HOUSE OF LORDS

Secondary Legislation Scrutiny Committee

4th Report of Session 2024–25

Drawn to the special attention of the House:

Draft Windsor Framework (Non-Commercial Movement of Pet Animals) Regulations 2024

Recognition of Overseas Qualifications (Charges) Regulations 2024

Scotland Act 1998 (Agency Arrangements) (Specification) Order 2024

Architects (Fees, Electronic Communications and Miscellaneous Amendments) (Amendment) Regulations 2024

Correspondence with the Home Office on the unlawful charging of certain fees in the immigration system

Correspondence with HM Treasury on the timetable for a new regulatory regime for Central Counterparties

Includes information paragraphs on:

Draft Consumer Composite Investments (Designated Activities) Regulations 2024 and one related instrument

Draft Radio Equipment (Amendment) (Northern Ireland) Regulations 2024

Official Controls (Extension of Transitional Periods) and Plant Health (Frequency of Checks) (Miscellaneous Amendments) Regulations 2024

Payment Services (Amendment) Regulations 2024

Seafarers' Wages Regulations 2024

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Secondary Legislation Scrutiny Committee

The Committee's terms of reference, as agreed on 29 July 2024, are set out on the website but are, in summary:

To report on draft instruments and memoranda laid before Parliament under section 23(1) of the European Union (Withdrawal) Act 2018 and sections 12 and 14 of the Retained EU Law (Revocation and Reform) Act 2023.

And, to scrutinise –

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

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

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

Members

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Registered interests

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

Publications

The Committee's Reports are published on the internet at https://committees.parliament.uk/committee/255/secondary-legislation-scrutiny-committee/publications/

Committee Staff

The staff of the Committee are Jen Mills (Clerk), India Kearsley (Adviser), Philipp Mende (Adviser), Chris Smith (Adviser) and Clayton Gurney (Committee Operations Officer).

Further Information

Further information about the Committee is available at https://committees.parliament.uk/committee/255/secondary-legislation-scrutiny-committee/

The progress of statutory instruments can be followed at https://statutoryinstruments.parliament.uk/

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

Contacts

Any query about the Committee or its work, or opinions on any new item of secondary legislation, should be directed to the Clerk to the Secondary Legislation Scrutiny Committee, Legislation Office, House of Lords, London SW1A 0PW. The telephone number is 020 7219 8821 and the email address is hlseclegscrutiny@parliament.uk.

Fourth Report

GUIDELINES FOR EXPLANATORY MEMORANDUMS FOR INSTRUMENTS THAT CORRECT SITUATIONS WHERE A FEE WAS, OR MAY HAVE BEEN, CHARGED UNLAWFULLY

1. In this and our previous Report, we have drawn three instruments to the special attention of the House that are intended to correct situations where a fee is being charged either without the necessary statutory backing or where there is some ambiguity about whether such statutory authority is required.[1]

2. Although the instruments were laid by three different departments, the Explanatory Memorandums (EMs) in each case have been especially poor. In particular, none has included the following information, which is critical to understanding the introduction and operation of the changed policies:

   (1) An explicit statement that fees have been, or may have been, paid inappropriately in the past and that there is a risk of legal challenges in relation to the fees.

   (2) What, if any, actions the department is taking in relation to people who have paid such fees. For example, in response to our questions, the Home Office said that it is "considering all options, including restitution schemes and retrospective legislation".

   (3) The expected timescales for such a review of past cases, including specific dates. We are conscious that reviews of past public sector errors can be prolonged, with undesirable implications for those affected.

   (4) How and when the situation originated, and who was responsible.

   (5) How much has been paid in fees over time.

   (6) How many people have been affected.

   (7) How and when the possibility that the fees are unlawful came to light, and who identified this. The EM should also make reference to any reports, for example by Parliament's Joint Committee on Statutory Instruments, that questioned the lawfulness of the fees.[2]

   (8) The role of any government contractor in setting the fees, and by what authority any such contractor charged fees.

   (9) Whether fees have continued to be charged once the unlawfulness, or possible unlawfulness, came to light; and if so, why this course of action was chosen.

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1 Draft Immigration and Nationality (Fees) (Amendment) Order 2024, drawn to the Special Attention of the House in *3rd Report* (Session 2024–25, HL Paper 15); and in this Report, the Recognition of Overseas Qualifications (Charges) Regulations 2024 (SI 2024/942) and the Architects (Fees, Electronic Communications and Miscellaneous Amendments) (Amendment) Regulations 2024 (SI 2024/1017).

2 See paras 44 to 45 of this Report.

(10) If the legal position is not clear cut, the various legal analyses (for example, that no statutory authority is necessary or that statutory authority is indeed required).

3. While it is inexcusable that such situations arise, it is correct that, if and when they come to light, action is taken to regularise the position as soon as possible. It is then critical that the EM does not obscure any issues with a policy and provides a full, balanced and rounded description of the context. We intend the above list to provide an indication of the information that should be included in all future instances, although it may not be exhaustive. **We will have no hesitation in writing to Ministers, or calling them in to give evidence, if EMs on such important policies are inadequate.**

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

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

- Electricity Capacity Mechanism (Amendment) Regulations 2024

INSTRUMENTS DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

Draft Windsor Framework (Non-Commercial Movement of Pet Animals) Regulations 2024

Date laid: 10 October 2024

Parliamentary procedure: affirmative

The purpose of this instrument is to provide a statutory basis for the Northern Ireland Pet Travel Scheme ("the Scheme") which was agreed as part of the Windsor Framework between the UK and the EU in February 2023. According to the Department for Environment, Food and Rural Affairs (Defra), the Scheme will enable the "smooth and straightforward movement" of pet dogs (including assistance dogs), cats and ferrets from Great Britain (GB) to Northern Ireland (NI), while ensuring that any pet movements from GB into Ireland or other EU Member States remain subject to relevant EU law requirements. Defra says that the Scheme delivers "a significant improvement on the requirements that would have applied in the original Northern Ireland Protocol".

We have received several submissions which criticise the lack of public consultation on the policy and raise concerns about the impact of the Scheme on those travelling with pets between NI and GB. The submissions appear to indicate a misunderstanding of the requirements that will apply to residents of NI in particular. While the Department says that it engaged with relevant stakeholders, ***we consider that the instrument is an example of where wider consultation would have been desirable: it could have helped to raise awareness of the Scheme and improve understanding of how it will work in practice. We therefore welcome that Defra has committed to "continue to engage comprehensively in the run up to the scheme's launch, in order to make sure that those travelling with their pets are prepared."***

This instrument is drawn to the special attention of the House on the ground that it is politically or legally important and gives rise to issues of public policy likely to be of interest to the House.

4. The purpose of these Regulations is to provide a statutory basis for the Northern Ireland Pet Travel Scheme ("the Scheme") which was agreed as part of the Windsor Framework between the UK and the EU in February 2023. According to the Department for Environment, Food and Rural Affairs (Defra), the Scheme will allow "the smooth and straightforward movement" of pet dogs (including assistance dogs), cats and ferrets from Great Britain (GB) to Northern Ireland (NI), while ensuring that pets moving from GB into Ireland or other EU Member States remain subject to the relevant EU law requirements.

The original Northern Ireland Protocol

5. Defra explains that under the original NI Protocol as agreed between the UK and the EU, all pets travelling from GB to NI were subject to the full requirements of EU law for third countries.[3] This included a requirement for pets to be microchipped (or have a legible tattoo) and be vaccinated against rabies (with a 21-day waiting period after a primary vaccination) and for

3 Regulation (EU) No 576/2013 of the European Parliament and of the Council of 12 June 2013 on the non-commercial movement of pet animals.

dogs to be treated against tapeworm. In addition, every pet was required to be presented at a specific entry point in NI for mandatory compliance checks and to be accompanied by a new EU Animal Health Certificate, which can only be issued by trained official veterinarians, for each journey. While grace periods meant that these requirements were not implemented in practice, Defra says that they were still the "legally applicable requirements" and would have meant "significant administrative and financial burdens", particularly for people who travel frequently with their pets or who require an assistance dog to travel independently.

How the Scheme will operate in practice

6. The Department says that the Windsor Framework establishes a "new, sustainable and durable framework" for pet movements that replaces the previous requirements under the NI Protocol. While pets will need to be microchipped under the Scheme, Defra says that this is already a legal requirement for dogs in GB and NI as well as for cats in England. Apart from the microchipping requirement, the key features of the Scheme are that:

- Residents of NI will be able to travel with their pets to, and return from, GB without needing any pet travel document and will not be subject to any checks or processes.
- Pets will no longer require treatment in relation to rabies and tapeworm before travelling from GB to NI. This is in recognition of the disease-free status of the UK regarding these conditions.
- GB-based pet owners travelling to NI will no longer require single-use EU pet travel certificates but instead will be able to use a single 'pet travel document' which will be valid for the lifetime of the pet. As part of this document, pet owners will have to confirm that the pet is microchipped and will not be moved subsequently into the EU. Defra says that the document will be "free of charge and simple and quick to apply for online" and will not require a visit to a vet.

7. To enable the operation of the Scheme, the instrument allows the relevant competent authority to request certain information from commercial pet microchip database operators, including a pet's microchip record, the pet's owner and their address and the pet's breed and colour. The competent authority may also carry out relevant checks on GB-based pets and may require pet owners to present their animal at a relevant sanitary and phytosanitary inspection facility in NI.

8. Movements of pets from GB to Ireland and the rest of the EU will continue to be subject to EU law requirements. The Scheme will also not apply to: people who are resident outside the UK and travel to NI via GB; the commercial movements of dogs, cats and ferrets, including where there is a change in ownership or sale; or to other pets, such as birds or rabbits. In those cases, the full EU law requirements will apply.

9. As the application of the Scheme will be based on the pet owner's place of residence, we asked Defra how the authorities will know whether people travelling with pets are resident in NI, GB or outside the UK, and whether this will require checks of everyone travelling with a pet. The Department responded that:

> "Northern Ireland pet owners will not face any checks and will not be required to hold a pet travel document. Nor will there be any checks for pets travelling from NI to GB. But GB pet owners will need to be able to show that they have a valid pet travel document and that it applies for the pet they are travelling with, in order to mitigate against abuse of the scheme.
>
> As the scheme is for GB origin pets only, pet owners will need a valid GB address to obtain a Pet Travel Document. This will be checked during the course of applying for a pet travel document. NI residents will not be required to travel with a Pet Travel Document.
>
> As has always been the case, pets that do not originate from the UK or those travelling onward to EU Member States like Ireland via Northern Ireland, are legally obliged to report to officials in Northern Ireland for checks. If they fail to do so, criminal enforcement action can be taken."

Consent from the devolved Governments

10. The Department says that because the policy deals with matters which are a devolved responsibility, it developed the instrument alongside the Scottish Government, Welsh Government and the NI Department of Agriculture, Environment and Rural Affairs and obtained the relevant legislative consent.

Concerns raised about the instrument in external submissions

11. We have received submissions from members of the public and from Jim Allister KC MP (Traditional Unionist Voice). The submissions raised a range of concerns about the Scheme and the Government's approach to pet travel between NI and GB, including about the political and constitutional significance of the instrument and its practical impact. We put the concerns to the Department and have published the submissions and Defra's response in full on our website.[4]

12. One of the key concerns raised in the submission was about the lack of public consultation on the policy. The Department explained:

> "The plans for new pet arrangements under the Windsor Framework were originally set out on 27 February 2023 in the 'The Windsor Framework: A New Way Forward' command paper.[5] The changes made by these regulations are necessary to implement those arrangements. They are a significant improvement on the requirements that would have applied in the original Northern Ireland Protocol and ensure the removal of many of the burdens (particularly rabies vaccines) that are noted in the submissions. We are confident in our view that these are a significant improvement upon those of the original Northern Ireland Protocol.
>
> There was not a public consultation on the approach as it flows from the arrangements enshrined in the Framework which represent the UK's international obligations. But there has been significant engagement through user research with pet owners, ferry and airline companies

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

5 Prime Minister's Office, *The Windsor Framework*, Policy paper (27 February 2023): https://www.gov.uk/government/publications/the-windsor-framework [accessed 23 October 2024].

> operating travel routes between GB and NI and commercially owned pet microchip database operators, in drafting these Regulations. We will continue to engage comprehensively in the run up to the scheme's launch, in order to make sure that those travelling with their pets are prepared.
>
> Guide Dogs UK have specifically highlighted the positive impact of removing single-use EU certificates on assistance dog owners travelling to Northern Ireland and the British Veterinary Association has outlined that the arrangement will reduce paperwork for vets and health treatments for pets."

13. Another key concern raised in the submissions was about the impact the Scheme will have specifically on those travelling with pets from NI to GB. The submissions criticised, amongst other issues, the increased complexity of the arrangements compared to the current practice, the need for medical treatment and veterinary certificates and the costs of the Scheme. Given that, according to Defra, there will not be any such requirements under the Scheme, apart from the need for the pet to be microchipped, for those travelling from NI to GB and returning home, there appears to be some misunderstanding of the new rules.

Conclusion

14. We have previously said that public consultation can provide opportunities not only to improve a policy but also to help increase public confidence in the policy, and that consulting widely can be particularly important where legislation deals with a policy area that is contentious and where interested parties have strongly felt views.[6] **We consider that this instrument is another example of where a wider consultation would have been desirable: it could have helped to raise awareness of the Scheme and to improve understanding of its practical requirements. We therefore welcome that the Department has committed to "continue to engage comprehensively in the run up to the scheme's launch, in order to make sure that those travelling with their pets are prepared." Effective engagement and communication, for example through a publicity campaign and notices in veterinary surgeries, will be vital to improve public understanding of how the Scheme will operate in practice**.

6 Windsor Framework (Retail Movement Scheme: Plant and Animal Health) (Amendment etc.) Regulations 2024 (SI 2024/853) and *3rd Report* (Session 2024–25, HL Paper 15).

Recognition of Overseas Qualifications (Charges) Regulations (SI 2024/942)

Date laid: 12 September 2024

Parliamentary procedure: negative

These Regulations provide a statutory basis for the UK National Information Centre's charges for assessments of the comparability of UK and overseas qualifications. The original Explanatory Memorandum (EM) to the instrument contained no explanation of why the change was needed. In response to our questions, the Department for Education (DfE) said that while it believes such a statutory footing is not necessary, there is a "legitimate alternative analysis" and that it is therefore "prudent" to put the matter beyond doubt.

We do not dispute that this is a sensible approach. However, the original EM should have given a full and balanced description of the reason for the policy change, as well as sufficient context to understand the 'bigger picture'. ***We regret that the EM did not meet these requirements.*** *The DfE provided us with additional information and has revised the EM to include some (but not all) of the background.* ***However, in any similar future situations departments should adhere to the guidelines on the information that should be included in the EM that we have provided in the introduction to this Report.***

These Regulations are drawn to the special attention of the House on the ground that the explanatory material laid in support provides insufficient information to gain a clear understanding about the instrument's policy objective and intended implementation.

Background

15. These Regulations provide a statutory basis for the charges for services provided by the UK's National Information Centre (ENIC). ENIC provides assessments of the comparability of UK and overseas qualifications across a wide range of sectors, with the aim of facilitating academic and professional mobility between countries. The services also meet international treaty obligations. For example, ENIC provides:

- 'Statements of comparability' that evidence the comparability of overseas qualifications with UK qualifications, assisting access to higher education and employment in the UK including in health and social care, business administration, law, information and communication technology, construction, and engineering.

- 'UK qualification reference statements' that provide information about an individual's UK qualification and can be used to demonstrate the scope of that qualification overseas or in the UK.

Levels of charges

16. The instrument also sets the levels of charges for ENIC services, which are unchanged from their current rates. For example, a statement of comparability under the standard service and a qualification reference statement each cost £49.50. In the Explanatory Memorandum (EM) to the instrument, the Department for Education (DfE) states that these charges are set "at cost across the UK-ENIC services on an aggregate basis". However, we note that ENIC's services are provided by a private contractor, Ecctis Limited

("Ecctis"), on behalf of the DfE.[7] In these circumstances, the definition of "cost" is different to that when the public sector provides the service itself, because the charges are set at a level agreed in a contract between Ecctis and the Government and Ecctis will expect to make a profit on its operations. **We therefore observe that the 'cost' of the services in this instance includes the private contractor's profits.**

Why introduce a statutory basis for the charges?

17. The original EM contained no explanation about why it was necessary to introduce a statutory basis for the charges. In response to our questions, the DfE stated its view that such a basis was not required but said it had identified a "legitimate alternative analysis". The DfE therefore said it was "prudent to put charging for this service on a statutory footing". We questioned the DfE further on the legal arguments on each side of the case. The Department said:

> "The analysis relates to whether the services are 'commercial'. As 'Managing Public Money' says (paragraph 6.10.1): "Some public sector services are discretionary, i.e. no statute underpins them. Services of this kind are often supplied into competitive markets, though sometimes the public sector supplier has a monopoly or other natural advantage."[8] If they are commercial, they do not require statutory authority.
>
> Prior to the Recognition of Overseas Qualifications (Charges) Regulations 2024 coming into force, there was no statutory underpinning for UK ENIC services. DfE's position is that the services are commercial, insofar as they could be offered by any commercial provider, and like services were previously supplied into a competitive market. However, as the position is complex, and subject to an alternative analysis, to put the position beyond doubt we are making statutory provision."

18. It is not our role to take a view of the legal position and, if there is doubt, the move to place the charges on an unequivocal statutory footing appears sensible.

Information missing from the EM

19. However, it is our role to aid the House in its scrutiny of the Regulations, and in doing so we rely on an EM that should contain a full and balanced description of the reason for the policy change, as well as sufficient context to understand the 'bigger picture' around the policy. As stated above, the original EM contained none of this information.

20. For example, the original EM did not make clear the implication that past fees may have been charged unlawfully, meaning that the DfE may receive legal challenges relating to these payments. Nor did it provide relevant data; for example, on the number of users affected and the amount of fees paid, and what action the DfE was taking in respect of such cases.

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7 Ecctis is also the contractor involved in the Home Office's Draft Immigration and Nationality (Fees) (Amendment) Order 2024, drawn to the special attention of the House in our previous Report *3rd Report*, (Session 2024–25, HL Paper 15), and covered in correspondence elsewhere in this Report. DfE told us that while the Home Office and DfE currently have separate contracts with Ecctis for the Visas and Nationality Service and ENIC respectively, both contracts are expiring and a joint, routine procurement exercise has been launched.

8 HM Treasury, 'Managing Public Money' (4 May 2023): https://www.gov.uk/government/publications/managing-public-money [accessed 17 October 2024].

21. In response to questions, the Department told us that "ENIC services have been provided through a contract since at least 2014", and that ENIC charged total fees of around £45 million between that date and 2023. However, the DfE was not able to provide data on the number of users affected. In relation to a review of past cases, the Department told us that "we are currently in the process of conducting further scoping on any other action that may or may not need to be taken as a result". DfE did provide us with a timetable for this review, saying that it "is nearing conclusion and is likely to conclude in the next one to two months". **The House may wish to follow up on the outcome of the review**.

22. The EM also did not mention that fees continued to be charged even once the "legitimate alternative analysis" as to their lawfulness had come to light, which the DfE told us was in February 2024. Questioned on why it had taken this course of action, the Department repeated its view that the fees were not unlawful and said that "the fees were justified and proportionate; end users paid reasonable sums for a service they received".

23. **In order to provide a balanced view of the context of the policy, all of this information should have been in the EM; as it was not, the EM was inadequate.** At our request, the DfE has revised the EM, but the revisions are limited to explaining the rationale for the instrument: that the legal basis for the fees is doubtful. **In any case, our intervention should not have been necessary.** Regrettably, the revised EM still does not include any additional information, such as the position of those who have paid past fees, the DfE's consideration of how these should be treated, that the Department is potentially vulnerable to legal challenges in respect of past payments and why fees continued to be charged once their doubtful lawfulness had been identified.

Conclusion

24. This instrument has similarities to two others on which we have recently reported, laid by the Home Office[9] and the Ministry of Housing, Communities and Local Government.[10] All these instruments were designed to correct situations where a fee has been charged either without the necessary statutory backing or where there is some ambiguity about whether statutory authority is required. In all three cases the original EM omitted key information, so that readers were not able to understand fully the rationale for the changes and the background to them.

25. We regard a full, clear and open statement of why an instrument has been brought forward as central to understanding a policy change. **We were disappointed that in this case the original EM fell short by entirely omitting information about the reason for the changes and the possible further implications.** We welcome that the DfE agreed to revise the EM to include some (but not all) of the missing information. **However, in any similar future situations departments should adhere to the guidelines on the information that should be included in the EM, as set out in the introduction to this Report.**

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9 Draft Immigration and Nationality (Fees) (Amendment) Order 2024, in *3rd Report* (Session 2024–25, HL Paper 15), and correspondence on the same instrument elsewhere in this Report.

10 Architects (Fees, Electronic Communications and Miscellaneous Amendments) (Amendment) Regulations 2024 (SI 2024/1017), in this Report.

Scotland Act 1998 (Agency Arrangements) (Specification) Order 2024 (SI 2024/989)

Date laid: 4 October 2024

Parliamentary procedure: negative

Powers related to winter heating assistance are devolved to Scotland, which is funded on an equivalent basis to England and Wales. Following the decision to means test the Winter Fuel Payment in England and Wales from winter 2024–25, the Scottish Government will now only receive funding equivalent to a means tested payment. Consequently, the Scottish Government cannot fund a universal payment this winter without making significant savings elsewhere, nor can it adapt its delivery infrastructure in time to means test the payment.

The Department for Work and Pensions (DWP) therefore intends to deliver a means tested payment on behalf of the Scottish Government this winter. This Order is required to specify certain administrative functions of Scottish Ministers in relation to winter heating assistance, so that an agency arrangement can be agreed between the Scottish and UK Governments to enable DWP to make payments this winter.

We found the broader policy behind this Order to give rise to a number of issues, particularly in relation to the Scottish Government's ability to exercise its devolved power, the lack of consultation with devolved Governments and the implementation timeline, which remains unclear. Further, we found the Explanatory Memorandum lacked detail about the number of people affected in Scotland, as well as the funding arrangements. ***The House may wish to seek further clarity on these issues from the Minister.***

26. **This Order is drawn to the special attention of the House on the ground that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House.**

Background

27. On 29 July 2024, the Chancellor of the Exchequer announced that the Winter Fuel Payment in England and Wales would be means tested from winter 2024–25, so that only those over pensionable age and in receipt of specified benefits would be eligible.[11] Previously, all pensioners were eligible. Powers in relation to support for winter heating assistance were devolved to Scotland under the Scotland Act 2016, but the Department for Work and Pensions (DWP) continued to pay Winter Fuel Payments in Scotland until its power to do so expired in April 2024. The Scottish Government was preparing to introduce its own Pension Age Winter Heating Payment (PAWHP) from winter 2024–25 on a universal basis.

28. Under the Barnett Formula, the Scottish Government receives funding for winter heating assistance on an equivalent basis to England and Wales. Following the decision to means test the Winter Fuel Payment in England and Wales, the Scottish Government will now only receive funding on the basis of a means tested Winter Fuel Payment, rather than a universal payment. Consequently, the Scottish Government has announced that it will no longer be able to introduce a universal PAWHP, and that its infrastructure will not be ready in time to deliver a means tested payment this winter either.

11 HM Treasury and The Rt Hon Rachel Reeves MP, *Chancellor statement on public spending inheritance*, Oral statement to Parliament (29 July 2024): https://www.gov.uk/government/speeches/chancellor-statement-on-public-spending-inheritance [accessed 15 October 2024].

29. The DWP therefore intends to deliver a means tested PAWHP on behalf of the Scottish Government for winter 2024–25 only. However, with powers in relation to support for winter heating assistance having been devolved, the UK Government has not had the power to make Winter Fuel Payments in Scotland since April 2024. This Order specifies certain functions of Scottish Ministers related to winter heating assistance, so that they can be exercised by a Minister of the Crown on their behalf, paving the way for an agency arrangement between the Scottish and UK Governments to permit the DWP to deliver these payments.

Infringing on devolution?

30. The Explanatory Memorandum (EM) makes clear that the Scottish Government is unable to deliver the PAWHP on a universal basis due to the change in funding as a result of the UK Government's decision to means test the Winter Fuel Payment. While Scotland's powers in relation to winter heating assistance are not themselves directly affected by the UK Government's decision, the impact on funding makes it difficult for Scotland to fully exercise its devolved power in this area. When asked about this, the Scotland Office simply replied that "policy and spending decisions in devolved areas are matters for the Scottish Government." **As the exercise of devolved power is a matter of interest to the House, the House may wish to explore this issue further with the Minister.**

Rushed implementation?

31. In our second report,[12] we drew the Social Fund Winter Fuel Payment Regulations 2024,[13] which implemented the means testing of the Winter Fuel Payment in England and Wales, to the special attention of the House. In particular, we criticised the urgency with which the Regulations were laid, which we found to create issues with bringing in the change at short notice. We now find that the need for this Order and the agency arrangement highlight a further issue with the pace at which the Social Fund Winter Fuel Payment Regulations 2024 were brought in; namely that implementation issues have arisen in Scotland. **The House may wish to ask the Minister what consideration the Government made of implementation in Scotland in the decision to means test the Winter Fuel Payment.**

32. The implementation timeline for the PAWHP for this winter remains unclear. We asked the Scotland Office for more detail; they told us the agency arrangement will be agreed after this Order comes into force, and that "the exact delivery timetable [for the PAWHP for winter 2024–25] is being developed". This Order comes into force on 21 November 2024; payments presumably cannot be made until after the agency arrangement has been agreed, which could be well into winter. **We question whether the uncertainty over this timeline will give recipients sufficient reassurance that they will receive a PAWHP in time to feel confident putting their heating on this winter.**

Impact in Scotland

33. No impact assessment has yet been provided for the decision to means test the Winter Fuel Payment, and this EM contains no detail on the numbers

12 *2nd Report* (Session 2024–25, HL Paper 4).
13 Social Fund Winter Fuel Payment Regulations 2024 (SI 2024/869).

of people expected to be affected in Scotland. When asked for figures, the Scotland Office replied:

> "In winter 2023/24 1.01m pensioners in Scotland received a Winter Fuel Payment. The number eligible for Pension Age Winter Heating Payment in winter 2024/25 is a matter for the Scottish Government."

34. As the UK Government will be administering this year's PAWHP on behalf of the Scottish Government, it presumably has some idea of the scale of that operation, including the cost and number of payments expected to be made. It is estimated that around 140,000 individuals are in receipt of Pension Credit in Scotland, which is one of the ways to qualify for the PAWHP this winter,[14] though we note that recipients of other specified benefits also qualify. **Information on the scale of impact should have been included in the EM. The House may wish to press the Minister for information on the number of individuals expected to receive the PAWHP this winter.**

35. The EM also lacked information on the amount of funding the Scottish Government will receive this winter, following the Winter Fuel Payment cut in England and Wales. Prior to the Chancellor's announcement, the Scottish Government expected £178 million in funding though the Block Grant Adjustment for Winter Fuel Payments for 2024–25, but now expects this to reduce by approximately £150 million.[15] The Scottish Fiscal Commission estimates that total spending on the PAWHP this winter will now be £32 million.[16] **This would be a very significant reduction and, again, this information should have been included in the EM. The House may wish to explore further the issue of funding.**

Consultation

36. The EM states that no formal consultation was required, given the Order specifies certain delegated administrative functions. We asked the Scotland Office whether the Scottish Government was consulted on the means testing of the Winter Fuel Payment. The Scotland Office replied:

> "The Scottish Government was informed of the UK Government's decision to means-test Winter Fuel Payments in England and Wales immediately after the Chancellor's statement on the state of the public finances on 29 July. As the benefit is devolved, it was for the Scottish Government to decide whether to follow the same approach. The UK Government has worked closely with the Scottish Government to support the delivery of its policy decisions."

37. Given the impact of the decision to means test the Winter Fuel Payment in England and Wales on the funding available for Scotland, it is surprising that the Scottish Government was only informed after the announcement. We note that in a Written Ministerial Statement made by Gordon Lyons

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14 The Scottish Parliament Information Centre, 'Winter Fuel Payment in Scotland' (26 September 2024): https://spice-spotlight.scot/2024/09/26/winter-fuel-payment-in-scotland/ [accessed 11 October 2024].

15 The Scottish Parliament Information Centre, 'Winter Fuel Payment in Scotland' (26 September 2024): https://spice-spotlight.scot/2024/09/26/winter-fuel-payment-in-scotland/ [accessed 11 October 2024]

16 Scottish Fiscal Commission, *Supplementary Costing: Pension Age Winter Heating Payment*, SFC/2024/5 (September 2024): https://fiscalcommission.scot/wp-content/uploads/2024/09/Supplementary-Costing-Pension-Age-Winter-Heating-Payment-September-2024.pdf [accessed 22 October 2024].

MLA in the Northern Ireland Assembly, the lack of consultation on the decision with the Northern Ireland Executive was described as "extremely disappointing".[17] **The House may wish to press the Minister further on the decision not to consult the devolved Governments before a decision which impacted on their ability to exercise their devolved powers.**

Conclusion

38. The EM is missing information on the scale, cost and impact of the policy. Yet perhaps more concerning are the issues to which the broader policy gives rise: the impact on the exercise of devolved power, a lack of consultation with devolved Governments and an unclear delivery timeline for payments this winter. Furthermore, the need for this Order at all highlights the implementation issues that have arisen as a result of the Government's seemingly rushed decision to means test the Winter Fuel Payment in England and Wales, leaving the Scottish Government unable to adapt in time for this winter.

Architects (Fees, Electronic Communications and Miscellaneous Amendments) (Amendment) Regulations 2024 (SI 2024/1017)

Date laid 10 October 2024

Parliamentary procedure: negative

The purpose of this instrument is to state in legislation who is liable to pay fees to the Architects Registration Board (ARB) and how these fees are to be paid, and to require the ARB to publish details about the calculation of the fees. The ARB's ability to charge people for its services was introduced through regulations in 2022. The Ministry of Housing, Communities and Local Government (MHCLG) says in the Explanatory Memorandum (EM) that the instrument improves transparency: under the current legislation the ARB is allowed to determine who may be charged fees for its services without any requirement on it to publish details about how these fees are calculated.

We note that the EM omits another important reason for the instrument: the MHCLG told us that as well as improving transparency, the instrument removes the risk of a legal challenge to the ARB's ability to charge fees. We regret that the EM did not include this explanation and also failed to mention that the Joint Committee on Statutory Instruments (JCSI) questioned the lawfulness of the fee charging powers when they were conferred on the ARB in 2022. These omissions are significant: without the additional explanation it is not possible to understand fully the policy rationale of the instrument. ***We welcome that the MHCLG has agreed to revise the EM to include the missing information. In any similar future situations departments should adhere to the guidelines on the information that should be included in the EM that we have provided in the introduction to this Report.***

17 Northern Ireland Assembly, *Proposed Policy Changes to the Winter Fuel Payment Scheme in Northern Ireland*, Written Ministerial Statement (30 August 2024): https://www.niassembly.gov.uk/assembly-business/official-report/written-ministerial-statements/department-for-communities---proposed-policy-changes-to-the-winter-fuel-payment-scheme-in-northern-ireland/ [accessed 14 October 2024].

These Regulations are drawn to the special attention of the House on the ground that the explanatory material laid in support provides insufficient information to gain a clear understanding about the instrument's policy objective and intended implementation.

39. The purpose of this instrument is to state in legislation who is liable to pay certain fees to the Architects Registration Board (ARB) and how these fees are to be paid, and to require the ARB to publish details about the calculation of the fees. The ARB's ability to charge fees for its services was introduced through the Architects (Fees, Electronic Communications and Miscellaneous Amendments) Regulations 2022 ("the 2022 Regulations"). Under the 2022 Regulations, the ARB may charge fees for:

    (1) prescribing a qualification with the effect that it will be recognised by the ARB for the purpose of registering people as architects;

    (2) providing any document or information about a person whose name is entered on the register of architects; and

    (3) preparing or arranging a test that must be passed by applicants holding overseas qualifications or experience, including fees paid by the applicant to sit the test.

40. The Ministry of Housing, Communities and Local Government (MHCLG) told us that the ARB has started to charge for the first service, the prescription of domestic qualifications (with 60 learning providers having been invoiced a total of just over £350,000) but is not currently charging for the other two services, providing a document or arranging a test.

41. The MHCLG explains in the Explanatory Memorandum (EM) that the instrument improves transparency: under the 2022 Regulations the ARB is allowed to determine who may be charged fees for its services and how those fees are to be calculated and paid, without any requirement on the ARB to publish details about the calculation of the fees. The MHCLG says that the instrument therefore "makes minor changes to the 2022 Regulations, stating specifically who is liable to pay the fees and how the fee is to be paid and requiring the ARB to publish details about their calculation". The MHCLG emphasises that the "overall policy of allowing the ARB to charge the fees set out in the 2022 Regulations has not changed"; instead, this instrument specifies "who should be charged those fees and how they should be paid, rather than delegating those decisions to ARB as the 2022 Regulations did". According to MHCLG, this will "enable stakeholders to scrutinise the fees and ensure they are being charged on a cost-recovery basis only".

Potential legal challenges of the ARB's ability to charge fees

42. In response to questions we had about the policy rationale for the changes, the MHCLG provided us with additional information that suggests that apart from transparency, there is another important reason for the instrument which is not mentioned in the EM. The MHCLG told us:

> "As well as improving transparency, the instrument removes the risk of a person challenging the ability of the Architects Registration Board (ARB) to charge fees on the basis that the 2022 regulations give them more discretion than the relevant powers allow.

> Section 24A of the Architects Act 1997 (under which both the 2022 Regulation and this instrument are made) gives the Secretary of State the power to make provision in regulations about:
>
> (a) the services, or types of services, in respect of which the Board may charge a fee;
>
> (b) the persons who are liable to pay a fee;
>
> (c) how fees charged by the Board are to be calculated;
>
> (d) how fees charged by the Board are to be paid.
>
> It is possible to interpret section 24A as requiring those matters (a)-(d) to be set out in regulations. However regulation 2 of the 2022 regulations delegated (b)-(d) to the ARB, allowing it to prescribe who was liable for a fee and how that fee was to be calculated and paid. We have taken the decision to remove that discretion and set those matters out in regulations in order to avoid the possibility that a legal challenge is made against the ARB for taking decisions it could not lawfully take. Such a legal challenge would incur time and cost and disrupt the smooth operation of the ARB's fee-charging processes."

43. **This explanation is significant: seeking to ensure the lawfulness of the ARB's fee charging power to avoid the possibility of a legal challenge is clearly a key aspect of the policy rationale for this instrument and as such should have been set out in the EM. It is disappointing that the MHCLG suggested in the EM that the changes made by this instrument would improve the transparency of the ARB's fee charging policy but then failed to provide in the same EM the full policy rationale of the instrument**.

44. We also note that the question of lawfulness was raised by the Joint Committee for Statutory Instruments (JCSI) when the 2022 Regulations were originally laid before Parliament.[18] The JCSI drew the 2022 Regulations to the special attention of both Houses on the ground that there was doubt as to whether the provisions conferring new powers and discretions on the ARB in relation to the charging of fees were *intra vires*. At the time, the then Department for Levelling Up, Housing and Communities disagreed with the JCSI's view. Asked whether this instrument meant that the Government had changed its position on the lawfulness of the provisions and why there was no reference to the JCSI's report in the EM, the MHCLG explained:

> "The Department has not changed its position and remains of the view that the delegation made in the 2022 instrument was lawful. We acknowledge, however, that arguments could be made either way and that a Court may not agree with our position. We want to avoid any uncertainty around the legality of the ARB's fee charging activities and so have decided to legislate to put the matter beyond doubt. We did not identify this instrument as one that was of special interest to Parliament because (in our view) it does not correct an error previously reported by the JCSI. However we are happy to revise the EM accordingly".

18 Joint Committee on Statutory Instruments, *Twenty-Sixth Report* (Session 2022–23,HC 4-xxvi, HL Paper 149), paras 2.1 to 2.4.

45. It is not our role to take a view on the question of whether the ARB's fee charging powers are lawful, and the decision to legislate to "put the matter beyond doubt" appears sensible. However, it is our role to support the House in its scrutiny of the Regulations. In doing so we rely on an EM to contain a full and balanced description of the reason for the instrument and of its context. **We regard the concerns raised by the JCSI as relevant context that should have been mentioned in the EM, especially as the MHCLG acknowledges that the JCSI's report was the "trigger for the department to further consider the legal risk" to the 2022 Regulations, and that the decision was taken to prepare this instrument following that further consideration.**

46. We note that to date, there has not been any legal challenge of the ARB's ability to charge fees. The MHCLG told us that it had not asked the ARB to suspend the charging of fees under the 2022 Regulations while there remained the risk of a legal challenge:

> "[We remain] of the view that the delegation made in the 2022 instrument was lawful and charging the prescription fees is critical to ARB's wider reforms to modernise the initial education and training of architects. Delaying the ability to charge fees would have caused significant disruption to the ARB's operational activities."

Conclusion

47. The issues identified with this instrument are similar to those highlighted in relation to two other instruments that we have reported on recently, laid by the Home Office[19] and the Department for Education.[20] All the instruments were designed to correct situations where a fee has been charged either without the necessary statutory backing or where there is some ambiguity about whether statutory authority is required**.** In all three cases the original EM omitted key information, so that readers were not able to understand fully the rationale for the changes and the background to them.

48. We regard a full, clear and open statement of why an instrument has been brought forward as central to understanding a policy change. **We were disappointed therefore that in this case the original EM fell short by omitting key information about the risk of a legal challenge of the ARB's ability to charge fees for its services and about Parliament previously questioning the lawfulness of the ARB's fee charging powers. We welcome, however, that the MHCLG has agreed to revise the EM to include the missing information**. This will provide the reader with a complete explanation of why the MHCLG made this instrument. **In any similar future situations departments should adhere to the guidelines on the information that should be included in the EM, as set out in the introduction to this Report**.

19 Draft Immigration and Nationality (Fees) (Amendment) Order 2024 and *3rd Report* (Session 2024–25, HL Paper 15).

20 Recognition of Overseas Qualifications (Charges) Regulations 2024 (SI 2024/942) see paras 15 to 25 of this Report.

CORRESPONDENCE WITH THE HOME OFFICE ON THE UNLAWFUL CHARGING OF CERTAIN FEES IN THE IMMIGRATION SYSTEM

49. The draft Immigration and Nationality (Fees) (Amendment) Order 2024 would be the first stage in correcting a situation whereby certain fees in the immigration system have been, and are being, charged to applicants without the necessary statutory authority to do so. We drew the draft Order to the special attention of the House in our 3rd Report.[21]

50. We were particularly critical of the Explanatory Memorandum (EM) to the Order. The EM was, in our view, missing information vital to understanding the instrument. For example, the EM did not: make clear that fees have been charged without the necessary authority; acknowledge the implication that past users of these services may have paid fees inappropriately and that there may be legal challenges against such payments; discuss what the Home Office intended to do about such cases; or divulge that the fees are still being charged despite their unlawfulness.

51. Prior to our earlier Report, the Home Office had refused to revise the EM, leaving us to provide some of the missing information. We wrote to the Minister for Migration and Citizenship, Seema Malhotra MP, with further questions and to request again a revision of the EM. The exchange of letters is published in Appendix 2.

52. The response from the Minister provides additional useful information. For example, it sets out that the Home Office is considering the option of primary legislation to provide retrospective legal authority in respect of past fees charged, and that this is the reason it continues to charge the fees despite their unlawfulness. Ms Malhotra also noted that suspending the fees would have "significant potential impacts on the public purse". The letter also describes how the unlawfulness of the arrangements came to be identified during a reprocurement exercise.

53. The response also makes clear that the Home Office still does not know certain key information, such as how the situation arose in the first place and the timetable for the Home Office's review of the situation. We also note that the letter does not include an estimate for the volume and value of fees unlawfully charged. In this context, we refer back to the information we obtained from the Home Office and included in our previous report on the instrument. This stated that fees have been charged since 2008 and, while complete data was not then available, the contractor's revenue over the last three years was "in the region of £50 million".

54. **Ms Malhotra expressed a hope that more detail would be available by the time the instrument is debated, and Members may wish to follow up such questions at that time. We note with concern Ms Malhotra's statement that it may not be possible to identify certain key details, such as the number of people affected.**

55. In relation to revising the EM, Ms Malhotra again declined, stating that the EM as it stands "serves the purpose of enabling Parliament to consider the instrument". In particular, Ms Malhotra argued that the position in

21 *3rd Report* (Session 2024–25, HL Paper 15).

relation to those previously charged fees is "fundamentally uncertain at this stage" and that it would not be "appropriate or helpful" to include these uncertainties in the EM. We agree that it may not have been appropriate to discuss all the complexities of the situation. However, the EM did not even provide the most basic information that past users had paid fees that were not lawfully charged and therefore that the Government may be open to legal challenge, or state that the Home Office was considering how to treat such cases, or make clear that fees were still being charged despite their unlawfulness. The EM thus failed in its task of providing a balanced view of the policy and providing sufficient context to understand the 'bigger picture' around the policy; the introduction to this Report summarises the type of information that should be included in the EM. **The EM was unequivocally deficient in these respects, and we are disappointed that the Home Office does not acknowledge this. We also note that in three analogous cases the departments involved agreed that it would be appropriate to revise the EM to include additional details.**[22] **Once again, the Home Office appears to be a laggard in presenting adequate information to Parliament and the public.**

22 Administration of Estates Act 1925 (Fixed Net Sum) Order 2023 (SI 2023/758), drawn to the special attention of the House in *47th Report* (Session 2022–23, HL Paper 236); and two instruments covered in this Report, the Recognition of Overseas Qualifications (Charges) Regulations 2024 (SI 2024/942) and the Architects (Fees, Electronic Communications and Miscellaneous Amendments) (Amendment) Regulations 2024 (SI 2024/1017).

CORRESPONDENCE WITH HM TREASURY ON THE TIMETABLE FOR A NEW REGULATORY REGIME FOR CENTRAL COUNTERPARTIES

56. The Central Counterparties (Transitional Provision) (Extension and Amendment) Regulations 2024 (SI 2024/923) provide for the third extension of two post-Brexit transitional periods relating to the regulation of overseas Central Counterparties (CCPs), which sit between the buyers and sellers of financial instruments to reduce counterparty risk.

57. Our 3rd Report expressed disappointment that HM Treasury (HMT) was still not able to provide a timetable for establishing a new, permanent regulatory regime in this area.[23] We noted that it is now nearly four years since the end of the Brexit transition period and nearly two years after our initial concerns about the transitional regime were published (by which point the EU had already completed its own CCP recognition assessments). We also observed that HMT describe this as a "priority" area.

58. We therefore wrote to the Minister, Tulip Siddiq MP, requesting further details. The exchange of letters is published in Appendix 3.

59. The response from the Minister sets out progress to date, but states that she "cannot give an exact timeline for the remainder of the work". **This is disappointing. As Ms Siddiq notes, we retain an interest in this area and will be observing HMT's progress**.

23 *3rd Report* (Session 2024–25, HL Paper 15).

INSTRUMENTS OF INTEREST

Draft Consumer Composite Investments (Designated Activities) Regulations 2024

Draft Packaged Retail and Insurance Investment Products (Retail Disclosure) (Amendment) Regulations 2024

60. These two instruments relate to the legislative framework for the regulation of Consumer Composite Investments (CCIs), to date known as Packaged Retail and Insurance-based Investment Products (PRIIPs), a category of financial products including investment trusts. Currently, PRIIPs are regulated under EU assimilated law, which HM Treasury (HMT) says has been "widely criticised for imposing prescriptive requirements" which are "overly burdensome" and lead to the presentation of "misleading information to retail investors".

61. The **draft Consumer Composite Investments (Designated Activities) Regulations 2024** would replace the EU-derived PRIIPs regulation with a new UK regime. The Regulations would set out an overarching regulatory framework, with the Financial Conduct Authority (FCA) setting the detailed rules following further consultation. HMT states that the new approach will be less prescriptive and more flexible, and "more proportionate and tailored to UK markets […] balancing burdens for UK businesses with the need to ensure retail investors receive appropriate disclosure to make informed investment decisions". The FCA has stated that it aims to finalise the CCI regime in the first half of 2025.

62. In the meantime, the **draft Packaged Retail and Insurance-based Investment Products (Retail Disclosure) (Amendment) Regulations 2024** would make certain changes to existing assimilated law to address the inadequacies identified until the new regime is in place. In particular, it would exempt investment trusts from having to produce Key Information Documents and disclose certain cost information to clients.

Draft Radio Equipment (Amendment) (Northern Ireland) Regulations 2024

63. The purpose of this instrument is to implement the EU's Common Charger Directive[24] in Northern Ireland (NI), in line with the terms of the Windsor Framework which provides for NI's access to the EU Single Market for goods. The Directive requires all new mobile phones and other mobile devices[25] which are put on the market to have a common charger based on USB-C; harmonise fast charging technology; 'unbundle' the sale of a charger and device, so that consumers can buy a new device without a new charger; and require consumers to be given information about a device's charging characteristics, including whether it supports fast charging. The new requirements will apply across the EU and in NI from 28 December 2024; laptops will need to meet the new requirements from 28 April 2026.

64. The Department for Business and Trade (DBT) says that the rules are "not expected to have a substantive impact in practice. Many manufacturers have already moved to a common charger solution based on USB-C in order to

24 Directive (EU) 2022/2380 of the European Parliament and of the Council of 23 November 2022.

25 Such as tablets, digital cameras, headphones, headsets, portable speakers, videogame consoles, e-readers, earbuds, keyboards, mice and portable navigation systems.

continue to supply the EU market ahead of the new requirements coming into force. Industry has told the Government they are highly likely to adopt similar measures for devices supplied to the whole of the UK in order to avoid supply chain complexity."

65. The Government has launched a call for evidence[26] to help assess the potential for introducing similar measures across the UK. The DBT told us that: "We consider that it would potentially help businesses and deliver consumer and environmental benefits if we were to introduce standardised requirements for chargers for certain portable electrical/electronic devices across the whole UK. We are first seeking necessary evidence to better understand the expected implications of doing so." The call for evidence will close on 4 December 2024.

66. Asked about the impact on trade between NI and Great Britian, the DBT explained:

> "Under the Government's commitment to providing unfettered access for qualifying Northern Ireland goods to the rest of the UK market, qualifying electrical/electronic devices that meet the requirements of the Regulations in order to be placed on the market in Northern Ireland can also be made available on the GB market. Additionally, the legislation laid by the Government earlier this year to continue recognition of current EU requirements and CE marking for a range of product regulations, including radio equipment, means that manufacturers who meet the Common Charger Directive requirements for certain electrical/electronic devices in order to supply the EU market will also be able to place these devices on the GB market."

67. We received a submission from Mr Jim Allister KC MP (Traditional Unionist Voice) which raised concerns about the instrument, including the lack of public consultation, the undemocratic imposition of the EU's Common Charger Directive on NI and the risk of regulatory divergence between NI and the rest of the UK. In response, the DBT highlighted that no concerns were raised in its consultation with a range of stakeholders, including manufacturers, retailers, and trade associations; that it did not expect the legislation to have a substantive impact in practice; and that it would potentially help businesses and deliver consumer and environmental benefits. We have published the submission and the Department's response in full on our website.[27]

Official Controls (Extension of Transitional Periods) and Plant Health (Frequency of Checks) (Miscellaneous Amendments) Regulations 2024 (SI 2024/1001)

68. This instrument extends from 1 January 2025 until 1 July 2025 the Transitional Staging Period (TSP) for the implementation of import controls on certain sanitary and phytosanitary goods entering Great Britain (GB) from the EU, Liechtenstein or Switzerland. The TSP was introduced after Brexit to temporarily ease the requirement for certain official documents and official controls on some categories of animals, plants and other goods

26 Office for Product Safety and Standards, *Common charger for electrical devices: call for evidence*, Open call for evidence (9 October 2024) https://www.gov.uk/government/calls-for-evidence/common-charger-for-electrical-devices-call-for-evidence [accessed 23 October 2024]

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

imported into GB. The extension relates to controls that are being introduced in stages under the Border Target Operating Model (BTOM)[28] which will establish a new risk-based import control regime for GB after Brexit.

69. The instrument also delays until 1 July 2025 import checks on plants, plant products and other objects, such as machinery and vehicles used for agricultural or forestry purposes, which are entering GB from the EU, Liechtenstein or Switzerland, via a West Coast Port. Without the extension, the controls would come into effect on 1 November 2024. According to the Department for Environment, Food and Rural Affairs (Defra), the delay will ensure that the checks will not commence before Border Control Post facilities are in place. The instrument also adds Swansea Port to the list of West Coast Ports and extends until 1 July 2025 an easement which delays the requirement for checks on medium risk fruit and vegetables imported from the EU, Liechtenstein or Switzerland. Without the instrument, the easement would end on 31 October 2024. Defra says that the extension gives industry additional time to prepare and that without it "there was a risk that there would be a shortage of these products, due to them being held at the border".

70. Asked whether extending the TSP for the fifth time would discourage businesses from investing in the necessary preparations for the full implementation of the BTOM, the Department replied:

> "To ensure that new ministers have a full and thorough opportunity to review the planned implementation of further border controls, and an opportunity listen to businesses across import supply chains, it is necessary to extend the TSP. The TSP currently expires at the end of January 2025, so business is receiving >3 months' notice of its extension […]. Defra has already introduced health certification and checks at the border for imports from the EU from 31 January and 30 April this year as announced in the final BTOM published in August 2023. The new Government is committed to continued delivery of the controls introduced as part of these milestones that are necessary to safeguard our biosecurity, public health, and economy. It is well understood by industry that introduction of checks on the west coast and non-qualifying goods from Ireland depends on delivery readiness across the whole of GB. Businesses should continue to be ready for the implementation of the remaining controls. The postponement of the temporary easement which classifies most fruit and vegetables from the EU has been driven substantially by industry's concerns about supply chain readiness, to allow businesses the time they need to prepare for the easement's expiry on 1 July."

Payment Services (Amendment) Regulations 2024 (SI 2024/1013)

71. These Regulations allow payment service providers, such as banks, to delay crediting a payment to a customer's account until the fourth business day after receipt of the payment order (instead of the first business day, as at present) if there are reasonable grounds to suspect the payment arises from a fraud. The aim is to counter crimes in which a victim is manipulated into authorising a payment to a fraudster, by giving providers additional time to investigate whether to execute the payment order. Providers must inform

28 Cabinet Office, *The Border Target Operating Model: August 2023*, Guidance (29 August 2023): https://www.gov.uk/government/publications/the-border-target-operating-model-august-2023 [accessed 24 October 2024]

their customers about any delay. HM Treasury (HMT) reports that there were over 230,000 such "scams" in 2023, with losses totalling £460 million, and its best estimate is that the change may prevent around 5,400 to 6,000 scams per year over the next five years.

72. The consultation process on the change appears to have been comprehensive, including a call for evidence in January 2023. However, the Government's response has not been published: HMT told us this was because it had been "overtaken by other priorities" and that whether it would be published at all is still being considered. **From the point of view of scrutiny, this is unsatisfactory; the response should be published, and by the time the instrument is laid**. In addition, the Financial Conduct Authority's (FCA) guidance to providers in operating the new regime has not yet been published, less than a fortnight before it comes into force. HMT told us that the FCA's consultation on the guidance provided a "clear indication of the FCA's direction" and that the legislation is permissive, rather than imposing requirements. Nevertheless, providers are unlikely to be able to put in place detailed processes by the coming into force date. **The overall sequencing and timing of this legislation and its supporting information is sub-standard.**

Seafarers' Wages Regulations 2024 (SI 2024/1015)

73. These Regulations give effect to the provisions in the Seafarers' Wages Act 2023, which aims to ensure that employers pay seafarers working on international services which frequently call in at UK ports wages no less than a rate equivalent to the UK National Minimum Wage (NMW) for time spent working in the UK and in UK waters. Employers must provide a declaration to this effect or pay a surcharge. These changes were introduced following the actions of P&O Ferries, which dismissed 800 employees and replaced them with lower wage workers in 2022.[29]

74. These Regulations set out the administrative detail of the regime, including the obligations on harbour authorities and employers, and the rates for NMW equivalent and surcharges. A service is defined as frequently entering a UK port if it does so at least 120 times a year; this threshold was chosen as it brings the majority of ferry services in scope of the legislation. It is expected that 33% of all seafarers on 'ro-pax' (roll-on, roll-off and accompanied freight/passenger) services and 25% of all seafarers on other vessels will benefit directly from an increase in wages to at least NMW equivalent. A similar proportion will also benefit indirectly, from increases to pay above NMW to maintain pay differentials. **We commend the Department for Transport for a comprehensive and well-explained Explanatory Memorandum.**

29 BBC News, 'Outrage and no ferries after mass P&O sackings' (18 March 2022): https://www.bbc.co.uk/news/business-60779001 [accessed 15 October 2024].

APPENDIX 1: INSTRUMENTS NOT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

Draft instruments subject to affirmative approval

Draft	Barnsley and Sheffield (Boundary Change) Order 2024
Draft	Consumer Composite Investments (Designated Activities) Regulations 2024
Draft	Packaged Retail and Insurance-based Investment Products (Retail Disclosure) (Amendment) Regulations 2024
Draft	Persistent Organic Pollutants (Amendment) Regulations 2024
Draft	Prudential Regulation of Credit Institutions (Meaning of CRR Rules and Recognised Exchange) (Amendment) Regulations 2024
Draft	Radio Equipment (Amendment) (Northern Ireland) Regulations 2024
Draft	Reporting on Payment Practices and Performance (Amendment) (No. 2) Regulations 2024
Draft	Securitisation (Amendment) (No. 2) Regulations 2024

Draft instruments subject to annulment

Draft	Gateshead (Electoral Changes) Order 2024
Draft	Sefton (Electoral Changes) Order 2024

Instruments subject to annulment

SI 2024/990	Air Navigation (Amendment) Order 2024
SI 2024/991	Transfer of Functions (Secretary of State for Housing, Communities and Local Government) Order 2024
SI 2024/1001	Official Controls (Extension of Transitional Periods) and Plant Health (Frequency of Checks) (Miscellaneous Amendments) Regulations 2024
SI 2024/1004	School Teachers' Incentive Payments (England) (Amendment) Order 2024
SI 2024/1006	Financial Services Act 2012 (Relevant Functions in relation to Complaints Scheme) (Amendment) Order 2024
SI 2024/1007	Council Tax (Prescribed Classes of Dwellings and Consequential Amendments) (England) Regulations 2024
SI 2024/1009	Corporation Tax (Certification as Low-Budget Film) Regulations 2024
SI 2024/1013	Payment Services (Amendment) Regulations 2024
SI 2024/1015	Seafarers' Wages Regulations 2024
SI 2024/1016	Family Procedure (Amendment) Rules 2024
SI 2024/1019	Levelling-up and Regeneration Act 2023 (Miscellaneous Amendment) Regulations 2024

APPENDIX 2: CORRESPONDENCE FROM THE HOME OFFICE ON THE UNLAWFUL CHARGING OF CERTAIN FEES IN THE IMMIGRATION SYSTEM

Letter from Lord Hunt of Wirral, Chair of the Secondary Legislation Scrutiny Committee, to Seema Malhotra MP, Parliamentary Under Secretary of State at the Home Office on the draft Immigration and Nationality (Fees) (Amendment) Order 2024

I am writing to you in my capacity as Chair of the House of Lords Secondary Legislation Scrutiny Committee. Our 3rd Report, containing our commentary on the above draft Order, is due to be published on Thursday 10 October 2024.

We were disappointed to find that the original Explanatory Memorandum (EM) accompanying the Order was deficient in several respects. For example, the EM did not: make clear that fees have been, and are being, charged without the necessary authority; describe how that position came about, and how the unlawfulness came to light; acknowledge the implication that past users of these services may have paid fees inappropriately; discuss what the Home Office intended to do about such cases; or divulge that the fees are still being charged. These are all critical areas to understanding the background to the Order and should have been included in the EM.

We received some information in response to our questions to officials in your department, which included indications that the sums of money involved are significant. Again, this is important information that should have been in the EM.

Regrettably, the Home Office refused our request to revise the EM, stating that it was "sufficient". We disagree. The EM should contain a full, clear and open statement of why the instrument has been brought forward along with all relevant context.

We therefore request answers to the following questions:

(1) How and when did the situation that fees are being charged without appropriate statutory backing come to exist in the first place (we recognise that this predates your time in office)?

(2) What role did the contractor, Ecctis Limited, play in the way in which fees were set and charged and by what authority did Ecctis Limited charge fees?

(3) How and when did the unlawfulness of the fees come to light, and who identified this?

(4) What steps are being taken now to understand the impact of the past, and ongoing, unlawfulness?

(5) What options are being considered for cases that have paid fees in the past?

(6) What, precisely, is the timetable for any such review to conclude?

(7) How many people have paid fees that have no lawful basis, and what is the total amount of those fees?

(8) Why have you taken the decision to continue charging fees that are known to be unlawful until the position is rectified? (As opposed to, for example, suspending the fees immediately the position came to light.)

We also again request please that you revise the EM to contain the above information and that previously provided to our staff. We would also welcome an explanation of why the original EM was authorised for laying in this form.

10 October 2024

Letter from Seema Malhotra MP, Parliamentary Under-Secretary of State at the Home Office, to Lord Hunt of Wirral, Chair of the Secondary Legislation Scrutiny Committee

Thank you for your letter of 10 October regarding the Immigration and Nationality (Fees) (Amendment) Order 2024.

I have considered your further request to lay a revised Explanatory Memorandum. I appreciate the Committee's view that a fuller explanation of the context of this legislation and the associated issue is required, including the status of fees charged prior to appropriate Regulations being brought into force. However, as I have set out below, the treatment of those previously charged fees is subject to a range of complex and ongoing considerations, which makes the position fundamentally uncertain at this stage. While I recognise that greater detail would be helpful in supporting a comprehensive understanding of the issues at hand, I do not consider that it would be appropriate or helpful to set these uncertainties out on the face of the Explanatory Memorandum. Given that, and given that the EM is clear on the necessity of laying legislation to put these fees on a statutory footing and the rationale for the specific provisions being made, I am content that the EM serves the purpose of enabling Parliament to consider the instrument. I will however endeavour to provide detail in response to your follow up questions where possible, as well as in the course of debates in Parliament.

With regards to your questions on the current arrangements, I have set out below my responses which I hope you will find helpful.

1. How and when did the situation that fees are being charged without appropriate statutory backing come to exist in the first place?

The requirement to use the services provided by ECCTIS (formerly UK NARIC) have been set in Immigration Rules since 2008, however we do not currently have a comprehensive view of the associated fees that have been charged during this period or whether the need for statutory authority for the charging of these fees had been previously considered, and if so why this was not identified at the time. We are continuing to assess the available data and hope to be in a position to provide more information on this when our amendment to the Immigration and Nationality (Fees) Order 2016 is debated in both Houses.

2. What role did the contractor, Ecctis Limited, play in the way in which fees were set and charged and by what authority did Ecctis Limited charge fees?

Fees for services provided by Ecctis on behalf of the Home Office are set in the contract agreed between both parties. Changes to fee levels cannot be made without the agreement of the Home Office.

3. How and when did the unlawfulness of the fees come to light, and who identified this?

The lawfulness of the current arrangements was identified as part of a procurement exercise that commenced earlier this year that would, once complete, allow for a new contract to be issued to the supplier of these services. This contract will allow the Home Office to receive the fees paid for these services directly, as opposed to the previous arrangement where the supplier had collected and retained those fees.

As part of an assessment of the arrangements that need to be in place to enable the Home Office to receive the fee, it was identified by the Home Office in Spring 2024 that the fees charged for these services should have already been set in the Immigration and Nationality (Fees) Regulations 2018. Work was then taken forward immediately to prepare the necessary legislation to put the fees on a lawful basis, however introduction of this legislation was delayed by announcement of the General Election in mid-2024 and subsequent change in Government.

4.What steps are being taken now to understand the impact of the past, and ongoing, unlawfulness?

Home Office officials are working with the supplier to identify the volume of relevant applications. In the event that restitution claims are submitted to the Home Office, we will work with the supplier to identify whether the claims are genuine. It is not clear though at this stage whether the necessary level of detail will be available to assess claims fully.

5. What options are being considered for cases that have paid fees in the past?

We are considering all options in respect of fees paid prior to the appropriate Regulations coming into force. This includes the establishment of a restitution scheme, or alternatively the introduction of primary legislation providing retrospective legal authority in respect of fees charged. Scoping of these options is an ongoing process and involves a series of complex considerations which we are not in a position to go into detail on at this stage. As regards the option of retrospective legislation, we are engaging with other relevant Government departments on the case for this and hope to be in a position to provide more information when our amendment to the Immigration and Nationality (Fees) Order 2016 is debated in both Houses.

6. What, precisely, is the timetable for any such review to conclude?

As noted above, the potential options in respect of previously charged fees carry a range of complex considerations and in some case require specialised advice from across Government. While this work is being progressed at pace, I unfortunately cannot at this time give a specific indication of when this review will be completed or the specific actionthat is likely to be taken. However, we hope to be in a position to provide more information on this when our amendment to the Immigration and Nationality (Fees) Order 2016 is debated in both Houses.

7. How many people have paid fees that have no lawful basis, and what is the total amount of those fees?

Due to the length of time that these fees have been in place, it may not be possible to identify the total number of people who have paid for these services. We are in the process of assessing the available application data to provide as clear a sense as possible of the relevant volumes and associated fees charged.

8. Why have you taken the decision to continue charging fees that are known to be unlawful until the position is rectified? (As opposed to, for example, suspending the fees immediately the position came to light.)

As noted above, there are a range of options under consideration in respect of fees charged prior to the appropriate Regulations coming into force, including potential primary legislation. The eventual option that is pursued will have a fundamental impact on the bearing of those fees, and may result in retrospective legal authority being granted such that those fees would (following the commencement of the appropriate primary legislation) have been lawfully charged. It should be emphasised that no final decision has been taken on the potential options at this time and that these are subject to ongoing detailed consideration.

It is also important to note the suspension of charging for these services would have significant potential impacts on the public purse. Because these services are integral to the operation of several immigration routes, it is not feasible for the services themselves to be suspended.

Given the options under consideration and the significant impacts associated with suspending charging for these services, the department has determined that fees should continue to be charged until such a time as the position in respect of previously charged fees is confirmed. This will also serve to ensure there is consistency of treatment in both the fees that have been historically charged and those charged in the period between the issue being identified and the appropriate legislation coming into force. The department however appreciates the challenging nature of this position given the lack of extant legal authority for the charging of these fees, and is working at pace to clarify the position.

15 October 2024

APPENDIX 3: CORRESPONDENCE WITH HM TREASURY ON A NEW REGULATORY REGIME FOR CENTRAL COUNTERPARTIES

Letter from Lord Hunt of Wirral, Chair of the Secondary Legislation Scrutiny Committee, to Tulip Siddiq MP, Parliamentary Under-Secretary of State at HM Treasury on the Central Counterparties (Transitional Provision) (Extension and Amendment) Regulations 2024 (SI 2024/923)

I am writing to you in my capacity as Chair of the House of Lords Secondary Legislation Scrutiny Committee. Our 3rd Report, containing our commentary on the above Regulations, is due to be published on Thursday 10 October 2024.

We were disappointed that, in response to our questions, HM Treasury was not able to provide a timeline for the reforms that will lead to a new regulatory regime for Central Counterparties/Qualifying Central Counterparties, despite describing this as a "priority" area. We note that it is now nearly four years from the end of the Brexit transition period and nearly two years since we first expressed concerns about the current position.

Given this background, we believe that it should by now be possible to provide a more definite timeline. Could I therefore please ask you for a timetable for the introduction of a new CCP/QCCP regime, including specific dates?

9 October 2024

Letter from Tulip Siddiq MP, Economic Secretary at HM Treasury, to Lord Hunt of Wirral, Chair of the Secondary Legislation Scrutiny Committee

Thank you for your letter of 9 October where you asked for a timeline for reforms to the regulatory regime for central counterparties (CCPs) and Qualifying Central Counterparties (QCCPs).

I understand why the Committee has raised this as a matter of concern and agree that it is important that we take forward reforms to assimilated EU law in a timely manner. However, it is vitally important that we get our future supervisory and regulatory regime for CCPs right. The UK is home to three CCPs which all play a key role in global markets and ensuring that we are a safe and trusted custodian for this important part of the global financial system is therefore critical.

Previously regulation for CCPs was largely set at the EU level in the European Market Infrastructure Regulation (Regulation (EU) No 648/2012 or "EMIR"). The government has therefore had to put in place an entirely new regulatory regime for CCPs with the Bank of England (the Bank) as the lead authority for setting regulatory requirements. This involved granting the Bank new statutory objectives, rule-making powers and accountability arrangements in relation to domestic and overseas CCPs. The government legislated for this in the Financial Services and Markets Act 2023 (FSMA 2023) and made regulations last year to activate this which means that matters such as the Bank's new Financial Market Infrastructure Committee are now up and running.

Our next step, now that this architecture is in place, is to repeal and replace assimilated EU law for CCPs, with the Bank being able to set firm-facing requirements within its rules. We have therefore been working with the Bank on the repeal and replacement of Titles III, IV and V of EMIR as it forms part of assimilated EU law. These are the parts of EMIR that provide for the regulation

of CCPs. This is a significant undertaking given the extent of the legislation and the need to ensure a seamless transition to Bank rules.

As part of this we will also be reforming the requirements for overseas CCPs. FSMA 2023 included a new systemic and non-systemic classification system for overseas CCPs as well as regulatory powers for the Bank over such firms. This legislation also needs to be operationalised as we replace assimilated EU law.

The QCCP regime–which provides for UK firms to benefit from a different capital treatment for exposures to overseas CCPs within the regime - is a small but important part of the overseas regime. HM Treasury decided to reform the whole framework for overseas CCPs as a single project, rather than reform individual parts of the regime in isolation. Although we understood that this carried the potential downside of multiple one-year extensions to the QCCP transitional regime, this approach ensures that any changes to QCCP status are consistent with our redesigned regulatory framework and avoids a potential need for legislating twice on the matter. We have stayed in close contact with the financial services regulators on this matter and they have been supportive of this approach.

The work to put in place an updated UK supervisory and regulatory regime for CCPs is therefore well under way. Unfortunately I cannot give you an exact timeline for the remainder of the work. Please let me assure you, however, that my officials and I are very much aware of the Committee's interest in this space and will do our best to progress the work in a way that resolves any outstanding concerns.

15 October 2024

APPENDIX 4: 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 22 October 2024, Members declared no interests.

Attendance:

The meeting was attended by Baroness Harris of Richmond, Lord Hunt of Wirral, Baroness Lea of Lymm, Baroness Randerson, Baroness Ritchie of Downpatrick, Lord Rowlands, Lord Russell of Liverpool and Lord Thomas of Cwmgiedd.