House of Lords
House of Commons

Joint Committee on Statutory Instruments

Eighth Report of Session 2010-11

Drawing special attention to:

Misuse of Drugs (Licence Fees) Regulations 2010 ***(S.I. 2010/2497)***
Animal Feed (England) Regulations 2010 ***(S.I. 2010/2503)***

Ordered by the House of Lords to be printed 24 November 2010
Ordered by the House of Commons to be printed 24 November 2010

HL Paper 65
HC 354-viii
Published on 30 November 2010
by authority of the House of Lords
and the House of Commons
London: The Stationery Office Limited
£0.00

Joint Committee on Statutory Instruments

Current membership

House of Lords
Lord Campbell of Alloway (*Conservative*)
Lord Clinton-Davis *(Labour)*
Baroness Eccles *(Conservative)*
Lord Kennedy *(Labour)*
Earl of Mar and Kellie (*Liberal Democrat*)
Lord Rees Mogg *(Crossbench)*
Baroness Stern (*Crossbench*)

House of Commons
Mr George Mudie MP (*Labour, Leeds East*) (Chairman)
Mr Robert Buckland MP (*Conservative, South Swindon*)
Michael Ellis MP (*Conservative, Northampton North*)
John Hemming MP (Liberal Democrat*, Birmingham, Yardley*)
Mr Ian Liddell-Grainger MP (Conservative*, Bridgwater and West Somerset*)
Toby Perkins MP (Labour*, Chesterfield*)

Powers

The full constitution and powers of the Committee are set out in House of Commons Standing Order No. 151 and House of Lords Standing Order No. 74, available on the Internet via www.parliament.uk/jcsi.

Remit

The Joint Committee on Statutory Instruments (JCSI) is appointed to consider statutory instruments made in exercise of powers granted by Act of Parliament. Instruments not laid before Parliament are included within the Committee's remit; but local instruments and instruments made by devolved administrations are not considered by JCSI unless they are required to be laid before Parliament.

The role of the JCSI, whose membership is drawn from both Houses of Parliament, is to assess the technical qualities of each instrument that falls within its remit and to decide whether to draw the special attention of each House to any instrument on one or more of the following grounds:

i. that it imposes, or sets the amount of, a charge on public revenue or that it requires payment for a licence, consent or service to be made to the Exchequer, a government department or a public or local authority, or sets the amount of the payment;
ii. that its parent legislation says that it cannot be challenged in the courts;
iii. that it appears to have retrospective effect without the express authority of the parent legislation;
iv. that there appears to have been unjustifiable delay in publishing it or laying it before Parliament;
v. that there appears to have been unjustifiable delay in sending a notification under the proviso to section 4(1) of the Statutory Instruments Act 1946, where the instrument has come into force before it has been laid;
vi. that there appears to be doubt about whether there is power to make it or that it appears to make an unusual or unexpected use of the power to make;
vii. that its form or meaning needs to be explained;
viii. that its drafting appears to be defective;
ix. any other ground which does not go to its merits or the policy behind it.

The Committee usually meets weekly when Parliament is sitting.

Publications

The reports of the Committee are published by The Stationery Office by Order of both Houses. All publications of the Committee are on the Internet at www.parliament.uk/jcsi.

Committee staff

The current staff of the Committee are John Whatley (*Commons Clerk*), Kath Kavanagh (*Lords Clerk*) and Jennifer Steele (*Committee Assistant*). Advisory Counsel: Peter Davis and Peter Brooksbank (*Commons)*; Allan Roberts, Nicholas Beach and Peter Milledge *(Lords)*.

Contacts

All correspondence should be addressed to the Clerk of the Joint Committee on Statutory Instruments, 7 Millbank, London SW1P 3JA. The telephone number for general inquiries is: 020 7219 2026; the Committee's email address is: jcsi@parliament.uk.

Contents

Report

Instruments reported

At its meeting on 24 November 2010 the Committee scrutinised a number of Instruments in accordance with Standing Orders. It was agreed that the special attention of both Houses should be drawn to two of those considered. The Instruments and the grounds for reporting them are given below. The relevant Departmental memoranda are published as appendices to this report.

1 S.I. 2010/2497: Reported for defective drafting

Misuse of Drugs (Licence Fees) Regulations 2010 (S.I. 2010/2497)

1.1 **The Committee draws the special attention of both Houses to these Regulations on the ground that they are defectively drafted in one respect.**

1.2 The Regulations relate to fees for licences to produce, import or export controlled drugs. Regulation 1(3) deals with extent, in effect stating that all the fees relate to Great Britain but that the importation and exportation ones also relate to Northern Ireland. In a memorandum printed at Appendix 1 the Home Office identifies where it understands the relevant Northern Ireland responsibility to rest, acknowledges that the inclusion of Northern Ireland was an oversight, and indicates that it will make amending regulations at the earliest convenience and not levy charges there in the meantime. **The Committee accordingly reports regulation 1(3) for defective drafting, acknowledged by the Department.**

2 S.I. 2010/2503: Reported for defective drafting

Animal Feed (England) Regulations 2010 (S.I. 2010/2503)

2.1 **The Committee draws the special attention of both Houses to these Regulations on the ground that they are defectively drafted in one respect.**

2.2 Regulation 4(1) provides that, subject to transitional provisions, any person who contravenes or fails to comply with any provision of Regulation (EC) No. 767/2009 specified in Schedule 1 is guilty of an offence.

2.3 Some of the provisions listed in Schedule 1—Articles 11, 13(1), 13(2) and (3), 14(1) and (2), 15, 16, 17(1) and (2), 18, 19 and 20(1)—impose requirements as to the labelling of animal feed but do not identify, expressly or implicitly, the person whose responsibility it is to ensure that they are complied with. Other provisions listed—Article 12(1), (2) and (3)—do not impose any prohibitions or requirements but instead identify the person responsible for ensuring such compliance. In a memorandum printed at Appendix 2, the Food Standards Agency acknowledges that Article 12(1), (2) and (3) should not have been listed as provisions to which regulation 4(1) applies and that the other provisions referred to above should have been specified as "as read with Article 12(1) to (3)". It undertakes to make appropriate amendments to address these points at the next available opportunity.

2.4 Other provisions specified in Schedule 1 include Articles 4(3), 6(1) and 8(1). Article 4 is headed "Safety and marketing requirements". Paragraphs (1) and (2) impose obligations on persons placing feed on the market. Paragraph (3) provides simply that feed shall comply with specified technical provisions on impurities and other chemical requirements. Article 6(1) states that feed shall not contain or consist of materials (listed in Annex III) whose placing on the market or use for animal nutritional purposes is restricted or prohibited. Article 8(1) states that feed materials and complementary feed shall not contain levels of feed additives that are higher than certain limits. Articles 4(3), 6(1) and 8(1) each therefore impose requirements with which feed must comply without saying who is responsible for ensuring that those requirements are complied with.

2.5 The Department claims that it is clear that Article 4(3) is a provision which is supplementary to article 4(1) and (2) and places obligations on feed business operators and other persons placing feed on the market or using it; that Article 6(1) is a provision that prohibits the placing on the market of feed that does not comply with the stated requirements; and that Article 8(1) is about the use of feed additives. The Committee is not persuaded that any of these matters is sufficiently clear, taken alone, to be the basis for prosecution for an offence. Article 4(3) says nothing about placing feed on the market or its use. Article 6(1) is concerned with the composition of feed but says nothing directly about its placing on the market. Article 8(1) is concerned with the composition of feed but says nothing directly about use of additives.

2.6 Regulation 4(1) therefore purports to make it an offence for a person to contravene or fail to comply with Article 4(3), 6(1) or 8(1) of Regulation (EC) No. 767/2009, even though it is only feed, and not people, that can contravene or fail to comply with them.

2.7 The Department argues further that, as there is nothing in Regulation (EC) No. 767/2009 saying expressly and clearly on whom the obligations fall, it would undermine its effectiveness to make provision about on whom the duty falls and in what circumstances. The Committee is again unconvinced. The default assumption that courts must interpret national law, as far as possible, in the light of the wording and purpose of relevant EU law appears to be limited so as to not to impose criminal liability in unclear cases (see ECJ Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969). While that case related to a Directive, that limitation can be assumed to be equally relevant here, for Article 31 of Regulation (EC) No. 767/2009 requires Member States to lay down penalties applicable to infringements of the provisions of the Regulation and to take all measures necessary to ensure that they are implemented, and states that the penalties provided for must be effective, proportionate and dissuasive. While the Committee accepts that the express identification of liability would have called for interpretation, it does not consider that omission to identify it was in the range of reasonable options for the Department, for there can be nothing effective or dissuasive about a penalty for an offence that, at least arguably, cannot be prosecuted at all.

2.8 **The Committee accordingly reports regulation 4(1) and Schedule 1 for defective drafting, acknowledged in part by the Department.**

Instruments not reported

At its meeting on 24 November 2010 the Committee considered the Instruments set out in the Annex to this Report, none of which were required to be reported to both Houses.

○ *denotes written evidence has been submitted but not printed*

Annex

Draft Instruments requiring affirmative approval

Draft S.I.	European Union (Definition of Treaties) (Partnership and Cooperation Agreement) (Republic of Indonesia) Order 2010
○ **Draft S.I.**	Mutilations (Permitted Procedures) (England) (Amendment) Regulations 2010
Draft S.I.	Post Office Network Subsidy Scheme (Amendment) Order 2010
Draft S.I.	Road Safety (Financial Penalty Deposit) (Appropriate Amount) (Amendment) Order 2010

Instruments subject to annulment

S.I. 2010/2605	Seed Marketing Regulations 2010
S.I. 2010/2615	Housing (Codes of Management Practice) (Student Accommodation) (England) Order 2010
S.I. 2010/2659	Occupational, Personal and Stakeholder Pension Schemes (Disclosure of Information) (Amendment) Regulations 2010
S.I. 2010/2694	Copyright, Designs and Patents Act 1988 (Amendment) Regulations 2010

Instruments not subject to Parliamentary proceedings not laid before Parliament

S.I. 2010/2650	Up-rating of Basic Pension etc. (Designated Tax Year) Order 2010
S.I. 2010/2700	Police Act 1997 (Criminal Records) (Guernsey) (Amendment) Regulations 2010
S.I. 2010/2701	Police Act 1997 (Criminal Records) (Jersey) (Amendment) Regulations 2010

Appendix 1

S.I. 2010/2497: memorandum from the Home Office

Misuse of Drugs (Licence Fees) Regulations 2010 (S.I. 2010/2497)

1. This memorandum is submitted in response to a question from the Joint Committee on Statutory Instruments to the Home Office on 10 November 2010. The Committee asked:

> *Given —*
> - *section 31(4) of the Misuse of Drugs Act 1971, and*
> - *section 38(1) of that Act as it applies to —*
>   - *sections 3(2)(b) and 30 of that Act, and*
>   - *the definition of "prescribed" in section 37(1) of that Act,*
>
> *explain how regulations 2(4) and 2(5) (to the extent that it relates to regulation 2(4)) are apt for extension to Northern Ireland.*

2. The department is grateful to the Committee for bringing to its attention the extension of the Misuse of Drugs (Licence Fees) Regulations 2010 (S.I. 2010/2497) to Northern Ireland. We accept that the effect of the provisions cited in the Committee's question is that regulation 2(4) and (5) should not extend to Northern Ireland, and apologise for this oversight. We understand that the devolved Northern Ireland department (the Department of Health, Social Services and Public Safety) is the appropriate department for introducing such charges. Steps have already been taken to ensure that no charges are levied in relation to Northern Ireland after the coming into force of S.I. 2010/2497 on 15th November and we will make amending regulations at the earliest convenience.

Home Office
16th November 2010

Appendix 2

S.I. 2010/2503: memorandum from the Food Standards Agency

Animal Feed (England) Regulations 2010 (S.I. 2010/2503)

1. In its letter to the Department of 3 November 2010, the Joint Committee requested a memorandum on the following points:

(1) *Regulation 4(1) provides that any person who contravenes or fails to comply with any provision of Regulation 767/2009 specified in Schedule 1 is guilty of an offence. The provisions so specified individually include articles 11, 13(1), 13(2) & (3), 14(1) & (2), 15, 16, 17(1) & (2), 18, 19 and 20(1), which impose requirements as to labelling, but do not identify the person whose responsibility it is to ensure compliance with them. Article 12 is the provision of the Regulation which provides for this.*

Why, therefore, does Schedule 1 not specify those provisions "as read with Article 12" and omit the stand-alone reference to that article?

(2) *In addition, the provisions of Regulation 767/2009 covered by Regulation 4(1) include Articles 4(3), 6(1) and 8(1), which as read literally impose requirements on products but not on persons, and have no link to Article 12. Why is regulation 4 silent on who has the duty to comply and in what circumstances?*

2. The Department's response to each of the Committee's points is outlined below.

Point (1)—the Joint Committee raises two issues in relation to this point. First whether Schedule 1 or regulation 4 should have made it clear in relation to the various articles identified by the JCSI that they needed to be read with article 12(1) to (3) and secondly, whether article 12 should have been included in Schedule 1 as a stand alone reference.

To deal with the second issue first, article 12 of Regulation (EC) No 767/2009 contains a mixture of provisions, some of which identify who has primary responsibility for compliance with substantive requirements contained elsewhere in the Regulation (paragraphs 1, 2 and 3), and some of which in the Agency's view are stand-alone requirements (paragraphs 4 and 5). Accordingly, it is correct for Schedule 1 to include article 12 as a stand-alone reference. However, it should have been narrowed down to Article 12(4) and(5).

Turning to the second issue, the Agency agrees with the Committee that article 12(1), (2) and (3) should, in accordance with drafting practice elsewhere in Schedule 1, have been brought to the reader's attention as an "as read with" provision.

Point (2)—the Agency agrees with the Committee that articles 4(3), 6(1) and 8(1) are drafted in terms of feed. However, it is clear that article 4(3) is a provision supplementary to articles 4(1) and (2) and places obligations on feed business operators (as well as other persons placing feed on the market or using it). Article 6 is a provision that prohibits the placing on the market of feed that does not comply with the requirements of Annex III or which contains materials that are otherwise restricted or prohibited. Article 8(1) is about the use of feed additives. It would not be consistent with the purpose of the EU Regulation and it would undermine the effectiveness of the Regulation to interpret those provisions as not imposing any obligations on any person. As there is nothing in the EU Regulation saying expressly and clearly on whom the obligations fall, it would be inappropriate for the implementing regulations to make provision about on whom the duty falls and in what circumstances.

The Agency undertakes to make appropriate amendments to meet the points raised by the Committee at point (1) at the next available opportunity.

Food Standards Agency
15 November 2010