



House of Lords
House of Commons
Joint Committee on
Statutory Instruments

**Twentieth Report
of Session 2014-15**

Drawing special attention to:

Rent Officers (Housing Benefit and Universal Credit Functions) (Local Housing Allowance Amendments) Order 2014 (S.I. 2014/3126)

Export Control (Sudan, South Sudan and Central African Republic Sanctions) Regulations 2014 (S.I. 2014/3258)

Common Agricultural Policy (Control and Enforcement, Cross-Compliance, Scrutiny of Transactions and Appeals) Regulations 2014 (S.I. 2014/3263) (S.I. 2014/3263)

Environmental Permitting (England and Wales) (Amendment) Regulations 2015 (Draft S.I.)

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Joint Committee on Statutory Instruments

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

Remit

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

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

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

The Committee usually meets weekly when Parliament is sitting.

Publications

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

Committee staff

The current staff of the Committee are Joanna Welham (*Commons Clerk*), Jane White (*Lords Clerk*) and Liz Booth (*Committee Assistant*). Advisory Counsel: Peter Davis, Peter Brooksbank, Philip Davies and Daniel Greenberg (*Commons*); Nicholas Beach, Peter Milledge and John Crane (*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 28 January 2015 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 an appendices to this report.

1 S.I. 2014/3126: Reported for defective drafting

Rent Officers (Housing Benefit and Universal Credit Functions) (Local Housing Allowance Amendments) Order 2014 (S.I. 2014/3126)

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

1.2 Article 4 of this Order amends the Rent Officers (Universal Credit Functions) Order 2013. Paragraph (4) of that article substitutes a new paragraph (3) in article 4 of the 2013 Order.

1.3 The new paragraph reads as follows:

(3) Any local housing allowance determination made in accordance with paragraph (1) is to take effect –

(a) on the next 6th April following the day on which the determination is made; or

(b) in the case of existing claims –

(i) on the next 6th April following the day on which the determination is made where that is the first day of the claimant’s assessment period; or

(ii) where the next 6th April following the day on which the determination is made is not the first day of the claimant’s assessment period, on the first day of the next assessment period following that.

1.4 The expression “existing claims” is not explained either in this Order or in the 2013 Order, so the Committee asked to Department for Work and Pensions to explain its meaning and why it is not explained in the 2013 Order as amended.

1.5 In a memorandum printed at Appendix 1, the Department state that it is intended to mean any entitlement to Universal Credit that exists immediately before 6th April 2015 and that there is limited scope for different interpretation. It considers that the drafting of paragraph (3)(b) links entitlement to the first day of the claimant’s assessment period whether this is on or after 6th April. If the claimant does not have an existing entitlement

immediately before 6th April they cannot have an assessment period on which the change to local housing determination can take effect. The Department acknowledges, however, that the drafting could be clearer and will remedy this as soon as it is reasonably possible to do so.

1.6 The Committee welcomes the plan to remedy as it does not consider the drafting acceptable. Expressions such as “existing claims” commonly feature in transitional provisions but are also defined. In this case the obscurity of the expression is exacerbated by the fact that the provision is inserted as an amendment to the 2013 Order, given that it is routine that legislation once amended can be read as a whole. The 2013 Order came into force on 29 April 2013 and this Order comes into force on 8 January 2015. The question arises: existing on what date? There is nothing in either instrument to trigger a 6 April 2015 date as opposed to 6 April in a different year.

1.7 The Committee accordingly reports article 4(4) for defective drafting, acknowledged in principle by the Department.

2 S.I. 2014/3258: Reported for defective drafting

Export Control (Sudan, South Sudan and Central African Republic Sanctions) Regulations 2014 (S.I. 2014/3258)

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 Regulations 4, 5 and 6 purport to create offences in relation to provisions in the Sudan Regulation, the South Sudan Regulation and the Central African Republic Regulation (all of which are defined) respectively. Regulation 5, however, refers to Article 2 of the Sudan Regulation and so materially replicates regulation 4.

2.3 In a memorandum printed at Appendix 2, the Department for Business, Innovation and Skills acknowledges that it should have referred to the South Sudan Regulation, and undertakes to make the necessary correction as soon as possible. The Committee’s view is that an amending instrument rather than a correction slip is the correct way forward: although the error and correction are obvious and small scale in textual terms, the express widening of criminal liability is not small scale in essence. **The Committee accordingly reports regulation 5 for defective drafting, acknowledged by the Department.**

3 S.I. 2014/3263: Reported for defective drafting

Common Agricultural Policy (Control and Enforcement, Cross-Compliance, Scrutiny of Transactions and Appeals) Regulations 2014 (S.I. 2014/3263)

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

3.2 Regulation 21(1)(b) confers a power of entry for an authorised officer for the purpose of ascertaining whether certain offences have been or are being committed. Regulation 28 provides a defence of due diligence in any proceedings for certain offences. In each case the offences specified include an offence under regulation 25(4). Regulation 25(4) prescribes the penalty on conviction for an offence under regulation 25(3), which is also identified in the two provisions in question, but does not create any offence.

3.3 In a memorandum printed at Appendix 3, the Department for Environment, Food and Rural Affairs acknowledges the errors and undertakes to amend the Regulations at the next appropriate opportunity. **The Committee accordingly reports regulations 21(1)(b) and 28 for defective drafting, acknowledged by the Department.**

4 Draft S.I.: Reported for requiring elucidation

Environmental Permitting (England and Wales) (Amendment) Regulations 2015 (Draft S.I.)

4.1 **The Committee draws the special attention of both Houses to this draft instrument on the grounds that it requires the elucidation provided in the Department’s memorandum.**

4.2 Regulation 6 of the draft Regulations would insert a new Schedule 8A into the Environmental Permitting (England and Wales) Regulations 2010 (“the 2010 Regulations”) for the purpose of transposing Article 14(5) to (9) of Directive 2012/27/EU of the European Parliament and of the Council on energy efficiency (“the Energy Efficiency Directive”). This requires Member States to ensure that a cost-benefit analysis is carried out to assess the installation of cogeneration or the utilisation of waste heat from energy producing installations, with the aim to increase energy efficiency. The effect of the new Schedule 8A would be to oblige operators of such installations in England and Wales to undertake a cost benefit analysis as a part of the existing environmental permitting system.

4.3 The enabling powers recited in the preamble of the draft Regulations are section 2 of, and Schedule 1 to, the Pollution Prevention and Control Act 1999 (“the 1999 Act”). Section 2 allows the Secretary of State to make regulations for any of the purposes listed in Part 1 of Schedule 1. Section 1 of the 1999 Act is also relevant. This says that section 2 is to enable provision to be made for or in connection with—

- (a) implementing Council Directive 96/61/EC concerning integrated pollution prevention and control;
- (b) regulating, otherwise than in pursuance of that Directive, activities which are capable of any environmental pollution;
- (c) otherwise preventing or controlling emissions capable of causing any such pollution.

4.4 Part 1 of Schedule 1 specifies particular purposes for which provision may be made under section 2. For example, paragraph 4 allows regulations to be made for the purpose of prohibiting persons from operating any installation or plan of any specified description, or otherwise carrying on any activities of any specified description, except under a permit in force under the regulations, and in accordance with any conditions to which the permit is subject.

4.5 Paragraph 20(1) of Schedule 1 is also significant. This allows provision to be made in regulations which “corresponds or is similar to ... any provision made, or capable of being made, under section 2(2) of the European Communities Act 1972 in connection with one of the relevant directives”. The term “relevant directive” is defined in paragraph 20(2) as including Council Directive 96/61/EC concerning integrated pollution prevention and control, and “any other directive of the Council of the European Union designated for the purposes of this paragraph by order made by statutory instrument”.

4.6 The Pollution Prevention and Control (Designation of Directives) (England and Wales) Order 2013 (S.I. 2013/123) designates a number of Directives for the purposes of paragraph 20 of Schedule 1 to the 1999 Act, but not the Energy Efficiency Directive.

4.7 The Committee asked the Department for Environment, Food and Rural Affairs to explain why it was thought that section 2 of and Schedule 1 to the 1999 Act authorise the new Schedule 8A to be inserted into the 2010 Regulations given that (a) it is intended to transpose provisions in a Directive which are about the promotion of energy efficiency rather than the control of pollution, and (b) that Directive has not been designated by order as “a relevant directive”.

4.8 In paragraph 2 of a memorandum printed at Appendix 4, the Department point to section 1(2) of the 1999 Act which defines “environmental pollution” as pollution of the air, water or land which may give rise to any harm, and provides that “pollution” includes pollution caused by heat or any other kind of release of energy. The Department submit that the provisions of the 1999 Act may be used as the enabling power in these circumstances. They assert that Article 14(5) to (9) of the Energy Efficiency Directive provides for the recovery and use of waste heat from electricity power installations and other industrial installations which could otherwise cause pollution.

4.9 The Committee points out that Article 14(5) to (9) of that Directive provides not for the recovery and use of waste heat, but instead requires Member States to ensure that a cost benefit analysis is carried out to assess the installation of cogeneration or the utilisation of waste heat from energy producing installations. It was looking to the Department to identify particular provisions in section 2 of, and Schedule 1 to, the 1999 Act which authorise regulations to be made imposing a cost benefit analysis requirement on operators of energy producing installations.

4.10 Nonetheless, subject to the question of the designation order discussed below, the Committee is prepared to accept that the powers in 1999 Act are wide enough to allow for this imposition of this requirement by amending the environmental permitting scheme established by the 2010 Regulations. Section 1(1)(b) specifies as one of the purposes of the section 2 powers is to make provision regulating activities capable of causing any environmental pollution, which (as the Department observe) is defined to include

pollution caused by the release of heat. Paragraph 4 of Schedule 1 would appear to allow the issue of a permit to be made subject to the supply of a cost benefit analysis.

4.11 The Committee was also concerned that it would be inappropriate to implement the Energy Efficiency Directive in reliance on the powers conferred by the 1999 Act as it is not designated as “a relevant directive” under paragraph 20 of Schedule 1 to the Act. However, the Department now say in paragraph 3 of their memorandum that an order designating the Energy Efficiency Directive under paragraph 20(2)(c) of Schedule 1 to the 1999 Act will be made and will come into force before the draft Regulations are made. This important information was omitted from the explanatory memorandum laid before Parliament along with the draft Regulations. The Committee would also expect to see a footnote referring to the order designating the Energy Efficiency Directive included in the Regulations when made and published (assuming they are first approved in draft by each House).

4.12 The Committee therefore reports the draft Regulations on the ground that they require the elucidation now provided in the Department’s memorandum.

Instruments not reported

At its meeting on 28 January 2015 the Committee considered the Instruments set out in the Annex to this Report, none of which were required to be reported to both Houses.

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

Annex

Instrument requiring affirmative approval

Local Government (Transparency) (Descriptions of Information) (England) Order 2015

Draft Instruments requiring affirmative approval

- Draft S.I.** Local Government (Transparency) (Descriptions of Information) (England) Order 2015
- Draft S.I.** Draft Freedom of Information (Designation as Public Authorities) Order 2015
- Draft S.I.** Representation of the People (Ballot Paper) Regulations 2015
- Draft S.I.** Childcare Payments (Eligibility) Regulations 2015
- Draft S.I.** Companies Act 2006 (Amendment of Part 18) Regulations 2015
- Draft S.I.** European Union (Definition of Treaties) (Association Agreement) (Georgia) Order 2015
- Draft S.I.** European Union (Definition of Treaties) (Association Agreement) (Moldova) Order 2015
- Draft S.I.** European Union (Definition of Treaties) (Association Agreement) (Ukraine) Order 2015
- Draft S.I.** Anti-social Behaviour (Authorised Persons) Order 2015
- Draft S.I.** Courts Reform (Scotland) Act 2014 (Consequential Provisions and Modifications) Order 2015
- Draft S.I.** Motor Vehicles (Wearing of Seat Belts) (Amendment) (No. 2) Regulations 2015
- Draft S.I.** Renewable Transport Fuel Obligations (Amendment) Order 2015
- Draft S.I.** Mesothelioma Lump Sum Payments (Conditions and Amounts) (Amendment) Regulations 2015
- Draft S.I.** Pneumoconiosis etc. (Workers' Compensation) (Payment of Claims) (Amendment) Regulations 2015
- Draft S.I.** Non-Domestic Rating (Levy and Safety Net) (Amendment) Regulations 2015

Draft S.I.	Community Right to Challenge (Business Improvement Districts) Regulations 2015
Draft S.I.	Tax Credits Up-rating Regulations 2015
Draft S.I.	Guardian's Allowance Up-rating Order 2015
Draft S.I.	Guardian's Allowance Up-rating (Northern Ireland) Order 2015
Draft S.I.	Road Safety Act 2006 (Consequential Amendments) Order 2015
Draft S.I.	Social Security Benefits Up-rating Order 2015
Draft S.I.	Guaranteed Minimum Pensions Increase Order 2015
Draft S.I.	Automatic Enrolment (Earnings Trigger and Qualifying Earnings Band) Order 2015
Draft S.I.	Civil Proceedings and Family Proceedings Fees (Amendment) Order 2015
Draft S.I.	Electricity Supplier Obligations (Amendment & Excluded Electricity) Regulations 2015
Draft S.I.	Electricity Capacity (Amendment) Regulations 2015
Draft S.I.	Electricity Market Reform (General) (Amendment) Regulations 2015
Draft S.I.	Immigration (Biometric Registration) (Amendment) Regulations 2015
Draft S.I.	Immigration (Leave to Enter and Remain) (Amendment) Order 2015
Draft S.I.	Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2015
Draft S.I.	Scotland Act 1998 (Modification of Schedules 4 and 5 and Transfer of Functions to the Scottish Ministers etc.) Order 2015
Draft S.I.	Insolvency Act 1986 (Amendment) Order 2015

Instruments subject to annulment

○ S.I. 2014/3255	Shared Parental Leave and Statutory Shared Parental Pay (Consequential Amendments to Subordinate Legislation) Order 2014
S.I. 2014/3344	Building Societies (Bail-in) Order 2014
S.I. 2014/3348	Bank Recovery and Resolution (No. 2) Order 2014
S.I. 2015/1	Landlord and Tenant (Notices) (Revocations) (England) Regulations 2015
S.I. 2015/6	Housing Benefit and Housing Benefit (Persons who have attained the qualifying age for state pension credit) (Income from earnings) (Amendment) Regulations 2015
S.I. 2015/7	Public Lending Right Scheme 1982 (Commencement of Variation) Order 2015

S.I. 2015/8	M6 Motorway (Junctions 10a to 13)(Variable Speed Limits) Regulations 2015
S.I. 2015/9	Criminal Justice (Specified Class B Drugs) Order 2015
S.I. 2015/11	Money Laundering (Amendment) Regulations 2015
S.I. 2015/12	Costs in Criminal Cases (General) (Amendment) Regulations 2015
S.I. 2015/13	Criminal Procedure (Amendment) Rules 2015

Appendix 1

S.I. 2014/3126: memorandum from the Department for Work and Pensions

<i>Rent Officers (Housing Benefit and Universal Credit Functions) (Local Housing Allowance Amendments) Order 2014 (S.I. 2014/3126)</i>

1. In its letter to the Department of 14th January 2015, the Committee requested a memorandum on the following point:

“In article 4(4), the opening of which appears to need brackets around the identified paragraph number (as does the opening of substitute paragraph (3) inserted into article 4 of S.I. 2013/382), explain the meaning of “existing claims” in sub-paragraph (b) of that substitute paragraph, and why this is not explained in the 2013 Order as amended.”

2. The Department’s response to the Committee’s point is outlined below.
3. The Rent Officers (Housing Benefit and Universal Credit Functions) (Local Housing Allowance Amendments) Order 2014 is referred to in this memorandum as “the Order”.
4. Firstly, the Department is grateful to the Committee for drawing its attention to the omission of brackets in the opening of article 4(4) and the corresponding provision in S.I. 2013/382. The Department will take steps to remedy this error.
5. In regards to the use of “existing claim” in article 4(4) of the Order, the Department intends this to mean any entitlement to Universal Credit that exists immediately before 6th April 2015. The intended effect is that, for claimants who are entitled to the Housing Costs Element of the Universal Credit at this time, the new local housing allowance rate will be used to calculate their entitlement as from either: the 6th April 2015 where that is the first date of their assessment period; or, where it is not, the first day of their next assessment period following 6th April 2015.
6. The Department’s view is that the drafting of paragraph (3)(b) links entitlement to the first day of the claimant’s assessment period whether this is on or after 6th April. If the claimant does not have an existing entitlement immediately before 6th April then they cannot have an assessment period on which the change to local housing determination can take effect. Given this context, the

Department's view is that there is limited scope for this provision to be interpreted in a way different to that intended.

7. Despite this the Department recognises that the drafting could be clearer and regrets that it is not. The Department will remedy this as soon as it is reasonably practicable to do so.

Department for Work and Pensions

20 January 2015

Appendix 2

S.I. 2014/3258: memorandum from the Department for Business, Innovation and Skills

Export Control (Sudan, South Sudan and Central African Republic Sanctions) Regulations 2014 (S.I. 2014/3258)

1. This memorandum is submitted in response to a question from the Joint Committee on Statutory Instruments to the Department for Business, Innovation and Skills on 14th January 2015.
2. The Committee asked:

Regulation 5 refers to Article 2 of the Sudan Regulation. Is this correct?
3. Regulation 4 creates offences in relation to the contravention of the Sudan Regulation (747/2014/EU) and regulation 5 is intended to create offences in relation to any contravention of the South Sudan Regulation (748/2014/EU).
4. Therefore, the reference in regulation 5 to Article 2 of “the Sudan Regulation” is incorrect. Regulation 5 should refer to “the South Sudan Regulation”.
5. The Department thanks the Committee for bringing this error to its attention and will make the necessary correction as soon as possible.

Department for Business, Innovation and Skills

20 January 2015

Appendix 3

S.I. 2014/3263: memorandum from the Department for Environment, Food and Rural Affairs

Common Agricultural Policy (Control and Enforcement, Cross-Compliance, Scrutiny of Transactions and Appeals) Regulations 2014 (S.I. 2014/3263)

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

Why do regulations 21(1)(b) and 28 refer to an offence under regulation 25(4)?

2. These are cross-referencing errors. In an earlier draft version of the SI, regulation 25(4) set out an offence. That provision was subsequently omitted from the draft but the cross-references in regulations 21(1)(b) and 28 were not correctly amended in light of that omission.
3. The Department is grateful to the Committee for identifying these errors and will, at the next appropriate opportunity, amend regulations 21(1)(b) and 28 so that they do not refer to an offence under regulation 25(4).

Department for Environment, Food and Rural Affairs

15 January 2015

Appendix 4

Draft S.I.: memorandum from the Department for Environment, Food and Rural Affairs

Environmental Permitting (England and Wales) (Amendment) Regulations 2015 (Draft S.I.)

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

Explain why it is thought that section 2 of, and Schedule 1 to, the Pollution Prevention and Control Act 1999 authorise the new Schedule 8A inserted by reg. 6 of the draft Regulations given that—

- (a) the new Schedule is intended to transpose provisions in Directive 2012/27/EU which are about the promotion of energy efficiency rather than the control of pollution; and*
- (b) that Directive has been not designated as a relevant directive for the purposes of paragraph 20(2)(c) of Schedule 1 to the 1999 Act.*
2. With regard to point (a) Section 1(2) of the 1999 Act defines “environmental pollution” as pollution of the air, water or land which may give rise to any harm, and provides that “pollution” includes pollution caused by heat or any other kind of release of energy. The Department submits that the provisions of the 1999 Act may be used as the enabling power in these circumstances. Article 14(5)-(9) of the Energy Efficiency Directive provides for the recovery and use of waste heat from electricity power installations and other industrial installations which could otherwise cause pollution.
 3. With regard to point (b), an order designating the Energy Efficiency Directive under paragraph 20(2)(c) of Schedule 1 to the 1999 Act will be made and will come into force before the draft Regulations are made.

Department for Environment, Food and Rural Affairs
16 January 2015