



House of Lords
House of Commons
Joint Committee on
Statutory Instruments

**Twenty-ninth Report
of Session 2017–19**

Drawing special attention to:

Renewable Heat Incentive Scheme and Domestic Renewable Heat Incentive Scheme (Amendment) Regulations 2018 (S.I. 2018/635)

Road Vehicles (Defeat Devices, Fuel Economy and Type-Approval) (Amendment) Regulations 2018 (S.I. 2018/673)

Money Market Funds Regulations 2018 (S.I. 2018/698)

*Ordered by the House of Lords
to be printed 11 July 2018*

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to be printed 11 July 2018*

Joint Committee on Statutory Instruments

Current membership

House of Lords

[Baroness Bloomfield of Hinton Waldrist](#) (*Conservative*)

[Lord Lexden](#) (*Conservative*)

[Baroness Meacher](#) (*Crossbench*)

[Lord Morris of Handsworth](#) (*Labour*)

[Lord Rowe-Beddoe](#) (*Crossbench*)

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House of Commons

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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. 73, 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 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 Mike Winter (Commons Clerk), Jane White (Lords Clerk) and Liz Booth (Committee Assistant). Advisory Counsel: Daniel Greenberg, Klara Banaszak, Peter Brooksbank, Philip Davies and Vanessa MacNair (Commons); James Cooper, Nicholas Beach, John Crane and Ché Diamond (Lords).

Contacts

All correspondence should be addressed to the Clerk of the Joint Committee on Statutory Instruments, House of Commons, London, SW1A 0AA. 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 11 July 2018 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 three 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. 2018/635: Reported for defective drafting

Renewable Heat Incentive Scheme and Domestic Renewable Heat Incentive Scheme (Amendment) Regulations 2018

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

1.2 These Regulations amend two other sets of Regulations: Part 2 amends the Domestic Renewable Heat Incentive Scheme Regulations 2014; and Part 3 amends the Renewable Heat Incentive Scheme Regulations 2018. Part 2 begins with regulation 2 stating that the 2014 Regulations “are amended in accordance with this Part”; and Part 3 begins with regulation 8 stating the equivalent proposition for the 2018 Regulations. The whole of Part 2 is commenced on 27 June 2018 (reg.1(3)); some provisions of Part 3 are commenced on 20 June (reg.1(2)) and the remainder on 1 October (reg.1(4)). The introductory provision of Part 3 (regulation 8) is not included in the list of provisions coming into force on 20 June, and the Committee asked the Department to explain the omission.

1.3 In a memorandum printed at Appendix 1, the Department for Business, Energy and Industrial Strategy agrees that “it would have been preferable for regulation 8 to have also been listed in regulation 1(2)” but adds “However, the Department is content that there is no doubt about the effect of the Regulations, including the dates that the various amendments made by the Regulations take effect”. The Committee does not understand the Department’s apparent insouciance. Failure to commence the provision which is required to identify the target of the amendments in Part 3 is a clear defect, not merely the less preferable option; and the defect is compounded by the instrument’s internal inconsistency, as the introductory provision of Part 2 is expressly commenced along with its dependent amendments. Faced with a challenge to the effectiveness of the Part 3 amendments between 20 June and 1 October, the Committee accepts that a court might feel bound to identify this as a drafting defect and correct it in accordance with the rule in *Inco Europe Ltd v First Choice Distribution* [2000] 1 W.L.R. 586: but there are limitations on the rectification rule in *Inco Europe* and it is a discretionary judicial remedy which should never be anticipated as a foregone conclusion; nor is it right that citizens should be left to rely on the courts to correct clear defects and inconsistencies in legislation. Although the Committee agrees that on balance the legislative intent is clear, it would have preferred to see some acknowledgment by the Department that it is unsatisfactory for that intent to have to be inferred in the face of defective drafting and internal inconsistency, particularly in an instrument as short and simple as this one. **The Committee accordingly reports this Order for defective drafting.**

2 S.I. 2018/673: Reported for defective drafting

Road Vehicles (Defeat Devices, Fuel Economy and Type-Approval) (Amendment) Regulations 2018

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 Regulation 18 amends the Road Vehicles (Approval) Regulations 2009 by inserting Schedule 7, which provides for penalties, enforcement and other matters. Paragraph 8 of Schedule 7 prohibits obstruction of officers, failure to comply with requirements of officers or to give assistance required by officers, and making false statements. Sub-paragraph (10) of paragraph 9 of Schedule 7 provides that a person who is not an officer of the approval authority must not purport to act as such under paragraph 9, which confers powers of search and seizure. The 2009 Regulations as amended by this instrument do not provide any sanction for a contravention of any of these prohibitions.

2.3 In a memorandum printed at Appendix 2, the Department for Transport states that sanctions were erroneously removed as a result of a late change in the drafting of the Regulations. It is aware that the Committee has reported on the need for duties to be accompanied by appropriate sanctions on more than one occasion and apologises for the error.

2.4 The Department undertakes to revisit the sanctions and correct the error at the earliest appropriate opportunity. As the Department rightly notes, the Committee has more than once drawn attention to the impropriety of creating prohibitions that are unenforceable, due to the lack of an express sanction. Until this error is corrected, an ineffective provision remains on the statute book; the Committee therefore expects action to be taken as a matter of priority, and asks the Department to inform the Committee as soon as it has made arrangements to correct the error.

2.5 The Committee regrets both that it took the Department nine years to address errors in the 2009 Regulations, and that in doing so the Department has introduced a new error.

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

3 S.I. 2018/698: Reported for an unjustifiable breach of the 21-day rule

Money Market Funds Regulations 2018

3.1 The Committee draws the special attention of both Houses to these Regulations on the ground that there has been an unjustifiable breach of the 21-day rule.

3.2 These Regulations were made on 7 June and laid before Parliament on 11 June. Regulation 1(2)(a) provides that the Regulations come into force for certain purposes 21 days after the day on which they are made.

3.3 In a memorandum printed at Appendix 3, the Treasury states that the breach of the 21-day rule was an unintentional oversight. The commencement should have been specified as 21 days after laying or a specific date which would have ensured there was no breach. **The Committee accordingly reports these Regulations for an unjustifiable breach of the 21-day rule, acknowledged by the Department.**

Instruments not reported

At its meeting on 11 July 2018 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.	Data Retention and Acquisition Regulations 2018
Draft S.I.	Third Parties (Rights Against Insurers) Act 2010 (Consequential Amendment of Companies Act 2006) Regulations 2018
Draft S.I.	Higher Education (Fee Limits and Fee Limit Condition) (England) Regulations 2018
Draft S.I.	Immigration (Provision of Physical Data) (Amendment) (EU Exit) Regulations 2018

Instruments subject to annulment

S.I. 2018/738	Hartpury College of Further Education (Designated Institution in Further Education) Order 2018
S.I. 2018/748	Police Super-complaints (Designation and Procedure) Regulations 2018
S.I. 2018/754	Cattle Compensation (England) (Amendment) Order 2018
S.I. 2018/755	National Health Service (Existing Liabilities Scheme) (England) Regulations 2018
S.I. 2018/756	National Health Service (Liabilities to Third Parties Scheme) (England) Regulations 2018
S.I. 2018/757	National Health Service (Property Expenses Scheme) (England) Regulations 2018
S.I. 2018/769	Social Security (Industrial Injuries) (Prescribed Diseases) Amendment Regulations 2018
S.I. 2018/770	Coroners and Justice Act 2009 (Alteration of Coroner Areas) Order 2018
S.I. 2018/788	Child Benefit, Tax Credits and Childcare Payments (Section 67 Immigration Act 2016 Leave) (Amendment) Regulations 2018

Instrument not subject to Parliamentary proceedings not laid before Parliament

S.I. 2018/758	Bus Services Act 2017 (Commencement) Regulations 2018
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Appendix 1

S.I. 2018/635

Renewable Heat Incentive Scheme and Domestic Renewable Heat Incentive Scheme (Amendment) Regulations 2018

1. In its letter to the Department of 20th June 2018, the Joint Committee requested a memorandum on the following point in relation to the Renewable Heat Incentive Scheme and Domestic Renewable Heat Incentive Scheme (Amendment) Regulations 2018 (“the Regulations”):

Why is regulation 8 not among the provisions listed in regulation 1(2)?

2. Regulation 1(2) lists the provisions of the Regulations which came into force on 20th June 2018. These include some of the amendments to the Renewable Heat Incentive Scheme Regulations 2018 made by Part 3 of the Regulations. Regulation 8 is the first provision in Part 3 and provides as follows:

The Renewable Heat Incentive Scheme Regulations 2018 are amended in accordance with this Part.

3. The Department considers that to the extent amendments made by Part 3 of the Regulations came into force on 20th June 2018 under regulation 1(2) it would have been preferable for regulation 8 to have also been listed in regulation 1(2). However, the Department is content that there is no doubt about the effect of the Regulations, including the dates that the various amendments made by the Regulations take effect.

Department for Business, Energy and Industrial Strategy

25 June 2018

Appendix 2

S.I. 2018/673

Road Vehicles (Defeat Devices, Fuel Economy and Type-Approval) (Amendment) Regulations 2018

1. By letter dated 27 June 2018, the Joint Committee on Statutory Instruments has requested a memorandum on the following point:

In relation to paragraphs 8 and 9(10) of Schedule 7 to the 2009 Regulations inserted by regulation 18, what sanctions are applicable in the event of a contravention of the prohibitions, and where is this made clear?

2. The Department acknowledges that, due to a late change in the scope of the offence provision being inserted by these regulations, sanctions for breach of the obligations identified by the Committee were erroneously removed. The Department is aware that the Committee has reported on the need for duties to be accompanied by appropriate sanctions on more than one occasion, and apologises for the error that has occurred.

3. The Department will revisit the sanctions applied under these Regulations and correct this at the earliest appropriate opportunity.

Department for Transport

2 July 2018

Appendix 3

S.I. 2018/698

Money Market Funds Regulations 2018

1. The Committee has asked, in relation to the Money Market Funds Regulations 2018 (S.I. 2018/698) for a memorandum on the following point:

Explain the reason for the breach of the 21-day rule, and why it is not explained in the Explanatory Memorandum.

2. The instrument comes into force 21 days after the day on which the Regulations were made for the purposes of the Financial Conduct Authority making rules or giving directions or guidance under the Financial Services and Markets Act 2000. This provision was necessary to enable the Financial Conduct Authority to have the appropriate rules and guidance in place to authorise money market funds and enforce the EU Money Market Funds Regulation (EU) No 2017/1131 from 21st July 2018 when the Regulation becomes directly applicable. The substantive provisions of the instrument will come into force on 21st July 2018. Therefore, no individuals or businesses have been impacted by this element of the instrument coming into force early.

3. The breach of the 21-day rule in respect of the provision was an oversight and unintentional, which is why the breach was not explained in the Explanatory Memorandum. The Treasury apologise that this oversight was not detected in the Treasury's internal checks before the Regulations were made and laid. The S.I. should have specified that it would come into force for those relevant purposes 21 days after it had been laid or specified such a date as would have avoided breaching the 21-day rule.

4. The Treasury apologise for this error and we will ensure that our checking processes are applied rigorously to minimise the risk of a similar mistake recurring.

HM Treasury

29 June 2018