House of Lords
House of Commons

Joint Committee on Statutory Instruments

Thirty-eighth Report of Session 2017–19

Drawing special attention to:

Plant Health (England) (Amendment) (No. 4) Order 2018 **(S.I. 2018/1051)**

Misuse of Drugs (Amendments) (Cannabis and Licence Fees) (England, Wales and Scotland) Regulations 2018 **(S.I. 2018/1055)**

Sanctions (Overseas Territories) (Amendment of Information Provisions) Order 2018 **(S.I. 2018/1076)**

Computer Reservation Systems (Amendment) (EU Exit) Regulations 2018 **(S.I. 2018/1080)**

Insolvency (Scotland) (Company Voluntary Arrangements and Administration) Rules 2018 **(S.I. 2018/1082)**

Hertfordshire (Electoral Changes) (Amendment) Order 2018 **(Draft S.I.)**

Online Pornography (Commercial Basis) Regulations 2018 **(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. 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 Jeanne Delebarre (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).

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Instruments reported

At its meeting on 21 November 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 seven 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. 2018/1051: Reported for defective drafting

Plant Health (England) (Amendment) (No. 4) Order 2018

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 This Order implements EU law by introducing new measures that seek to prevent harmful plant pests and diseases from being introduced to or spread within England. Among these measures are restrictions on the import of garden tomato seeds to prevent the spread of Pepino mosaic virus.

1.3 The Committee asked the Department for Environment, Food and Rural Affairs to explain why, when transposing these restrictions into articles 6(c) and 7(a) (as new items 89A and 43A), the language in the original EU Decision was changed in such a way as to make the propositions syntactically inaccurate. In a memorandum printed at Appendix 1, the Department acknowledges and apologises for the errors and undertakes to correct them at the earliest opportunity. The Committee is concerned that errors should not be introduced during transposition, particularly when the original text is correct, and **accordingly reports articles 6 and 7 for defective drafting, acknowledged by the Department.**

2 S.I. 2018/1055: Reported for requiring elucidation

Misuse of Drugs (Amendments) (Cannabis and Licence Fees) (England, Wales and Scotland) Regulations 2018

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 This instrument makes cannabis-based products available to be prescribed for medicinal use. This amendment is made by inserting the new entry for "cannabis-based products for medicinal use in humans" into Schedule 2 to the Misuse of Drugs Regulations 2001 and the definition into regulation 2(1) of those Regulations.

2.3 This is the first time that the enabling powers to reschedule products have been used to specify a product by reference to both its form and purpose as well as to its composition. In paragraphs 3.1 and 3.2 of the Explanatory Memorandum, the Home Office explains that it is relying on its ability to make provision in relation to "other different cases or circumstances" (section 31(1)(a) of the Misuse of Drugs Act 1971) to specify the product by reference to its purpose.

2.4 Section 7(1)(b) of the Misuse of Drugs Act 1971 (which is also cited as an enabling power for these Regulations) allows the Secretary of State to "make such other provision as he thinks fit for the purpose of making it lawful for persons to do things which … it would otherwise be unlawful for them to do."

2.5 The Committee asked the Department to confirm that section 7(1)(b) is relied on in addition to the provisions specified in the Explanatory Memorandum. In a memorandum printed at Appendix 2, the Department provides that confirmation, and adds that reliance is also placed on section 31(1)(a) (read with section 7(1)(a)) for the scheme of scheduling of controlled drugs to the 2001 Regulations to have their full effect. **The Committee finds this explanation helpful and accordingly reports these Regulations for requiring the elucidation provided by the Department's memorandum.**

3 S.I. 2018/1076: Reported for defective drafting and for requiring elucidation

Sanctions (Overseas Territories) (Amendment of Information Provisions) Order 2018

3.1 **The Committee draws the special attention of both Houses to this Order on the grounds that it is defectively drafted in one respect and that it requires elucidation in one respect.**

3.2 This Order in Council amends the laws of British Overseas Territories to implement UN sanctions against various UN Member States. The amendments make certain businesses and professions subject to reporting requirements that currently apply only to financial institutions.

3.3 Article 8(3) purports to amend article 30(5) of the Libya (Restrictive Measures) (Overseas Territories) Order 2011 to create two definitions of "relevant person"—one in respect of a relevant financial institution and one in respect of a relevant business or profession. The amendment substitutes text in article 8(3) for the text "In this paragraph "relevant person"" in article 30(5) of the 2011 Order.

3.4 The Committee asked the Foreign and Commonwealth Office to explain how the amendment would be effected given that article 30(5) does not contain the text "In this paragraph "relevant person"". In a memorandum printed at Appendix 3 the Department accepts that the amendment cannot be effected, apologises for the error and undertakes to correct it at the earliest opportunity. **The Committee accordingly reports article 8 for defective drafting, acknowledged by the Department.**

3.5 The Committee also asked the Department to explain why the amendments made by articles 2, 6, 7 and 8 were not made to extend to Bermuda, given that the instruments they amend do so extend. In its memorandum, the Department explains that Bermuda has in recent years been making its own legislation to implement sanctions measures, which are primarily given effect by its International Sanctions Regulations 2013 as amended from time to time. The Department notes that as a result of Bermuda's 2013 Regulations, it is no longer necessary for the instruments amended by this Order to extend to Bermuda. It has informed the Government of Bermuda of this unnecessary duplication and undertakes to remove it at the earliest opportunity. **The Committee finds this explanation and undertaking helpful and accordingly reports this Order for elucidation, as provided in the Department's memorandum.**

4 S.I. 2018/1080: Reported for defective drafting

Computer Reservation Systems (Amendment) (EU Exit) Regulations 2018

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

4.2 These Regulations prospectively amend Regulation (EC) 80/2009 to update out-of-date references in anticipation of the EU Regulation becoming retained EU law after exit day.

4.3 Regulation 8 amends Article 11 of the EU Regulation, which deals with processing and storing personal data, by substituting references to the General Data Protection Regulation (GDPR) for references to the repealed Data Protection Directive (DPD). The Committee asked the Department for Transport to explain why the cross-reference in Article 11(3) had not been amended to refer to the correct article of the GDPR, i.e., the article that deals with special categories of data (Article 8 DPD but Article 9 GDPR).

4.4 The Committee also asked why the sentence "This Regulation shall be binding in its entirety and directly applicable in all Member States" had not been omitted, in line with the standard practice in other EU exit instruments that prospectively amend EU Regulations.

4.5 In a memorandum printed at Appendix 4, the Department acknowledges the errors and undertakes to deal with them at the earliest suitable opportunity. **The Committee accordingly reports these regulations for defective drafting, acknowledged by the Department.**

5 S.I. 2018/1082: Reported for defective drafting

Insolvency (Scotland) (Company Voluntary Arrangements and Administration) Rules 2018

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

5.2 These Rules set out the detailed procedures for the conduct of company voluntary arrangements and administration proceedings in Scotland under the Insolvency Act 1986. The Rules modernise and consolidate the Insolvency (Scotland) Rules 1986.

5.3 Rule 2.7(3) enables a nominee to require the proposer to provide information as to whether any director or officer (or certain former directors or officers) of the company in question has previously been involved with a company which has been the subject of insolvency proceedings or has been the subject of personal insolvency proceedings. Paragraph 3(d) lists whether the director or officer has "granted a trust deed" as information that must be provided to the nominee. The Committee asked the Department for Business, Energy and Industrial Strategy whether Rule 2.7(3)(d) is intended to cover the grant of any trust deed or is limited to a trust deed for the benefit of creditors.

5.4 In a memorandum printed at Appendix 5, the Department clarifies that rule 2.7(3) is intended to be limited to the grant of a trust deed for the benefit of creditors and asserts that this should be well understood in the context of the list in rule 2.7(3) which refers to either individual or corporate insolvency processes; it also undertakes to make an appropriate amendment to the rule at the next available opportunity. The Committee accepts that the provision would probably have to be given a restrictive interpretation in view of the context; but of course the precise intended scope of the provision should have been expressed, as it generally is in similar contexts. **The Committee accordingly reports rule 2.7(3)(d) for defective drafting.**

5.5 Rule 3.67(2)(d) lists those persons who can lodge a notice regarding the death of the administrator. The Committee asked the Department whether, under Rule 3.67(2)(d), a single executor if there is more than one, can lodge the notice, and if so, whether the first "the" should be replaced with "an". In its memorandum, the Department explains the policy intention is that if there is more than one executor, any one of them can lodge the notice. The Department acknowledges that it would have been preferable to use the indefinite rather than the definite article to deliver that policy intention but nonetheless considers that the drafting is sufficiently clear; and it undertakes to make an appropriate amendment to the rule at the next available opportunity. Again, the Committee accepts that it is more likely than not that courts and other readers will be forced to a conclusion coinciding with the Department's policy intention; but as always it would have been better to avoid the possibility of confusion. **The Committee accordingly reports Rule 3.67(2)(d) for defective drafting.**

6 Draft S.I.: Reported for failure to comply with proper legislative practice

Hertfordshire (Electoral Changes) (Amendment) Order 2018

6.1 **The Committee draws the special attention of both Houses to this Order on the ground that it fails to comply with proper legislative practice.**

6.2 This Order amends the date on which the electoral arrangements for the parish of Chorleywood come in to effect.

6.3 Section 59(9) of the Local Democracy, Economic Development and Construction Act 2009 and section 6(1) of the Statutory Instruments Act 1946 require that the Order be laid before Parliament for a period of forty days during which period either House may resolve that the Order not be made. Paragraph 3.11.28 of the Government's Statutory Instrument Practice states that the preamble should set out the fulfilment of any condition that the enabling Act requires before an instrument can be made and gives as an example the fact that a specified period has expired and neither House has resolved that the instrument should not be made.

6.4 The Committee asked the Local Government Boundary Commission for England why the fulfilment of this condition was not recited in the preamble. In a memorandum printed at Appendix 6, the Department accepts that this was an error. **The Committee accordingly reports the preamble for failure to comply with proper legislative practice, acknowledged by the Department.**

7 Draft S.I.: Reported for defective drafting and for unexpected use of powers

Online Pornography (Commercial Basis) Regulations 2018

7.1 **The Committee draws the special attention of both Houses to these draft Regulations on the grounds that they are defectively drafted and make an unexpected use of the enabling power.**

7.2 Part 3 of the Digital Economy Act 2017 ("the 2017 Act") contains provisions designed to prevent persons under the age of 18 from accessing internet sites which contain pornographic material. An age-verification regulator[1] is given a number of powers to enforce the requirements of Part 3, including the power to impose substantial fines.[2]

7.3 Section 14(1) is the key requirement. It provides:

> *"A person contravenes [Part 3 of the Act] if the person makes pornographic material available on the internet to persons in the United Kingdom on a commercial basis other than in a way that secures that, at any given time, the material is not normally accessible by persons under the age of 18".*

7.4 The term "commercial basis" is not defined in the Act itself. Instead, section 14(2) confers a power on the Secretary of State to specify in regulations the circumstances in which, for the purposes of Part 3, pornographic material is or is not to be regarded as made available on a commercial basis. These draft regulations would be made in exercise of that power. Regulation 2 provides:

> "(1) Pornographic material is to be regarded as made available on the internet to persons in the United Kingdom on a commercial basis for the purposes of Part 3 of the Digital Economy Act 2017 if either paragraph (2) or (3) are met.
>
> (2) This paragraph applies if access to that pornographic material is available only upon payment.
>
> (3) This paragraph applies (subject to paragraph (4)) if the pornographic material is made available free of charge and the person who makes it available receives (or reasonably expects to receive) a payment, reward or other benefit in connection with making it available on the internet.
>
> (4) Subject to paragraph (5), paragraph (3) does not apply in a case where it is reasonable for the age-verification regulator to assume that pornographic material makes up less than *one-third of the content of the material made available on or via the internet site or other means (such as an application program) of accessing the internet by means of which the pornographic material is made available.*
>
> (5) Paragraph (4) does not apply if the internet site or other means (such as an application program) of accessing the internet (by means of which the pornographic material is made available) is marketed as an internet site or other means of accessing the internet by means of which pornographic material is made available to persons in the United Kingdom."

1 The Secretary of State has designated the British Board of Film Classification to be the age-verification regulator.
2 See sections 19 and 20 of the 2017 Act.

7.5 The Committee finds these provisions difficult to understand, whether as a matter of simple English or as legal propositions. Paragraphs (4) and (5) are particularly obscure.

7.6 As far as the Committee can gather from the Explanatory Memorandum, the policy intention is that a person will be regarded as making pornographic material available on the internet on a commercial basis if:

(A) a charge is made for access to the material; OR

(B) the internet site is accessible free of charge, but the person expects to receive a payment or other commercial benefit, for example through advertising carried on the site.

7.7 There is, however, an exception to (B): in cases in which no access charge is made, the person will NOT be regarded as making the pornographic material available on a commercial basis if the material makes up less than one-third of the content on the internet site—even if the person expects to receive a payment or other commercial benefit from the site. But that exception does not apply in a case where the person markets it as a pornographic site, or markets an "app" as a means of accessing pornography on the site.

7.8 As the Committee was doubtful whether regulation 2 as drafted is effective to achieve the intended result, it asked the Department for Digital, Culture, Media and Sport a number of questions. These were designed to elicit information about the regulation's meaning and effect.

7.9 The Committee is disappointed with the Department's memorandum in response, printed at Appendix 7: it fails to address adequately the issues raised by the Committee.

7.10 The Committee's first question asked the Department to explain why paragraph (1) of regulation 2 refers to whether either paragraph (2) or (3) "are met"[3] rather than "applies". The Committee raised this point because paragraphs (2) and (3) each begin with "This paragraph applies if …". There is therefore a mismatch between paragraph (1) and the subsequent paragraphs, which could make the regulation difficult to interpret. It would be appropriate to conclude paragraph (1) with "is met" only if paragraphs (2) and (3) began with "The condition in this paragraph is met if …". The Department's memorandum does not explain this discrepancy. **The Committee accordingly reports regulation 2(1) for defective drafting.**

7.11 The first part of the Committee's second question sought to probe the intended effect of the words in paragraph (4) of regulation 2 italicised above, and how the Department considers that effect is achieved.

7.12 While the Department's memorandum sets out the policy reasons for setting the one-third threshold, it offers little enlightenment on whether paragraph (4) is effective to achieve the policy aims. Nor does it deal properly with the second part of the Committee's question, which sought clarification of the concept of "one-third of … material … on … [a] means …. of accessing the internet …".

7.13 The Committee is puzzled by the references in regulation 2(4) to the means of accessing the internet. Section 14(2) of the 2017 Act confers a power on the Secretary of

3 "are met" should in any event read "is met".

State to specify in regulations circumstances in which pornographic material is or is not to be regarded as made available on the internet on a commercial basis. The means by which the material is accessed (for example, via an application program on a smart phone) appears to be irrelevant to the question of whether it is made available on the internet on a commercial basis. The Committee remains baffled by the concept of "one-third of … material … on [a] means … of accessing the internet".

7.14 More generally, regulation 2(4) fails to specify how the one-third threshold is to be measured and what exactly it applies to. Will the regulator be required to measure one-third of the pictures or one-third of the words on a particular internet site or both together? And will a single webpage on the site count towards the total if less than one-third of the page's content is pornographic—for example, a sexually explicit picture occupying 32% of the page, with the remaining 68% made up of an article about fishing? The Committee worries that the lack of clarity in regulation 2(4) may afford the promoter of a pornographic website opportunities to circumvent Part 3 of the 2017 Act.

7.15 The Committee is particularly concerned that a promoter may make pornographic material available on one or more internet sites containing multiple pages, more than two-thirds of which are non-pornographic. For every 10 pages of pornography, there could be 21 pages about (for example) gardening or football. Provided the sites are not actively marketed as pornographic, they would not be regarded as made available on a commercial basis. This means that Part 3 of the Act would not apply, and the promoter would be free to make profits through advertising carried on the sites, while taking no steps at all to ensure that they were inaccessible to persons under 18.

7.16 The Committee anticipates that the shortcomings described above are likely to cause significant difficulty in the application and interpretation of regulation 2(4). The Committee also doubts whether Parliament contemplated, when enacting Part 3 of the 2017 Act, that the power conferred by section 14(2) would be exercised in the way provided for in regulation 2(4). **The Committee therefore reports regulation 2(4) for defective drafting and on the ground that it appears to make an unexpected use of the enabling power.**

Instruments not reported

At its meeting on 21 November 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.	Social Security (Amendment) (EU Exit) Regulations 2018
Draft S.I.	Social Security (Amendment) (Northern Ireland) (EU Exit) Regulations 2018
Draft S.I.	Privacy and Electronic Communications (Amendment) (No. 2) Regulations 2018
Draft S.I.	Tobacco Products and Nicotine Inhaling Products (Amendment etc.) (EU Exit) Regulations 2018
Draft S.I.	Anti-social Behaviour, Crime and Policing Act 2014 (Amendment) Order 2018
Draft S.I.	Universal Credit (Managed Migration) Regulations 2018
Draft S.I.	Payment Accounts (Amendment) (EU Exit) Regulations 2018
Draft S.I.	Statutory Auditors and Third Country Auditors (Amendment) (EU Exit) Regulations 2018
Draft S.I.	Trade Repositories (Amendment and Transitional Provision) (EU Exit) Regulations 2018
Draft S.I.	Merchant Shipping (Recognised Organisations) (Amendment) (EU Exit) Regulations 2019
Draft S.I.	Social Entrepreneurship Funds (Amendment) (EU Exit) Regulations 2018
Draft S.I.	Venture Capital Funds (Amendment) (EU Exit) Regulations 2018

Instruments subject to annulment

S.I. 2018/1109	Merchant Shipping (Work in Fishing Convention) (Consequential Provisions) Regulations 2018
S.I. 2018/1110	Zoonotic Disease Eradication and Control (Amendment) (England) (EU Exit) Regulations 2018
S.I. 2018/1111	Armed Forces Pension Schemes and Early Departure Payments Schemes (Amendments Relating to Flexible Working and Miscellaneous Amendments) Regulations 2018
S.I. 2018/1122	Ship Recycling (Requirements in relation to Hazardous Materials on Ships) (Amendment etc.) Regulations 2018

S.I. 2018/1124	Civil Jurisdiction and Judgments (Hague Convention on Choice of Court Agreements 2005) (EU Exit) Regulations 2018
S.I. 2018/1125	International Recovery of Maintenance (Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance 2007) (EU Exit) Regulations 2018
S.I. 2018/1126	Recovery of Costs (Remand to Youth Detention Accommodation) (Amendment No. 3) Regulations 2018
S.I. 2018/1127	Coroners Allowances, Fees and Expenses (Amendment) Regulations 2018
S.I. 2018/1135	Education Administration Rules 2018
S.I. 2018/1147	Communication of Investments (Revocation) (EU Exit) Regulations 2018

Draft instruments subject to negative procedure

Draft S.I.	Bournemouth, Christchurch and Poole (Electoral Changes) Order 2018
Draft S.I.	Dorset (Electoral Changes) Order 2018
Draft S.I.	East Suffolk (Electoral Changes) Order 2018
Draft S.I.	Somerset West and Taunton (Electoral Changes) Order 2018
Draft S.I.	West Suffolk (Electoral Changes) Order 2018

Appendix 1

S.I. 2018/1051

Plant Health (England) (Amendment) (No. 4) Order 2018

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

> *Explain why, when transposing the Annex to Commission Decision 2004/200/EC into articles 6(c) and 7(a) (as new items 89A and 43A respectively), the language was changed in such a way as to make the propositions syntactically inaccurate.*

2. The inaccurate syntax which the Committee has identified was an error. The Department apologises for the error and will correct it at the earliest opportunity.

Department for Environment, Food and Rural Affairs

6 November 2018

Appendix 2

S.I. 2018/1055

Misuse of Drugs (Amendments) (Cannabis and Licence Fees) (England, Wales and Scotland) Regulations 2018

1. The Committee has asked the Home Office for a memorandum on the following point:

> *Does the Department have anything to add to paragraphs 3.1 and 3.2 of the Explanatory Memorandum? In particular can the Department confirm that section 7(1)(b) of the Misuse of Drugs Act 1971 (which is also cited as an enabling power) is intended to be relied upon as providing relevant vires for what is proposed?*

2. The Department's own analysis of the reliance that it is placing on section 7(1) of the Misuse of Drugs Act 1971 ("the 1971 Act") for the purposes of inserting the new entry for "cannabis-based products for medicinal use in humans" into Schedule 2 to the Misuse of Drugs Regulations 2001 ("the 2001 Regulations"), and the attendant definition into regulation 2(1) of those Regulations, is as follows. At the outset, it may be helpful to set out section 7(1) of the 1971 Act, which provides:

> *"7.-(1) The Secretary of State may by regulations—*
>
> *a) except from section 3(1)(a) or (b), 4(1)(a) or (b) or 5(1) of this Act such controlled drugs as may be specified in the regulations; and*
>
> *b) make such other provision as he thinks fit for the purpose of making it lawful for persons to do things which under any of the following provisions of this Act, that is to say section 4(1), 5(1) and 6(1), it would otherwise be unlawful for them to do."* (emphases added)

3. Regulation 3 of the 2001 Regulations introduces Schedules 1 to 5 to those Regulations, which function in part simply as lists of the controlled drugs specified under section 7(1)(a) of the 1971 Act. However, in some instances, ensuring that entries to the lists function appropriately requires qualification of those entries in ways that make use of powers other than the bare power to specify "controlled drugs" as defined in section 2(1) of the 1971 Act.

4. In particular, reliance may also be placed either on section 7(1)(b) of the 1971 Act to make such other provision as the Secretary of State thinks fit for the purposes mentioned in paragraph (b), or on section 31(1)(a) of the 1971 Act for regulations made under any provision of the Act to make different provision in relation to different cases or circumstances. Section 31(1)(a) of the 1971 Act provides:

> *"31.-(1) Regulations made by the Secretary of State under any provision of this Act-*
>
> *a) may make different provisions in relation to different controlled drugs, different classes of persons, different provisions of this Act or other different cases or circumstances;"*

5. Generally, the Department accepts that it is to be assumed that it has relied on a substantive power such as section 7(1) rather than a "parasitic" power such as section 31(1)(a). The Department can confirm that some reliance is placed on section 7(1)(b), and, to the extent that such a construction is tenable, it is to be preferred over a construction that places reliance on a section 31(1)(a).

6. However, regulations under section 7(1)(b) can only address partially the impact of placing controlled drugs in Schedules 1 to 5 to the 2001 Regulations. The Department therefore considers that some reliance has to be placed on section 31(1)(a) (read with section 7(1)(a)) for the scheme of scheduling of controlled drugs to the 2001 Regulations, generally, to have their full effect.

7. As such, in the absence of section 7(1)(b) of the 1971 Act, the Department considers that it would be able to rely wholly on section 7(1)(a) and section 31(1)(a) to reschedule by reference to the form and purpose of the cannabis-based products in issue in the way that it has. Nevertheless, the Department accepts that it should have expressly indicated in paragraph 3.2 of its Explanatory Memorandum that it was also relying on the substantive power in section 7(1)(b) of the 1971 Act as relevant vires and apologises for not doing so.

Home Office

6 November 2018

Appendix 3

S.I. 2018/1076

Sanctions (Overseas Territories) (Amendment of Information Provisions) Order 2018

1. On 31 October 2018, the Committee requested that the Foreign and Commonwealth Office ("FCO") submit a memorandum on the following points:

a) Explain how the amendment made by article 8(3) will be effected, given that the provision being amended does not contain the text "In this paragraph "relevant person"".

b) Explain why the amendments made by articles 2, 6, 7 and 8 are not made to extend to Bermuda, given that the instruments they amend do so extend.

2. The FCO is grateful for the Committee's consideration of this instrument, and responds as set out below.

Response to question a)

3. It is accepted that the amendment made by article 8(3) cannot be effected, given that the provision being amended does not contain the text "In this paragraph "relevant person""; the provision in fact reads "In this article "relevant person"". The FCO apologises for this error.

4. The policy intention remains to amend the text of the provision so that it will read: "In this article, "relevant person", in respect of a relevant institution,". The FCO will correct article 8(3) through an amending instrument at the earliest opportunity.

Response to question b)

5. In recent years it has been standard practice that the instruments giving effect to sanctions regimes in the Overseas Territories apply to all territories, excluding Bermuda and Gibraltar. This is because Bermuda and Gibraltar make their own domestic legislation to implement the sanctions measures.

6. The International Sanctions Regulations 2013 ("2013 Regulations") were made by the Attorney-General and Minister of Legal Affairs of Bermuda on 21 March 2013.

7. Regulation 2 and paragraphs (f) and (j) of Schedule 1 to the 2013 Regulations provide for the Lebanon and Syria (United Nations Measures) (Overseas Territories) Order 2006 and the Libya (Restrictive Measures) (Overseas Territories) Order 2011, any amendments made from time to time to those Orders, and any modifications made to the Orders by regulation 2A of the 2013 Regulations, to have the force of law in Bermuda. Therefore, the amendments made by articles 2,6,7 and 8 of this instrument will have the force of law in Bermuda once this instrument has entered into force on 7 November.

8. The FCO further notes that regulation 2 of the 2013 Regulations expressly states that the relevant Orders shall have the force of law in Bermuda "whether or not it has been extended to Bermuda".

9. For completeness, the FCO notes that since September 2018, regulation 2A of the 2013 Regulations (as amended) has provided for the substance of the amendments made by articles 2, 6 and 8 of this instrument to apply in Bermuda. The Government of Bermuda has informed the FCO that this is an interim measure for the period until this instrument comes into force. It will amend the 2013 Regulations to remove these temporary provisions once this instrument has come into force on 7 November when these provisions will have the force of law in Bermuda by virtue of regulation 2.

10. Therefore, the FCO does not consider that the amendments made by articles 2, 6, 7 and 8 of this instrument should be extended to Bermuda.

11. However, it is acknowledged that the Lebanon and Syria (United Nations Measures) (Overseas Territories) Order 2006 and Part 1 of the Libya (Restrictive Measures) (Overseas Territories) Order 2011 continue to apply in Bermuda, despite the adoption by the Government of Bermuda of the 2013 Regulations.

12. The FCO is grateful to the Committee for highlighting this issue. We have informed the Government of Bermuda of this unnecessary duplication, but we note that there is no deficiency. We will look to remove the duplication at the earliest opportunity by way of an amending instrument.

Foreign and Commonwealth Office

6 November 2018

Appendix 4

S.I. 2018/1080

Computer Reservation Systems (Amendment) (EU Exit) Regulations 2018

1. In its letter to the Department of 31st October 2018, the Committee requested a memorandum on the following points:

> *1. Explain why regulation 8 has not amended the cross-reference in Article 11(3) of Regulation (EC) 80/2009 so that it refers to the correct article of the General Data Protection Regulation.*
>
> *2. Explain why the sentence "This Regulation shall be binding in its entirety and directly applicable in all Member States" has not been omitted.*

2. We are most grateful to the JCSI for pointing out these two omissions and will make further provision to deal with them at the earliest suitable opportunity.

Department for Transport

6 November 2018

Appendix 5

S.I. 2018/1082

Insolvency (Scotland) (Company Voluntary Arrangements and Administration) Rules 2018

1. In its letter to the Department of 31 October 2018, the Committee requested a memorandum on the following points:

> *1. Whether Rule 2.7(3)(d) is intended to cover the grant of any trust deed or is limited to a trust deed for the benefit of creditors (compare rule 3.79(b) and Rule 3.84(5)(g)); and*

2. The reference in rule 2.7(3) is intended to be limited to the grant of a trust deed for the benefit of creditors. The purpose of rule 2.7(3) is to enable the nominee, in preparing his or her report to the court, to require the proposer to provide information as to whether any current or former officer or director of the company which is the subject of the proposed CVA has previously been involved with a company which has been the subject of insolvency proceedings, or whether that director or officer has been the subject of personal insolvency proceedings. Items (a), (b), (c) and (e) in the list at rule 2.7(3) each refer to either corporate insolvency or individual insolvency processes. In the context of this list, we consider the reference at (d) to "granted a trust deed" will be well understood in Scotland as meaning the grant of a trust deed for the benefit of creditors, and that the provision will accordingly operate as intended in practice. An appropriate amendment will however be made to the rule at the next available opportunity in order to remove any doubt.

> *2. Whether, under Rule 3.67(2)(d), a single executor if there is more than one, can lodge the notice, and if so, whether the first "the" should be replaced with "an".*

3. The policy intention is that if there is more than one executor, any one of them can lodge the notice. While it is acknowledged that it would have been preferable to use the indefinite rather than the definite article to deliver that policy intention, we do not consider the meaning of the provision to be significantly impeded by use of the word "the". The singular reference to "the executor" includes the plural "the executors", implying that more than one executor may lodge the notice. On this basis, the drafting of the provision is considered to be sufficiently clear. An appropriate amendment will however be made to the rule at the next available opportunity in order to remove any doubt.

Department of Business, Energy Industrial Strategy

5 November 2018

Appendix 6

Draft S.I.

Hertfordshire (Electoral Changes) (Amendment) Order 2018

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

> *Explain why the preamble does not set out that a draft of the instrument has been laid before Parliament and a period of forty days has expired and neither House has resolved that the instrument should not be made.*

Response

2. The Commission accepts that the draft of the Hertfordshire (Electoral Changes) (Amendment) Order 2018 should have set out that a draft of the instrument has been laid before Parliament and a period of forty days has expired and neither House has resolved that the instrument should not be made.

3. The Commission apologises for this oversight, and intends to remedy this omission when the Order is made.

Local Government Boundary Commission for England

6 November 2018

Appendix 7

Draft S.I.

Online Pornography (Commercial Basis) Regulations 2018

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

Q1. Explain why regulation 2(1) concludes with "are met" instead of "applies".

2. Regulation 2(1) concludes with "are met" rather than "applies" because it has been drafted on the basis that a person is not to be considered to be making available pornographic material on the internet on a commercial basis unless it **meets** one of a set of criteria:

- They charge for making pornography available
- or, if making pornography available free of charge, receives a payment or other benefit (eg advertising revenue) for doing so.

3. Where content is made available free of charge but payment or benefit is received via other sources, at least a third of the content must be pornographic material for it to be in scope of these regulations (see Regulation 2(4)), unless the website is marketed with the intention to make pornography available.

Q2. In relation to regulation 2(4), explain:

(a) the intended effect of "… one-third of the content of the material made available on or via the internet site or other means (such as an application program) of accessing the internet by means of which the pornographic material is made available", and how the Department considers that effect is achieved; and

4. The intended effect of that provision is to ensure that the legislation applies to pornographic websites, rather than popular social media platforms on which pornographic material is only a small part of the overall content. This was debated in Parliament during the passage of the Bill.

5. The definition of commercial providers of online pornography include persons that do not charge customers for providing access to the pornographic material but nevertheless receive a commercial benefit (for example through advertising) for doing so. Therefore, to achieve the intended effect, it is necessary to set a threshold below which that material should not be regarded as made available on a commercial basis to ensure a proportionate approach. If less than a third of the content of a website is pornography, we feel that pornography does not make up a significant portion of the overall commercial benefit that the person receives in connection with operating that means of accessing the internet, and therefore it should not be regarded as a commercial pornographic website.

(b) the concept of "more than a third of material on a means of accessing the internet" (see paragraph 7.6 of the Explanatory Memorandum).

6. The BBFC will ascertain whether regulation 2(3) of the Commercial Regulations does not apply based on whether it is reasonable to assume that pornographic material makes up less than one-third of the content of the material made available on or via the internet site or other means (such as an application program) of accessing the internet by means of which the pornographic material is made available. The BBFC's assessment will be made in relation to the number of pieces of content and will be based on sampling.

Q3. Explain the intended meaning of "the internet site" in regulation 2(4) and (5).

7. For the purposes of these regulations, an "internet site" is intended to mean a set of related web pages located under a single domain name.

Department for Digital, Culture, Media and Sport

6 November 2018