



House of Lords
House of Commons
Joint Committee on
Statutory Instruments

**Twelfth Report
of Session 2010-11**

Drawing special attention to:

*Electricity (Competitive Tenders for Offshore Transmission Licences)
Regulations 2010 (S.I. 2010/1903)*

*Visits to Former Looked After Children in Detention (England) Regulations
2010 (S.I. 2010/2797)*

*Ordered by the House of Lords to be printed
19 January 2011*

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Joint Committee on Statutory Instruments

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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*).

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Instruments reported

At its meeting on 19 January 2011 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. 2010/1903: Reported for defective drafting

Electricity (Competitive Tenders for Offshore Transmission Licences) Regulations 2010 (S.I. 2010/1903)

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

1.2 Regulation 3(1) defines the term ‘entry conditions’. Apart from the definition itself, however, the term “entry conditions” is confined to the headings. In a memorandum printed at Appendix 1, the Office of Gas and Electricity Markets says “the definition of ‘entry conditions’ is redundant in the current version of the regulations. Ofgem is grateful to the Committee for bringing this error to Ofgem’s attention and we undertake to address the point as part of the upcoming review.” The Committee notes the undertaking to correct the position as part of a review planned for 2011. **The Committee accordingly reports regulation 3(1) for defective drafting, acknowledged by the Department.**

1.3 Paragraph 3 of Schedule 1 provides that “Where the Authority considers that the developer has not met the requirements in paragraph 2(c), (d) or (e), it may deem a project to be a qualifying project for those purposes, where the Authority is satisfied that the developer will use its reasonable endeavours to meet those requirements within a reasonable time period, such period to be notified by the Authority to the developer and to be no later than 31 March 2012.” The Committee asked whether it is intended that 31 March 2012 is to be the final start date for the reasonable time period referred to, the final end date for that period or the final date for it be notified, and how that intention is achieved by the text. In its memorandum the Office of Gas and Electricity Markets says “the intention is that the 31 March 2012 date is to be the final end date for the reasonable time period referred to in the previous line. ... Ofgem considers that this intention is supported by the language of Schedule 1, paragraph 3, but recognises that the language could be clearer. Ofgem is grateful to the Committee for bringing this point to Ofgem’s attention and we undertake to address it as part of the upcoming review.” The Committee continues to think the provision unclear in its present form and is therefore pleased to note the intention to clarify it as part of the proposed review. **The Committee accordingly reports paragraph 3 of Schedule 1 for defective drafting, acknowledged to some extent by the Department.**

2 S.I. 2010/2797: Reported for defective drafting

*Visits to Former Looked After Children in Detention (England) Regulations 2010
(S.I. 2010/2797)*

2.1 The Committee draws the special attention of both Houses to these Regulations on the ground that they are defectively drafted in four related respects.

2.2 Regulation 2(1) contains a reference to the expression “youth offending team”, regulation 3 (which contains unconventionally numbered sub-divisions) refers to “young offender institution” and “secure training centre”, and regulation 6(3) refers to the “registered manager” of an institution. None of these expressions is defined either in the operative text of the instrument or in the enabling Act. Instead, in each case a footnote is inserted giving a reference to other legislation which defines or otherwise explains the intended meaning of the expression.

2.3 In a memorandum printed at Appendix 2, the Department for Education accepts that it would have been appropriate to define the expressions in the operative text of the instrument and undertakes to amend the Regulations to achieve this, and to correct the numbering in regulation 3, at the earliest suitable opportunity. The Department also accepts that three of the footnotes are themselves defective or incomplete.

2.4 The Committee accordingly reports these Regulations for defective drafting, acknowledged by the Department.

Instruments not reported

At its meeting on 19 January 2011 the Committee considered the Instruments set out in the Annex to this Report, none of which were required to be reported to both Houses.

Annex

Draft Instruments requiring affirmative approval

Draft S.I.	Investment Bank (Amendment of Definition) Order 2011
Draft S.I.	Investment Bank Special Administration Regulations 2011
Draft S.I.	Offshore Chemicals (Amendment) Regulations 2011
Draft S.I.	Offshore Petroleum Activities (Oil Pollution Prevention and Control) (Amendment) Regulations 2011
Draft S.I.	Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order 2011

Instruments subject to annulment

S.I. 2010/2861	Occupational Pensions (Revaluation) Order 2010
S.I. 2010/2868	Hydrocarbon Oil Duties (Marine Voyages Reliefs) (Amendment) Regulations 2010
S.I. 2010/2870	Marine (Scotland) Act 2010 (Consequential Provisions) Order 2010
S.I. 2010/2881	Measuring Instruments (Amendment) Regulations 2010
S.I. 2010/2910	Licensable Means of Fishing Order 2010
S.I. 2010/2919	Education (Independent Educational Provision in England) (Provision of Information) Regulations 2010
S.I. 2010/2920	Education (Independent Educational Provision in England) (Unsuitable Persons) (Amendment) Regulations 2010
S.I. 2010/2927	National Insurance Contributions (Application of Part 7 of the Finance Act 2004) (Amendment) Regulations 2010
S.I. 2010/2944	Northern Ireland Assembly (Minimum Period) Order 2010
S.I. 2010/2952	Non-Domestic Rating Contributions (England) (Amendment) Regulations 2010
S.I. 2010/2991	Flexible Working (Eligibility, Complaints and Remedies) (Amendment) Regulations 2010
S.I. 2010/2992	Royal Forest of Dean College (Dissolution) Order 2010

Instruments not subject to Parliamentary proceedings laid before Parliament

S.I. 2010/2926 Employment Rights (Increase of Limits) Order 2010

Instruments not subject to Parliamentary proceedings not laid before Parliament

S.I. 2010/2842 Legal Services Act 2007 (Commencement No. 9) Order 2010

S.I. 2010/2854 Veterinary Surgeons and Veterinary Practitioners (Registration) Regulations
Order of Council 2010

S.I. 2010/2879 Income Tax (Indexation) Order 2010

S.I. 2010/2882 Spring Traps Approval (Variation) (England) Order 2010

S.I. 2010/2906 Education and Skills Act 2008 (Commencement No. 7 and Transitory Provisions)
Order 2010

S.I. 2010/2918 Lewisham Hospital National Health Service Trust (Change of Name) Order 2010

S.I. 2010/2921 Courts Act 2003 (Commencement No. 14) Order 2010

S.I. 2010/2938 Finance Act 2009, Sections 23 and Schedule 2 (High Income Excess Relief Charge)
(Repeal) Order 2010

S.I. 2010/2988 Policing and Crime Act 2009 (Commencement No. 7) Order 2010

S.I. 2010/2989 Crime and Security Act 2010 (Commencement No. 1) Order 2010

Appendix 1

S.I. 2010/1903: memorandum from the Office of Gas and Electricity Markets

Electricity (Competitive Tenders for Offshore Transmission Licences) Regulations 2010 (S.I. 2010/1903)

1. This memorandum is submitted in response to questions from the Joint Committee on Statutory Instruments (the Committee) to the Office of Gas and Electricity Markets (Ofgem)^a on 8 December 2010 in relation to The Electricity (Competitive Tenders for Offshore Transmission Licences) Regulations 2010 (the regulations). The regulations were made by the Gas and Electricity Markets Authority (the Authority) and approved by the Secretary of State for Energy and Climate Change on 22 July 2010 under section 6C of the Electricity Act 1989 (the Act).
2. The Committee asked:
 1. *Explain why regulation 3(1) defines the term ‘entry conditions’, which (apart from the definition) is confined to the headings.*
 2. *In relation to regulations 23 and 24 explain –*
 - a) *what steps are envisaged between the preferred bidder becoming the successful bidder under regulation 23(1) and the determination by the Gas and Electricity Markets Authority to grant the successful bidder an offshore transmission licence under regulation 23(2);*
 - b) *what events might impede the reasonable practicability of confirming that determination under regulation 24(6);*
 - c) *why the steps and events in question are not referred to in either regulation 23 and 24; and*
 - d) *why the bar in regulation 24(4) on granting an offshore transmission licence expires at the end of the period specified in paragraph 24(5) rather than at the moment of that confirmation.*
 3. *In relation to Schedule 1, paragraph 3, explain –*
 - a) *whether it is intended that 31 March 2012 is to be the final start date for the reasonable time period referred to, the final end date for that period or the final date for it be notified, and*

^a The Gas and Electricity Markets Authority (the Authority) is the regulator of gas and electricity markets in Great Britain. Ofgem is the Office of Gas and Electricity Markets, which supports the Authority in performing its statutory duties and functions. Whilst the terms “Ofgem” and “the Authority” are used interchangeably in this memorandum it is the Authority which is responsible for exercising the relevant statutory powers.

b) how that intention is achieved by the text.

Review

3. Ofgem is planning to review the regulations in 2011 to reflect recent policy developments. As with the 2009 and 2010 regulations, Ofgem will work closely with the Department of Energy and Climate Change (DECC) in carrying out this review. Accordingly, Ofgem will be consulting on amendments to the regulations in the new year and as part of that process we will be able to propose appropriate amendments to reflect any recommendations made by the Committee in relation to the questions raised above.

Legal and regulatory framework

4. Under section 6C(1) of the Act, the Authority *“may by regulations make such provision as appears to it to be appropriate for facilitating the making, in prescribed cases, of a determination on a competitive basis of the person to whom an offshore transmission licence is to be granted.”*

5. Section 6C(2) sets out provisions that the regulations to be made under section 6C(1) may include. Section 6C(2) provides:

“[The regulations] may include –

...

(d) provision for regulating the manner in which applications are considered and determined.”

6. Section 6C(3) provides:

“Regulations under this section –

(a) may make provision by reference to a determination by the Authority or to the opinion of the Authority as to any matter...”

7. The tender process set out in the regulations has been designed to reflect the principles of EU procurement law, including the EU Directive 2007/66/EC (the Remedies Directive), to ensure tenders are carried out in accordance with best practice in major infrastructure procurement.

8. In addition, the regulations also recognise the industry codes and technical standards which govern the legal and commercial framework of relationships between electricity industry participants. The establishment of these codes and standards is a requirement under the Electricity Transmission Licence, which is granted by Ofgem in accordance with the Act.

Point 1

9. **With respect to point 1**, the definition of ‘entry conditions’ is redundant in the current version of the regulations. Ofgem is grateful to the Committee for bringing this error to Ofgem’s attention and we undertake to address the point as part of the upcoming review.

Point 2

10. **With respect to point 2(a)**, regulation 18(4) sets out the matters *within* the control of the preferred bidder which it must satisfy in order to become the successful bidder. There are then further steps which need to be taken under the industry codes and technical standards before Ofgem can determine that the successful bidder shall be granted an offshore transmission licence.
11. These steps involve third party arrangements which are largely *outside* of Ofgem and the successful bidder’s control and relate to interfaces which are governed by other parts of the regulatory framework, such as contractual arrangements under the industry codes between National Grid Electricity Transmission (NGET) and the developer of a qualifying project.
12. The detailed actions which will need to be taken by the parties to such arrangements will depend on a variety of factors, including the characteristics of the qualifying project, the commercial arrangements put in place by the successful bidder and the precise terms of the relevant industry codes and technical standards.
13. **With respect to point 2(b)**, regulation 24(5) reflects article 2A(2) of Directive 89/665/EC (inserted by the Remedies Directive), which is entitled ‘standstill period’ and provides:
- “A contract may not be concluded following the decision to award a contract falling within the scope of Directive 2004/18/EC before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned if fax or electronic means are used...”*
14. The purpose of this ‘standstill period’ is to allow unsuccessful bidders the opportunity to take appropriate action if they believe they have been prejudiced by a breach of requirements in making the successful bidder decision.^b The confirmation

^b See Article 2C of Directive 89/665/EC (inserted by the Remedies Directive), which provides that where an application to review an authority’s decision “*must be made before the expiry of a specified period, this period shall be at least 10 calendar days with effect from the day following the date on which the contracting authority’s decision is sent to the tenderer...*”

of the determination under regulation 24(6) can only take place *after* the standstill period set out in regulation 24(5).

15. If no notice of a potential action is received then Ofgem would expect to grant the licence shortly after the expiry of the standstill period. However, should Ofgem receive notice of potential action during this standstill period, it could impede the confirmation under regulation 24(6) until the issue has been fully considered and resolved. Regulation 24(6) reflects this by requiring Ofgem to wait until it is “*reasonably practicable*” before confirming its decision.
16. **With respect to point 2(c)**, each qualifying project will have unique characteristics which need to be addressed on an individual basis. It is impracticable for Ofgem to specify in advance each and every step which will be required to take place in all scenarios prior to Ofgem being able to grant an offshore transmission licence.
17. Further, Ofgem considers that it would not be appropriate to include such steps in the regulations. As noted above, these steps involve arrangements governed by other parts of the regulatory framework and Ofgem could inadvertently circumvent other regulatory processes (particularly in respect of industry codes and technical standards) if it attempted to specify such steps in regulation 23.
18. Similarly, if Ofgem receives a notice of potential action during the standstill period, this may have consequential effects which cannot be adequately addressed in regulation 24:
 - a. if the action is successful (at least in part) Ofgem may be required to revisit parts of the tender process before proceeding with the licence grant; and
 - b. even if the action is unsuccessful, the delay caused by the action may require the successful bidder to re-arrange certain conditions.
19. As outlined above, section 6C of the Act enables the Authority to make provision for “*regulating the manner in which applications are considered and determined*” and the regulations may “*make provision by reference to a determination by the Authority or to the opinion of the Authority as to any matter.*” Regulations 23 and 24 are consistent with these provisions.
20. **With respect to point 2(d)**, the purpose of the bar in regulation 24(4) on granting an offshore transmission licence is to ensure that Ofgem’s decision is not implemented during the standstill period, consistent with the Remedies Directive. This protects unsuccessful bidders and other interested parties who may wish to take appropriate action against the decision, therefore the bar is expressly tied to the end of the standstill period.

21. Once this standstill period has expired, Ofgem is placed under an obligation to confirm its decision “*as soon as reasonably practicable*”. This protects the successful bidder by ensuring that Ofgem carries out the necessary steps and issues the licence when appropriate.
22. Ofgem considers that the bar should expire at the end of the period specified in regulation 24(5), as this reinforces the standstill period. In any event, Ofgem will not issue an offshore transmission licence until it has fully considered any challenges and decided that it is practicable to issue the licence, in accordance with regulation 24(6).

Point 3

23. **With respect to point 3(a)** and Schedule 1, paragraph 3, the intention is that the 31 March 2012 date is to be the final end date for the reasonable time period referred to in the previous line.
24. **With respect to point 3(b)**, Ofgem considers that this intention is supported by the language of Schedule 1, paragraph 3, but recognises that the language could be clearer. Ofgem is grateful to the Committee for bringing this point to Ofgem’s attention and we undertake to address it as part of the upcoming review.

The Office of Gas and Electricity Markets
14 December 2010

Appendix 2

S.I. 2010/2797: memorandum from the Department for Education

***Visits to Former Looked After Children in Detention (England) Regulations 2010
(S.I. 2010/2797)***

The Committee has requested a memorandum on the following points:

(1) Why does the operative text of the Regulations (as opposed to footnotes) neither contain nor cross-refer to definitions of the following terms:

- (a) "youth offending team", which appears in the definition of "relevant youth offending team case manager" in regulation 2(1);*
- (b) "young offender institution", which appears in regulation 3(1)(i) (which should conventionally be 3(a));*
- (c) "secure training centre", which appears in regulation 3(1)(ii) (which should conventionally be 3(b)); and*
- (d) "registered manager", which appears in regulation 6(3)?*

The Department accepts that it would have been appropriate to define these terms in the operative text of the Regulations and will amend the Regulations accordingly at the earliest suitable opportunity.

The amending Regulations will also correct the erroneous labels given to the subparagraphs of regulation 3(1).

(2) The Committee notes that, in any event, in the footnote relating to (a) the obligation to establish a youth offending team is incompletely described, in that relating to (b) the term is inaccurately described, and in that relating to (c) the notes of amendments appear to lack some detail.

The Department accepts the points made by the Committee and will ensure the footnotes to the new definitions in the amending Regulations reflect these points.

The Department apologises for these errors.

Department for Education

7 January 2011