



House of Lords  
House of Commons  
Joint Committee on  
Statutory Instruments

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# Fifty-ninth Report of Session 2017–19

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**Drawing special attention to:**

*Fisheries, Aquaculture and Marine (Functions Exercisable in or as Regards Scotland) (Amendment) (EU Exit) Regulations 2019 (S.I. 2019/728)*

*Ordered by the House of Lords  
to be printed 15 May 2019*

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## 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-Beedoe](#) (*Crossbench*)

[Lord Rowlands](#) (*Labour*)

[Baroness Scott of Needham Market](#) (*Liberal Democrat*)

#### House of Commons

[Jessica Morden MP](#) (*Labour, Newport East*) (Chair)

[Susan Elan Jones](#) (*Labour, Clwyd South*)

[Vicky Foxcroft MP](#) (*Labour, Lewisham, Deptford*)

[Patrick Grady MP](#) (*Scottish National Party, Glasgow North*)

[John Lamont MP](#) (*Conservative, Berwickshire, Roxburgh and Selkirk*)

[Julia Lopez MP](#) (*Conservative, Hornchurch and Upminster*)

[Sir Robert Syms MP](#) (*Conservative, Poole*)

### 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](#), relating to Public Business.

### 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**

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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](http://www.parliament.uk/jcsi).

### **Committee staff**

The current staff of the Committee are Jeanne Delebarre (Commons Clerk), Christine Salmon Percival (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](mailto:jcsi@parliament.uk).



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# Instruments reported

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At its meeting on 15 May 2019 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 one of those considered. The Instrument and the grounds for reporting it are given below. The relevant Departmental memorandum, is published as an appendix to this report.

## 1 S.I. 2019/728: Reported for doubt about whether there was power to make the Regulations

### *Fisheries, Aquaculture and Marine (Functions Exercisable in or as Regards Scotland) (Amendment) (EU Exit) Regulations 2019*

1.1 The Committee draws the special attention of both Houses to these Regulations on the ground that there appears to be a doubt about whether there was power to make them.

1.2 This instrument, which is subject to annulment, is made under section 8(1) of the European Union (Withdrawal) Act 2018. Paragraph 3(2) of Schedule 7 to the Act states, in effect, that a minister may not make an instrument under section 8(1) so that it is subject to annulment unless the minister has made a statement in writing to the effect that in the minister's opinion the instrument should be subject to annulment and has laid before each House a draft of the instrument.

1.3 A draft was laid before Parliament and considered by the sifting committee of each House which agreed that annulment was an appropriate procedure. Regulation 1 of the draft provided for the instrument to come into force on exit day. Regulation 1 of this instrument, however, provides for it to come into force on whichever is the later of exit day or the 21st day after the day on which it is made. Given the difference between the draft and the made instrument, the Committee asked the Department for Environment, Food and Rural Affairs to explain how the instrument satisfies the requirements of paragraph 3(2).

1.4 In a memorandum printed as an Appendix, the Department explains the reason for the change – a desire to avoid a breach of the 21-day rule (at the time the instrument was made, on 28 March, exit day was prescribed as 29 March). The Department did not consider that the requirement to lay a draft under paragraph 3(2) required the instrument to be re-laid for reconsideration by the sifting committees, given the nature of the change. As the effect of the change was only to the commencement date it would not have affected the recommendations of the committees. The Department therefore considered that the instrument as made satisfied the requirements of paragraph 3(2). However, it acknowledges that this may not be the case and, if so, will commit to revoking this instrument and re-laying it in accordance with the requirements of Schedule 7.

1.5 In the Committee's view, the wording of paragraph 3(2) is very specific. It does not merely prescribe a procedural requirement, but also expressly states that the instrument may not be made unless that requirement is fulfilled. Although the difference between the laid draft and the instrument which is purported to have been made is minor and,

in the light of subsequent events, of no practical effect, at the time the instrument was made there was a real difference. Paragraph 3(2) does not require the laying of a draft of a similar instrument, it requires the laying of a draft of the instrument.

**1.6 The Committee accordingly reports these Regulations on the ground that there appears to be doubt about whether there was power to make them, the possibility of which is acknowledged by the Department.**

## Instruments not reported

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At its meeting on 15 May 2019 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

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### Draft instrument requiring affirmative approval

**Draft S.I.** Justice and Security (Northern Ireland) Act 2007 (Extension of duration of non-jury trial provisions) Order 2019

### Instruments subject to annulment

**S.I. 2019/891** Disabled Persons (Badges for Motor Vehicles) (England) (Amendment) Regulations 2019

**S.I. 2019/893** Marine Licensing (Exempted Activities) (Amendment) Order 2019

**S.I. 2019/894** Legal Aid (Financial Resources and Contribution Orders) (Amendment) Regulations 2019

**S.I. 2019/903** County Courts (Interest on Judgment Debts) (Amendment) Order 2019

### Instrument not subject to Parliamentary proceedings not laid before Parliament

**S.I. 2019/896** European Parliamentary Elections (Returning Officer's Charges) (Northern Ireland) Order 2019

# Appendix

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## S.I. 2019/728

### ***Fisheries, Aquaculture and Marine (Functions Exercisable in or as Regards Scotland) (Amendment) (EU Exit) Regulations 2019***

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

*In the draft instrument bearing the title of this one that was laid before Parliament under paragraph 3(3) of Schedule 7 to the European Union (Withdrawal) Act 2018 regulation 1 provided for that instrument to come into force on exit day. Given that article 1 of this instrument makes different provision (albeit not with a different effect as it transpires), explain how this instrument satisfies the requirements of paragraph 3(2) of that Schedule.*

2. This instrument was laid in draft before both Houses of Parliament in accordance with paragraph 3(3) of Schedule 7 on 6 March 2019. The relevant committees (“the sifting committees”) agreed with the Government that the instrument did not need to be debated in Parliament. It was then made on 28 March 2019 and laid before Parliament subject to the negative procedure on 29 March 2019.

3. As the Committee has noted, the draft of the instrument which was considered by the sifting committees contained slightly different wording in regulation 1 compared to the instrument as subsequently made. The draft of the instrument considered by the sifting committees stated in regulation 1: “*These Regulations...come into force on exit day*”. Whereas the instrument as subsequently made stated in regulation 1: “*These Regulations... come into force on the later of exit day or the 21st day after the day on which they are made*”.

4. The reason for the change in the wording of regulation 1 was because the Department did not wish to breach the convention that an instrument should not normally be laid before Parliament less than 21 days before it comes into force (“the 21 day rule”). On the date of making, given the statutory definition of “exit day” that applied at the time, the 21 day rule would have been breached. However, as the Committee has noted, given the subsequent amendment of the definition of “exit day”, the instrument will now come into force on exit day, as per the original wording of the draft instrument.

5. The Department did not consider that the requirement to lay a draft of the instrument before Parliament under paragraph 3(3) of Schedule 7 required the instrument to be re-laid for reconsideration by the sifting committees, given the nature of the change. The effect of the change of wording in regulation 1 only concerned the coming into force date, allowing for compliance with the 21 day rule. The change would therefore not have affected the recommendations of the sifting committees. We therefore considered that the instrument as made satisfied the requirements of paragraph 3(2) of that Schedule. However, we acknowledge that this may not be the case and, if so, we will commit to revoking the instrument and re-laying it in accordance with the requirements of the Schedule.

**Department for Environment, Food and Rural Affairs**

**7 May 2019**