House of Lords
House of Commons
Joint Committee on Statutory Instruments

Sixty-fourth Report of Session 2017–19

Drawing special attention to:

Proxy Advisors (Shareholders’ Rights) Regulations 2019 (S.I. 2019/926)
Cyber-Attacks (Asset-Freezing) Regulations 2019 (S.I. 2019/956)
Firearms (Amendment) Rules 2019 (S.I. 2019/963)

Ordered by the House of Lords
to be printed 26 June 2019

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Joint Committee on Statutory Instruments

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Lord Lexden (Conservative)
Baroness Meacher (Crossbench)
Lord Morris of Handsworth (Labour)
Lord Rowe-Beddoe (Crossbench)
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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, 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.

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 Brookesbank, 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 26 June 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 five 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. 2019/926: Reported for requiring elucidation and for defective drafting

Proxy Advisors (Shareholders’ Rights) Regulations 2019

1.1 The Committee draws the special attention of both Houses to these Regulations on the grounds that they require elucidation in one respect and are defectively drafted in another respect.

1.2 These Regulations transpose Article 3j of the revised EU Shareholder Rights Directive (Directive 2007/36/EC) into UK law. Article 3j requires proxy advisors to make certain disclosures about the way in which they conduct their business.

1.3 The Committee asked HM Treasury to explain how regulation 3(4)(a) complies with the requirement in Article 3j(1) of the Directive for the information in that regulation to be updated on an annual basis. In a memorandum printed at Appendix 1, the Department acknowledges that for some proxy advisors, the first update to the information published under regulation 3 will not be made within one year of the first publication. The Department explains that regulation 3(4)(a) enables proxy advisors to align their first update of information with their normal financial year reporting cycle and that the information will be updated at intervals of no more than 12 months thereafter (regulation 3(4)(b)). The Department considered that it was disproportionately burdensome on industry to require that proxy advisors make disclosures at a different time to their normal financial reporting cycle. Although not a legally binding document, the Department relied on the European Commission, Directorate General for Justice document dated 12 September 2018, “A follow-up to the Special Company Law Expert Group meetings on the Transposition and Implementation of Directive (EU) 2017/828 (Shareholders’ Rights Directive)” to support their policy objective of proportional implementation using a transitional measure. The Committee accordingly reports regulation 3(4)(a) for requiring the elucidation provided by the Department’s memorandum.

1.4 The Committee also asked the Department to explain why, given that paragraph 7.8 of the Explanatory Memorandum mentions a ground on which entry on to the public list of proxy advisors can be refused (that a proxy advisor is not within the scope of the regime), refusal on this ground is not covered in regulation 31. In its memorandum, the Department explains that it was considered unnecessary to include this ground in regulation 31 because that regulation already obliges the Financial Conduct Authority (FCA) to maintain a public list of proxy advisors within the scope of the Regulations and obliges those proxy advisors to notify the FCA so that the FCA can include them on the list. The Department argues that it is implicit in regulation 31 that persons who are not proxy advisors under the definition in regulation 2 would not be admitted to the list.
Committee disagrees. Regulation 31(6) obliges the FCA to admit every proxy advisor who gives notice under paragraph (3) to the public list. It is possible that a person who gives notice under that paragraph may not be within the scope of the regime. Regulation 32(2) allows the FCA to remove a person from the list if it is satisfied that person has ceased to be a proxy advisor and has failed to give notice but there is no similar provision for the FCA to refuse admission to the list if it is satisfied that the person giving notice is not a proxy advisor within the scope of the Regulations. The Committee accordingly reports regulation 31 for defective drafting.

2 S.I. 2019/945: Reported for failure to comply with proper legislative practice

Cattle Compensation (England) Order 2019

2.1 The Committee draws the special attention of both Houses to this Order on the ground that it fails to comply with proper legislative practice in one respect.

2.2 This Order replaces the expiring Cattle Compensation (England) Order 2012 and provides for rates of compensation where the Secretary of State causes an animal to be slaughtered under the Animal Health Act 1981 in its application to bovine tuberculosis, brucellosis and enzootic bovine leukosis.

2.3 Paragraph 4 of the Schedule contains an express requirement for the Secretary of State to give reasons for any decision to reduce compensation but paragraph 5 which relates to a review of that decision contains no such requirement. The Committee asked the Department for Environment, Food and Rural Affairs to explain the difference. In a memorandum printed at Appendix 2, the Department explains that the owner will now be receiving the full report and recommendation of the person appointed by the Secretary of State to review the decision together with the notification of the Secretary of State’s decision on the review. This report will contain the reasons for the appointed person’s recommendation to the Secretary of State. However, as the Department acknowledges, the Secretary of State may not accept the recommendation or may accept it for different reasons; in such a case the Department argues that there is a clear expectation as a matter of good public administration that the notification should explain the reasons. The Committee agrees that the duty to give reasons can be implied from the duty of decision makers to act fairly and rationally but it is inconsistent and potentially confusing to include an express requirement to give reasons in paragraph 4 but leave that requirement to be implied in paragraph 5. The Committee accordingly reports paragraphs 4 and 5 of the Schedule for failure to comply with proper legislative practice.

3 S.I. 2019/956: Reported for requiring elucidation

Cyber-Attacks (Asset-Freezing) Regulations 2019*

3.1 The Committee draws the special attention of both Houses to these Regulations on the ground that they require elucidation in one respect.
3.2 This instrument implements in UK law the enforcement regime that applies to Council Regulation (EU) 2019/796 of 17 May 2019 concerning restrictive measures against cyber-attacks threatening the Union or its Member States. Article 3 of the EU Regulation provides that “No funds or economic resources shall be made available, directly or indirectly, to or for the benefit of natural or legal persons, entities or bodies listed in Annex I.” This prohibition is repeated in regulations 5 and 7 of the UK instrument, which it is an offence to contravene, but in both cases the prohibition only applies when the person listed in the Annex “obtains, or is able to obtain, a significant financial benefit” from the funds or economic resources being made available to them. It was not clear to the Committee on what authority the prohibition could be limited in this way. It therefore asked the Treasury to explain why regulations 5 and 7 prohibit funds and economic resources from being made available for the benefit of a designated person only where that person would thereby obtain a significant financial benefit. In a memorandum printed at Appendix 3, the Department explains that this reflects a policy choice to give meaning to the term “benefit” for the purposes of domestic criminal law, and that limiting the application of the criminal law in this way means that the penalties for infringing the provisions of the Regulation are effective, proportionate and dissuasive. The Committee accordingly reports regulations 5 and 7 as requiring the elucidation provided by the Department’s memorandum.

* The Committee takes this opportunity to publish the letter to which paragraph 3.1 of the Explanatory Memorandum to this instrument refers, which is printed at Appendix 3b.

4 S.I. 2019/963: Reported for defective drafting

**Firearms (Amendment) Rules 2019**

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

4.2 This instrument replaces the existing application form for registration as a firearms dealer (in Schedule 5 to the Firearms Rules 1998 (SI 1998/1941)) so that applicants are required to provide additional information. Part F of the form is a new personal health and medical declaration to be made by the individual making the application. The form requires the individual to provide the details of their GP or GP practice, consent to the police contacting their GP to obtain their medical history, and consent to the GP sharing their sensitive personal data with the police. According to the notes to Part F, where the application is made on behalf of a company, the individual who makes the application is the officer of the company who has day-to-day responsibility for or direct oversight of the firearms held by the company. The notes state that the police will ask the individual’s GP to place an encoded reminder on their patient record “to indicate that you have been registered as a firearms dealer” and that the declaration applies “during the validity of your registration”.

4.3 It was not clear to the Committee how these provisions were intended to work in practice when the registered firearms dealer was a company. It asked the Home Office to clarify what happens if the officer who made the medical declaration ceases to be the person with day-to-day responsibility for or direct oversight of firearms for that company,
and whether that officer’s consent to information sharing, if not expressly withdrawn, continues to apply while the company’s registration remains valid. In a memorandum printed at Appendix 4, the Department explains that the outgoing officer’s consent will continue only for as long as they remain the officer with day-to-day responsibility for or direct oversight of firearms for the company, but it is not entirely clear how: the Department appears to suggest that this will result from Part F being completed by the new officer when the company applies for a new registration certificate. The Department also states that if the outgoing officer or the company notifies the police of a change, the police will request that the encoded reminder be removed from their GP’s records.

4.4 The Committee considers this process to be insufficiently certain. A registration certificate need only be renewed every three years. There is no requirement to notify the police that the officer with day-to-day responsibility for or direct oversight of firearms has changed within that three-year period. Consequently, the role could be occupied for long periods by an individual suffering from a medical condition that affects their ability to possess a gun safely, which is precisely the mischief the new medical declaration requirement seeks to address. The Committee is also troubled by the fact that the consent and encoded reminder will remain in place unless the police are notified of a change, given that apart from the three-year renewal requirement, no such notification is required or even suggested. Since the GP is under a continuing obligation to notify the police of any new diagnosis or relevant medical conditions and has continuing consent to share details about the individual’s physical and mental health, this does not provide adequate safeguards for the individual’s right to respect for their private life. The processes identified by the Department could meet these difficulties, but given the specificity of detail in these Regulations, it is inconsistent to say the least (and possibly ineffective) to leave them to be implied administratively. The Committee accordingly reports Part F of the form in Schedule 1 for defective drafting.

5 S.R. 2019/107: Reported for requiring elucidation and for failure to comply with proper legislative practice

Welfare Reform (Northern Ireland) Order 2015 (Commencement No. 13 and Savings and Transitional Provisions (Amendment)) Order 2019

5.1 The Committee draws the special attention of both Houses to this Order on the grounds that it requires elucidation in one respect and fails to comply with proper legislative practice in another respect.

5.2 This Order inserts a new definition of “couple” into an earlier welfare reform Order with the effect that the term is defined by reference to different provisions of primary legislation in different circumstances. Two of those provisions, however, define “couple” in identical terms. The Committee asked the Department for Work and Pensions to explain why, that being the case, different definitions of “couple” are required in different circumstances. In a memorandum printed at Appendix 5, the Department explains that despite the like wording in primary legislation, each definition operates by reference to different subordinate legislation, as a result of which the definitions diverge in relation to the circumstances in which a couple is to be treated as not living together as part of the same household. The Committee accordingly reports Article 2(2)(b) for requiring the elucidation provided by the Department’s memorandum.
5.3 The Committee also noticed that footnotes to the new definition refer to defined terms which have been repealed by the Civil Partnership Act 2004. The Department acknowledges and apologises for these errors. The Committee accordingly reports the footnotes to Article 2(2)(b) for failure to comply with proper legislative practice, acknowledged by the Department.
Instruments not reported

At its meeting on 26 June 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

Instruments subject to annulment

S.I. 2019/981  Finance Act 2019, Section 57(2) and (4) (Tobacco for Heating) (Appointed Day) Regulations 2019

S.I. 2019/982  Occupational Pension Schemes (Investment and Disclosure) (Amendment) Regulations 2019

S.I. 2019/989  Export Control (Amendment) Order 2019

S.I. 2019/990  National Health Service (Amendments Relating to Serious Shortage Protocols) Regulations 2019

S.I. 2019/1005  Smart Export Guarantee Order 2019

S.I. 2019/1006  Housing (Right to Buy) (Designated Rural Area and Designated Region) (England) Order 2019

S.I. 2019/1009  Social Security (Contributions) (Amendment No. 2) Regulations 2019


S.I. 2019/1012  Euratom Research and Training Programme (Revocation) (EU Exit) Regulations 2019

Instrument subject to annulment (Northern Ireland)

S.R. 2019/118  Personal Independence Payment (Transitional Provisions) (Amendment) Regulations (Northern Ireland) 2019

Instruments not subject to Parliamentary proceedings not laid before Parliament

S.I. 2019/950  Wireless Telegraphy (Spectrum Trading) (Amendment) Regulations 2019

S.I. 2019/951  Wireless Telegraphy (Mobile Spectrum Trading) (Amendment) Regulations 2019

S.I. 2019/952  Wireless Telegraphy (Register) (Amendment) Regulations 2019
Appendix 1

S.I. 2019/926

Proxy Advisors (Shareholders' Rights) Regulations 2019

1. The Committee has asked, in relation to the Proxy Advisors (Shareholders' Rights) Regulations 2019 (S.I. 2019/926) (the Regulations) for a memorandum on the following point:

   Explain how regulation 3(4)(a) complies with the requirement in Article 3j(1) of the Shareholder Rights Directive for the information in that regulation to be updated on an annual basis (given that regulation 3(3)(c) requires information to be published for the first time no later than 21 June 2019 and regulation 3(4)(a) requires that information to be updated for the first time no later than the end of P’s first financial year starting after 10 June 2019, which could be a date in 2021).

2. Regulation 3(4)(a) requires proxy advisors to update the information published in accordance with regulation 3 for the first time no later than the end of the proxy advisor’s first financial year starting after 10 June 2019 (the transposition deadline). This is a transitional provision which will apply to the first update only of information by proxy advisors.

3. This provision enables proxy advisors to align the first update of information in regulation 3 with their normal financial year reporting cycle. The information will be updated by proxy advisors at intervals of no more than 12 months thereafter (regulation 3(4)(b)), in line with Article 3J(1) of Directive 2017/828. These provisions aim to avoid the need for proxy advisors to make two reports in the first year after the Regulations come into force and each year after that.

4. It is acknowledged that for some proxy advisors, the first update to the information published under regulation 3 will not be made within one year of the first publication, as required by Article 3J(1) of the Directive. This decision was taken on the basis that it was considered disproportionately burdensome on industry to require that proxy advisors make disclosures as set out in regulation 3 at a different time to their normal financial reporting cycle.


6. The question considered, and the answer given, is as follows:

   “Q: What should be the starting point of the reporting obligations for companies, investors and proxy advisors?”
A: The directive does not include any specific provisions specifying the exact starting point of the reporting obligations and the definition of transitional rules has been left to Member States.

In line with the approach taken for other legal acts relating to reporting (e.g. Directive 2013/34/EU), it could be understood that reporting requirements that pertain to a specific financial year (such as a requirement to establish a remuneration report in line with Article 9b of Directive 2007/36/EC) should apply at the latest to the financial year beginning after the expiry of the deadline for the transposition of this Directive, i.e. after 10 June 2019.

However, Member States may also require that reports that are prepared after the expiry of the transposition deadline are prepared in line with the new rules.”

7. This is not a legally binding document and nor does it commit the European Commission. However, HM Treasury have relied on this to support the policy objective of proportionate implementation using a transitional measure. The provision in regulation 3(4)(a) aligns with similar approaches taken on the transposition of other requirements in the Directive (e.g. Article 9b(2) of the Directive), which have been transposed by other departments.

8. The Committee has also asked, in relation to the Proxy Advisors (Shareholders’ Rights) Regulations 2019 (S.I. 2019/926) for a memorandum on the following point:

Given that paragraph 7.8 of the Explanatory Memorandum mentions a ground on which entry on to the list can be refused, explain why refusal on this ground is not covered in regulation 31.

9. The ground for refusing entry of a proxy advisor onto the list mentioned in paragraph 7.8 of the Explanatory Memorandum is not set out in the Regulations. HM Treasury considered it unnecessary to include it for the following reasons: regulation 31 obliges the FCA to maintain a public list of those proxy advisors within the scope of the Regulations. It also obliges existing proxy advisors within the scope of the Regulations, or anyone who becomes a proxy advisor within the scope of the Regulations, to notify the FCA so that the FCA can include them on the list. Persons who are not proxy advisors under the definition in regulation 2 of the Regulations would not be admitted to the list and that is implicit in regulation 31.

10. The phrase in paragraph 7.8 of the Explanatory Memorandum aims to explain that someone who isn’t a proxy advisor within the scope of the Regulations could not be admitted to the list maintained by the FCA, and would be refused on that basis.

HM Treasury

17 June 2019
Appendix 2

S.I. 2019/945

Cattle Compensation (England) Order 2019

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

   Explain why there is no requirement in paragraph 5(4) of the Schedule for the Secretary of State to give reasons for his decision.

2. The Department accepts that it is a matter of good public administration to provide reasons for decisions that are taken as a result of a review of a decision such as this. The review is available under paragraph 5 of the Schedule, where a cattle owner seeks to challenge the percentage reduction applied to the compensation that would have been received but for the owner’s considerable delay in having his or her cattle herd tested for bovine Tuberculosis. Paragraph 4 sets out the formula for such reductions on a sliding scale (from more than 60 days’ delay to more than 180 days).

3. The Cattle Compensation (England) Order 2012 (S.I. 2012/1379) introduced reductions to the compensatory payment for the first time. Paragraph 5 of the Schedule to that instrument contained an explicit requirement for the Secretary of State to give reasons for the review decision when reporting it to the owner. However, for the purposes of the replacement of that instrument by the Cattle Compensation (England) Order 2019, the Department decided that it was appropriate that the owner should receive the full report and recommendation of the appointed person alongside the notification of the Secretary of State’s decision on the review. That report will provide the analysis and reasons for the appointed person’s recommendation to the Secretary of State.

4. It was considered that the provision of this report made it unnecessary to specify in the legislation that reasons for the Secretary of State’s decision should also be provided. Where the Secretary of State accepts the conclusions and reasoning of the report, the reasons will be those contained in the report.

5. In the event that the Secretary of State does not accept the recommendation in the report of the appointed person (which is likely to be rare), or if he accepts it for different reasons, there would be a clear expectation as a matter of good public administration that the notification should explain the reasons why the Secretary of State felt it necessary to depart from the recommendation or from the reasons given in the report. An omission to do so would give rise to an unexplained and incoherent disjunction between the recommendation and the Secretary of State’s decision. Accordingly, where the decision to maintain, amend or withdraw the decision under paragraph 4 differs from the recommendation or reasons of the appointed person, the notification of the decision will necessarily contain the reasons for that decision.
6. It is perhaps of note that since 2012 there has been no review requested under paragraph 5 of the Schedule. The Secretary of State has therefore never made a decision regarding a review under the existing provision.

Department for Environment, Food and Rural Affairs

18 June 2019
Appendix 3a

S.I. 2019/956

Cyber-Attacks (Asset-Freezing) Regulations 2019

1. The Committee has asked, in relation to the Cyber-Attacks (Asset-Freezing) Regulations 2019 (S.I. 2019/956) (the Regulations) for a memorandum on the following point:

   Explain why regulations 5 and 7 prohibit funds and economic resources from being made available for the benefit of a designated person only where that person would thereby obtain a significant financial benefit.

2. The Regulations set out the domestic scheme for enforcement of the obligations arising from Council Regulation (EU) 2019/796. By Article 15(1) of that Regulation, “Member States shall lay down the rules on penalties applicable to infringements of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented. The penalties provided for shall be effective, proportionate and dissuasive.”

3. The Council Regulation prohibits funds or economic resources from being provided to, or for the benefit of, a designated person. “Benefit”, however, is not defined in the Regulation.

4. The Treasury has taken a policy choice in regulations 5 and 7 to give some meaning to the term for the purposes of domestic criminal law. In deciding how best to enforce the provisions of EU law in the UK, the Treasury has consistently taken the view in provisions such as these that it is an effective, proportionate and dissuasive approach to limit the application of the criminal law to those cases where a person makes funds or economic resources available to a person for the benefit of a designated person, only where that person would thereby obtain a significant financial benefit. This would rule out prosecution, for example, in cases such as a person buying a bus ticket on a one-off basis for the benefit of a designated person.

5. The drafting in this instrument follows that in all analogous instruments drafted to enforce other EU sanctions regimes. It is also used in the Terrorist Asset-Freezing etc Act 2010, sections 13 and 15.

HM Treasury

18 June 2019
Appendix 3b


1. I write on behalf of HM Treasury in response to the Committee’s comments in paragraph 1.4 of the above report, published on 22 July 2016. We are sorry that it has taken us some time to respond to the Committee’s invitation.

2. The Committee raised concerns at paragraph 1.4 about the Department’s use of repetition of EU provisions with direct effect.

   1.4 The Committee notes, in the light of those statements, that the 2013 Regulations appear extensively to repeat EU provisions of direct effect—a practice traditionally treated by the CJEU as unlawful in EU law (case 34–73, VARIOLA) save to the extent required for coherence of legislative controls (case 272–83, COMMISSION V ITALY). The Committee, which did not query the repetition in relation to the 2013 Regulations, raises no objection to the solution proposed now. Nonetheless, it invites the Department to reconsider its overall approach to repetition if the 2013 Regulations come to be revoked and replaced or if regulations equivalent to the 2013 Regulations come to be made and, if the practice is continued, to use the Explanatory Memorandum to set out its reasons for continuation.

3. As requested, HM Treasury has taken the opportunity to review its approach to the repetition of EU provisions of direct effect. For the reasons set out below, and in particular due to the report detailed below from the Secondary Legislation Scrutiny Committee concerning the need for transparency in respect of instruments which provide for offences, it has concluded that it will for the present time continue with its current drafting approach.

4. HM Treasury is aware that the Committee requested that if the Department intends, as it does, to continue with its approach, it should set out its reasons within the relevant Explanatory Memorandum should the 2013 Regulations come to be revoked and replaced or if regulations equivalent to the 2013 Regulations come to be made. Given, however, that the reasons for HM Treasury’s position go into some detail, we thought that the Committee might be better assisted by a letter setting out the position and the key reasons for it.

   **Reasons for repetition of directly applicable EU provisions—Financial sanctions**

5. HM Treasury recognises that there is clear EU case law to support the prohibition on repetition of EU provisions with direct effect, and in particular that domestic legislation should in no way:

   - conceal the Community nature, effect and timing of the EU provisions; or
   - provide additional exemption from, or adversely effect, the EU provision.
6. However, the EU case law also accepts that there will be situations where repetition is appropriate. The European Court has specifically recognised that it is permissible to transpose provisions of EU regulations into national law:

- where the relevant provisions are so worded as to require or invite implementation by the Member States. The Court summarised its view in Case C-223/98 Adidas [1999] ECR I-7081:

  “...where the implementation of a Community [EU] regulation is a matter for the national authorities...recourse to rules of national law is possible only in so far as it is necessary for the correct application of that regulation and in so far as it does not jeopardise either the scope or the effectiveness thereof.... Under the obligations laid down in Article...[10 EC]..., those national measures must, in general, facilitate the application of the Community [EU] regulation and not hinder its implementation.”

- where incorporation of some elements of the EU Regulation in national law is necessary for the sake of coherence and in order to make the national implementing legislation comprehensible to the persons to whom it applies. The Court stated in Case 272/83 Commission v Italy [1985] ECR 1057:

  “The application in Italy of the system for encouraging the formation of producer groups cannot be assured by the Community Regulations alone; as the Commission itself recognizes, it depends upon the combination of a number of provisions adopted at Community, national and regional level. In such special circumstances, the fact that regional laws incorporate, for the sake of coherence and in order to make them comprehensible to the persons to whom they apply, some elements of the Community Regulations, cannot be regarded as a breach of Community law.”

Implementation

7. In relation to the effective implementation of the relevant European law, standard provisions in EU financial sanctions regimes imposes obligations on Member States to provide for enforcement measures. For example, Article 14(1) of Council Regulation (EC) No 329/2007 concerning restrictive measures against the Democratic People’s Republic of Korea says that “Member States shall lay down the rules on penalties applicable to infringements of this Regulation and shall take all measures necessary to ensure that they are implemented. The penalties provided for shall be effective, proportionate and dissuasive.”

8. The EU requirement that Member States take all measures necessary to ensure that they are implemented and that the penalties provided for shall be effective, proportionate and dissuasive provides each Member State with a level of discretion about the scope and implementation of the penalty provisions. The Department considers that in order to ensure that the measures it imposes are both effective and proportionate, a degree of detail is required within the domestic provisions about what the prohibitions are, which if breached, can lead to a criminal offence being committed.
9. Further, as part of the Department’s approach to effective implementation of EU law in this area, UK statutory instruments are usually timed to come into force at the same time (or immediately after) the EU Regulations and contain the same prohibitions. The UK statutory instruments do not contain additional derogations or exemptions from the EU Regulations; nor do we consider the EU provision or the simultaneous and uniform application of EU law is adversely affected by the particular approach to drafting in these cases.

Coherence

10. HM Treasury takes the view that the current approach to drafting is necessary for the sake of coherence and in order to make the implementing legislation comprehensible to the persons to whom it applies.

11. We are also of course mindful of the case law on Article 7 of the European Convention of Human Rights and the fact that criminal law should be sufficiently accessible and precise to enable an individual to know in advance whether conduct is criminal. In the case of Handyside v UK (1974) 17 Y.B. 228, the Court found that Article 7 “includes a requirement that the offence should be clearly described by law”.

12. HM Treasury’s drafting approach is also informed by concerns raised by the Secondary Legislation Scrutiny Committee in its 25th Report of Session 2003–04 about the extent to which regulations detail the elements of the criminal offence. At paragraph 49 of that report, the Committee commented as follows:

“Transparency of provisions

49. It is important that those affected by secondary legislation (as well as other interested parties) should be able to understand the effect of such legislation by looking at the instrument in question, without having to refer elsewhere.

We have therefore had concerns in relation to a number of SIs which provided for offences (notably relating to financial sanctions imposed against members of former regimes) and which appeared to lack transparency, for example, by failing to spell out details of the actions that would result in the commission of offences because those details were provided elsewhere (notably in European legislative instruments) We hope that Departments will pay close regard to the need for transparency, even if properly meeting this need may require re-consideration of well-established approaches to framing statutory instruments.”

13. The Committee went on to consider this issue in respect of past legislation providing for the enforcement of sanctions regimes which had not set out the elements of the offence but simply cross-referred to the relevant EU Regulation. In its 20th Report of Session 2005–06 the Committee states at paragraph 45:

“45. In our Special Report of November 2004, we expressed concern about the need for greater transparency in financial sanctions statutory instruments. We have subsequently followed up this concern through correspondence in relation to individual instruments laid by H.M. Treasury. A letter from Treasury Legal Advisers was brought to the attention of the Committee in respect of SI 2005/3432 Lebanon and Syria (United Nations Measures) Order 2005. The letter is printed at Appendix 2 to this Report. …

APPENDIX 2: EXPLANATORY INFORMATION (SI 2005/3432)

Lebanon and Syria (United Nations Measures) Order 2005 (SI 2005/3432)

Letter from Mr Duncan Cromarty, HM Treasury

We corresponded earlier this year about the financial sanctions statutory instruments made by HM Treasury. The Committee expressed a concern about the manner in which the Treasury gave effect to certain obligations, by reference to EC Regulations.

In my letter of 13 July 2005, I confirmed that we had decided to adopt the suggested approach of spelling out on the face of Statutory Instruments the actions that would result in the commission of offences, rather than creating offences by reference to EC Regulations.

I am pleased to confirm that we have prepared a Statutory Instrument which embodies this approach. …

An EC Regulation will shortly be made which gives effect to the UN Security Council Resolution throughout the European Community. We have drafted the Order in such a way as to give effect to the standard terms for EC Regulations relating to the freezing of funds. This will achieve the aim of providing the necessary enforcement of the EC Regulation without incorporating its provisions by cross-reference. …”

14. In sum, HM Treasury considers that it is necessary for the sake of coherence and appropriate to include the detail of the prohibitions imposed by sanctions regimes in its statutory instruments, in order that the elements of criminal behaviour are clear and comprehensible to any person reading the instrument. By detailing the prohibitions in the Regulations it is clear on the face of the legislation what conduct is considered criminal. HM Treasury also concludes that its approach to the detail of the prohibitions does not conceal the Community nature, effect and timing of the EU provisions.
15. As the Committee will of course appreciate, while this is HM Treasury’s current position, the implementation of financial sanctions is something that may be affected by withdrawal from the EU. HM Treasury will naturally need to review its position on its approach to implementation in due course. The Committee will be made aware of any such change in approach in the course of its scrutiny of any relevant future secondary legislation.

HM Treasury

21 December 2016
Appendix 4

S.I. 2019/963

Firearms (Amendment) Rules 2019

1. This memorandum is submitted in response to questions from the Joint Committee on Statutory Instruments to the Home Office on 12 June 2019. The Committee asked:

   1. In Schedule 1, in the note on Part A and the text in bold at the top of Part F, clarify whether “person” is intended to include a body of persons corporate or unincorporate, in accordance with Schedule 1 to the Interpretation Act 1978.

   2. In relation to the medical declaration and consent required by part F, clarify what happens if the officer who made the medical declaration ceases to be the person with day to day responsibility for or direct oversight of firearms for that company, and whether that officer’s consent to information sharing, if not expressly withdrawn, continues to apply while the company’s registration remains valid, as provided for by note 10.

Question 1

2. The word “person” in the note to Part A is not intended to include “a body of persons corporate or unincorporated”. Part A is intended to be completed by an individual, whereas Parts B and C are to be completed by a company representative. The Department considers that this will be clear to users of the form as Part A asks for personal details and Parts B and C ask for company details and details of the company representative respectively.

Question 2

3. The outgoing officer’s consent would continue only for as long as they remained the officer with day to day responsibility for or direct oversight of firearms for the company. When the company makes an application for a new Certificate of Registration a medical declaration will be completed by the new officer with day to day responsibility for or direct oversight of firearms. In the majority of cases Registered Firearms Dealers (“RFDs”) will already hold a personal firearms and/or shotgun certificate and so will have already completed a medical declaration as part of that firearms application process. This amendment to the Firearms Rules 1998 seeks to ensure that medical information will also be provided in those cases where RFDs do not already hold a firearms and/or shotgun certificate.

4. If the outgoing officer or the company notify the police of a change in officer, the police will inform the GP and ask for the encoded reminder (as mentioned in note 9) to be removed from the GP’s records.

Home Office

18 June 2019
Appendix 5

S.R. 2019/107

Welfare Reform (Northern Ireland) Order 2015 (Commencement No. 13 and Savings and Transitional Provisions (Amendment)) Order 2019

1. In its letter to the Department of 12th June 2019, the Committee requested a memorandum on the following point:

   In relation to Article 2(2)(b), given that the definitions of married and unmarried couple in s.17(1) of the 2002 Act and s.133(1) of the 1992 Act have been repealed and replaced by a new definition of “couple”, which is the same in both provisions, explain why different definitions are required in different circumstances as provided by new paragraph (1A), and why footnotes (d) and (e) refer to terms that are no longer defined.

2. The Department’s response to the Committee’s point is set out below.

3. The new definition the Committee refers to (inserted by paras. 150(2) and 99(3) of Sch. 24 to the Civil Partnership Act 2004 (c.33) into the 2002 Act and the 1992 Act, respectively, and in force since 5th December 2005, further to art. 2(1) and para. 1 of the Schedule to S.I. 2005/3255 (C.139)) includes a power to prescribe circumstances in which a couple are to be treated as not living together (whether as man and wife or civil partners) as part of the same household. Regulations prescribe these circumstances differently under the amended subsections of each Act (to address different issues relevant to the assessment of entitlement to state pension credit and housing benefit). So, despite the like wording in the primary legislation, the related secondary legislation means the definitions diverge. See regulation 5 of the State Pension Credit Regulations (Northern Ireland) 2003 (S.R. 2003/28) as compared to regulation 19 of the Housing Benefit (Persons who have attained the qualifying age for state pension credit) Regulations (Northern Ireland) 2006 (S.R. 2006/406).

4. The inserted para (1A) addresses the divergent meanings in order that, as relevant, entitlement to state pension credit or housing benefit in relation to a couple is read in accordance with the appropriate prescription of couple for the benefit concerned. The Department considers that the reference to the primary legislation is sufficient to draw through the meanings given by the distinct prescriptions in secondary legislation.

5. The Department notes and apologises for the errors in the footnotes referred to and that they do not refer to the amendments inserting the new definitions of couple. The Department will consider seeking to rectify the errors.

Department for Work and Pensions

19 June 2019