



House of Lords
House of Commons
Joint Committee on
Statutory Instruments

**Twenty-seventh Report
of Session 2010-12**

Drawing special attention to:

Warm Home Discount (Reconciliation) Regulations 2011 (S.I. 2011/1414)
Food Additives (England) (Amendment) (No. 2) Regulations 2011
(S.I. 2011/1456)
Civil Courts (Amendment) Order 2011 (S.I. 2011/1465)
Civil Jurisdiction and Judgments (Maintenance) Regulations 2011
(S.I. 2011/1484)

Ordered by the House of Lords to be printed
13 July 2011

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Joint Committee on Statutory Instruments

Current membership

House of Lords

Baroness Berridge (*Conservative*)
Lord Clinton-Davis (*Labour*)
Baroness Eccles of Moulton (*Conservative*)
Lord Kennedy (*Labour*)
Earl of Mar and Kellie (*Liberal Democrat*)
Lord Rees-Mogg (*Crossbench*)
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House of Commons

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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*), Jane White (*Lords Clerk*) and Jennifer Steele (*Committee Assistant*). Advisory Counsel: Peter Davis, Peter Brooksbank, Philip Davies and Daniel Greenberg (*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.

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Instruments reported

At its meeting on 13 July 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 four 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. 2011/1414: Reported for defective drafting

Warm Home Discount (Reconciliation) Regulations 2011 (S.I. 2011/1414)

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 make provision for a reconciliation mechanism for the Warm Home Discount Scheme so that the costs to electricity suppliers under the scheme are proportionate to their market share. The mechanism can involve suppliers having to make payments to the operator of the scheme in certain circumstances. Regulation 9(2) imposes one of two duties on a supplier that is given notice that it is liable to make a payment: a duty to make the payment (sub-paragraph (a)) or (if the supplier has authorised the operator to debit its bank account) a duty to ensure that the account contains sufficient funds (sub-paragraph (b)). The Committee asked the Department of Energy and Climate Change to explain the purpose of sub-paragraph (b) and to identify the sanctions for failing to comply with it.

1.3 In a memorandum printed at Appendix 1—

- in relation to purpose, the Department explains that sub-paragraph (b) was included to make it clear that a supplier using direct debit as the means of payment not only has to provide a direct debit authority but must also ensure that funds are available, and also argues that it follows regulation 9(1)(b) in distinguishing between payment (undefined) and debit authorisation, and
- in relation to sanctions, the Department points out that breach of either duty can be penalised by the making of a compliance order, or the imposition of a penalty, under the Electricity Act 1989; and that a failure to comply with sub-paragraph (b) (as well as a failure to comply with sub-paragraph (a)) will attract a liability to pay interest under regulation 12.

1.4 In fact regulation 12 imposes the liability to pay interest following failure 'to make the whole or part of a payment ... by the date on which it is due.' It does not include anything about account debit.

1.5 In consequence, the Committee regards the Regulations as inconsistent as to whether the concept of payment includes or does not include debit authorisation. Had sub-paragraph (b) of regulation 9(2) been clearly identified as a particularisation of the duty in sub-paragraph (a) as it operates in certain circumstances—an approach that would have been consistent with the structure of regulation 9(1)(b)—it would have been clear that

regulation 12 attached to the duty in sub-paragraph (b) as well as to that in sub-paragraph (a). As the text stands, there is scope for doubt on the point. It also occurs to the Committee that specific mention of direct debit mechanisms in the context of a duty to make payments might be unnecessary altogether and that therefore a possible alternative solution to the problem might lie in simplifying both paragraph (1)(b) and paragraph (2) of regulation 9 to refer only to payment (without more). **The Committee accordingly reports regulation 9(2)(b) for defective drafting.**

2 S.I. 2011/1456: Reported for defective drafting

Food Additives (England) (Amendment) (No. 2) Regulations 2011 (S.I. 2011/1456)

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 These Regulations have effect to adjust the application to lycopene of the regulatory system established by S.I.2009/3238. Regulation 4 requires reviews; and paragraph (3) of that regulation requires the report of a review to set out and assess the objectives of “the regulatory system established by these Regulations”. The Committee queried the terms of that paragraph in the light of the limited purpose of the Regulations. In a memorandum printed at Appendix 2, the Food Standards Agency states that the terms of paragraph (3) are closely based on the text of the Guidance on Sunsetting Regulations produced by the Better Regulation Executive and argues that those terms are not inappropriate, given that the Regulations establish an altered regulatory system for lycopene. The Committee considers that including in regulation 4(3) some specific reference to the regulatory system established by S.I.2009/3238 as, by virtue of the Regulations, it applies in relation to lycopene would have accurately indicated what a report of a review is required to address: the Regulations do not establish a regulatory system as such but vary the coverage of an already established regulatory system. **The Committee accordingly reports regulation 4(3) for defective drafting.**

3 S.I. 2011/1465: Reported for defective drafting

Civil Courts (Amendment) Order 2011 (S.I. 2011/1465)

3.1 The Committee draws the special attention of both Houses to this Order on the ground that it is defectively drafted in one respect.

3.2 Article 1 of the Order provides that the Order is to come into force on 4 different dates. The article specifies the courts in respect of which each of the dates is to be the commencement date. But as article 1 does not mention the county court at Workington, no commencement is provided for articles 3, 4, 5 or 8(3)(b) or (5) or the paragraph 17 inserted by article 8(6). Nor does article 1 make any provision to cover the amendments

made by article 8(2)(h) and (o) and (3)(a), which do not relate to any of the courts specified in article 1. In a memorandum printed at Appendix 3, the Ministry of Justice accepts that article 1 is defective in this respect. The Ministry acted with commendable speed to correct the defect by making an amending instrument (S.I. 2011/1609) on 30 June. **The Committee accordingly reports article 1 for defective drafting, acknowledged by the Department, and commends the Ministry for the prompt action taken to rectify the defect.**

4 S.I. 2011/1484: Reported for defective drafting

<i>Civil Jurisdiction and Judgments (Maintenance) Regulations 2011 (S.I. 2011/1484)</i>

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

4.2 These Regulations are designed to facilitate the application of a Council Regulation about the enforcement of maintenance decisions of other EU member States. Schedule 2 makes provision controlling access to information. Paragraph 4 of that Schedule creates an offence of unauthorised disclosure by “a person who ... is or has been employed by ... or ... provides or has provided services to” various public authorities. It is clear that an employee has to be an individual, while a service provider could include a body corporate, and the opening words of the paragraph refer to a “person”, which would include bodies; but the paragraph goes on to refer to “he or she”, which, at least in the context of the particular provision, appears apt only for individuals. The Committee asked the Ministry of Justice to explain the discrepancy. In a memorandum printed at Appendix 4, the Ministry explains that the intention was for the offence to apply only to individuals; they go on to “accept that the use of ‘individual’ in the introductory words would have been preferable to achieve that effect”, and they add that they “will look for an early opportunity to improve the drafting of the provision”. **The Committee accordingly reports paragraph 4 of Schedule 2 for defective drafting, acknowledged by the Department.**

Instruments not reported

At its meeting on 13 July 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.** Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) (Amendment) Order 2011
- Draft S.I.** First-tier Tribunal (Immigration and Asylum Chamber) Fees Order 2011
- Draft S.I.** Weights and Measures (Specified Quantities) (Unwrapped Bread and Intoxicating Liquor) Order 2011

Instruments subject to annulment

- S.I. 2011/1552** NHS Foundation Trusts and Primary Care Trusts (Transfer of Trust Property) Order 2011
- S.I. 2011/1553** Immigration (Passenger Transit Visa) (Amendment) Order 2011
- S.I. 2011/1554** Social Security (Exemption from Claiming Retirement Pension) Regulations 2011

Instruments not subject to Parliamentary proceedings laid before Parliament

- S.I. 2011/1609** Civil Courts (Amendment No. 2) Order 2011

Instruments not subject to Parliamentary proceedings not laid before Parliament

- S.I. 2011/1508** Wireless Telegraphy (Register) (Amendment) (No. 2) Regulations 2011
- S.I. 2011/1569** Local Democracy, Economic Development and Construction Act 2009 (Commencement No. 1) Order 2011
- S.I. 2011/1582** Local Democracy, Economic Development and Construction Act 2009 (Commencement No. 2) (England) Order 2011

Appendix 1

S.I. 2011/1414: memorandum from the Department of Energy and Climate Change

<i>Warm Home Discount (Reconciliation) Regulations 2011 (S.I. 2011/1414)</i>

1. By a letter to the Department dated 29 June 2011 the Joint Committee has requested a memorandum on the following point:

What is the purpose of the duty in regulation 9(2)(b) and what is the sanction for failure to comply with it?

2. The purpose of regulation 9(2) as a whole is to impose a duty on scheme electricity suppliers to make reconciliation payments when notified by the Operator of the reconciliation mechanism that they are due. Sub-paragraph (b) is included because it is likely that in practice suppliers will make payments by the method mentioned in it, namely by giving the Operator a continuing authority to debit reconciliation payments from their bank accounts. Its purpose is to make it clear that the duty of a supplier using this method of payment is not merely to provide a direct debit authority, but to ensure that funds are available to be debited on the date on which the Operator notifies the supplier they are due to be taken.
3. We also consider that the inclusion of regulation 9(2)(b) aids the internal consistency of the regulation, in that regulation 9(2)(a) relates to cases where a notice has been given under regulation 9(1)(b)(i) while regulation 9(2)(b) relates to cases where a notice has been given under regulation 9(1)(b)(ii).
4. The sanction for failure by a scheme electricity supplier to comply with any duty in these Regulations, including that in regulation 9(2)(b), is that the Gas and Electricity Markets Authority has power to make an order for securing compliance under section 25 of the Electricity Act 1989 or to impose a penalty under section 27A of that Act. That power arises since a duty or requirement imposed on a licence holder under section 11 of the Energy Act 2010 (the power under which these Regulations are made) is included within the definition of 'relevant requirement' in section 25(8) of the Electricity Act 1989. A scheme electricity supplier must be a holder of an electricity supply licence, by virtue of the definition of 'scheme electricity supplier' in the Warm Home Discount Regulations 2011 which is applied by regulation 2(2) of these Regulations.
5. An additional consequence of failure to comply with the duty in regulation 9(2)(b) will be liability to pay late payment interest under regulation 12.

Appendix 2

S.I. 2011/1456: memorandum from the Food Standards Agency (Department of Health)

<i>Food Additives (England) (Amendment) (No. 2) Regulations 2011 (S.I. 2011/1456)</i>
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1. In its letter of 29th June 2011, the Joint Committee requested a memorandum on the following point:

Why does regulation 4(3) require the report of a review of regulation 2 to set out and consider the objectives of “the regulatory system established by these Regulations”, given that the only substantive effect of the Regulations (made by regulation 2) is to adjust the application to lycopene of the regulatory system established by S.I.2009/3238?

2. The Food Standards Agency’s response to the Committee’s point is outlined below.
3. As the Committee is probably aware, the wording of regulation 4 is closely based on the text set out in Annex C to the Guidance on Sunsetting Regulations issued to all central Government Departments by the Better Regulation Executive in March this year.

It appeared to the Agency when considering to what extent if any the text in Annex C should be adapted that the phrase “regulatory system established by these Regulations” was designed to be given a broad construction.

The regulatory system in question in this case is the EU control of food additives as a whole, which in the case of lycopene is enforced in England by S.I. 2009/3238 as now amended by S.I. 2011/1456. What the Agency intends to be reviewed at the end of the five year period is the regulatory system for controlling the use of lycopene in the form established by the amendments made to S.I. 2009/3238 by S.I. 2011/1456. Put another way, by amending the principal instrument, S.I. 2011/1456 establishes an altered regulatory system and that system to the extent that it has been altered will form the subject of the review.

Food Standards Agency
1st July 2011

Appendix 3

S.I. 2011/1465: memorandum from the Ministry of Justice

Civil Courts (Amendment) Order 2011 (S.I. 2011/1465)

1. In its letter to the Ministry dated 29th June 2011 the Joint Committee requested a memorandum on the following point:

What is the intended commencement of articles 3, 4, 5 and 8(2)(h) and (o), (3), (5) and (6) and how is that intention achieved?

2. The intended commencement date of the articles in question is 4th July 2011. The Ministry recognises that the commencement provision is defective and has laid an amending order to remedy this. This will be provided free to purchasers of S.I. 2011/1465, in accordance with S.I. practice.
3. The Ministry apologises for this error and for the need to breach the 21 day period when laying the correcting instrument so that it could come into force before the relevant commencement date. We appreciate the timeliness of the Committee's memorandum which enabled us to take correcting action speedily.

Ministry of Justice
5 July 2011

Appendix 4

S.I. 2011/1484: memorandum from the Ministry of Justice

Civil Jurisdiction and Judgments (Maintenance) Regulations 2011 (S.I. 2011/1484)

1. By a letter dated 29 June 2011, the Committee sought a memorandum on the following points:

(1) *In relation to paragraph 4(1) of Schedule 2—*

- (a) *is it intended that a body corporate might be a person falling within paragraph (b);*
- (b) *if it is, why do the full-out words refer to “he or she”; and*
- (c) *if not, why do the introductory words include “person” rather than “individual”?*

(2) *Explain the purpose and effect of the exception provided for by paragraph 4(3) of Schedule 2.*

2. The Ministry of Justice's response to the Committee's queries is set out below.
3. Paragraph 4(1) of Schedule 2 deals with the criminal offence of wrongful disclosure of information provided to designated Central Authorities under the requirements of the EU Maintenance Regulation 4/2009 and these Regulations. It was intended that it would be the individuals making wrongful disclosure, rather than bodies corporate, who should be subject to the offence. We accept that the use of "individual" in the introductory words would have been preferable to achieve that effect—"person" has been used in reliance upon section 19 of the Commissioners for Revenue and Customs Act 2005, on which this offence has been modelled. We will look for an early opportunity to improve the drafting of this provision.
4. The purpose of the exception in paragraph 4(3) of Schedule 2 is to ensure that the criminal offence in paragraph 4(1) in relation to those employed by, or providing services to, a Central Authority applies only where an equivalent offence exists for the employees of the departments from which information has been provided.
5. There is no equivalent offence of wrongful disclosure by employees of the three departments listed in paragraph 4(3)(a); and in relation to paragraph (3)(b), the equivalent offence does not relate to information held for the purposes of employment and training only. In relation to information provided from those sources, it was not thought appropriate to impose criminal liability in relation to activity which would not attract that liability in the hands of the disclosing body.

Ministry of Justice
5 July 2011