



House of Lords
House of Commons
Joint Committee on
Statutory Instruments

**Twentieth Report
of Session 2015-16**

Drawing special attention to:

Sheep and Goats (Records, Identification and Movement) (England) (Amendment) Order 2016 (S.I. 2016/76)

Building Societies (Floating Charges and Other Provisions) Order 2016 (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 Amelia Aspden (*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.

Contents

Report	<i>Page</i>
Instruments reported	2
1 S.I.2016/76: Reported for defective drafting	2
2 Draft S.I.: Reported for defective drafting	2
Instruments not reported	5
Annex	5
Appendix 1	7
S.I. 2016/76: memorandum from the Department for Environment, Food and Rural Affairs	7
Appendix 2	7
Draft S.I.: memorandum from HM Treasury	7

Instruments reported

At its meeting on 9 March 2016 the Committee scrutinised a number of Instruments in accordance with Standing Orders. It was agreed that the special attention of both Houses should be drawn to two of those considered. The Instruments and the grounds for reporting them, are given below. The relevant Departmental memoranda are published as appendices to this report.

1 S.I.2016/76: Reported for defective drafting

Sheep and Goats (Records, Identification and Movement) (England) (Amendment) Order 2016 (S.I. 2016/76)

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 Before its amendment by this Order, article 43(1) of the Sheep and Goats (Records, Identification and Movement) (England) Order 2009 read as follows:

“(1) Before the end of the review period the Secretary of State must –

- (a) carry out a review of this Order;*
- (b) set out the conclusions of the review in a report; and*
- (c) publish the report.”*

1.3 Article 2(3)(a) of this Order substitutes for that paragraph the following

“(1) The Secretary of State must from time to time –”.

1.4 In a memorandum printed at Appendix 1, the Department for Environment, Food and Rural Affairs acknowledges that its amendment has inadvertently removed the requirement to carry out a review. This error will be corrected at the earliest opportunity. **The Committee accordingly reports article 2(3)(a) for defective drafting, acknowledged by the Department.**

2 Draft S.I.: Reported for defective drafting

Building Societies (Floating Charges and Other Provisions) Order 2016 (Draft S.I.)

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

2.2 Article 6 of this instrument would amend paragraph 23(2A) and (4A) of Schedule 8 to the Scotland Act 1998 with a view to replacing references to the Financial Services Authority with references to the Financial Conduct Authority. Those sub-paragraphs were inserted by article 360 of the Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001 (S.I. 2001/3649 – “the 2001 Order”) in substitution for provisions of that paragraph as originally enacted.

2.3 The Committee asked the Treasury to explain the effect of the proposed amendment in light of the fact that the 2001 Order was revoked on 6th April 2015 by the National Savings Regulations 2015 (S.I. 2015/623 – “the 2015 Regulations”).

2.4 In its response in a memorandum printed at Appendix 2, the Treasury explains that the intention appears to have been to revoke only one provision of the 2001 Regulations, but that the whole Order was revoked by the 2015 Regulations in error.

2.5 Nonetheless, the Treasury considers that there are “good arguments” that can be made in relation to the continuing validity of the amendments made by the 2001 Order on the basis that “the 2015 Regulations do not evince an intention to reverse the insertion of paragraph 23(2A) and (4A) in Schedule 8 to the Scotland Act 1998”. This is because those Regulations do not expressly amend sub-paragraphs (2A) and (4A), nor do they contain anything indicating that they are concerned with that provision. Moreover, according to the Treasury, it would “clearly be very surprising indeed to find in regulations about national savings a revocation of unrelated provision about building societies in Scotland”. For these reasons, the Treasury is satisfied that sub-paragraphs (2A) and (4A) can properly be treated as being still in force for the purposes of this draft instrument.

2.6 The Committee does not find these arguments persuasive. In its view, applying accepted principles of statutory interpretation, the continued existence of sub-paragraphs (2A) and (4A) depends upon the 2001 Order remaining in force. Once that Order was revoked, they ceased to have effect. The fact that the Treasury did not intend this result in making the 2015 Regulations would seem to be irrelevant. The Courts have emphasised that the essential task in statutory interpretation is to construe the language of the legislation: see, for example, the Court of Appeal’s judgment in *R (on the application of D and M) v Secretary of State for Work and Pensions* [2010] EWCA Civ 18, paragraph 51. There appears to be no basis for construing the words used in the 2015 Regulations to revoke the 2001 Order as meaning anything other than exactly what they say.

2.7 The memorandum goes on to refer to clause 35 of the Bank of England and Financial Services Bill, which is currently before the House of Commons. That clause was introduced by Government amendment at Lords Report Stage in order “to resolve the unsatisfactory position created by the unintended revocation of the 2001 Order”: see paragraph 6 of the memorandum. The clause, which provides for the revocation of the 2001 Order to be treated as never having had effect, would come into force when the Bill receives Royal Assent, which the Treasury expects to happen in April or May 2016. This would, according to paragraph 7 of the memorandum, “resolve the legal uncertainty, but not on the basis that that every ... amendment [made by the 2001 Order] has necessarily been repealed”.

2.8 In paragraph 8 of the memorandum, the Treasury acknowledges that the amendment made by article 6 should be made by a separate instrument after the enactment of clause 35 “if the view is taken that the amendment [to the Scotland Act] made by article 360 of the 2001 Order has been repealed”. However, in the final sentence, the Treasury asserts its firm view that the revocation of the 2001 Order has not reversed the substitution of paragraph 23(2A) and (4A) of Schedule 8 to the Scotland Act 1998, so that the amendment of those provisions by article 6 would be effective. The Committee takes this to mean that the Treasury intends to make the instrument, assuming it is approved in draft by each House, without waiting for the Bank of England and Financial Services Bill to receive Royal Assent.

2.9 Assuming that this transpires, the Committee considers that the instrument would be defective when made because article 6 would amend provisions whose existence is open to significant legal uncertainty. **The Committee therefore reports article 6 for defective drafting.**

Instruments not reported

At its meeting on 9 March 2016 the Committee considered the Instruments set out in the Annex to this Report, none of which were required to be reported to both Houses.

Annex

Draft Instruments requiring affirmative approval

- Draft S.I.** Third Parties (Rights against Insurers) Regulations 2016
- Draft S.I.** Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations 2016

Instruments subject to annulment

- S.I. 2016/138** Water Environment (Water Framework Directive) (England and Wales) (Amendment) Regulations 2016
- S.I. 2016/139** Water Environment (Water Framework Directive) (Northumbria and Solway Tweed River Basin Districts) (Amendment) Regulations 2016
- S.I. 2016/143** Non-Domestic Rating (Small Business Rate Relief) (England) (Amendment) Order 2016
- S.I. 2016/146** Central Rating List (England) (Amendment) Regulations 2016
- S.I. 2016/149** Environmental Permitting (England and Wales) (Amendment) Regulations 2016
- S.I. 2016/153** Personal Injuries (NHS Charges) (Amounts) Amendment Regulations 2016
- S.I. 2016/160** Northern Ireland Act 1998 (Modification) Order 2016
- S.I. 2016/163** Financial Services (Banking Reform) Act 2013 (Consequential Amendments) Order 2016
- S.I. 2016/167** Care and Support (Direct Payments) (Amendment) Regulations 2016
- S.I. 2016/179** Education (Designated Institutions) (England) Order 2016
- S.I. 2016/181** Water Supply and Sewerage Licences (Cross-Border Applications) Regulations 2016
- S.I. 2016/202** Financial Services (Banking Reform) Act 2013 (Designated Representative Bodies) Order 2016

Draft Instrument subject to negative procedure

- Draft S.I.** Code of Recommendations for the Welfare of Livestock: Meat Chickens and Breeding Chickens (Revocation) (England) Order 2016

Instrument not subject to Parliamentary proceedings not laid before Parliament

- S.R. 2016/46** Welfare Reform (Northern Ireland) Order 2015 (Commencement No. 1) Order 2016
- S.I. 2016/113** Self-build and Custom Housebuilding Act 2015 (Commencement) Regulations 2016

- S.I. 2016/147** Policing and Crime Act 2009 (Commencement No. 11 and Transitional Provisions and Savings) Order 2016
- S.I. 2016/148** Serious Crime Act 2015 (Commencement No. 5 and Transitional Provisions and Savings) Regulations 2016
- S.I. 2016/150** Pollution Prevention and Control (Designation) (England and Wales) Order 2016
- S.I. 2016/155** Air Navigation (Isle of Man) (Amendment) Order 2016
- S.I. 2016/157** Social Security (Reciprocal Agreement) (Isle of Man) Order 2016
- S.I. 2016/158** Social Security (Reciprocal Agreements) Order 2016

Appendix 1

S.I. 2016/76: memorandum from the Department for Environment, Food and Rural Affairs

Sheep and Goats (Records, Identification and Movement) (England) (Amendment) Order 2016 (S.I. 2016/76)

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

Explain the meaning of article 43(1) of the 2009 Order, as substituted by article 2(3)(a), given that the amendment has the effect of deleting sub-paragraphs (a) to (c) of the original.

2. Article 43, in 2014, introduced a review requirement into the 2009 Order. The amendment intended to replicate standard wording (providing for ongoing reviews at 5-yearly intervals rather than a single review within a 5-year period.) The Department accepts that the amendment has deleted the wording containing the obligation to review. This was not intended.
3. The Department undertakes to restore sub-paragraphs (a) to (c), and thus, the requirement to review, in the instrument at the earliest opportunity.

Department for Environment, Food and Rural Affairs
29 February 2016

Appendix 2

Draft S.I.: memorandum from HM Treasury

Building Societies (Floating Charges and Other Provisions) Order 2016 (Draft S.I.)

The Committee has requested Her Majesty's Treasury to submit a memorandum on the following point:

Article 6 would amend provisions inserted into paragraph 23 of Schedule 8 to the Scotland Act 1998 by S.I. 2001/3649. Explain the effect of the proposed amendment in light of the revocation of S.I. 2001/3649 on 6th April 2015 (see S.I. 2015/623).

1. The National Savings Regulations 2015 (S.I. 2015/623) ("the 2015 Regulations") were made on 10 March 2015 and came into force on 6 April 2015. Regulation

64 and the Schedule to the 2015 Regulations revoked a number of instruments. The intention was to revoke instruments concerned with national savings. The Schedule specified the Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001 (S.I. 2001/3649) (“the 2001 Order”), and this had the effect of revoking that Order. The Committee’s question concerns the effect of that revocation on provisions substituted by the 2001 Order which are amended by article 6 of the draft Order.

2. The 2001 Order made consequential amendments necessary for the implementation of the Financial Services and Markets Act 2000, which introduced a new framework for the regulation of financial services in the United Kingdom. It contained 610 articles amending a wide variety of primary and secondary legislation. Only one article appears to concern national savings legislation: article 370 amended the National Savings Stock Register Regulations 1976 (S.I. 1976/2012), which were revoked by the National Savings (No. 2) Regulations 2015 (S.I. 2015/624). It appears that the intention was to revoke just article 370, which would cease to have effect upon the revocation of the instrument it amended, but that the whole of the 2001 Order was revoked in error.
3. When the 2015 Regulations were made, some of the amendments made by the 2001 Order were no longer in force because they had been superseded by subsequent legislation. But many of the amendments were still in force, including the amendment made by article 360 of the 2001 Order, which by substitution inserted sub-paragraphs (2A) and (4A) of paragraph 23 of Schedule 8 to the Scotland Act 1998.
4. While recognising that this is a contentious issue, the Treasury consider that good arguments can be made in relation to the continuing validity of individual amendments made by the 2001 Order. As regards the amendments of paragraph 23 of Schedule 8 to the Scotland Act 1998, the 2015 Regulations do not evince an intention to reverse the insertion of paragraph 23(2A) and (4A) in Schedule 8 to the Scotland Act 1998 for the following reasons. They do not expressly amend sub-paragraphs (2A) and (4A). Nor do they contain anything that would lead one to think that they are concerned with that provision; it would clearly be very surprising indeed to find in regulations about national savings a revocation of unrelated provision about building societies in Scotland.
5. The Treasury are satisfied that paragraph 23(2A) and (4A) of Schedule 8 to the Scotland Act 1998 can properly be treated as being still in force, and that the effect of article 6 of the draft Order is to amend each sub-paragraph in the manner set out, namely by substituting “Financial Conduct Authority” for “Financial Services Authority”.
6. However, to resolve the unsatisfactory position created by the unintended revocation of the 2001 Order, the Treasury has corrected the Schedule to the

2015 Regulations by introducing a government amendment of the Bank of England and Financial Services Bill. The amendment has inserted a clause (clause 35 of the Bill as amended in Public Bill Committee) which provides that the revocation of the 2001 Order by the 2015 Regulations is to be treated as never having had effect, and omits the entry for the 2001 Order in the Schedule to the 2015 Regulations. That clause will come into effect when the Bill receives Royal Assent, which is expected to be in April or May.

7. When clause 35 comes into force, it will have retrospective effect, ensuring that all amendments made by the 2001 Order which remained in force before it was revoked are still in force. This will resolve the legal uncertainty, but not on the basis that every such amendment has necessarily been repealed. In the meanwhile, the effect of article 6 of the draft Order, which amends provision substituted by such an amendment, depends on whether the revocation of the 2001 Order by the 2015 Regulations has had the effect of repealing that amendment (so that sub-paragraphs (2A) and (4A) of paragraph 23 of Schedule 8 to the Scotland Act 1998 are no longer in force).
8. If the view is taken that the amendment made by article 360 of the 2001 Order has been repealed, it follows that the article 6 amendment should be made by a separate instrument after clause 35 of the Bill is in force. But as indicated in paragraphs 4 and 5 above, the Treasury is firmly of the view that the revocation of the 2001 Order has not reversed the substitution of paragraph 23(2A) and (4A), so that the amendment of these provisions by the draft Order as described in paragraph 5 will be effective.

HM Treasury
29 February 2016