HOUSE OF LORDS

Secondary Legislation Scrutiny Committee

10th Report of Session 2024–25

Drawn to the special attention of the House:

Draft Home Detention Curfew and Requisite and Minimum Custodial Periods (Amendment) Order 2024

Draft Official Controls (Amendment) Regulations 2024

Dangerous Dogs (Exemption Schemes) (England and Wales) (Amendment) (No. 2) Order 2024

Includes information paragraph on:

Draft Clean Heat Market Mechanism Regulations 2024

Ordered to be printed 3 December 2024 and published 5 December 2024

Published by the Authority of the House of Lords

HL Paper 51

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.

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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 Kezia Williamson (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.

Tenth Report

INSTRUMENTS DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

Draft Home Detention Curfew and Requisite and Minimum Custodial Periods (Amendment) Order 2024

Date laid: 13 November 2024

Parliamentary procedure: affirmative

This Order is another measure designed to relieve pressure on prison places. It would bring forward the point at which an offender may be eligible for release under curfew ("Home Detention Curfew") from 180 days before their automatic release point to 365 days before. In combination with an earlier instrument that brought forward the automatic release point from 50% of a sentence to 40% ("SDS40"), this means that many offenders will leave jail significantly earlier than under the previous regime. For example, someone serving a six-year sentence may now be eligible for release after less than a year and a half.

HDC was introduced in 1999 and this is the fourth lengthening of the period, meaning that extensive data on the likely effects of HDC and changes to it (spanning several administrations) should be available. However, no comprehensive assessment has been published. At the time of the previous increase, in June 2023, we called on the Ministry of Justice (MoJ) to publish its "evaluations" of the effects as soon as possible. ***We were disappointed to hear from this Government that the previous Government "failed to complete or even start" this evaluation work and, therefore, that these changes have to be implemented without such an assessment.*** *We do not dispute the MoJ's assertion that this is an urgent and necessary measure to respond to a crisis in the criminal justice system.* ***However, the absence of information means that we, Parliament (and, potentially, Ministers) remain effectively 'in the dark' about its likely effects. This is a sub-optimal way of making policy.***

In initial responses to our questions, MoJ re-committed to publishing assessments, though initially saying that these may not be specific to HDC and will only be made available in stages between now and 2027. However, subsequent responses suggested that detailed evaluations will be undertaken on this policy change and that data will be published. ***The House may wish to seek reassurance from the Minister that there will be specific HDC assessments and may wish to seek an explicit timetable for their publication.***

The MoJ has explained to us how this change interacts with SDS40 and a separate extension of magistrates' sentencing powers, both of which also have significant effects on the prison population. ***However, this important context should have been provided in the Explanatory Memorandum.*** *Moreover, we note that the strategy has risks, and unexpected events could derail the plans, leading to the need for further urgent changes in relation to prison capacity. The three measures combined also have important implications for supporting services, notably HM Prison and Probation Service. Again, there is limited information on how those services will be affected by the combined effect of all the changes, but it is*

possible that service standards may be reduced. ***The House may wish to press the Minister for more information on this point.***

This draft Order is 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

1. For the majority of prison sentences in England and Wales, the offender is eligible for automatic release from custody part-way through their sentence. The remainder of the sentence is spent 'on licence', meaning that they are under supervision and subject to certain conditions. The point of automatic release for most offences has recently been reduced from 50% of the sentence to 40%, a policy known as 'SDS40'.[1] The rationale was to reduce the acute pressure on prison places.

2. The effect of SDS40 is that offenders spend less time in prison and more time on licence in the community. However, certain offenders may also be eligible for release before their automatic release date subject to stricter conditions, including an electronically monitored curfew at a specified, suitable address, typically for 12 hours a day. This is known as Home Detention Curfew (HDC). The overall purpose of HDC is to manage more effectively the transition of offenders from custody back into the community, by allowing some prisoners to be released early, while remaining subject to significant restrictions on their liberty. The curfew period lasts until the offender's automatic release date, at which point they move to being on licence for the remainder of their sentence.

3. This instrument would increase the length of time prior to automatic release that offenders may be released under HDC, from 180 days to 365 days, subject to serving a minimum period in detention of at least half the period up to their automatic release date. Again, the Ministry of Justice (MoJ) says that the reason for the change is to "help ensure there is sufficient prison capacity to service the courts" and to "avoid running out of prison places which would cause criminal justice gridlock".

4. Some types of offences are ineligible for HDC, either by statute or as a matter of policy. These include: terrorist and sex offences; deportations from the UK; murder; those involving offensive weapons, firearms and explosives; cruelty to children; and offences associated with domestic abuse. All releases on HDC are discretionary, on approval of the prison governor, and the MoJ states that individual prisoners are "subject to a rigorous risk assessment to ensure that they are only released if there is a plan in place to manage them safely in the community". Victims may also be informed about the release of an offender and given the opportunity to make representations to the HDC decision maker.

5. Separately, the Order would make changes to some of the offences eligible for SDS40, particularly to ensure that offences closely related to those that currently disqualify a prisoner from SDS40 also have the same effect. The

1 Implemented by the Criminal Justice Act 2003 (Requisite and Minimum Custodial Periods) Order 2024 (SI 2024/844), drawn to the special attention of the House in SLSC, *2nd Report* (Session 2024–25, HL Paper 4). The reduction took effect on 10 September 2024, for eligible sentences of less than five years, and on 22 October 2024 for longer eligible sentences.

updates follow 37 prisoners being released "in error" under SDS40, although the MoJ states that all 37 were "swiftly returned to custody". We make no further comment on this aspect of the instrument.

Combined effect of SDS40 and HDC changes on release dates

6. **While we accept the need for steps to be taken to address the prison crisis, the House should be aware that the changes to SDS40 and HDC combined lead to significant changes in release dates for eligible offenders**. For example, someone given a sentence of six years would have been eligible for release from custody after 30 months before either change, but would now be eligible after around 17 months. For a sentence of four years, the earliest eligible release date reduces from 18 months to around 9.5 months.[2]

Reviews of the effects of HDC and previous changes

7. The HDC policy was first introduced in January 1999, at which point the eligibility period was from 60 days before the automatic release date. It has since been extended four times: to 90 days in October 2002; to 135 days in April 2003; to 180 days in June 2023; and to 365 days by this instrument.

8. At the time of the previous, 2023, extension, we observed that "although this scheme has been running for more than 20 years the evidence of its usefulness in preventing reoffending is surprisingly limited".[3] We noted that the main research cited by the MoJ was from 2011[4] and its findings were limited; for example, stating that "a like-for-like comparison based on offenders' characteristics and sentence length showed that those released on HDC were no more likely to engage in criminal behaviour during the first two years after release from custody."

9. In its response to our questions at the time of the 2023 extension, the MoJ said that its projects involving electronic monitoring were "underpinned by robust evaluations designed to further develop our understanding of the effective use of our devices. We expect the first evaluations to be available internally in late 2024, with others to follow as the projects progress." We suggested that the House press the MoJ to publish those evaluations as soon as possible.

10. However, this Order was laid with no further data or analysis about the impact of HDC or the effect of changing its parameters, such as the number of days it is available prior to automatic release. We therefore asked the MoJ for an update on the progress of its "evaluations". The MoJ again stressed that these evaluations related to the use of electronic monitoring (EM) devices generally, rather than just in the context of HDC (so including, for example, alcohol monitoring and monitoring while on licence). It then stated that:

> "The evaluations for these projects are expected to start being published this year, starting with process evaluations, with impact and economic evaluations to then be published across 2025–2027. This length of time

2 The figure of 9.5 months was originally printed as seven months, in error.
3 SLSC, *30th Report* (Session 2022–23, HL Paper 152).
4 Ministry of Justice, 'The effect of Home Detention Curfew on recidivism' (6 May 2011): https://www.gov.uk/government/publications/the-effect-of-home-detention-curfew-on-recidivism [accessed 27 November 2024].

> will ensure that we can make an accurate assessment of how the EM interventions impact on reducing reoffending […]
>
> The current capacity context has materially changed since the previous government's extension of HDC […]. We therefore must extend HDC to help ensure there is sufficient capacity to serve the courts. MoJ and HMPPS [HM Prison and Probation Service] will jointly and carefully monitor the impact of this change, publishing statistics on its use."

11. We further questioned the MoJ on the contents of its "evaluations" and when they would be published. The MoJ said:

> "Process evaluation assesses how well the intervention has been operating from the perspective of key stakeholders; impact evaluation measures to what extent the intervention has achieved its intended effects; and an economic evaluation assesses whether the intervention provided overall value for money. The individual publication dates for each evaluation of the four post-custody licence projects are not yet confirmed but we expect the first of them to be released early next year.
>
> As previously noted, these four EM projects will not draw any conclusions to contribute to the evidence base of HDC. The change to HDC through the Victims and Prisoners Act (2024) is still being operationalised and therefore there has not been an appropriate point to undertake evaluation (this is because the change came into force recently and a new cohort of prisoners are being given HDC for up to six months–we will need more time to evaluate impact). However, the HDC is very closely monitored by HMPPS and the MoJ and data on its use is regularly published. This will continue."

12. Even the "evaluations" that the MoJ states it is currently undertaking are not specific to HDC and will only be published in stages between now and 2027. **The House may wish to press the Minister for a commitment to more specific, and more timely, assessments.**

13. We also asked whether the Secretary of State for Justice was made aware, before signing the instrument and Explanatory Memorandum, of our previous concerns about the lack of data and evidence relating to the policy, and in particular about our suggestion that the House press MoJ for publication of the evaluations as soon as possible. The MoJ initially replied:

> "We take the committee's concerns seriously and we will seek to ensure the EM project evaluations are published as soon as practicable on the timeline that is required to produce accurate assessments of impact on reoffending.
>
> As above, whilst there has not been an appropriate point to undertake evaluation of recent HDC changes (because the most recent changes to HDC were agreed just before the General Election and are now being implemented), the impact of HDC12 [the increase that would be implemented by this Order] will be closely monitored and data will be published on its use.
>
> The Lord Chancellor has been clear that we must implement further urgent measures that will ensure the prison system avoids collapse before the sentencing review concludes and we can implement its

recommendations. This extension is necessary to help avoid reaching critical capacity and to ensure there are enough prison places to serve the courts."

14. Subsequently, the MoJ sent a further response to the same question, which contained the following additional text:

> "The Secretary of State has been made aware of the Committee's previous concerns around evaluation and evidence. Detailed evaluation will be undertaken once this policy change has been implemented. The impact of HDC12 will be closely monitored and data will be published on its use.
>
> The previous administration committed to evaluating the change to HDC in June 2023, however they failed to complete or even start this work. This government then inherited a crisis in our prisons and is having to act at pace to prevent the total collapse of the criminal justice system. This meant decisions are having to be made at significant pace. In short, the crisis has simply moved too quickly to allow for evaluation to be completed yet.
>
> As the committee will know it takes a number of months to implement this change and due to the fast-moving nature of the crisis, the department is still implementing the changes made just before the general election was called.
>
> However, the Secretary of State is committed to increased transparency and the department is putting in place processes that adequately provide information for better decision and policy making in the future. We need to bring the system back from the brink of collapse and allow for a period of stability, for proper evaluation to be possible."

15. **We do not accept the initial argument that there has not been an appropriate point to assess HDC.** The policy has a long history and its parameters have changed several times. **There have therefore been plenty of opportunities for a comprehensive assessment, but at no stage does this seem to have taken place.** We note that these opportunities span several different administrations.

16. **It is disappointing to be told by this Government that the previous Government did not meet its commitment to evaluate the 2023 change, particularly as we had explicitly called for such an assessment to be published as soon as possible.** We are of course unable to approach the previous Government for comment. We do not dispute the MoJ's assertion that this measure is an urgent response to a crisis in the criminal justice system and, as such, had to be implemented before any evaluation could be completed.

17. Neither response answers the question of whether the Secretary of State, at the time of signing this instrument and its explanatory material, was made aware of our concerns about the previous change. Without such a confirmation, we cannot be confident that the MoJ has previously taken our concerns "seriously". Conversely, we welcome the statements that the Secretary of State is now aware, is committed to "increased transparency", and that detailed evaluation on this change will be undertaken and published. **The House may wish to seek reassurance from the Minister**

that this commitment covers HDC specifically (as well as electronic monitoring more widely).

18. **Notwithstanding these points, the promise of information in the future does not help in scrutinising this Order: we, Parliament (and, potentially, Ministers) remain effectively 'in the dark' about its likely effects. Again, we appreciate the need for urgent action, but this is a sub-optimal way of making policy.**

Recall rates

19. There are several areas where additional data on the effect of changes in the HDC period would be welcome, including the impact on victims and the take-up of HDC (it is voluntary, and prisoners have to opt in). However, one particularly important subject is the rate of prisoners who are recalled to prison for breach of the conditions of the curfew. If the longer HDC period results in a higher recall rate, this would reduce the effectiveness of the policy (and lead to greater burdens on other services, such as the police).

20. The Impact Assessment (IA) for the policy includes some scenarios for the recall rate. In the 'central scenario', the MoJ assumes an increase in the recall rate which is the same as the difference between the recall rate for offenders on licence in the 12 months after release, compared to six months after release. The MoJ also analyses another scenario in which there are zero recalls in the second sixth months of an HDC period (because, the MoJ says, recalls are typically skewed towards the day of release), and another scenario in which recall rates in the additional 6-month period are the same as those in the current 6-month period. The MoJ told us that it was "reasonably confident that these scenarios are wide ranging enough to cover all likely possibilities".

21. However, it is not out of the question that other scenarios arise. For example, recall rates in the first six months might increase, because prisoners being released earlier receive less training and preparation for release than they otherwise would have done. **This is an area on which an assessment of past changes to HDC could have shed light and, again, we regret that no such analysis has taken place.**

Consistency with other initiatives

22. Both SDS40 and the changes to HDC address the "urgent" need for prison places by reducing the detained population. Meanwhile, a third policy, which increases magistrates' sentencing powers and came into force on 18 November 2024, has the opposite effect, at least in the short and medium term.[5] We asked the MoJ how the various reforms were consistent and coordinated. The MoJ told us that this was largely a matter of timing:

> "SDS40 was a necessary immediate measure to avoid criminal justice system gridlock but was not a sufficient answer and further measures are required (including due to the increased pressure on the system following the violent disorder of the summer). This includes the extension to HDC and an independent review of sentencing.

5 Sentencing Act 2020 (Magistrates' Court Sentencing Powers) (Amendment) Regulations 2024 (SI 2024/1067), drawn to the special attention of the House in SLSC, *7th Report* (Session 2024–25, HL Paper 37).

> This extension to HDC will not come into effect until June 2025, as stated in the impact assessment (para 17) without taking action, we expect that we would reach critical capacity in the adult male estate again in July 2025 […].
>
> The implementation of SDS40 provides sufficient capacity in prisons to absorb the short-term, inflationary impact of increasing magistrates' court sentencing powers and realise the benefits to the Crown Court outstanding caseload […]
>
> While the increase to Magistrates Sentencing Powers will have a short-term inflationary impact on the overall prison population, within that it will ease pressure in the remand population as cases are tried and sentenced more quickly in the magistrates' courts."

23. It may be sensible to use the short-term capacity provided by SDS40 to improve the efficiency of the system, as the changes to magistrates' sentencing powers do. However, the way these related policy changes interact with each other is important context and should have been set out in the Explanatory Memorandum. Moreover, margins in prison capacity appear to be small and unexpected events, such as further widespread rioting or errors in the MoJ's forecasts of the effects of the various measures, could lead to further issues. **The House may wish to be assured that the MoJ is closely monitoring the impacts of the changes and their implications for prison capacity.**

Capacity and funding in related services

24. As with the SDS40 policy, increasing the numbers of offenders on HDC will have implications for a variety of other services on which released prisoners may rely. These include: probation services; local authority (LA) accommodation providers; the police (who would be responsible for returning to jail any additional offenders breaching their curfew conditions); the Electronic Monitoring Service, which provides the 'tags';[6] the NHS; and welfare and benefit services.

25. In its IA, the MoJ estimated the cost to probation services (£10 million per year) and LA accommodation providers (£5.5 million per year), but not the cost for other services. It also did not discuss capacity issues. When we questioned the MoJ further, it noted that there is a programme to recruit at least 1,000 additional trainee probation officers by the end of March 2025. **However, we note that this recruitment was also referred to in support of SDS40; the House may wish to question the Minister further on whether the plans are sufficient to cover both policies.**

26. The MoJ also told us that probation services would be considering what other steps may be necessary; for example, a "focus on higher risk individuals". Again, this has echoes of the MoJ's explanation of the impact of the SDS40 policy, which it said could involve reducing the degree to which lower-risk offenders are subject to active supervision after the completion of their full sentence and targeting active supervision during the first two-thirds of an offender's licence period. **It is clear from these contingency plans that, despite the recruitment of additional officers, probation services may**

6 In this context, we also refer back to previous concerns we have expressed about the appointment process for the contractor, Serco Limited, that is delivering electronic monitoring on behalf of the MoJ; and we reiterate the risks and concerns in this regard reported by the House of Commons Public Accounts Committee. On these points, see SLSC, *21st Report* (Session 2023–24, HL Paper 98).

have to prioritise and ration their work, meaning that some offenders may not be given the support they would previously have received.

27. **The MoJ also did not respond to our questions on how the additional costs for accommodation services would be met, and the House may wish to probe further on this point.**

28. The IA estimates that the change in policy will increase the number of people on HDC by around 1,300, with related reduced prison running costs of £51 million per year and a reduction in required prison building equivalent to £513 million in present value terms. We were interested in how this increase compares to the existing caseload. In response to our question, the MoJ said that there were 2,194 people on HDC at the end of June 2024. The MoJ noted that these figures are not perfectly comparable, because the additional 1,300 cases compare to a counterfactual scenario incorporating expected future prison projections and other relevant changes. **However, the fact that the change will lead to an increase in HDC cases of around 60% compared to existing volumes gives a good indication of the scale of the change and the increases in pressure on related services.**

Conclusion

29. This Order is a further provision intended to relieve the acute pressure on prison places. In tabling it, the MoJ has provided little information on its likely effects. **This is disappointing, given that HDC has been in place for 25 years (spanning several administrations), meaning that the MoJ could and should have conducted and published an analysis of its impact.**

30. We do not dispute the MoJ's assertion that this change is an urgent and necessary measure to deal with a crisis in the criminal justice system. **However, without sufficient information we and Parliament, in scrutinising the instrument, and potentially Ministers in signing it off, are effectively doing so 'in the dark'.** We have explicitly called for information on the effects of HDC, and changes to it, in the past and we repeat that request in the context of this Order. **In particular, in its most recent responses to our questions, the MoJ has committed to a detailed evaluation of this latest change, and to publishing data on it. The House may wish to seek commitments from the Minister on the contents of such an evaluation and its likely timescale.**

31. Other omissions from the explanatory material, such as how this change interacts with other related policy changes and the implications for supporting services, notably probation services, cannot be explained by reference to the previous Government. **The House may wish to press the Minister for more information in these areas.**

Draft Official Controls (Amendment) Regulations 2024

Date laid: 19 November 2024

Parliamentary procedure: affirmative

The purpose of these draft Regulations is to provide a long-term statutory basis for implementing and updating the requirements of the Border Target Operating Model (BTOM), which is being introduced in stages to establish a new risk-based post-Brexit import control regime. The instrument proposes to confer powers to enable the Government to apply sanitary and phytosanitary controls to imports into Great Britain "dynamically" in response to changing levels of risk to plant, animal and public health. This includes the ability to make some changes administratively, rather than through secondary legislation.

While the Department for Environment, Food and Rural Affairs (Defra) says that most of the changes will not have a policy impact until the new powers are exercised at a future date, we note that the use of these new administrative powers will not be subject to oversight by Parliament. We asked Defra for further information about the intended use of these powers. We also received a submission from Friends of the Earth which raised concerns, including about the absence of a risk-assessment in the Explanatory Memorandum. We have published the submission and Defra's response in full on our website.

It is apparent that there are some concerns about the risk-based approach to import controls that the Government has adopted under the BTOM and for which these Regulations provide a statutory basis. We welcome therefore that while this instrument allows for some changes to be made administratively, any substantial policy changes in the future will require further secondary legislation and will be subject to parliamentary scrutiny and oversight. In addition, Defra has committed to continuing to seek feedback from stakeholders on any such changes.

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

Purpose

32. The purpose of these draft Regulation is to provide a long-term statutory basis for implementing and updating the requirements of the Border Target Operating Model (BTOM).[7] The BTOM is being introduced in stages to establish a new post-Brexit import control regime. It is expected to take full effect from 1 July 2025. The draft Regulations propose to confer powers on the Government to enable it to apply sanitary and phytosanitary (SPS) controls to goods entering Great Britain (GB) "dynamically" in response to changing levels of risk to plant, animal and public health. This includes the ability to deliver key aspects of the BTOM, such as Trusted Trader Schemes,[8] and to make some changes administratively, rather than through secondary legislation.

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7 Cabinet Office, 'The Border Target Operating Model: August 2023': https://www.gov.uk/government/publications/the-border-target-operating-model-august-2023 [accessed 4 December 2024].

8 Department for Environment, Food and Rural Affairs, 'Accredited Trusted Trader Scheme pilot': https://www.gov.uk/guidance/accredited-trusted-trader-scheme-pilot [accessed 4 December 2024].

33. The Department for Environment, Food and Rural Affairs (Defra) says that the Scottish and Welsh Governments were consulted on the changes and are content, having noted "the importance of maintaining a consistent approach to SPS controls across GB".

Use of the new administrative powers

34. Whilst Defra emphasises that most of the changes proposed by this instrument will not have a policy impact until the new powers are exercised at a future date, the new powers to make changes administratively, rather than through secondary legislation, mean that the use of these powers will not be subject to oversight by Parliament. These new administrative powers will apply, for example, to decisions on whether certain countries or products pose an acceptable risk and should therefore be subject to reduced import controls or fewer checks. Defra says that this "approach allows an appropriately responsive implementation of risk mitigations to address changing sanitary risks and hazards".

35. We received a submission from Friends of the Earth (FoE) which raised concerns about the absence of any assessment of risk or of potential environmental or public health impacts of this approach in the Explanatory Memorandum. We put the submission to Defra which responded:

> "Defra has undertaken the risk modelling necessary to categorise animals and animal products, advised by an expert panel comprised of risk analysts, risk managers and policy representatives from the Animal and Plant Health Agency, the Food Standards Agency [FSA] (which advises the UK and Welsh Governments), and Food Standards Scotland [FSS], alongside public health and disease control policy experts from the UK Health Security Agency [UKHSA] and from the UK, Welsh and Scottish Governments.
>
> We now have the ability to formally categorise imports of animals and their products as low, medium, or high risk, and for each category to require different levels of documentation and checks depending on the risk posed to animal and plant health, food and feed safety, biosecurity, animal welfare and public health, alongside any specific risk from the country/region of origin.
>
> The categorisation approach draws on a range of data including disease outbreak data, known public health risks, transmission data, trade restrictions, non-compliance data and our confidence in the exporting country's production standards and health controls, among other sources.
>
> The categorisation is based on the inherent risk that the commodity poses to animal health, food and feed safety and biosecurity, and public health, alongside the risks specific to the country of origin. Risk assessment by country/commodity combination will be based on data sets drawn from domestic sources such as trade volume, compliance data or intelligence on emerging hazards; and international sources such as World Animal Health Organisation (WOAH) and the European Rapid Alert System for Food and Feed (RASFF).
>
> The risk management model has been developed to assess the likelihood of various hazards arriving at the UK border. A panel of risk managers

including subject matter experts and risk analysts will consider each of the country/commodity combination hazards and will recommend a risk categorisation. This recommendation is then presented to FSA/FSS governance and Animal Disease Policy Group (ADPG) (and Aquatic Animal Health Board as required) where it is formally agreed, with ADPG acting on behalf of Defra and Devolved Government Ministers. [ADPG includes the four Chief Veterinary Officers, Devolved Government officials, FSA and FSS, UKHSA and policy leads.] However, where there may be additional factors to consider, the technical governance recommendations will be presented to Ministers for the final decision.

The default documentary check rate remains at 100% and we have introduced [in this instrument] the ability to reduce the requirement to carry out documentary checks on all imports, expanding existing powers to allow the frequency of such checks to take the new risk-based approach. Further legislation is needed for any changes to take effect.

Whilst low risk goods do not require certification or routine checks under the BTOM, we have retained the scope to be able to pull low risk goods (or medium risk goods that have not been targeted for a check) in for checks based on intelligence. For example, If the competent authority/ PHA have concerns then they can detain the consignment in the Border Control Post (BCP) for a check, on a risk or random basis. This is the reason why we have a condition for low-risk goods to enter through a point of entry with a designated BCP. Low risk animal goods must also comply with SPS import rules as set out in the relevant commodity legislation."

36. Asked for information about the use of administrative, rather than legislative powers in other areas of import controls, Defra explained:

"Since the United Kingdom left the European Union, Defra has been responsible for managing legally binding import conditions for animals and animal products. Rapid amendments to these conditions are vital to protect biosecurity and public and animal health, as well as to facilitate trade. While powers exist to control imports through statutory instruments, administrative powers are required to ensure changes to import conditions can be made rapidly in response to emerging biosecurity and food safety risks in trading partners approved to export to Great Britain.

The amendments […] reflect and build on changes already made since the United Kingdom left the EU to refine our listing procedures for imports of animals and animal products which provide the flexibility and responsiveness needed to protect biosecurity and facilitate trade.

In July 2022, the Import of Animals and Animal Products and Approved Countries (Amendment) Regulations 2022 (SI 2022/735)[9] established a means for Defra officials to make rapid, administrative amendments to the lists of approved trading partners for commercial imports of live animals, germinal products and most products of animal origin (POAO) in response to changing levels of biosecurity and/or food safety risk. The exercise of such powers is subject to consent from the Scottish and

9 Import of Animals and Animal Products and Approved Countries (Amendment) Regulations 2022 (SI 2022/735), see: SLSC, *37th Report* (Session 2021–22, HL Paper 197).

Welsh Governments and appropriate assessments of risk. The powers now constitute the primary means of managing country-specific import conditions for imports of most animals and animal products. They are used regularly to:

- Impose import restrictions that prohibit the entry of specific commodities from a country or territory (or region of a country) in response to emerging biosecurity risks.
- Impose and/or amend additional country-specific import conditions that must be met for trade in specified commodities to continue (e.g. requirements for products to be processed in a certain way to mitigate risk of disease incursion).
- Lift import restrictions, permitting the entry of specific products from a country (or region of a country) where biosecurity risks have reduced (e.g. when a disease outbreak has been successfully controlled). Keeping restrictive measures in place where there is no longer a basis for them in biosecurity terms risks conflict with our WTO obligations as well as those under individual trade agreements.

SI 2022/735 did not, however, establish a means for making administrative amendments to approved country lists for all commodities. Country-specific approvals for animal by-products and certain POAO (including live bivalve molluscs, fishery products, frogs' legs and snails, insects, and bovine embryos) continue to be set out in lists in legislation.

The legislative process required to amend such conditions does not provide the speed or flexibility needed to protect biosecurity and public and animal health. There is a need to establish a means of managing import conditions for such products administratively, reflecting the approach already in place for most commercial imports of live animals, germinal products and POAO."

37. **We note Defra's explanation and are reassured about the use of administrative rather than legislative powers in this specific policy area**.

Checks away from Border Control Posts

38. The submission from FoE referred to concerns that were raised previously about the BTOM regarding the potential environmental and public health risks of moving checks on imports away from Border Control Posts (BCPs).[10] The submission asked how these concerns had been addressed. Defra responded:

"This instrument provides the ability for documentary, identity and physical controls to take place at places other than Border Control Posts or control points. Currently, some controls already take place away from Border Control Posts and control points, such as documentary checks which take place remotely, and ID and physical checks on live animals from the EU which take place at destination. This instrument provides the legislative framework for these policies to continue, or be extended to non-EU goods. As it is important that the BTOM can be responsive

10 See, for example, Official Controls (Location of Border Control Posts) (England) Regulations 2024 (SI 2024/416), SLSC, *21st Report* (Session 2023–24, HL Paper 98).

to changing biosecurity and public health risk, this instrument provides the legislative basis for this approach to be extended to other goods in future, depending on risk. However, this instrument does not itself make any changes to where controls are currently conducted.

We will seek views from stakeholders on any proposed legislative changes which impact where checks can take place and will consider these responses ahead of legislation being made. The relevant Statutory Instruments would also be subject to parliamentary scrutiny."

Conclusion

39. We note the additional information provided by the Department in response to our questions and FoE's submission. We have published the submission and Defra's response in full on our website.[11] **It is apparent that there are some concerns about the risk-based approach to import controls that the Government has adopted under the BTOM and for which this instrument provides a statutory basis. We welcome therefore that any substantial policy changes in this area will require further secondary legislation and will be subject to parliamentary scrutiny and oversight, and that Defra has committed to continuing to seek feedback from stakeholders on any such changes**.

Dangerous Dogs (Exemption Schemes) (England and Wales) (Amendment) (No. 2) Order 2024 (SI 2024/1149)

Date laid: 13 November 2024

Parliamentary procedure: negative

This Order amends the ban on XL Bully dogs in England and Wales and related legislation. The amendments tweak the policy rather than make any substantial changes: for animal health reasons, they increase the age from which XL Bully dogs must be neutered under the ban, and they require owners of XL Bully dogs who hold an exemption certificate to provide evidence of public liability insurance on request rather than annually to reduce the administrative burden. The instrument also makes changes to remove VAT from fees for an exemption certificate granted by a court. The Department for Environment, Food and Rural Affairs (Defra) says that this will correct a "historic drafting error" and ensure that VAT is not charged on these fees in the future. While the overall fee for an exemption certificate will remain the same, this raises questions about for how long VAT has been charged in error, when the error was first identified, how many people may have been impacted by it and whether they should be compensated. These issues are not addressed in the Explanatory Memorandum (EM).

We are not convinced by Defra's explanation that nobody was overcharged because the VAT levy was required by legislation. As the Department acknowledges, the VAT charge was made in error against the Government's own policy and is now being removed. In this context, removing VAT whilst leaving the total cost of an

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

exemption certificate unchanged appears convenient, but it is not clear whether this reflects cost recovery accurately. In any case, we are disappointed that the EM did not provide a full explanation of the correction made by the Order.

The Order is 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

40. This Order makes changes to the ban on XL Bully dogs and related legislation. The ban was introduced in England and Wales at the end of 2023,[12] by adding the type of dog known as the XL Bully to the list of types of dogs that are banned under the Dangerous Dogs Act 1991. The Department for Environment, Food and Rural Affairs (Defra) explains that under this ban, owners of XL Bully dogs could apply for an exemption certificate on or before 31 January 2024 to allow them to keep their dogs legally from 1 February 2024, when the ban fully came into effect. Holders of such exemption certificates must comply with various conditions, including a requirement to neuter the animal, keep it on a lead and muzzled when in public and to have public liability insurance.

Changes made by this instrument

41. The amendments made by this instrument tweak the policy rather than make any substantial changes to it. For animal health reasons, they ensure that the age from which XL Bully dogs must be neutered is not younger than 18 months. The Order also requires owners of XL Bully dogs who hold an exemption certificate to provide evidence of public liability insurance on request rather than annually, to reduce administrative burdens on owners, Defra and enforcement agencies.

42. The instrument also amends an earlier instrument, the Dangerous Dogs Exemption Schemes (England and Wales) Order 2015 ("the 2015 Order")[13], which continued, with adjustments, a scheme originally created in 1997 under which a court can also exempt a prohibited dog from a ban. In para 5.5 of the Explanatory Memorandum (EM), Defra says that the aim of this amendment is to:

> "remove the VAT charge on Exemption Certificate fees for dogs exempted through the court process. This change will correct an historic drafting error and ensure that we are not charging VAT on fees in future. The overall fee will remain the same."

Lack of information in the EM

43. The EM does not offer any further explanation of this correction. On request, Defra told us that the error was first identified in 2022 by the Department's tax team, and that it "came to light in a routine spot check on un-invoiced receipts" carried out by the tax team. Asked for further explanation of why VAT should not have been charged, Defra explained that:

12 Dangerous Dogs (Designated Types) (England and Wales) Order 2023 (SI 2023/1164).
13 Dangerous Dogs Exemption Schemes (England and Wales) Order 2015 (SI 2025/138).

> "The fee charged is a statutory fee intended to cover the costs to the Department of administering the Dangerous Dogs index. There is no significant distortion to competition by not charging VAT. On that basis, the charge is in respect of a non-business supply for VAT purposes and therefore falls outside the scope of VAT (and this was confirmed by HMRC [HM Revenue and Customs])."[14]

44. We also asked the Department whether, given that the VAT charge was an error, people who had been charged VAT when they should not have been, would be re-imbursed. Defra responded:

> "As explained in the Explanatory Memorandum, this change will correct an historic drafting error that applied VAT to the exemption fee, and will ensure that we are not charging VAT on exemption fees in future. The overall fee will remain the same. This drafting error dates back to when the Dangerous Dogs Compensation and Exemption Schemes Order 1991 was introduced. We are not proposing to provide refunds.
>
> It is important to note that the VAT charge did not apply to fees for certificates of exemption issued for XL Bully dogs during the transition period."

45. Pressed further on the impact of the incorrect VAT charge, Defra explained:

> "No VAT has been charged for any of the approx. 57,000 Certificates of Exemption issued for XL Bully dogs whose owners applied for an exemption during the transition period, which was set out in The Dangerous Dogs (Compensation and Exemption Schemes) (England and Wales) Order 2023 ("The 2023 Order"). The fee of £92.40 for dogs exempted through this route did not include VAT as when the 2023 Order was made we were already aware that VAT did not apply to this type of fee.
>
> The other route by which XL Bully dogs may have received an exemption certificate in this time period is through the court process. Since the end of the transition period, approximately 300-400 XL Bully dog owners have been through the Court process to get a Certificate of Exemption (this could be because they missed the deadline for applying during the transition period, for example). This process is set out in The Dangerous Dogs Exemption Schemes (England and Wales) Order 2015 ("The 2015 Order)"–which (as drafted in 2015) includes a requirement for VAT to be charged on the fee. However, it is important to note that the total fee paid under this route (£77 + VAT) was the same as that which applied to XL Bully owners that exempted their dogs during the transition period (£92.40)."

46. We also asked whether VAT had been charged incorrectly for the exemption certificates for any other type of dangerous dog because of the historic drafting error. Defra responded:

> "Yes, the exemption fee paid by owners of other prohibited breeds that have been exempted since 1991 has included VAT because the legislation applicable to those exemptions required it. We do not hold complete

14 HM Revenue and Customs, 'HMRC internal manual: VAT Government and Public Bodies': https://www.gov.uk/hmrc-internal-manuals/vat-government-and-public-bodies/vatgpb3000 [accessed 4 December 2024].

> data on the number of owners that this may have affected, but prior to the introduction of the XL Bully ban, there were around 3,000 dogs listed on the Index of Exempted dogs.
>
> Since 1st February 2024, approximately 100 dogs that are not XL bullies, but other banned breed types have been granted an exemption through the court process and added to the Index - and their owners will have paid the fee which included VAT."

47. We note that VAT appears to have been charged wrongly for exemption certificates since 1991. **Given that the error was discovered in 2022, it is not clear why correcting legislation was not brought forward earlier, thereby avoiding up to 400 owners of XL Bully dogs and around 100 owners of other dangerous dogs being charged VAT incorrectly since February 2024**. There have been several opportunities to do so: this Order is the fifth amending instrument that has been laid since the ban on XL Bully dogs was introduced at the end of December 2023.

48. Asked about the actual cost of an exemption certificate, the Department explained:

> "The fee for all exemption certificates is £92.40.
>
> In the 2015 Order (for dogs that are exempted through the court process) the fee was £77.00 + VAT–which meant the dog owner paid £92.40 in total–and this fee was last set in 2013. Prior to that date the fee had been increased several times since the legislation for dangerous dogs was first introduced in 1991, with VAT being included every time.
>
> For consistency, for the XL Bully dogs exempted during the transition period the fee was set at £92.40–but with no VAT. This fee was assessed to reflect a proportionate increase from £77 to £92.40, taking into account inflation and the administration required for each dog to remain on the Index of Exempted dogs.
>
> [This Order], which will come into force on 5th December, amends the 2015 Order to remove the VAT and change the exemption fee to £92.40 for all dogs exempted through the court process."

49. The standard approach to setting charges for public services is full cost recovery.[15] If the cost of an exemption certificate under the 2015 Order was £77 + VAT and it is assumed that the £77 reflected full cost recovery, this could mean that people are now being overcharged with a fee of £92.40 without VAT. Asked about this, Defra said:

> "The fee of £92.40 set out in the 2023 Order (which is the same total amount as £77 plus VAT) was assessed to reflect a proportionate increase from the previous fee of £77, taking into account inflation and the administration required for each dog to remain on the Index of Exempted dogs.
>
> The amendment made in [this Order] means that the '+VAT' error is rectified in the 2015 Order but in a way that achieves consistency and

15 HM Treasury, Managing Public Money (May 2023), para A6.1.9: https://assets.publishing.service.gov.uk/media/65c4a3773f634b001242c6b7/Managing_Public_Money_-_May_2023_2.pdf [accessed 4 December 2024].

> ensures cost recovery (as the administrative costs are the same for all certificates of exemption, whether issued under the 2015 or the 2023 Orders)."

50. **Removing VAT while leaving the total cost of the exemption certificate unchanged appears convenient, but, in the absence of any detailed figures or calculation, it is not clear whether this reflects cost recovery accurately**.

51. Finally, we asked the Department how many people had been overcharged in total because of the error and how Defra was planning to remedy the situation for those who had paid VAT incorrectly. Defra responded:

> "Our understanding is that nobody has been overcharged because the legislation since 1991 required VAT to be charged, and the government was therefore obliged to collect it. No refunds are proposed."

52. **We are not convinced by the Department's reasoning that no one has been overcharged since 1991 when VAT was first levied on exemption certificates because the VAT levy was required by legislation. As the Department acknowledges, VAT was charged in error, against its own VAT policy and the charge is now being removed.**

Conclusion

53. This is a complex situation in which the Department is correcting a situation whereby VAT has been charged for a particular service in line with underlying legislation, but where that underlying legislation was incorrect in its interpretation of when VAT should be charged. **We welcome this correction of a historic mistake, although it is not clear why this action could not have been taken sooner**, given that there have been several legislative opportunities to do so since the ban on XL Bully dogs was introduced at the end of 2023.

54. It appears to us that the Department may be taking the wrong approach in setting the new fees at the previous, VAT inclusive, level for "consistency". Fees should always be charged at the level which recovers the cost of providing the service, with VAT added (or not) as appropriate. If £77+VAT was the correct level of fee in the past, but the VAT charge was inappropriate, it follows that there is a case to be made that previous fee-payers have been overcharged. Defra has not adequately addressed this argument and the House may wish to pursue it, and the consequences that might follow, further. If there is a possibility that previous payers have been overcharged, the situation has some parallels to those discussed in our 4th Report of this Session, which included guidelines on the types of information that should be provided in an EM.[16] This includes an explanation of whether a charge or fee has continued to be charged once the error came to light; and if so, why this course of action was chosen, and a clear acknowledgment of any adverse impact and the number of people affected. **In any case, we are disappointed that none of these issues was explained in the EM, and that it needed our questioning to obtain a fuller understanding of the correction made by this Order**.

16 SLSC, *4th Report* (Session 2024–25, HL Paper 28) paras 1-3.

INSTRUMENTS OF INTEREST

Draft Clean Heat Market Mechanism Regulations 2024

55. The purpose of these draft Regulations is to a establish a new UK-wide Clean Heat Market Mechanism (CHMM) to promote the development of the market for retrofit installations of heat pumps in existing buildings. The CHMM is to launch on 1 April 2025 and run for an initial period of four years. Under the scheme, manufacturers of heating appliances which have sales above specified thresholds will have to meet an annual target of selling heat pumps equivalent to 6% of their annual sales of fossil fuel boilers, while manufacturers of heat pumps will be able to earn a certificate for the installation of every heat pump in a scheme year. These certificates will be tradable, so that manufacturers of fossil fuel boilers can acquire them to help them meet their 6% target. Manufacturers which fail to meet their target and do not surrender the correct number of heat pump certificates will have to pay £500 per missing certificate. Any increases in the target in future scheme years will require further secondary legislation.

56. According to the Department for Energy Security and Net Zero (DESNZ), the current market for heat pumps is comparatively small: around 40,500 heat pumps were installed in existing buildings in 2023, in comparison to around 1.49 million fossil fuel boilers. The DESNZ says that the scheme aims to provide businesses with the certainty to invest in developing the heat pump market, growing the supply chain and promoting the uptake of heat pumps by consumers. The CHMM will work alongside a range of other policies, such as grant funding for heat pump installations. The DESNZ expects the scheme to help ensure the installation of at least 77,000 heat pumps a year in existing homes between 2024/25 and 2028/29. We consider this, from a starting point of around 40,500 installations per year, to be ambitious.

INSTRUMENTS NOT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

Draft instruments subject to affirmative approval

Draft	Clean Heat Market Mechanism Regulations 2024
Draft	Combined Authorities (Borrowing) and East Midlands Combined County Authority (Borrowing and Functions) (Amendment) Regulations 2025
Draft	Electricity Capacity Mechanism (Amendment) Regulations 2024
Draft	Free-Range Egg Marketing Standards (Amendment) (England) Regulations 2024

Draft instruments subject to annulment

Draft	Part 12 Energy Act 2023–Draft Core Fuel Sanctions Guidance

Made instruments subject to annulment

SI 2024/1149	Dangerous Dogs (Exemption Schemes) (England and Wales) (Amendment) (No. 2) Order 2024
SI 2024/1169	Official Controls (Import of High-Risk Food and Feed of Non-Animal Origin) (Amendment of Commission Implementing Regulation (EU) 2019/1793) (England) (No. 2) Regulations 2024
SI 2024/1170	Meteorological Office Trading Fund (Maximum Borrowing) (Amendment) Order 2024
SI 2024/1174	Occupational Pensions (Revaluation) Order 2024
SI 2024/1205	Health and Care Act 2022 (Further Consequential Amendments) Regulations 2024

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 3 December 2024, Members declared the following interests:

Draft Home Detention Curfew and Requisite and Minimum Custodial Periods (Amendment) Order 2024

Lord Watson of Wyre Forest
Member, Public Services Advisory Board, Palantir UK Ltd (software)

Attendance:

The meeting was attended by Baroness Harris of Richmond, Lord Hunt of Wirral, Baroness Lea of Lymm, Lord Powell of Bayswater, Baroness Randerson, Baroness Ritchie of Downpatrick, Lord Rowlands, Lord Russell of Liverpool and Lord Watson of Wyre Forest.