mechanism that UK companies may use to move their EU EACH registrations to the EU to maintain access to the market:

> "While the Government cannot legislate for EU market access, UK based companies can move their registrations to enable continued access. ECHA has provided guidance to UK companies on its website on how to do this. We have made businesses aware of this through our extensive stakeholder engagement; however, it is for them to decide whether they wish to act on ECHA's guidance."

25. **The Committee notes that UK companies may move their registrations of chemicals to the EU, but remains concerned that a 'no deal' exit may impact significantly on the ability of UK companies to maintain access to the EU market. The Committee urges the Department to continue its engagement with the sector to help them prepare for the new regulatory regime after EU exit.**

26. Defra's additional guidance suggests that EU companies will have to seek new registrations under the UK REACH system or use a UK-based Only Representative[12] to enable them to export substances to the UK after exit. We asked the Department whether the impact of the new registration requirements on the availability of EU chemicals in the UK had been assessed, and whether there could be a period during which chemicals from the EU may not be available in the UK. The Department explained that the

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10 Gross value added (GVA) is the measure of the value of goods and services produced in an area, industry or sector of an economy.

11 House of Lords European Union Committee, 23rd Report, Session 2017–19 (HL Paper 215), p 3.

12 Under the new UK REACH regime, so-called Only Representatives (ORs) would be able to register with HSE on behalf of EU, that is third country, companies to give them access to the UK market.

proposed notification system for EU REACH chemicals (see paragraph 12) would ensure availability of chemicals in the UK:

> "Although the SI does not grandfather EU-27 held REACH registrations there should be no impact on the chemicals available to the UK market at the point of exit and no period when chemicals will be unavailable in the UK. This is because the provisions in the REACH SI for a "notification" system (new Article 127E) would allow the continued import of chemicals from the EU/EEA by UK companies currently procuring substances and mixtures from EU/EEA suppliers. The UK importer would need to provide some basic information to the UK Agency (HSE) within 180 days of the UK leaving the EU. The interim information would need to be replaced with a full registration within two years, if they wish to continue importing from the EU."

27. **The Committee notes the proposed notification system, which is to ensure that chemicals from the EU/EEA remain available in the UK. We remain concerned, however, that there may be disruption to the UK chemical industry, supply chains and wider economy as a result of new requirements to register chemicals from the EU after exit. The House may wish to explore this during debate.**

28. The IA identifies the requirement on UK companies to re-submit the supporting data for their substance registrations to HSE as the key cost factor for business. The Department says that due to the current EU REACH procedures, under which industry seeks joint registrations and shares data, UK companies may not be able to re-submit all of the data to HSE immediately. The instrument therefore proposes a transition process: data that companies own fully would have to be submitted to HSE within 60 days, while data that may be part of a joint industry registration would be required within two years.

29. Defra explains in the IA that this requirement to re-submit data may cause additional costs to companies, but that it has not quantified the costs as it is not clear whether EU REACH data will continue to be shared with HSE and UK companies after exit. There is also uncertainty about UK companies' existing data arrangements and how many registrations and authorisations UK companies will seek after exit. Defra notes, however, that the costs for companies could be "substantial".

30. **While the Committee notes the uncertainties highlighted by the Department, it is regrettable that no financial analysis or estimate of possible costs for industry in relation to obtaining the data that is required to complete the registration of chemicals with HSE has been included in the IA.**

31. The Regulatory Policy Committee's opinion on the IA notes this deficit, concluding that:

> "The IA sets out clearly the rationale for the policy but does not currently provide estimates of the costs. A clearer evidence base for cost estimation, however, would improve the IA significantly. […]
>
> The IA would benefit from providing: (a) further discussion of how the overall balance of cost and benefits would be affected by a no-deal

> scenario, and how a no-deal scenario would impact trade in chemicals covered by REACH to and from the EEA [and] (b) a clearer explanation of how the overall costs and (particularly) benefits weigh up against each other in the differing scenarios."[13]

32. **Given the significance of the draft Regulations for the UK chemical industry, the Committee is very concerned about the absence of any financial analysis of the potential impact of a 'no deal' scenario and the introduction of a stand-alone UK chemicals regulatory regime on the sector.**

Future alignment with EU REACH

33. Green Alliance raised concerns about a lack of commitment to mirror EU outcomes on chemical regulation after EU exit, saying that without an automatic provision for copy-across of EU restrictions and future improvements in EU chemicals laws, UK controls on chemicals would rapidly diverge from those in the EU, reducing the protection of human health and the environment. The Department responded that:

> "The European Union (Withdrawal) Act limits the powers to make amendments to retained EU law to remedying deficiencies that result from EU exit and providing transitional arrangements. A provision that automatically copied across future changes to EU chemicals law would be beyond the scope of the amending powers.
>
> However, the Government has made clear its commitment to environmental standards, including in the context of the EU exit, for example in the policy paper[14] that accompanied the publication of the Environment Bill on 19 December 2018."

Conclusions

34. These draft Regulations seek to replicate the current EU REACH regulatory regime for chemicals in a UK domestic context. The Committee notes that the proposals would present significant change for UK regulatory authorities, such as HSE, and UK companies that currently have registrations under the EU REACH regime. The Committee is concerned about the lack of information that the Department has provided on the potential impact of the proposed changes and a 'no deal' scenario, especially given the significance of the chemical industry for the UK economy. These are issues that the House may wish to explore further with the Minister. **We therefore draw the draft Regulations to the special attention of the House, on the ground that the explanatory material laid in support of them provides insufficient information on their expected impact and that they give rise to issues of public policy likely to be of interest to the House.**

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13 Regulatory Policy Committee, *Opinion: Final Stage IA. UK REACH (Registration, Evaluation, Authorisation & restriction of Chemicals)* (10 January 2019): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/770416/RPC18-4313_1_-DEFRA_UK_REACH__Registration_Evaluation_Authorisation__restriction_of_CHemicals__-_IA_f__-_opinion.pdf [accessed 6 February 2019].

14 Defra, Environment Bill: policy paper (19 December 2018): https://www.gov.uk/government/publications/draft-environment-principles-and-governance-bill-2018/environment-bill-policy-paper [accessed 4 February 2019].

Draft State Aid (EU Exit) Regulations 2019

Date laid: 21 January 2019

Parliamentary procedure: affirmative

The purpose of these draft Regulations is to replicate the current EU regulatory regime for State aid in a UK domestic context after EU exit, with the Competition and Markets Authority (CMA) taking on the role of national regulator. Current exemptions and thresholds are to be maintained. The Department for Business, Energy and Industrial Strategy says that the chosen approach seeks to provide continuity and give confidence to business, minimise distortions of competition, and prevent a subsidy race within the UK and protect consumers. The Committee has sought additional information from the Department about the expected impact on the CMA and the resources that it would need to carry out is new role. While the Department says that the draft Regulations seek to maintain the current rules, the State aid regime is nevertheless a politically significant aspect of the UK's withdrawal from the EU.

The draft Regulations are therefore drawn 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.

35. The Department for Business, Energy and Industrial Strategy (BEIS) has laid these draft Regulations with an Explanatory Memorandum (EM). The purpose of the instrument is to transpose the EU State aid regime, as set out in Articles 107 and 108 of the Treaty on the Functioning of the European Union, into UK domestic law and to transfer the function of regulating the regime that is currently held by the EU Commission (the Commission) to the Competition and Markets Authority (CMA).

Background

36. BEIS defines State aid "as support in any form (financial or kind) from any level of government which gives a business or another entity an advantage that could not be obtained in the normal course of business". The Department explains that the current EU regime obliges Member States to notify the Commission of any aid in advance and that awarding this aid before it has been approved by the Commission (the so-called "standstill obligation") makes the aid unlawful. While the Commission is responsible for monitoring the system and investigating whether State aid is compatible with the requirements of the internal market, it is the role of national Courts to enforce the standstill obligation. Competitors may apply to a national Court to uphold this right.

37. The EU regime provides for specified exemptions under which State aid does not have to be notified to the Commission in advance.[15] The exemptions cover specific economic sectors such as fisheries and agriculture, and services of general economic interest (which the market does not provide sufficiently, such as postal services or rural transport). There are also de minimis thresholds below which funding is exempt from the State aid requirements. BEIS explains that while these exemptions are defined tightly

15 These exemptions are set out in the General Block Exemption Regulation, the Agricultural Block Exemption Regulation, the Fisheries Block Exemption Regulation, the general de minimis regulation, the Services of General Economic Interest de minimis regulation, the agricultural de minimis regulation and the fisheries de minimis regulation.

and compliance is monitored carefully by the Commission, they enable Member States to make available significant funding, and that around 90% of State aid does not need prior approval from the Commission under the current rules.

What is changing

38. According to BEIS, the draft Regulations do not propose any material changes to the EU State aid framework: the instrument proposes to retain the definition of State aid and the general prohibition on providing such aid. The Department explains in the EM that the policy aims are to "provide continuity and give confidence to business, to minimise distortions of competition and to prevent wealthier parts of the UK subsidising local undertakings at the expense of those in other parts of the country". In addition, BEIS says that the UK State aid regime is intended to protect consumers, suggesting that "companies which are aid dependent tend not to be innovative" and that "[t]his in turn can lead to higher prices and poorer customer service".

39. The Department also explains, however, that several changes are required to ensure that the new State aid regime can operate effectively in a purely UK domestic context after exit. The instrument proposes to make the CMA the national regulator, reflecting its current expertise in competition matters, and to provide it with similar investigatory and enforcement powers to the Commission. This is to include powers to require information from companies and to issue administrative penalties where companies fail to comply with such requests during a formal investigation, as well as powers of entry, backed by criminal sanctions, to obtain information needed for a preliminary examination in cases where an aid recipient is suspected of having misused aid. The instrument also proposes powers similar to those held by the Commission with regard to requiring public authorities to suspend, terminate or recover any unlawful or misused aid, with such orders to be enforceable by the Courts.

40. BEIS explains that to provide continuity and certainty, the CMA is to adopt the Commission's State aid guidelines, frameworks, communications and notices which set out clearly when aid should be approved. The instrument also seeks to retain the link to relevant EU case law. BEIS explains that there is a large amount of EU case law which shapes the interpretation of key concepts in the legislation and that not retaining this link would lead to uncertainty.

41. The instrument proposes to adopt the EU regime's substantive rules for the new UK regime as they are on exit day. Current powers of the Commission to make and amend exemptions, however, are not to be transferred into the UK regime. BEIS explains that this would be inappropriate and told the Committee that "if an amending power is required in the future, it would be appropriate for Parliament to consider the scope and potential uses of such a power at that time".

42. Current powers of the European Council to grant aid in exceptional circumstances would also not be transferred. BEIS says that there is already sufficient flexibility to provide aid at short notice; that, where necessary, the Secretary of State could issue further guidance on the approval of aid; and that the Government could bring forward primary legislation to provide aid in critical cases where the CMA found that it was unable to approve aid.

The Committee is not clear whether the proposals do, as the Department claims, provide sufficient flexibility, and whether primary legislation would be a suitable way forward in critical cases where State aid may be required at short notice. **The House may wish to explore this issue with the Minister during debate.**

43. BEIS emphasises that the instrument does not seek to restrict the ability of future Parliaments to pass Acts that grant State aid directly, reflecting the constitutional principle that one Act of Parliament cannot bind future Acts of Parliament.

44. The instrument proposes to exempt certain EU funding programmes, such as the EU's Horizon 2020 research programme, from State aid rules. While such programmes are not currently covered by the EU State aid regime (on the ground that funding is allocated by the Commission rather than by Member States), the Department says that there is a risk that, because of the financial guarantee that HM Treasury has provided for these programmes post exit, such payments could qualify as State aid.

45. The instrument also proposes to retain oversight of the Courts. According to BEIS, most decisions of the CMA are to be subject to judicial review in the High Court (or the Court of Session in Scotland) and CMA decisions in relation to issuing penalties are to be subject to appeal in the High Court (or Court of Session in Scotland). As is the case under the current arrangements, the High Court (or Court of Session in Scotland) is to continue to hear cases where public authorities have allegedly provided aid without the approval of the CMA.

Impact

46. The draft Regulations transfer significant new responsibilities on the CMA as the UK regulator of the State aid regime, yet the EM states that there will be no impact on the public sector. We asked the Department whether the CMA will have the staffing, funding, and expertise it needs to carry out its new role from day one after EU exit. BEIS explained that:

> "The CMA has estimated that it will need to recruit approximately 50 full time members of staff in order to exercise its new State aid functions effectively. The CMA is currently recruiting and training staff who will form part of a new State aid group led by a Senior Director for State aid.
>
> In its 2018 Budget, the UK Government allocated £20 million to the CMA for financial year 2019/2020 to ensure that the CMA has the resources it needs to prepare for EU exit – including its new role in the enforcement of the UK domestic State aid regime. In October 2018 the Government allocated £23.6m to the CMA for financial year 2018/19, which specifically included £3.3m provision for the CMA to prepare for its new State aid function.
>
> The Government considers that CMA has existing experience and expertise which is relevant here. It already exercises a broad range of competition functions involving complex economic and legal analysis. The CMA's decisions in relation to competition and markets issues are taken independently of Government.

> As noted above, the Government has allocated additional budget to the CMA for financial year 2019/2020 to enable the CMA to prepare for EU Exit – including taking on its new State aid functions. The CMA's preparations include recruiting additional staff members, undertaking State aid-specific training and working on establishing new infrastructure to deal with State aid cases – for example, a new IT system."

Consultation

47. The EM states that the Department had technical discussions related to the instrument with the Devolved Administrations and the CMA. We asked BEIS whether the Devolved Administrations were content with the approach and, given that a significant amount of aid is provided locally, whether local government had also been consulted. BEIS explained that:

> "There have been extensive technical discussions with the Devolved Administrations on the proposed State aid regime and there is broad agreement on the substance of the Government's policy. The UK Government has not sought political consent from the devolved administrations to the draft SI, as the UK Government considers the regulation of State aid to be a reserved matter.
>
> [W]e have discussed the proposed regime with the Local Government Association (LGA). In addition we have also facilitated a meeting between the LGA and the future regulator the Competition and Markets Authority (CMA)."

Conclusions

48. These draft Regulations seek to replicate the current EU State aid regime in a UK domestic context, with the CMA as the national regulator. State aid is a politically significant aspect of the UK's withdrawal from the EU. The House may wish to explore further the potential impact of the proposed changes, especially in relation to the additional responsibilities for the CMA and the resources that will be needed to manage the new regulatory regime. **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

Draft Chemicals (Health and Safety) and Genetically Modified Organisms (Contained Use) (Amendment Etc.) (EU Exit) Regulations 2019

49. These contingency Regulations preserve the existing controls on dangerous chemicals, biocides, pesticides and Genetically Modified Organisms in case of a 'no-deal' Brexit. They set up the Health and Safety Executive as a UK regulator should the European competent authorities no longer be available. The Explanatory Memorandum (EM) sets out the changes that will affect industry throughout the supply chain from the import of raw materials, to the labelling of products. In particular, the fee basis will change from the European system, which relates to the size of the firm submitting the application, to one based on the UK system of full cost recovery for the work involved.[16] The EM notes that there may be duplication of approvals and additional costs for firms if they wish to market new products in both the UK and the EU, but that it is an inevitable result of leaving the EU; the regulatory system will minimise this where possible. The EM also explains a legislative change which will enable amendments to the list of regulated substances to be issued by the Secretary of State,[17] including the current system of ambulatory references to EU Regulations. This means that updates can be issued swiftly without the need to produce a new Statutory Instrument every time. The EM explains that biocides alone might require about 50 such changes a year. The EM also indicates extensive liaison with industry and with the Devolved Administrations in producing these Regulations. **We commend the EM which is both thorough and clear.**

Draft Import of and Trade in Animals and Animal Products (Amendment etc.) (EU Exit) Regulations 2019

Draft Trade in Animals and Related Products (Amendment) (EU Exit) Regulations 2019

50. The purpose of these two sets of draft Regulations is to address failures of domestic legislation and other deficiencies arising from the withdrawal of the UK from the EU. According to the Department for Environment, Food and Rural Affairs (Defra), they aim to ensure that, in a 'no deal' scenario, the existing arrangements for the import of live animals, animal products (including meat), animal by-products, germplasm, and the non-commercial movement of pets, circus animals and equines can continue, and no import barriers are created. Defra highlights the importance of the sector: 52 million tonnes of live animals and products of animal origin are imported into the UK annually, worth around £58 billion, of which an estimated 34 million tonnes and £41 billion are from trade with the EU. In addition, around 300,000 pet animals move into the UK annually through the EU Pet Travel Scheme, which provides relatively disruption-free travel between participating countries. The Committee recommended an upgrade of the draft Trade in Animals and Related Products (Amendment) (EU Exit) Regulations 2019 to the affirmative procedure when the instrument was initially laid as a proposed negative instrument. The Committee noted at the time that, while the instrument sought to maintain current arrangements for imports from the EU into the UK in a possible 'no deal' scenario, the

16 Section 12 of the EM provides indicative lists of where there are likely to be specific changes in fee.
17 Following advice from the HSE or Environment Agency experts, as appropriate.

question of whether the EU would reciprocate these arrangements was subject to negotiations with the EU. The Committee found that if treated as a third country, the UK would face considerable additional administrative requirements and potential costs in relation to the export of animals and animal-related products and the non-commercial movement of pets to the EU. The Committee concluded that the House would welcome an opportunity to debate the Department's choice of unilateral recognition of current import arrangements and the potential impact of a 'no deal' in this area.

Draft Public Record, Disclosure of Information and Co-operation (Financial Services) (Amendment) (EU Exit) Regulations 2019

51. Existing primary and secondary legislation, including retained EU legislation, relating to financial services sets out the gateways for disclosing confidential information within the UK, to European Economic Area (EEA) regulatory authorities and to third-country regulatory authorities. In the Explanatory Memorandum to these Regulations, HM Treasury (HMT) says that, after the UK's exit from the EU, these provisions in both domestic legislation and retained direct EU legislation will become deficient, and that the instrument addresses these deficiencies to ensure that the legislation continues to operate effectively at the point of exit. The Regulations will ensure the continuation of robust protections for how the UK's financial services regulators disclose confidential information with other regulatory and supervisory authorities in the UK and elsewhere. HMT has said that, in relation to certain types of confidential information, the UK will have to enter into cooperation agreements with the European Supervisory Authorities and EEA authorities in order to continue to share such information, in some cases before exit day.[18] We asked HMT whether it was confident that, where necessary, such cooperation agreements would be concluded in good time. The Department told us:

> "While HM Treasury is responsible for ensuring that the legislation functions appropriately, the UK financial services regulators (namely, the Prudential Regulatory Authority and the Financial Conduct Authority) are ultimately responsible for drafting and concluding these cooperation agreements with the relevant EU and EEA national authorities. UK and EU authorities have made good progress in their discussions on memoranda of understanding (MoUs), which includes the essential provisions for information-sharing and co-operation to continue between those authorities after exit. The regulators are continuing to negotiate these MoUs with the relevant EU authorities, and they expect to reach agreement sufficiently in time before the end of March."

Draft Road Vehicles and Non-Road Mobile Machinery (Type-Approval) (Amendment) (EU Exit) Regulations 2019

52. To sell and register vehicles and components in the EU, manufacturers must hold a European Community type-approval ("EC type-approval") issued by the responsible authority in an EU Member State (the Vehicle Certification

18 HM Treasury, *Guidance: The Public Record, Disclosure of Information and Co-operation (Financial Services) (Amendment) (EU Exit) Regulations 2019: explanatory information* (9 January 2019): https://www.gov.uk/government/publications/draft-public-record-disclosure-of-information-and-co-operation-financial-services-amendment-eu-exit-regulations-2019/the-public-record-disclosure-of-information-and-co-operation-financial-services-amendment-eu-exit-regulations-2019-explanatory-information [accessed 6 February 2019].

Agency (VCA) in the UK). In the event of 'no deal' with the EU, EC type-approvals issued in another Member State will no longer be accepted in the UK. Manufacturers holding an EC type-approval will be issued with a Provisional UK type-approval during a transitional period of two years. The Explanatory Memorandum explains that "all of this is an interim arrangement valid for a maximum of two years, pending a comprehensive review and re-working of the UK's type approval arrangements (with legislation planned for mid-2019)." Existing EU approvals issued by the VCA will remain valid. When this instrument was previously presented as a Proposed Negative, the Committee recommended that this instrument be upgraded to the affirmative resolution procedure.

Railways (Access, Management and Licensing of Railway Undertakings) (Amendment) Regulations 2019 (SI 2019/82)

53. There is currently a package of EU legislation governing the access, management, and licensing of railway undertakings. The fourth package of legislation, which includes the 'Market Pillar Directive',[19] aims to improve competition within the EU by extending access rights into domestic passenger services and to ensure the impartiality and independence of infrastructure managers of rail networks.

54. Using powers under the European Communities Act 1972, the Department for Transport (DfT) is implementing the provisions of the Market Pillar Directive until 31 December 2020. DfT points out that the UK's obligations to give effect to the Market Pillar Directive will cease on exit day. However, subject to the terms of a proposed 'EU Withdrawal Agreement', EU law will continue to apply to the UK during an implementation period until 31 December 2020. The Government believe that extending the compliance with the Market Pillar Directive will provide greater flexibility to determine railway policy and legislation after exit, especially in light of the ongoing Williams Rail Review.[20]

55. DfT explains that the legislation is being implemented as part of the Government's continuing obligations as an EU Member State prior to exit. The UK obligations under the Market Pillar Directive are being preserved as retained domestic law after exit. However, any deficiencies which need to be corrected as a result of the UK leaving the EU will be dealt with in an EU exit instrument which DfT states will be laid in due course.

19 Directive (EU) 2016/2370.

20 A call for evidence has been published to support a review of the organisational and commercial frameworks of the UK rail industry. This consultation closes at 11:45pm on 31 May 2019. See HM Government, *Williams Rail Review*: https://www.gov.uk/government/consultations/williams-rail-review [accessed 6 February 2019].

INSTRUMENTS NOT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

Draft instruments subject to affirmative approval

Animals (Legislative Functions) (EU Exit) Regulations 2019

Aquatic Animal Health and Plant Health (Legislative Functions) (EU Exit) Regulations 2019

Chemicals (Health and Safety) and Genetically Modified Organisms (Contained Use) (Amendment etc.) (EU Exit) Regulations 2019

Financial Services (Gibraltar) (Amendment) (EU Exit) Regulations 2019

Import of and Trade in Animals and Animal Products (Amendment etc.) (EU Exit) Regulations 2019

Public Record, Disclosure of Information and Co-operation (Financial Services) (Amendment) (EU Exit) Regulations 2019

Road Vehicles and Non-Road Mobile Machinery (Type Approval) (Amendment) (EU Exit) Regulations 2019

Trade in Animals and Related Products (Amendment) (EU Exit) Regulations 2019

Draft instruments subject to annulment

Modifications to the Standard Conditions of Electricity and Gas Supply Licences and the Smart Energy Code (Smart Meters No.1 of 2019)

Instruments subject to annulment

CP 20	UK/Kazakhstan: Agreement on International Road Transport
SI 2019/72	Animals (Scientific Procedures) Act 1986 (EU Exit) Regulations 2019
SI 2019/76	Zoonotic Disease Eradication and Control (Amendment) (Northern Ireland) (EU Exit) Regulations 2019
SI 2019/82	Railways (Access, Management and Licensing of Railway Undertakings) (Amendment) Regulations 2019
SI 2019/88	Genetically Modified Organisms (Amendment) (England) (EU Exit) Regulations 2019
SI 2019/90	Genetically Modified Organisms (Amendment) (EU Exit) Regulations 2019
SI 2019/101	Council Tax and Non-Domestic Rating (Demand Notices) (England) (Amendment) Regulations 2019

APPENDIX 1: 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 5 February 2019, Members declared no interests.

Attendance:

The meeting was attended by Lord Cunningham of Felling, Baroness Donaghy, Lord Goddard of Stockport, Lord Janvrin, Lord Kirkwood of Kirkhope, Baroness O'Loan, Baroness Redfern, Lord Rooker and Lord Sherbourne of Didsbury.