House of Lords
House of Commons
Joint Committee on Statutory Instruments

Ninth Report of Session 2012-13

Drawing special attention to:

Sustainable Communities Regulations 2012 **(S.I. 2012/1523)**
Plant Protection Products (Sustainable Use) Regulations 2012 **(S.I. 2012/1657)**
Green Deal (Disclosure) Regulations 2012 **(S.I. 2012/1660)**
Green Deal (Acknowledgment) Regulations 2012 **(S.I. 2012/1661)**
Pension Protection Fund (Miscellaneous Amendments) Regulations 2012 **(S.I. 2012/1688)**
Criminal Procedure Rules 2012 **(S.I. 2012/1726)**
Merchant Shipping (Accident Reporting and Investigation) Regulations 2012 **(S.I. 2012/1743)**
Consumer Credit (Total Charge for Credit) (Amendment) Regulations 2012 **(S.I. 2012/1745)**
Al-Qaida (United Nations Measures) (Overseas Territories) Order 2012 **(S.I. 2012/1757)**
Serious Organised Crime and Police Act 2005 (Designated Sites under Section 128) (Amendment) Order 2012 **(S.I. 2012/1769)**
National Insurance Contributions (Application of Part 7 of the Finance Act 2004) Regulations 2012 **(S.I. 2012/1868)**
National Health Service (Pharmaceutical Services) Regulations 2012 **(S.I. 2012/1909)**
Human Medicines Regulations 2012 **(S.I. 2012/1916)**

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Joint Committee on Statutory Instruments

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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 Charlotte Littleboy (*Commons Clerk*), Jane White (*Lords Clerk*) and Liz Booth (*Committee Assistant*). Advisory Counsel: Peter Davis, Peter Brooksbank, Philip Davies and Daniel Greenberg (*Commons)*; Allan Roberts, Nicholas Beach and Peter Milledge *(Lords)*.

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Contents

Report

Instruments reported

At its meeting on 31 October 2012 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 12 of those considered. The Instruments and the grounds for reporting them are given below. The relevant Departmental memoranda are published as the appendices to this report.

1 S.I. 2012/1523: Reported for unexpected use of the enabling power

Sustainable Communities Regulations 2012 (S.I. 2012/1523)

1.1 **The Committee draws the special attention of both Houses to these Regulations on the grounds that there is a doubt whether they are *intra vires* in one respect and that they make an unexpected use of the enabling power in a related respect.**

1.2 The Regulations govern the process for dealing with sustainability proposals submitted by local authorities in response to an invitation issued by the Secretary of State under section 5A of the Sustainable Communities Act 2007.

1.3 Regulation 5 requires the Secretary of State to appoint a person to whom rejected proposals may be submitted by a local authority. The Committee asked the Department for Communities and Local Government to identify the *vires* for regulation 5, having regard, in particular, to the facts that regulation 5(1) imposes a duty and that regulation 5(3) appears to create an appeal or further reference mechanism.

1.4 In a memorandum printed at Appendix 1, the Department asserts that "section 5B(3)(g) and (h) of the Sustainable Communities Act 2007 together with the generality of section 5B(1) and the power to make incidental and supplementary provision in section 5D(1) is sufficient *vires* for regulation 5".

1.5 Section 5B(3)(g) allows regulations to enable the Secretary of State to appoint a person to advise, while section 5B(3)(h) allows regulations to enable the Secretary of State to "specify one or more persons who must be consulted, and with whom the Secretary of State must try to reach agreement, before making a decision in relation to a proposal". Neither of these provisions in terms allows regulations to require (as opposed to permit) the appointment of such a person or to provide for the person so appointed to be involved in reconsideration of the Secretary of State's decision after it has been made.

1.6 As to regulation 5(3), the Department in its memorandum asserts that it "does not provide for an appeal mechanism" but is "a mechanism which will enable local authorities to ask the Secretary of State to reconsider his decision in cases where the selector considers that the proposals should be re-submitted to the Secretary of State for re-consideration". The Department adds that "regulation 5(3) either falls within the generality of section 5B(1) or is incidental and supplementary provision to the role of the selector as set out in regulation 5 and 6".

1.7 The Committee accepts that section 5B(1) is a general power to make regulations "about proposals", and that section 5B(3), which lists particular provisions that the regulations may make, is expressly non-exhaustive. In accordance with the normal rule that general powers have to be construed in the light of specific provisions, however, and in the context of a highly specific list in section 5B(3) which focuses entirely on the process before a decision is made, the Committee doubts whether either the specific or the general provisions of this section are sufficient to cover the creation of what amounts, in effect, to a right of statutory appeal after a decision has been made. If it is not covered by the general power in section 5B(1) or the specific powers in section 5B(3), the residual powers for supplementary provision would equally not appear to be sufficient.

1.8 The Committee also asked the Department to explain why no time limit for reference to the appointed person was provided for. In its memorandum the Department says "A policy decision was made not to place any time limit on a local authority submitting a proposal to the selector [the term used for the appointed person], so as to provide as much flexibility as possible". Clearly, in so far as an appeal or further reference mechanism is consistent with the enabling power, flexibility on timing is a reasonable aim, and in any event falls within the area of policy and so is not a matter of concern to the Committee. However in the Committee's view it is so unlikely that such a provision would be regarded as unlimited in time that the result is not so much flexibility as uncertainty. As the Regulations stand it will be difficult or impossible for local authorities and others to know at what point the decision is to be taken as final.

1.9 The Committee observes that, at the cost of possible elaboration of the drafting, the flaws that it perceives could be rectified, largely without parting company from the Department's apparent aims, by introducing a structure empowering (but not requiring) the Secretary of State to appoint an equivalent of the selector and introducing a form of notifications of decisions that the Secretary of State was minded to take, with scope for reference to the person in question (if appointed) within a time limit, before the provisional decision so notified crystallised into a final one.

1.10 **The Committee accordingly reports regulation 5 on the grounds that there is doubt whether it is *intra vires* and that (in so far as the *vires* exist) it makes an unexpected use of the enabling power.**

2 S.I. 2012/1657: Reported for requiring elucidation

Plant Protection Products (Sustainable Use) Regulations 2012 (S.I. 2012/1657)

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

2.2 The Regulations, which are made under section 2(2) of the European Communities Act 1972, are stated in the Explanatory Note to transpose Directive 2009/128/EC of the European Parliament and of the Council establishing a framework for Community action to achieve the sustainable use of pesticides. Regulation 8(1) requires people using plant protection products authorised for professional use to hold a certificate or to work under supervision. Regulation 8(3) (as read with regulation 8(4)) postpones, in certain circumstances, the application of that requirement in respect of people born on or before

31st December 1964. The Committee asked the Department for Environment, Food and Rural Affairs to identify the authority in EU law for the United Kingdom to include regulation 8(3). In a memorandum printed at Appendix 2, the Department explains: (a) that the postponement is designed to preserve an existing exemption under the domestic legislation replaced by the Directive which these Regulations implement; and (b) that the date chosen for the end of the postponement does not go beyond the latest date consistent with the requirements of the Directive, which come into force at different times.

2.3 The provisions of the Directive cited in the memorandum (Articles 5 and 6(2)) do not immediately appear consistent on the surface with the Department's approach, for Article 5 is expressed as relating to use and does not provide scope for the postponement, while Article 6 (which does) is expressed as relating to sales to those without certificates. However the Committee accepts that it is sufficiently difficult to reconcile those Articles with each other that the Department's interpretation is a permissible one. In any event there cannot be an issue of *vires*, for at worst the transposition is incomplete. **The Committee accordingly reports the Regulations as requiring the elucidation provided by the Department's memorandum.**

3 S.I. 2012/1660 and 1661: Reported for failure to comply with accepted legislative practice

Green Deal (Disclosure) Regulations 2012 (S.I. 2012/1660)

Green Deal (Acknowledgment) Regulations 2012 (S.I. 2012/1661)

3.1 **The Committee draws the special attention of both Houses to these two sets of Regulations on the ground that they fail to comply with accepted legislative practice.**

3.2 These two sets of Regulations are part of a set of measures which establish the green deal energy efficiency scheme using powers conferred by Chapter 1 of Part 1 of the Energy Act 2011.

3.3 Both Regulations include cross-references to another instrument laid in draft and not yet approved at the time when these sets of Regulations were made. In its 22nd Report for Session 2010-2012 the Committee reported the Immigration and Nationality (Cost Recovery Fees) Regulations 2011 (S.I 2011/790) on the grounds, in part, that "the Committee considers it conceptually incomplete for instruments to be made which refer to other legislation which does not exist, and would discourage Departments from doing so." The Committee therefore asked the Department of Energy and Climate Change why the combined Explanatory Memorandum for these Regulations indicated that there were no matters of interest to the Committee, having regard to the Committee's Report on S.I. 2011/790.

3.4 In a memorandum printed at Appendix 3, the Department accepts that the issue should have been mentioned in the Explanatory Memorandum, correctly apologises for the failure to do so and proceeds to explain why the decision was taken to refer to the draft instrument despite the reservations expressed in the Committee's earlier Report. In essence, these two sets of Regulations are part of a series of instruments, subject to different forms of scrutiny procedure, and the Department argues that if these sets of Regulations

had not referred to the draft instrument, the draft instrument would have had to refer to these sets of Regulations (at a time when they were neither made nor published in draft). The Department acknowledges that this could have been avoided, but suggests that any method of avoiding it would have involved additional complexity overall. In addition, the affirmative instrument was in fact approved in draft; in consequence it was made and came into force in time for the references to work at the time these two sets of Regulations came into force.

3.5 The Committee notes that the Department accepts that it could have been possible to find other ways (albeit more complicated) around the problem; in any event, the undesirability of legislating in a way that appears to take it for granted that draft instruments will be approved by Parliament is such that the Committee believes that it should be avoided even at the risk of additional complexity. More significantly, reference in a draft affirmative instrument to negative instruments not yet made is not similarly flawed. In such circumstances the Explanatory Memorandum can be used to set out or append the text of the negative instruments planned and indicate an intention to make them, if the draft affirmative instrument comes to be approved. **The Committee accordingly reports these two sets of Regulations for failure to comply with accepted legislative practice.**

4 S.I. 2012/1688: Reported for doubt as to whether they are *intra vires*

Pension Protection Fund (Miscellaneous Amendments) Regulations 2012 (S.I. 2012/1688)

4.1 **The Committee draws the special attention of both Houses to these Regulations on the ground that there appears to be a doubt as to whether they are *intra vires*.**

4.2 The Regulations make amendments in existing secondary legislation relating to the Pension Protection Fund.

4.3 The preamble to the Regulations cites among the powers in reliance on which the Regulations are made section 213(1) and (2)(b) of the Pensions Act 2004 ("the 2004 Act"). Regulation 7 of the Regulations appears to the Committee to have been made in reliance on that power. Section 316(2)(h) of the 2004 Act provides that "a statutory instrument which contains regulations under section 213" of that Act cannot be made unless a draft has been laid before, and approved by a resolution of, each House of Parliament. The Regulations were laid before Parliament after being made without, so far as the Committee was aware, any draft having been so laid.

4.4 The Committee therefore asked the Department of Work and Pensions why, given section 316(2)(h) of the 2004 Act, the Regulations contain (in regulation 7) provision made by virtue of section 213 of the 2004 Act without a draft having been laid before, and approved by a resolution of, each House of Parliament.

4.5 In a memorandum printed at Appendix 4, the Department acknowledges that the provision made by virtue of section 213 should not have been included without a draft of the Regulations having been laid before, and approved by a resolution of, each House of Parliament. It goes on to say that it intends to correct the mistake as soon as possible.

4.6 The Committee considers that the terms of section 316(2)(h) of the 2004 Act mean that the failure to lay a draft of the instrument containing the Regulations taints the whole of the Regulations and raises a real issue whether they are *intra vires*. It therefore considers that the Department should either re-make the instrument as a draft for approval by each House or (alternatively) sever the instrument into two and lay as a draft for approval the portions made in reliance on section 213 and as a made instrument the remainder (which would be subject to the negative parliamentary procedure). Given the scope for argument on the point, the Committee considers in addition that it would be desirable for any follow-up action not to take the nullity of these Regulations for granted; in particular provision should be included to ensure that (in case the amendments made by these Regulations are efficacious) they are revoked immediately before any re-made amendments take effect.

4.7 **The Committee accordingly reports the Regulations on the ground that there appears to be a doubt as to whether they are *intra vires*.**

5 S.I. 2012/1726: Reported for requiring elucidation

Criminal Procedure Rules 2012 (S.I. 2012/1726)

5.1 **The Committee draws the special attention of both Houses to these Rules on the ground that they require elucidation in one respect.**

5.2 The Rules consolidate the Criminal Procedure Rules 2011 (S.I. 2011/1709) with amendments made by S.I. 2011/3075 and with further amendments.

5.3 In a number of places the Rules use the word "will" rather than a word implying obligation. In its 31st Report for Session 2010-12 the Committee reported that usage in S.I. 2011/1709 as a failure to comply with proper drafting practice.

5.4 The Explanatory Memorandum produced for the Rules by the Ministry of Justice indicates at paragraph 3.4 that the practice (as operated in S.I. 2011/1709) of including provisions indicating expectation rather than an indication of what is required was maintained "for the time being" in these Rules, and that the Rule Committee plans to continue to reflect on the Committee's observations on that practice in the course of its continuing review of the Rules.

5.5 Having regard to the repeated use of this form of drafting in these Rules and its continued use in other rules of court, the Committee asked the Department whether the need to co-ordinate an approach to the JCSI's observations with the makers of other court rules was a factor in maintaining the practice and, if so, when it is expected that any such co-ordination exercise will be completed or discontinued.

5.6 In a memorandum printed at Appendix 5, the Department confirmed that the issue is being considered in consultation between the Criminal Procedure Rule Committee, the Civil Procedure Rule Committee and the Family Procedure Rule Committee, to be completed before the planned Criminal Procedure Rules 2013 are made next June, so as to adopt a consistent and principled approach to the Committee's observations. The Committee accepts that this is a matter which the Rule Committees need time to address in co-ordination and therefore, in the period envisaged for completion of the co-ordination

exercise, does not expect to comment on this usage in reports on individual court rules (although the issue might feature in any more general Report of the Committee). **The Committee accordingly reports the Rules as requiring the elucidation provided in the Department's memorandum.**

6 S.I. 2012/1743: Reported for defective drafting

Merchant Shipping (Accident Reporting and Investigation) Regulations 2012 (S.I. 2012/1743)

6.1 **The Committee draws the special attention of both Houses to these Regulations on the ground that their accompanying Explanatory Memorandum is defectively drafted in one repeated respect.**

6.2 The Regulations implement the provisions of Directive 2009/18/EC of the European Parliament and of the Council of 23rd April 2009 establishing the fundamental principles governing the investigation of accidents in the maritime transport sector. Paragraph 3.4 of the Explanatory Memorandum produced by the Department for Transport and published together with the Regulations asserts that they will lapse unless reviewed within 5 years. The Committee asked the Department to explain that assertion, in the absence of any provision to that effect in the Regulations. In a memorandum printed at Appendix 6, the Department accepts that the statement in the Explanatory Memorandum is wrong and undertakes to correct it together with a parallel statement elsewhere in the memorandum, which it has correctly pointed out. **The Committee accordingly reports the Regulations on the grounds that their accompanying Explanatory Memorandum is defectively drafted, as acknowledged by the Department.**

7 S.I. 2012/1745: Reported for failure to comply with proper drafting practice

Consumer Credit (Total Charge for Credit) (Amendment) Regulations 2012 (S.I. 2012/1745)

7.1 **The Committee draws the special attention of both Houses to these Regulations on the ground that they fail to comply with proper drafting practice in one respect.**

7.2 The Regulations implement Directive 2011/90/EU amending Part II of Annex I to Directive 2008/48/EC of the European Parliament and of the Council by amending provisions of the Consumer Credit (Total Charge for Credit) Regulations 2010 (S.I. 2010/1011) which set out assumptions for the purposes of calculating the total charge for credit and the annual percentage rate of charge.

7.3 Regulation 4 substitutes a new regulation 6 in S.I. 2010/1011; the new regulation 6 contains a number of paragraphs numbered sequentially, except for the inclusion of a paragraph (fa). The Committee asked the Department for Business, Innovation and Skills why paragraph (fa) was added as part of a consolidated regulation rather than inserted alone as an amendment.

7.4 In a memorandum printed at Appendix 7, the Department explains that, for the purpose of implementing the EU obligations to which these amending Regulations relate,

the Department identified that "the following amendments had to be made to regulation 6: paragraph (j) required minor amendment, paragraphs (k) to (n) had to be replaced, paragraphs (p) and (q) had to be deleted, and to ensure the [text] read logically and followed as closely as possible the order of the new Directive annex, an existing paragraph (paragraph (i)) needed to be moved between paragraphs (f) and (g)." The Department adds: "Given the number of changes required to regulation 6, we concluded that rather than do this by way of a series of stand alone amendments, it would be clearer to the reader to substitute regulation 6 in its entirety. Having decided this, it was clear that the new provision (fa) needed to be part of that consolidated regulation 6." The Department further explains that it did consider renumbering the paragraphs sequentially, but that "our aim, when transposing the Annex of Directive 2011/90/EU, was to make as few amendments to SI 2010/1011 as possible, given that business was familiar with the structure and paragraph lettering of SI 2010/1011 and indeed referred to parts of regulation 6 in its marketing literature and credit agreements. To minimise the burden on credit providers, we therefore thought it preferable to maintain the current lettering of the paragraphs, which could be done by labelling this provision as (fa)."

7.5 The Committee accepts that the Department had a number of considerations to take into account and that its choice was driven by a desire to help the principal target audience, commends the Department for highlighting its choice in its original Explanatory Memorandum as a matter of interest to the Committee and is persuaded that the end result is justified.

7.6 However, the Committee is not convinced that the mechanism by which the end result was achieved was correct. As far as the Committee is aware the introduction of a consolidated provision without standard sequential numbering and lettering is not used in primary legislation and, although the Committee does not rule out the possibility of a compelling case being made for it, a reason for resisting it is the difficulty of defining, other than randomly, the boundary of acceptability. Furthermore the Committee has accepted in a number of instruments the possibility of including provisions of no legal effect provided that they are so presented (for example as italicised notes in parallel brackets) as to make it clear that they are not intended to be part of the operative text; a similar device could have been used here to include the consolidated version of regulation 6 at the end of individual amendments. Another possibility might have been inclusion of the consolidated text in the Explanatory Note. It follows that it would have been possible to present the consolidated version in full without inconsistency with standard practice for drafting amendments. **The Committee accordingly reports regulation 4 for failure to comply with proper drafting practice.**

8 S.I. 2012/1757: Reported for defective drafting

Al-Qaida (United Nations Measures) (Overseas Territories) Order 2012 (S.I. 2012/1757)

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

8.2 This Order makes provision in relation to overseas territories for giving effect to decisions of the United Nations Security Council in relation to persons associated with Al-Qaida. The Afghanistan (United Nations Measures) (Overseas Territories) Order 2012 (S.I.

2012/1758) makes parallel provision for giving effect to decisions of the United Nations Security Council in relation to Afghanistan.

8.3 Both Orders impose prohibitions on making funds available. Article 19 of each Order provides exceptions from the prohibitions. Paragraph (1)(b) excepts a person who credits a frozen account with payments made pursuant to a requirement which arose before the account became a frozen account. Paragraph (2) excepts a relevant institution which credits a frozen account where it receives funds transferred to the account.

8.4 Article 22(3) of this Order requires a relevant institution to inform the Governor of the territory concerned when it credits an account in accordance with article 19(2). Article 22(3) of S.I. 2012/1758 requires a relevant institution to inform the Governor of the territory concerned when it credits an account in accordance with either article 19(1)(b) or article 19(2).

8.5 The Committee asked the Foreign and Commonwealth Office to explain this apparent inconsistency given that the Orders are otherwise of parallel effect. In a memorandum printed at Appendix 8, the Department accepts that the omission of a reference to article 19(1)(b) in article 22(3) of this Order is "a regrettable oversight" which it undertakes to amend at the next appropriate opportunity.

8.6 **The Committee accordingly reports article 22(3) for defective drafting, acknowledged by the Department.**

9 S.I. 2012/1769: Reported for defective drafting

Serious Organised Crime and Police Act 2005 (Designated Sites under Section 128) (Amendment) Order 2012 (S.I. 2012/1769)

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

9.2 The Order amends the Serious Organised Crime and Police Act 2005 (Designated Sites under Section 128) Order (S.I. 2007/930) with the intention of adding part of the site of Kensington Palace to the list of sites designated under section 128 of Serious Organised Crime and Police Act 2005. A person who enters a site designated under that section as a trespasser commits a criminal offence.

9.3 Paragraph (1) of article 2 of S.I. 2007/930 provides that six named sites and (in sub-paragraph (g)) "the sites described in paragraphs (2) to (11)" are designated for the purposes of section 128. The Order adds to article 2 a paragraph (12) describing part of Kensington Palace. But it does not amend paragraph (1)(g) to add a reference to the new paragraph (12).

9.4 The Committee asked the Home Office to explain why, given that paragraph (1) of article 2 contains the substantive proposition of law about the sites referred to in that article, the Order does not amend sub-paragraph (g) of paragraph (1) to include a reference to the new paragraph (12).

9.5 In a memorandum printed at Appendix 9, the Department accepts that article 2(1)(g) should have been amended. The Department states that it intends to rectify the error as

soon as possible and, because the error leaves uncertainty about the status of the site specified in paragraph (12) as a designated site, intends to bring into force the instrument making the correction on the day after it is laid, even though that would involve a breach of the 21-day rule. The Committee is grateful for the Department's reaction to its having pointed out the error and is content that, assuming the correcting provision comes to be made expeditiously, it is justified to bring it into force as soon as practicable after it is made.

9.6 **The Committee accordingly reports article 2 for defective drafting, acknowledged by the Department.**

10 S.I. 2012/1868: Reported for defective drafting and failure to comply with proper drafting practice

National Insurance Contributions (Application of Part 7 of the Finance Act 2004) Regulations 2012 (S.I. 2012/1868)

10.1 **The Committee draws the special attention of both Houses to these Regulations on the ground that they are defectively drafted in one respect and fail to comply with proper drafting practice in two related respects.**

10.2 The Regulations make for national insurance contributions provision corresponding to that made by, and by regulations under, Part 7 of the Finance Act 2004 in relation to tax. That Part concerns arrangements and proposals for arrangements for avoidance. The Regulations replace and revoke previous regulations made in 2007.

10.3 Regulation 4(2) is a transitional provision. It states "Anything begun under or for the purpose of any regulations revoked by these Regulations shall be construed under or, as the case may be, for the purpose of the corresponding provision of these Regulations." The Committee was puzzled by the presence of the word "construed" and wondered whether it was meant to be "continued".

10.4 The Committee was, however, also concerned that (if "construed" were indeed a typographical error for "continued") regulation 4(2) appeared to add little or nothing to sections 16, 17 and 23 of the Interpretation Act 1978. Section 16 provides, among other things, that a repeal of an enactment does not prevent any investigation, legal proceeding or remedy being continued as if the repeal had not been made. Section 17 provides, among other things, that, where an Act makes a repeal and substitutes provisions for the repealed enactment, any reference to the repealed provision is to be construed as a reference to the re-enacted provision. Section 23 ensures that the Act applies to subordinate legislation for material purposes in the same manner as it applies to Acts.

10.5 Regulation 4(3) is also a transitional provision. It states "Where any document refers to a provision of a regulation revoked by these Regulations, such reference shall, unless the context otherwise requires, be construed as a reference to the corresponding provision of these Regulations." Again, the Committee wondered what (if anything) it added to sections 17 and 23 of the Interpretation Act 1978.

10.6 The Committee accordingly asked Her Majesty's Revenue and Customs to explain whether, in regulation 4(2), "construed" is a misprint for "continued" and—

(a) if not, to explain the intended effect of that provision and how effect is given to that intention, and

(b) if so, to explain (by example) what the provision achieves beyond what is achieved by sections 16, 17 and 23 of the Interpretation Act 1978.

The Committee also asked for an explanation (by example) of what regulation 4(3) achieves beyond what is achieved by sections 17 and 23 of the Interpretation Act 1978.

10.7 In a memorandum printed at Appendix 10, the Department accepts that, in regulation 4(2), "construed" should read "continued", apologises for the error and undertakes to make arrangements for its correction. It also accepts that regulation 4(2) and (3) are intended to achieve no more than the Interpretation Act 1978. The Department states that its intention in including them in the Regulations was to emphasise the application of the transitional provision made by them in the sensitive area of disclosure of tax avoidance arrangements. It proposes to leave them in place for the time being on the ground that they cause no confusion and will become spent in due course and the Committee does not take issue with that; additionally, given the explanation above, it regards the alteration of "construed" to "continued" as sufficiently small scale and obvious as to justify a correction slip, if that is the Department's preferred approach.

10.8 The Committee nonetheless expects to see the practice changed if the Regulations come to be revoked and remade. It considers that it is undesirable that an instrument should contain provision intended to be of identical effect to provisions of general application. Occasionally a transitional provision included in a particular instrument, or indeed an Act, has some effect different from (and normally wider than) the provisions implied by the Interpretation Act 1978. In cases where the enabling power covers transition, it is plainly acceptable to include such a different provision. But where a provision is intended to add nothing to the provisions so implied it is otiose and therefore undesirable. It is the Committee's view that, where what is achieved by sections 16, 17 and 23 matches what is intended, proper drafting practice is to rely on the operation of those provisions, which can - if a Department wishes - be drawn to attention in the Explanatory Note or a referential footnote.

10.9 **The Committee accordingly reports regulation 4(2) for defective drafting, acknowledged by the Department and regulation 4(2) and (3) for failure to comply with proper drafting practice, acknowledged in part by the Department.**

11 S.I. 2012/1909: Reported for defective drafting

National Health Service (Pharmaceutical Services) Regulations 2012 (S.I. 2012/1909)

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

11.2 The Regulations govern the arrangements in England for the provision of pharmaceutical services under the National Health Service Act 2006 ("the 2006 Act").

11.3 Regulation 18 imposes a duty on a Primary Care Trust that has received a routine application (a term that covers applications for inclusion on a pharmaceutical list, for opening additional or relocating pharmaceutical premises or for providing additional pharmaceutical services in particular circumstances). It is a duty to have regard to a number of specified matters when determining whether it is satisfied that granting the application would secure improvements, or better access, to pharmaceutical services.

11.4 The Committee had some difficulty in trying to work out what are the particular circumstances in which the duty applies. Paragraph (1) of regulation 18 reads as follows—

> "*(1) If a Primary Care Trust receives a routine application and is required to determine whether the Primary Care Trust is satisfied that granting it, or granting it in respect of some only of the services specified in it, would secure improvements, or better access—*
>
> > *(a) to pharmaceutical services, or pharmaceutical services of a specified type, in its area; but*
> > *(b) the improvements or better access that would be secured were or were not included in its pharmaceutical needs assessment in accordance with paragraph 4 of Schedule 1,*
>
> *in determining whether it is satisfied as mentioned in section 129(2B) of the 2006 Act (regulations as to pharmaceutical services), the Primary Care Trust must have regard to the matters set out in paragraph (2).*"

11.5 The Committee asked the Department of Health to explain, in the light of the paragraphing employed in regulation 18(1), what is intended by that provision and how effect is given to that intention.

11.6 In a memorandum printed at Appendix 11, the Department accepts that the paragraphing employed in regulation 18(1) is confusing and suggests that paragraph (a) should have begun after the opening word "If" with the "but" between the paragraphs then becoming "and". The Committee agrees that that would be a significant improvement. The Department intends to replace the provision with one along those lines when, in early 2013, it re-makes the Regulations with amendments to reflect changes made by the Health and Social Care Act 2012.

11.7 **The Committee accordingly reports regulation 18(1) for defective drafting, acknowledged by the Department.**

12 S.I. 2012/1916: Reported for defective drafting

Human Medicines Regulations 2012 (S.I. 2012/1916)

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

12.2 These Regulations consolidate the law of the United Kingdom concerning medicinal products for human use.

12.3 Regulation 3(9)(a), as read with other provisions in regulation 3, provides that the Regulations do not apply to certain cases satisfying the condition that a "medicinal product is not manufactured or, as the case may be, assembled (a) on a large scale; or (b) by an industrial process". The Committee asked the Department of Health to explain what is intended to be achieved by the inclusion of regulation 3(9)(a), and why so apparently imprecise a term as "large scale" has been used. In a memorandum printed at Appendix 12, the Department explains that the effect of Article 2(1) of Directive 2001/83/EC is that the Directive does not apply to products which are neither "prepared industrially" nor "manufactured by a method involving an industrial process". The Department asserts that regulation 3(9) has to be read in that context, and "closes a possible loophole whereby e.g. a clinic might look to attract lots of patients for the single mumps vaccine and then look to manufacture the product on a large scale for the patients of that clinic". The Department argues that "large scale" is not imprecise in the particular context of regulation 3 and "is to be given its ordinary meaning in the context of Article 2(1) of the Directive". The Department adds that "the Medicines and Healthcare products Regulatory Agency would only look to enforce this provision in the circumstances envisaged by Article 2(1) of the Directive – where the production ceases to be for a limited number of patients but takes place on an industrial / large scale". In the Committee's opinion this is a case in which the drafter's attempt to use words other than the language of the Directive leads the reader to an unnecessary uncertainty which, as the Department demonstrates, can be resolved only by having recourse to the Directive. Reference to industrial production, for example, would have been no less clear as a matter of natural English usage than "large scale", and would have established a clearer link to the Directive, as would cross-reference to the Directive. Although the choice of "copy-out", cross-reference and elaboration is often a difficult one for Departments to make, the fact that the Department argues that the regulation can be understood easily but only by reference to the Directive suggests that the wrong choice was made in this particular case; **accordingly the Committee reports regulation 3(9)(a) for defective drafting.**

12.4 Part 9 of the Regulations deals with determination by the licensing authority whether a "borderline" product is in fact a medicinal product. Regulation 165 provides that "nothing in this Part prevents the licensing authority from determining that a product is a medicinal product without following the procedures in this Part when it thinks it appropriate". The Committee asked the Department to identify the source of the licensing authority's power, protected by regulation 165, to determine that a product is a medicinal product and, should it be claimed that the licensing authority can rely on regulation 165 alone to determine that a product is a medicinal product, to explain how Part 9 can be enforced in relation to such a product, given that the offences in regulation 166 appear not to apply. In its memorandum the Department explains that "there is no direct source in EU law for Part 9 or specifically regulation 165. The determination as to whether a product is a medicinal product is just a necessary step when it comes to eg enforcing Article 6(1) of Directive 2001/83 (the requirement that a medicinal product must have a licence before being placed on the market). Regulation 165 clarifies that a formal determination under Part 9 is not necessary wherever the licensing authority consider that a product is a medicinal product. This covers the situation where for example an unlicensed product represents a risk to public health (eg where the lengthy formal determination process would hinder the protection of public health) or where similar products have already been through the determination process and have been classified as medicines (so the question

of status has already been decided)." The Department adds that "the offences in regulation 166 are not needed in a case where regulation 165 applies. This is because enforcement is carried out under other provisions. For instance, if a product is placed on the market without a licence in breach of Article 6(1) of Directive 2001/83, there would be an offence under regulation 47 of SI 2012/1916."

12.5 The Committee accepts that the offences in regulation 166 are not needed but is unconvinced by the examples that what the licensing authority is doing counts as a determination. The term "medicinal product" appears to be defined in regulation 2(1) on the basis of product presentation or function. It follows that, in the examples in question, the role of the licensing authority is technically one of argument rather than determination for, in any court proceedings relating to a product that followed, the question whether it counted as a medicinal product would be a matter for the court alone to decide. What the Department appears to be seeking to achieve is security that use of Part 9 is never to be taken as an essential preliminary to other action that the licensing authority might take under or by reference to the Regulations. The Committee does not rule out the possibility that a provision to achieve that might be needed for avoidance of doubt, but considers that the particular provision drafted overstates the role of the licensing authority. **The Committee accordingly reports regulation 165 for defective drafting.**

Instruments not reported

At its meeting on 31 October 2012 the Committee considered the Instruments set out in the Annex to this Report, none of which were required to be reported to both Houses.

A memorandum from the Foreign and Commonwealth Office in connection with the Pitcairn (Court of Appeal) Order 2012 (S.I. 2012/1761) is printed at Appendix 13.

Annex

Instruments to which the Committee does not draw the special attention of both Houses

- *denotes that the written evidence submitted in connection with the instrument is printed with this Report*

Draft Instruments requiring affirmative approval

Draft S.I.	Producer Responsibility Obligations (Packaging Waste) (Amendment) Regulations 2012
Draft S.I.	Housing Act 1996 (Additional Preference for Armed Forces) (England) Regulations 2012
Draft S.I.	Public Bodies (Water Supply and Water Quality Fees) Order 2012
Draft S.I.	Scotland Act 1998 (Modification of Schedule 5) Order 2013
Draft S.I.	Disabled People's Right to Control (Pilot Scheme) (England) (Amendment) Regulations 2012

Instruments subject to annulment

S.I. 2012/1758	Afghanistan (United Nations Measures) (Overseas Territories) Order 2012
• **S.I. 2012/1761**	Pitcairn (Court of Appeal) Order 2012
S.I. 2012/1914	Hinkley Point Harbour Empowerment Order 2012
S.I. 2012/1915	Health and Social Care Act 2008 (Consequential Amendments) (Council Tax) Order 2012
S.I. 2012/2067	Prosecution of Offences Act 1985 (Specified Proceedings) (Amendment No. 2) Order 2012
S.I. 2012/2257	Town and Country Planning (General Permitted Development) (Amendment) (No. 2) (England) Order 2012
S.I. 2012/2262	European Communities (Iron and Steel Employees Re-adaptation Benefits Scheme) (No. 2) (Revocation) Regulations 2012

S.I. 2012/2263 Cosmetic Products (Safety) (Amendment) Regulations 2012

S.I. 2012/2264 Insolvency Practitioners and Insolvency Services Account (Fees) (Amendment) Order 2012

S.I. 2012/2268 Feed-in Tarriffs (Specified Maximum Capacity and Functions) (Amendment No. 3) Order 2012

S.I. 2012/2269 Local Authorities (Capital Finance and Accounting) (England) (Amendment) (No. 4) Regulations 2012

S.I. 2012/2270 Teachers' Pensions (Amendment) (No. 2) Regulations 2012

S.I. 2012/2273 National Health Service (Primary Dental Services) (Amendments Related to Units of Dental Activity) Regulations 2012

S.I. 2012/2275 Planning (Listed Buildings and Conservation Areas) (Amendment) (England) Regulations 2012

S.I. 2012/2280 Social Fund Cold Weather Payments (General) Amendment Regulations 2012

S.I. 2012/2281 Smoke Control Areas (Authorised Fuels) (England) (No. 2) Regulations 2012

S.I. 2012/2282 Smoke Control Areas (Exempted Fireplaces) (England) (No. 2) Order 2012

S.I. 2012/2283 Scallop Fishing (England) Order 2012

S.I. 2012/2290 Licensing Act 2003 (Forms and Notices) (Amendment) Regulations 2012

S.I. 2012/2298 Money Laundering (Amendment) Regulations 2012

S.I. 2012/2299 Terrorism Act 2000 and Proceeds of Crime Act 2002 (Business in the Regulated Sector) (No. 2) Order 2012

S.I. 2012/2300 European Economic Interest Grouping and European Public Limited-Liability Company (Fees) Revocation Regulations 2012

S.I. 2012/2301 Companies and Limited Liability Partnerships (Accounts and Audit Exemptions and Change of Accounting Framework) Regulations 2012

S.I. 2012/2320 Controlled Waste (England and Wales) (Amendment) Regulations 2012

S.I. 2012/2336 National Assistance (Assessment of Resources) Amendment (England) Regulations 2012

S.I. 2012/2371 National Health Service (Pharmaceutical Services) Regulations 2012 (Amendment) Regulations 2012

S.I. 2012/2372 Town and Country Planning (Control of Advertisements) (England) (Amendment) Regulations 2012

S.I. 2012/2379 Social Fund Cold Weather Payments (General) Amendment (No. 2) Regulations 2012

S.I. 2012/2380 Child Support (Northern Ireland Reciprocal Arrangements) Amendment Regulations 2012

S.I. 2012/2394 Misuse of Drugs (Supply to Addicts) (Amendment) Regulations 2012

S.I. 2012/2413 Transfer of Undertakings (Protection of Employment) (RCUK Shared Services Centre Limited) Regulations 2012

S.I. 2012/2414 Electricity and Gas (Competitive Tenders for Smart Meter Communication Licences) Regulations 2012

S.I. 2012/2463 Early Years Foundation Stage (Exemptions from Learning and Development Requirements) (Amendment) Regulations 2012

S.I. 2012/2479 Elected Local Policing Bodies (Specified Information) (Amendment) Order 2012

S.I. 2012/2488 Local Authority (Duty to Secure Early Years Provision Free of Charge) Regulations 2012

S.I. 2012/2505 Police and Criminal Evidence Act 1984 (Armed Forces) (Amendment) Order 2012

S.I. 2012/2524 Syria (European Union Financial Sanctions) (Amendment No. 2) Regulations 2012

S.I. 2012/2546 Medicines (Products for Human Use) (Fees) (Amendment) Regulations 2012

S.I. 2012/2550 Late Night Levy (Expenses, Exemptions and Reductions) Regulations 2012

S.I. 2012/2553 Police and Crime Commissioner Elections (Declaration of Acceptance of Office) Order 2012

S.I. 2012/2567 Motor Fuel (Composition and Content) (Amendment) Regulations 2012

Instruments not subject to Parliamentary proceedings not laid before Parliament

S.I. 2012/2213 Education Act 2011 (Commencement No. 5) Order 2012

S.I. 2012/2265 Designation of Schools Having a Religious Character (Independent Schools) (England) (No. 2) Order 2012

S.I. 2012/2317 Shropshire Community National Health Service Trust (Establishment) Amendment Order 2012

S.I. 2012/2373 Police and Justice Act 2006 (Commencement No. 15) Order 2012

S.I. 2012/2374 Coroners and Justice Act 2009 (Commencement No. 10) Order 2012

S.I. 2012/2378 Police and Crime Commissioner Elections (Local Returning Officers' and Police Area Returning Officers' Charges) Order 2012

S.I. 2012/2405 Accounting Standards (Prescribed Bodies) (United States of America and Japan) Regulations 2012

S.I. 2012/2412 Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No. 2 and Specification of Commencement Date) Order 2012

S.I. 2012/2420 Localism Act 2011 (Commencement No. 1) (England) Order 2012

S.I. 2012/2480 Pensions Act 2008 (Commencement No. 14 and Supplementary Provisions) Order 2012

S.I. 2012/2521 Protection of Freedoms Act 2012 (Commencement No. 4) Order 2012

S.I. 2012/2523 Child Maintenance and Other Payments Act 2008 (Commencement No. 9) and the Welfare Reform Act 2009 (Commencement No. 9) Order 2012

S.I. 2012/2530 Welfare Reform Act 2012 (Commencement No. 4) Order 2012

S.I. 2012/2574 Criminal Justice Act 2003 (Commencement No. 29 and Saving Provisions) Order 2012

Appendix 1

S.I. 2012/1523: memorandum from the Department for Communities and Local Government

Sustainable Communities Regulations 2012 (S.I. 2012/1523)

1. The Committee has requested a memorandum on the following points:

(1) Identify the vires for regulation 5 having regard, in particular, to—
(a) the fact that regulation 5(1) imposes a duty, and
(b) the fact that regulation 5(3) appears to create some kind of appeal or further reference mechanism.
(2) Where regulation 5(3) applies, explain why no time limit for reference to the selector is provided for.

2. Our view is that section 5B(3)(g) and (h) of the Sustainable Communities Act 2007 together with the generality of section 5B(1) and the power to make incidental and supplementary provision in section 5D(1) is sufficient vires for regulation 5. Section 5B(3)(g) provides that regulations may enable the Secretary of State to appoint one or more persons to advise the Secretary of State in relation to proposals, or to prepare a short list of proposals for consideration by the Secretary of State. This is, in effect, the role of the selector as set out in regulation 5. Section 5B(3)(g) does not provide for a duty to appoint such a person but section 5B(3)(h) enables the Secretary of State to specify one or more persons who must be consulted, and with whom the Secretary of State must try to reach agreement, before making a decision in relation to a proposal. Regulation 6 provides that the Secretary of State must consult and try to reach agreement with the selector. Given that regulation 6 specifies the selector as the person who must be consulted and with whom the Secretary of State must try to reach agreement, our view is that imposing a duty on the Secretary of State is an appropriate use of either the generality of the power to make regulations in section 5B(1) or the power to make incidental and supplementary provision.

3. Regulation 5(3) does not provide for an appeal mechanism. The Regulations provide a mechanism which will enable local authorities to ask the Secretary of State to reconsider his decision in cases where the selector considers that the proposals should be re-submitted to the Secretary of State for re-consideration. In our view, regulation 5(3) either falls within the generality of section 5B(1) or is incidental and supplementary provision to the role of the selector as set out in regulation 5 and 6.

4. A policy decision was made not to place any time limit on a local authority submitting a proposal to the selector, so as to provide as much flexibility as possible.

Department for Communities and Local Government
23 October 2012

Appendix 2

S.I. 2012/1657: memorandum from the Department for Environment, Food and Rural Affairs

Plant Protection Products (Sustainable Use) Regulations 2012 (S.I. 2012/1657)

1. The Committee has asked the Department for Environment, Food and Rural Affairs for a memorandum on the following point:

   Identify the authority in EU law for the United Kingdom to include regulation 8(3).

2. Directive 2009/128/EC ("the Directive"), which imposes obligations on the UK as a Member State, establishes a framework for Community action to achieve the sustainable use of pesticides (referred to in UK domestic legislation as "plant protection products").

3. Article 5 of the Directive requires Member States to ensure that professional users, distributors and advisors have access to training, and to ensure that certification systems are established by 26th November 2013. Certificates issued pursuant to those systems will provide evidence of sufficient knowledge of plant protection product use and associated risks and hazards, such knowledge having been acquired by training or by other means. Article 6(2) of the Directive requires sales of plant protection products authorised for professional use to be restricted to persons holding a certificate from 26th November 2015.

4. Previously the UK operated a domestic regime to regulate, among other things, the use of plant protection products, as set out in the Plant Protection Products (Basic Conditions) Regulations 1997 (S.I. 1997/189)("the Basic Conditions Regulations"). The Basic Conditions Regulations required any person using a plant protection product authorised for agricultural use to hold a certificate of competence. However, any person born on or before 31st December 1964 was exempted from that requirement by paragraph 8 of Schedule 3.

5. Regulation 32(3)(a) of the 2012 Regulations revokes the Basic Conditions Regulations, because the Directive effectively replaced the existing domestic regime. However, related to the implementation of the Directive was the issue of how to facilitate transition from the existing domestic regime, particularly as regards those persons born on or before 31st December 1964 who had the benefit of the exemption from holding a certificate of competence. Regulation 8(3) of the 2012 Regulations is a transitional provision which provides for the continuation of that exemption until 25th November 2015, that being the day before the requirement takes effect restricting sales of plant protection products authorised for professional use to persons holding a certificate.

6. Section 2(2)(b) of the European Communities Act 1972 enables provisions to be made for the purpose of "dealing with matters arising *out of or related to*" the implementation of an EU obligation of the UK [emphasis added]. The provision in regulation 8(3) was inserted using that power, since it relates to the transition from the domestic regime under the Basic Conditions Regulations to the Community scheme under the Directive, as implemented by the remainder of the 2012 Regulations.

Department for Environment, Food and Rural Affairs
22 October 2012

Appendix 3

S.I. 2012/1660 and 1661: memorandum from the Department of Energy and Climate Change

Green Deal (Disclosure) Regulations 2012 (S.I. 2012/1660)

Green Deal (Acknowledgment) Regulations 2012 (S.I. 2012/1661)

1. This memorandum relates to S.I. 2012/1660 (Green Deal (Disclosure) Regulations 2012) and S.I. 2012/1661(Green Deal (Acknowledgment) Regulations 2012) (together referred to as "**the Disclosure and Acknowledgment Instruments**").

2. It responds to the Committee's request (in its letter of 17 October 2012) for the Department of Energy and Climate Change ("**DECC**") to provide a memorandum on the following point:

   "*Given that the reference to the Framework Regulations in both these instruments is inconsistent with the approach taken by the Committee to S.I. 2011/790 in its 22nd Report for the previous Session, explain why the combined Explanatory Memorandum indicates that there are no matters of interest to the Committee.*"

3. DECC acknowledges that, in light of the approach taken by the Committee to S.I. 2011/790 in its 22nd Report of Session 2010-2012, the different approach taken by DECC in this case should have been brought to the Committee's attention in the combined Explanatory Memorandum for the Disclosure and Acknowledgment Instruments. DECC apologises for this oversight. No discourtesy was intended.

4. DECC acknowledges the Committee's view that it considers it conceptually incomplete for instruments to be made which refer to legislation which does not exist and that it discourages Departments from taking this approach. The remainder of this memorandum sets out the reasoning behind DECC's course of action.

5. As the Committee will be aware, the Disclosure and Acknowledgment Instruments are part of a suite of legislation which establishes the Green Deal energy efficiency scheme. The main set of regulations, the Green Deal Framework (Disclosure, Acknowledgment, Redress, etc.) Regulations 2012 (S.I 2012/2079) ("**the Framework Regulations**"), which were subject to the affirmative procedure, were laid before Parliament in draft on 11 June and debated in Parliament on 2 July 2012 (House of Commons) and 23 July 2012 (House of Lords) and subsequently approved by both Houses. They were made on 6 August 2012, with some provisions coming into force on 7 August 2012, and the remainder coming into force on either 1 October 2012 or 28 January 2013.

6. The Disclosure and Acknowledgment Instruments were made on 26 June 2012 and laid before Parliament on 27 June 2012. They come into force on 28 January 2013.

7. In addition to the Disclosure and Acknowledgment Instruments referring to the Framework Regulations, the Framework Regulations also make reference to the Disclosure and Acknowledgment Instruments. Accordingly, if DECC had delayed making the Disclosure and Acknowledgment Instruments until after the affirmative Framework Regulations had been made, the Framework Regulations would have made reference to two negative instruments that did not yet exist.

8. At the time the Disclosure and Acknowledgment Instruments were made, DECC was focussed on ensuring that the full suite of Green Deal legislation was before Parliament to assist with its consideration of the Framework Regulations, particularly given the complexity of the Green Deal scheme. In hindsight, DECC acknowledges that it may have been possible to avoid or mitigate the impact of this conceptual issue by, for example, including provision in the Disclosure and Acknowledgment Instruments to make the coming into force of those Instruments contingent on the Framework Regulations being made, or by making all of the instruments on the same day. Alternatively, DECC may have

been able to delete the relevant provisions in the Framework Regulations and/or the Disclosure and Acknowledgment Instruments and enact them in separate instruments. However, this option would have required additional statutory instruments to be made which would have added further complexity to what is already a complex suite of legislation and would have been difficult to achieve in practice.

9. DECC apologises for any discourtesy to Parliament that its course of action may have caused and assures the Committee that none was intended. DECC would also like to assure the Committee that no presumption was made regarding Parliament's consideration of the Framework Regulations. Had the Framework Regulations not been approved, an amendment would have been made to the Disclosure and Acknowledgment Instruments before they came into force on 28 January 2013 to resolve this matter.

Department for Energy and Climate Change
23 October 2012

Appendix 4

S.I. 2012/1688: memorandum from the Department for Work and Pensions

Pension Protection Fund (Miscellaneous Amendments) Regulations 2012 (S.I. 2012/1688)

1. In its letter to the Department of 17th October 2012, the Joint Committee requested a memorandum on the following point:

   Explain why, given section 316(2)(h) of the Pensions Act 2004, the Regulations contain (in regulation 7) provision made by virtue of section 213 of that Act (cited in the preamble) without a draft of the Regulations having been laid before, and approved by a resolution of, each House of Parliament.

2. The Department's response to the Committee's point is set out below.

3. The Department acknowledges with regret that the provision made by virtue of section 213 of the Pensions Act 2004 should not have been included without a draft of these Regulations having been laid before, and approved by a resolution of, each House of Parliament. The Department apologises for this error. The Department is grateful to the Committee for highlighting this, and intends to correct the mistake as soon as possible.

Department for Work and Pensions
23 October 2012

Appendix 5

S.I. 2012/1726: memorandum from the Ministry of Justice

Criminal Procedure Rules 2012 (S.I. 2012/1726)

1. The Committee has requested a memorandum on the following point:

Given—

(a) the indication, in paragraph 3.4 of the Explanatory Memorandum, that—

(i) the practice (as operated in S.I. 2011/1709) of including provisions indicating expectation rather than an indication of what is required has been maintained "for the time being" in these Rules, and

(ii) the makers of the Rules plan to continue to reflect on the Committee's observations on that practice in the course of its continuing review of the Rules, and

(b) the fact that there are other Court Rules in force where that practice is operated,

explain whether any plan to seek to co-ordinate an approach to the JCSI's observations with the makers of those other Court Rules has been a factor in maintaining the practice and, if so, when it is expected that any such co-ordination exercise will be completed or discontinued.

2. Yes, it has. It is expected that consultation by the Criminal Procedure Rule Committee with the Civil Procedure Rule Committee and the Family Procedure Rule Committee will be completed before the planned Criminal Procedure Rules 2013 are made next June.

3. The Committee's observations on the Criminal Procedure Rules 2011 in its Thirty-first Report of Session 2010-12, published on 8th November, 2011, were discussed by the Criminal Procedure Rule Committee at its meetings in December, 2011, and in May, June and July, 2012. The meeting in June was attended by advisers to the JCSI, to whom the Rule Committee and the Ministry of Justice are most grateful. The Rule Committee takes the Committee's observations very seriously indeed and wishes to adopt a consistent and principled approach to those observations. The contexts within which all three Procedure Rule Committees function are broadly similar, though with some significant differences. Consultation with the Civil Procedure Rule Committee and the Family Procedure Rule Committee is clearly appropriate: not least in the light of the Committee's observations on the Civil Procedure (Amendment No.

4) Rules 2011 in its Forty-first Report of Session 2010-12, published on 6th March, 2012.

Ministry of Justice
23 October 2012

Appendix 6

S.I. 2012/1743: memorandum from the Department for Transport

Merchant Shipping (Accident Reporting and Investigation) Regulations 2012 (S.I. 2012/1743)

1. By a letter dated 17th October 2012, the Joint Committee on Statutory Instruments requested a memorandum on the following:

> *"Given the statement in paragraph 3.4 of the Explanatory Memorandum (the heading to section 3 of which unusually refers to stakeholders rather than the Committee) that the instrument will lapse unless reviewed within 5 years, explain the apparent absence of any provision to that effect in regulation 20."*

2. The statement in paragraph 3.4 of the Explanatory Memorandum is wrong. As the Committee rightly suggests, regulation 20 makes provision for the review of the Regulations but does not make provision for the Regulations to lapse. The Explanatory Note, at (u), correctly sets out the position:

   "[The Regulations] require the Secretary of State to review the operation and effect of these Regulations and lay a report before Parliament within five years after they come into force and within every five years after that. Following a review it will fall to the Secretary of State to consider whether the Regulations should remain as they are, or be revoked or be amended. A further instrument would be needed to revoke the Regulations or to amend them".

3. Paragraph 12.1 of the Explanatory Memorandum is also wrong because it suggests the Regulations will lapse if the Regulations are not reviewed.

4. The Department apologises for the error and thanks the Committee for drawing it to the Department's attention. The Department will take steps to correct the Explanatory Memorandum.

Department for Transport
23 October 2012

Appendix 7

S.I. 2012/1745: memorandum from the Department for Business, Innovation and Skills

Consumer Credit (Total Charge for Credit) (Amendment) Regulations 2012 (S.I. 2012/1745)

Question asked:
"*Explain why new paragraph (fa) of regulation 6 of S.I. 2010/1011 was added as part of a consolidated regulation rather than inserted alone as an amendment*"

To answer your question we have explained below:

(a) why we transposed article 1 of Directive 2011/90/EU by way of a consolidated regulation 6; and

(b) why we used the lettering (fa).

If we have misunderstood your question, or the memorandum does not clarify the position sufficiently, please let us know.

Background

1. Article 1 of Directive 2011/90/EU Amending Part II to Annex I to Directive 2008/48/EC of the European Parliament and of the Council providing Additional Assumptions for the Calculation of the Annual Percentage Rate of Charge provides that its Annex replaces Part II of Annex I of Directive 2008/48/EC on Credit Agreements for Consumers (the "Consumer Credit Directive").

2. Part II of Annex I of the Consumer Credit Directive had been transposed into domestic legislation by regulation 6 of The Consumer Credit (Total Charge for Credit) Regulations 2010 (SI 2010/1011).

3. The Annex of Directive 2011/90/EU contains 11 paragraphs. Some of these paragraphs are identical to paragraphs found in Part II of Annex I of the Consumer Credit Directive, but other paragraphs replace those in the Consumer Credit Directive.

4. We identified that to transpose the Annex, the following amendments had to be made to regulation 6: paragraph (j) required minor amendment, paragraphs (k) to (n) had to be replaced, paragraphs (p) and (q) had to be deleted, and to ensure the annex read logically and followed as closely as possible the order of the new Directive annex, an existing paragraph (paragraph (i)) needed to be moved between paragraphs (f) and (g).

Reason for substituting regulation 6 in its entirety

5. Given the number of changes required to regulation 6, we concluded that rather than do this by way of a series of stand alone amendments, it would be clearer to the reader to substitute regulation 6 in its entirety. Having decided this, it was clear that the new provision (fa) needed to be part of that consolidated regulation 6.

Reason for lettering the paragraph (fa)

6. We did consider relettering the paragraphs sequentially, such that the provision that is now lettered (fa) would have become paragraph (g). However, as explained in paragraph 3.2 of the Explanatory Memorandum to SI 2012/1745, that would have resulted in changes to the lettering of the subsequent paragraphs of regulation 6. This in turn would have necessitated consequential amendments to the Consumer Credit (Advertisements) Regulations 2010 (SI 2010/1012), the Consumer Credit (Disclosure of Information) Regulations (SI 2010/1013), and the Consumer Credit (Agreements) Regulations 2010 (SI 2010/1014) to update cross-references to these paragraphs.

7. Our aim, when transposing the Annex of Directive 2011/90/EU, was to make as few amendments to SI 2010/1011 as possible, given that business was familiar with the structure and paragraph lettering of SI 2010/1011 and indeed referred to parts of regulation 6 in its marketing literature and credit agreements. To minimise the burden on credit providers, we therefore thought it preferable to maintain the current lettering of the paragraphs, which could be done by labelling this provision as (fa).

Department for Business, Innovation and Skills
22 October 2012

Appendix 8

S.I. 2012/1757: memorandum from the Foreign and Commonwealth Office

Al-Qaida (United Nations Measures) (Overseas Territories) Order 2012 (S.I. 2012/1757)

1. The Committee considered the above instrument at its meeting on 17 October 2012 and asked for a memorandum on the following point:

> *Explain why there is an inconsistency between article 22(3) of S.I. 2012/1757 (which does not refer to article 19(1)(b) of that instrument) and article 22(3) of S.I. 2012/1758 (which does refer to article 19(1)(b) of that instrument) given that they are otherwise of parallel effect.*

2. The omission of a reference to article 19(1)(b) in article 22(3) of S.I. 2012/1757 was a regrettable oversight. The Order will be amended at the next appropriate opportunity.

Foreign and Commonwealth Office
22 October 2012

Appendix 9

S.I. 2012/1769: memorandum from the Home Office

Serious Organised Crime and Police Act 2005 (Designated Sites under Section 128) (Amendment) Order 2012 (S.I. 2012/1769)

1. The purpose of this Memorandum is to respond to the following question raised by the Committee which was relayed in your letter of 17 October 2012:

> *"Explain why, given that paragraph (1) of article 2 of S.I. 2007/930 contains the substantive proposition of law about the sites referred to in that article, the Order does not amend sub-paragraph (g) of that paragraph to include a reference to the new paragraph (12), which is inserted in that article by the Order and adds to that article a reference to another site."*

2. The Department accepts that article 2(1)(g) should have been amended to include a reference to the new paragraph (12). The Department is grateful to the JSCI for pointing out this drafting omission and apologies for the oversight.

3. The Department will endeavour to rectify this drafting oversight as soon as possible. Indeed, as we shall explain again in our Explanatory Memorandum, it is considered necessary on this occasion to breach the 21 day rule so that the statutory instrument correcting the drafting oversight comes into force the day after it has been laid. The Department's reasons for breaching the 21 day rule are as follows:

> *The intended effect of S.I 2012/1769 is to designate a particular site under section 128 of the Serious Organised Crime and Police Act 2005, with the consequence that anyone who enters such the site as a trespasser commits a criminal offence under section 128(1) of that Act. At present, due to the drafting oversight highlighted by the Committee, there is serious doubt both in law and in the public's mind as to whether the site mentioned in paragraph (12) is designated. It is essential that the Order is corrected as soon as possible so that the general public are clear about what behaviour is subject to criminal sanction.*

From the perspective of the protection of the site itself from trespass, it is important to correct the drafting omission as soon as possible to ensure that there is a criminal sanction for trespass of the site. A policy decision has already been made that such a sanction (and resultant power of arrest given to the police) is a necessary and effective deterrent to potential trespassers.

Once again, we are grateful to the Committee for pointing out this drafting omission.

Home Office
23 October 2012

Appendix 10

S.I. 2012/1868: memorandum from HM Revenue and Customs

National Insurance Contributions (Application of Part 7 of the Finance Act 2004) Regulations 2012 (S.I. 2012/1868)

1. The Joint Committee has requested a memorandum to be submitted on the following points—

"(1) Explain whether, in regulation 4(2), "construed" is a misprint for "continued" and—

(a) if not, explain the intended effect of that provision and how effect is given to that intention, and
(b) if so, explain (by example) what the provision achieves beyond what is achieved by sections 16, 17 and 23 of the Interpretation Act 1978.

(2) Explain (by example) what regulation 4(3) achieves beyond what is achieved by sections 17 and 23 of the Interpretation Act 1978."

2. The Department accepts that, in regulation 4(2) "construed" is a mistake and should have read "continued". The Department apologises for this error and will make arrangements for its correction.

3. The Department also accepts that the provisions in regulations 4(2) and 4(3) do not achieve anything beyond what is achieved by sections 16, 17 and 23 of the Interpretation Act 1978. Regulations 4(2) and 4(3) were inserted so that the continuity provisions were included within the consolidating instrument. The Statutory Instrument relates to disclosure of tax avoidance arrangements. The Department was concerned to avoid any possible suggestion that there is

uncertainty about the application of these Regulations or repealed provisions that might lead to promoters or users of tax avoidance arrangements delaying or not complying with provisions of the Regulations. Regulations 4(2) and 4(3) only apply to cases which are already in progress so will become spent in due course.

4. The Department does not believe that regulations 4(2) and 4(3) will cause any confusion. The Department is therefore very grateful to the Joint Committee for pointing this out on this occasion but considers that in this case, the provisions are best left in place.

HM Revenue and Customs (on behalf of HM Treasury)
23 October 2012

Appendix 11

S.I. 2012/1909: memorandum from the Department of Health

National Health Service (Pharmaceutical Services) Regulations 2012 (S.I. 2012/1909)

1. In its letter to the Department of 17th October 2012, the Joint Committee requested a memorandum on the following point:

   Explain, in the light of the paragraphing employed in regulation 18(1), what is intended by that provision and how effect is given to that intention.

2. The Department's response to the Committee's point is set out below.

3. The Department accepts that the paragraphing employed in regulation 18(1) is confusing. The Department's intention is to remake these Regulations in early 2013 with revisions as part of the implementation programme for the Health and Social Care Act 2012. It will revise regulation 18(1) as part of that process.

4. The intention of regulation 18(1) is to establish a type of application that will need to be determined having regard to the matters set out in regulation 18(2). The applications in question are "routine applications" (a term defined in regulation 12) for the provision of pharmaceutical services, or pharmaceutical services of a specified type, which offer to secure improvements, or better access, to pharmaceutical services in the area of the Primary Care Trust to which the application is made.

5. Generally, routine applications have to be based on needs, improvements or better access identified in the Primary Care Trust's pharmaceutical needs assessment (which is, in effect, its local plan for the provision of pharmaceutical services). However, by virtue of regulation 18, a routine application will be possible in relation to improvements or better access not identified in the Primary Care Trust's pharmaceutical needs assessment, in the circumstances set out in regulation 18(2)(b) – but subject to the remaining provisions of that regulation and regulation 19.

6. In the Department's view, regulation 18(1) would have been more clearly structured as follows:

(1)If—

(a) a Primary Care Trust receives a routine application and is required to determine whether it is satisfied that granting the application, or granting it in respect of some only of the services specified in it, would secure improvements or better access to pharmaceutical services, or pharmaceutical services of a specified type, in its area; and

(b) the improvements or better access that would be secured were or was not included in its pharmaceutical needs assessment in accordance with paragraph 4 of Schedule 1,

in determining whether it is satisfied as mentioned in section 129(2B) of the 2006 Act (regulations as to pharmaceutical services), the Primary Care Trust must have regard to the matters set out in paragraph (2).

7. The Department's intention is to revise regulation 18(1) along these lines (but taking account also of the abolition of Primary Care Trusts) in the set of Regulations mentioned in paragraph 3 above.

Department of Health
23 October 2012

Appendix 12

S.I. 2012/1916: memorandum from the Department of Health

Human Medicines Regulations 2012 (S.I. 2012/1916)

1. In its letter to the Department of 17th October 2012, the Joint Committee requested a memorandum on the following points:

(1) Explain what is intended to be achieved by the inclusion of regulation 3(9)(a), and why so apparently imprecise a term as "large scale" has been used.
(2) Identify the source of the licensing authority power, protected by regulation 165, to determine that a product is a medicinal product.
(3) If it is claimed in response to question (2) that the licensing authority can rely on regulation 165 alone to determine that a product is a medicinal product, explain how Part 9 can be enforced in relation to such a product, given that the offences in regulation 166 appear not to apply.

2. The Department's response to the Committee's points is set out below.

(1) The effect of Article 2(1) of Directive 2001/83 is that the provisions of that Directive do not apply to products which are neither "prepared industrially" nor "manufactured by a method involving an industrial process". For present purposes that means that a manufacturing licence is unnecessary for the purposes of the Directive for the manufacture or assembly of such products.

Regulation 3(4) and (5) therefore exempts from the requirement for a manufacturing licence products manufactured or assembled by doctors, dentists, nurses or midwives provided the criteria in regulation 3(8) and (9) are met. The criterion in regulation 3(8) is that the medicinal product manufactured by one of those clinicians is supplied to a patient in the course of treatment of that patient or, where the product is manufactured by a doctor or dentist, to a patient of another doctor or dentist who is a member of the same medical or dental practice.

Regulation 3(9) has to be read in that context. It closes a possible loophole whereby eg a clinic might look to attract lots of patients for the single mumps vaccine and then look to manufacture the product on a large scale for the patients of that clinic. Regulation 3(9) closes that potential loophole. It is considered that "large scale" is not imprecise in the particular context of regulation 3(4), (5), (8) and (9) which are about manufacture by doctors, dentists etc. The intention of regulation 3(4) and (5) is to cover inherently small scale production. The expression "large scale" is to be given its ordinary meaning in the context of Article 2(1) of the Directive. The Medicines and Healthcare products Regulatory Agency would only look to enforce this provision in the circumstances envisaged by Article 2(1) of the Directive – where the production ceases to be for a limited number of patients but takes place on an industrial / large scale.

(2) Regulation 165 derives from, and replicates, regulation 3A(7) of SI 1994/3144. Regulation 3A was inserted by S.I. 2000/292. There is no direct source in EU law for Part 9 or specifically regulation 165. The determination as to whether a product is a medicinal product is just a necessary step when it comes to eg enforcing Article 6(1) of Directive 2001/83 (the requirement that a medicinal product must have a licence before being placed on the market).

Regulation 165 clarifies that a formal determination under Part 9 is not necessary wherever the licensing authority consider that a product is a medicinal product. This

covers the situation where for example an unlicensed product represents a risk to public health (eg where the lengthy formal determination process would hinder the protection of public health) or where similar products have already been through the determination process and have been classified as medicines (so the question of status has already been decided).

(3) The offences in regulation 166 are not needed in a case where regulation 165 applies. This is because enforcement is carried out under other provisions. For instance, if a product is placed on the market without a licence in breach of Article 6(1) of Directive 2001/83, there would be an offence under regulation 47 of SI 2012/1916.

Department of Health
23 October 2012

Appendix 13

S.I. 2012/1761: memorandum from the Foreign and Commonwealth Office

Pitcairn (Court of Appeal) Order 2012 (S.I. 2012/1761)

1. The Committee considered the above instrument at its meeting on 17 October and requested a memorandum on the following point:

   Explain the steps in the reasoning process that led to the conclusion that the retrospective validation of appointments effected by article 3 was intra vires.

2. Judges of the Court of Appeal of Pitcairn are appointed in accordance with section 52(1) of the Constitution of Pitcairn set out in Schedule 2 to the Pitcairn Constitution Order 2010. This requires the Governor to appoint the judges on instruction from Her Majesty given through a Secretary of State.

3. Doubts had arisen about whether the Governor of Pitcairn complied with the Constitution of Pitcairn in appointing three judges of the Pitcairn Court of Appeal. It was therefore necessary to remove those doubts by validating the appointments and any acts done by these judges in purported exercise of their offices. The appropriate remedial mechanism was by Order in Council.

4. The Pitcairn (Court of Appeal) Order 2012 was made under the British Settlements Acts 1887 and 1945. The powers provided by these Acts have been held by the Court of Appeal to be plenary powers, and to be exercisable

retrospectively: Sabally and N'Jie v Attorney General [1965] 1 QB 273, CA. See Halsbury's Laws of England, Vol. 13 (2009) 5th Edition, British Overseas Territories, para 807 footnote 11.

Foreign and Commonwealth Office
22 October 2012