HOUSE OF LORDS

Secondary Legislation Scrutiny Committee

7th Report of Session 2012-13

Draft Assets of Community Value (England) Regulations 2012

Draft Housing Benefit (Amendment) Regulations 2012

Draft Online Infringement of Copyright (Initial Obligations) (Sharing of Costs) Order 2012

Health and Safety (Fees) Regulations 2012

Plus 3 Information Paragraphs on 5 Instruments

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Secondary Legislation Scrutiny Committee (formerly Merits of Statutory Instruments Committee)

The Committee has the following terms of reference:

(1) The Committee shall, with the exception of those instruments in paragraphs (3) and (4), scrutinise—

(a) every instrument (whether or not a statutory instrument), or draft of an instrument, which is laid before each House of Parliament and upon which proceedings may be, or might have been, taken in either House of Parliament under an Act of Parliament;

(b) every proposal which is in the form of a draft of such an instrument and is laid before each House of Parliament under an Act of Parliament,

with a view to determining whether or not the special attention of the House should be drawn to it on any of the grounds specified in paragraph (2).

(2) The grounds on which an instrument, draft or proposal may be drawn to the special attention of the House are—

(a) that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House;

(b) that it may be inappropriate in view of changed circumstances since the enactment of the parent Act;

(c) that it may inappropriately implement European Union legislation;

(d) that it may imperfectly achieve its policy objectives.

(3) The exceptions are—

(a) remedial orders, and draft remedial orders, under section 10 of the Human Rights Act 1998;

(b) draft orders under sections 14 and 18 of the Legislative and Regulatory Reform Act 2006, and subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001;

(c) Measures under the Church of England Assembly (Powers) Act 1919 and instruments made, and drafts of instruments to be made, under them.

(4) The Committee shall report on draft orders and documents laid before Parliament under section 11(1) of the Public Bodies Act 2011 in accordance with the procedures set out in sections 11(5) and (6). The Committee may also consider and report on any material changes in a draft order laid under section 11(8) of the Act.

(5) The Committee shall also consider such other general matters relating to the effective scrutiny of secondary legislation and arising from the performance of its functions under paragraphs (1) to (4) as the Committee considers appropriate, except matters within the orders of reference of the Joint Committee on Statutory Instruments.

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Information about interests of Committee Members can be found in Appendix 2.

Publications

The Committee's Reports are published on the internet at www.parliament.uk/seclegpublications

Information and Contacts

If you have a query about the Committee or its work, including concerns or opinions on any new item of secondary legislation, please contact the Clerk of the Secondary Legislation Scrutiny Committee, Legislation Office, House of Lords, London SW1A 0PW; telephone 020-7219 8821; fax 020-7219 2571; email seclegscrutiny@parliament.uk.

Statutory instruments

The National Archives publishes statutory instruments on the internet at http://www.legislation.gov.uk/, together with a plain English explanatory memorandum.

Seventh Report

INSTRUMENTS DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

The Committee has considered the following instruments and has determined that the special attention of the House should be drawn to them the grounds specified.

A. Draft Assets of Community Value (England) Regulations 2012

Date laid: 4 July
Parliamentary Procedure: affirmative

Summary: The Localism Act 2011 ("the 2011 Act") includes provisions relating to assets of community value ("the Assets Scheme"), requiring a local authority to maintain a list of buildings and other land in its area which are of community value, and ensuring that when such land is to be sold local community groups will have the opportunity to delay the sale, to enable them to prepare a bid to buy it. These draft Regulations specify details necessary to bring the Assets Scheme into force, covering requirements for both local authorities and owners of listed land, including exemptions and rights to appeal and compensation, and safeguards against non-compliance and the penalty where non-compliance exists.

This instrument is drawn to the special attention of the House on the grounds that it gives rise to issues of public policy likely to be of interest to the House.

1. The Department for Communities and Local Government (DCLG) has laid these draft Regulations, with an Explanatory Memorandum (EM) and impact assessment (IA). The Regulations are laid under the Localism Act 2011 ("the 2011 Act") which provides for the introduction of the Assets Scheme, requiring a local authority to maintain a list of buildings and other land in its area which are of community value.

2. In the EM, DCLG states that the Government's policy in introducing these provisions is to assist local community groups to preserve buildings or land which are of importance to their community. The Department refers to the fact that, in recent years, communities have "lost" local amenities and buildings of importance to them through the sales process, and to evidence that a lack of awareness of a proposed sale, and the speed with which local assets may be sold, are important factors in the inability of a local community to make an alternative proposal for use of the site. The focus of the Assets Scheme is to give the local community early warning of sales and to enable eligible local groups to delay sales by six months, so as to provide time for them to put together a competitive bid to buy the asset.

3. When the Localism Bill was under consideration by this House, the Government acknowledged that its provisions had an impact on the rights of private property owners, and confirmed that a compensation scheme would be provided in the Bill, enabling private property owners to claim for costs or loss incurred as a result of complying with the procedures required by the

provisions.[1] In the EM to this instrument, DCLG explains that section 99 of the 2011 Act allows for compensation to be provided under the scheme, and that Regulation 14 of this instrument sets out the detail. In particular, the EM states that Regulation 14(1) and (2) enable a private owner of listed land, or previously listed land, to claim compensation for loss or expense incurred while they were the owner of the land; confirms that the Government recognise that the policy does affect private property ownership rights, and the compensation provisions are intended to minimise this impact; and explains that the amount of compensation is to be determined by, and paid by, the local authority.

4. The IA shows that there will be significant costs to local authorities from the Assets Scheme: a one-off cost to set up the list of assets of community value, of £379k (for year 1 only); the cost of managing the list process and five-year review of the list, of £2.5m per annum; the cost of paying compensation to asset-owners for loss of asset value, expected to average £233k per annum over nine years; and the cost of enforcement, of £35k per annum over 10 years. DCLG has told us that the costs to local authorities will be covered by central Government during the Spending Review period, but that thereafter local authorities will have to cover their additional costs from within their budgets.

5. DCLG carried out consultation on the statutory instruments for the Assets Scheme between February and May 2011, and has published a summary of the responses.[2] In the EM, DCLG states that many local authorities were supportive of the aims of the proposals, but expressed concern about additional burdens on local authorities in terms of costs and human resources to administer the scheme and the number of delegated powers on the face of the Bill.

6. We note the statement by DCLG in the EM that "the responses to the consultation have shaped the Regulations". The published summary of responses records that one of the consultation questions asked whether compensation claims should be considered and paid for by the local authority; that 87 of the total of 178 respondents disagreed that local authorities should do so, because this would impose additional costs and burdens on them; and that these numbers included a total of 74 local authority respondents, of which 55 said "no" to the question. As noted above, Regulation 14 relates to compensation, and gives effect to the Government's intention, notwithstanding these consultation responses, that the amount of compensation payable under the Asset Scheme is to be determined by, and paid by, the local authority. We put questions to the Department on this issue and publish the answers that we received (see Appendix 1). The Government have said that they understand the concerns expressed by some local authorities, but believe that the support provided through the New Burdens doctrine and the provision of a safety net will help to mitigate these worries.

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[1] See "Assets of Community Value – Policy Statement" (September 2011):
http://www.communities.gov.uk/publications/localgovernment/assetscommunityvaluestatement

[2] http://www.communities.gov.uk/publications/localgovernment/righttobuyresponses

B. Draft Housing Benefit (Amendment) Regulations 2012

Date laid: 28 June
Parliamentary Procedure: affirmative

Summary: This instrument stems from section 69 of the Welfare Reform Act 2012 and introduces the "under-occupancy" savings to Housing Benefit first announced by the Chancellor as part of the June 2010 Budget. From 1 April 2013 working age claimants living in the social housing rented sector will have their Housing Benefit calculated on the basis of the number of bedrooms the claimant's household needs, not on the size of the property they occupy: Housing Benefit will not be paid for "spare" bedrooms. DWP states that around 660,000 claimants are likely to be affected by this measure with an average weekly loss of about £12 for claimants under-occupying by one bedroom and about £22 for those under-occupying by two or more bedrooms.

This instrument is brought to the special attention of the House on the grounds that it gives rise to issues of public policy likely to be of interest to the House.

7. These Regulations have been laid by the Department for Work and Pensions (DWP) accompanied by an Explanatory Memorandum (EM) and an Impact Assessment (IA).

8. This instrument stems from section 69 of the Welfare Reform Act 2012 and introduces the "under-occupancy" savings to Housing Benefit first announced by the Chancellor as part of the June 2010 Budget. From 1 April 2013 working age claimants living in the social housing rented sector will have their Housing Benefit calculated on the basis of the number of bedrooms the family needs, not on the size of the property they occupy: Housing Benefit will not be paid for "spare" bedrooms.

9. DWP states that introducing restrictions in the social sector from April 2013 to reflect household size, using the same size criteria as currently used for calculating Housing Benefit for private sector claimants under Local Housing Allowance rules, will ensure that all tenants, regardless of their tenure type, are treated consistently.

10. The Department published analysis of the potential impacts of these changes during the parliamentary passage of the Welfare Reform Act 2012 but this has now been updated. Overall the average weekly loss for existing claimants is now expected to be around £14, with an average weekly loss of about £12 for claimants under-occupying by one bedroom and about £22 for those under-occupying by two or more bedrooms. Around 660,000 claimants are likely to be affected by this measure.

11. From 1 April 2013, using information on the number of bedrooms in a claimant's property and details of people living in the claimant's household, the size criteria will be used to assess whether a claimant is under-occupying his or her accommodation. One bedroom will be allowed in the size criteria for each of the following:

    - A couple
    - A person who is not a child (age 16 and over)
    - Two children of the same sex
    - Two children who are under 10 years of age

- Any other child
- A non-resident overnight carer.

12. All occupiers (except foster children[3]) will be taken into account and the size criteria applied to establish whether or not the claimant is under-occupying their home and, if they are, by how many bedrooms. Where a claimant is deemed to be under-occupying, one of two percentage reduction rates will be applied:

    - 14% where under-occupying by one bedroom
    - 25% where under-occupying by two or more bedrooms.

13. The reduction will apply to the total eligible rent for the dwelling including any eligible service charges and will affect all existing working age claimants who are under-occupying their accommodation from 1 April 2013 and anyone who makes a new claim after that date.

14. Paragraph 7.9 of the EM mentions that in response to the concerns raised in the consultation responses about the potential impact of this measure the Government have announced an additional £30m a year for the Discretionary Housing Payment budget from 2013-14. "This additional funding is aimed specifically at two groups:

    - Disabled people who live in significantly adapted accommodation, and
    - Foster carers, including those who need to keep an extra room when they are in between fostering".

15. The House however may wish to note that the £30m additional funding being given to the Discretionary Housing Payment fund ("the DHP fund") is not ring-fenced. DWP states:

    > "It is for individual local authorities to manage their fund according to local priorities and needs. However the guidance,[4] which is currently being reviewed, will set out the importance of supporting both foster carers and those living in adapted properties. We know from talking to local authorities that they welcome and do follow the guidance we provide.
    >
    > Anyone receiving Housing Benefit or Council Tax Benefit who does not receive sufficient benefit to meet their rent or council tax liability can make a claim to the DHP fund. However each local authority manages their own fund and prioritises those that they consider most in need of help."

16. The Government anticipate that the introduction of size criteria restrictions to the calculation of Housing Benefit for working age claimants living in the social rented sector will achieve total Exchequer savings of around £1bn in Great Britain by 2014/15, that is around a fifth of the expected annual savings of more than £2bn to result from the Housing Benefit reforms announced in the Emergency Budget and Spending Review in 2010. The

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[3] Foster children are not included in the assessment of any income-related benefits but any fostering allowances paid for that child/children are disregarded in full.

[4] Current DWP guidance on Discretionary Housing Payments http://www.dwp.gov.uk/docs/dhpguide.pdf a revised version is due to be published in the summer.

Government also anticipate that the change will make better use of available social housing stock and increase mobility in the social rented sector. However, actual savings and behaviour will depend on how claimants and social landlords react to this change and the effects will be monitored with an initial report in early 2014 and a final report in late 2015.

17. The instrument also simplifies the administration of Local Housing Allowance by removing the requirement for claims to be reviewed on the anniversary of the claim date, as up-rating will be done as part of the general review in April of each year that will increase the benefit in line with the Consumer Price Index.[5]

C. Draft Online Infringement (Initial Obligations) (Sharing of Costs) Order 2012

Date laid: 26 June
Parliamentary Procedure: affirmative

Summary: The Digital Economy Act 2010 (DEA) contained measures to address the rise in online infringement of copyright by introducing a system of "mass notifications designed to educate consumers about copyright and bring about a change in consumer behaviour."(Impact Assessment page 3) The policy objective is to reduce online infringement of copyright by 75% through a range of policy measures. The proposed system requires copyright owners to identify instances of unlawful file sharing and notify the Internet Service Provider (ISP) that an internet address has been connected with unlawful activity by means of a Copyright Infringement Report (CIR). The ISP will be obliged to notify the subscriber identified and to maintain lists of who infringes and how often. The DEA requires Ofcom to produce an Initial Obligations Code that sets out how the provisions of the regulatory scheme will work in practice. The Code will be underpinned by this Sharing of Costs Order which sets out that the "relevant costs" will be apportioned 75:25 between copyright owners and ISPs. The division of costs has been controversial and the scope of the costs to be shared by ISPs has been reduced following a judicial review. The Order also imposes a £20 charge for subscriber appeals: this has proved particularly contentious both in principle and in detail – and we have received a number of evidence submissions on this aspect which are published on our website. We seek clarification on whether £20 is the appropriate amount given that significant parts of the structure of the scheme and the appeal mechanism are still undecided.

We also note that there are reservations expressed in both the EM and in the Impact Assessment (IA) about the degree to which the copyright owners will operate the system of mass notifications in practice. DCMS state repeatedly in the IA that the level of copyright holders' participation is directly dependent on the number of appeals – which is an unpredictable factor. Copyright holders state that, if the proportion of appealed notifications increases, fewer CIRs will be sent which raises questions about whether DCMS's policy objective of reducing online infringement of copyright by 75% is achievable. The House may wish to press the Minister for greater reassurance about whether this scheme will function effectively and we

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[5] The Rent Officers Order (Housing Benefits Functions) (Amendment) Order 2012 (SI 2012/646) changed the uprating of Local Housing Allowance to be in line with the Consumer Price Index with effect from April 2013

therefore draw the Order to the attention of the House on the grounds that it may imperfectly achieve its policy objective.

This instrument is drawn to the special attention of the House on the grounds that it gives rise to issues of public policy likely to be of interest to the House and it may imperfectly achieve its policy objective.

18. The Order has been laid before the House by the Department of Culture, Media and Sport (DCMS) along with an Explanatory Memorandum (EM) and an Impact Assessment (IA). We received well-argued evidence submissions on the proposed legislation from Consumer Focus, Copyright for Knowledge, the Taxpayers Alliance and Which. They are published on the Committee's website, and referred to in the relevant sections below.[6]

Background

19. The Digital Economy Act 2010 (DEA) contained measures to address the rise in online infringement of copyright by introducing a system of "mass notifications designed to educate consumers about copyright and bring about a change in consumer behaviour." (IA page 3) The policy objective is, through a range of policy measures, to reduce online infringement of copyright by 75% (IA page 12). Under the DEA copyright owners will identify instances of unlawful file sharing and notify the Internet Service Provider (ISP) that an internet address has been connected with unlawful activity by means of a Copyright Infringement Report (CIR). The ISP will be obliged to notify the subscriber identified and to maintain lists of who infringes and how often. If they chose to do so, copyright holders may identify serious infringers from this list and seek to prosecute them under the Copyright, Designs and Patents Act 1988.

20. The DEA requires Ofcom to produce an Initial Obligations Code that sets out how the provisions of the regulatory scheme will work in practice. The Code will be underpinned by this Sharing of Costs Order which sets out that the "relevant costs" will be apportioned 75:25 between copyright owners (against whom the infringement takes place) and ISPs. The IA states that the Sharing of Costs Order does not itself introduce any regulation, but sets out provisions to be included in Ofcom's Code.

21. The Order also requires a subscriber accused of infringement to pay a £20 fee to appeal.

Timetabling for the regulatory Scheme

22. DCMS's EM assumed a level of familiarity with the wider policy objectives around this scheme and we asked them for additional information to set this Order in context. DCMS explained that there are three main elements necessary for the implementation of the online copyright provisions of the DEA:

    - First, under section 124D of the Communications Act 2003, Ofcom are to make a Code for the purposes of regulating the initial obligations. That Code is set out in a draft statutory instrument which is currently under

[6] See www.parliament.uk/seclegpublications

consultation and will be made and laid before Parliament in due course, following the consultation and consideration by the European Commission under the Technical Standards Directive. DCMS expect the Code to be in force and Ofcom to have obtained legally binding CIR volume commitments from copyright owners by February 2013.

- Second, under section 124M of the Communications Act 2003, the Secretary of State may make an order setting out provisions as to the sharing of costs which must be included in the Code. That is the statutory instrument which is currently before the House and is the subject of this Report.
- Third, this draft instrument requires Ofcom to determine the precise amounts which will be due from copyright owners to ISPs in any given year. Ofcom is currently consulting on the implementation of the draft Sharing of Costs Statutory Instrument in anticipation of it being laid before Parliament.[7] The consultation runs until 18 September 2012 and Ofcom will publish a statement in due course, currently anticipated in December 2012.

Ofcom are currently consulting on options, but anticipate there being up to one year of set-up (to build the ISP system, establish an appeals body and establish a measurement approach) to allow the scheme to begin in the first quarter of 2014.

Cost sharing

23. The Sharing of Costs Order was originally laid in January 2011 but was withdrawn because of drafting errors identified by the Joint Committee on Statutory Instruments[8]. Other elements of the legislation have also been amended in the revised draft Order in the light of a judicial review brought by the ISPs over whether they should be liable for "qualifying costs" and "case fees".

24. This revised Order sets out that all the "qualifying costs" and "case fees" will be met by the copyright owners, but the "relevant costs" will be apportioned 75:25 between copyright owners and ISPs. DCMS tell us that the ongoing consultation "envisages an iterative process to enable copyright owners to determine participation and likely volumes of CIRs. Negotiations on the tariff and volumes will begin between Ofcom and copyright owners once the Code is made and laid in Parliament by January 2013."

25. Amongst those who sent in submissions, opinion about the division of costs was divided: Consumer Focus felt the Order relied on inconsistent reasons for imposing 25% of costs on ISPs, whereas Which were content with the revised distribution.

Effectiveness of the scheme

26. We note that there are reservations expressed in both the EM (see paragraph 12) and IA (for example at the foot of page 6 or at the top of page 9) as to the degree to which the copyright owners will operate the system. Given the costs of set-up, and that the system is entirely for the copyright owners'

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7 http://stakeholders.ofcom.org.uk/consultations/infringement-implementation/

8 16th Report of Session 2010-12, HL Paper 103

benefit, we asked DCMS for what reassurance they could provide that the scheme will function effectively:

> "The system is being set up for the benefit of copyright owners and whether copyright owners participate is a matter of whether they consider that the benefits outweigh the costs. This is a commercial decision for copyright owners that we cannot pre-empt.
>
> However, for the purposes of the impact assessment, copyright owners indicated that they intend to send 2 million copyright infringement reports per annum. There have also been public statements in support of the DEA from, for example, the Creative Coalition Campaign.
>
> The Committee should also note that removing or reducing the subscriber appeal fee would increase the impact on copyright owners, consequently increasing the risk that they decide not to participate in the system."

Fee for appeals

27. The revised Order also requires a subscriber accused of infringement to pay a £20 fee to appeal. This is a new development so we asked the DCMS about precedents for such a charge. They said:

> "Precedents of appeal mechanisms that require a fee are considered in Ofcom's 2011 advice to Government on appeals, Digital Economy Act Online Copyright Infringement Appeals Process: Options for Reducing Appeals Costs (page 33-35). Indirect parallels can be drawn with exam fees, immigration appeal fees and to a lesser extent court fees. However, there is no notion of vexatious appeals in these circumstances.
>
> Ofcom's study on appeal costs noted other appeals procedures in the UK that charge appellants a fee. These include GCSE and GCE Examinations Appeals and court fees. The study also notes appeals systems that may award costs to appellants. Government has also recently introduced non-refundable fee charges for certain types of appeal to the Immigration and Asylum Chambers of the First-Tier Tribunal and the Upper Tribunal. These appeal systems are not directly comparable. Ofcom's study therefore noted a paucity of evidence from a lack of directly comparable appeal systems, which is why the Government has committed to review the fee after 12 months of the initial obligations being in effect with the benefit of evidence gathered of the impact of the fee on appeals during this period."

28. Because such a charge is controversial we asked what consultation had been done. DCMS replied:

> "The Government first announced our decision to set the fee at £20 in our document titled Next steps for implementation of the Digital Economy Act published in August 2011. There has not been a formal public consultation on this level of fee. We also committed in August 2011 to review the fee level after 12 months of notifications being sent to subscribers to make sure it is still appropriate.
>
> The collection of the appeal fee and service of infringement letters are matters for the Code and not for the Sharing of Costs Statutory Instrument. The draft Code envisages infringement letters being sent by first class post.

> The appeals body will establish procedures setting out details of how the appeals process will work, including service of appeal notice and payment of appeals fees. Those procedures will be subject to Ofcom approval. Ofcom will begin the process of appointing the appeals body in 2013"

29. We also asked the basis for setting the fee at £20 as both Which and Consumer Focus felt this figure had been chosen arbitrarily. DCMS replied:

> "Ofcom's 2011 study on appeals costs modelled the impact of a £5 and £10 fee on the number of appeals based on the assumptions set out in their study. The Government used this model to extrapolate the impact of a £20 fee, because we concluded that £10 was an insufficient deterrent to vexatious appeals intending to disrupt the system and potentially drive up costs to an unworkable level. Our extrapolation is set out in the Sharing of Costs Impact Assessment and assesses the impact on appeal costs in six scenarios.
>
> We have not proposed means testing because the fee will be refunded in full if the appeal is successful and a fee of £20 is relatively small. Means tested immigration appeal fees in comparison are £80 or £140. Ofcom's study also found little reliable evidence of the likely impact of a fee on low income subscribers.
>
> Government and Ofcom have taken steps to benefit subscribers in terms of appeals. These are set out in Ofcom's draft Initial Obligations Code and therefore are not directly related to the Sharing of Costs Statutory Instrument. For example, Ofcom will approve copyright owners' evidence gathering procedures and intends to introduce technical standards which will both reduce the risk of a subscriber receiving a letter as a result of incorrect or inadequate evidence. The appeals body will also be independent of Ofcom and Government."

30. Para 10.2 of the EM says "the [appeal] fee at this level will successfully deter vexatious appeals whilst not deterring those with legitimate grounds for appealing". We asked DCMS to supply the evidence that underpins this statement:

> "The Government has based its estimates on the best available evidence including comparisons with other appeal processes. Both Ofcom and Government have made extensive efforts to identify comparators. This has included examples from abroad and systems used to appeal decisions in the UK on traffic offences, public examinations and planning applications. These are noted in Ofcom's 2011 study on appeal costs. However, it is difficult to benchmark the level of fee against comparable systems, because of the weak parallels between the appeals mechanism outlined here and other systems.
>
> The Government intends to review the level of the fee after 12 months of notifications being sent to subscribers, in order to assess whether the £20 level is still appropriate and will take into account any evidence that subscribers with legitimate grounds for appeal are being deterred. In cases where appeals are upheld, individuals would have their £20 fee refunded."

31. We also note that DCMS offer no robust definition of what they interpret as "vexatious" or "frivolous" appeals.

External comments on the proposed fee for appeals

32. The evidence we received also expressed concerns about how the legislation would impact on specific groups. The Taxpayers Alliance queried the position of small firms, such as internet cafes, which will be put to great cost and inconvenience to appeal notifications from infringements by passing customers in order to avoid being placed on the copyright infringement list. Similarly Copyright for Knowledge questioned the position of the educational networks provided by public and university libraries which, under the definitions in the DEA, would appear to be treated as individual subscribers and consequently may have to expend significant time and resources to follow up notifications received.

33. In response, DCMS told us that:

> "These issues will be addressed in Ofcom's Initial Obligations Code which will be put before Parliament later in the year rather than in the Costs Order.
>
> This issue is covered by Annex 5 of the Code consultation. Ofcom consider that such undertakings should be considered non-qualifying ISPS and therefore not legitimate recipients of infringements. ISPs that meet the threshold of 400,000 subscribers will be required to comply with the initial obligations – these large ISPs will be known as qualifying ISPs. Libraries and universities, will not meet this threshold and will be considered non-qualifying ISPs of the internet networks to library members and students.
>
> In respect of internet cafes, upstream qualifying ISPs must identify their subscribers accurately, and any such small business can explain to its upstream provider why it should be treated as a non-qualifying ISP and not a subscriber."

34. On this issue, we note that paragraph 10.4 of the EM says first that under the Initial Obligations Code libraries offering public access networks will not be considered to be ISPs but in the following sentence the EM says that they can claim that they are ISPs. We find this confusing; and we remain unclear whether or not such institutions will be charged the £20 appeal fee.

Conclusion

35. Some of the questions raised by the Committee and in the evidence we received apparently relate to parts of the wider implementation package that will follow this Order. DCMS should have given the House a much clearer explanation of how this Order fits into the wider policy context. We hope some of the additional information included in this Report will assist the House to understand the specific function of this Order.

36. We were also concerned about the unusual situation where DCMS have laid before Parliament an Order that is the subject of an ongoing consultation. DCMS assured us that the consultation relates only to the implementation of the Order and not to the instrument itself. However, if DCMS is not yet clear about how the scheme will be implemented, it raises questions about how can they set the level of an appeal fee that satisfies the terms of the Treasury Rules for full cost recovery. DCMS also state explicitly that removing or reducing the subscriber appeal fee would increase the impact on copyright owners, consequently increasing the risk that they would decide

not to participate in the infringement system. On this basis the Committee does not have sufficient information to judge whether £20 is the appropriate amount given that significant parts of the structure of the scheme and the appeal mechanism are still undecided.

37. What concerns us most is that the copyright owners, for whose benefit this scheme is being set up, have set strict budgetary limits on their use of it - although a working assumption of 2 million CIRs is mentioned, we do not know what proportion this represents of the breaches identified in previous years. DCMS tell us that "Negotiations on the tariff and volumes [of CIRs] will begin between Ofcom and the copyright owners once the Code is made and laid in Parliament in January 2013." So it is not yet clear to what extent the copyright holders will operate the scheme. This Order makes a division of costs based on a large number of currently unknown factors, and those who are required to operate it have made it clear that their cooperation is entirely dependent on financial considerations. This raises questions about whether DCMS's policy objective of reducing online infringement of copyright by 75% is achievable. **The House may wish to press the Minister in debate for greater reassurance about whether this scheme will function effectively; and we draw the Order to the attention of the House on the grounds that it may imperfectly achieve its policy objective.**

Health and Safety (Fees) Regulations 2012 (SI 2012/1652)

Date laid: 28 June
Parliamentary Procedure: negative

Summary: These Regulations mainly replace the 2010 fees scheme for licensing and approval functions, but also introduce a new "fee for intervention" – that is, a fee to allow HSE to recoup its costs where a business has been found to be in material breach of Health and Safety law. The fee will be charged at £124 per hour up to the point where the matter is resolved or when the case is handed over for prosecution, details of the system are set out in guidance note HSE47. There is a procedure for review of disputes – requests for information or clarification will be free but disputes that follow the formal route will incur additional costs at the hourly rate if the HSE action is endorsed. The HSE estimate that this will transfer £39m per year of the cost of regulation from taxpayers to the non-compliant duty-holders. The Committee has received several submissions on the Regulations which express concerns about the hourly rate, what constitutes a "material breach" and how disputes will be addressed. Many of these points are explained in HSE 47 but the House may be interested to note industry's particular concerns about the composition of the dispute panel and the potential impact on the safety culture.

These Regulations are drawn to the special attention of the House on the grounds they give rise to issues of public policy likely to be of interest to the House.

38. These Regulations have been laid by the Health and Safety Executive accompanied by an Explanatory Memorandum (EM) and Impact Assessment (IA). These Regulations revoke and replace the 2010 fees scheme, which mainly relates to licensing and approval functions, without increase. However they also introduce two new charges: a fee for onshore borehole notifications and a "fee for interventions".

39. The Government announced its intention in March 2011 to extend the principle of full cost recovery to the cost of putting things right in businesses that are found to be in material breach of health and safety law. The rate is set at £124 per hour and further information on how the rate has been calculated is published in guidance note HSE 47 on HSE's website.[9] The fee will not be payable where the firm is compliant or the breach is trivial but where the inspector notifies a person in writing that, in the inspector's opinion, there has been a breach of the relevant health and safety obligations, for example an Improvement Notice. Fees will accrue up to the point that the matter is resolved or when the case is handed over for prosecution. There is a procedure for review of disputes[10] – requests for information or clarification will be free but disputes that follow the formal route will incur additional costs at the hourly rate if the HSE action is endorsed. The HSE estimate that this will transfer £39m per year of the cost of regulation from taxpayers to the non-compliant duty-holders.

40. The Committee has received several submissions about the "fee for interventions" which are published in full on our website: from the Chemical Business Association (CBA), the National Farmers Union (NFU) and the Forum of Private Business. Common concerns expressed are that the hourly rate is disproportionately high and that the heavy impact of costs on small businesses will deter them from reporting incidents and act against a culture that promotes safety. They would also like a clearer definition of what constitutes a "material breach" preferring that it should only apply where a statutory Improvement or Prohibition Notice is issued. The CBA comments that the dispute panel will have two HSE members and only one external representative which appears to be "structurally imbalanced". The Forum of Private Business is concerned about the consistency of inspection and argue that the "fee for intervention" structure should be scaled according to the size of the business as a flat rate fee will bear disproportionately on small firms. The NFU are also concerned about how consistency between inspectors in different parts of the country will be achieved and note the discrepancy where a Local Authority is the inspector, because no charges will be made for a parallel offence.

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[9] www.hse.gov.uk/pubns/hse47.htm

[10] Based on Regulation 25(5)–(6) and described in more detail on page 11 of Guidance Note HSE 47.

OTHER INSTRUMENTS OF INTEREST

Draft Green Deal Code of Practice

Green Deal (Disclosure) Regulations 2012 (SI 2012/1660)

Green Deal (Acknowledgement) Regulations 2012 (SI 2012/1661)

41. In our 5th Report (HL Paper 22), we drew to the attention of the House a number of affirmative statutory instruments relating to the Green Deal and the Energy Company Obligation.[11] The Department for Energy and Climate Change (DECC) has now laid these instruments as well, to supplement provisions made in the draft Green Deal Framework Regulations 2012.

42. The Green Deal (Disclosure) Regulations 2012 specify the time when information about a Green Deal plan at a property must be disclosed to prospective buyers, tenants and licensees. Where a Green Deal property is sold or let out, the prospective electricity bill-payer will need to give an acknowledgment to demonstrate that they are aware that there is a Green Deal plan at the property; the Green Deal (Acknowledgment) Regulations 2012 specify the form that this acknowledgment must take.

43. The draft Green Deal Code of Practice sets out requirements for Green Deal providers, Green Deal assessors, or Green Deal installers ("Green Deal Participants"), or certification bodies. DECC states that the requirements in this Code of Practice are designed to ensure that all Green Deal Participants and certification bodies operate fairly and transparently; deliver good customer service; have appropriate levels of training and expertise, and provide appropriate redress mechanisms for customers.

Care Quality Commission (Healthwatch England Committee) Regulations 2012 (SI 2012/1640)

44. The instrument makes provision for the structure and appointment of the Healthwatch England Committee of the Care Quality Commission. The Health and Social Care Act 2012 put forward Healthwatch as the new consumer champion for both health and social care. It will exist in two distinct forms: Healthwatch England is the national level. The 2012 Act also made provision for Local Healthwatch organisations by amending Part 14 of the Local Government and Public Involvement in Health Act 2007. Healthwatch England will have between six and 12 members in addition to the chair, which is consistent with the intention that Healthwatch England acts as a strategic organisation. The non-chair members will be appointed by the chair and a majority of members must be drawn from outside the Commission.

Plant Protection Products (Sustainable Use) Regulations 2012 (SI 2012/1657)

45. The Regulations, laid by the Department for Environment, Food and Rural Affairs (Defra), transpose the requirements of Directive 2009/128/EC on the sustainable use of pesticides ("the Directive"). The Directive includes a requirement for the United Kingdom to adopt a National Action Plan for the implementation of the Directive, and provisions aimed at achieving the

[11] The draft Green Deal Framework (Disclosure, Acknowledgment, Redress etc.) Regulations 2012; the draft Green Deal (Energy Efficiency Improvements) Order 2012; the draft Green Deal (Qualifying Energy Improvements) Order 2012; and the draft Electricity and Gas (Energy Company Obligation) Order 2012.

sustainable use of pesticides by reducing risks and impacts of their use on human health and the environment. It applies to plant protection products which are agricultural pesticides used to protect plants from pests and diseases, employed in agriculture, the amenity sector, and domestic gardens.

46. Schedule 3 to the Regulations deals with powers of authorised persons. Paragraph 1 of the Schedule, covering powers of entry, provides that an authorised person may enter any premises for the purpose of ensuring compliance with the Regulations. Paragraph 2 contains provisions on search warrants, which may be issued subject to various conditions, including that an authorised person has been refused admission. This approach is in line with provisions on powers of entry which have been included in other instruments laid by Defra, and which have prompted us to question the way in which those powers may be exercised, in particular where admission is refused without a warrant having been issued. We have been assured by Defra that the powers are essential for effective enforcement, and that the Department has received no complaints about their use by authorised persons.

INSTRUMENTS NOT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

The Committee has considered the instruments set out below and has determined that the special attention of the House need not be drawn to them.

Draft Instruments subject to annulment

Green Deal Code of Practice

Instruments subject to annulment

SI 2012/1586 National Health Service (Charges to Overseas Visitors) Amendment Regulations 2012

SI 2012/1588 British Nationality (General) (Amendment) Regulations 2012

SI 2012/1604 Social Security (Notification of Deaths) Regulations 2012

SI 2012/1616 Jobseeker's Allowance (Members of the Reserve Forces) Regulations 2012

SI 2012/1631 National Health Service (Clinical Commissioning Groups) Regulations 2012

SI 2012/1634 Social Security (Industrial Injuries) (Prescribed Diseases) Amendment (No.2) Regulations 2012

SI 2012/1635 Prosecution of Offences Act 1985 (Specified Proceedings) (Amendment) Order 2012

SI 2012/1640 Care Quality Commission (Healthwatch England Committee) Regulations 2012

SI 2012/1641 NHS Commissioning Board Authority (Abolition and Transfer of Staff, Property and Liabilities) and the Health and Social Care Act 2012 (Consequential Amendments) Order 2012

SI 2012/1644 Local Authorities (Exemption from Political Restrictions) (Designation) Regulations 2012

SI 2012/1646 Electricity (Exemption from the Requirement for a Supply Licence) (MVV Environment Devonport Limited) (England and Wales) Order 2012

SI 2012/1650 National Health Service (Travel Expenses and Remission of Charges) Amendment Regulations 2012

SI 2012/1653 Education (Student Fees, Awards and Support) (Amendment) Regulations 2012

SI 2012/1654 General Medical Council (Constitution) (Amendment) Order 2012

SI 2012/1655 General Dental Council (Constitution) (Amendment) Order 2012

SI 2012/1656 Social Security (Benefit) (Members of the Forces) (Amendment) Regulations 2012

SI 2012/1657 Plant Protection Products (Sustainable Use) Regulations 2012

SI 2012/1660 Green Deal (Disclosure) Regulations 2012

SI 2012/1661 Green Deal (Acknowledgement) Regulations 2012

SI 2012/1666 Safety of Sports Grounds (Designation) (No.2) Order 2012

SI 2012/1673 First-tier Tribunal and Upper Tribunal (Chambers) (Amendment) Order 2012

APPENDIX 1: DRAFT ASSETS OF COMMUNITY VALUE (ENGLAND) REGULATIONS 2012

DCLG officials have provided the following responses to the questions put by the Committee:

Q1: The impact assessment gives the following costs to local authorities: (a) One-off cost to set up the list of assets of community value £379,000 (for year 1 only); (b) Cost of managing the list process and five year review of the list = £2.5m per year; (c) Compensation for loss of asset value= average of £233k per annum over 9 years; (d) Costs of enforcement- £35k per annum over 10 years. Which of these costs will be met by central Government, in full or only partly, and over what period?

A1: Costs to local authorities will be covered by central government (via New Burdens) during the Spending Review period. After this period LAs will have to cover their additional costs from within their budgets.

Local authorities are being asked to manage the scheme, including deciding whether to list a nominated asset. The view has been that it is therefore appropriate for authorities to also manage the compensation scheme. The Department factored the estimated costs of compensation claims and the administration of them into the New Burdens assessment. Local authorities are encouraged to look at how best to manage the risk of claims, possibly through individual or mutual insurance. However, recognising the potential risk, Government will provide a safety net for local authorities facing claims of over £20,000 in one year - either from a single claim or a number of separate claims. Such verified claims over £20,000 will be met by Government. This approach was agreed as part of the new burdens assessment and then incorporated into the Impact Assessment. This approach was tested with our Local Authority reference group in January and did not incur any significant comment.

Q2: Question 37 in the consultation paper asked: "Do you agree that compensation claims should be considered and paid for by the local authority?" The August 2011 summary of responses states that "Just over half of respondents agreed with the proposal in the consultation document, and thought it was reasonable for local authorities to administer the compensation scheme. However, the majority of local authorities were not in agreement with this." The relevant table shows that there were 178 respondents to Q37. The summary states that 87 respondents disagreed that local authorities should consider and pay compensation claims because it would impose additional costs and burdens on local authorities. In particular, they were concerned about the difficulty of budgeting for an unknown cost, which could be particularly difficult for smaller authorities to handle. Given the overwhelming opposition of local authorities to the proposal, how do you justify going ahead with it?

A2: When making decisions around the structure of the scheme, it was clearly important to take on board the opinions of all those stakeholders affected by the policy not just local authorities in isolation. There is clearly strong and understandable support for compensation claims to be considered and paid for by local level by Landowners, Business, the VCS and Parish Councils. Overall there is a majority in favour of having compensation considered at the local level and this clearly fits with the overall "localist" agenda of the policy.

Whilst the Government understand the concerns around compensation payment expressed by some local authorities, it believes that the support provided through new burdens and the provision of a safety net will help to mitigate these worries.

Overall, local authorities are being asked to manage the scheme and the compensation element is part of this.

Department for Communities and Local Government

6 July 2012

APPENDIX 2: INTERESTS AND ATTENDANCE

Committee Members' registered interests may be examined in the online Register of Lords' Interests at www.publications.parliament.uk/pa/ld/ldreg.htm. The Register may also be inspected in the Parliamentary Archives.

For the business taken at the meeting on 10 July 2012 Members declared the following interests:

Draft Online Infringement of Copyright (Initial Obligations) (Sharing of Costs) Order 2012

Baroness Morris of Yardley as Non-Executive Director, Performing Rights Society

Lord Eames, Lord Hart of Chilton, Lord Norton of Louth and Lord Plant of Highfield, as copyright holders of downloadable or published material.

Attendance:

The meeting was attended by Lord Bichard, Lord Eames, Baroness Eaton, Lord Goodlad, Baroness Hamwee, Lord Hart of Chilton, Lord Methuen, Baroness Morris of Yardley, Lord Norton of Louth, Lord Plant of Highfield and Lord Scott of Foscote.