



House of Lords  
House of Commons  
Joint Committee on  
Statutory Instruments

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**Fifteenth Report  
of Session 2017–19**

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**Drawing special attention to:**

*Fluorinated Greenhouse Gases (Amendment) Regulations 2018 (S.I. 2018/98)*

*Late Payment of Commercial Debts (Amendment) Regulations 2018  
(S.I. 2018/117)*

*Education (Student Fees, Awards and Support) (Amendment) Regulations  
2018 (S.I. 2018/137)*

*Ordered by the House of Lords  
to be printed 7 March 2018*

*Ordered by the House of Commons  
to be printed 7 March 2018*

**HL 89  
HC 542-xv**

Published on 9 March 2018  
by authority of the House of Lords  
and the House of Commons

## 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

[Derek Twigg MP](#) (*Labour, Halton*) (Chair)

[Dan Carden MP](#) (*Labour, Liverpool, Walton*)

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

[Lee Rowley MP](#) (*Conservative, North East Derbyshire*)

[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, available on the Internet via [www.parliament.uk/jcsi](http://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](http://www.parliament.uk/jcsi).

#### **Committee staff**

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

#### **Contacts**

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# Instruments reported

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At its meeting on 7 March 2018 the Committee scrutinised a number of Instruments in accordance with Standing Orders. It was agreed that the special attention of both Houses should be drawn to three of those considered. The Instruments and the grounds for reporting them are given below. The relevant Departmental memoranda are published as appendices to this report.

## 1 S.I. 2018/98: Reported for requiring elucidation

### *Fluorinated Greenhouse Gases (Amendment) Regulations 2018*

1.1 The Committee draws the special attention of both Houses to these Regulations on the ground that they require elucidation in two respects.

1.2 These Regulations are made under section 2(2) of the European Communities Act 1972. They amend the Fluorinated Greenhouse Gases Regulations 2015 (S.I. 2015/310) to provide for the enforcement of five new EU Commission Implementing Regulations. They also provide for the introduction of civil penalties in England and Scotland and for offshore installations and sub-delegate the appointment of certification, evaluation and attestation bodies to the Secretary of State.

1.3 The Committee asked the Department for Environment, Food and Rural Affairs to explain why regulations 27 and 31 replace criminal sanctions with civil penalties and to confirm the Department's understanding of the effect of section 85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 in relation to the limits on criminal penalties in England and Wales in paragraph 1 of Schedule 2 to the 1972 Act. In a memorandum printed at Appendix 1, the Department sets out the purpose of the change from criminal to civil penalties, and provides the confirmation sought in relation to the effect of section 85 of the 2012 Act. The Committee notes the helpful exposition provided by the Department's memorandum, **and accordingly reports regulations 27 and 31 as requiring elucidation, provided by the Department's memorandum.**

1.4 The Committee also asked the Department why regulation 9 sub-delegates to the Secretary of State matters dealt with in 2015 by the Regulations themselves. The Department's memorandum asserts that the appointment of certification, attestation and evaluation bodies is administrative in nature and therefore, although it was formerly provided for in legislation, the prohibition on legislative sub-delegation in paragraph 1(c) of Schedule 2 to the 1972 Act does not apply. The Committee does not disagree with the Department's assertion, **and accordingly reports regulation 9 for requiring elucidation, provided by the Department's memorandum.**

## **2 S.I. 2018/117: Reported for unjustifiable delay in laying them before Parliament**

### ***Late Payment of Commercial Debts (Amendment) Regulations 2018***

**2.1 The Committee draws the special attention of both Houses to these Regulations on the ground that there appears to have been unjustifiable delay in laying them before Parliament.**

2.2 These Regulations implement requirements of Directive 2011/7/EU of the European Parliament and of the Council of 16th February 2011 on combating late payment in commercial transactions.

2.3 There was a delay of thirteen days between the making of this instrument and laying it before Parliament, and the Committee asked the Department for Business, Energy and Industrial Strategy to explain the delay. In a memorandum printed at Appendix 2, the Department apologises for the delay and undertakes to review its internal procedures and processes to ensure this is not repeated.

2.4 The Committee repeats what it said in its Twenty-Sixth Report of Session 2016–17 (in relation to S.I.s 2017/66 and 2017/112): that it is difficult to imagine why it could have been necessary to postpone such a simple administrative step as laying before Parliament. The statutory arrangements for laying before Parliament remain part of the required formal measures by which publicity is assured. As previously stated, the Committee considers that, as a general rule and in the absence of exceptional circumstances, a delay of 10 calendar days or more will amount to an unjustifiable delay.

**2.5 The Committee accordingly reports these Regulations for unjustifiable delay in laying before Parliament, acknowledged by the Department.**

## **3 S.I. 2018/137: Reported for defective drafting**

### ***Education (Student Fees, Awards and Support) (Amendment) Regulations 2018***

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

3.2 These Regulations amend several statutory instruments including the Education (Student Support) (European University Institute) Regulations 2010, which provide support for students taking designated postgraduate courses at the European University Institute in Florence. Regulation 18 sets out the requirements for persons granted leave to remain in the UK as stateless persons, and their family members, to be eligible students under the 2010 Regulations (including a requirement that the person be ordinarily resident in the United Kingdom for a three-year period).

3.3 The Committee asked the Department for Education to explain the reason why the three-year period relied on in regulation 18(4) is defined by reference to the “relevant date” in inserted paragraphs 4A(1)(b) and (2)(b) and by reference to “the first day of the first academic year of the course” in inserted paragraph 4A(3)(d).

3.4 In a memorandum printed at Appendix 3, the Department explains that the reference to “the first day of the first academic year of the course” in inserted paragraph 4A(3) (d) is a drafting error and that the provision should have referred to “the relevant date”. The Department adds that the effect of the error is that a child of a person with stateless leave, or child of the spouse or civil partner of a person granted stateless leave, who seeks support to study at the European University Institute will need to prove that they have acquired three years’ ordinary residence in the United Kingdom by the first day of the course, around 1 October, rather than by the earlier date of 1 February of the year that the course started. The Department undertakes to amend the incorrect reference at the earliest opportunity to ensure that the drafting properly implements government policy. **The Committee accordingly reports Regulation 18(4) for defective drafting, acknowledged by the Department.**

## Instruments not reported

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At its meeting on 7 March 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

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### Draft instruments requiring affirmative approval

- Draft S.I.** Companies (Disclosure of Address) (Amendment) Regulations 2018
- Draft S.I.** First-tier Tribunal and Upper Tribunal (Composition of Tribunal) (Amendment) Order 2018
- Draft S.I.** European Union (Definition of Treaties) (Work in Fishing Convention) Order 2018
- Draft S.I.** Mandatory Use of Closed Circuit Television in Slaughterhouses (England) Regulations 2018
- Draft S.I.** Crime and Courts Act 2013 (Deferred Prosecution Agreements) (Amendment of Specified Offences) Order 2018

### Instruments subject to annulment

- S.I. 2018/141** Personal Injuries (NHS Charges) (Amounts) Amendment Regulations 2018
- S.I. 2018/166** School Teachers (Recognition of Professional Qualifications) (Amendment) Regulations 2018
- S.I. 2018/173** Freedom of Information (Additional Public Authorities) Order 2018
- S.I. 2018/178** Commonwealth Heads of Government Meeting (Immunities and Privileges) Order 2018
- S.I. 2018/182** Further Education Loans (Amendment) Regulations 2018
- S.I. 2018/200** Export Control (North Korea Sanctions) Order 2018
- S.I. 2018/210** Criminal Justice Act 2003 (Alcohol Abstinence and Monitoring Requirement) (Prescription of Arrangement for Monitoring) Order 2018
- S.I. 2018/219** Communications (Television Licensing) (Amendment) Regulations 2018

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

- S.I. 2018/179** Venezuela (Sanctions) (Overseas Territories) Order 2018
- S.I. 2018/187** United Nations (International Residual Mechanism for Criminal Tribunals) Order 2018

## **Instruments not subject to Parliamentary proceedings not laid before Parliament**

- |                      |   |
|----------------------|---|
| <b>S.I. 2018/140</b> | Technical and Further Education Act 2017 (Commencement No. 3) Regulations 2018  |
| <b>S.I. 2018/145</b> | Welfare Reform Act 2012 (Commencement No. 30 and Transitory Provisions) Order 2018  |
| <b>S.I. 2018/167</b> | Homelessness Reduction Act 2017 (Commencement and Transitional and Savings Provisions) Regulations 2018                       |
| <b>S.I. 2018/168</b> | Universal Credit (Work-Related Requirements) In Work Pilot Scheme (Extension) Order 2018                                      |
| <b>S.I. 2018/175</b> | Inspectors of Education, Children’s Services and Skills Order 2018  |
| <b>S.I. 2018/214</b> | Wales Act 2014, Sections 16 and 19 (Disapplication of UK Stamp Duty Land Tax and UK Landfill Tax) (Appointed Date) Order 2018 |

# Appendix 1

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## S.I. 2018/98

### ***Fluorinated Greenhouse Gases (Amendment) Regulations 2018***

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

*(i) (a) [Explain] whether part of the motive for replacing criminal sanctions with civil penalties was to increase the deterrent impact, by providing for a maximum penalty in excess of the maximum criminal penalty permitted by paragraph 1 of Schedule 2 to the European Communities Act 1972*

2. The Department’s motivation for replacing criminal sanctions with civil penalties was to increase the deterrent impact. This arose from concerns expressed by both businesses and environmental stakeholders about whether the current regime provides sufficient deterrence against non-compliance in England and Scotland. The Department’s view is that civil penalties will enhance deterrence by being simpler to apply and increasing the likelihood of a financial penalty for infringements.

3. The criminal offences in the Fluorinated Greenhouse Gases Regulations 2015 (S.I. 2015/310) (“2015 Regulations”) carry a maximum penalty of an unlimited fine (regulation 31(b)). Under this regime, criminal prosecutions were used relatively infrequently. The usual practice was to take no further action if recipients complied with enforcement notices, which themselves carried no financial penalty. This was in part because criminal prosecutions can be resource-intensive and costly to pursue. This created a concern that some may have felt that there was little risk or little to lose from not complying.

4. Given the substantial penalties already available for criminal prosecutions, the Department’s motivation for moving to civil penalties was less to do with the size of the maximum civil penalties and more to do with the overall effectiveness of having to rely upon bringing criminal prosecutions to provide adequate deterrence. In addition, the Government’s policy is to avoid the creation of unnecessary or disproportionate criminal sanctions when implementing EU obligations. These amendments provided the opportunity for the Department to extend the application of this policy by removing most criminal offences from the 2015 Regulations.

5. It is the Department’s view that civil penalties are not covered by the restriction on the exercise of the use of section 2(2) of the European Communities Act 1972 (“1972 Act”) in paragraph 1(d) of Schedule 2 to that Act. That restriction applies to the creation of new criminal offences.

*(b) [Explain] if it is thought that section 85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 affected the operation of paragraph 1 of Schedule 2 to the 1972 Act in relation to England and Wales, what the effect is.*

6. The Department’s view – consistent with that of the rest of Government – is that section 85(2) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (“2012 Act”) has removed the limit for summary convictions in England and Wales in paragraph 1(d) of Schedule 2 to the 1972 Act. This means that summary offences created under section 2(2) can impose a fine of any amount.

7. Various statutory offences were punishable on summary conviction by a fine not exceeding £5,000 or more until section 85 of the 2012 Act came into force. The figure of the fine on summary conviction may have been expressed in an enactment creating the offence in a number of ways, whether as a fixed sum (“£5,000”), or by a form of words such as “the statutory maximum”, “level 5 on the standard scale”, or “the prescribed sum”. Section 85(2) removes these limits where relevant powers can be used to create an offence, however they may be expressed.

8. The restriction on the use of the power in section 2(2) of the 1972 Act, as it currently applies in England and Wales, prevents:

“[the creation of] any new criminal offence punishable with imprisonment for more than two years or punishable on summary conviction with imprisonment for more than three months or with a fine of more than level 5 on the standard scale (if not calculated on a daily basis) or with a fine of more than £100 a day.”.

9. Section 85(2) of the 2012 Act provides that existing powers that could be exercised to create an offence punishable on summary conviction to a maximum fine of £5,000 (however expressed) may, following commencement of the provision, be exercised to create an offence punishable on summary conviction by a fine of any amount. The Department considers the power in section 2(2) of the 1972 Act to be caught by section 85(2) of the 2012 Act.

*(ii) Explain why regulation 9 (inserted regulation 8) sub-delegates to the Secretary of State in respect of matters formerly dealt with in the regulations themselves.*

10. The amended regulation 8 of the 2015 Regulations provides for the appointment by the Secretary of State of various certification, evaluation and attestation bodies. The appointment of such bodies is required by the directly applicable Commission Regulations set out in the amended regulation 8. This amendment was drawn to the Committee’s attention in the Explanatory Memorandum accompanying the Fluorinated Greenhouse Gases (Amendment) Regulations 2018 (“2018 Regulations”).

11. Prior to the coming into force of the amendment, these appointments were made by naming the certification, attestation and evaluation bodies in the 2015 Regulations. This meant that, in order to appoint a new body or to remove one of the existing bodies, the instrument would have to be amended. An amendment would also have been required if, for example, a company appointed as a certification body underwent a corporate restructure. Bodies are identified by their company number, but if, in this example, functions were moved into another corporate vehicle, the body would be unable to carry out the functions required by the Commission Regulations until the domestic regulations had been amended.

12. The Department considered that this approach created a risk of delays in being able to designate new bodies. In particular, the Department considered that there was a risk associated with being unable to replace bodies no longer able to act as a certification or evaluation body, even where a suitable replacement existed, such that there could for a period be no appointed body able to carry out these functions.

13. The Department does not consider that the appointment of certification, attestation and evaluation bodies needs to be exercised through legislation. The directly applicable Commission Implementing Regulation 2015/2067<sup>1</sup> provides at Article 7 that:

“A certification body shall be provided for in national law or designated by the competent authority of a Member State or other entities entitled to do so, as being allowed to issue certificates to natural persons or companies involved in one or more of the activities referred to in Article 2.”.

Similarly, Article 8 mentions “An evaluation body designated by the competent authority of a Member State or other entities entitled to do so”.

14. Such appointments are considered by the Department to be administrative in nature, notwithstanding that this used to be provided in legislation. Decisions on who should be appointed as certification, evaluation and attestation bodies will be dependent upon their technical ability to carry out the functions listed in the Commission Regulations, as well as their independence and impartiality. The amendment to regulation 8 of the 2015 Regulations enables changes to be made more quickly, reducing the risk to those who rely on certification, evaluation and attestation bodies that no such body will be in place. It also reduces the potential need to have to frequently amend the legislation every time an appointed body undergoes a corporate restructure or needs to be replaced, or if another entity wishes to become a certification, evaluation or attestation body and is considered suitable for such a role by the Secretary of State.

15. The Department does not consider that the previous inclusion of functions of an administrative nature in legislation precludes those functions from subsequently being exercised administratively, either in terms of vires or what may be considered an expected use of the power. The Department, in consultation with the devolved administrations, reviewed the effectiveness of this legislative regime based on the experience of both the 2015 Regulations and the predecessor legislation, the Fluorinated Greenhouse Gases Regulations 2009 (S.I. 2009/261), and concluded that this change would improve it.

16. The power to make the appointment is now provided in legislation and will consequently be subject to Parliamentary scrutiny, should further amendments be made in the future. The 2018 Regulations also inserted a new regulation 19A requiring more information to be published than was previously included in the 2015 Regulations, namely the postal address, telephone number and email address of the appointed person, as well as their name and company number.

17. The Department does not consider the restriction on the use of section 2(2) of the 1972 Act in paragraph 1(c) of Schedule 2 to that Act to apply because the amended regulation 8 does not purport to “confer any power to legislate”.

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

**27 February 2018**

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<sup>1</sup> Commission Implementing Regulation 2015/2067 establishing, pursuant to Regulation (EU) No 517/2014 of the European Parliament and of the Council, minimum requirements and the conditions for mutual recognition for the certification of natural persons as regards stationary refrigeration, air conditioning and heat pump equipment, and refrigeration units of refrigerated trucks and trailers, containing fluorinated greenhouse gases and for the certification of companies as regards stationary refrigeration, air conditioning and heat pump equipment, containing fluorinated greenhouse gases (OJ No. L 301, 18.11.2015, p. 28).

## Appendix 2

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### S.I. 2018/117

#### ***Late Payment of Commercial Debts (Amendment) Regulations 2018***

1. The Committee considered the above instruments at its meeting today and has instructed me to request you to submit a memorandum on the following point:

*Explain the significant delay between the making and laying of this instrument.*

2. The Department apologises to the Committee for the administrative oversight which resulted in the delay between making and laying these regulations, and will review its internal procedures and processes to ensure this is not repeated.

**Department for Business, Energy and Industrial Strategy**

**27 February 2018**

## Appendix 3

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### S.I. 2018/137

#### ***Education (Student Fees, Awards and Support) (Amendment) Regulations 2018***

1. In its letter to the Department for Education of 21 February 2018, the Joint Committee requested a memorandum on the following point:

*Explain the reason why the three-year period relied on in regulation 18(4) is defined by reference to the “relevant date” in inserted paragraphs 4A(1)(b) and (2)(b) and by reference to “the first day of the first academic year of the course” in inserted paragraph 4A(3)(d).*

2. This memorandum has been prepared by the Department for Education.

3. The reference to “the first day of the first academic year of the course” in inserted paragraph 4A(3)(d) is a drafting error, for which the Department apologises. That provision should have referred to “the relevant date”.

4. The effect of the error is that under the Education (Student Support) (European University Institute) Regulations 2010, a child of a person with stateless leave, or child of the spouse or civil partner of a person granted stateless leave, who seeks support to study at the European University Institute in Italy would need to prove that they had acquired three years’ ordinary residence in the United Kingdom and Islands by the first day of the course, around 1 October, rather than by the earlier date of 1 February of the year that the course started. In giving such a person a later date by which to meet the necessary residence requirement the error is likely to benefit applicants for student support rather than disadvantage them. However, it is necessary to correct the error to ensure that the drafting properly implements government policy.

5. The Department for Education intends to amend the incorrect reference at the earliest opportunity. There are plans to amend the Education (Student Support) Regulations 2011 in the next few months. We will consider, therefore, whether those amending Regulations provide a suitable vehicle for the amendment of paragraph 4A(3)(d) of Schedule 1 to the Education (Student Support) (European University Institute) Regulations 2010, to rectify the error.

**Department for Education**

**27 February 2018**